

State of California  
**AIR RESOURCES BOARD**  
COMPLIANCE DIVISION

Final Statement of Reasons for Rulemaking  
Including Summary of Comments and Agency Responses

Public Hearing to Consider a Definition of Minor Violation and  
Guidelines for Issuance of a Notice to Comply

Public Hearing Date: April 23, 1998  
Agenda Item No.: 98-4-2

# I. General

## A. Purpose

This final Statement of Reasons for Rulemaking (“FSOR”) updates the Initial Statement of Reasons for Rulemaking (“ISOR”) by identifying and explaining the modifications that were made to our original proposed regulation. The original proposal was contained in the ISOR which was prepared and made public on March 6, 1998. The ISOR is incorporated herein by reference.

This FSOR also summarizes written and oral comments received during the rulemaking process and contains the ARB’s responses to these comments. Determinations and explanations regarding economic impacts are also included.

This report comprises the Final Statement of Reasons for Rulemaking required by the Administrative Procedure Act (Government Code section 11346.9) which specifies that such a report shall be written and shall include the above information.

## B. Background - Description of Board Action

On April 23, 1998, the Air Resources Board (hereafter “ARB” or “Board”) conducted a public hearing to consider a proposed regulation titled “Definition of Minor Violation and Guidelines for Issuance of a Notice to Comply”. The public hearing was held to comply with the relevant provisions of AB 2937 (Brulte; Stats. 1996, Chapter 775) codified at sections 39150 through 39153 of the Health and Safety Code (hereafter “H&SC”), which requires the ARB to adopt regulations classifying minor violations in the areas for which it has direct enforcement authority. These areas include motor vehicle fuels content, cargo tank inspections, and consumer products (H&SC sections 43830 et seq., 41962, and 41712, respectively).

AB 2937 requires the ARB, the local air pollution control districts, the State Water Resources Control Board and regional water quality control boards to adopt regulations classifying minor violations and to implement a “Notice to Comply” (NTC) program in accordance with the statutory criteria. Local air district programs are not included in this rulemaking decision. They are currently drafting and adopting their own rules to comply with this legislation.

A notice announcing the April 23 hearing was made public on March 6, 1998 (*Appendix 1- Notice of Hearing*), as was the Initial Statement of Reasons for Rulemaking. Over 4,000 mailings occurred. This notice also announced the 45-day public comment period which commenced March 6, 1998 and continued until the April 23 hearing date. Three written comment letters were received during this process (see section III).

At the April 23 hearing, the Board adopted Resolution 98-18, in which it approved the Definition of Minor Violation and Guidelines for Issuance of a Notice to Comply regulation (hereafter “Minor Violation & NTC regulation”) and related modifications (*Appendix 2 - Resolution 98-18*).

The approved regulation included modifications to the originally proposed language of the Minor Violation & NTC regulation (*Appendix 3 - Draft Regulation with Proposed Modifications*). Two public members testified at the hearing (see section V).

In accordance with Government Code section 11346.8(c), Resolution 98-18 directed the Executive Officer to adopt the modified regulation after making it available for public comment for 15 days, and to make additional modifications as may be appropriate in light of comments received during this period.

The modified Minor Violation & NTC regulation was made available to the public for a 15-day comment period from August 1 to August 16, 1998. The “Notice of Availability of Modified Text”, which included a copy of the full text of the regulation with the modifications clearly indicated, was mailed to all parties who received the original notice, as well as all parties who commented during the 15-day comment period and each of the individuals described in subsections (a)(1) through (a)(4) of section 44, Title 1, CCR. Due to an error in the text of the notice, an Errata notice was sent to all of the individuals mentioned above, which extended the comment period to August 25, 1998 (*Appendix 4 - Notice of 15-day Comment Period and Availability of Modified Text, and Errata Notice Extending Public Comment Period*).

One comment letter was received during the second public comment period of August 1 through August 25, 1998 (see section V). The Executive Officer determined that no additional changes would be made to the regulation. The Executive Officer issued Executive Order #G-98-065, by which the modified regulation was adopted (*Appendix 5 - Executive Order*).

Section 39153 of the H&SC requires that the ARB prepare a report to the Legislature by January 1, 2000, on actions taken by the state board and the local air districts to implement Chapter 3 - Minor Violations (sections 39150 - 39153) and the results of that implementation. Further, the Board approved at the April 23, 1998 hearing, staff’s proposal to provide a report to them on ARB’s Minor Violation Program, due June 1999.

The Minor Violation & NTC regulation will be contained in Title 17, CCR, sections 60090 through 60094.

C. *Description and Location of Comment Summaries and Modifications*

The description and rationale for modifications made to the regulation that are not addressed in the Summary of Comments section(s), are addressed in item D below. Summaries of comments received on our initial proposal during the 45-day comment period (before the April hearing) are contained in detail in section III of this report. All modifications made to the regulation as a result of these public comments are contained in section IV of this report. The summary of oral comments made at the April hearing are contained in section V. A summary of comments received on the modifications to the initial proposal (after the hearing) during the extended “15-day” comment period of August 1 to August 25 1998, are contained in section VI of this report.

D. *Description of and Rationale for Deletion of Sunset Date*

This provides the description and rationale for the deletion of the sunset date from the originally proposed regulation. This is addressed in this section because it is not specifically addressed in the Summary of Comments and Agency Responses section(s) below.

***Modification to Section 60096 - Regulation Sunset Date***

This entire section was deleted from the regulation:

~~17 CCR, Section 60096~~

~~Regulation sunset date: this regulation shall remain in effect only until January 1, 2001, as of that date is repealed, unless a later enacted statute, which is enacted on or before January 1, 2001, deletes or extends that date.~~

***Rationale for Deletion***

The inclusion of the sunset provision was found to be unnecessary since the Board may hold a public hearing at any time to consider modifying or repealing any regulation.

E. *Determination of Local Mandate - Summary of Economic Impacts on State and Local Agencies*

This regulation imposes no mandate on local agencies or school districts. ARB staff has determined that the proposed amendments will not create any costs or savings as defined by Government Code section 11346.5(a)(6), to any State agency or in federal funding to the State, and will not create any costs or mandate to any local agency or school districts 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 discretionary savings to local agencies.

F. *Statement Regarding Small Business Alternatives - Summary of Economic Impacts on Businesses and Individuals*

No proposed alternatives were defined that would lessen the adverse economic impact on small businesses, as the proposed regulation will have no adverse impact on California businesses and individuals. Many businesses are likely to benefit from the proposed regulation. The regulation should provide a more resource efficient enforcement mechanism, faster compliance times and foster a more productive and cooperative working relationship between the ARB and the regulated community while maintaining protection of human health and safety and the environment. As a result, ARB staff expects the proposed regulation to have overall positive impacts on California employment, business status, and business competitiveness.

The Board has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.

## II. List of Commenters

Dalton Trucking	Terry Klenske, President Dalton Trucking, Inc. Written Comment: March 18, 1998
LA County Sanitation	Frank R. Caponi Supervising Engineer Los Angeles (LA) Solid Waste Management Department Written Comment: March 31, 1998 Oral Testimony: April 23, 1998
Trade and Commerce Agency	Kathy McLaughlin, Analyst Regulation Review Unit California Trade & Commerce Agency Written Comment: April 13, 1998
CMA	Jot Condie, Director Environmental Quality California Manufacturers Association (CMA) Oral Testimony: April 23, 1998
ISSA	William (Bo) J. Ochsner Manager of State Legislative Affairs International Sanitary Supply Association, Inc. (ISSA) Written Comment: August 21, 1998

### III. Summary of Comments on Initial Proposed Regulation and Agency Responses

Three written comment letters were received during the 45-day comment period before the hearing (March 6 to the April 23 hearing date). Changes made to the originally proposed regulation as a result of public comment are contained in section IV of this report. This section contains a summary of each written comment letter and ARB's response to each.

1. *Dalton Trucking - Written Comment Letter & Written ARB Response (Appendix 6 - Comment Letters & ARB Response)*

**Comment:** Expressed general concern over ARB staff's proposal to exclude emission-related violations that contain toxic air contaminants from consideration as a minor violation.

**Agency Response:** ARB has responded to the concerns of industry by broadening our definition of minor violation to include emissions containing toxic air contaminants as long as the emissions violation does not contain any increase in toxic emissions above allowable emission standards. For example, parameters in a formula for gasoline contain limits. There is a limit for benzene, a toxic air contaminant. If a truly inconsequential amount of air pollutants has been generated by a violation of our motor vehicle fuels regulation, and the benzene level has not been exceeded, but other non-toxic parameter limits have been exceeded, this could be a minor violation for which a notice to comply could be issued. ARB's mission is to protect the public health by attaining the Ambient Air Quality Standards and reducing exposure to toxic air pollutants. **A modification was made to the regulation.**

**Comment:** The ARB proposes that the determination of which emission-related violations will be de minimis be made on a case-by-case basis, therefore allowing too much discretion on the part of the inspector.

**Agency Response:** The comment regarding inspector discretion has been carefully considered. It is important to realize that any emissions violation found in the field by an ARB inspector will have to undergo some type of testing to determine the violation, therefore limiting most discretion to the results of the test. For example, fuels violations are determined in the field using a mobile laboratory, cargo tank emissions are determined in the field by the use of a TLV sniffer/analyzer, and consumer products emission violations are determined using our consumer products laboratory located in the Sacramento area. In determining procedural violations, ARB inspectors, as always, are required to use good judgement during inspections. **No modification was made to the regulation.**

**Comment:** More objective standards should be developed to limit inspector discretion.

**Agency Response:** A major component of California’s SIP is enforcement capability. U.S. EPA will not support an enforcement regulation which has the effect of weakening this capability. Producing a long list of instances (that bar use of good judgment of the circumstances surrounding these violations ) limit our enforcement capability for those violations because no penalties can be assessed after the NTC is issued, therefore weakening enforcement authority for those areas listed.

It is neither possible or desirable to set a numerical threshold for “de minimis” which will suffice in all circumstances. Determinations should be made on a case-by-case basis, depending on circumstances. Inspectors are required to use good judgment and discretion during inspections. **No modification was made to the regulation.**

2. *Solid Waste Management Department, LA County Sanitation District (Appendix 6 - Comment Letters and ARB Responses)*. Although ARB’s regulation does not directly affect this county agency, comments were submitted to ARB about our regulation under the assumption that many districts, including South Coast, will model their local district rule after our rule.

**Comment:** This county agency is an active permittee of the SCAQMD. The Department expressed a general concern that the proposed regulation does not include odors as being eligible for consideration as a minor violation. The Department believes that under certain prescribed circumstances, odors can be construed as minor violations. Low inversion levels and other meteorological conditions can give rise to infrequent odors that can be detected offsite. A definition of “air contaminant” should be included in the regulation, and should include odors within this definition.

**Agency Response:** In order for a violation on the basis of an “odor” nuisance to be pursued by ARB, the criteria set forth in H&SC section 41700 nuisance provisions would be applied. This H&SC provision states that no person may emit such quantities of air contaminants as will interfere with public health, safety, welfare, or comfort, and requires that a significant number of persons must be affected. Staff maintains that anything that affects a “significant number of people” is not minor. **No modification was made to the regulation.**

**Comment:** The letter also included comments regarding ARB’s definition of chronic violation. The Department objected to language stating that a pattern of neglect be established by *one or more* violations. The Department believes that one violation does not establish a pattern. “Chronic” violations should be determined on a case-by-case basis or a revision to the language should be made to better define the need for more than one violation to establish the pattern.

**Agency Response:** The definition of chronic violation was modified to more clearly define the “pattern of neglect” required for the determination. The new regulation requires the pattern to be established by more than one “reasonably contemporaneous” violation of the same or similar nature. This clearly establishes that the “pattern” must consist of at least two violations occurring within a similar time period. The term reasonably contemporaneous will be applied using good

judgment in consideration of the nature and circumstances surrounding the violations (see section IV). **A modification was made to the regulation.**

**Comment:** Concern was also expressed because “de minimis” is not defined.

**Agency Response:** This was addressed in the last paragraph of item 1, above.

**Comment:** When offsite testing is done and a NTC must be mailed to the owner or operator, certified mail should be used so that the start of the 30-day period can be clearly established.

**Agency Response:** ARB staff will use certified mail to send NTCs, and all parties will be notified (including owners and operators at separate addresses). **No modification was made to the regulation.**

**Comment:** Section 60093(b) states that any violation corrected immediately in the presence of an inspector shall not be subject to issuance of a notice to comply. “Immediately” is problematic. Many inspectors cannot remain around even a half hour or so while minor repairs are made. The enforcement authority should have the discretion to make this determination allowing up to one workday.

**Agency Response:** The enforcement authority will use good judgment and discretion when determining what is “immediate”. **No modification was made to the regulation.**

**Comment:** Appeals procedures developed should steer clear of formal, quasi-judicial, intimidating hearing boards.

**Agency Response:** While the appeals process will be determined by ARB’s Office of Legal Affairs, no plans for the use of a “hearing board” have been suggested. **No modification was made to the regulation.**

### 3. Trade and Commerce Agency (Appendix 6 - Comment Letters & ARB Responses)

**Comment:** ARB did not classify the types of violations as required by H&SC section 39150(c).

**Agency Response:** ARB has classified violations into two categories: procedural violations and emission-related violations that are inconsequential, or de minimis. **This satisfies the requirements of the statute and no modification was made to the regulation.**

**Comment:** ARB has not stated what time period will be used to establish a pattern of neglect.

**Agency Response:** ARB has responded to the issue of defining a time period for establishment of a pattern of neglect. Rather than prescriptively defining a time period such as “within two years” etc., ARB has modified the language to state that a pattern of neglect or disregard can be

established by more than one *reasonably contemporaneous* violation of the same or similar nature. **A modification was made to the regulation** (see section IV).

**Comment:** ARB may want to consider the size of business when determining a pattern of neglect.

**Agency Response:** The original definition was developed as part of the notice and workshop process. Stakeholders were afforded the opportunity to say whether the definition should take into account different interest groups, such as small business. No comments from industry, including small businesses, were raised in this area. It has been determined that the minor violation program will have a positive effect on small business. **No modification was made to the regulation.**

**Comment:** Proposed regulation section 60091(d) contains double negatives and should be reworded to avoid confusion to regulated parties. ARB should consider the following wording changes, “where the noncompliance meets all of the following criteria:

- A. ~~Does not r~~ Results in or contributes to, or ~~have~~s the effect of conveying or concealing, an increase in emissions of any air contaminant by more than a de minimis amount, and;
- B. ~~Does not e~~ Endangers the health, safety, or welfare of any person(s), and...”.

**Agency Response:** ARB staff consulted with ARB Legal Affairs regarding the issue of a “double negative”. Legal responded that no changes to the regulation were necessary because no double negative exists. A further review of the matter of the double negative was initiated after the hearing in response to Board member concern for the importance of clarity in the language of the regulation. In a memo to ARB Executive Officer Mike Kenny (*Appendix 6*), staff concluded that revision of the regulation as recommended would completely reverse the definition of minor violation.

Staff believes that any change to paragraph A would make the definition more confusing rather than adding clarity. The definition as written is the best choice for conveying the purpose, intent, and meaning of the section. **No further modifications were made to the regulation.**

**Comment:** The “plain English” requirements of Government Code section 11346.2(a)(1) need to be addressed.

**Agency Comment:** Page 4 of ARB’s Initial Statement of Reasons for Rulemaking under II ‘Summary of Proposed Regulation’, first paragraph, first sentence reads “In this chapter we provide a plain English discussion of the proposed regulation’s major provisions in order to satisfy the requirements of Government Code section 11346.2(a)(1), which requires that a non-controlling “plain English” summary of the regulation be made available to the public”. This “plain English” summary was provided to the public for the required 45-day public comment period. **The ARB has satisfied the requirements of Government Code section 11346.2 (a)(1) and no further action is necessary.**

## IV. Modifications Made to the Original Proposal

### A. Background

The proposed minor violation regulation had been in development over a one and one-half year period before coming before the Board in April 1998. In its earlier stages, ARB staff worked closely with the CAPCOA minor violation subcommittee as it developed a model rule for air district consideration. During workshops held by ARB staff on its initial proposal and workshops held by the CAPCOA subcommittee, staff learned that the main issues of concern in defining a minor violation were: 1) the pattern of neglect needed to establish that a violation was chronic, and 2) whether emissions-related violations were under any circumstances to be considered as minor violations. The proposal that ARB originally developed made no allowance for any emissions-related violations. Based on workshops held before the notice was issued, the proposed version sent out for public comment in the Initial Statement of Reasons for Rulemaking allowed for de minimis emissions-related violations as long as there was no increase in toxic emissions.

In response to comments received during the 45-day comment period and as a result of prehearing discussions, modifications were made to the proposed regulation (*Appendix 4*). These modifications were approved by the Board at the April 23, 1998 hearing and are listed below.

### B. Modifications Made to the Regulation

#### 1. Chronic Violation - Pattern of Neglect

##### *Section 60091(a) - Definitions*

The definition of chronic violation was modified to more clearly define the “pattern of neglect” required for the determination. The new regulation requires the pattern to be established by more than one “reasonably contemporaneous” violation of the same or similar nature. This clearly establishes that the “pattern” must consist of at least two violations occurring within a similar time period. The term “reasonably contemporaneous” will be applied using good judgment in consideration of the nature and circumstances surrounding the violations.

*The specific modification to the regulation language is as follows:*

A pattern of neglect or disregard can be established by ~~one or more~~ more than one reasonably contemporaneous violations of the same or similar nature ~~as previous violations~~ at the same facility or by the same operator.

2. Excess Emissions and Toxic Air Contaminants

*Section 60091(d)(1)(D) - Definitions*

ARB's proposed regulation was drafted to preclude an otherwise de minimis emissions-related violation from consideration as a minor violation if there was any increase in emissions of toxics air contaminants (TAC). The Board modified the language to require that an emission standard or other requirement applicable to a TAC cannot be exceeded if an otherwise de minimis emissions-related violation is to be eligible for consideration as a minor violation. We believe this is sufficiently protective of public health.

*The modification to the regulation (section 60091) is as follows:*

“(d)(1) “Minor Violation” means:

(1) The failure of a person to comply with any requirement or condition of any applicable rule, regulation, information request, order, variance, or other requirement, whether procedural or substantive, adopted by the Air Resources Board pursuant to Division 26 of the Health and Safety Code sections 42380 et seq., 41962, and 41712 where the noncompliance meets all of the following criteria:

- A. does not result in or contribute to, or have the effect of covering or concealing, an increase in emissions of any air contaminant by more than a de minimis amount; and,
- B. does not endanger the health, safety, or welfare of any person(s); and
- C. does not endanger the environment; and
- D. does not cause or contribute to ~~any~~ an increase in emissions of any toxic air contaminant in excess of any emission standard, limitation, or other state or federal requirement that is applicable to that toxic air contaminant; and, ...”.

## V. Oral Testimony - April 23, 1998 Board Hearing

### 1. General Comments - LA County Sanitation District

Odors at times, are minor violations and therefore should be allowed as minor violations. Testimony included the concern that the South Coast Air Quality Management District (SCAQMD), which has primary jurisdiction over the L.A. County Sanitation District in air quality matters, will use ARB's rule as a model for their own rule, thereby excluding odors from being eligible as minor in that District.

#### Agency Response

Board Chairman Dunlap responded directly to this issue, expressing his concern over odor issues and how highly sensitive this issue was to the public. James Morgester, Chief, Compliance Division, testified that he had recently spoken at a conference on odors attended by over 200 people, collaborating Mr. Dunlap's remarks. **No modifications to the regulation were made.**

### 2. General Comments - California Manufacturers Association (CMA)

Mr. Condi testified in support of ARB's modified regulation, stating that it was a greatly improved version over the original.

#### Agency Response

We appreciate the comment. **No response by this agency is necessary.**

## VI. Summary of Comments Received During 15-Day Period (Public Availability of Modified Text ) and Agency Response

### 1. International Sanitary Supply Associations (Appendix 7 - Comment Letter)

**Comment:** These comments and recommended amendments to the modifications are in regard to 60091(a), definition of a “chronic violation”, and 60091(d)(1)(D), definition of a “minor violation”. Comments state that language within these provisions is both contrary to AB 2937 and fatally vague. Specifically, concern was expressed that “three violations of the same air pollution control requirement on the same inspection could be defined as a chronic violation”.

Language was recommended to change ARB’s definition of a chronic violation to the following: “Evidence of ~~A~~ a pattern of neglect or disregard can be established by ~~one or more~~ more than one, reasonably contemporaneous violations of the same or similar nature on reasonably contemporaneous inspections at the same facility, or of ~~by~~ the same operator”.

**Agency Response:** The regulation had already been modified in response to industry concern that the language was too vague and did not clearly indicate what defined the pattern of neglect. It is now clear that more than one violation must be found before a pattern can be established. **No further modification was made to the regulation.**

**Comment:** The comment letter stated that the definition of a minor violation neglects to include and follow the Legislature’s mandate that the Board consider other factors when determining what is a minor violation: (1) the magnitude of the violation; the scope of the violation; (3) the severity of the violation; (4) the degree to which it puts human health and safety or welfare or the environment into jeopardy; (5) the degree to which it could contribute to the failure of important goals or programs; (6) the degree to which the violation may make it difficult to determine compliance.

**Agency Response:** The Board considered the statutory criteria in developing its definition of minor violation. It is not necessary to parrot the statute, but rather to faithfully implement it. This has been done. **No further modification was made to the regulation.**

**Comment:** The comment letter further stated that VOC-containing consumer and institutional products subject to 17 CCR section 94507 will receive inequitable treatment under (d)(1)(D) due to production and marketing practices for these products. A single container found to have a molecule more than the applicable emission standard results in the entire product line being out of compliance. The recommended amendment to the language [section 60091(d)(1)(D)] was the following:

“(d)(1) “Minor Violation” means:

(1) The failure of a person to comply with any requirement or condition of any applicable rule, regulation, information request, order, variance, or other requirement, whether procedural or substantive, adopted by the Air Resources Board pursuant to Division 26 of the Health and Safety Code sections 42380 et seq., 41962, and 41712 where the noncompliance meets all of the following criteria:

- A. does not result in or contribute to, or have the effect of covering or concealing, and increase in emissions of any air contaminant by more than a de minimis amount; and
- B. does not endanger the health, safety, or welfare of any person(s); and
- C. does not endanger the environment; and
- D. does not cause an increase in emissions of any applicable air contaminant requirement by more than a de minimis amount ~~in excess of any emission standard, limitation, or other state or federal requirement that is applicable to that toxic air contaminant; and ...”.~~

**Agency Response:** Staff has responded to the issue of emission-related violations with our provisions to allow eligibility for certain de minimis emission-related violations. The modified language allows that a specific toxic limit cannot be exceeded if an otherwise de minimis emission-related violation is to be eligible for consideration as a minor violation. We believe this is a reasonable approach. An exceedance of a limit implies some loss in public health protection. ARB’s mission is to protect the public health by attaining the Ambient Air Quality Standards and reducing exposure to toxic air pollutants.

If a small number of a non-complying product was inadvertently offered for sale at a retail establishment, ARB has established that this could be considered a minor violation. Even if one or two units of the product was inadvertently sold for use, the emission could still qualify as a “de minimis” violation if no toxic emission limits for the product had been exceeded. **No further modification was made to the regulation.**