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Catherine H. Reheis-Boyd
President

April 14, 2011

Via E-mail: pjacobs@arb.ca.gov

Mr. Paul Jacobs
Chief, Mobile Source Enforcement
California Air Resources Board
9530 Telstar Avenue,
El Monte, CA. 91731

**Re: WSPA Comments on the Issue Summary for the California Air Resources Board
Draft Enforcement Penalties: Background and Policy**

Dear Mr. Jacobs:

The Western States Petroleum Association (WSPA) is a non-profit trade association representing twenty-six companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California, Arizona, Nevada, Oregon, Washington and Hawaii.

First, we want to thank you for the outreach and productive dialogue the California Air Resources Board (ARB) has had with stakeholders. We also appreciate the opportunity to submit these comments.

On February 25th ARB issued the "Enforcement Penalties: Background and Policy" for comment. The development of this written policy was required under SB 1402 unanimously adopted by the California legislature and chaptered in 2010. SB 1402 stated that the policy shall take into consideration all relevant circumstances including the following penalty mitigation factors already established in Section 43031 of the California Health and Safety Code:

- The extent of harm to public health, safety, and welfare caused by the violation.
- The nature and persistence of the violation, including the magnitude of the excess emissions.
- The compliance history of the defendant, including the frequency of past violations.
- The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.
- The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.

- The efforts of the defendant to attain, or provide for, compliance.
- The cooperation of the defendant during the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation.
- The financial burden to the defendant.

Subsequent to release of the proposed policy, ARB held two workshops on March 29 and 30 where staff provided an overview of the agency's objectives in proposing policy revisions. WSPA attended in Sacramento, taking note of several key issues.

We agreed with ARB when staff noted that penalties are a tool for enforcement and that some of the agency's key objectives are to enhance transparency, fairness, and swift resolution of issues. We also agree that penalties should act as deterrence and as a means to discourage violations.

These comments expand upon the ARB presentation and comments at those workshops. WSPA's comments are based on our experience with ARB on important air quality issues in California over the last 30 years. WSPA is aware of compliance and enforcement challenges that face sources and facilities as they implement ARB's very rigorous regulatory program.

Overview of Concerns

While the draft written policy is an attempt to provide clearer guidance to regulated parties on the process ARB uses to estimate and apply penalties, **WSPA feels additional clarity is needed as it currently falls short of meeting the full intent of SB 1402. It appears to modify the penalty mitigation factors already established in the Health and Safety Code; introduce additional factors that can be used to increase penalties; and provide justification for setting increased numbers of penalties near statutory maximums.**

ARB also appears to be going beyond the requirements of SB 1402 or existing Health and Safety Code requirements to include maximum penalty calculations in Notices of Violation immediately upon issuance and posting negotiated penalties in settlement and release documents on the internet without sufficient explanation of how mitigation factors were considered in the final penalty amount.

We understand, and indeed support, the need for consistent and effective enforcement, but we are concerned that ARB's proposed modifications to its penalty policy come at a time where there is great uncertainty about the requirements, procedures, processes, and reporting needs associated with implementation of AB 32 and the LCFS. ARB should carefully review its proposed changes to ensure that they reflect the requirements of the Health and Safety Code and SB 1402 and do not inadvertently result in punitive penalties that do not bear a reasonable relationship to the environmental harm associated with a violation.

Key Issues

- The draft policy does not clearly define a process to comply with the legislative intent that penalties must bear a rational relationship to the harm and not exceed levels necessary to punish and deter.

The policy, while considering all relevant factors, should state that the greatest weight will be given to the environmental harm created by the violation. In fact, it should acknowledge that violations with no harm to the environment or administrative (e.g., “paperwork”) violations merit a “notice to comply” rather than a civil penalty. Such violations could, as an alternative, be characterized as “minor” with commensurate penalties.

With specific reference to penalties, SB 1402 specifies that ARB must consider “excess emissions above an applicable standard” when determining an appropriate penalty. The agency should clarify the definition of “excess emissions” resulting from a given violation and how they would be calculated to determine the difference between more or less significant violations.

The baseline emissions from a permitted source, irrespective of whether from a fuel, vehicle, or stationary engine, in compliance with the standards, should not be included in the calculation. In other words, only excess emissions should be considered as incremental emissions that result from the violation. Furthermore, harm should not be defined based on impact to ARB regulatory programs as asserted in the workshop and in the proposed policy, when no environmental or consumer harm results from the violation.

Further, the policy should acknowledge that calculating a daily penalty is only appropriate and relevant when a daily harm is occurring and when the emissions are under the control of the source or facility operator. If the violator can demonstrate that no harm occurred for part of the period used to calculate the penalty (e.g., vehicle was not operated, fuel was not shipped), then no daily penalty should be assessed for that period. Otherwise, the policy would impose highly punitive penalties and create a disincentive for voluntary, early self-reporting that represents a good faith effort on the part of businesses to “do the right thing.”

A daily penalty should not be used to artificially inflate the overall violation by essentially penalizing the same underlying violation multiple times.

- The draft policy does not adequately recognize the discretion that should reasonably be applied in penalty assessments when it asserts that case law requires governmental agencies to presume maximum penalties until the violator has demonstrated mitigating circumstances.

Case law **does not** require governmental agencies to presumptively apply maximum authorized penalties until the violator has demonstrated mitigating circumstances (or, for that matter, for the agency to “start at the maximum and work down” as implied in the workshop). That is a judicial interpretation of the rules of evidence that applies when a court is reviewing the appropriateness of a fine. There is no judicial or statutory requirement for ARB to initiate their penalty analysis at the maximum level. However, it would be a

violation of statutory requirements if ARB sought the maximum statutory penalty without consideration of known relevant and mitigating circumstances. *See*, H&S 42403(b).

Additionally, ARB claims that penalties need to be assessed near maximums for older statutes to provide a deterrent effect. There is nothing in the California Health and Safety Code or the relevant legislative history to support this approach. If ARB believes “deterrence” should be considered as an additional factor in determining a penalty, it should explicitly define the term “deterrence” and a process for determining the appropriate weight to give deterrence when calculating the penalty. Penalties need to take into account the circumstances of the case and mitigating factors – not the age of the underlying statute or a vague, undefined approach with each increase intended to have some appropriate “deterrence effect.”

We do not believe that ARB should rely or otherwise employ a "one size fits all" penalty policy, especially because the legislature clearly provided different criteria for different types of violations.¹ In fact, the proposed policy would appear to ignore H&S 43025 where the legislature made it clear, in enacting H&S 43013(b) with its eight criteria and "consideration [of] all relevant circumstances" language, there was no intent "to modify penalty settlements beyond historic levels". ARB should make clear how the proposed amendments are consistent with legislative intent and with previous practice.

- The draft policy does not adequately define how ARB will take into account the compliance history of an enterprise faced with a violation.

The policy should more explicitly define what constitutes a “repeat violation” and exactly how it will be considered in determining a penalty. A violation should only be considered “repeat” if it resulted from a cause similar to a previous violation and not simply because an enterprise or facility has more than one unrelated event in a given time period.

In fact, the draft policy states, “*Because penalties are imposed to deter violations and motivate compliance, a repeat violation indicates that the prior penalty was inadequate and should be augmented.*” Only if the causation was the same as the first violation is it reasonable to conclude that a violator’s response to the initial compliance issue was inadequate. ARB’s current practice of considering all violations from a single enterprise as repeat violations unfairly escalates the penalty amount.

If ARB asserts compliance history as a reason for penalty escalation, then it should identify the past violations and the common causation that qualifies them as “repeats.”

¹ *See, for example, Chapter 1.5 of Part 5, enacted in 1995, entitled "Penalties for Violation of Fuel Regulations" which appears to be the sole provision applicable to fuel violations*

- ARB should clearly define in its policy how it will consider the “financial burden of the defendant.”

This factor was clearly intended to mitigate penalties for smaller businesses and should not be confused with assessing a company’s “ability to pay” when determining a penalty. As we stated previously, penalties should consider all relevant factors but the greatest weight should be applied to the harm created by the violation.

As stated on page 15, a violator’s financial condition is to be considered as a mitigating factor in moderating a penalty, not as an opportunity to increase the penalty on larger companies based on an “ability to pay.” This principle of equitable treatment exists irrespective of whether the source operates a single engine, a retail gasoline outlet or is a corporation with multiple facilities.

- The quality of the compliance program should be considered when reviewing the compliance history.

The compliance history is a required penalty mitigation factor. However, the number of past violations should not be the only consideration when reviewing the compliance history. The quality of the compliance program of an enterprise is relevant to this review. For example, an enterprise with one facility and five violations may be deemed to have a poor compliance program, but an enterprise with twenty large, complex facilities and five violations among them will arguably have a good compliance program. Therefore, there should not be an automatic escalation of subsequent penalties based on compliance history (as solely the number of past violations) without consideration of the quality of the compliance program of the enterprise.

- The policy should recognize instances where errors or omissions in paperwork may occur from time to time that do not result in actual emissions over authorized levels and hence, should not result in punitive enforcement actions.

WSPA believes that ARB should consider the concept of a "fix it ticket" or a "notice to comply" for paperwork infractions where there were no emission impacts. This concept would allow a company to notify ARB and re-submit paperwork (e.g., a predictive model notification) without being subject to a violation and penalty.

- Dispute Resolution as Element of Enforcement Penalty Policy

ARB should develop a dispute resolution process within its Proposed Enforcement Penalty Policy. This process should provide a procedure for: i) variance (from violation) by an independent party (hearing board, hearing officer or judge, etc.), and ii) evaluation and assessment of penalty that is independent of the ARB enforcement division.

These changes would improve the overall transparency of the penalty assessment process and help address the many compliance and enforcement issues that arise from ARB's complex and comprehensive regulatory program.

- The policy should assign numerical values to all relevant factors considered so the regulated community can understand how the penalty is calculated.

A penalty policy should explain the methodology of exercising agency discretion in order for the regulated community to know that it is being applied rationally and consistently. A policy that maximizes virtually all penalties, and in practice does not explain the weight given to the relevant factors considered in each case, does not follow the intent of SB 1402.

WSPA appreciates the opportunity to submit these comments and we appreciate ARB's consideration of them. If you have any questions regarding our comments, please contact me at this office or Mike Wang at (626) 590-4905 or via e-mail at mike@wspa.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Catharine A. Boyd". The signature is fluid and cursive, with the first name "Catharine" being the most prominent.

cc: Mark Stover (mstover@arb.ca.gov)
Mike Wang (WSPA)