

The EPA Penalty Policy is a Model that CARB Should Adopt in Order to Achieve Consistency , Efficiency and Transparency

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The enforcement office of the California Air Resources Board does not have a public policy for calculating the amount of penalties for violations of the mobile source requirements. Instead, for each violation the CARB enforcement office informs the violator of the penalty it must pay, but does not describe the internal procedure or criteria used to calculate the penalty amount. CARB and parties subject to the mobile source requirements would benefit from a published penalty policy, because a public policy would provide transparency in the penalty process, consistency in calculating penalty amounts and greater efficiency in initiating and resolving enforcement actions. The U. S. Environmental Protection Agency recently published a mobile source penalty policy that provides a model that CARB should consider. I helped develop this EPA Penalty Policy based on my 30 years of experience as an attorney at EPA handling enforcement matters and cases.

The EPA mobile source penalty policy, published on January 16, 2009, was developed in response to a significant increase in the number and types of mobile source enforcement actions being prosecuted by EPA. This increase occurred because many categories of nonroad vehicles and engines recently became subject to federal emission

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standards. In addition, there was a significant increase in the number of enforcement actions, particularly involving importations of uncertified engines from China.

The EPA penalty policy was developed to calculate penalty amounts in an easy and objective manner. Under the policy, penalties usually can be calculated using information contained in inspection reports, which avoids the time and expense of gathering additional technical information prior to beginning an enforcement action. In addition, penalty amounts calculated under the EPA penalty policy reflect the comparative egregiousness of violations across the entire mobile source program, so that enforcement consistency is achieved.

Penalties calculated under the EPA penalty policy are based on the factors specified in the Clean Air Act for setting penalties for mobile source violations. These factors include the gravity of the violation, the violator's economic benefit from the violation, the size of the violator's business, the violator's history of compliance, the violator's actions to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and other matters as justice may require. The EPA penalty policy also takes into account whether the violator's actions were willful or negligent, and the violator's degree of cooperation.

The gravity penalty component reflects the egregiousness of the violation based on the potential for excess emissions. The amount of emissions an uncontrolled engine emits is approximately proportional to the size of the engine. This is true for both gasoline and diesel engines. However, the actual level of excess emissions for any particular engine can be determined only through expensive emissions testing, which

normally is justified only in cases involving a large number of vehicles. Therefore, penalties in routine cases are based on potential, as opposed to actual, excess emissions.

As a result, the gravity penalty component is based on the horsepower of the engines in violation, the number of engines, whether the particular violation is likely to result in excess emissions (e.g., a missing catalytic converter results in a larger penalty than missing label information), and whether the violator has remedied the violation.

The economic benefit penalty component is intended to recover any significant economic benefit of noncompliance to the violator. However, precise calculation of a violator's economic benefit normally would require a fact-specific economic analysis that is time-consuming and expensive. As a result, the EPA penalty policy uses a "rule of thumb" method of calculating economic benefit based on the number of vehicles or engines in violation and their horsepower, which is appropriate because the cost of emissions control is roughly proportional to engine horsepower. Nevertheless, evidence of actual economic benefit can be substituted in any particular case if the violator has evidence the rule of thumb estimate is too high or if the government has evidence this estimate is too low.

The EPA penalty policy has proven to be an effective tool for calculating penalties for most mobile source violations. The policy provides consistency by basing penalties on the potential for excess emissions, which reflects the environmental purpose for the mobile source requirements. The policy streamlines the enforcement practice by basing gravity and economic benefit penalty calculations on readily available information, such as engine horsepower and number of engines in violation, which allows most routine cases to proceed without the need for emissions testing or other in-depth

technical or economic evaluation. The transparency of the policy allows the regulated parties to understand how penalties are calculated using objective criteria, which promotes case resolutions that are achieved more quickly with less contention.

It is likely that CARB's mobile source enforcement program would achieve these same benefits if it adopted a public penalty policy. CARB should adopt a policy modeled on the EPA penalty policy in order to achieve consistency, efficiency and transparency in its enforcement program.