



SB 1402 - TRANSPARENCY AND GOOD GOVERNMENT

I. PURPOSE OF AMENDMENT

- Increase the transparency and consistency of CARB enforcement under the Health and Safety Code. Requires CARB to provide transparent communications during the enforcement and settlement process both to the regulated community and the public. These communications must include, among others, the manner in which CARB determined the penalty amount, the aggravating and mitigating factors CARB considered for the penalty, the per unit vehicle basis for the penalty, whether there were direct pollution emissions resulting from the violation or not, and CARB’s statutory authority for the penalty.
- Clarifies CARB’s statutory authority under the Health and Safety Code to ensure CARB complies with the \$5,000 per vehicle cap on penalties and does not apply multiple penalties for the same violation. Using multiple sections of the Health and Safety Code, CARB currently calculates separate and overlapping \$5,000 penalties for the same conduct (see below in Section III).
- Creates a level playing field by ensuring that all penalties under the Health and Safety Code are transparent, predictable, consistent, and proportional to the nature of the violation. The amendment requires CARB, in assessing penalties for mobile source violations, to consider objective penalty policy factors related to the violation, which include the nature and extent of the harm to the environment, the defendant’s compliance history, and any mitigation efforts by the defendant. These “penalty criteria” are modeled after existing criteria under both the U.S. EPA’s mobile source and CARB’s fuels programs.

II. ILLUSTRATION OF PROBLEM

- CARB’s penalty assessment process under the mobile source provisions of the Health and Safety Code is not transparent. CARB is not required to consider any of the objective factors discussed above, nor make its decisions available – either to the regulated entity or the public. For example, CARB is not required to, and generally does not, explain how it calculates penalties or discounts for mitigation efforts. The result is a patchwork scheme of penalties which often bear no relation to the nature of the violation. This random and uncertain enforcement environment is harming California business and eroding CARB’s credibility. Below are several case illustrations that demonstrate inconsistent results that bear no relation to the impacts on air quality.

A. Cases With Apparent Adverse Environmental Impacts

- April 2004 penalty of \$106,337 against a distributor for the sale of 2,415 uncertified engines, which appear to have caused emissions exceedences. Yet, the per-unit penalty (approximately \$45) is more consistent with a mis-labeling violation. (See Section C below).
- August 2005 penalty of \$100,000 against a distributor for \$100,000 per party for the sale of an unspecified number of non-compliant and non-California certified scooters.
- April, 2009 penalty of \$93,000 against a manufacturer/distributor for an unspecified number of motorcycles sold without required evaporative control equipment.

B. Cases With No Apparent Adverse Environmental Impacts

- June 2008 penalty of \$6 million against a construction company for allegedly operating portable engines without required air district pollution permits. The alleged violation centered on a failure to obtain necessary permits, and appears to carry zero adverse emissions impacts. Clearly, this penalty far exceeds others with clear adverse air impacts.
- Spring 2009 penalty of \$180,000 against a manufacturer/distributor for a DMV glitch allowing off-road motorcycles to be used on-road. There appears to be no emissions impacts, yet the penalty exceeds most of the settlements with emissions impacts.

C. Inconsistent Paperwork/Ministerial Penalties

- For smaller “mislabeling” penalties, CARB will apply a \$50/unit penalty in some cases, while for other identical violations CARB will apply a \$5,000/unit penalty. CARB has not explained the disparity and does not provide enough details in any given settlement for the regulated community to be clear about the Agency’s approach.

III. AMENDMENTS TO HEALTH AND SAFETY CODE

CARB uses the following sections of the Health and Safety Code to assess penalties for various violations of its mobile source regulations. These sections are unclear, duplicative, and in need of legislative clarification. SB 1402 would make the following changes to these provisions: (1) clarify that the legislature intended that a certification violation be capped at \$5,000 per vehicle under § 43154; (2) clarify that the legislature intended that these provisions of the Health and Safety Code do not provide the authority to assess multiple penalties on multiple parties for the same violation (*i.e.*, no aggregating penalties under §§ 43151-43153 for the same violation); and (3) update the Health and Safety Code with other parts of the code that require CARB to consider the penalty policy criteria mentioned above. As the following sections demonstrate, the certification provisions of the Health and Safety Code are deficient in these respects, and do not contain any penalty policy criteria.

The following are the provisions under Health and Safety Code, Division 26, Part 5, Vehicular Air Pollution Control law, used for certification violations:

§ 43151. (a) No person who is a resident of, or who operates an established place of business within, this state shall import, deliver, purchase, rent, lease, acquire, or receive a new motor vehicle, new motor vehicle engine, or motor vehicle with a new motor vehicle engine for use, registration, or resale in this state **unless such motor vehicle engine or motor vehicle has been certified** pursuant to this chapter. No person shall attempt or assist in any such action.

Note - CARB is not required to consider any penalty policy criteria.

§ 43152. No person who is engaged in this state in the business of selling to an ultimate purchaser, or renting or leasing new motor vehicles or new motor vehicle engines, including, but not limited to, manufacturers, distributors, and dealers, shall **intentionally or negligently import, deliver, purchase, receive, or otherwise acquire** a new motor vehicle, new motor vehicle engine, or vehicle with a new motor vehicle engine which is intended for use primarily in this state, for sale or resale to an ultimate purchaser who is a resident of or doing business in this state, or for registration, leasing or rental in this state, **which has not been certified** pursuant to this chapter. No person shall attempt or assist in any such act.

Note – Under § 43152 CARB is not required to consider any penalty policy criteria. The inclusion of “intentional” or “negligent” elements are not sufficient substitutes for penalty policy criteria.

§ 43153. No person who is engaged in this state in the business of selling to an ultimate purchaser or renting or leasing new motor vehicles or new motor vehicle engines, including, but not limited to, manufacturers, distributors, and dealers, shall **intentionally or negligently sell, or offer to sell,** to an ultimate purchaser who is a resident of or doing business in this state, or lease, offer to lease, rent, or offer to rent, in this state any new motor vehicle, new motor vehicle engine, or vehicle with a new motor vehicle engine, which is intended primarily for use or for registration in this state, and **which has not been certified** pursuant to this chapter. No person shall attempt or assist in any such action.

Note - Under § 43153 CARB is not required to consider any penalty policy criteria. The inclusion of “intentional” or “negligent” elements are not sufficient substitutes for penalty policy criteria.

43154. (a) Any person who violates any provision of this article shall be liable for a civil penalty **not to exceed five thousand dollars (\$5,000) per vehicle.**

Note - § 43154 confines CARB's use of §§ 43151-43153 to a per vehicle cap of \$5,000. CARB does not follow § 43154 and instead routinely combines its authority under §§ 43151-43153 to assess a per vehicle penalty of \$15,000 or more.

And for mislabeling violations, CARB relies on Health and Safety Code section 43212, which states:

43212. Any manufacturer or distributor who does not comply with the emission standards or the test procedures adopted by the state board shall be subject to a civil penalty of fifty dollars (\$50) for each vehicle which does not comply with the standards or procedures and which is first sold in this state. The payment of such penalties to the state board shall be a condition to the further sale by such manufacturer or distributor of motor vehicles in this state.

Any penalty recovered pursuant to this section shall be deposited into the Air Pollution Control Fund.

Note – Nothing on the face of § 43212 grants CARB the authority to assess penalties for mislabeling.