

**State of California  
AIR RESOURCES BOARD**

**PROPOSED/AMENDED**

**ENFORCEMENT PENALTIES:  
BACKGROUND AND POLICY**

**Pursuant to Senate Bill 1402 (Dutton, Chapter 413, Statutes of 2010)**

**Released for Additional Public Comment: July 21 , 2011**

**Note: No text was deleted from the February 25, 2011 draft. Added text is shaded and appears on pages 8, 15, 19 and 22.**

## PREFACE

This document has been prepared by the Air Resources Board (ARB) pursuant to Health and Safety Code Section 43024 which was adopted as part of Senate Bill 1402 (SB 1402, Dutton, Chapter 413, Stats. 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.*

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## EXECUTIVE SUMMARY

Millions of Californians continue to breathe unhealthful air. Many areas in California exceed health-based air quality standards and cannot tolerate additional, illegal emissions of smog-forming compounds and diesel soot. For many toxic air contaminants, such as benzene and formaldehyde, there are no known safe levels of exposure. There is no practical way Californians can individually protect themselves from air pollution. Children, the elderly and people with heart and lung disease are particularly at risk.

The Air Resources Board approaches this challenge with the conviction that betterment of public health goes hand-in-hand with economic health.

The bottom line of ARB's enforcement program is the same as its overall mission: "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." The ARB aims to reduce air emissions through fair, consistent and comprehensive enforcement of air pollution laws and by providing compliance assistance.

In 2009, the ARB began to explore ways to improve compliance and make its enforcement process more transparent. Staff solicited public comment in a widely announced Oct. 12, 2009 workshop in Sacramento, which drew a large audience and much participation. Many commenters encouraged ARB to increase the transparency of its enforcement process. The Enforcement Division reported the results of its outreach efforts at the Board's Jan. 28, 2010 meeting and committed to developing a written penalty policy that explains how it resolves violations and determines penalties.

The California Legislature underscored the importance of ARB's enforcement outreach in approving Senate Bill 1402, which became law on Sept. 28, 2010. Appendix A contains a copy of the bill. Among other requirements, SB 1402 directs the ARB to publish by March 1, 2011 a penalty policy that takes certain circumstances into account when assessing penalties. This document responds to that directive.

Part 1 provides context and background for the penalty policy. It outlines California's air pollution laws, regulations and corresponding penalties and details ARB's enforcement program, which includes public outreach and compliance assistance workshops. The handling of penalty revenue also is discussed.

Part 2 is the proposed penalty policy itself and related Cal/EPA guidance documents. The policy calls for consideration of "all relevant circumstances," in determining the penalty amount. By law, penalty levels must be set at levels to

ensure compliance and deter violations. They may be based on any relevant evidence, including a violator's financial condition. Such circumstances, along with the eight factors enumerated in SB 1402 (see Preface), must all be considered in determining penalties for violations of laws under the Board's jurisdiction.

For easy reference, Appendix B of this document presents a matrix of most of the laws and regulations ARB enforces, with the corresponding penalties.

The penalty policy explains how ARB works to consistently reach swift and fair resolution of violations.

Fairness is at the heart of an effective enforcement program—one that benefits those who invested in pollution controls and maintains consistency in the level of penalties issued for similar violations. To be fair, the Board also takes into account the specific circumstances, causes, results and actors—all of which vary from case to case.

As a result, comparisons between individual cases of similar violations may be invalid. Similarly, the policy does not have a mathematical formula for calculating penalties. Such a formulaic approach would not properly weigh individual circumstances and might result in an unjust or ineffective penalty.

Fairness also calls for proportionality, meaning monetary sanctions should be severe enough to deter future violations but proportionate to the financial wherewithal of the company or individuals involved.

ARB's penalty determinations are designed to prevent harm to the public and the environment, not to drive people out of business. Penalties may be reduced in cases of financial hardship. Also, for example, ARB's consumer product regulations commonly provide a "sell-through" period, allowing businesses to sell their remaining inventory of newly prohibited, higher-polluting products for a limited period before enforcement takes effect. The ARB's Enforcement Division generally launches an extensive public outreach campaign with the rollout of a new regulation so the regulated community isn't caught by surprise or misinformed.

The Enforcement Division takes great care to engage regulated industries and businesses in developing, understanding and complying with each regulation it adopts. Over the years, the enforcement staff has grown more specialized and involved in public outreach. The division's compliance assistance workshops annually draw thousands of from small business, industries, local air pollution control districts and other groups. Enrollment more than doubled in 2009 to 9,000.

The ARB resolves thousands of violations a year and annually deposits

millions of dollars in penalties in an Air Pollution Control Fund controlled by the California Legislature.

Over the years, ARB regulations have evolved from focusing almost exclusively on large enterprises such as engine manufacturing and fuel production to medium and small operations. This is particularly the case with enforcement of the Board's diesel risk reduction regulations that affect owners of truck and bus fleets of any size. The Board's strategy for attaining cleaner diesel emission standards traditionally called for accelerated retirement of older, higher polluting diesel trucks and buses. Recent regulations, however, also require fleet operators to retrofit certain model years of higher-polluting diesel vehicles and equipment that are still years away from retirement. There are more than 500,000 heavy-duty diesel trucks on California's roads today.

Enforcement also has grown more active. The number of cases or citations closed in 2009 totaled 4,054, compared with 1,535 in 2002. Penalties collected in 2009 totaled \$16.3 million, up from \$11.3 million collected in 2002. For more enforcement statistics, please visit the ARB Enforcement Division website at: <http://www.arb.ca.gov/enf/enf.htm>.

ARB's enforcement process can be summarized in five steps: (1) finding violations through inspections, investigations or complaints, (2) determining the penalty, (3) notifying the responsible party, (4) providing the responsible party an opportunity to explain and ask questions and (5) resolving the violation informally if possible. These steps may vary, depending on the type of violation.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or criminal prosecution if warranted. Administrative hearings may be held for certain mobile source citations.

The proposed penalty policy fulfills the requirements of SB 1402. The policy extends ARB's practice of explaining the basis of its penalty determinations to include more details in its written demands for a penalty or settlement, as SB 1402 requires. Those details include the governing law and a quantification of excess emissions where practicable.

The policy also formalizes the Board's longtime penalty-setting practice of taking into consideration "all relevant circumstances," including the eight SB 1402 factors. Those factors include the extent of public harm caused by the violation and the defendant's compliance history and level of cooperation in the investigation.

ARB's efforts to improve the transparency of its enforcement process go beyond the fulfillment of SB 1402's requirements. For example, ARB now posts online all settlement agreements, complete with explanations of penalty determinations.

The Board staff worked with the interested public and regulated community on refining the penalty policy in public workshops and in response to public comments. When this policy was published, efforts were still underway to implement and interpret The Global Warming Solutions Act of 2006 (AB 32). Although this policy reflects some principles that are common to all enforcement efforts, this policy is not intended to determine how regulations issued under AB 32 will be written or implemented.

## **PART 1: BACKGROUND ON ARB ENFORCEMENT**

### **I. INTRODUCTION**

To fully understand ARB's penalty policy, it is important to understand the Board's overall mission, goals, environmental justice policies and enforcement program.

#### **A. Mission**

- 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.

#### **B. Major Goals**

- Provide healthful air to all Californians
- Protect public from exposure to Toxic Air Contaminants
- Reduce California's emission of greenhouse gases
- Provide leadership in implementing and enforcing air pollution control regulations
- Provide innovative approaches for complying with air pollution regulations
- Base decisions on best possible scientific and economic information
- Provide quality service to the public

#### **C. Environmental Justice Policies**

ARB is committed to making the achievement of environmental justice an integral part of its activities. State law defines environmental justice 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.

The Board approved its Environmental Justice Policies and Actions on Dec. 13, 2001, consistent with the directives of state law. They are available at <http://www.arb.ca.gov/ch/programs/ej/ej.htm>

#### **D. ARB's Enforcement Program**

The ARB designed its enforcement program to achieve immediate compliance, deter future violations and to make sure that people who follow the rules are not disadvantaged by those who don't.

ARB resolves several thousand violations a year through a swift and informal settlement process and annually deposits several million dollars in penalties in an Air Pollution Control Fund that is controlled by the California Legislature.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or to a District Attorney if criminal prosecution is warranted. Administrative hearings are available for some of ARB's cases.

ARB's regulations have become increasingly complex and have reached larger and more diverse industrial and business sectors. Consequently, the need to provide compliance assistance and a clear enforcement policy has become more critical.

## **II. LEGAL FRAMEWORK**

### **A. Laws and Regulations**

The Air Resources Board enforces a variety of laws and regulations to stop illegal air pollution. The statutes are found in the **California Health and Safety Code (HSC)**, which recognizes air pollution sources as either "vehicular" or "non-vehicular."

- **Vehicular:** cars, trucks and other motorized mobile sources.
- **Non-vehicular:** stationary sources such as oil refineries, factories, dry cleaners and auto body shops. Such sources include "consumer products," meaning chemically formulated products for household or institutional use. Regulated products include cleaning compounds, aerosol paints, perfumes and other personal care products.

Most of the air quality statutes the ARB enforces are in HSC's **Division 26**, which is divided into five **Parts**. Division 26 gives the ARB responsibility for control of vehicular sources. It allocates primary control of the non-vehicular sources to the **local air pollution control districts**, which are subject to ARB oversight. ARB regulations are in **Titles 13 and 17** of the **California Code of Regulations (CCR)**.

For easy reference, Appendix B of this document presents a matrix of most of the laws and regulations ARB enforces, with the corresponding penalties.

## **B. Regulations**

In proposing an air pollution regulation, ARB staff documents why it is needed, inventories the sources of emissions and their contribution to the problem and surveys existing control options. ARB then publicly issues a draft regulatory proposal, solicits comments from various stakeholders and refines the proposal based on those comments. The staff contacts stakeholder groups – typically representatives from industry, the environmental community and public health professionals – and holds public workshops. The goal of this iterative process is to resolve as many stakeholder issues as possible before staff presents the proposed regulation to the Board for adoption. ARB follows the same steps when a regulation requires re-evaluation and amendment. After regulations are adopted, ARB expends considerable efforts to help the affected industry comply with it.

## **C. Penalties**

California's air quality laws and regulations apply the legal doctrine of "**strict liability**," meaning a prohibited act constitutes a violation no matter one's intent or the amount of care taken to avoid violations. Under strict liability, the circumstances of a violation are taken into account to determine the appropriate penalty, not to excuse the violation. The doctrine is common to environmental laws nationwide (including the federal Clean Air Act), because pollution violations occur in the course of ongoing business activity and usually are not committed intentionally or even negligently. In some cases, higher maximum penalties are available for intentional or negligent violations. But without strict liability, air pollution laws would have little deterrent effect.

**Maximum** penalties are specified for each type violation:

- **Stationary Sources, Consumer Products and AB 32 Penalties (Part 4 of Division 26, HSC)**

There are civil penalties (sections 42401 through 42403) and criminal penalties (sections 42400 through 42400.8). Violators may be punished using either, but not both (section 42400.7). Most violations are punished civilly.

Maximum penalty amounts are based on the degree of a violator's intent. The range begins at \$1,000 per violation per day, which can be imposed with no finding of intent (strict liability). Penalties top at \$1 million per violation per day for corporate violators and \$250,000 per violation per day for individuals, in cases of willful and intentional emissions of air contaminants that result in great bodily harm or death. ARB also can obtain a court order or "injunction" to stop violations from taking place (section 41513). In criminal cases, violators also face possible jail sentences of 30 days to 1 year per violation per day.

Part 4 penalty provisions also apply to violations of ARB's consumer products regulations (Title 17, California Code of Regulations, sections 94500-94575), indoor air cleaner regulations (sections 94800-94810) and any requirement ARB adopts under Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006 (Chapter 488 Statutes of 2006).

The list of factors that must be considered in determining a penalty under Part 4 (section 42403) is similar to those required under SB 1402 (section 43024).

- **Air Toxics Penalties (Part 2 of Division 26, HSC)**

ARB enforces state and some federal Air Toxic Control Measures (ATCMs) under section 39674 of Part 2. That section provides for penalties of up to \$10,000 per violation, per day. Higher penalties may also apply because certain ATCMs may also be enforced under section 39675 provisions of Part 4, stationary sources, described above. Because the regulations ARB adopts to control diesel particulate matter are in part adopted pursuant to ARB's authority to control air toxics, violations of the ARB's diesel retrofit regulations, for example, may also carry penalties under Health and Safety Code sections 39674 and 39675.

- **Mobile Sources and Fuels Penalties (Part 5 of Division 26, HSC)**

Unlike Part 4, Part 5 relies almost exclusively on civil penalties. Transactions involving new motor vehicles that are not certified to ARB's emission standards are subject to civil penalties of up to \$5,000 per vehicle per violation (section 43154). These are the hallmark penalties that safeguard ARB's stringent motor vehicle emission standards. They were upheld in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, which rejected many of the legal challenges to ARB's ability to enforce its vehicle certification programs.

Other requirements carrying specific penalties for violations selling vehicles that violate ARB's emission standards [\$5,000 per vehicle (section 43211)], violating ARB test procedures [\$50 per vehicle (section 43212)] and tampering with pollution control devices (\$1,000 per violation for car dealers (section 43012)).

There's a "catchall" provision (section 43016) for violations of requirements that do not carry a specific penalty. It provides for penalties of up to \$500 per violation and is commonly applied to violations of the Small Off-Road Engine regulations (Title 13 CCR sections 2400-2409).

The SB 1402 penalty factors now formally apply to mobile source violations. Section 43031 applies a similar list of factors to violations of ARB's fuels regulations.

As for ARB's fuel regulations, willful violations are subject to civil penalties of up to \$250,000 per day, plus removing any economic benefit. Negligent violations are subject to penalties of up to \$50,000 per day, while strict liability violations are subject to penalties of up to \$35,000 per day (sections 43027 and 43030.)

It is a criminal offense to knowingly violate an ARB fuels regulation (section 43020). The misdemeanor is punishable by up to \$1,000 per day of violation and a maximum six months jail time.

ARB can obtain a court order to stop any violation of a Part 5 requirement from occurring (section 43017).

### **III. ARB's ENFORCEMENT PROCESS**

#### **A. Finding the violation**

ARB learns about violations through inspections, tips from the public, referrals from other agencies, mandatory emissions reporting and voluntary disclosure. How ARB learns about a violation may make a difference in how it calculates the penalty. Concealing violations, for example, may result in a maximum penalty.

#### **B. Determining the penalty**

When it finds a violation, ARB determines a proposed penalty amount based on applicable laws and court decisions. The penalty amount may be adjusted based on other relevant circumstances, such as the violator's financial position and history of violations. In some cases, each item (say a vehicle or piece of equipment that is not certified to ARB emission standards) triggers a penalty. In other situations, each day a violation continues is a separate violation.

#### **C. Notifying the responsible party**

Every person ARB believes has violated a law is notified. The notice may be a citation issued (say on a roadside inspection of big rig truck with smoking exhaust), in a letter informing the person of an apparent violation or in a more

formal “Notice of Violation.” In rare cases, the first notice will be a legal pleading requiring a response and appearance in court to face charges. No matter the form, all notifications contain the information required by SB 1402. ARB explains the basis for any penalty it demands, and violators may request a reduced penalty based on mitigating circumstances ARB had previously not known about. Likewise, written demands explain:

- Laws or regulations on which the penalty is based.
- How the penalty amount was determined, including mitigating or aggravating factors.
- The penalty’s per unit basis, if any.
- Whether the law violated specifies emission limits, and if so, a quantification of excess emissions where practicable (Health and Safety Code section 39619.7).

#### **D. Opportunity to discuss**

Everyone ARB notifies of violating any law or regulation is given one or more opportunities to explain the circumstances and to ask about the basis of the accusation. Depending on the seriousness and scope of the violations, the discussion may be a phone call, meetings with ARB staff or an exchange of correspondence. These discussions are a two-way street. The ARB seeks to confirm and learn more about the violations, while the violator may want to explain that no violation occurred or outline points that could lower the penalty.

#### **E. Resolution**

Most violations are quickly resolved when the violator mails in a fine or negotiates a settlement by phone or in person. Violations that are disputed sometimes require more information gathering and discussion before an agreement is reached.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or criminal prosecution if warranted. In most cases, ARB has discretion whether to initiate an administrative hearing prior to litigation. Given its success in obtaining mutually agreeable settlements, ARB has had little need for these administrative hearings.

### **IV. PUBLIC COMMUNICATIONS AND OUTREACH**

ARB issues press releases announcing its settlements in cases involving large penalties. All settlement agreements complete with explanations of penalty determinations are posted online at: <http://www.arb.ca.gov/enf/casesett/casesett.htm>. In addition, ARB publishes a detailed report of its enforcement activities each year at: <http://www.arb.ca.gov/enf/reports/reports.htm>.

Much effort goes to engage regulated industries and small businesses in developing, understanding and complying with each regulation it adopts. Staff widely broadcasts enforcement advisories, maintains web pages and list-serves on regulatory developments, distributes brochures and fact sheets, publishes articles in trade journals and regularly responds to public inquiries.

ARB's Office of the Ombudsman specializes in helping owners of small businesses and start-ups navigate permitting, resolve compliance issues and find financial assistance and incentive programs.

Over the years, ARB's enforcement staff has offered compliance assistance workshops for thousands of people from industry, small business, academia, local air districts and other groups. Enrollment more than doubled in 2009 to 9,000.

## **V. PENALTY REVENUE**

ARB staff records penalty checks then deposits them into the Air Pollution Control Fund, which is administered by the California Legislature. Money in the fund must be appropriated by the Legislature before it can be spent.

Some cases are resolved by paying part of the penalty (not to exceed 25 percent) to a Supplemental Environmental Project as described in Appendix D.

## **VI. DEVELOPING AN ARB PENALTY POLICY**

In 2009, the Enforcement Division began to explore ways to improve compliance and better assist a growing regulated community that faces increasing complex air pollution laws and regulations.

In the largest listserve broadcast in ARB history, staff announced an Oct. 12, 2009 public workshop to discuss enforcement policy. See: <http://www.arb.ca.gov/enf/meetings/meetings.htm> Staff followed up with hundreds of phone calls to a wide spectrum of people interested in ARB's enforcement. The workshop drew a large attendance and wide participation. Many commenters expressed support for ongoing enforcement outreach and encouraged ARB to increase the transparency of its enforcement process.

The Enforcement Division reported the results of its outreach efforts at the Board's Jan. 28, 2010 meeting and committed to developing a penalty policy in consultation with stakeholders.

As ARB conducted its enforcement policy discussions, the Legislature considered SB 1402. The version of SB 1402 enacted and signed into law (see Appendix A) requires ARB to publish a penalty policy by March 1, 2011 that is applicable to specified vehicular air pollution violations. (See Health and Safety Code section 43024.)

This document responds to that directive. Because the principles governing ARB's penalty calculations are common across ARB's programs (see Health and Safety Code sections 42403, 43024 and 43031), the policy is designed to apply to all the programs the ARB has historically enforced.

*Note regarding AB 32*

Many aspects of this policy are universal, such as ARB's practice to seek a penalty that will deter other violations and is fair in light of the law, facts, and circumstances of individual situations. When this policy was published however, ARB did not have longstanding experience enforcing regulations promulgated under AB 32. Also, many of the AB 32 regulations were not final or had implementation dates set in the future. Accordingly, since this policy cannot describe present practice with regard to AB 32, it is premature to describe in this policy specifically how AB 32 regulations will be implemented. It may be appropriate to develop additional enforcement guidance tailored to climate change laws when ARB has acquired more experience implementing them.

## **PART 2: ENFORCEMENT PENALTY POLICY**

### **VIII. ARB CONSIDERS ALL RELEVANT CIRCUMSTANCES IN ASSESSING PENALTIES INCLUDING EIGHT STATUTORY FACTORS**

#### **A. Introduction**

Health and Safety Code section 42403, 43024 and 43031 require that penalties "shall take into consideration all relevant circumstances, including, but not limited to," eight specified factors. This analysis must account for legal authorities that provide that penalty levels must be set at levels to ensure compliance and deter violations, that penalties may be based on any relevant evidence, and must relate to violators' financial condition. It also requires recognition that, as the Legislature has declared, air quality laws protect the public health and welfare. These circumstances, along with the eight factors enumerated in Health and Safety Code sections 42403, 43024 and 43031 must all be considered in calculating penalties. Cal/EPA has published guidance documents on penalty-related topics, one on self-disclosure of violations (attached as Appendix C) and the other on supplemental environmental projects (attached as Appendix D). These guidance documents and ARB mission statements are also relevant circumstances that ARB considers in calculating penalties. They are discussed at the end of this section.

## **B. General Penalty Principles**

A penalty's ultimate purpose is to promote compliance with the law. The Legislature determines the appropriate penalty in the first instance by establishing an amount in statute, based on the environmental and health values that the Legislature sought to protect against a particular violation. Many statutes provide for penalties "not more than" the maximum, giving courts and ARB some discretion to reduce the maximum amount. The circumstances of individual cases may or may not provide reasons to reduce penalties below the maximum.

Three key principles guide penalty determinations: the need for deterrence, fairness, and swift correction of environmental problems. ARB typically exercises its discretion by considering the circumstances of the particular violation, past penalties in similar cases, and the potential costs and risk associated with litigating particular violations.

Deterrence. To achieve the goal of deterrence, every penalty must impose a consequence that will deter both the violator and others from future violations. In keeping with that goal, an adequate penalty must deprive a violator of any economic benefit resulting from the violation and include an additional amount reflecting the seriousness of the violation. In many cases, the amount of any economic benefit may be smaller than the proposed penalty, difficult to calculate, or both. Accordingly, ARB does not routinely calculate a precise economic benefit amount unless the facts suggest that such benefit is significant or easily determined.

Fairness. To treat the regulated community fairly requires both consistency and flexibility. Treating similar situations similarly is key to fairness. The consideration of each case must be flexible enough to reflect legitimate differences between violations.

Swift Resolution. The third key goal is swift resolution of both environmental problems and pending cases. Prompt resolution of disputes limits environmental harm, promotes good environmental practices and enhances a penalty's deterrent effect.

## **C. General Legal Considerations in Calculating Penalties**

The determination of an appropriate penalty depends on the purpose and meaning of the particular statute, and is informed by the larger statutory scheme and case law.

The statutes establishing penalties for violations of ARB program requirements are discussed above and listed in the matrix in Appendix B. In some statutes the Legislature carefully distinguished between intentional

conduct, knowing failure to correct a violation, negligence, and strict liability, setting forth different maximum penalties for each.<sup>1</sup> Accordingly, when determining a penalty for an intentional violation subject to the penalty set forth in section 42402.3, for example, it may be inappropriate to automatically consider intent as an aggravating factor. Conversely, the absence of intent may not be a significant mitigating factor for strict liability violations. Many of the penalty statutes the Air Resources Board applies were adopted decades ago. To maintain the deterrent effect the Legislature intended at the time these statutes were adopted, current penalties are appropriately set toward the maximum ranges the statutes provide.

Case law interpreting penalty statutes also informs the meaning and operation of penalty provisions. Those cases uniformly note that the purpose of penalties is to punish and deter violations. California courts, like federal courts interpreting the federal Clean Air Act, have stated that the statutory maximum is the presumptive starting point, subject to reductions based on mitigating factors a violator can establish. These cases are discussed in more detail below, but it is important to note the reason for air quality laws in the first place—to protect public health and safety—and acknowledge that this also weights the calculation toward substantial penalties.

#### **D. Air Quality Laws Protect Public Health and Safety**

Calculating penalties for violations of California air quality laws must account for the fact that these laws protect the public health, safety and welfare of all Californians. The Legislature declared this in Health and Safety Code section 39000, which provides:

“The Legislature finds and declares that the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California.”

The important public policy interests involved in air quality cases justify substantial penalties for violations. Many areas in California fail to attain ambient air quality standards and cannot tolerate additional, illegal emissions. In the case of toxic air contaminants, there are no known safe exposure thresholds. There is no practical way for people to protect themselves from air pollution, so air quality violations must be prevented wherever possible.

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<sup>1</sup> Compare Health and Safety Code sections 42402 [\$10,000 strict liability], 42402.1 [\$25,000 negligence], 42402.2 [\$40,000 knowing], 42402.3 [\$75,000 intentional]. See also Health and Safety Code section 43027, subd. (a) [\$250,000 intentional], (b) [\$50,000 negligent], and (c) [\$35,000 strict liability].

## **E. All Relevant Evidence is Considered in Calculating Penalties**

As provided in SB 1402 and elsewhere, the proper penalty amount is an issue that can be proven by any relevant evidence. (See: Health and Safety Code section 42403, 43031 and 43024; Evidence Code section 350.) “Relevant evidence” is a very wide term and means any evidence that would be admissible in court and has a tendency to prove what the proper penalty should be. (See: Evidence Code sections 210 and 350.)

## **F. General Case Law on Civil Penalties**

Courts have not interpreted most of the air quality penalty provisions in the Health and Safety Code, but they have considered other civil penalty statutes. These courts have recognized that civil penalties have several purposes: punishment, deterring future violations, motivating compliance, and preventing unjust enrichment and unfair business advantage.

For example courts have said a civil penalty is “unquestionably intended as a deterrent against future misconduct and does constitute a severe punitive exaction by the state....” (*People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431.) Civil penalties “do partake of the nature of punishments for wrongdoing [,] accomplish a chastisement of the wrongdoer and act as a deterrent against similar misconduct” by the violator and others. (*People v. Superior Court (Kardon)* (1973) 35 Cal.App.3d 710, 713.) “[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives.” (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [279 Cal.Rptr. 318] cited in *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4<sup>th</sup> 1302, 1315 [92 Cal.Rptr. 418].

## **G. Case Law on Air Quality Penalties**

The concepts developed in civil penalty cases in other contexts have been applied to California air quality law. Discussing the civil penalties provided in Health and Safety Code section 43154 for violations of California’s vehicular air quality certification requirements, the court in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4<sup>th</sup> 1332, explained at page 1351 that when air quality violations occur, maximum penalties are presumed and the violator has the obligation to demonstrate that a lesser penalty amount is appropriate:

“In addition to disgorging illicit gains and obtaining recompense, a civil penalty also has the purpose of deterring future misconduct. (*State of California v. City & County of San Francisco* (1979) 94 Cal.App. 3d 522, 531 [156 Cal.Rptr. 542]; *People v. Bestline*

*Products, Inc.* (1976) 61 Cal.App.3d 879, 924 [132 Cal.Rptr. 767].) Regulatory statutes would have little deterrent effect if violators could be penalized only where a plaintiff demonstrated quantifiable damages. (*State of California v. City & County of San Francisco*, *supra*, 94 Cal.App.3d at p. 531.) Further, “A penalty statute presupposes that its violation produces damages *beyond that which is compensable.*” (*Ibid.*, italics added.) The burden of proving that actual damages are less than the liquidated maximum provided in a penalty statute lies with the defendant, and in the absence of evidence in mitigation a court is free to assess the full amount. (*Id.* at pp. 531-532.)”<sup>2</sup>

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.

#### H. Penalties Must Also Relate to the Violator’s Financial Condition

To accomplish their intended goals, civil penalties must bear some relationship to the violator’s financial condition. The relevance of a violator’s financial information was established in *People v. Toomey* (1985) 157 Cal.App.3d 1, 24-25. In *Toomey* the court reiterated the holding in *People v. Superior Court (Kardon)* (1973) Cal.App.3d 710, 713, that civil penalty provisions are sufficiently similar to exemplary damages as to permit discovery of a violator’s financial condition. The *Kardon* court explained the necessity of financial information: “a relatively small penalty might suffice for the small operator, while the same penalty would be paid with little hurt by the wealthy one” (*Kardon*, at p. 713.) More recently, the court observed in *City and County of San Francisco v. Sainez*, *supra*, at p. 1319:

“Accordingly, we hold that, as in the case of substantive due process protection against excessive punitive damages awards, substantive due process protection against civil penalties under the

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<sup>2</sup> Similarly, courts calculating Clean Air Act (CAA) and Clean Water Act (CWA) fines often start with the maximum penalty. (*United States v. Dell’Aquila* (3d Cir. 1998) 150 F.3d 329, 338 [CAA]; *United States v. B & W Inv. Properties* (7th Cir. 1994) 38 F.3d 362, 368 [CAA]; *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.* (11th Cir. 1990) 897 F.2d 1128, 1137 [under CWA “the point of departure for the district court should be the maximum fines for such violations”]; *United States v. Midwest Suspension & Brake* (E.D. Mich. 1993) 824 F. Supp. 713, 735 [CAA]; *United States v. Hoge Lumber Co.* (N.D. Ohio 1997) Case No. 3:95CV7044, 1997 U.S. Dist. LEXIS 22353 [CAA]; *U.S. v. Vista Paint Corp.* (C.D.Cal.1996) 1996 WL 477053, 1996 U.S. Dist. LEXIS 22129, \*27 [CAA calls for top-down approach starting with the maximum].)

rationale of *Hale* and *Kinney* allows inquiry into a defendant's full net worth, not just the value of the particular property at issue in the case."

Applying this holding, the *Sainez* court upheld a civil penalty that totaled 28.4 percent of the violators' net worth and 120 percent of the illegal rents they charged. The court took note of *U.S. v. Lippert* (8<sup>th</sup> Cir. 1998) 148 F.3d 974, 976, 978 where "[a] net worth of about \$500,000 has been held enough ability to pay to uphold a penalty of \$353,000...."

Accordingly, a violator's financial condition always is relevant to determining an appropriate penalty and ARB takes it into account. Health and Safety Code section 42403 mentions it in relation to determining civil penalties for violations of ARB requirements adopted pursuant Part 4 of Division 26 of the Health and Safety Code. SB 1402 made it expressly applicable to Part 5 or mobile source violations via the new Health and Safety Code section 43024.

### **I. SB 1402's Statutory Factors**

Several enforcement provisions in statutes implemented by ARB set forth considerations pertinent to determining the penalty amount to be assessed or recovered in settlement. Health and Safety Code sections 42403, 43024, and 43031 require consideration of "all relevant circumstances, including but not limited to" eight separate, but somewhat interrelated, factors. Because the eight factors are nearly identical in those three statutes, this Policy focuses on the wording found in SB 1402's section 43024. However, as provided in SB 1402 and ARB's other penalty assessment statutes, penalty calculations must be made in consideration of the totality of the circumstances, both factual and legal, not just be based on the non-exclusive list of factors the penalty assessment statutes enumerate.

In Health and Safety Code section 43024, SB 1402 provides that penalties "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.”<sup>3</sup>

## **J. The Penalty Factors Explained**

The factors in SB 1402 and ARB’s other penalty assessment statutes can affect a penalty determination in either direction. Applying the factors in any particular case involves a weighing process because the factors are somewhat vague and seldom command a particular penalty in any case. Although no circumstance allows a penalty to exceed the statutory maximum, a violation that involves 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 penalty, despite the presence of other mitigating factors. As case law provides, penalty calculations must start at the maximum but can be mitigated, if possible, down from there. The burden is on the violator to make the case for mitigation.

Each of Health and Safety Code section 43024’s eight factors are discussed below. Based on experience, some of the most common considerations in penalty calculations are whether the penalty is set at a level sufficient to discourage violations, illegal emissions, the violator’s financial condition and his or her compliance history and cooperation with the investigation.

- (1) “The extent of harm to public health, safety, and welfare caused by the violation” refers to injury to air quality, property, persons, or the implementation of an air quality regulation. In cases involving vehicles, engines, pieces of equipment, fuels or products not certified to ARB’s air quality standards, the emissions from these illegal units are illegal and excess as well. These types of violations undermine ARB’s emission standards, the lynchpin of the emission reductions achieved under ARB’s regulations. Since acquiring the data necessary to quantify these illegal emissions (when it exists at all) can be time consuming and expensive, ARB makes these calculations where practicable in accordance with SB 1402 (see: Health and Safety Code section 39619.7). Whether quantifiable or not, wherever there is a violation of a requirement ARB is charged with enforcing and there are emissions to the air, the violation

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<sup>3</sup> Health and Safety Code section 42403 is very similar, as is section 43031, pertaining to fuels violations. Instead of “financial burden to the defendant,” section 43031 subd. (b)(8) sets forth the eighth factor as follows: “For a person who owns a single retail service station, the size of the business.” Because the “financial burden” of paying a penalty will depend in large part on the “size of the business,” the two formulations are conceptually very similar. To the extent there is any difference, we note that the financial burden on a defendant or the size of any enterprise may constitute a “relevant circumstance” under any of the statutes.

involves illegal, excess emissions. Removing illegal units from the state is very difficult.

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.

- (2) “The nature and persistence of the violation, including the magnitude of the excess emissions” refers to the type of illegal conduct, quantity and type of pollutant, length of time the violation extended over, as well as the considerations discussed under factor (1).
- (3) “The compliance history of the defendant, including the frequency of past violations” refers to whether defendant has had environmental violations within the past several years. Because penalties are imposed to deter violations and motivate compliance, a repeat violation indicates that the prior penalty was inadequate and should be augmented. If the prior violations are closer factually or temporally to the present one, this argues for a higher penalty augmentation. The absence of prior violations may argue for mitigating the penalty.
- (4) “The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance” refers to acts, including installation, operation or maintenance of equipment, to comply, and systematic attempts to prevent or promptly identify and correct violations. It does not refer to actions required by a permit, the rules, or the normal standard of care.
- (5) “The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods” refers to creative methods or unusual efforts to comply that should be encouraged, even if not entirely successful as well as the accuracy of test methods used to determine violations. This factor does not refer to efforts that are common in an industry.
- (6) “The efforts of the defendant to attain, or provide for, compliance” is related to factor (4) and refers to actions taken *prior to* the violation to ensure 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” refers to actions taken *after* a violation is detected. Cooperation with the investigation includes providing information on the violation in a complete and timely manner. Mitigation includes improvements to prevent future violations. A mere return to compliance is not mitigation. A special policy applies to self-disclosed violations discovered through a systematic audit process: Cal/EPA’s October 2003 “Recommended Guidance on Incentives for Voluntary Disclosure.” That Guidance is designed to encourage “regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements through the use of routine, systematic application of an environmental compliance auditing program.” It defines the terms “environmental audit” and “gravity based penalties,” provides incentives to conduct environmental audits and self-disclose violations, and lists conditions that must be met for the Guidance to apply. For more information, the Cal/EPA Guidance is discussed in greater detail below and is attached as Appendix C. The criteria that Guidance contains can be difficult to meet in certain cases. The ARB considers reducing penalties for self-disclosures that do not meet all of the Guidance criteria.

- (8) “The financial burden to the defendant” refers to the burden of the penalty to the violator in terms of continued viability of business, fraction of assets, revenues, gross income, or income represented by the portion of the penalty in excess of any economic benefit. Proposed penalties may be adjusted for financial burden only after a defendant adequately reveals its finances for recent years. Special case law has been developed to deal with financial issues and is discussed above.

#### **K. Penalty Reductions under the California Environmental Protection Agency Voluntary Disclosure Guidance**

Penalties may be reduced under the Cal/EPA Voluntary Disclosure guidance. The criteria the Guidance contains can be difficult to meet in certain cases. The ARB considers reducing penalties for self-disclosures that do not meet all of the Guidance criteria.

## **i. Introduction**

The California Environmental Protection Agency (Cal/EPA) issued its "Recommended Guidance on Incentives for Voluntary Disclosure" in October of 2003. It is attached as Appendix C. This Guidance is designed to encourage "regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements through the use of routine, systematic application of an environmental compliance auditing program." The Guidance **defines** the terms "environmental audit" and "gravity based penalties", provides **incentives** to conduct environmental audits and self-disclose violations and lists **conditions** that must be met for the Guidance to apply.

## **ii. Voluntary Disclosure Guidance-Definitions**

"Environmental Audit" is a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Gravity based penalties" are that portion of a penalty over and above the economic benefit gained by noncompliance, whether or not they are labeled that way. In other words, the punitive portion of the penalty is the gravity based part.

## **iii. Incentives-Why a Company Would Do Environmental Audits**

The major incentives to encourage self-audits, prompt disclosure, and correction may include: significantly reducing or not seeking gravity based civil penalties, declining to refer for criminal prosecution companies that self-report, and refraining from routine requests for audits.

## **iv. Conditions FOR A Voluntary Self-Disclosure to Reduce Penalties**

1. The violation was discovered through an environmental audit or other objective, documented, **systematic** procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations.
2. The violation was discovered **voluntarily** and not due to a legal mandate.
3. The disclosure must be **prompt** and in writing, no more than 21 days after the violation is discovered.
4. The disclosure must be **independent**, meaning it is not made in reaction to a pending government enforcement action or third party complaint.

5. The violation was **corrected immediately**.
6. The violator agrees to **prevent recurrences**.
7. The violation (or similar violation) must not have occurred at the same facility within the past three years.
8. The violation is **not serious**, meaning it did not cause actual harm, present an imminent or substantial endangerment to, human health or the environment, or violate the specific terms of any judicial or administrative order, or consent agreement.
9. The violator **fully cooperated** with the regulatory agency.

Note: Nothing in this modifies the Cal/EPA “Recommended Guidance on Incentives for Voluntary Disclosure,” dated October of 2003.

#### **L. Penalty Allocations under the California Environmental Protection Agency Supplemental Environmental Projects Guidance**

Some cases may be resolved by paying part of the penalty (not to exceed 25 percent) to a supplemental environmental project, provided that the criteria of the Cal/EPA Supplemental Environmental Projects Guidance are met.

##### **i. Introduction**

The California Environmental Protection Agency (Cal/EPA) issued its “Recommended Guidance on Supplemental Environmental Projects (SEP)” in October of 2003. It is attached as Appendix D. This Guidance notes that, “Although SEPs may not be appropriate in all instances, they can play an important [role in] . . . an effective enforcement program.”

The Guidance:

- **defines** the term “SEP”;
- lists **legal guidelines** for and **categories** of SEPs;
- discusses the **proper ratio** between **SEP funds** and penalty funds in settlements; and,
- counsels that all SEPs should be **well-defined** and **implementable**.

SEPs are “environmentally beneficial projects that [an alleged violator] agrees to undertake in settlement of an enforcement action, but which the [alleged violator] is not otherwise legally required to perform.” For example, the funds an alleged violator expends to come into compliance are not properly

considered part of a SEP, but funds the same entity might expend to reduce emissions below regulatory requirements could be considered a SEP.

## ii. Guidelines for SEPs

ARB has broad discretion in settling cases, including the discretion to include SEPs as part of its settlements. Nevertheless, SEPs must further the statutory goals of ARB and cannot violate public policy. The Cal/EPA SEP Guidance contains the following elements to ensure that these requirements are met.

- SEPs must be **consistent** with ARB's underlying statutes and **advance** at least one of the objectives of the statutes involved in the enforcement action.
- SEPs must have an adequate **nexus** with ARB's enforcement responsibilities, i.e., reduce the environmental or health impact of the violation or the likelihood that such a violation will reoccur.
- SEPs must be **clearly defined**.
- SEPs should **not directly benefit the alleged violator**. For example, a SEP that funds the purchase of products manufactured by the alleged violator would be inappropriate.

Categories of SEPs include: environmental compliance promotion, enforcement projects, emergency planning, pollution prevention/reduction, environmental restoration/protection, public health or any other projects that are consistent with the Guidance. Two types are not allowed: general educational or public environmental awareness projects and projects unrelated to environmental protection. Such projects lack a nexus with the laws involved in ARB enforcement actions, would not advance the goals of ARB's programs and may directly benefit the alleged violator.

## iii. Proper Ratio of SEP Funds to Penalty Funds

In general, a SEP should constitute no more than 25 percent of the total settlement. For example, if a settlement is reached for a total of \$1,000,000, it should include a payment of at least \$750,000 in penalty funds and any SEP should not exceed \$250,000.

Note: This summary is only informational and does not modify the Cal/EPA "Recommended Guidance on Supplemental Environmental Projects" dated October 2003.