

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
AIR RESOURCES BOARD**



ENFORCEMENT DIVISION

**STAFF REPORT: INITIAL STATEMENT OF REASONS FOR
PROPOSED RULEMAKING**

**PUBLIC HEARING TO CONSIDER AMENDMENTS TO REGULATIONS DEFINING
PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR CITATIONS AND
COMPLAINTS**

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State of California

AIR RESOURCES BOARD

Staff Report: Initial Statement
Of Reasons for Proposed
Rulemaking

ADMINISTRATIVE CIVIL PENALTY PROGRAM - PUBLIC HEARING TO CONSIDER
AMENDMENTS TO THE PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR
CITATIONS AND COMPLAINTS

Date of Release: October 24, 2002
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I. INTRODUCTION

A. Purpose

Staff proposes to modify existing Administrative Hearing Procedures to conform with directives of Senate Bill (SB) 527 (Stats. 2001, c. 769 (SB 527) §§3 and 18, codified at §42410 and §43023 of the Health and Safety Code (HSC).) SB 527 provides that, as an alternate to seeking judicial civil penalties, the ARB may impose administrative civil penalties for violations of all ARB adopted rules 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.

This report comprises the Staff Report: Initial Statement of Reasons for Rulemaking for Public Hearing (Staff Report) to consider “*Administrative Civil Penalties*” as required by the Administrative Procedure Act (Government Code §11340 et seq.).

B. Executive Summary

Most enforcement actions brought by the Air Resources Board (ARB) 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. In those cases where ARB is unable to reach an acceptable settlement with a violator, the matter must be pursued in the courts. This process, while necessary, is 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 26 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 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 HSC §§42410 and 43023. These sections expand ARB's authority to impose administrative civil penalties as an alternative to judicial civil penalties. SB 527 limits the amount that the ARB may assess as an administrative penalty to \$10,000 per violation per day, with a maximum assessment 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 HSC for that violation.

The legislation also specifically directs the ARB to use its existing administrative hearing regulations to implement the penalty assessment program. To this end, staff is proposing modifications to title 17, CCR §60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and CCR §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 three-tiered enforcement process. The most serious and complex cases would continue to be referred to judicial courts for enforcement. But for other violations, administrative penalties could be pursued. The administrative process provides that complaints may be issued for the more serious and complex of these remaining violations and citations issued for the least serious, clear-cut violations.

Staff's proposal would broaden the existing administrative penalty assessment and hearing procedures to allow for the issuance of administrative citations and complaints for all violations covered by SB 527. The existing administrative penalty provisions that provide for the issuance of citations and fuel-related complaints would remain unchanged. Because of the different maximum penalties that may be assessed for fuel-related violations and those violations covered under SB 527, the amendments would separately set forth the ARB's authority to assess penalties for violations covered by SB 527.

In response to other directives of SB 527, the staff has proposed the following

modifications to title 17, CCR §60065.1 et seq. and CCR §60075.1 et seq.:

- Clarify that an administrative civil penalty would 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 assessments for violations covered under HSC §43023 and adding a new provision establishing penalty assessment criteria for violations covered under HSC §42410.

Additionally, the staff is proposing to make other minor modifications to the hearing procedures for purposes of clarity and conformity with other state administrative hearing procedures.

The proposed modifications would not adversely impact the environment or raise any environmental justice issues. The amendments also would not adversely affect California businesses or have any economic or fiscal impact on state and local governments.

II. GENERAL--BACKGROUND

A. Judicial Civil Penalty Provisions

Prior to 1990, the ARB had been authorized by the Legislature to redress violations of the Health and Safety Code and its rules and regulations in judicial court.¹

Actions for recovery of civil penalties had to be brought in a court of proper jurisdiction in the county where the violation occurred and be brought in the name of the People of the State of California by the Attorney General. (See HSC §§42403 and 43154.) Among the

¹In 1990, the Legislature provided the ARB with authority 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 26 of the Health and Safety Code, which allowed the ARB to establish, among other things, administrative procedures to assess and adjudicate civil penalties for violating the state's fuel-related regulations. (See Health and Safety Code sections 43028 and 43031.) As used in this report, "judicial penalties" are penalties enforced in judicial court and "administrative penalties" are penalties assessed and adjudicated before an administrative tribunal.

sources that were required to be prosecuted in a state judicial court for violating ARB adopted rules and regulations implementing provisions of parts 1 through 4 of the HSC were: manufacturers, distributors, and retailers of consumer products; owners of idling diesel-powered busses; cargo tank trucks required to be equipped with a certified vapor recovery system; and persons causing the release of toxic air contaminants. (See HSC §39674 and 42402 et seq.) Similarly, the ARB could only bring a state court action against sources that violated provisions of part 5 of division 26 of the HSC, and the regulations and orders adopted by the ARB to implement the provisions thereof. Included among these sources are: manufacturers and retailers of new motor vehicles and engines; manufacturers, distributors, and retailers of off-road vehicles and equipment; used car dealerships; and manufacturers and owners of retrofit kits for bus fleets.

Under HSC §§39674 and 42402 et seq., a source violating an ARB adopted rule or regulation is subject to civil judicial penalties ranging between \$1,000 to \$50,000 per violation per day. There are no maximum caps as to total penalties that may be sought through the courts. A person in violation of the provisions under part 5, division 26 of the HSC are subject to judicial civil penalties ranging between \$50 to \$5,000 for each unit found to be in violation. Again, there are no maximum caps that may be sought through judicial enforcement. (See e.g. HSC §§43016, 43154, and 43211.)

B. History of ARB's Administrative Civil Penalty Program

Prior to the enactment of SB 527 in 2001, ARB was authorized to assess and enforce administrative penalties for violations in two discrete areas: the Heavy Duty Vehicle Inspection Program (HDVIP) and rules and regulations pertaining to fuel standards and requirements. In this section, we give an overview of the progression of ARB's administrative penalty program.

In 1991, pursuant to amendments to HSC section §44011.6 (stats.1990, c.1433 SB 1874), ARB adopted regulations establishing test procedures and protocols of enforcement and procedures for conducting administrative hearings for citations issued by the HDVIP pursuant to Health and Safety Code §44011.6. (See title 17, CCR, §§60075.1 et seq.) In accord with the directives of the Legislature, penalties for first time violations under the HDVIP were set at \$800 with \$500 waivable if repairs were completed and documented in a timely manner. Penalties for repeat violations within a year of the first were set at \$1800. (Id.) The hearing procedures set forth at title 17, CCR, §§60075.1 et seq. were adopted by ARB as a streamlined administrative hearing process to specifically address the anticipated high volume of cited HDVIP vehicles.

In 1995, the legislature expanded ARB's authority to assess administrative civil penalties as an alternative to judicially imposed penalties. (HSC §§43028 and 43031(a), stats. 1995, c. 966 (SB 163), §3.) Under this grant of authority and after finding the administrative hearing process to be an efficient, expeditious, and, in general, better suited process for adjudicating certain types of violations, the ARB adopted title 17, CCR

§§60065.1 et seq., establishing administrative hearing procedures for the review of complaints, and amended title 17, CCR §60075.1 et seq. to expand the use of citations.

In so doing, ARB adopted a three-tiered enforcement process. The most serious and complex fuel-related violations would still be handled through the courts. The Executive Officer was provided with discretion, however, to refer other fuel-related cases to the administrative hearing process. The more serious and complex of these cases are subject to penalties up to \$25,000 per day per violation, with a maximum total penalty assessment as high as \$300,000. These violations are subject to issuance of a complaint and adjudicated under the provisions of §§60065.1 et seq. if the Executive Officer so determines. These procedures are somewhat more formal than the procedures set forth at §§60075.1 et seq. and assure parties subject to potentially greater penalty amounts a full and fair hearing on all contested issues. The procedures at title 17, CCR, §§60075.1 et seq., were amended to incorporate the least serious and readily discernable fuels-related violations. These violations were classified, along with HDVIP violations, as Class I violations, and are typically enforced by issuing field citations. Fuels-related citations are not subject to penalties of more than \$5,000 per violation per day, with total penalty assessments not to exceed \$15,000.

At that time, staff also amended the hearing procedures to incorporate provisions of the recently amended Administrative Procedures Act, Government Code §§11400 et seq. (Stats. 1995 c.938 (SB 523).) Further amendments clarified and made more specific the rights and responsibilities of the parties to the hearing, the hearing office, and the adjudicating hearing officers.

III. SB 527 BROADENS ARB'S AUTHORITY TO ASSESS ADMINISTRATIVE CIVIL PENALTIES

A. Introduction

In 2001, the Legislature adopted SB 527 to enact HSC §42410 and §43023. Those sections broadly authorize ARB to impose administrative civil penalties as an alternative to judicial civil penalties for all ARB adopted rules 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. 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.

SB 527 specifically directs ARB staff to use ARB's existing administrative hearing regulations to implement the program. To this end, staff is proposing modifications to title 17, CCR §§60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and CCR §§60075.1 et seq. (Administrative Hearing Procedures for the Review of Citations) to incorporate the directives of the legislation.

As stated, SB 527 provides an alternative means to enforce specific provisions of the HSC and ARB adopted rules and regulations. The intent of the legislation is to allow the ARB flexibility to pursue administrative penalties and adjudicate those violations that are less severe and complex and that involve smaller penalties. For stakeholders, the main difference between a civil judicial penalty and a civil administrative penalty is process. Under both types of assessments, the ARB will continue to resolve violations wherever possible, through negotiated settlements. In contrast to the administrative hearing process, the judicial process is typically more formal, requiring, in most cases, representation by counsel, lengthy pretrial procedures, and delay because of crowded court dockets. The administrative hearing process found in title 17, CCR §§60065.1 et seq. and CCR §§60075.1 et seq. affords a person who has received a complaint or citation an avenue to have the merits of the citation or complaint expeditiously reviewed by an administrative law judge in a full and fair hearing.

B. Summary of Legislation

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

1. Intent of Legislation

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.

2. Provisions of the Bill

SB 527 adds 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.

³ SB 527's other provisions pertain to greenhouse gases and the California Climate Action Registry that are not applicable to this rulemaking item.

- 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.
- 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, 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 statute, as penalty data for calendar year 2005 cannot be collected by January 1, 2005.)

IV. SUMMARY OF SUBSTANTIVE AMENDMENTS TO EXISTING ADMINISTRATIVE

HEARING PROCEDURES

- A. Proposed Amendments to title 17, CCR §§ 60065.1 et seq., Administrative Hearing Procedures for Review of Complaints. (The full text of the proposed amendments are attached to this Staff Report as Attachment A.

§60065.1 Applicability

Pursuant to the express authority granted by the Legislature in SB 527, the staff proposes to modify §60065.1(a) by adding language to indicate that an administrative complaint can be issued pursuant to HSC §§42410 and 43023. Section 42410 provides that the ARB may assess and adjudicate administratively, penalties for violations of its rules and regulations adopted under authority granted in parts 1 through 4, of division 26 of the HSC. Section 43023 provides that the ARB may assess and adjudicate administratively penalties for violations arising under chapters 1 through 4 and chapter 6 of part 5, division 26 of the HSC, and rules and regulations adopted by the ARB to implement those statutes. These hearing procedures were first adopted by the ARB in 1998 to implement previously granted authority to assess and adjudicate administrative complaints for violations of ARB adopted fuel regulations and standards. These hearing procedures would continue to apply to those types of violations.

The staff is proposing that the hearing procedures be broadened to include violations under HSC §§42410 and 43023 having found that administrative assessments and adjudication for less complex and serious violations afford more efficient and expeditious process for all parties, and allows the ARB to better utilize its enforcement resources. It follows that improved enforcement will result in greater compliance with air quality laws.

§60065.2(a) - Definitions

Staff proposes to delete reference to title 13, CCR, Chapter 5, Standards for Motor Vehicle Fuels, §2250 et seq., and Chapter 8, Clean Fuels Program, §2300, et seq. These sections are being deleted as staff has determined that it is unnecessary to reference these definitions in the administrative hearing procedures. A hearing officer will be able to take judicial notice of these provisions, which reference the ARB fuel standards and specification regulations, as well as any other provisions of the HSC or the adopted rules and regulations of the ARB, in any case involving violations of those provisions that are brought before the administrative tribunal.

§60065.2(b)(3) - Definition of Complaint

Staff is proposing modifications to this section to make it clear that a complaint cannot be

issued for a Class I violation, which is covered by the administrative hearing procedures set forth in title 17, CCR, §§60075.1 et seq. Staff is also proposing, consistent with SB 527, to make it clear that a complaint in these proceedings is for administrative penalties that are an alternative to judicially enforced penalties.

§60065.2(b)(10) - Definition of Hearing Officer

Staff has added language that clarifies that the hearing officer is “either” an administrative law judge (ALJ) appointed by ARB to conduct hearings pursuant to HSC §43028 (fuels requirements and standards) or “an administrative law judge within the Department of General Services, State Office of Administrative Hearings (OAH) who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023.” This modification conforms the hearing procedures to the directives of SB 527 that administrative law judges from OAH adjudicate all matters issued pursuant to the provisions of the legislation.

§60065.2(b)(15) - Definition - Response/Request for Hearing

Staff is proposing to modify the title of this definition to more accurately reflect that when responding to the complaint, the respondent is effectively requesting a hearing before an administrative law judge.

§60065.13(c) Prohibited Communications

The phrase “petition for review of executive officer decision” was inadvertently placed in the existing procedures and staff is proposing that the reference be deleted throughout the regulation. In this particular section, staff is proposing that the phrase be replaced with the word “complaint”.

§60065.16 Violations Subject to a Complaint; Issuance

The staff is proposing that §60065.16(a) be amended to include the ARB’s new authority to issue complaints assessing administrative penalties pursuant to the Legislature’s delegation in HSC §§42410 and 43023. The language of title 17, CCR, §60065(a)(1) is written broadly to cover both complaints seeking administrative penalties issued under HSC §43023 and §43028, which authorizes the ARB to assess penalties for fuel-related violations and under which the provisions of §60065.1 et seq. were initially adopted in 1998. The reference in existing §60065.16(a)(2) - that a complaint cannot be issued for violations that are determined to be a Class I violation subject to a citation issued under title 17, CCR, §§60075.1 - has been moved to §60065.16(d)(2).

Former §60065.16(a)(3) has been reformatted to be §60065(b). Although amended for purposes of clarification, the substance of the modified paragraph remains basically unchanged, i.e., complaints seeking penalties pursuant to HSC §43028 for violations ARB

fuel requirements and standards shall not exceed \$25,000 per violation for each day of violation and shall not exceed a total penalty of \$300,000. SB 525 specifically stated that its provisions do not apply Chapter 1.5 (commencing with §43025). (See §43023(h).)

A new §60065.16(c) has been added to authorize issuing complaints assessing penalties pursuant to §§42410 and 43023. Pursuant to the directives of SB 527, paragraph (c) would authorize the ARB to assess penalties not to exceed the lesser of the maximum amount allowed by statute for the violation, or \$10,000 per violation per day of violation with a total penalty assessment not to exceed \$100,000. In determining the amount allowed by statute, the ARB would be required to use the method of calculation set forth in the underlying statute (e.g., HSC §43016 states that penalties shall be assessed on a per vehicle basis).

§60065(d) has been added to make clear that the ARB would not be allowed to issue complaints under two specific circumstances. Paragraph (d)(1) provides, pursuant to the directives of SB 527, that ARB would not be allowed to issue an enforcement complaint in those circumstances in which the ARB and a district share concurrent enforcement authority over a violation and the district has commenced an enforcement action. As previously stated, paragraph (d)(2) is carried over from the existing regulation and sets forth an administrative determination by the ARB that it would not issue complaints for violations determined to be Class I violations, as defined in §§60075.2(b)(5) and 60075.11.

Former §60065(b) has been moved to paragraph (e). Except for subparagraphs (e)(5) and (7), the substance of the language remains the same. Subparagraphs (e)(5) and (7) would be modified to be consistent with the earlier described definition change in §60065.2(b)(15). The change would make it clear that a party's response to a complaint is an effective request for hearing.

Proposed §60065.16(f) would require the ARB to file a copy of the complaint with the appropriate administrative hearing office as well as serving the original copy on the respondent. This modification would provide notice to the respective administrative hearing offices that an action has been lodged, which should facilitate case management.

§60065.18 Response to Complaint by Respondent

For reasons of clarity and consistency, staff is proposing that the title of this section and references in the text to "response to complaint" be modified to reflect that a response is also a request for hearing. (See definition change at §60065.2(b)(15).) Staff is also recommending that paragraph (a) be further amended, consistent with §60065.3, to clarify that a party may use a representative who may or may not be a legal counsel. Also the section would be amended to make it clear that a response/request for hearing be filed with the administrative hearing office designated in the complaint. This change is required

because cases will be referred to different hearing offices.

§60065.19 Issues for Hearing

This language is meant to clarify that if a complaint is issued for a repeat violation, the only relevant issues in the instant hearing are those that pertain to the present violation. The amendment would make it clear that a party could not contest the merits of a previously issued complaint that was itself not timely contested.

§60065.21 – Scheduling of Hearings

Staff is proposing a new paragraph (a) that pertains to scheduling of hearings and assignment of hearing officers for complaints issued pursuant to the new authority granted under HSC §§42410 and 43023.

Proposed paragraph (b) would be amended to clarify that complaints issued pursuant to HSC §43028 would continue, in the first instance, to be assigned to a hearing officer of the state board. As stated previously, the provisions of SB 527 did not supercede the authority previously granted in §§43028 and 43031. To ensure expeditious enforcement of cases, staff proposes that paragraph (c) be amended to require a hearing office to schedule a complaint for hearing within 45 days from the date of issuance in those cases in which no response/request for hearing has been filed. Staff further recommends that superfluous language in paragraph (c) be deleted for clarity.

§60065.25 – Settlement Agreements and Consent Orders

Staff proposes to delete the phrase “by agreeing upon a civil penalty, with or without conditions or other appropriate remedy” finding the language to be superfluous and unnecessary.

Staff is proposing that language be added to paragraph (b) to allow OAH to allow administrative law judges from the ARB to assist in settlement discussions. This would allow persons with expertise and experience in air pollution law to assist OAH in settling cases.

Consistent with earlier mentioned modifications, existing paragraph (e) would be deleted in that it applies only to petition for review hearings. As stated, this language was inadvertently included in the existing procedures when initially adopted.

§60065.38 – Default Order

Staff is proposing that the time for filing a request for reinstatement be reduced from 30 days to 10 days. The staff believes that the initially provided period is too long and causes unnecessary delay in decisions becoming final and affected sources coming into

compliance with the law. It is believed that 10 days for a party to take action after receiving written notice of the default is reasonable. The proposed change is consistent with or less stringent than other state administrative hearing procedures. (See e.g., Administrative Procedure Act, Government Code §11520(c) [a party has 7 days in which to file motion to request that default order be vacated]; “Rules of Practice and Procedure of the Occupational Safety and Health Appeals Board,” title 8, CCR, §383(b) [10 days for filing motion to request reinstatement after dismissal for failure to appear].

§60065.40 – Penalty Assessment Criteria

Consistent with the Legislature’s directives in HSC §42410(f) that the criteria of HSC §42403 be considered when determining penalty assessments for violations issued under HSC §42410, staff is proposing a new paragraph (a), which sets forth the criteria of §42403. Again, consistent with the directives of the Legislature in HSC §43023(f), staff is proposing that proposed paragraph (b) be amended to reflect that the penalty assessment criteria of HSC §43031 be used for penalty assessments issued pursuant to HSC §43023 as well as §43028. ARB staff is also proposing to add an additional factor to both paragraphs (a) and (b) that would require a hearing officer to consider penalties or range of penalties established by the ARB in its rules or regulations that underlie the violation. The staff believes that for reasons that are self-evident that this factor should be considered among others.

B. Proposed Amendments to title 17, California Code of Regulations, §60075 – Administrative Hearing Procedures for Review of Citations. (The full text of the proposed amendments are attached to the Staff Report as Attachment B).

§ 60075.1 Applicability

Pursuant to the express authority granted by the Legislature in SB 527, the staff proposes to modify §60075.1(a) by adding language to indicate that an administrative citation can be issued pursuant to HSC §§42410 and 43023. Section 42410 provides that the ARB may assess and adjudicate administratively, penalties for violations of its rules and regulations adopted under authority granted in parts 1 through 4, division 26 of the HSC. Section 43023 provides that the ARB may assess and adjudicate administratively penalties for violations arising under chapters 1 through 4 and chapter 6 of part 5, Division 26 of the HSC and rules and regulations adopted by the ARB to implement those statutes.

The staff is proposing that the hearing procedures be broadened to include violations under HSC §§42410 and 43023 having found that administrative assessments and adjudication for less complex and serious violations afford more efficient and expeditious process for all parties, and allows the ARB to better utilize its enforcement resources. It follows that improved enforcement will result in greater compliance with air quality laws.

§60075.2 – Definitions

Staff proposes to delete reference to title 13, CCR, Chapter 5, Standards for Motor Vehicle Fuels, §2250 et seq., and Chapter 8, Clean Fuels Program, §2300, et seq. These sections are being deleted as staff has determined that it is unnecessary to reference these definitions in the administrative hearing procedures. A hearing officer will be able to take judicial notice of these provisions, which reference the ARB fuel standards and specification regulations, as well as any other provisions of the HSC or the adopted rules and regulations of the ARB, in any case involving violations of those provisions that are brought before the administrative tribunal.

§60075.2(b)(4) – New Definition – Citing Party

Staff has proposed to add this new definition. Finding that the term “citing party” more accurately identifies the moving party in a citation proceeding, the staff proposes that the term replace “complainant” (existing paragraph (b)(5) of these definitions). This change will be reflected throughout the regulation.

Existing §60075.2.(b)(5) – Definition – Complainant

As discussed above in section 60075.2(b)(4), this term is being replaced by "citing party" throughout this regulation.

§60075.2(b)(7) – New Definition - Days

The staff proposes the addition of this definition to clarify that “days” means calendar days.

§60075.2(b)(10) - New Definition – Executive Officer

Staff proposes to add this new definition to clarify that “Executive Officer” means the executive officer of the ARB.

§60075.2(b)(11) – Definition - Hearing Office

The staff is proposing that this definition be amended to include the Office of Administrative Hearings (OAH). This modification would conform these regulations to the directives of SB 527 that violations arising under HSC §§42410 and 43023 be referred to that state office.

§60075.2(b)(12) – Definition – Hearing Officer

Staff proposes to amend definitions in CCR §60075.2(b)(12) to specify that in

administrative hearings held pursuant to HSC §42410 and §43023, the Hearing Officer shall be an administrative law judge appointed by OAH. As state, this amendment would conform these regulations to the directives of SB 527.

§60075.2(14) - Definition - Penalty

For purposes of clarity – to distinguish judicially enforced penalties from administratively enforced penalties - staff proposes to replace the words “the civil” with “an administrative” in describing penalties in these procedures.

§60075.4 - Service, Notice and Posting

Pursuant to SB 527, administrative hearings arising under HSC §§42410 and 43023 are to be conducted by the hearing office of the State Office of Administrative Hearings. Therefore, to facilitate administrative processing of citations and requests for hearings, staff proposes to amend §60075.4(b) to provide that if the designated hearing office is the State Office of Administrative Hearings, an original of every pleading, letter, document or other writing served in a proceeding under these rules shall be filed with that hearing office and also the ARB. This amendment would provide both OAH and the ARB with timely access to documents and better management of cases.

§60075.11 - Determination of Class I Violations

For purposes of clarity staff proposes that this section be reorganized to delineate the new authority to assess administrative penalties granted under SB 527. The basic definition and criteria for determination of “Class I” violations remains unchanged. The term would still cover all violations occurring under the HDVIP and those violations determined by the executive officer to be of a “nature that is clear cut and less complex and serious, in terms of size, scope, and harm to the public and environment”.

The staff is proposing that §60075.11(b) be modified to so that it pertains to paragraph (a)(2) and (3) of §60075.11, both violations occurring under HSC §§43023 and 43028. The staff proposes that the section further make clear that the Executive Officer would be required to consider the penalty criteria set forth by the Legislature when he or she assesses penalties and determining whether circumstances involve a Class I violation.

As required by SB 527, staff is proposing that §60075.11(c) be amended to clarify that an administrative penalty may not exceed the maximum penalty allowed under the HSC for the same violation. Additionally, for purposes of clarity, the staff is proposing that in determining the maximum penalty allowed under the statute, the executive officer would be directed to use the same method as used under the statute (e.g. HSC §43016 assesses penalties on a per vehicle basis).

To conform the regulations to the directives of SB 527, the staff is proposing a new

paragraph (d). That section would provide that if a local air pollution control district shares concurrent enforcement authority with the ARB and the district has commenced an enforcement action for a violation, the state board would not issue a citation for that violation.

§60075.12 - Issuance and Service of Citations

Staff is proposing clarifications to §60075.12(b)(7) to better identify the information that would be required to be included in the citation. Staff also recommends that a new paragraph (b)(8) be added to §60075.12 specifying the requirements for service of a citation on a citee.

§60075.17 - Filing a Request for Hearing

The staff is proposing a new paragraph (b), which clarifies that a request for hearing to contest a citation be filed with the Executive Officer of the Air Resources Board.

Since citations would now be required to be filed with the Executive Officer and not a hearing office, staff proposes that term “hearing office” be replaced with “executive officer” in paragraphs (e) and “hearing office” in paragraphs (f) through (i). The staff is proposing this new process because of the directives of SB 527 that some violations be heard by OAH. Other violations will continue to be heard by the administrative hearing office at the state board. For ease of administration, the regulation would require that all citations in the first instance, be filed with the Executive Officer who will then refer the cases to the appropriate hearing office.

Finally, staff is proposing that paragraph (i) be amended to indicate that either the “executive officer or the ” hearing officer assigned to the case ” may allow the citee to amend the request for hearing after the deadline for filing has passed”. Again, this change is being made to conform to the change in process and for reasons of administrative fairness.

§60075.19 – Issues for Hearing

The staff is proposing that §60075.19(b) be modified to delete the phrase “pursuant to §2185, title 13, California Code of Regulations”. The reason for the change is that the provisions of the section would be applicable adoption of these amendments to a wider spectrum of violations and not just the deleted section.

§60075.20 – Stays Pending Filing a Request for Hearing

Staff proposes amendments to this section for reasons of clarity.

§60075.21 – Response by Citing Party

Staff proposes that §60075.21 be modified to be consistent with previously described proposed amendments regarding, among other things, the change in process proposed under §60075.17. (See above discussion.)

§60075.22 - Withdrawal of Request for Hearing

Staff is proposing amendments to paragraph (b) for purposes of clarity.

§60075.24 – Settlement Agreements and Consent Orders

Staff proposes to delete from paragraph (a) the phrase “by agreeing upon a civil penalty, with or without conditions or other appropriate remedy” finding the language to be superfluous and unnecessary. The staff is also proposing that a sentence be added to paragraph (b) that would allow OAH to use administrative law judges from the administrative hearing office at the ARB to assist in settlement discussions. Staff believes that it might be beneficial to use hearing officers with expertise and experience in the area of air pollution law to assist OAH hearing officers in such discussions.

§60075.30(a) -Time and Place of Hearings

Staff has proposed modifications to indicate that there are now two hearing offices that may review the issuance of citations.

§60075.38 – Default Order

Staff is proposing minor changes to paragraph (a) for purposes of clarity.

Staff further proposes that the phrase “in a complaint proceeding” be deleted from paragraph (b). The phrase was inadvertently included in this regulation when amended in 1998. Finally, staff is proposing to delete the phrase “Except as provided in §60075.17(e)” from paragraph (c). Staff has determined that the failure to file a request for hearing to review a citation, which is addressed in existing §60075.17(e) [proposed §60075(f)] is not a default issued by a hearing officer. Eliminating the phrase from this section would provide clarity and avoid confusion.

Amendments of paragraph (d) are being proposed for clarity. Also, staff is proposing that the time for filing a request for reinstatement be reduced from 30 days to 10 days. The staff believes that the initially provided period is too long and causes unnecessary delay in decisions becoming final and compliance achieved. It is believed that 10 days is a sufficient time period for a party to take action after receiving written notice of the default. The change is consistent with or less stringent than other administrative hearing

processes. (See e.g., Administrative Procedure Act, Government Code §11520 [7 days in which to file motion to request that default order be vacated]; “Rules of Practice and Procedure of the Occupational Safety and Health Appeals Board,” title 8, CCR, §383(b) [10 days for filing motion to request reinstatement after dismissal for failure to appear].

§60075.39 - Penalty Assessment Criteria

As required by SB 527, staff proposes to amend paragraph (b) so that the penalty criteria set forth in HSC §43031 is used to determine penalty amounts for citations issued under HSC §43023 in addition to §43028. ARB staff is also proposing to add an additional factor that would require a hearing officer to consider penalties or range of penalties established by the ARB in its rules or regulations that underlie the violation.

The staff believes that for reasons that are self-evident, this factor should be considered among others. In accord with similar directives of SB 527, staff proposes to add a new paragraph (c) which would set forth the penalty assessment criteria of HSC §42403 for citations issued under HS&C §42410. The staff further proposes similar changes to paragraph (b) to include an additional factor that would require the Executive Officer to also consider penalties or range of penalties established by the ARB in its rules or regulations that underlie the violation.

§60075.45– Judicial Review

Consistent with SB 527 and the discussion of previous amendments, above, staff proposes to add references to HSC §§42410 and 43023 in paragraph (a)(2).

V. IMPACT ON THE ENVIRONMENT, BUSINESS AND ECONOMY OF THE STATE

A. Environmental Impact

ARB staff has determined that the proposed amendments would impose no adverse environmental impacts. SB 527 provides an alternate avenue for enforcing provisions of the Health and Safety Code and rules and regulations of the ARB through assessment of administrative penalties.

The proposed amendments do not alter or relax existing ARB rules and regulations but, as stated, provides an alternative means for enforcement. The amendments are expected to provide the ARB with greater flexibility in selecting the appropriate forum for enforcement and allow the ARB to better utilize its enforcement resources. For less complex and serious violations involving less significant penalties, administrative hearings provide a more efficient and expeditious process than judicial court, while affording fair hearings and due process for all parties. A more efficient enforcement and administrative process is expected to improve environmental compliance, with consequential benefits to the health and welfare of the state.

B. Environmental Justice Issues

Having identified that the proposed regulations will not result in any adverse environmental impacts, this proposal would not adversely impact any community in the State, especially low-income or minority communities.

C. Impact on Businesses and Individuals

It has been determined that this rulemaking would not cause any adverse economic impact on businesses or small businesses and would not affect the ability of California businesses to compete with businesses in other states. As stated above, the proposed amendments do not substantively change existing enforcement authority but rather provides an alternative process for enforcing air quality laws. By providing a less formal, more expeditious process for resolving compliance disputes, the proposed procedures are expected to be of benefit to affected businesses and individuals as well as the ARB. More effective enforcement will benefit the great majority of businesses who comply with the law and who are adversely affected by those few businesses that attempt to gain an economic advantage through noncompliance.

Parties who elect to have matters heard under the proposed amended procedures may incur attorney fees for representation, which may run \$200.00 or more per hour if an attorney is used. However, while attorneys are typically used in judicial hearings, the proposed amended administrative hearings are less formal and arcane and allow parties to be represented by persons other than legal counsel. Representation costs are therefore expected to be significantly less than are presently incurred in judicial litigation.

The proposed amendments do not increase existing penalty amounts for violations. As stated administrative penalties cannot exceed historic levels for violations that have in the past been judicially enforced and that administrative penalties can only be assessed for those categories of violations for which the state board presently maintains the authority to impose civil penalties.

D. Fiscal and Economic Impacts on State and Local Government

It is not anticipated that this rulemaking will have a significant effect on local agencies or local programs or funds. While state and local government entities are subject to the same air pollution rules as businesses and individuals, and therefore may be subject to a monetary penalty if locally owned equipment or vehicles were found to be in violation, the proposal does not increase potential penalties. (See previous discussion in section C. above. SB 527 merely provides an alternative means for enforcing existing air quality laws and associated penalty provisions for violations.

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 pursuant to Part 7 (commencing with section 17500) Division 4, title 2 of the Government Code, or other discretionary savings to local agencies.

E. Alternatives Considered

Staff has determined that no alternative to this proposal would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to the affected persons than the proposed action.

SB 527 provides that the ARB may establish an alternative process for enforcing violations of the HSC and the ARB adopted rules and regulations. As stated above, the ARB has determined that adopting administrative procedures for assessing and adjudicating civil penalties for the violations covered in SB 527 is, in some circumstances, more efficient than judicial enforcement, while being equally protective of a party's due process. Accordingly, the ARB has rejected the alternative of not adopting administrative procedures for enforcing violations covered in SB 527.

In SB 527, the Legislature set forth specific directives for the ARB to follow if it elects to implement an alternative administrative enforcement process. Specifically, it directs the ARB to use the existing administrative procedures found at title 17, CRR §60065.1 et seq. and §60075.1 et seq., with certain expressed exceptions (e.g. use of hearing officers from the Office of Administrative Hearings, maximum caps on penalty assessments, limitations on penalty assessment authority, etc.) Thus, because of the expressed legislative directives, alternatives to the proposed administrative procedures are limited.

After public notice, the ARB staff held workshops to review the initial drafts of the proposed amendments implementing the requirements of SB 527. The staff received no suggested alternatives to the proposed amendments from interested stakeholders. Accordingly, because of the specific mandates of SB 527 and the fact that no suggested alternatives have been received, not other alternatives to the suggested amendments have been considered.