

California Air Resources Board Workshop

**Proposed Enforcement
Penalties:**

Background and Policy

March 29, 2011

1:00 to 3:00 p.m.

1001 I Street

**Sacramento, California
95814**

**Proposed Enforcement
Penalties:**

Background and Policy

March 30, 2011

1:00 to 3:00 p.m.

9530 Telstar Avenue

**El Monte, California
91731**

Workshop Agenda

- Please sign in at the entrance to the auditorium and fill out a speaker card if you would like to testify
- ARB presentation
- Public comments, questions. ARB will consider comments before issuing final Policy
- Please line up to speak at the podium when your name is called
- Please state your name and affiliation

ARB's Proposed Enforcement Penalty Policy

- Health & Safety Code (HSC) section 43024 was enacted in 2010 as part of SB 1402, Dutton
- HSC 43024 directs ARB to publish an Enforcement Penalty Policy (EPP or Policy) that takes into account all relevant circumstances including 8 penalty factors
- The Policy will increase the transparency of the ARB's enforcement program and will elevate overall compliance

ARB's Proposed Enforcement Penalty Policy, continued

- ARB's enforcement program is designed to obtain immediate compliance, ensure a level playing field, and stop future violations
- ARB determines a proposed penalty amount based on all relevant circumstances and HSC section 43024's eight factors. This involves evaluating: the facts of the case, applicable statutes, which establish the maximum penalties, court decisions, other case settlements, enforcement goals and relevant policies
- The Proposed Policy does not employ a mathematical formula to calculate penalties due to limitations of that approach and its conflict with HSC section 43024

ARB's Proposed Enforcement Penalty Policy, continued

- ARB penalties are based on the considerations specified in HSC section 43024 (vehicular), and parallel provisions section 42403 (stationary sources) and 43031 (fuels). The Proposed Policy applies to all ARB enforcement actions.
- The Proposed Policy contains a Background section, the Proposed Policy and four appendices: A. Senate Bill 1402; B. Matrix of ARB Regulations and Corresponding Penalties; C. Cal/EPA's "Recommended Guidance on Incentives for Self-Disclosure; and, D. Cal/EPA's "Recommend Guidance on Supplemental Environmental Projects".

Enforcement Goals

- Obtain immediate compliance
 - Cannot capture lost emissions
 - Air pollution standards: health-based
- Achieve a level playing field
- Create deterrence
- Swift resolution
- Penalties are a tool to achieve these goals

Level Playing Field

- Fairness to those who have complied
- Consistent enforcement is key to program integrity
- Similar penalties for similar violations
- Take financial hardship into account

October 2009 Workshop

- Participants encouraged ARB to increase the transparency of its enforcement program
- The Proposed Policy will:
 - Increase enforcement transparency
 - Inform the regulated community of regulations and associated penalties
 - Assist in case resolution

ARB's Mission Statement

“To promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state.”

ARB Enforcement Division's Mission Statement

“The Enforcement Division seeks to protect the environment and public health and provide safe, clean air to all Californians by reducing emissions of air contaminants through the fair, consistent and comprehensive enforcement of air pollution laws, and by providing training and compliance assistance.”

ARB's

Environmental Justice Policies

- ARB is committed to making the achievement of environmental justice (EJ) an integral part of its activities
- EJ is defined as the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies
- ARB's EJ policies and actions are available at <http://www.arb.ca.gov/ch/programs/ej/ej.htm>

Regulatory Implementation, Compliance and Enforcement Activities at ARB

- Outreach/compliance assistance/training to industry
- Implementation strategies to facilitate compliance and track compliance
- Enforcement in instances of non-compliance

ARB Enforcement Information Resources

- Visit the ARB Enforcement Division on line at: <http://www.arb.ca.gov/enf/enf.htm>
- ARB's comprehensive annual enforcement reports are available at:
<http://www.arb.ca.gov/enf/reports/reports.htm>
- Case settlements are available at:
<http://www.arb.ca.gov/enf/casesett/casesett.htm>

ARB's Basic Enforcement Process

- Find the violation
 - Conduct frequent, unannounced inspections
 - Investigations
 - Industry and citizen complaints
 - Voluntary disclosure
- Determine the Penalty
- Notify the responsible party
 - Citations, notices of violation, cease and desist letters
- Opportunity to discuss
- Resolution
 - Assess appropriate penalties
 - Resolve by mutual agreement
 - Vast majority of cases are settled in-house, but some are referred for prosecution, usually to the Attorney General or a District Attorney

How Penalty Funds are Handled at ARB

- Penalties are deposited in the Air Pollution Control Fund (APCF) (established in the HSC, administered by the Legislature)
- Penalty checks are made payable to the APCF and are mailed to the case investigator for processing
- Some cases are resolved by payment of no more than 25% of the total penalty to a Supplemental Environmental Project (SEP)

Overview of Penalties for Violating ARB Requirements

- The California HSC sets the maximum penalties
- HSC establishes a system of strict liability
- Strict liability exists in environmental law nationally
- Under strict liability, all relevant circumstances are taken into account to determine an appropriate penalty, not to excuse the violation

Division 26 of the HSC

- Contains most of the statutory provisions of CA air quality law
- Recognizes vehicular and non-vehicular sources
- Stationary source violations may be punished criminally or civilly
- Mobile sources and fuels may be punished civilly
- Maximum penalty amounts on a per violation or per day basis

Part 2 of Division 26, HSC

- ARB enforces state and some federal air toxic control measures
- Penalties of up to \$10,000 per violation, per day
- Violations of ARB's diesel retrofit regulations may also carry these penalties

Part 4 of Division 26, HSC

- Stationary source violations
- Criminal and civil penalties
- Primarily controlled by the local air districts
- Assembly Bill 32 makes the Part 4 penalties applicable to violations of any requirement adopted by ARB under AB 32
- Part 4 penalty provisions also apply to violations of consumer products
- ARB can obtain an injunction

Part 5 of Division 26, HSC

- ARB responsible for enforcement of vehicles and fuels
- Civil penalties range from \$500 per violation up to \$5,000 per violation
- Injunctions also available

Examples of Mobile Source Violations

- Some mobile source violations under Part 5:
 - Uncertified engines and/or vehicles
(\$5,000 per vehicle)
 - Violation of ARB test procedures
(\$50 per vehicle)
 - Tampering with pollution control devices
(up to \$1,500 per violation)
 - \$500 catch-all penalty provision

Fuels Penalties

- Calculated on a daily basis
- Strict liability civil penalties of up to \$250,000 per day
- Documentation violations subject to penalties of up to \$25,000
 - Each day (or month if monthly reporting) is a separate violation
- Criminal prosecution
 - Misdemeanor to knowingly violate anyd fuels regulation
 - Punishable by a max of six months jail and penalty up to \$1,000 per day of violation

Assessing Penalties Generally

- HSC sections 42403, 43024, and 43031 provide that penalties “shall take into consideration all relevant circumstances including, but not limited to,” eight specified factors
- Penalties ultimate purpose is to promote compliance with the law
- Maximum penalty amounts are established in statute
- HSC section 39000 recognizes that air quality laws protect public health and safety

General Penalty Principles

- 3 general principles guide penalty determinations
 - Deterrence
 - Deter both the violator and future violators
 - Deprive the violator of any economical benefit
 - Fairness
 - Requires consistency and flexibility
 - Swift resolution of both environmental problems and pending cases
 - Limits environmental harm
 - Promotes good environmental practice
 - Enhances penalty's deterrent effects

“All Relevant Circumstances” for Penalty Calculations

HSC section 43024 provides that penalties “*shall take into consideration all relevant circumstances*”. These include:

- Facts of the case
- Air quality laws
- Case law
- All relevant evidence/general penalty principles
- Penalties must relate to violator’s financial condition
- Penalties must be set at levels to encourage compliance with the law
- Air quality laws protect public health and safety
- Other case settlements
- Relevant policies

“All Relevant Circumstances,” continued

- Case law provides that penalty calculations must start at the maximum but can be mitigated from there
- The burden is on the violator to make the case for mitigation

8 Factors for Penalty Calculations

HSC section 43024 provides that penalties “shall take into consideration, all relevant circumstances *including, but not limited to, all of the following:*”

- Extent of harm to public health and safety
- Nature and persistence of the violation
- Compliance history of the violator
- Preventive efforts taken by the violator
- Innovative nature and magnitude of effort to comply
- Efforts of violator to attain, or provide for, compliance
- Cooperation of violator during investigation and any mitigation on the part of the violator
- Financial burden to the violator
- Similar language is found in HSC sections 42403 and 43031

Penalty Factor:

The Extent of Harm to Public Health and Safety

- Injury to air quality, property, persons, or the implementation of an air quality regulation
- Uncertified vehicles, engines, pieces of equipment, fuels or products violations are illegal and emit illegal, excess emissions.
- These excess emissions are not always quantifiable, however.
- Violations undermine ARB's emission standards and regulations to the detriment of their public health goals

Penalty Factor:

The Nature and Persistence of the Violation/Magnitude of Excess Emissions

- The type of violative conduct
- Quantity and type of pollutant
- Length of time the violation occurred
- Other considerations in factor (1)

Penalty Factor: The Violator's Compliance History

- Has the violator had environmental violations in the past?
- A repeat violation indicates that the prior penalty was inadequate
- The absence of prior violations may argue for mitigating the penalty

Penalty Factor: Preventive Efforts

- Record of maintenance
- Program to ensure compliance
- Systematic attempts to prevent or promptly identify and correct violations
- Not including actions required by a permit, the rules, or the normal standard of care

Penalty Factor: Nature and Magnitude of the Effort to Comply

- Effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods
- Does not refer to efforts that are common in an industry

Penalty Factor: The Efforts to Attain or Provide for Compliance

- Related to factor (4)
- Refers to actions taken *prior* to the violations to ensure compliance

Penalty Factor: Cooperation During the Investigation and Mitigation

- Nature, extent, and time of response of any action taken to mitigate the violation
- Actions taken *after* a violation is detected
- Cooperation includes providing information on the violation in a complete and timely manner
- Mitigation includes improvements to prevent future violations

Penalty Factor: Financial Burden

- Burden of penalty to the violator:
 - Continued viability of business
 - Fraction of assets
 - Revenues
 - Gross income
 - Income represented by the portion of the penalty in excess of any economic benefit
- Violator must provide financial information to qualify

Cal/EPA's Voluntary Disclosure Policy

Cal/EPA "Recommended Guidance on Incentives for Voluntary Disclosure" – October 2003

- Environmental Audit
- Gravity based penalties
- Provides Incentives
 - Significantly reducing or not seeking gravity based civil penalties
 - Declining to refer for criminal prosecution companies that self-report
 - Refraining from routine requests for audits

Cal/EPA's Voluntary Disclosure Policy, continued

- Violation was discovered through an environmental audit
- Violation was discovered voluntarily
- Disclosure must be prompt and in writing
- Disclosure must be independent
- Violation was corrected immediately
- Violator agrees to prevent recurrences
- Violation or similar violation must not have occurred within the past 3 years
- Violation is not serious
- Violator fully cooperated with agency
- ARB will consider penalty reduction for self-disclosures that fall short of the policy's requirements

Cal/EPA's Policy on Supplemental Environmental Projects (SEPs)

Cal/EPA's "Recommended Guidance on SEPs" – October 2003

- Must be consistent with ARB's underlying statutes and advance at least one of the objectives in the statute
- Must have nexus with ARB's enforcement responsibilities
- Must be clearly defined
- Must not directly benefit the violator
- Cannot exceed 25% or the total settlement

Summary

- ARB regulates activities that impact air quality to ensure the health and safety of all Californians
- Penalties are a tool to achieve this and must take into consideration all relevant circumstances, including the eight factors specified in the HSC

Next Steps

- Consider comments received at the workshops
- Issue a final SB 1402 “Enforcement Penalties: Background and Policy” document
- Post the final policy on ARB’s website