

TITLE 17. CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO PROCEDURES FOR ADJUDICATORY HEARINGS AND ADMINISTRATIVE HEARINGS FOR CITATIONS ISSUED UNDER THE HEAVY-DUTY VEHICLE ROADSIDE SMOKE AND TAMPERING INSPECTION PROGRAM (ROADSIDE INSPECTION PROGRAM) AND ADOPTION OF PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR REVIEW OF COMPLAINTS AND PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

The Air Resources Board (the "Board" or "ARB") will conduct a public hearing at the time and place noted below to consider amendments to its procedures for adjudicatory hearings and administrative hearings for citations issued under the heavy-duty vehicle roadside smoke and tampering inspection program (roadside inspection program) and adoption of procedures for administrative hearings for complaints and petitions for review of executive officer decisions.

DATE: September 24, 1998

TIME: 9:30 a.m.

PLACE: Kern County Board of Supervisors
Board of Supervisors Chambers, First Floor
1115 Truxton Avenue
Bakersfield, CA

This item will be considered at a two-day meeting of the Board, which will commence at 9:30 a.m., September 24, 1998 and may continue at 8:30 a.m., September 25, 1998. This item may not be considered until September 25, 1998. Please consult the agenda for the meeting, which will be available at least 10 days before September 24, 1998 to determine the day on which this item will be considered.

This facility is accessible to persons with disabilities. If accommodation is needed, please contact the Clerk of the Board at (916) 322-5594 or TDD (916) 324-9531 or (800) 700-8326 for TDD calls from outside the Sacramento area by September 10, 1998 to ensure accommodation.

INFORMATIVE DIGEST OF PROPOSED ACTION/PLAIN ENGLISH POLICY STATEMENT OVERVIEW

Sections Affected: Amend Title 17, California Code of Regulations ("CCR"), sections 60040 and 60075.1 through 60075.45; Adopt Title 17, CCR, sections 60055.1 through 60055.43 and 60065.1 through 60065.45.

Background:

In the late 1980's, early 1990's, the Air Resources Board adopted procedures for two distinct types of administrative hearings. The adjudicatory hearing procedures were adopted in 1989, Title 17, CCR, sections 60040.1, et seq., to allow persons adversely affected by certain executive officer decisions to petition the Board for review. These matters typically involve complex, legal and policy matters, involving potentially significant amounts of documentary and other forms of evidence. In contrast, in 1991, in response to legislation creating the heavy-duty vehicle roadside smoke and tampering inspection program (Roadside Inspection Program), Title 13, CCR, sections 2180, et seq., the ARB adopted alternative administrative hearing procedures for review of citations issued under that program, Title 17, CCR, sections 60075.1, et seq. The procedures adopted for this latter program were specifically crafted to address the anticipated high volume of citations in an expeditious manner, while providing cited vehicle owners with proper notice and the opportunity to contest the citations before a neutral hearing officer.

In 1995, the Legislature expanded the ARB's authority to assess and enforce administrative penalties. (Senate Bill (SB) 163, Stats. 1995, Ch. 966, Sec. 3, codified at Health and Safety Code section 43025, et seq.) Section 43028 provides that the ARB may adopt rules and regulations to impose and enforce administrative civil penalties for violations of Part 5 of the Health and Safety Code, or any rule regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards. Under the legislative authorization, the ARB may assess administrative penalties up to a maximum of \$25,000 per day for each violation, up to a maximum total penalty of \$300,000. Section 43031(a) provides that the ARB may adopt administrative hearing procedures to review administrative penalties that have been assessed.

Summary of Proposed Rulemaking

The administrative civil penalties that can be assessed under Health and Safety Code section 43028 cover a myriad of different types and forms of penalties, ranging from straightforward clear violations involving relatively small penalty amounts to violations involving complicated issues, large amounts of evidence, and significant penalties. Given the breadth of potentially different violations and the different interests involved in the litigating of such matters, the ARB staff recommends that violations covered under Health and Safety Code section 43028 be treated as citations or complaints. Under the authority provided in section 43031(a), the staff proposes two distinct hearing procedures for the review of citations and complaints. The staff recommends that citations should be issued for the less serious, less complex, more readily discernable violations. These violations would be classified as Class I violations and would be subject to maximum penalties of \$5000 per violation per day. A citation could be issued for multiple violations up to a maximum of \$15,000. For the review of citations issued pursuant to section 43028, staff proposes that the hearing procedures that have previously been adopted to review citations issued under the Roadside Inspection Program be amended to cover citations issued under section 43028. The amended procedures would be entitled, "Administrative Hearing Procedures for Considering Citations." Beyond broadening the scope of the existing citation hearing procedures, the proposed amendments would incorporate provisions of the recently amended Administrative Procedures Act (APA),

Government Code section 11370, et seq. Staff also proposes to amend the citation hearing procedures where necessary to clarify and make more specific the rights and responsibilities of the parties to the hearing, the hearing office and the officers who adjudicate and review the decisions and orders that are issued.

As mentioned, staff recommends the adoption of new hearing procedures for the review of complaints, those penalty assessments under section 43028 involving the more serious, more complex violations. The penalties that could be assessed for these violations would likely be significantly higher than those assessed for citations. The new procedures would review complaints that allege penalties of up to \$25,000 per day for each violation, up to a maximum of \$300,000. Given the greater interests at risk in complaint proceedings, staff proposes that more formal hearing procedures be adopted for review of complaints. The new procedures would be codified at Article 4.5 of Title 17, CCR, sections 60065.1 through 60065.45, and be entitled, “Administrative Hearing Procedures for Review of Complaints.”

Like the administrative hearing procedures for citations, the new procedures would provide the parties with notice and an opportunity to be heard by a neutral hearing officer in an evidentiary hearing. The procedures would set forth the specific rights and responsibilities of the participants in the hearing process. The procedures include general requirements that provide for the filing of pleadings and motions, including time limits for filings and requirements for proper service and formatting of documents filed and notice to the parties of their right to representation and interpreters. The procedures also include specific prehearing procedures that provide, among other things, for prehearing and settlement conferences, discovery, and the filing of subpoenas. The procedures also outline the authority of hearing officers and how hearings are to be conducted. Most importantly, the procedures set forth specific due process protections for the parties that appear, including the right to impartial hearing officers, the right to request disqualification of a hearing officer for reasons of perceived bias, prohibitions of ex parte communications, and the requirement that all decisions are to be in writing. All decisions of the hearing officer would be subject to reconsideration and judicial review.

The proposed procedures for the review of complaints are more comprehensive than the proposed amended procedures for the review of citations. Given the greater public and private interests at stake in complaint proceedings, the hearing procedures for the review of complaints would entail a more detailed prehearing process, including providing the hearing officer with greater discretion to allow discovery. The more comprehensive proceedings would enable the parties to better identify issues in controversy, prepare for hearing, and resolve issues short of hearing. As with the citation procedures, the proposed procedures for the review of complaints would incorporate provisions from the amended APA.

Staff also proposes that the board adopt new hearing procedures for considering petitions for review of executive officer decisions. These petitions are presently considered under the existing procedures for adjudicatory hearings, Title 17, CCR, sections 60040-60053. The new procedures would be codified at Article 4.25 of Title 17, CCR, sections 60065.1, et seq., and be entitled, “Administrative Hearing Procedures to Consider Petitions for Review of Executive Officer Decisions.” Staff is proposing the new procedures because recent experience in administering the existing adjudicatory regulations has made it clear that more

detailed and expressed hearing procedures would improve the hearing process for all parties. Like the proposed hearing procedures for the review of complaints, the interests at issue in petition proceedings are significant and proposed hearing procedures would be similarly comprehensive. Although substantively similar, the staff is proposing separate procedures because of the distinct nature and the special procedural requirements for each type of hearing. As with the hearing procedures for complaints, the proposed procedures would afford the parties with appropriate due process and be cost-effective.

Finally, the staff proposes that Title 17, CCR, sections 60040-60053 be amended to clarify that all executive officer decisions issued prior to the effective date of the new hearing procedures be heard under the existing adjudicatory hearing procedures, unless the parties agree otherwise.

Federal Regulations:

Federal administrative hearing procedures exist. See Administrative Procedure Act, 5 U.S.C. section 500, et seq., and U.S. Environmental Protection Agency's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 CFR Part 22. However, the procedures have no applicability to California law. The California Legislature specifically directed the ARB to adopt hearing procedures for the Roadside Inspection Program and administrative civil penalties pertaining to the ARB fuel requirements and standards. Health and Safety Code sections 43028 and 44011.6. See also Health and Safety Code section 43105 (public hearing to allow manufacturer to present evidence in support of manufacturers objections to recall).

AVAILABILITY OF DOCUMENTS AND CONTACT PERSON

The Board staff has prepared a Staff Report which includes the initial statement of reasons for the proposed action and a summary of the environmental impacts of the proposal, if any. Copies of the Staff Report and the full text of the proposed regulatory language may be obtained from the Board's Public Information Office, 2020 L Street, Sacramento, CA 95814, (916) 322-2990. Copies can also be viewed and downloaded from ARB's web site at: <http://arbis.arb.ca.gov/regact/regact.htm>. The Board staff has compiled a record which includes all information upon which the proposal is based. This material is available for inspection upon request to the contact person identified immediately below. To obtain this document in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 322-4505, TDD (916) 324-9531, or (800) 700-8326 for TDD calls from outside the Sacramento area.

ARB has determined that the regulations affect small business and have been drafted in plain English. Additionally, the Staff Report, Initial Statement of Reasons, presents a plain English summary of the procedures.

Further inquiries regarding this matter should be directed to Michael L. Terris, Administrative Law Judge, at (916) 327-2032, 2020 L Street, Sacramento, CA 95814.

COSTS TO PUBLIC AGENCIES AND TO BUSINESSES AND PERSONS AFFECTED

The determinations of the Board's Executive Officer concerning the costs or savings necessarily incurred in reasonable compliance with the proposed regulations are presented below.

The Executive Officer has determined that the proposed regulatory action will not create costs or savings, as defined in Government Code section 11346.5(a)(6), to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code, or other nondiscretionary savings to local agencies.

The Executive Officer has also determined that adoption of the proposed regulatory action will not have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

In accordance with Government Code section 11346.3, the Executive Officer has determined that the proposed regulatory action will not affect the creation or elimination of jobs within the State of California, the creation of new businesses or elimination of existing businesses within California, or the expansion of businesses currently doing business within California. An assessment of the economic impacts of the proposed regulatory action can be found in the Staff Report.

Finally, the Executive Officer has determined that there will be no, or an insignificant, potential cost impact, as defined in Government Code section 11346.5(a)(9), on private persons or businesses directly affected resulting from the proposed action.

Before taking final action on the proposed regulatory action, the Board must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

SUBMITTAL OF COMMENTS

The public may present comments relating to this matter orally or in writing. To be considered by the Board, written submissions must be addressed to and received by the Clerk of the Board, Air Resources Board, P.O. Box 2815, Sacramento, CA 95812, no later than 12:00 noon, September 23, 1998, or received by the Clerk of the Board at the hearing.

The Board requests but does not require that 20 copies of any written statement be submitted and that all written statements be filed at least 10 days prior to the hearing. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action.

STATUTORY AUTHORITY AND HEARING PROCEDURES

This regulatory action is proposed under that authority granted in Health and Safety Code sections 39600, 39601, 43028, 43105 and 44011.6. This action is proposed to implement, interpret and make specific *Mathews v. Eldridge*, 424 U.S. 319 (1976); Health and Safety Code sections 43105, 43028 and 44011.6; Government Code sections 6250, et seq., 11182, 11184, and 11400-11529; Evidence Code sections 451-452, 751, 915(b), and 1561; Code of Civil Procedure sections 1094.5, 1985-1985.4, 1987 and 1988; and Title 13, California Code of Regulations sections 2180, et seq.

The public hearing will be conducted in accordance with the California Administrative Procedure Act, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340) of the Government Code.

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with nonsubstantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice that the regulatory language as modified could result from the proposed regulatory action; in such event the full regulatory text, with the modifications clearly indicated, will be made available to the public, for written comment, at least 15 days before it is adopted. The public may request a copy of the modified regulatory text from the Board's Public Information Office, 2020 L Street, Sacramento, CA 95814, (916) 322-2990.

CALIFORNIA AIR RESOURCES BOARD

Michael P. Kenny
Executive Officer

Date: