

State of California
Environmental Protection Agency
Air Resources Board



Report to the Governor and the California
Legislature

on

Penalties Imposed Under SB 527's
Administrative Penalty Program



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STATE of CALIFORNIA

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This report has been reviewed by the staff of the California Air Resources Board and approved for publication. To obtain this report in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 322-8168.

This report is submitted to comply with the following requirements:

Senate Bill 527 (Sher, Stats. 2001, c. 769 sections 3 and 8) has added sections 42410 and 43023 to the Health and Safety Code (HSC).

Health & Safety Code section 42410 (m) states:

“On or before January 30, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.”

Health & Safety Code section 43023 (m) states:

“On or before January 1, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.”¹

¹) While the two statutes have almost identical language, they list two different due dates for the report. The Air Resources Board is submitting this report to meet both.

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I. Executive Summary

Until recently (October of 2003), the Air Resources Board (“ARB or “State Board”) pursued penalties for violations of most of its regulations in one of two ways: through mutual settlement negotiations, or if that failed, through formal litigation in the state courts.

Two exceptions to this process were the Heavy Duty Vehicle Inspection Program (HDVIP) and ARB’s regulations pertaining to motor vehicle fuels. In these two discrete areas, an administrative penalty process has been authorized by the Legislature. This more streamlined and expeditious administrative hearing process allows ARB to issue an administrative penalty of various amounts pursuant to the guidelines specified in the governing statutes and administrative hearing regulations. Under the administrative hearing procedures, the party receiving the notice of a violation and penalty assessment has the option of either paying the penalty within a certain timeframe or requesting an administrative hearing before an administrative law judge. If they choose not to pay and do not request a hearing, the ARB could proceed to the Superior Court and obtain a judgement for the amount of the penalty. The ARB has found this process to be quicker and more efficient than the formal court hearings, which are time consuming and resource intense.

With the enactment of Senate Bill 527 in 2001, ARB now has the discretion to pursue this streamlined administrative hearing process for virtually all violations. SB 527 broadened ARB’s authority to impose administrative civil penalties as an alternative to judicial civil penalties for almost all of ARB’s adopted rules and regulations.² It provides the ARB with administrative flexibility in determining the most efficient forum for enforcing specific provisions of the Health and Safety Code (HSC) and ARB’s adopted regulations. The legislation also specifically directed ARB to use the existing administrative hearing procedure regulations developed for enforcing and litigating violations under the HDVIP and motor vehicle fuel programs. (see title 17, §§60065 et seq. and 60075 et seq.).

For stakeholders, the main difference between hearings to enforce a civil judicial penalty and civil administrative penalty is process.³ However, under the new “Administrative Penalty Program” the ARB has the option of issuing a “citation” or “complaint” for the alleged violation.⁴ If ARB chooses to pursue this avenue, the

²) Applicable regulations include all of ARB’s adopted laws and regulations under parts 1 through 4, division 26 of the HSC and most air pollution violations under part 5, division 26 of the HSC.

³) As used in this report, “civil judicial penalties” are penalties enforced in judicial court and “civil administrative penalties” are penalties assessed and adjudicated before an administrative tribunal.

⁴) A “citation” is issued for a “Class I” violation, which are those violations that ARB has determined to be of a nature that is clear cut, less complex and less serious in terms of scope and harm to the environment. Citation penalty assessments cannot exceed \$5,000 per day or

person receiving the citation or complaint has 30 days to request a hearing before an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). This affords a person who has received a citation or complaint an avenue to have the merits of the citation or complaint expeditiously reviewed and adjudicated.

An administrative hearing process is typically less formal and representation by counsel is not necessary, thereby being less costly to the citee. Judicial civil proceedings, on the other hand, are more formal and time consuming because of crowded court dockets and lengthy pretrial procedures, all of which may be avoided with an administrative hearing.

A. Implementation of the Administrative Penalty Program

Senate Bill 527 was enacted in 2001. ARB modified its existing Administrative Hearing Procedures as directed by the Bill. After a noticed public hearing, the State Board approved the modified regulations on December 12, 2002. These regulations became effective on October 9, 2003.

The intent of SB 527 is to allow ARB flexibility to pursue administrative penalties and adjudicate those violations that are less severe and complex and involve smaller penalties. (The more serious and complex cases will continue to be pursued judicially through the court system.) It is also to provide administrative penalty authority only for those categories of violations for which the state board maintains the authority to impose civil penalties, and to ensure that the level of penalty impositions do not exceed historic levels. To that end, specific provisions, among others, were added to the regulations to address each of the items listed above to ensure that the intent of the legislation was realized.

In January 2004, ARB's Enforcement Division held training for staff on these new administrative procedures. Since all hearings conducted under this new program are to be heard by Administrative Law Judges (ALJs) from the Office of Administrative Hearings, two ALJs from OAH conducted the training. It was designed to familiarize staff with the new procedures and how to prepare and present a case before an OAH ALJ. The training was also offered to industry.

In addition to the training, Enforcement Division staff met with ARB's Office of Legal Affairs and determined that the proper way to implement this program was to use it specifically as intended, as an alternative. ARB's mutual settlement process works, and it was determined that that process would be utilized first. If a settlement could not be reached, ARB would then decide whether it would be

\$15,000 total (see title 17, CCR §60075.11(a) and (c)). A "complaint" is issued for more serious violations, and penalty assessments cannot exceed \$10,000 or \$100,000 total (see title 17, CCR §60065.16(c)). The hearing procedures for complaints (CCR §§60075.1 et seq.) are somewhat more formal than those for citations.

better to pursue the violation through the new administrative penalty process or the civil judicial penalty process. ARB Enforcement Division staff have been instructed to include a notice to all alleged violators that ARB could pursue the violations either civilly or administratively if mutual settlement negotiations failed.

Early in the regulatory process, ARB developed a web site (<http://www.arb.ca.gov/enf/admpenal/admpenal.htm>) to inform the public of upcoming regulatory workshops and to track the process of the development of the regulations. This web site now contains a link to the “request for hearing” form that a citee can use to request a hearing.

Certain industries (gasoline cargo tank haulers in particular) expressed an interest in this administrative process. However, since implementation of the program in 2003, none have requested use of an administrative hearing process. It is ARB’s policy that if a citee were to express interest in using the administrative hearing process, the ARB would provide the documents necessary to initiate the process. Such a requesting party would be provided every opportunity to proceed to administrative hearing on the merits of the violation.

B. Administrative Penalties Issued by the State Board for Calendar Years 2002, 2003, 2004 and 2005

Since October 9, 2003, the Air Resources Board has issued notices of violation, but has not proceeded to administrative hearing on any noticed violations. ARB is continuing to use the mutual settlement program to resolve violations. ARB has not received any requests from the regulated community to use the administrative process for their alleged violations.

Therefore, the total number of administrative penalties issued by the State Board for calendar years 2002, 2003, 2004 is zero. The calendar year 2005 has not yet begun, so information for that year is not available.⁵

C. Conclusion

The intent of the legislation has been achieved. However, ARB has not yet used the option provided by this program because the current mutual settlement program works so well. In calendar years 2002, 2003, 2004, no administrative

⁵ Health & Safety code section 42302 (m) states: On or before January 1, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.” (Emphasis added.)

Health & Safety code section 42410 (m) states: “On or before January 30, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.” (Emphasis added.)

hearings under the AB 527 program have been requested or held. No information is yet available for calendar year 2005.

II. Background

Most enforcement actions brought by the Air Resources Board are resolved through negotiated settlements. In a negotiated settlement, the source is brought into compliance as quickly as possible and pays a monetary settlement in lieu of civil penalties. Prior to implementation of this new program, those cases where ARB was unable to reach an acceptable settlement with a violator had to be pursued in the courts. This process, while necessary, was both costly and cumbersome. In 1990, the Legislature authorized the ARB to adopt an administrative hearing process to adjudicate violations of the Heavy Duty Vehicle Inspection Program (HDVIP) and assessment of administrative civil penalties (Health and Safety Code section 44011.6). That authority was expanded in 1995, with the adoption of chapter 1.5 of part 5 of division 2 of the Health and Safety Code, which provided the ARB with authority to establish, among other things, administrative procedures to assess and adjudicate civil penalties for violations of ARB fuel-related regulations. (See Health and Safety Code sections 43028(a) and 43031.)

Prior to the enactment of SB 527, all other provisions of division 26 of the Health and Safety Code within the ARB's purview could only be enforced judicially. In SB 527, the Legislature enacted Health and Safety Code sections 42410 and 43023. These sections expanded ARB's authority to impose administrative civil penalties as an alternative to judicial civil penalties.

The legislation also specifically directed the ARB to use its existing administrative hearing regulations to implement the penalty assessment program. To this end, on December 12, 2002, the ARB adopted modifications to title 17, California Code of Regulations §60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and California Code of Regulations §60075.1 et seq. (Administrative Hearing Procedures for the Review of Citations) to address the specific directives of the legislation. In initially adopting administrative hearing procedures, the ARB established a two-tiered enforcement hearing process. This process provides for complaints to be issued for the most serious and complex violations – subject to higher penalty assessments – and citations to be issued for less serious, less complex, and more clear cut violations.

The effective date of the amendments to the regulations was October 9, 2003.

III. Administrative Penalty Legislation

In 2001, the Legislature adopted SB 527 to enact HSC §42410 and §43023. SB 527 provides that the administrative assessments are to be the lesser of the judicial penalty amount authorized by the HSC for the violation in question or \$10,000 per day per violation, with total penalty assessments not to exceed \$100,000. In no event may administrative penalties for a violation exceed the

judicial civil penalty that could be assessed under the Health and Safety Code for that violation.

A. Summary of Legislation

This summary addresses only sections 3 and 18 of SB 527 that pertain to the ARB's Administrative Penalty Program.⁶

1. Intent of Legislation

It is believed that the state legislative intent of SB 527 is to:

- Provide ARB with an alternative to pursuing civil penalties through the court system by allowing the ARB to pursue penalties for less significant violations through an administrative hearing process;
- Provide administrative penalty authority only for those categories of violations for which the state board maintains the authority to impose civil penalties; and
- Ensure that the level of penalty impositions do not exceed historic levels.

Each of these areas have been adequately addressed by modifications to CCR §§60065.1 et seq. and 60075.1 et seq.

2. Provisions of the Bill

SB 527 added sections 42410 and 43023 to the Health and Safety Code. Those sections provide that:

- ARB may impose, as an alternative to judicially enforced penalties, administrative penalties for less significant violations of ARB rules and regulations under parts 1 through 4, division 26 of the HSC and most violations covered under part 5, division 26 of the HSC.
- Administrative penalty assessments shall be the lesser of the judicial civil penalty that can be imposed under the HSC for the violation in question, or \$10,000 per violation per day, up to a maximum assessment not to exceed \$100,000.
- Administrative penalties shall be imposed as an alternative to, and not in addition to, a judicially enforced penalty. ARB may not seek administrative penalties for any category of violations for which it does not have authority to recover penalties in a judicial civil action.

⁶ SB 527's other provisions pertain to greenhouse gases and the California Climate Action Registry which are not applicable to this report.

- ARB may not assess administrative penalties for any category of violation that wasn't subject to enforcement by the ARB as of January 1, 2002.
- If the ARB imposes an administrative penalty pursuant to SB 527, it may not bring any action pursuant to the Business and Professions Code, section 17000 et seq.
- If a violation is within the enforcement jurisdiction of both the ARB and a local air district, the ARB may not impose an administrative penalty if the air district has already commenced an enforcement action.
- When imposing an administrative penalty, ARB shall take into consideration all relevant circumstances surrounding the violation including, but not limited to, HSC §42403 for violations covered under HSC §42410, and HSC §43031 for violations covered under HSC §43023.
- Administrative review shall be conducted under the administrative hearing regulations located in title 17, California Code of Regulations (CCR) sections 60065.1 et seq. and 60075.1, except that an administrative law judge appointed by the Office of Administrative Hearings shall conduct the hearings.
- Parties are entitled to judicial review by filing of a writ of mandate in accordance with section 1094.5 of the Code of Civil Procedure.
- The ARB may apply to the Superior Court to enforce a judgment in the amount of the administrative penalty.
- By January 1 and 30, 2005, the ARB shall prepare a report to the Legislature and the Governor summarizing the administrative penalties imposed by the ARB for calendar years 2002, 2003, 2004, and 2005. (There appears to be a typographical error in the statutes, as penalty data for calendar year 2005 cannot be collected by January 1 or January 30, 2005.)

IV. Summary of Changes to ARB's Existing Administrative Hearing Regulations

The ARB has broadened the existing administrative penalty assessment and hearing procedures to allow for the issuance of administrative citations and complaints for all violations covered in SB 527. The existing administrative penalty provisions that provide for the issuance of citations and fuel-related complaints have not been changed. Because of the different maximum penalties that may be assessed for fuel violations and violations covered by SB 527, the amendments separately set forth the ARB's authority to assess penalties for violations covered by SB 527.

Consistent with other directives of SB 527, title 17, CCR §60065 et seq. and CCR §60075 et seq. have been modified to:

- Clarify that an administrative civil penalty is to be issued as an alternative to a judicial civil penalty and not be cumulative;
- Make clear that ARB's administrative penalty authority only extends to those categories of violations for which it maintains authority to impose judicial civil penalties;
- Clarify that an administrative law judge appointed by the Department of General Services, State Office of Administrative Hearings (OAH) would conduct all hearings authorized by HSC §42410 and §43023;
- Amend both hearing procedure regulations to add civil penalty limits in accordance with SB 527; and
- Amend the existing criteria used for assessing penalties for fuel violations to also apply to violations covered under Health and Safety Code section 43023. A new provision was added establishing penalty assessment criteria for violations covered under Health and Safety Code section 42410.

V. Program Implementation

A. Adoption of the Regulations

Following a Public Hearing on December 12, 2002, the ARB by Resolution 02-36 approved the amendments to ARB's Administrative Hearing Procedures found in title 17, California Code of Regulations sections 60065.1 et seq. and 60075.1 et seq. These amendments comply with the relevant provisions of Senate Bill 527 (SB 527) (Stats. 2001, c. 769 sections 3 and 8, codified at sections 42410 and 43023 of the Health and Safety Code (HSC)).

The effective date of the amendments to ARB's existing Administrative Hearing Procedures was October 9, 2003.

B. Staff Training

Because SB 527 established a new process whereby hearings would be held by Administrative Law Judges (ALJs) from the Office of Administrative Hearings (OAH), staff training was held. On January 9, 2004 two ALJs from the OAH conducted training for ARB's Enforcement Division staff to familiarize them with the process. A mock hearing was conducted as part of the training.

C. Amendments to ARB Documents Alleging a Violation

Because virtually all alleged violations found by ARB staff could be eligible for an administrative hearing, staff determined that a modification to all documents alleging a violation was appropriate. The types of documents issued by the ARB enforcement staff alleging a violation of an ARB regulation are typically a “citation” or a “Notice of Violation” (NOV) document. Staff has been instructed to include the following language on any document that is used to notify a party of an alleged violation of an ARB regulation.

“Please call the Air Resources Board (ARB) Enforcement Division at (916) 322-7061 within 30 (thirty) days from the date of this notice to discuss this NOV and set up a settlement conference if needed. If this matter is not resolved, civil or administrative action may be taken by the ARB to enforce this NOV” (emphasis added).

D. Process

ARB Enforcement Division staff met with ARB’s Office of Legal Affairs and determined that this process should be used as intended. It is intended to be used as alternative to the civil judicial penalty process. Therefore, ARB has the discretion to determine which violations with which to proceed administratively. It has been determined that first the mutual settlement process would be initiated (where applicable) and if that process failed, ARB could then use the alternative administrative process if it is determined that is the best way to pursue the violation. If not, then the judicial civil process would be pursued.

Certain industries (gasoline cargo tank haulers in particular) expressed an interest in this administrative process. However, since implementation of the program in 2003, none have requested use of an administrative hearing process. It is ARB’s policy that if a citee were to express interest in using the administrative hearing process, then ARB would immediately provide all documents necessary to initiate the process, thus allowing the citee the opportunity to request an administrative hearing on the merits of the violation (the documents are also available on ARB’s web page).

E. Web Site

Early in the regulatory process, ARB developed a web site <http://www.arb.ca.gov/enf/admpenal/admpenal.htm> to inform the public of upcoming workshops and to track the process of the development of the regulations. This web site also contains a link to the “request for hearing” form that a citee can use to request a hearing.

VI. Administrative Penalties Imposed by the State Board (ARB) for Calendar Years 2002, 2003, 2004 and 2005

There have not been any administrative penalties issued under the new program initiated by SB 527 (Administrative Penalty Program).

As stated, it is understood that intent of the legislation is to give ARB an *alternative* to civil judicial civil penalties. To date, ARB has been successful in resolving all alleged violations through our mutual settlement program and has not deemed it necessary to pursue an administrative action under this program.

ARB's regulation did not take effect until October 9, 2003; therefore only violations after that date would be eligible for an administrative process under this new program. On average, ARB closes about 1,200 cases per year of which approximately 25% would be eligible under this new program (the other 75% are HDVIP violations, which are also eligible for administrative hearing as discussed in this report). Therefore, on average approximately 300 violations of ARB's rules and regulations could be pursued through this SB 527 administrative penalty program per calendar year.

VII. Conclusions

The intent of SB 527 was to give the ARB flexibility to pursue less significant violations of its regulations through an administrative hearing process rather than through the court system, to provide penalty authority for only those areas where ARB has authority to impose penalties and ensure that the level of penalties do not exceed historic levels. ARB's regulations have been modified to address each of these areas. ARB has been successful in settling all violations of its regulations. Therefore, the ARB has not yet had to utilize the option afforded under this program. If it were to, however, approximately 300 violations would be eligible per year.