

August 21, 2011

Mr. Paul Jacobs  
Chief Mobile Source Enforcement  
Enforcement Division  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

**Subject: CalChamber Comments on Notice of Amendments to ARB's Proposed Enforcement Penalty Policy**

Dear Mr. Jacobs:

On Feb 25, 2011, The California Air Resources Board (CARB) released its Proposed Enforcement Penalty Policy pursuant to SB 1402 (Dutton, Chapter 413, Statutes of 2010). The California Chamber of Commerce (CalChamber) submitted comments on April 14 and expressed concerns with several items included in the policy. Following the release of the new amendments to the Proposed Enforcement Penalty Policy on July 21, 2011, CalChamber would like to submit additional comments as they relate to the new amendments.

The CalChamber is the largest, broad-based business advocate in the state, representing the interests of nearly 15,000 California businesses, both large and small. Many of CalChamber's members are subject to CARB's regulations and thus would be directly impacted by the Proposed Enforcement Penalty Policy developed under CARB's enforcement program. CalChamber has been a constructive voice in several of CARB's air quality measures and we continue to do so in order to ensure air quality safety while maintaining the competitiveness of California businesses and the health of the economy.

As CARB released the recent amendments to its Enforcement Penalty Policy, CalChamber was disappointed to see that the Board addressed nearly none of our concerns expressed in the previous comment (See Attachment A). Below is a summary of the issues that CalChamber raised in its previous comments to ARB regarding the Proposed Enforcement Penalty Policy:

- Assessment of penalties must be better defined and penalties should not be set at the statutory maximum. Moreover, we recommended that the administrative errors be addressed through a Notice to Comply program (NTC).
- Determination of repeat violations should take into account the entity's compliance history and violation should be considered repeat only if the causation was the same as a previous violation.
- Assessment of financial impact should be fair and balanced as to not disproportionately impact one business over another.
- The quality of an entity's compliance program should be taken into account when assessing penalties.
- A dispute resolution & variance program, similar to the one currently in operation at local Air Quality Districts, should be established to give facilities the ability to challenge and resolve

disagreements and potential enforcement actions through an independent process. A transparent program would save the State and the facilities time and financial resources that would otherwise be spent on costly court cases.

The recent amendments made two changes relevant to the issues raised above:

- With regards to the maximum statutory penalties, CARB added: *“In settling cases, ARB computes the maximum penalty as a reference point, but proposes a penalty based on the facts, law, and circumstances of the particular case.”* However, this comment was followed by the explanation of *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4<sup>th</sup> 1332, case that stated: *“When air quality violations occur, maximum penalties are presumed and the violator has the obligation to demonstrate that a lesser penalty amount is appropriate”.*

This suggests that CARB will start setting the penalties at the statutory maximum and the violator would need to demonstrate whether the penalty could be reduced based on “facts, law, and circumstances of the particular case”. CalChamber respectfully disagrees with this revision and requests, as mentioned in our previous comment, that the penalty be assessed based upon the level of environmental harm and therefore, not be set at the statutory maximum.

- In addressing penalties set for administrative errors, CARB added: *“Recordkeeping, reporting and certification obligations are important. Air Quality programs cannot function properly without them and violations of these types of obligations warrant substantial penalties even in cases where direct harm to the air quality may not be present. On the other hand, depending on the circumstances, violations involving things like genuine clerical errors and typographical mistakes may warrant nominal penalties”.*

As expressed in our previous comments, CalChamber believes that a NTC program would be more fair and appropriate in addressing unintentional administrative errors that do not cause environmental harm. CARB did not address the possibility of using a different approach in resolving such nominal violations as compared to other environmentally detrimental violations.

On page 15, CARB also added a note regarding AB 32, clarifying that due to the fact that many AB 32 regulations are yet finalized, it would be more appropriate for the Enforcement Policy to develop additional enforcement guidelines relating to AB 32 *after* climate change laws have been fully implemented. CalChamber supports the addition of this language to the Proposed Enforcement Policy.

CalChamber, as mentioned above, was disappointed to read that the new amendments failed to address any of our concerns. Therefore, we would like to schedule a meeting with the Air Resources Board to discuss our concerns and to continue our cooperation and collaboration with the Board to ensure that the Enforcement Policy incorporates fair practices that do not impose excessive burden on California businesses.

Should you have any questions, please feel free to contact me at 916.444.6670.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenda Coleman". The signature is fluid and cursive, with a large initial "B" and "C".

Brenda Coleman  
Policy Advocate

BC: so

April 14, 2011

Mr. Paul Jacobs  
Chief Mobile Source Enforcement  
Enforcement Division  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

**Subject: CalChamber Comments on the California Air Resources Board's Proposed Enforcement Penalty Policy**

Dear Mr. Jacobs:

The California Chamber of Commerce (CalChamber) appreciates the opportunity to comment on the California Air Resources Board's (CARB) proposed enforcement penalty policy pursuant to SB 1402 (Dutton, Chapter 413, Statutes of 2010) as released on February 25, 2011.

The CalChamber is the largest, broad-based business advocate in the state, representing the interests of nearly 15,000 California businesses, both large and small. Many of CalChamber's members are subject to CARB's laws and regulations and thus would be directly impacted by the proposed enforcement penalty policy under CARB's enforcement program. CalChamber has been a constructive voice in several of CARB's air quality rules and regulations and we continue to do so in order to ensure air quality safety while maintaining the competitiveness of California businesses and the health of the economy.

CalChamber has identified areas of concern in the proposed policy and requests CARB's consideration to the following as CARB seeks to revise the proposed enforcement penalty policy. While we believe in consistent and effective enforcement, we have concerns with modifications of an enforcement policy when there is still much uncertainty in CARB's own regulatory statutes. With much uncertainty and pending elements around AB 32, we have concerns about ending up with duplicative penalties that could unfairly penalize compliance entities. In keeping this in mind, we urge CARB to carefully review its proposed changes to avoid unnecessary duplication and therefore inadvertent punitive penalties. The following focuses on assessment of penalty, determination of repeat violations, the assessment of financial impact, assessment of compliance program, and finally the need for a dispute resolution/variance program.

***Assessment of Penalty***

CalChamber believes that the assessment of penalties must be better defined. We ask that the first factor of penalty calculation be given consideration, 'extent of harm to public health and safety' so that the penalty be assessed based upon the level of environmental harm. With this in mind, penalties should not be set at the statutory maximum, especially not for those violations that do not

cause environmental harm such as administrative errors. It is recommended that these violations instead be assessed separately through a Notice to Comply program, similar to current practice done at the local air district level.

### ***Determination of Repeat Violations***

For purposes of determining a 'repeat violation' and hence imposing a penalty, CalChamber believes the 'compliance history of the violator' (factor 3) must be taken into consideration. A violation should be considered repeat only if the causation was the same as a previous violation. Similarity in violations is the only reasonable way to conclude that a violator's response to the initial compliance issue was inadequate. The current practice of considering all violations from a single enterprise as repeat violations unfairly escalates the penalty amount.

### ***Assessment of Financial Impact***

While we appreciate CARB taking an entity's current economic situation into account when assessing a penalty, we caution much carefulness in applying this consideration so that it does not inadvertently impact or set the financial burden on larger facilities. Given CalChamber's membership, we believe in fairness and balance in the rulemaking arena so as to not disproportionately impact one business over another. While we believe CARB's 'financial burden' consideration is intended to mitigate the penalties downward for smaller businesses so that those suffering from an adverse economy are not punished with an assessment in excess of their ability to pay, we have concerns over how 'financial burden' will be defined or measured as it relates to larger facilities. The economic recession has had an across the board impact on both small and large businesses with multi-billion dollar companies financially burdened in the current market. And while these companies may appear to be able to absorb these impacts, penalty fines of any magnitude are just as much of a financial detriment to large businesses as they are to smaller ones. CalChamber would like to ensure that 'financial burden' is properly assessed to treat both small and large businesses fairly. The 'financial burden' of an entity's financial condition should be viewed as a mitigating factor in moderating a penalty and NOT as an opportunity increase the penalty on what may appear to be a 'financially successful' company.

### ***Compliance Program***

CalChamber believes that the policy should take into consideration the quality of a facility's compliance program when determining penalties. For example, an operator with one facility and five violations may be deemed to have a poor compliance program. However, an operator with 25-30 facilities and only five violations among them should be deemed to have a good compliance program and thus penalties should be calculated accordingly.

### ***Dispute Resolution & Variance Program***

Related to CARB's Enforcement Policy Issue, CalChamber strongly believes that CARB should develop a dispute resolution process for CARB's stationary source programs. Such a program would give facilities the ability to challenge and resolve disagreements and potential enforcement actions through an independent process. Issues such as regulatory and program disagreements with an Enforcement officer's (EO) decision could be resolved in an appropriate manner using a fair and transparent process – a process that removes CARB as the final decision making authority and instead replace with an unbiased, third party administrator.

Without a dispute resolution or a variance process, an entity's recourses are limited. Currently, an entity's only course of action is to challenge the decision in court, which requires significant resources and time. Lawsuits are not only costly but very rarely solve the problem. CalChamber is a proponent of a transparent process that helps reduce money and time spent defending lawsuits so that regulated entities can instead focus their time and efforts on job creation and economic stimulation.

Finally, CalChamber also proposes that CARB incorporate a Variance program similar to what is currently in operation at local Air Quality Districts.

Again, we appreciate your consideration and the opportunity to comment on the proposed enforcement penalty policy. We look forward to further communication and the opportunity to engage with CARB on this issue as it moves forward.

Should you have any questions, please feel free to contact me at 916.444.6670.

Sincerely,

A handwritten signature in cursive script that reads "Brenda M. Coleman".

Brenda M. Coleman  
Policy Advocate

BC:am

Attachement A

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[www.cceeb.org](http://www.cceeb.org)

August 22, 2011

*Submitted via email: [pjacobs@arb.ca.gov](mailto:pjacobs@arb.ca.gov)*

Mr. Paul Jacobs  
Chief  
Mobile Source Enforcement Branch  
California Air Resources Board  
P.O. Box 2815  
Sacramento, CA 95812

## **RE: California Air Resources Board's proposed/amended "Enforcement Penalty Policy; Background and Policy", Dated July 21, 2011**

Dear Mr. Jacobs:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of California business, labor and public leaders which strives to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates the opportunity to offer the following comments on the proposed/amended "Enforcement Penalty Policy" ("Proposed Policy"). We hope that our comments can help achieve the goals and objectives laid out in SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402").

CCEEB submitted comments to the first draft of the proposed policy on April 15, 2011. You, Kirk Oliver, Jim Ryden and Mark Stover graciously accepted an invitation to be our guests at CCEEB's Air Quality and Transportation meeting on May 12, 2011. After our discussion, and at Kirk Oliver's suggestion, CCEEB sent a follow-up letter on June 8, 2011 with additional comments.

While we understood CCEEB could submit follow-up comments (with the caveat there would be staff review but no commitment by the ARB to address our June 8<sup>th</sup> comments in the new draft), we are disappointed to see that most of our original comments were not significantly or satisfactorily addressed.

We are attaching our original correspondence as they provide detailed rationale for our suggested changes. Below is a brief list CCEEB's key items that we believe ARB still needs to fully address:



- The policy must specifically identify and list administrative violations, using criteria as outlined in our June 8, 2011 letter addressed to Kirk Oliver.
- The enforcement policy must clearly distinguish between administrative violations, as a component of minor violations, and more substantive violations that may affect air quality.
- Language should be included to define administrative violations and specify how such violations will be handled, with consideration of whether any harm has been done to air quality.
- Do not begin a precedent of using the "maximum" penalty as the starting point for negotiations.
- Review all relevant circumstances prior to assessing or negotiating penalties.
- Administrative or paper-work violations should not automatically be considered at the maximum penalty level.
- The policy should define how the financial burden on the defendant will be accounted.
- An independent hearing board should be established by the California Air Resources Board to resolve disputes.
- Clarify the terms "deterrence" and "fairness", and what we perceive to be the ARB reinterpretation of the terms "extent of harm", "preventive efforts", and "magnitude of the effort required to comply".

We appreciate the time and effort required to develop the amendments to the Proposed Enforcement Penalty Policy. This is an important issue to our members and we would like to meet and work with CARB before the policy is finalized. If you have comments or questions concerning the enclosed comments, please contact me or Ms. Kendra Daijogo of The Gualco Group, Inc. at 916/441-1392.

Thank you for your consideration of the comments submitted. We look forward to working with you and your staff on this important issue.

Sincerely,

  
GERALD D. SECUNDY  
President



cc: Honorable Matthew Rodriquez  
Honorable Mary Nichols  
Mr. James Goldstene  
Ms. Ellen Peter  
Mr. Kirk Oliver  
Mr. James R. Ryden  
Mr. Mark Stover  
Mr. Ben Sehgal  
Mr. Mark Tavianini  
Mr. William J. Quinn  
Ms. Janet Whittick  
Mr. Jackson R. Gualco  
Mr. Robert Lucas  
Ms. Kendra Daijogo  
Mr. Mikhael Skvaria

Attachments (2): April 15, 2011 letter to Mr. Paul Jacobs  
June 8, 2011 letter to Mr. Kirk Oliver



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# California Council for Environmental and Economic Balance

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April 15, 2011

*Submitted via email: [pjacobs@arb.ca.gov](mailto:pjacobs@arb.ca.gov)*

Mr. Paul Jacobs  
Chief  
Mobile Source Enforcement Branch  
California Air Resources Board  
P.O. Box 2815  
Sacramento, CA 95812

**RE: California Air Resources Board's "Proposed Enforcement Penalties: Background and Policy"**

Dear Mr. Jacobs:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of California business, labor and public leaders which strives to work together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates the opportunity to offer the following comments on the "Proposed Proposed Enforcement Penalty Policy" ("Proposed Policy"). We hope that our comments can help achieve the goals and objectives laid out in SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402").

CCEEB has concerns with the proposed enforcement penalty policy. Specifically, we question whether certain penalty factors currently being proposed by the California Air Resources Board ("CARB") adhere to the spirit and intent of SB 1402.

Related to our concerns and issues on the Proposed Policy, we also believe that CARB should institute an independent dispute resolution hearing board that would also handle stationary source issues, which can serve to address and resolve disagreements and potential enforcement disputes between a regulated party and the ARB Executive Officer ("EO").

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**SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402")**

Section 43024 of the Health and Safety Code was adopted as part of Senate Bill 1402 (Dutton) - Chapter 413, Statutes of 2010. Section 43024 provides:

*43024. (a) No later than March 1, 2011, the state board shall publish a penalty policy for civil or administrative penalties prescribed under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200).*

*(b) The policy shall take into consideration all relevant circumstances, including, but not limited to, all of the following:*

- (1) The extent of harm to public health, safety and welfare caused by the violation.*
- (2) The nature and persistence of the violation, including the magnitude of the excess emissions.*
- (3) The compliance history of the defendant, including the frequency of past violations.*
- (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.*
- (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.*
- (6) The efforts of the defendant to attain, or provide for, compliance.*
- (7) The cooperation of the defendant during the course of 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.*
- (8) The financial burden to the defendant.*

**Compliance Concerns**

The Proposed Policy does not clearly define a process to comply with the legislative intent of SB 1402 that penalties must bear a rational relationship to the harm and not exceed levels necessary to punish and deter. The proposal must clearly explain how CARB will utilize the criteria outlined in Section 43024 of the Health and Safety Code to ensure penalties are assessed in a transparent, fair, and consistent manner.

We believe the direction given to CARB through the language in SB 1402 is quite clear. Yet, it appears that CARB is using the opportunity to implement this bill to accomplish the following: redefine established penalty mitigation factors; introduce new factors that can be used to increase penalties; and, justify penalties closer to statutory maximums in more cases than in recent history.



We are also concerned that after releasing this proposal, CARB began including maximum penalty calculations in NOV's upon issuance. CARB is also including detailed explanations of the negotiated penalties in their settlement and release documents, and is posting these documents on its website. None of these steps are required by SB 1402; nor are the details of these approaches discussed in the penalty policy document.

CCEEB believes the discussion of financial burden is over-reaching and can overshadow other mitigating factors if viewed from the perspective of ability to pay vs. hardship.

CCEEB supports the proposed enforcement penalty policy directive that CARB shall take into consideration all relevant circumstances, including, but not limited to, a number of factors as set forth in the statute for determining a civil or administrative penalty. CCEEB urges CARB to continue to fully exercise the "including, but not limited to" approach when reviewing all relevant circumstances prior to assessing or negotiating penalties, and not begin a precedent of using the "maximum" penalty as the starting point for negotiations, which would give the appearance, if not the reality, of disregarding all other factors to be considered.

CCEEB's specific concerns are as follows:

1. Page 6 – The proposal introduces and emphasizes the term 'fairness'. This term is undefined and subjective. The proposal uses this term in different ways – consistency in level of penalties, but also proportional to deter non-compliance. At the same time it suggests that "to be fair", CARB must account for case-by-case circumstances.
2. Page 7 and throughout the document – The document focuses on the eight factors specified in SB 1402 including taking into account the "financial burden of the defendant." While this was clearly intended to mitigate the penalties downward for smaller businesses, the proposal uses the financial burden to justify increasing penalties based on ability to pay and in lieu of the other seven mitigating factors. SB 1402 requires CARB to take into account all mitigating circumstances. An example of this emphasis occurs on Page 15 where the proposal claims that penalty levels must take into account the "violators financial condition."
3. Page 16 – Terms such as "deterrence" and "fairness" are explained as general penalty principals, but appear to be subjective in terms of interpretation and application. This runs counter to the intent of SB 1402, which was to provide greater consistency and clarity.



4. Page 16 and Page 17 – The proposal states that penalties need to be assessed near maximum levels for older statutes to provide a deterrent effect. This is an opinion not backed up by the Health & Safety code – nor does it excuse ignoring the statutorily defined mitigating factors. Penalties should take into account the circumstances of each case, including any mitigating factors – not the age of the underlying statute.
5. Page 20 – The footnote acknowledges for fuels regulations that the eighth factor related to financial burden is based on the owner of a single station. Again, this suggests a downward adjustment factor for financial burden as opposed to an upward adjustment factor based on ability to pay.
6. Page 21 – In the first paragraph under “J”, the proposal suggests that additional factors such as public harm, illegal emissions, repeat violations, intent, impact on a particular regulatory program, unfair business advantage or similar factors may justify a penalty at or near the maximum despite the presence of other mitigating factors. CCEEB believes these additional factors are ill-defined or not specifically addressed in the Health & Safety Code whereas the mitigating factors CARB is looking to displace *are* addressed in the Health & Safety Code.
7. Page 21 – In the proposal CARB appears to be reinterpreting some of the eight penalty mitigation factors as follows:
  - a. (1) “extent of harm” now suggests that fuels, products, and equipment not properly certified are illegal and, therefore, all of the associated emissions are excess and illegal. This marks a change in how CARB views excess emissions – in the past, excess emissions were those exceedances above an emission standard. CCEEB believes that “extent of harm” should only apply to emissions exceedances because it is incorrect and counterintuitive to assume that any harm comes from fuel or equipment that meets all relevant emission requirements, but where a reporting or recordkeeping requirement was missed.
  - b. Page 22 – “preventative efforts” (4) and “magnitude of the effort required to comply” (5) now exclude normal standard of care or efforts that are common. Most defendants are going to use a normal standard of care and efforts common to industry to comply both in prevention of and in response to an incident. These additional burdens were not intended in the original mitigating factors but have been added by CARB in this document to deprive defendants of the benefits of these factors.



- c. Page 22 – “efforts of the defendant to attain, or provide for, compliance” now just references “preventative efforts” above. First, why have two factors if in CARB’s mind they essentially mean the same thing. Second, by referring to Factor 4, CARB is proposing to exclude normal standard of care from this factor as well.

### **Dispute Resolution**

As CARB notes on Pages 9 and 13, the agency has discretion during the enforcement process to utilize an administrative hearing. With this in mind, CCEEB strongly recommends that CARB establish a hearing board that would also handle stationary source issues, similar to the process statutorily required of regional air districts for variance review, but with the added authority to also engage and resolve disputes between a regulated party and the Executive Officer. Such a board would provide a fair, efficient and predictable forum available to all regulated parties, and will reduce the money and time spent in litigation. It will also increase the transparency of the appeal process and thus afford all stakeholders the opportunity to comment during the hearing.

There are two types of cases when a hearing board is warranted. First, and most typically, a hearing board can issue a variance to a regulated entity that allows them to temporarily continue operations while they work to bring a source into compliance. This provides enforcement discretion by taking into account extraordinary or site-specific circumstances that may cause a source to violate air regulations, despite the best intentions.

Second, regulatory programs may be unintentionally designed or implemented in such a way as to make compliance impossible or overly burdensome for regulated entities, usually due to technical errors, or in cases where the EO and regulated party have differing interpretations of requirements. As both the scope and the complexity of CARB regulations expands, this problem can become more pronounced. Stakeholders should have the opportunity to resolve a disagreement with the EO, through an independent dispute resolution board or similar mechanism, without having to resort to costly and time-consuming litigation.

The scope of CARB’s mission has changed from focusing primarily on mobile source emissions to a much broader reach in recent years. For example, the recently adopted AB32 Cap & Trade regulations will no doubt raise many issues of concern and there will be disagreements between the regulated community and the EO, and therefore there is a need to allow operators the ability to resolve disagreements through an independent dispute resolution process. For decades, regional air districts have been statutorily required to maintain variance hearing boards to address a notice of violation to possibly allow a facility to continue to operate while resolving a compliance problem or obtain a variance. CCEEB supports a process that would oversee a dispute resolution that facilitates



settlement of technical disagreements between the regulated community and the regulator.

The CARB Executive Officer and staff make significant enforcement decisions. In cases where CARB decides to extend a compliance deadline, there is no process to formally and publically adopt that extension. The only appeal process available to a regulated party is to litigate. This requires significant resources and time for all parties involved and therefore, CCEEB believes a dispute resolution process would result in resolving disagreements in a more effective manner and avoid filing costly and time consuming lawsuits.

For example, the AB 32 program requires that CARB create a new, far-reaching, and complex program under very tight statutory deadlines. The statutory deadlines are driving rapid development of regulations that may have unintended consequences and unknowable problems. These types of problems need an independent dispute resolution board which can serve to address and resolve disagreements and to allow discussion and opportunity outside of traditional enforcement processes and litigation.

### **Suggested Changes**

CCEEB would respectfully suggest the following:

- CCEEB urges CARB to continue to fully exercise the “including, but not limited to” approach when reviewing all relevant circumstances prior to assessing or negotiating penalties, and not begin a precedent of using the “maximum” penalty as the starting point for negotiations which would give the appearance, if not the reality, of disregarding all the factors to be considered.
- We believe the policy should place the greatest weight to the harm that is created by the violation, and likewise, the policy should also recognize violations that do not result in any environmental impact. Administrative or paper-work violations should not automatically be considered at the maximum penalty level.
- An independent hearing board be established by the California Air Resources Board, similar to the process statutorily required of regional air districts for variance review, that would also handle stationary source issues, but with the added authority to also engage and resolve disputes between a regulated party and the Executive Officer.



We appreciate the time and effort required to develop the Proposed Enforcement Penalty Policy. This is an important issue to our members, and we would like to work with CARB on these issues. If you have comments or questions concerning the enclosed comments, please contact me or Ms. Kendra Daijogo of The Gualco Group, Inc. at 916/441-1392.

Thank you for your consideration of the comments submitted.

Sincerely,



GERALD D. SECUNDY  
President

cc: Honorable Linda Adams  
Honorable Mary Nichols  
Mr. James Goldstene  
Mr. James R. Ryden  
Mr. Mark Stover  
Mr. Ben Sehgal  
Mr. Mark Tavianini  
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Robert W. Lucas  
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[www.cceeb.org](http://www.cceeb.org)



June 8, 2011

Mr. Kirk Oliver  
Senior Staff Counsel  
Office of Legal Affairs  
California Air Resources Board  
P.O. Box 2815  
Sacramento, CA 95812

**RE: California Air Resources Board's "Proposed Enforcement Penalties: Background and Policy"**

Dear Mr. Oliver:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of California business, labor and public leaders which advances strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates meeting with you, Paul Jacobs and Mark Stover on May 12, 2011, and your suggestion that we submit follow-up comments to our original comments on the Air Resources Board's "Proposed Enforcement Penalty Policy" ("Proposed Policy"). We hope that our original and follow-up comments can help achieve the goals and objectives laid out in SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402").

An appropriate and equitable enforcement policy must clearly distinguish between administrative violations, as a component of minor violations, and more substantive violations that may affect air quality. As described below, such a distinction is consistent with current and previous state laws, and would follow precedents established by air districts in their stationary source enforcement programs.

The Legislature has directed that "all relevant circumstances" be taken into account when resolving an alleged violation, and identified eight specific factors that must be considered in assessing penalties. (Health and Safety Code § 42403). The factors most relevant here are the extent of harm caused by the violation and the nature, persistence and duration of the violation, and the magnitude of the excess emissions.

In 1996, the Legislature directed the ARB and the districts to identify "minor violations" that would be enforced through issuance of a notice to comply rather than through the usual enforcement process. See former Health and Safety Code §§ 39150, et seq. (sunsetting January 1, 2001).

The Legislature established six factors to be used in classifying violations as minor, including the potential for impacts to human health and the environment, and the potential for impeding the ability to identify other violations of air quality requirements. (Former Health and Safety Code § 39150(d)).

The Bay Area and South Coast Air Quality Management Districts have taken an approach consistent with this legislative directive. The BAAQMD in its Regulation 1, Rule 2 (“Notice to Comply”) establishes five criteria for identifying minor violations. These criteria require that a minor violation cause no more than a de minimis increase in emissions, no endangerment of human health, safety and welfare or of the environment, and no hindrance of the district’s ability to determine compliance with other air quality requirements. (BAAQMD Rule 1-2-204). The rule further directs that “a Notice to Comply shall be the only means by which the [Air Pollution Control Officer] shall cite a minor violation.” (BAAQMD Rule 1-2-301). A similar approach has been taken by the SCAQMD in its Rule 112.

Administrative violations, such as errors in meeting particular monitoring, recordkeeping or reporting requirements, are a common component of minor violations. By their very nature, administrative violations result in no or de minimis excess emissions, and cause no harm to the public or to the environment. ARB’s enforcement policy should recognize and account for this substantial qualitative difference between administrative violations and substantive emissions violations. In particular, we recommend that the ARB include in its enforcement policy, and subsequently adopt by regulation, language defining administrative violations and specifying how such violations will be handled. The overriding consideration should be whether or not any harm has been done to air quality. Beyond that, the ARB enforcement policy should include the following key elements:

- ARB will specifically identify and list administrative violations, using criteria that include:
  - The quantity of excess emissions, if any
  - The duration of the violation
  - The impact of the violation on ambient air quality, human health and the environment – here, the “extent of harm” should only apply to emissions exceedances
  - Whether the violation would substantially interfere with ARB’s ability to determine compliance with other ARB regulatory requirements
  - Whether the violation provides the violator with an economic benefit
- Any administrative violation would be enforced only by issuance of a notice to comply. A notice to comply would:
  - Clearly identify the alleged administrative violation
  - Describe a means by which compliance with the specified requirement may be achieved
  - Specify a time limit for achieving compliance



For the reasons provided above, we urge the ARB to include in the new enforcement policy criteria for distinguishing administrative (or minor) violations from other, more serious, violations, along with a notice to comply or similar expedited process for resolving alleged administrative violations. Doing so would assure that administrative violations are addressed quickly and appropriately, without tying up agency enforcement resources that are better used to correct violations that affect emissions and air quality.

We appreciate the time and effort required to develop the Proposed Enforcement Penalty Policy, and for meeting with us on May 12, 2011. This is an important issue to our members, and therefore, we would like to schedule a meeting with CARB to further discuss these concerns. Ms. Kendra Daijogo of The Gualco Group, Inc. at 916/441-1392, will be contacting you shortly, so that we can schedule a follow-up meeting.

Thank you for your consideration of the comments submitted, and we look forward to working with you and your staff on this important issue.

Sincerely,



GERALD D. SECUNDY  
President

cc: Honorable Linda Adams  
Honorable Mary Nichols  
Mr. James Goldstene  
Mr. Paul Jacobs  
Mr. James R. Ryden  
Mr. Mark Stover  
Mr. Ben Sehgal  
Mr. Mark Tavianini  
Mr. William J. Quinn  
Ms. Janet Whittick  
Mr. Jackson R. Gualco  
Mr. Robert Lucas  
Ms. Kendra Daijogo  
Mr. Mikhael Skvarla





August 22, 2011

James Ryden  
Paul Jacobs  
Kirk Oliver  
The California Air Resources Board  
1001 "I" Street  
P.O. Box 2815  
Sacramento, CA 95812

**RE: CERT Comments on ARB's Proposed Penalty Policy**

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The Californians for Enforcement Reform and Transparency ("CERT")<sup>1</sup> appreciate the opportunity to comment on CARB's Proposed/Amended "Enforcement Penalties: Background and Policy" ("Penalty Policy") dated July 21, 2011. CERT is committed to working cooperatively with CARB and other stakeholders to achieve helpful reforms to strengthen and improve CARB's enforcement program.

**I. Comments on CARB's Draft Penalty Policy**

CERT has worked with CARB since October 2009 to formulate a workable penalty policy that achieves the good government goals of transparency and consistency, while maintaining the flexibility CARB needs to effectively operate its enforcement program. Most recently (on April 15, 2011), CERT submitted detailed comments to CARB's first proposed Penalty Policy (see comments attached as Exhibit A, which are incorporated by reference herein). These comments noted the significant deficiencies with CARB's February proposal, and continued to stress that the Penalty Policy, in order to comply with SB 1402, must make

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<sup>1</sup> CERT members include: American Home Furnishing Alliance (AHFA); California Chapter of the American Fence Contractors Association; California Dump Truck Owner Association (CDTOA); California Motorcycle Dealers Association (CMDA); California Moving and Storage Association (CMSA); California Retailers Association (CRA); Construction Industry Air Quality Association (CIAQC) – and several of their affiliates; Engineering Contractors Association; Flasher/Barricade Association; Independent Waste Oil Collectors and Transporters; Marine Builders Association; Moving and Storage Association; National Marine Manufacturers Association (NMMA); Outdoor Power Equipment Institute (OPEI); Compliant Car Builders Association; Southern California Contractors Association.

James Ryden  
Paul Jacobs  
The California Air Resources Board  
July 29, 2011  
Page 2

meaningful distinctions in the way CARB treats and penalizes violations that carry “excess emissions above an applicable standard” that harm California’s air quality, from those violations that do not result in “excess emissions above an applicable standard.” CERT noted in these April comments that “[t]he Penalty Policy, as proposed, mostly summarizes the prior status quo (pre-SB 1402). It similarly fails to provide a meaningful explanation of how CARB intends to integrate and apply SB 1402’s new criteria to generate consistent and transparent penalties for the same or similar violations.” CERT remains concerned that CARB continues to fail to comply with most of the provisions in SB-1402, resulting in arbitrary, inconsistent and unclear penalties. (See Section II below).

Contrary to the request made in consecutive comments from numerous, diverse stakeholders (including CERT), CARB has not made any meaningful changes to its draft policy. Accordingly, we strongly believe CARB remains out of compliance with the specific mandates and purpose and intent of SB 1402.<sup>2</sup> Indeed, in the most recent version—for which it took nearly six months to issue—CARB makes only two changes: (1) several clerical notations regarding the applicability to AB 32; and (2) one specific statement regarding paperwork violations. This latter statement expressly contradicts the intent and purpose of SB 1402 and will undermine its implementation.

Specifically, CARB now states:

“Recordkeeping, reporting and certification obligations are important. Air quality programs cannot function properly without them and violations of these types of obligations warrant substantial penalties even in cases where direct harm to the air quality may not be present. On the other hand, depending on the circumstances, violations involving things like genuine clerical errors and typographical mistakes may warrant nominal penalties.”

See Penalty Policy at 22.

CARB’s new revision disregards the core provisions of SB 1402 that require CARB to craft a penalty policy that recognizes that violations that harm California’s and the state’s air quality should be treated differently from those with gross, “excess emissions.” SB 1402 specifically requires the penalty policy to account for “the extent of harm to the public” and “the magnitude of the excess emissions.” CERT believes CARB’s penalty policy to not only be unlawful, but contrary to the spirit and intent of SB 1402, and one which will continue to result in inconsistent and arbitrary penalties to the state.

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<sup>2</sup> This includes the fact CARB was obligated by SB 1402 to publish a final penalty policy by March 1, 2011.

## **II. CARB's Failure to Comply with Other Related Provisions in SB-1402**

In an attempt to create a transparent penalty regime that correlates penalties with the magnitude of "excess emissions" attributable to the violation, S.B. 1402 required the California Air Resources Board (CARB) to provide a written communication to alleged violators detailing 1) the manner in which the penalty was determined, including aggravating and mitigating factors, and the per unit or per vehicle basis for the penalty; 2) the specific provision of law alleged to be violated and the appropriateness of that provision to the relevant conduct; and 3) a quantification of "excess emissions" resulting from the alleged violation.

S.B. 1402's "transparency" provisions were intended to provide sufficient information in order to reassure both the public and the regulated community that penalties are responsive to both public health goals and the unique circumstances surrounding the alleged conduct. To date, CARB has not complied with S.B. 1402 in a manner that would advance these important public policy goals. While CARB has included language in settlement agreements regarding its S.B. 1402 obligations, the boilerplate nature of this language and CARB's complete failure to quantify "excess emissions" in even a single case (since passage of S.B. 1402 last October) demonstrates that CARB has violated the spirit and intent of the legislation. Indeed, CARB's wooden "one-size fits all" approach to S.B. 1402 demonstrates that CARB views S.B. 1402 as a mere bureaucratic hurdle and not as a meaningful exercise in communicating with the public.

### **A. CARB's Obligation to Communicate the Manner in Which the Penalty was Assessed**

A thorough review of CARB's published settlements demonstrates that CARB has not in most cases provided a meaningful communication in accordance with S.B. 1402. (See enclosed table summarizing CARB settlements, which is attached as Exhibit B). In recent settlement agreements posted on CARB's website, CARB has merely provided a recitation that "the penalties in this matter were determined in accordance with all relevant circumstances, including the eight factors specified in H&SC section 42402 and 43024." See West Coast Refrigerated Trucking, 5/25/2011 settlement. In many recent cases for violations of the Periodic Smoke Inspection Program (PSIP), CARB professes to have considered the relevant factors, but still places the penalty at or near the statutory maximum, without explanation. Compare 5/10/2011 Key Energy Services settlement (\$375/violation for a total penalty of \$51,750) with 5/24/11 Albert D. Seeno Construction Company settlement (statutory maximum \$500/vehicle for a total penalty of \$5,500). CARB's failure to provide meaningful explanations of how penalty amounts are arrived at merely reinforces the perception that CARB is levying penalties arbitrarily. Indeed, in back-to-back settlements for PSIP violations, CARB alternately levied the statutory maximum for such "strict liability" violations and made allowances for unique factual

James Ryden  
Paul Jacobs  
The California Air Resources Board  
July 29, 2011  
Page 4

circumstances. Compare 3/18/11 International Pavement Solutions settlement (\$244/vehicle) and 3/3/11 Seaside Transportation Services settlement (\$500/vehicle for “strict liability” violation). The per-vehicle penalties assessed under the PSIP continue to demonstrate the arbitrariness that S.B. 1402 was intended to remedy.

#### **B. CARB’s Obligation to Quantify Excess Emissions**

A thorough review of CARB’s post-S.B. 1402 settlements demonstrates that CARB has never, in any single case quantified or attempted to quantify whether “excess emissions” resulted from the alleged violation. This is despite Executive Officer Goldstene’s statement in a recent letter to Senators Dutton and Correa that “ARB always considers the emissions and air quality consequences of violations when deciding whether to issue a citation and what penalty amount to assess.” See May 3, 2011, letter from Executive Officer Goldstene to Senators Dutton and Correa. Rather than attempting to quantify whether emissions are “excess” when possible to do so, CARB has conclusively stated that all emissions attributable to uncertified vehicles are “illegal and excess.” See Nemesis Motors 5/23/2011 settlement. In addition, in each of the large number of recent PSIP cases, CARB has included boilerplate language indicating that while CARB’s statutory authority prohibits emissions above an applicable standard, because the hours of operation and the individual emissions rates are unknown, quantification is impracticable. See KES 5/10/2011 settlement agreement. Despite CARB’s claims that it is considering air quality impacts in its penalty assessment, recent settlements indicate that CARB has no emissions information from which to draw such a conclusion.

#### **C. CARB’s Obligation to Enumerate the Specific Provision of Law and Explain the Appropriateness of that Provision**

CARB has included standard language in settlement agreements referencing the specific statutory provision that are alleged to have been violated. However, in cases where CARB exercises its discretion to utilize one enforcement provision over another (with one allowing it to levy higher penalties), CARB has failed to demonstrate that the selected enforcement provision is the “most appropriate,” in accordance with S.B. 1402’s explicit direction. The legislature included such provisions because the Health & Safety code provisions are overlapping and confusing to the public. In order to be responsive to S.B. 1402’s command, CARB must not only explain the enforcement provision it selected, but also explain why other apparently applicable provisions are not appropriate.

#### **D. Heavy-Handed Settlement Language on 1402 Compliance**

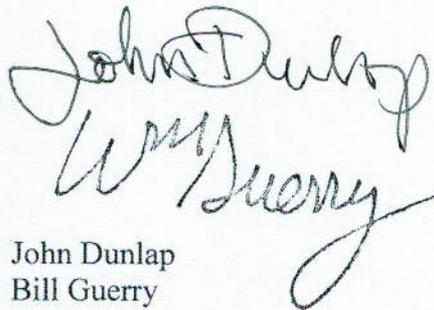
In an April 18, 2011, letter to CARB, Senators Dutton and Correa questioned CARB’s practice of including settlement language required alleged violators to acknowledge that CARB had complied with S.B. 1402, as this is a question of law and not an appropriate determination

James Ryden  
Paul Jacobs  
The California Air Resources Board  
July 29, 2011  
Page 5

for CARB to make. Despite this letter, CARB continues to include language requiring alleged violators to waive their legal right to challenge the issue.

\* \* \*

CERT's preference has always been, and continues to be, to work cooperatively with CARB to fully implement all the requirements in SB-1402. CERT urges CARB to reconsider its overall penalty – assessment obligations and policies – consistent with these comments and the enclosed attachments.



John Dunlap  
Bill Guerry



August 22, 2011

Mr. Paul Jacobs  
Chief, Mobile Source Enforcement Branch  
California Air Resources Board  
1001 I St.  
Sacramento, CA 95814  
E-Mail: [pjacobs@arb.ca.gov](mailto:pjacobs@arb.ca.gov)

**Re: Comments on Notice of Amendments to ARB's Proposed Enforcement Penalty Policy**

Dear Mr. Jacobs:

California Manufacturing & Technology Association (CMTA) is a trade association with the mission to improve and preserve a strong business climate for California's 25,000 small and large manufacturers, processors and technology-based companies. California manufacturers employ 1.5 million Californians and contribute billions of dollars to the state's economy. CMTA membership includes over 750 businesses representing chemical, aerospace, high-tech, biotech, pulp and paper, glass, oil, steel and others. CMTA lobbies the state legislature and regulatory agencies to promote policies on issues such as the one before us today to assure the continued viability of California's manufacturing community.

To our disappointment the amended proposed enforcement policy released by the California Air Resources Board on July 21 incorporated virtually none of the recommendations that were made by CMTA at the hearing on March 29<sup>th</sup> and submitted in writing on April 14<sup>th</sup>.

We still have the same concerns that were echoed by the Western States Petroleum Association and listed below:

1. Penalties must bear a rational relationship to harm and not exceed that which is required for deterrence.
2. The penalty policy should not presume a maximum amount and require the violator to justify a reduction from the maximum.
3. The draft enforcement policy does not explain how CARB takes compliance history into account.
4. The policy should define how the financial burden on the defendant will be accounted for.

5. The quality of the defendant's compliance program should be considered.
6. Paperwork-type errors should not result in punitive actions. WSPA recommends ARB incorporate a "notice to comply" process similar to the air districts' "notice to comply" programs.
7. The policy should include a dispute resolution process.
8. The policy should explain how penalties are calculated including numerical factors.

We do not believe that ARB can rationalize a penalty policy that starts with a maximum amount and requires the violator to justify a reduction. Over regulation and harsh penalties have already chased a significant number of manufacturers out of this state. Advocating such a penalty system only reinforces the thinking that industry is not welcome in this state.

We strongly believe that a "Notice to Comply" should be the first step for paperwork type errors where no harm is actually caused. Local air districts use this type of enforcement policy and do not believe it negates their effectiveness.

Should you have any questions, please feel free to contact me at 916-498-3313.

Sincerely,



Michael J. Rogge  
Director, Environmental Policy

cc: Jim Ryden, ARB  
Mark Stover, ARB



Western States Petroleum Association  
Credible Solutions • Responsive Service • Since 1907

**Catherine H. Reheis-Boyd**  
President

April 14, 2011

Via E-mail: [pjacobs@arb.ca.gov](mailto: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 25<sup>th</sup> 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.<sup>1</sup> 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.”

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<sup>1</sup> *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](mailto: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 being the most prominent.

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



Western States Petroleum Association  
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**Catherine H. Reheis-Boyd**

President

August 19, 2011

Mr. Paul Jacobs  
Chief, Mobile Source Enforcement Branch  
California Air Resources Board  
1001 I St.  
Sacramento, CA 95814  
Via e-mail at [pjacobs@arb.ca.gov](mailto:pjacobs@arb.ca.gov)

**Re: WSPA Comments on Notice of Amendments to ARB's Proposed Enforcement Penalty Policy**

Dear Mr. Jacobs:

On July 21 ARB released an amended proposed enforcement penalty policy for review and comment. The Western States Petroleum Association (WSPA) submitted significant comments on April 14 this year (attached), and would like to submit additional comments relative to the recent amendments.

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 and five other western states.

Overall, WSPA was disappointed to see that ARB addressed almost none of our comments. Below is a brief summary of the issues WSPA submitted, as well as what staff appears to have not addressed. WSPA would like to schedule a follow up meeting with you and ARB's legal staff to further discuss amendments we believe are necessary before ARB finalizes the policy.

Listed below are the eight key issues WSPA submitted comments on in our April letter:

1. Penalties must bear a rational relationship to harm and not exceed that which is required for deterrence.
2. The penalty policy should not presume a maximum amount and require the violator to justify a reduction from the maximum.
3. The draft enforcement policy does not explain how ARB takes compliance history into account.
4. The policy should define how the financial burden on the defendant will be accounted for.
5. The quality of the defendant's compliance program should be considered.
6. Paperwork-type errors should not result in punitive actions. WSPA recommends ARB incorporate a "notice to comply" process; similar to the air districts' "notice to comply" programs.

7. The policy should include a dispute resolution process.
8. The policy should explain how penalties are calculated including numerical factors.

In the Amended Enforcement Policy dated July 21, 2011, while ARB made two revisions specific to issues #2 and #6 above, unfortunately ARB did not provide any amendments, nor any explanation as to why our recommendations were not included, for the other 6 issues of concern. Based on the two issues ARB made revisions to, we are concerned and cannot support them for the following reasons:

2. The penalty policy should not presume a maximum amount and require the violator to justify a reduction from the maximum (see page 3-4 of the attached WSPA comments).

ARB added a comment to the Enforcement Policy that states: *"In settling cases, ARB computes the maximum penalty as a reference point, but proposes a penalty based on the facts, law and circumstances of the particular case."*

However, ARB retained their original interpretation of case law that suggests *"when air quality violations occur, maximum penalties are presumed and the violator has the obligation to demonstrate that a lesser penalty amount is appropriate."*

Simply defaulting to the statutory maximum penalty does not satisfy the legislative intent and express language of SB 1402, to provide a "clear explanation" of how the civil penalty was calculated that includes "the aggravating and mitigating factors the state board considered in arriving at the amount . . ."

Therefore, ARB has not added anything to the document that explains exactly how it will make the penalty determination. In fact the amended policy still suggests that ARB will start at the maximum, and the violator will need to demonstrate why any reduction would be appropriate. WSPA disagrees with ARB's proposed revision.

6. Paperwork-type errors should not result in punitive actions (see page 5 of the attached WSPA comments).

ARB added the following comment to the amended Enforcement Policy: *"Recordkeeping, reporting and certification obligations are important. Air quality programs cannot function properly without them and violations of these types of obligations warrant substantial penalties even in cases where direct harm to the air quality may not be present. On the other hand, depending on the circumstances, violations involving things like genuine clerical errors and typographical mistakes may warrant nominal penalties."*

ARB did not acknowledge the concept of a "notice to comply" and whether any such infraction could be handled outside of the normal violation/penalty process via a fix-it ticket type model.

ARB also added comments in two areas regarding AB32. Specifically, since AB32 is not fully implemented, the Enforcement Policy "is not intended to determine how regulations under AB32 will be written or implemented." In addition, "It may be appropriate to develop additional enforcement guidance tailored to climate change laws when ARB has acquired more experience implementing them." WSPA supports this language in the policy.

There are no changes to, or deletions of, the original text from the Draft Enforcement Policy. The Amended Enforcement Policy only adds the comments highlighted above.

As mentioned above, WSPA would like to schedule a meeting with ARB to discuss our continuing concerns and urge our recommendations and revisions be incorporated prior to finalizing the policy. Please contact my staff, Gina Grey, at 480-595-7121 to arrange such a meeting.

Sincerely,

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

c.c. Ellen Peter, ARB  
Jim Ryden, ARB  
Mark Stover, ARB