



# Air Resources Board



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FROM: James R. Ryden, Chief /s/  
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DATE: September 30, 2011

SUBJECT: **Release of Final ARB Penalty Policy/ Response to Comments**

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## Release of Final Policy

Senate Bill 1402 (Dutton, Chapter 413, Statutes of 2010) requires the Air Resources Board (ARB) to publish an enforcement penalty policy (Policy) that takes into consideration all relevant circumstances, including the eight factors prescribed in Health and Safety Code section 43024.

ARB published the Policy for 45-day public comment on February 25, 2011, and held public workshops on the Policy in Sacramento on March 29, 2011, and in El Monte on March 30, 2011. ARB then held face-to-face meetings with the stakeholders and posted the Policy for additional 30-day public comment on July 21, 2001. The final Policy is the product of this robust public process. After considering the comments received, the ARB made minor clarifying changes to the Policy and is issuing it as final.

The final Policy is available on ARB's website on the Enforcement Division program page under "SB 1402 Compliance Materials".

## Response to Comments on ARB's Penalty Policy

The ARB would like to respond to comments received on the July 21, 2001 version of the Policy as follows.

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.*

California Environmental Protection Agency

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The California Council for Environmental and Economic Balance (CEEB), the California Manufacturers and Technology Association (CMTA), the Western States Petroleum Association (WSPA) and the California Chamber of Commerce (CalChamber) submitted comments on ARB's Amended Penalty Policy. These comments reiterated comments they made in the first comment period. Their comments are summarized and responded to below.

1. Penalties must be related to the harm and not exceed what is necessary for deterrence.

Response: ARB believes that it is important to address violations that involve excess emissions, especially where they involve emissions in excess of a clear standard.

There are other violations that may not cause direct, immediate environmental harm, that also warrant substantial penalties, however. Among these are violations that jeopardize compliance with regulatory programs that achieve major emissions reductions. So are violations that secure violators unfair advantage over their law-abiding competitors. Substantial penalties are also warranted when excess emissions do occur, but it is not practicable to quantify them.

For example, ARB's emission standards achieve crucial emission reductions by requiring vehicles be certified to meet the standards before they can be sold in California. Selling uncertified vehicles in California warrants substantial penalties because it jeopardizes compliance with the emission standards, secures violators unfair business advantages and results in excess emissions. Uncertified vehicles are illegal for use in California and their emissions are illegal and excess as well. They are also extremely difficult to remove from the state. Since the illegal vehicles are not emissions-tested while in use, it is not practicable to quantify their excess emissions while they are being operated in the state. Having effective emission standards means setting penalties to reflect these circumstances and prevent uncertified vehicles from being put into commerce in California in the first place.

The Policy addresses these issues in several places. See, e.g., pages 15-23.

2. The policy should not presume the maximum penalty.

Response: The Policy was amended in response to this comment and clarifies that ARB uses the penalty maximum as a reference point, but considers all of the relevant facts, law and circumstances in determining a penalty.

The Policy refers to case law illustrating how courts assess air pollution penalties and other civil penalties. It is important to note that ARB does not unilaterally compute and impose penalties, but determines them in concert with violators who accept them in mutual settlement agreements. The Policy is meant to educate the public regarding how penalties are determined, but is not intended to chart a new or different course.

The Policy addresses these issues in several places. See, e.g., pages 18-19 and generally pages 15-23.

3. The policy does not explain how ARB takes compliance history into account.

Response: As discussed in the Policy, ARB considers a violator's entire history of violations. This history is relevant to penalty assessment and ARB is required by law to consider all relevant circumstances in determining penalties, including the "compliance history of the defendant, including the history of past violations", not just prior violations involving the identical cause or legal requirement. See: Health and Safety Code sections 42403(b), 43024(b) and 43031(b).

The Policy addresses this issue. See, e.g., page 22.

4. The policy does not define how financial burden on the violator will be accounted for.

Response: As discussed in the Policy, when violators claim financial hardship, ARB requests that they provide financial records that document these claims. If financial hardship is demonstrated, ARB reduces the penalty below what it would otherwise seek for the violation. A detailed, prescriptive process for conducting these assessments is unnecessary.

The Policy addresses this issue. See, e.g., pages 19-20 and 23.

5. The quality of the violator's compliance program should be considered.

Response: ARB does consider the quality of a violator's compliance program in assessing penalties pursuant to Health and Safety Code sections 42403(b), 43024(b) and 43031(b). This factor can be difficult to quantify. So is determining what its effect on a particular penalty assessment should be. These difficulties are compounded by the fact that the issue only arises when violations are found, which argues against the quality of the compliance program to some degree—effective compliance efforts prevent violations in the first place.

The Policy addresses this issue. See, e.g., page 22.

6. Paperwork-type violations should not be penalized and ARB should adopt a "notice to comply" program.

Response: ARB added language to the Policy that indicates that proven clerical errors and typographical mistakes should not result in substantial penalties. As noted above in the response to the first comment, reporting, recordkeeping and presale certification requirements are crucial to achieving the emission reductions achieved by many ARB programs. Violations of these requirements also secure unfair competitive advantage, and can result in excess emissions. They warrant substantial penalties.

"Notice to comply" programs or "warnings" do not promote full compliance with the law. These programs send the wrong signal-- that no one need comply with the law until they are caught violating it. ARB enforcement resources are stretched thin. Having to prosecute each member of the regulated community before they take the law seriously is simply not reasonable. Many clean air programs function by keeping illegal products out of California. Giving a free pass to ignore these requirements would result in many illegal products (and illegal emissions) in our state. It would also unfairly penalize businesses that make the effort to comply without having enforcement actions mounted against them.

ARB puts considerable efforts into developing and phasing in regulatory requirements in ways that foster compliance and backs them up with outreach and education for the regulated community. These efforts render a “notice to comply” program unnecessary.

The Policy addresses these issues in several places. See, e.g., pages 9-12, 21-22.

7. The policy should include a dispute resolution process.

Response: When ARB cannot reach a settlement with a violator, 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 is remarkably successful at resolving cases by mutual agreement—nearly 99% of the time—indicating that there is no need for an alternative to ARB’s current dispute resolution process. One problem with alternative processes is that they do not finally resolve matters like mutual settlements or court actions do. After most alternative dispute resolution processes take place, either party is free to challenge the matter all over again in court. Also adding formal hearing processes where experience indicates they are not required unnecessarily raises costs and delays case resolutions.

The Policy addresses this in several places. See, e.g., pages 6-7, 9 and 13.

8. The policy should explain how penalties are calculated including numerical factors.

Response: The Policy explains how ARB penalties are calculated, but does not employ numerical factors because ARB generally does not use them. The most common penalty reductions in the cases ARB resolves are for financial hardship and for unintentional, first time violators who cooperate with the investigation. The Policy does not employ a formulaic approach for calculating penalties because such an approach would not properly weigh individual circumstances and might result in an unjust or ineffective penalty. The Legislature set penalties that it deemed sufficient to accomplish goals

that include deterrence. No policy can precisely prejudice what penalties are appropriate under the facts of a particular case.

ARB discusses a penalty's basis with the violator, a practice formalized since the adoption of SB 1402. Explaining the basis, and setting out certain information in settlement agreements, such as restating a penalty in "per-unit" terms, can help the public understand more about the penalties ARB seeks and recovers. Because the final penalties in specific cases often follow confidential settlement negotiations, it is neither possible nor appropriate to disclose those negotiations in their entirety, including confidential financial information regarding a violator and ARB's confidential legal evaluations.

The Policy addresses these issues in several places. See, e.g., pages 6-7, 9-13, 15-23.

Californians for Enforcement Reform and Transparency (CERT) also submitted comments during the comment period. Some of them are directed at how ARB resolves violations under SB 1402, not at the Policy itself.

1. The Policy does not recognize that violations that cause direct harm to the environment should be treated differently from other violations.

Response: Please see the response to the first comment above.

2. ARB is not quantifying excess emissions as the law requires.

Response: SB 1402 requires that ARB quantify excess emissions in cases where the "penalty is being assessed under a provision of law that prohibits the emission of pollution at a specified level" and then only if doing so is "practicable". Since SB 1402 took effect, ARB has not settled a case that falls under this provision of the law.

3. ARB is not providing the other information that SB 1402 requires in settlement agreements.

Response: The settlement agreements ARB has entered since SB 1402 took effect contain all of the information required by SB 1402 and are posted on ARB's webpage.

4. ARB is requiring language in settlement agreements in which violators affirm that ARB complied with SB 1402 in prosecuting and settling the case.

Response: ARB complies with SB 1402 in prosecuting and settling cases, so violators sign this affirmation which basically means that ARB described the facts and law of their case to them before they agreed to the settlement. It documents for the record that ARB is complying with SB 1402 and prevents violators from later repudiating the agreements they enter.