

CERT

CALIFORNIANS FOR ENFORCEMENT REFORM AND TRANSPARENCY

Californians for Enforcement-Reform and Transparency (“CERT”) is a diverse group of industries and trade associations (with thousands of affected members) that have come together to work in cooperation with the California Air Resources Board (“CARB”) and other stakeholders to adopt needed improvements to CARB’s compliance and enforcement programs.

I. MUTUAL ENVIRONMENTAL GOALS

By working with all stakeholders in a consensus-building process, CERT seeks to achieve our mutual goals of reducing air pollution, efficiently prioritizing enforcement resources, and promoting compliance through a fair, transparent, and consistent process. CERT aims to strengthen (not weaken) CARB through specific improvements that will help industry achieve full compliance and help CARB more efficiently and effectively meet its overriding objectives—protecting public health and the environment by reducing air pollution. To those ends, CERT’s objectives are as follows:

(1) Strengthen, preserve and enhance CARB’s credibility and integrity through the adoption and implementation of a consistent, fair, and transparent penalty policy that will further CARB’s core air quality goals - as recognized and supported by Chairwoman Nichols at the July 23, 2009 CARB hearing.

(2) Prioritize CARB’s Enforcement Program to address and correspond to non-compliant products that cause excess emission violations.

(3) Achieve full and fair compliance through a clear and transparent regulatory process, which provides sufficient notice of new requirements, timely compliance outreaches to all regulated entities, and adequate lead time; and

(4) Ensure that all regulated entities are treated equally and consistently across all realms of CARB's compliance, certification, and enforcement programs.

II. IMPROVEMENTS TO ENFORCEMENT POLICIES AND PROGRAMS

A. Proper Incentives to Promote Compliance

CERT Position: The Coalition members, and their representative companies, take environmental compliance seriously and are among the most reputable business operations in California. Nonetheless, administrative mistakes do happen. Blindly holding companies "strictly liable" for even the most minor, paperwork violations, without any consideration of culpability or efforts to improve environmental compliance, undermines CARB's credibility and eliminates incentives for improvement. CARB's enforcement program, including its penalty policy, should account for a demonstrated commitment to achieve compliance – such as the installation of environmental management systems or improving compliance through supplemental environmental projects.

Policy Questions:

1. Should CARB incorporate into a formal penalty policy, mechanisms such as reduced penalties for companies that demonstrate commitment to improving compliance (such as the installation of environmental management systems or supplemental environmental projects), to incentivize compliance?

B. Formal Penalty Policy

CERT Position: Currently, CARB's process for calculating penalties is unknown and without any clear basis. It is unclear what factors CARB uses to adjust penalties, and as a result, penalties appear to be uncertain, inconsistent, and disproportionate to the violation. A formal penalty policy will benefit CARB and improve its effectiveness in achieving our air quality objectives. A formal penalty policy will maximize CARB's limited resources by distinguishing between serious emissions

violations, which deserve serious penalties, from paperwork-type violations with no attendant environmental harm, for which reduced penalties are appropriate. An open, transparent, and consistent enforcement and penalty process will enhance compliance, level the playing field, achieve settlements more efficiently, and preserve credibility and integrity in the enforcement program. A formal penalty policy, similar to U.S. EPA's, should account for, among other factors, the level of harm to the environment from the violation and the economic benefit gained from the violation, steps taken to mitigate the violation, and cooperation during the investigation.

In addition to the policy questions below, CERT would like to work with CARB and the California State Legislature to clarify and direct how CARB should be implementing its authority under the current Health and Safety Code or under any new legislation. If additional authority or direction is needed under the Health and Safety Code to meet the policy goals discussed below, we should evaluate closely the potential benefits of such legislation. Enclosed as **Exhibit "A"** is a discussion of CARB's authority under the Health and Safety Code, and several legal questions CERT has regarding CARB's current interpretation of that authority.

Policy Questions:

1. How can CARB most effectively develop a clear and transparent penalty policy based on specific, clear criteria (severity of harm, mitigation, cooperation) to ensure consistency and fundamental fairness while providing for administrative efficiency?
2. CERT believes that serious emissions violations warrant serious penalties, but that penalties should be lowered for lesser violations with little to no environmental harm or avoided compliance costs. To that end, how should ARB distinguish between different grades of major vs. minor violations, (and different grades of "innocence" or "culpability") in a consistent and transparent manner?
3. As a matter of equity, should CARB be seeking the same duplicative penalties from different parties (*i.e.*, manufacturers, retailers, and dealers) for the same violation? If not, how can CARB ensure that overlapping penalties for the same violation are not being assessed?

4. As part of a formal penalty policy, should CARB clarify its repeat violator penalty policy ensuring that it is accessible, clear, and understood by all stakeholders? As part of an official repeat violator policy, would CARB commit to not using prior settlements that contain language that such settlements are not to be used in future enforcement matters for any purpose?
5. Why would CARB enforcement staff be adverse to adopting a formal penalty policy for its mobile source enforcement program, when the proactive and progressive South California Air Quality Management District, has long used and relied on a similar penalty policy and matrix to assess penalties for stationary sources?
6. The penalty criteria laid out in Health and Safety Code § 42400.8, are similar to that in § 43031 (the fuels criteria) and track very closely with the “universal” criteria CARB has, in the past, said it uses in mobile source enforcement cases (*see* Exhibit “A”). Is CARB adverse to making such criteria clear and transparent through a formal document specifically for use in mobile source enforcement cases? If so, why?

C. Administrative Hearing Process

CERT Position: CARB provides virtually no process or forum — other than litigation with the Attorney General — for regulated entities to reach a fair settlement. A fair, accessible administrative hearing process, similar to the administrative hearing procedure used by CARB for citations under the Heavy-Duty Vehicle Inspection Program, is a minimum due process obligation. Such a process would provide industry with an objective forum to challenge Agency action (including inconsistent penalties and factual inaccuracies), while at the same time providing CARB the same forum to explain its actions. In addition, an administrative hearing process would provide a much needed perception of fairness and would help encourage more transparent settlements from all parties.

Policy Questions:

7. Does CARB share the Governor’s and Cal EPA’s strong endorsement of a full range of administrative hearing processes as a mechanism to curb uneven, arbitrary enforcement? Similarly, does CARB believe that the perception of fairness in its enforcement program is important?

8. Does CARB believe, that as part of meaningful due process, it is important that regulated entities have the opportunity to air their grievances in an open, objective forum like an administrative hearing? Similarly, it appears that CARB's administrative hearing process is confined to the Heavy-Duty Vehicle Inspection program. Why has CARB not extended the same administrative hearing process to other portions of its enforcement program?
9. As part of regulated industries' due process rights, and in furtherance of an open, transparent regulatory environment, should ARB provide a clear, written assessment of the alleged violation and why it is seeking penalties?

III. TRANSPARENT AND OPEN GOVERNMENT

CERT Position: In any government agency, federal, state or local, a critical component of good governance is the ability for the Governor, State Legislature, Non-Governmental Organizations (like environmental groups) and taxpayers to have access to information relating to the allocation and use of all public funds. As part of improving the credibility of its enforcement program, CARB should commit to publishing an annual or bi-annual report detailing precisely how it assesses penalties under the Air Pollution Control funds and how it allocates and spends those penalties – consistent with proper oversight and authority. There should be an evaluation of whether settlement funds should ultimately go to the State, rather than being retained by CARB - in order to achieve CARB's core mission (protecting air quality) and to protect CARB's integrity and credibility.

Policy Questions:

10. How does CARB distinguish between penalties collected and spent under the Air Pollution Control Fund, and penalties collected and spent under other programs/funds?
11. In furtherance of open, transparent, good governance, should CARB publish a report detailing how it has spent money under the Air Pollution Control Fund?
12. How does CARB ensure that money collected and spent under the Air Pollution Control Fund is tied to CARB's core mission of reducing air pollution and protecting public health?
13. Are CARB enforcement staff authorized to allocate Air Pollution Control Funds?

IV. ENHANCING FULL COMPLIANCE

CERT Position: CERT is committed to working with CARB to achieve our mutual environmental goals and to achieve full compliance through compliance outreach and regulatory notice and clarity. To that end, California law requires each agency to follow specific procedures for making substantive regulatory changes, including an opportunity for public involvement, and sufficient and consistent notice. In every case, CARB should provide adequate notice of any contemplated change and make clear when specific new requirements apply. For example, CARB should never enforce informal guidance (or retroactively or prematurely apply new regulations)—please see **Exhibits “B”, and “C”** for examples of past and ongoing use of underground regulations by CARB enforcement staff. CARB’s full compliance with the California Administrative Procedures Act, and applicable “due process” requirements, is needed to provide adequate lead time and clarity and thereby achieve full compliance.

Policy Questions:

14. What are the procedures CARB uses to ensure that its enforcement staff are not imposing obligations based on underground regulations or guidance that have not undergone the required rulemaking procedures in California (*i.e.*, review and approval by OAL)?
15. If CARB found out that its staff had been unlawfully imposing obligations through underground regulations or guidance, how would it remedy the situation? For example, would CARB stop all enforcement activities in such a case? What steps would CARB take to communicate to the regulated entity that it is addressing the situation? Does CARB have any internal procedures in place that address the unlawful use of underground regulations or guidance?
16. If CARB found out that it had collected penalties via a settlement agreement based on the use or enforcement of an underground regulation, how would the Agency remedy that situation? Should CARB reopen and revisit the lawfulness of the penalties under such a prior settlement?
17. If a regulated entity believes ARB is unlawfully enforcing an underground regulation, who would that entity contact to voice its concern and what process does ARB have in

place to ensure that all the facts—from both industry’s and ARB’s perspective—are appropriately vetted?

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With these goals and improvements in mind, CERT looks forward to a long-term, constructive, ongoing dialogue with CARB and other stakeholders to improve CARB’s compliance and enforcement programs.

Exhibit A – Health and Safety Code Legal Questions

CARB’s statutory authority to apply penalty criteria for various violations of the Vehicle Air Pollution laws is antiquated, convoluted, and unclear to all stakeholders, perhaps even CARB—it is our understanding that CARB, on multiple occasions in the past, has sought legislative clarity to various provisions of the Health and Safety Code. Specifically, CARB most frequently uses authority under three sections of the Health and Safety Code to assess penalties for mobile source violations—sections 43016, 43154, and 43212. The penalties under these sections vary from \$50 per vehicle for a violation all the way to \$5,000 per vehicle. The direction under these statutes is vague (*e.g.*, § 43154 may be used against manufacturers/dealers for certification violations, while § 43212 may be used against manufacturers/dealers for emissions standards or test procedure violations, but the penalty amount differs by an order of magnitude of 100) and regulated entities rarely understand why CARB chooses one authority over another (aside from the potential penalty).

Further, it is unclear how CARB uses what it has called “universal” penalty criteria to pursue penalties under its mobile source authorities. For example, in the past CARB has referenced § 43152 and the following language—“no person . . . shall intentionally or negligently import, deliver, purchase, receive, or otherwise acquire a new motor vehicle . . . which has not been certified”—as the mechanism it uses to implement “penalty criteria” in mobile source enforcement cases. It is unclear, however, how considerations of “intent” translate into penalty criteria considerations, such as the nature of environmental harm, excess emissions, past compliance, or economic benefit from avoided compliance costs. CARB has never explained, at least in a clear and public manner, how it considers

such universal criteria under the auspices of “intent.” Moreover, considerations of “intent” are only required under § 43152 for “certification” violations and not under either of the other two mobile source authorities (§§ 43016 or 43212). Therefore, it is unclear whether, for penalties under these provisions, CARB considers any factors or criteria at all.

The penalty authorities cited above were promulgated over 30 years ago, during the dawn of environmental regulation; certainly before the regulation of off-road vehicles was understood; and before the utility of penalty criteria was recognized. That 30 years ago, the legislature either established no guidance regarding criteria that should be factored into a penalty calculation (*i.e.*, §§ 43016 or 43212), or blunt and anachronistic “mental elements” derived primarily from criminal law (*i.e.*, “intentional” and “negligent” considerations in § 43152) is not surprising. As effective principles of regulation have developed, however, the legislature has advanced in its thinking as well. Indeed, the last time the legislature ceded CARB authority to enforce penalties for violations under the fuels program, it wisely set forth the very “universal” criteria CARB says it considers under the aforementioned mobile source provisions. *See* Health and Safety Code § 43031, (promulgated in 1996, requires CARB to consider the extent of the environmental harm, the nature and persistence of the violation, the compliance history, the mitigation efforts taken, the effort required to comply, the cooperation of the violator, and in some cases the size of the business). It is these same universal penalty criteria that CERT supports making part of the overall mobile source enforcement program. To that end, the following questions address some of CERT’s concerns about this issue:

18. Should CARB not make clear, not only to regulated entities but to the general public, its process for choosing which Health and Safety Code authority to use in enforcement cases?

19. H&S Code §§ 43016 and 43154 both permit CARB to assess penalties “not to exceed” the applicable dollar amount. It is our understanding that CARB takes the position that it assesses maximum penalties depending on the specific violation or level of intent (top-down), whereas EPA calculates penalties from the bottom up. Why does CARB start with maximum penalties when the statutory direction (“not to exceed”) seems to require a bottom up approach? If CARB starts from the top, what is its process for adjusting penalties downward, and how does it communicate this process to the violator (or the broader public)?
20. Does CARB have a formal policy to guide its enforcement staff in choosing under which authority (H&S Code §§ 43016, 43154, 43212) to assess penalties? If not, should CARB develop such a policy and make it publicly available so that it is clear in each case how CARB is using its regulatory authority and considering universal penalty criteria?
21. The last time the legislature spoke on CARB penalty authority in 1996, it provided CARB with “universal” criteria for fuels violations in H&S code § 43031 (*i.e.*, nature of the harm, excess emissions, compliance history, mitigation, cooperation etc.). Similarly, universal penalty criteria are required for certain stationary source violations (*see* H&S Code § 42400.8 – requires CARB to consider the extent of harm, the nature and persistence of the violation, compliance history, effort to comply, mitigation efforts, etc.). Does CARB consider these to be universal criteria and apply them in all mobile source enforcement cases?
22. Does CARB believe it needs additional statutory authority for it to consider universal penalty criteria in its mobile source program? If so, would CARB be amenable in cooperatively seeking such authority?
23. Is it CARB’s position that penalty criteria for non-fuel, non-road mobile source violations is dictated by “intentional” and “negligent” statutory language? If so, how does the consideration of “intent” or “negligence” translate into a consideration of the universal criteria in § 43031 or § 42400.8.
24. H&S Code § 43154 permits CARB to seek a \$5,000 penalty per vehicle for certification violations of the new “motor vehicle” regulations. The legislature gave CARB this authority in 1976 to combat California’s serious and growing air pollution problem from on-road motor vehicles.¹ What is CARB’s justification for using § 43154, for a variety of off-road mobile sources, particularly given the stark differences between on-road and off-road engines and emissions?
25. In what circumstances does CARB choose to seek penalties under H&S Code § 43212 (as opposed to § 43154), which authorizes penalties of \$50 per vehicle for manufacturer and dealer failures to comply with emissions standards or test procedures? Similarly, how

¹ The definition of “motor vehicle” in the Vehicle Code (which applies to the Health and Safety Code) is so broad, it means any vehicle that is self-propelled, except a wheelchair. *See* § 415 of the Vehicle Code.

does CARB distinguish penalties that fall under § 43016 vs. 43212 or 43154, and how does CARB communicate its process to the public?

Exhibit B Composite Wood Products ATCM

The American Home Furnishing Association (“AHFA”) brought to CERT’s attention an ongoing regulatory struggle its members are experiencing that illustrates the kind of problems with CARB’s enforcement program that CERT is seeking to remedy. CARB recently promulgated the Composite Wood Products Air Toxics Control Measure (“ATCM”), which requires downstream parties to take a variety of reasonable and prudent precautions (due diligence, recordkeeping, labeling, etc.) related to the chain of custody of finished composite wood products. These downstream entities must comply with the “reasonable prudent precautions” measures under the ATCM to ensure that the original manufacturer has complied with applicable emissions standards (in this case – formaldehyde emissions).

Importantly, the ATCM does not require downstream entities to do anything other than take “reasonable prudent precautions,” and does not set forth any lawful procedure CARB could apply to conduct deconstructive testing on finished goods.

Nevertheless, over the past several months, CARB enforcement staff has indicated it will conduct de-constructive testing using its own new procedure on finished goods at downstream facilities to determine formaldehyde content (*i.e.*, compliance with the ATCM). In so doing, CARB has essentially injected a new regulatory requirement into the ATCM where none existed before. CARB’s deconstructive test procedures have been imposed without any advanced notice, lead time, or meaningful discussion with any stakeholder, including environmental groups. This is precisely the type of “underground regulation” CERT is concerned with, and that appears to be a pattern and practice within CARB’s enforcement program.

Downstream furniture manufacturers and retailers are being held to a more stringent standard that is not in the regulations, while many, if not all, are complying with the “reasonable prudent precautions” that are set forth in the regulations.

Exhibit C – CARB Underground Regulations

In July of 2006, CARB approved amendments to the Off-Highway Recreational Vehicle (OHRV) program.² The amendments included the adoption of evaporative emissions standards, revision of OHRV riding seasons, and the transfer of off road utility vehicles into the OHRV program from the Offroad Large Spark Ignition Engine (LSI) program.

The regulations adopted by CARB in July 2006 moved most off-road utility vehicles into the OHRV classification, designating them as either “Off-Road Utility Vehicles” or “Off Road Sport Vehicles.” However, CARB never issued the required 15-day notice for the July 2006 proposed amendments, and consequently, they were never finalized, and never had the force of law. In fact, CARB continued to make changes to the provisions of these regulations, once in March 2007 and once again in May 2007. The proposed amendments did not become final until August 15, 2007. Therefore, prior to August 15, 2007, CARB lacked the authority to require vehicles to comply with the proposed OHRV regulations. Despite this lack of authority, CARB staff required that certain products, including ATV’s regulated under the Large-Spark Ignition (LSI) program, certify under the OHRV proposed amendments (*i.e.*, requiring compliance with underground regulations). CARB certification staff were inconsistent in their approach across product categories, and consequently some products were “conditionally certified” under the proposed OHRV amendments, while other products, like the Yamaha Rhino, became mired in regulatory confusion and were never certified. In the wake of these events, CARB has threatened to pursue enforcement against dealers that sold certain ATV products that were not properly

² See Cal Code Regs. Title 13, §2410-2415 (Attached hereto as Exhibit “C”).

certified to the aforementioned underground regulations. CARB would require these dealers to pay a fine, as well as recall the affected vehicles in order to be properly certified.