

**BEFORE THE
AIR RESOURCES BOARD
OF THE
STATE OF CALIFORNIA**

**SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY
COMMENT ON PROPOSED ENFORCEMENT PENALTY POLICY**

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SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY COMMENT ON PROPOSED ENFORCEMENT PENALTY POLICY

I. INTRODUCTION AND SUMMARY

The Southern California Public Power Authority (“SCPPA”)¹ respectfully submits this comment on the California Air Resources Board’s (“ARB”) paper entitled *Proposed – Enforcement Penalties: Background and Policy* (“Policy”) dated February 25, 2011. The Policy was prepared pursuant to California Health and Safety Code (“HSC”) section 43024, adopted as part of Senate Bill (“SB”) 1402 (Dutton, Chapter 413, Statutes of 2010).

In summary, SCPPA raises the following points for the ARB’s consideration:

- The Policy is very general. The regulations promulgated under Assembly Bill (“AB”) 32 (Statutes of 2006) (“AB 32 Regulations”) are complex, have no enforcement history, and are unlike the regulations the ARB has historically enforced. A more specific enforcement policy is required for the AB 32 Regulations.
- A policy for the AB 32 Regulations should address the enforcement issues that arise under those regulations, including the fact that there are overlapping penalty provisions and that daily penalties are not appropriate in some cases.
- Penalty calculations should not start at the maximum possible penalty. This is not required by law and is not appropriate.
- Instead, penalty calculations should follow the model established by the United States Environmental Protection Agency (“US EPA”), where a benefit component and a gravity component are calculated and then adjusted by reference to specified mitigating/aggravating factors.

¹ SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and

- The Policy should include more details on how the penalty factors set out in SB 1402 will be applied.
- Alternative dispute resolution mechanisms such as arbitration and a hearing board should be provided.

II. THE AB 32 REGULATIONS REQUIRE A MORE SPECIFIC ENFORCEMENT POLICY.

A. SB 1402 does not require the Policy to apply to all ARB regulations.

The Policy is stated to apply to all the programs the ARB enforces, on the grounds that the principles governing the ARB's penalty calculations are common across the ARB's programs (Policy section 1.VI, on page 12). However, the ARB was not required to take this approach to its penalty policy. SB 1402 only requires the ARB to prepare a penalty policy for penalties prescribed under the sections of the HSC on vehicular air pollution control (HSC s. 43024, inserted by SB 1402).

B. GHG emissions are different from traditional criteria pollutants.

While the general penalty principles may be the same for vehicular air pollution offences and greenhouse gas ("GHG") offences, the nature, causes and consequences of the offences, and the type of entity being penalized, are likely to be very different.

These differences are relevant when considering the enforcement goals outlined in the presentations delivered at the two ARB workshops on the Policy, held on March 29 and 30, 2011 ("Workshop Presentations"). Slide 6 of each Workshop Presentation notes that the ARB's enforcement goals include obtaining immediate compliance because lost emissions cannot be captured, and because the air pollution standards are health-based. While these statements are true for most of the ARB's regulations, they are less relevant for GHG emissions. Excess GHG

emissions can be made good by surrendering additional allowances (effectively lowering the GHG emissions cap to account for the excess emissions). GHG emissions can also be absorbed, for example by forestry or soil carbon projects. GHG emissions do not directly harm human health in the way that traditional criteria pollutants do. These characteristics of GHG emissions do not mean that enforcement is not required, but the differences from criteria pollutants are significant enough that they should be taken into account when designing enforcement policies.

C. No precedents are available for GHG penalties.

There is a decades-long record of enforcement actions for vehicular pollution offences, which may provide a guide to likely penalties. However, no such record is available in the case of GHG offences. The AB 32 Regulations are new, are quite different from and more complex than other ARB regulations, and do not contain detailed enforcement provisions.

The Health and Safety Code provides a considerable range of possible penalties, such that penalties for breaches of AB 32 Regulations may be tens of millions of dollars. Without some form of guidance as to the likely penalties for particular types of offences, it can be difficult for regulated entities to raise capital as investors want to understand the total potential liabilities of an entity before deciding whether to invest in it.

Additionally, if local air districts will undertake some enforcement activities under the AB 32 Regulations, the wide range of possible penalties and the absence of an enforcement record and any detailed guidance mean that there is a real risk that the AB 32 Regulations will be enforced in an inconsistent manner, leading to unfairness.

D. The Policy is too general to provide sufficient guidance for GHG penalties.

The Policy does not refer specifically to any AB 32 Regulations. The general principles outlined in the few pages that constitute the core of the Policy (section 2.VIII, pages 15-25) do

not contain sufficient detail to provide any useful guidance to entities covered by AB 32 Regulations, nor to the ARB itself when the time comes to determine a penalty for a breach of an AB 32 Regulation.

E. A GHG-specific policy should be prepared.

For these reasons, a more specific enforcement penalty policy is required for the AB 32 Regulations, addressing the particular issues that arise under those regulations and reflecting the fact that GHG emissions are different from the criteria pollutants the ARB has historically regulated.

Such a policy could be established as a form of “sub-policy” subsumed within the more general Policy. This approach has been successfully used by the US EPA. The US EPA established a general Policy on Civil Penalties accompanied by a Framework for Statute-Specific Approaches to Penalty Assessment (effective February 16, 1984 – “EPA Framework Policy”). Underneath those policies more specific policies were established, for example the Clean Air Act Stationary Source Civil Penalty Policy (effective October 25, 1991 – “EPA Stationary Source Policy”).² These policies follow the guidelines set out in the Framework but are tailored to particular subject areas.

The ARB could establish several sub-policies to provide more specific guidance on the enforcement of each major group of ARB regulations. Of these groupings, it is most important to establish a policy relating to the AB 32 Regulations, given the complexity and lack of enforcement history for these regulations.

In preparing a policy on enforcement of the AB 32 Regulations, the ARB should invite comments from all stakeholders involved in the development and implementation of the AB 32

² These policies are available at <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/> (last accessed April 12, 2011).

Regulations. Public input should be sought through a workshop and a request for written submissions on a draft of the policy.

This approach would assist in achieving the ARB's stated aim of increasing the transparency of its enforcement process (pages 5 and 7 of the Policy), and also would be likely to make entities covered by the AB 32 Regulations become more comfortable with and supportive of those regulations.

F. A penalty policy is also required for the RPS.

The Policy does not specifically address the enforcement of the 33 percent renewable portfolio standard ("RPS") set out in the recently-passed SBX1 2, and the general provisions of the Policy are inadequate to implement the enforcement directives SBX1 2 gives to the ARB. Section 399.30(o)(1) of the Public Utilities Code, introduced on page 60 of SBX1 2, requires the ARB to issue penalties to publicly-owned utilities comparable to those issued by the California Public Utilities Commission ("CPUC") to investor-owned utilities. A policy for enforcement of the AB 32 Regulations should specifically address the enforcement of the RPS in accordance with SBX1 2.

III. A GHG PENALTY POLICY SHOULD ADDRESS ISSUES ARISING UNDER AB 32 REGULATIONS.

Establishing a separate penalty policy for enforcing the AB 32 Regulations, perhaps including a policy for enforcing the RPS law as well (together, "GHG Penalty Policy"), would allow particular issues that arise in relation to the enforcement of those regulations to be addressed. These issues are currently causing entities covered by the AB 32 Regulations considerable concern. A clear and reasonable enforcement policy would provide much-needed assurance.

A. The policy should address the issue of overlapping penalty provisions.

A GHG Penalty Policy that applies to all of the AB 32 Regulations would be an ideal place to address the issue of overlapping penalty provisions in the different AB 32 Regulations. The Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, including the revisions approved by the ARB on December 16, 2010 (“MRR”), imposes a separate violation for each metric ton of GHG emitted but not reported (MRR section 95107(c)). In addition, separate daily penalties may be imposed for each day a report is late, incomplete, or inaccurate (MRR section 95107(a)). The regulation entitled *California Cap on Greenhouse Gas Emissions and Market-based Compliance Mechanisms* that was approved by the ARB on December 16, 2010 (“Cap and Trade Regulation”) also provides for per-day, per-ton penalties for excess emissions (section 96014). Additionally, the Cap and Trade Regulation contains a provision allowing the ARB to take four compliance instruments from a covered entity’s account for each compliance instrument that is owed but not surrendered by the compliance deadline (section 95857 of the Cap and Trade Regulation).

Each of these penalty provisions may be reasonable on its own. However, it is quite possible that one action – e.g., an under-reporting of emissions – may be considered a violation under each of the above provisions, leading to three separate sets of per-day, per-ton penalties, quickly adding up to extremely high dollar amounts. It is unreasonable to impose three separate sets of penalties on an entity for one action or omission.

Furthermore, these overlapping penalty provisions would constitute an excessive potential liability burden. Investors look at total potential liabilities when determining whether to invest in a project or purchase bonds. Inordinately high and uncertain potential penalties may have an adverse effect on the ability of entities subject to the AB 32 Regulations to raise capital for emission reduction projects, or even to raise capital at all.

The GHG Penalty Policy should establish principles to ensure that one action or omission is not penalized multiple times under the same regulation or under separate AB 32 Regulations.

B. The policy should set out a reasonable approach to daily penalties.

As discussed above, both the MRR and the Cap and Trade Regulation allow for separate penalties to be imposed for each ton of excess GHG emissions (“per-ton penalties”) each day a violation continues. Daily penalties can also be imposed under other AB 32 Regulations such as the Regulation for Reducing Sulfur Hexafluoride Emissions from Gas-Insulated Switchgear (“SF6 Regulation”).

The ARB has the discretion to impose daily penalties “where appropriate” (HSC section 38580(b)(3)). Daily penalties are appropriate when regulating traditional criteria pollutants, for which daily or hourly emissions limits are set. However, the AB 32 Regulations tend to have annual or multi-year compliance periods. Regulated entities may not know whether a violation has occurred until after the end of a compliance period. Imposing a separate penalty for each day of the whole compliance period, which may be done under the SF6 Regulation, is manifestly inappropriate and excessive. The GHG Penalty Policy should address this issue.

There are alternatives to issuing a penalty for each day of the whole compliance period. For example, in late 2010 ARB staff communicated to SCPPA that under the Renewable Electricity Standard regulation (approved by the ARB on September 23, 2010), the appropriate time period penalty multiplier would be six months, rather than one day as initially proposed.

In addressing the issue of overlapping penalties (discussed above), the GHG Penalty Policy should also address the issue of whether per-day or per-ton penalties are appropriate under particular regulations. For instance, it may be appropriate to impose daily penalties (but not per-ton penalties) under the MRR to ensure that reports and verification statements are provided promptly, and to impose per-ton penalties (but not daily penalties) under the Cap and Trade

Regulation to ensure that sufficient compliance instruments are surrendered to cover emissions. Rather than daily penalties, to incentivize prompt surrender of overdue compliance instruments the ARB could consider charging “interest” on overdue compliance instruments from the due date for surrender until the date on which the missing compliance instruments are surrendered.

The GHG Penalty Policy should recognize the fact that breaches of administrative requirements are less significant, and require lower penalties, than breaches of the requirement to surrender compliance instruments, as the former do not result in excess emissions.

Daily penalties in combination with per-ton penalties will result in total penalty amounts far in excess of the amounts needed to deter violations and punish violators and do not help to achieve the ARB’s stated aims of fairness and proportionality (Policy page 6). The GHG Penalty Policy should set out a more reasonable approach to determining penalties under the AB 32 Regulations.

C. Minor errors in a report that are identified and corrected during verification should not be penalized.

The MRR would impose daily penalties for inaccurate or incomplete reports (MRR section 95107(a)). It is inevitable, however, particularly in the early years of reporting, that an entity’s reports will contain various errors that are identified and corrected during the process of formal independent verification of the report.

While egregious or repeated errors and deliberate misstatements should be penalized, minor errors that are identified during verification such as accidental calculation mistakes, errors arising from the late settlement of electricity transactions, and errors relating to the interpretation of unclear provisions should not be subject to penalties. Such errors would not lead to the under-surrender of compliance instruments under the Cap and Trade Regulation because compliance obligations are calculated based on verified emissions rather than reported emissions.

Therefore the GHG Penalty Policy should provide that errors or non-conformances in a report that do not lead to material misstatements (as defined in MRR section 95102(a)(194)) and that are corrected when the error is discovered during verification (as provided for in MRR section 95131(b)(10)) will not be penalized.

The California Environmental Protection Agency's October 2003 Recommended Guidance on Incentives for Voluntary Disclosure ("Voluntary Disclosure Policy") is incorporated into the Policy in Appendix C and discussed in section 2.VIII.K of the Policy. The Voluntary Disclosure Policy provides for penalties to be reduced if violations are discovered through environmental audits and corrected immediately. The Policy states that the ARB will consider reducing a penalty pursuant to the Voluntary Disclosure Policy even if not all of the criteria set out in the Voluntary Disclosure Policy have been met (section 2.VIII.K, page 23). If reporting errors are identified and corrected during the course of verification under the MRR, the penalties, if not waived altogether, should be reduced in accordance with the ARB's stated approach to the Voluntary Disclosure Policy.

Furthermore, the GHG Penalty Policy should provide that no penalties are payable for reports that are submitted late due to technical issues with the reporting tool or for missing data where the missing data substitution procedures are followed. This is particularly important to avoid double-penalizing electric generating units. Under the MRR (which adopts the missing data procedures established for the federal Acid Rain program), electric generating units are subject to missing data substitution procedures that are in themselves punitive as they are designed to over-estimate the unrecorded emissions. No further punishment is necessary.

D. Daily penalties for inaccurate reports should only be imposed after the inaccuracy is identified.

The GHG Penalty Policy should provide that if a report submitted pursuant to the reporting requirements of the AB 32 Regulations is found to be inaccurate, daily penalties should

only be imposed for the days between the date when the inaccuracy is identified and the date when the corrected report is re-submitted. It would not be appropriate to impose daily penalties starting from the date the report was first submitted if the reporting entity submitted its report on time in good faith believing it to be correct and complete.

IV. PENALTY CALCULATIONS SHOULD NOT START AT THE MAXIMUM PENALTY.

A. Case law does not require penalty calculations to start at the maximum penalty.

The Policy states that “California courts ... have stated that the statutory maximum is the presumptive starting point, subject to reductions based on mitigating factors a violator can establish.” Policy at 2.VIII.C, page 17, reiterated in 2.VIII.J, page 21. The only California case cited in the Policy in support of this principle is *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332 (“*Wilmshurst*”; Policy at 2.VIII.G, page 18). The Policy states that *Wilmshurst* provides that “when air quality violations occur, maximum penalties are presumed and the violator has the obligation to demonstrate that a lesser penalty amount is appropriate.” Policy at 2.VIII.G, page 18. However, *Wilmshurst* does not set out this principle. It merely states that “in the absence of evidence in mitigation a court is free to assess the full amount.” *Wilmshurst* at 1351. The fact that a court has the discretion to assess the full statutory penalty amount in some circumstances does not require the ARB to set all penalties at the maximum amount as a starting point. The ARB has the discretion to seek the maximum penalty, but is not required to do so under case law.

B. Starting at the maximum penalty is inappropriate.

If legislators wish penalties of a certain level to be imposed, they can set minimum penalty levels, as has been done in other regulations. But minimum penalty levels were not set in the relevant provisions of the HSC. Nor did the legislature specify that the ARB should start its

penalty calculations at the maximum level. Instead the ARB has been given discretion to set penalties anywhere from zero to millions of dollars. The only requirement is that the ARB must take into account all relevant circumstances, including some specific factors listed in the HSC.

Given that the legislature was able to require the ARB to start at the maximum penalty but did not do so, and that case law does not require the ARB to start at the maximum, it is inappropriate for the ARB to establish a policy of starting penalty calculations at the maximum.

The Policy also cites the age of many of the penalty statutes that the ARB applies as being a reason for setting penalties towards the maximum levels (Policy at 2.VIII.C, pages 16-17). However, the issue of dollar amounts of penalties becoming comparatively less significant over time due to inflation is an issue for the legislature to address, either by setting a penalty inflation rate or periodically revising the penalty statutes to increase the penalty amounts.³ This is not an issue the ARB should take upon itself to address by setting penalties starting at the maximum amount.

Starting penalty calculations at the maximum amount would also be inconsistent with legislative requirements in some cases. For example, SBX1 2 provides for the ARB to set penalties under the HSC but, as discussed in section II.F above, the penalties must be comparable to those set by the CPUC.

C. Penalties should instead be based on benefit and gravity components and then adjusted to reflect mitigating/aggravating factors.

Instead of starting at the maximum penalty, the ARB should adopt the US EPA approach (discussed in more detail below) of determining a penalty based on a benefit component and gravity component, with both components being calculated using standardized methods and adjusted up or down to take into account mitigating and aggravating factors. This approach

would not be inconsistent with SB 1402, as the mitigating/aggravating factors would include the eight factors listed in HSC section 43024 (introduced in SB 1402).

This approach would provide the substantial benefits of allowing both consistency (in setting similar penalties for similar violations) and flexibility (in adjusting the penalty up or down, within certain predetermined limits, to reflect the unique facts of each case).

Like the US EPA policies, the ARB's Policy states that it aims to achieve fairness through consistency and proportionality (page 6), but its overly general terms and its reliance on the principle of starting at the maximum amount will not promote achievement of these aims.

V. THE POLICY SHOULD INCLUDE MORE DETAILS ON PENALTY CALCULATIONS.

The Policy should take the opportunity to provide information on how penalties will be calculated. This is a key role of a penalty policy. It is particularly important given the vague terms of SB 1402 and the wide range of possible penalties under the HSC. As currently drafted, the Policy is too general, and does not provide much more information than was previously available in relation to the ARB's penalty calculations. Thus it does not achieve the SB 1402 goal of increasing the transparency of the ARB's enforcement process (Policy page 5).

A. The Policy recognizes benefit and gravity aspects of penalties but does not detail them.

The Policy notes that "an adequate penalty must deprive a violator of any economic benefit resulting from the violation and include an additional amount reflecting the seriousness of the violation." Policy at 2.VIII.B, page 16. However, this idea is not fully developed in the Policy. Instead of providing a reasoned way to calculate these amounts, the Policy inappropriately falls back on the principle of starting at the maximum penalty amount.

³ This has been done at the federal level. See for example the US EPA's 2008 Civil Monetary Penalty Inflation Adjustment Rule, promulgated pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment

The US EPA builds its penalty policies on a rationale the same as the one set out on page 16 of the Policy, but provides much more detail. The US EPA’s Policy on Civil Penalties states, on pages 3-4:

- “[P]enalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.” This is referred to as the “benefit component.”
- For deterrence and fairness, penalties should “include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation.” This is referred to as the “gravity component.”

The EPA Framework Policy and the EPA Stationary Source Policy set out, in considerable detail, how each of these components is to be calculated. This detail is important in ensuring that penalties are fair and consistent – aims the Policy also espouses (Policy page 6; Workshop Presentations slide 7).

B. The Policy should contain details on the calculation of a benefit component.

The ARB’s Policy states that the ARB does not usually calculate a specific benefit component because it may be (a) smaller than the proposed penalty or (b) difficult to calculate (Policy at 2.VIII.B, page 16). Neither of these reasons is valid. The first reason is not logical given that the benefit component is never considered to constitute the whole of a penalty, only a component of it. The benefit component will always be smaller than the proposed penalty, but using this component as part of the penalty calculation nevertheless plays a significant role in making penalties fair and consistent.

Act of 1990, 28 U.S.C. §2461 note.

In relation to the second reason, under some regulations it is likely to be relatively easy to determine a benefit component. For example, the benefit of failing to surrender sufficient allowances under the Cap and Trade Regulation can be calculated with reference to the price of allowances at auction. Under other regulations it may be more difficult to calculate the precise financial benefit of a particular violation, but the US EPA establishes “rules of thumb” for calculating the benefit component (see the EPA Framework Policy at pages 7-9) and the ARB could do the same.

C. The Policy should contain details on the calculation of a gravity component.

The EPA Framework Policy (pages 13-16) and the EPA Stationary Source Policy (pages 9-15) set out specific factors and methods to be used when calculating the gravity component of the penalty.

The Policy does not provide any such information, despite the fact that the requirement in SB 1402 to take into account the *extent* of harm to public health, safety, and welfare (HSC s. 43024(b)(1), page 3 of SB 1402; emphasis added) would seem to require calculation of the extent of the harm, i.e., the gravity of the offence.

The Policy states that a mathematical formula for calculating penalties is not included as it “would not properly weigh individual circumstances and might result in an unjust or ineffective penalty.” Policy at page 6. However, it is appropriate to use a mathematical formula to calculate the gravity component of a penalty when the penalty amount is then adjusted by reference to the mitigating and aggravating factors applying in each case (discussed below). The Workshop Presentations state that the Policy does not employ a mathematical formula due to the limitations of that approach and the possibility that it conflicts with HSC section 43024 (slide 4). But HSC section 43024 in no way prevents the use of a standardized approach employing

formulae to calculate preliminary penalties, as long as the eight penalty factors listed in that section are also taken into consideration.

The ARB should consider including standardized methods to calculate the gravity component of penalties, similar to the approach of the US EPA. This would promote the consistency of penalties in similar cases. Consistency is important for the ARB's enforcement program to be fair and not arbitrary.

D. The Policy should contain more detail on penalty adjustments due to mitigating and aggravating factors.

Under the US EPA approach, the benefit component and the gravity component, added together, form the "preliminary deterrence figure." EPA Policy on Civil Penalties, page 4. This figure can then be adjusted up or down depending on the mitigating and/or aggravating factors present in a particular case. The circumstances in which, and the amount by which, the preliminary deterrence figure can be increased or decreased are also set out in detail in the EPA policies. In just one example, the EPA Stationary Source Policy provides (at page 17) that the gravity component of the penalty can be reduced by up to 30 percent if the violator cooperates with the EPA in one or more of three specified ways. The EPA Stationary Source Policy also provides examples of penalty calculations that illustrate the calculation of the benefit component, the gravity component, and the adjustments to those components (pages 24-31).

In contrast, the ARB's Policy provides barely two pages explaining how it intends to apply the eight penalty factors it is required to take into account under SB 1402 (Policy at 2.VIII.J, pages 21-22). No guidance is provided on how much a penalty may be adjusted to reflect any of these factors. Some issues with the Policy's descriptions of the penalty factors are briefly set out below, together with references to sections of US EPA policies that illustrate ways to address these issues.

- *(1) Extent of harm to public health, safety, and welfare caused by the violation:* The Policy does not set out the way in which the extent of harm will be calculated. This calculation may be particularly difficult for violations of the AB 32 Regulations, as GHG emissions do not directly harm health or property. The way in which “harm” will be calculated for reporting violations should also be addressed. The EPA Stationary Source Policy discusses the amount and toxicity of the pollutant, the sensitivity of the environment, and the significance of the violation for the regulatory scheme. Dollar amounts or ranges are set out for each factor (pages 9-14).
- *(2) Nature and persistence of the violation:* The Policy should address the facts that under some regulations (e.g., the SF6 Regulation) the extent of time over which a violation extended cannot be determined, and that under regulations with long compliance periods there may be some delay before a violation is found to have occurred. The EPA Framework Policy notes that if correction of the environmental problem was delayed by factors outside the control of the violator, the penalty may be reduced (page 18).
- *(3) Compliance history of the defendant, including the frequency of past violations:* The Policy should include more detail on the number of years that will be considered, how violations by different branches or subsidiaries of an entity will be treated, and whether violations of different provisions or only the same provision will be considered. The EPA Framework Policy requires policies to include detailed criteria on what constitutes a “similar violation”, e.g., did the violation involve the same permit, the same substance, the same regulatory provision, or a similar act/omission? It also discusses the situation of large corporations with many subsidiaries (pages 21-22).
- *(5) Innovative nature and magnitude of effort required to comply:* The Policy should discuss whether violations of a regulation in the first few years after the regulation comes into force,

when the actions needed to comply are not well understood and minor violations may be common, should be treated differently from violations of a well-established regulation. This is particularly relevant for the novel and complex AB 32 Regulations.

- *(7) Cooperation and mitigation by the defendant:* Mitigation should be discussed in the context of the AB 32 Regulations. The EPA Stationary Source Policy (page 17) and Framework Policy (pages 19-20) discuss prompt reporting of non-compliance, prompt correction of the issue, and cooperation with the EPA.
- *(8) Financial burden to the defendant:* The Policy should discuss how subsidiaries with parent company backing should be assessed. The EPA Stationary Source Policy sets out penalty ranges for companies of different sizes and discusses the treatment of companies with more than one facility (pages 14-15). There is also a separate guidance document on determining a violator's ability to pay.

VI. AN ALTERNATIVE DISPUTE RESOLUTION PROCESS SHOULD BE ESTABLISHED.

The Policy sets out ARB's enforcement process on pages 12-13. If a settlement cannot be reached after discussions between the ARB and the regulated entity, the ARB will refer the matter to a prosecutor, or may initiate an administrative hearing prior to litigation. There is no option for the regulated entity to request alternative dispute resolution such as arbitration by a neutral party.

An arbitration process would be extremely valuable in providing a relatively rapid, low-cost method to resolve disputes. Disputes may arise in relation to the interpretation of a particular regulation, particularly in the case of new, complex regulations such as the AB 32 Regulations, and a neutral party may play an important role in determining whether the regulated entity's actions in fact constituted a violation. The ability to present facts to an independent entity

without taking the expensive and time-consuming step of litigation would be likely to increase the level of comfort regulated parties have with the new regulations.

Numerous examples of such options exist. The California Independent System Operator Corporation sets out detailed dispute resolution procedures that are designed to be used by both private entities and government agencies.⁴ These procedures include details on arbitration.

The US EPA has a policy on alternative dispute resolution which states that the US EPA strongly supports the use of alternative dispute resolution procedures, including fact finding, minitrials, arbitration, and the use of ombuds.⁵

Local air districts have hearing boards. The hearing boards are independent, quasi-judicial panels that hear petitions for variances and appeals.⁶ Hearing boards are useful models that the ARB should consider.

The ARB should establish alternative dispute resolution procedures such as arbitration and hearing boards which would be available to a regulated entity after initial negotiations with the ARB.

VII. CONCLUSION

The ARB should establish an enforcement policy that addresses the specific issues that arise under the ARB 32 Regulations. The ARB should also revise the Policy to remove the presumption that penalty calculations will start at the maximum possible penalty, to provide details on the calculation of penalties based on benefit and gravity components and adjusted to

⁴ This policy was published on April 21, 2010 and is available at <http://www.caiso.com/1bcc/1bcc775734780.pdf> (last accessed April 12, 2011).

⁵ This policy was published in the Federal Register Vol. 65, No. 249 on December 27, 2000, and is available at <http://www.epa.gov/adr/epaadrpolicyfinal.pdf> (last accessed April 13, 2011).

⁶ For example, the South Coast Air Quality Management District has a hearing board process governed by detailed rules. These are available at <http://www.aqmd.gov/hearbd/HBRules.pdf> (last accessed April 12, 2011).

take into account mitigating and aggravating factors, and to include alternative dispute resolution procedures.

SCPPA appreciates the opportunity to submit these comments.

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