Study E-100 October 1, 1999

Memorandum 99-68

Air Resources Technical Revisions (Comments on Tentative Recommendation)

In June 1999, the Commission circulated a tentative recommendation proposing miscellaneous technical revisions to Parts 1 to 4 of Division 26 of the Health and Safety Code (relating to air quality). The proposed changes would solve technical problems that were identified in the course of the Commission's recent study of environmental and natural resource statutes.

We received letters of comment regarding the tentative recommendation from the California Council for Environmental and Economic Balance (CCEEB) (see Exhibit pp. 1-2) and the California Air Resources Board (ARB) (see Exhibit pp. 3-4). The issues raised by the commentators are discussed below. All statutory references are to the Health and Safety Code.

ADMINISTRATIVE CIVIL PENALTIES

The tentative recommendation contains a minor substantive change. It would correct an apparent oversight in the drafting of a section authorizing the imposition of a $500 administrative civil penalty for violation of nonvehicular air pollution law. See Section 42402.5. All of the provisions imposing criminal or civil penalties for such violations provide that each day in which a violation occurs constitutes a separate violation for the purpose of calculating a penalty. See Sections 42400-42400.4, 42402-42402.3. The administrative civil penalty provision does not contain equivalent language. Thus, if a criminal or civil penalty is imposed against a violator, the penalty can range from $1,000 to $50,000 per day of violation. If an administrative civil penalty is imposed, it would be limited to $500, regardless of the duration of the violation. The staff suspected that the omission of language providing that each day is a separate violation from Section 42402.5 was an oversight. When that issue was first raised, ARB concurred in the staff's conclusion (see Memorandum 98-76 at Exhibit p. 30):

> The application of [Section 42402.5], regarding each day of violation constituting a separate offense, is probably what the

> Legislature intended, and is how the ARB has always interpreted the provision. This interpretation gives more enforcement discretion to the districts, thus keeping more cases out of court. If administrative penalties were limited to a total of $500.00 per offense, instead of for each day during which the offense continued, the discrepancy between penalties available under this provision and penalties available in court would greatly limit the efficacy of this provision.

For this reason, the tentative recommendation proposed amending Section 42402.5 as follows:

> 42402.5. (a) In addition to any civil and criminal penalties prescribed under this article, a district may impose administrative civil penalties for a violation of this part, or any order, permit, rule, or regulation of the state board or of a district, including a district hearing board, adopted pursuant to Part 1 (commencing with Section 39000) to Part 4 (commencing with Section 41500), inclusive, if the district board has adopted rules and regulations specifying procedures for the imposition and amounts of these penalties. No administrative civil penalty levied pursuant to this section may exceed five hundred dollars ($500) for each violation. However, nothing in this section is intended to restrict the authority of a district to negotiate mutual settlements under any other penalty provisions of law which exceed five hundred dollars ($500).
>
> (b) Each day in which a violation occurs is a separate offense.
>
> **Comment**. Section 42402.5 is amended to provide that each day in which a violation occurs under this section is a separate offense. This is consistent with the provisions of this article providing for civil and criminal penalties. See Sections 42400(e), 42400.1(c), 42400.2(e), 42400.3(c), 42400.4((d), 42401, 42402(c), 42402.1(c), 42402.2(d), 42402.3(b).

CCEEB opposes this change (see Exhibit p. 2, emphasis in original):

> CCEEB recognizes that the proposed added language is contained in other sections of the air quality statutes. However, adding the same language to the section in question is a substantive change to state law that could affect the amounts of administrative civil penalties that are imposed. The language raises the policy issue of whether administrative penalty authority should be treated the same as traditional civil penalty authority. *This proposed change is a significant substantive change that is outside the scope of this "Technical Revisions" effort. CCEEB accordingly recommends the*

> *proposed amendment to Section 42402.5 on Page 23 of the tentative recommendation be deleted.*

This suggests that the proposed change could be politically controversial. This is a problem for two reasons: (1) We haven't had a full discussion of the policy issues and therefore can't be sure that our recommend change is the correct one. (2) We may want to try to get the proposed law introduced as a committee bill, considering that it might be difficult to find an author willing to introduce such a technical bill. A committee may well be unwilling to include a controversial substantive provision in an otherwise technical bill. **The Commission should probably delete Section 42402.5 from the recommendation.** The ARB is certainly aware of the problem with that section and could perhaps get it resolved in other legislation.

SUGGESTIONS OF THE AIR RESOURCES BOARD

ARB expresses general support for the recommended changes, but points out a few minor changes that should be made (see Exhibit pp. 3-4.):

> The ARB supports each of the proposed amendments, with the technical corrections noted in the attachment to this letter. ARB greatly appreciates the work of the Commission and its staff in reviewing and updating these provisions; we are glad that ours were among the first set of statutes to be reviewed pursuant to Study E-100 so that we can receive the benefits of that effort.

The suggestions made by ARB are discussed below:

Additional Obsolete Provision

The ARB maintains that subdivisions (a) and (b) of Section 42301.5 are obsolete and should be deleted. See Exhibit p. 4. The subdivisions provide for a five year deferral to the effect of regulations on facilities that were authorized for construction from 1981 to 1987. The deferral runs from the date of issuance of a permit to operate the facility. It is conceivable that a facility authorized for construction in 1987 might not have been issued a permit to operate until 1994 or later, in which case the five year deferral would still be in effect. However, the ARB staff checked with the various districts and reports that this problem does not exist. **The change should be implemented as follows:**

42301.5. (a) ~~Except as provided in subdivision (b), any district regulation which requires a reduction in emissions from any article, machine, equipment, or contrivance for which an authority to construct was issued between January 1, 1981, and December 31, 1987, inclusive, shall become effective for that article, machine, equipment, or contrivance five years after issuance of the permit to operate if the regulation was adopted after issuance of the authority to construct and construction has commenced within two years of the date of issuance of the authority to construct or the applicant has, in good faith reliance upon the permit issued, performed substantial work or incurred substantial liability.~~

~~(b) The district may require compliance with a regulation prior to completion of the five-year period specified in subdivision (a) if the district or a portion of the district is designated by the state board as a nonattainment area for any national ambient air quality standard and the district determines that earlier compliance is necessary to demonstrate reasonable progress toward attainment and that, on a case-by-case basis, compliance with the regulation will not do any of the following:~~

~~(1) Require the abandonment or removal from service of any existing manufacturing or energy-producing equipment.~~

~~(2) Specify an emission level or operating standard which would cause a substantial increase in the rate of degradation of energy-producing equipment or would cause a violation or voiding of a manufacturer's warranty for that equipment.~~

~~(3) Result in an increase in operating costs in excess of 5 percent per year for the article, machine, equipment, or contrivance for which the authority to construct was originally issued.~~

~~(4) Require an increase in capital costs in excess of one hundred thousand dollars ($100,000) or 3 percent of the original capital cost of the article, machine, equipment, or contrivance for which the authority to construct was originally issued, whichever is greater.~~

~~(c)~~ Any article, machine, equipment, or contrivance which may emit into the ambient air any toxic air contaminant identified pursuant to Section 39662 shall comply with any regulation adopted by the state board or a district requiring a reduction in emissions of that contaminant or chemical from the article, machine, equipment, or contrivance consistent with a reasonable schedule of compliance, as determined by the state board or the district.

~~(d)~~ (b) (1) Any article, machine, equipment, or contrivance which is located within a district which is designated by the state board as a nonattainment area for any national ambient air quality standard, and for which an authority to construct is issued on or after January 1, 1988, shall comply with any district regulation which is adopted after December 31, 1982, and which requires a

reduction in emissions of any air pollutant, including any precursor of an air pollutant, which interferes with the attainment of the standard, from that article, machine, equipment, or contrivance consistent with a reasonable schedule of compliance, as determined by the district.

(2) In determining a schedule of compliance under this subdivision, the district shall consider the extent to which the proposed schedule will adversely affect the ability of the facility owner or operator to amortize the capital costs of pollution control equipment purchased within the preceding five years.

Comment. Section 42301.5 is amended to eliminate obsolete provisions.

Cross Reference Problems

The ARB points out an erroneous cross-reference to a section that we propose to repeal as obsolete — Section 41507. See Exhibit p. 4. **The staff recommends that Section 39515 be revised to eliminate the erroneous reference:**

39515. (a) The state board shall appoint an executive officer who shall serve at the pleasure of the state board and, except as provided in subdivision (d), may delegate any duty to the executive officer which the state board deems appropriate.

(b) The intention of the Legislature is hereby declared to be that the executive officer shall perform and discharge, under the direction and control of the state board, the powers, duties, purposes, functions, and jurisdiction vested in the state board and delegated to the executive officer by the state board.

(c) The state board shall, upon the receipt of a petition from any affected member of the public, affected district, or designated air quality planning agency, hold a public hearing to review any action taken by the executive officer ~~relating to any of the following~~:

~~(1) Making any order pursuant to Section 41507, 41602, or 41603.~~

~~(2) Taking action~~ pursuant to Section 41650, 41651, or 41652.

(d) Any action taken by the executive officer pursuant to Section 40469 or Sections 41503 to 41505, inclusive, shall be subject to the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Section 39515 is amended to eliminate obsolete references to former Health and Safety Code Sections 41507, 41602, and 41603. Those sections are repealed. See 1988 Cal. Stat. ch. 1568, §§ 23 & 24, and the act that amended this section.

The ARB also points out an apparent erroneous cross-reference in a provision that is not included in the tentative recommendation — Section 41865. See

Exhibit p. 4. Section 41865(i) appears to regulate rice field burning in the years 2001 and thereafter. However, it refers to paragraph (c)(3), which governs rice field burning in 1998. ARB maintains that the reference should be to paragraph (c)(4), which provides that the limit on rice field burning in the years 2001 and thereafter "shall be the number of acres prescribed in subdivision (i), subject to subdivisions (f) and (h)." This appears to be correct. **The staff recommends that the Section 41865(i) be amended as requested by ARB.** Relevant portions of that section, with the recommended change, are set out below:

> 41865. …
>
> (c) Notwithstanding Section 41850, rice straw burning in counties in the Sacramento Valley Air Basin shall be phased down, as follows:
>
> (1) From 1998 to 2000, the maximum spring and fall burn acres shall be the following number of acres planted prior to September 1 of each year:

Year	Maximum Fall Burn Acres	Maximum Spring Burn Acres
1998	90,000	110,000
1999	90,000	110,000
2000	90,000	110,000

> (2) Notwithstanding paragraph (1), any of the 90,000 acres allocated in the fall that are not burned may be added to the maximum spring burn acres, provided that the maximum spring burn acres does not exceed 160,000 acres.
>
> (3) Notwithstanding paragraph (1), the maximum acres burned between January 1, 1998, and August 31, 1998, shall be limited so that the total acres burned between September 1, 1997, and August 31, 1998, do not exceed 38 percent of the total acres planted prior to September 1, 1997.
>
> (4) In 2001 and thereafter, the maximum annual burn acres shall be the number of acres prescribed in subdivision (i), subject to subdivisions (f) and (h).
>
> …
>
> (i)(1) The maximum annual number of acres burned in the Sacramento Valley Air Basin pursuant to paragraph ~~(3)~~ (4) of subdivision (c) shall be the lesser of:
>
> (A) The total of 25 percent of each individual applicant's planted acres that year.
>
> (B) A total of 125,000 acres planted in the Sacramento Valley Air Basin.

(2) Each grower shall be eligible to burn up to 25 percent of the grower's planted acres, as determined by the air pollution control officers in the Sacramento Valley Air Basin and subject to the maximum annual number of acres burned set forth in paragraph (1), if the grower has met the criteria for a conditional rice straw burning permit.

(3) The air pollution control council shall annually determine which is the lesser of subparagraphs (A) and (B) of paragraph (1), and shall determine the maximum percentage applicable to all growers subject to the conditions set forth in subdivisions (f) and (h).

(4) A grower who owns or operates 400 acres or less who has met the criteria for the issuance of a conditional rice straw burning permit may burn his or her entire acreage once every four years, provided that the limit prescribed in paragraph (1) is not exceeded.

(5) Nothing in this subdivision shall permit an applicant to transfer, sell, or trade any permission to burn granted pursuant to this subdivision to another applicant or individual.

…

Comment. Subdivision (i) of Section 41865 is amended to correct an erroneous cross-reference.

Punctuation

The ARB points out a comma that is made superfluous by an amendment to Section 40454(a). See Exhibit p. 4. **The comma will be deleted.**

Respectfully submitted,

Brian Hebert
Staff Counsel

California Council for Environmental and Economic Balance

100 Spear Street, Suite 805, San Francisco, CA 94105 • (415) 512-7890 • FAX (415) 512-7897

VIA FACSIMILE & U.S. MAIL

September 15, 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Attention: Mr. Brian Hebert

Re: June 1999 California Law Revision Commission Tentative Recommendation: Air Resource Technical Revisions

Dear Commission Members:

The California Council for Environmental and Economic Balance ("CCEEB") is a nonpartisan, nonprofit coalition of business, labor and public leaders who work to develop and advance collaborative strategies to protect California's environment and at the same time maintain a sound economy. Over the last twenty-five years, CCEEB has actively participated in the development of California's environmental laws. Following are CCEEB's comments regarding the California Law Revision Commission's (the "Commission's") June 1999 Tentative Recommendation regarding "Air Resource Technical Revisions" (the "Tentative Recommendation").

1. SUGGESTED DELETION OF PROPOSED AMENDMENT TO HEALTH AND SAFETY CODE SECTION 42402.5

As explained below, CCEEB has one suggested change to the Tentative Recommendation:

The Draft Proposal to Make a Substantive Change to an Administrative Civil Penalties Provision Should be Deleted.

[See Tentative Recommendation at Page 23, proposed change to Health and Safety Code Section 42402.5.]

2. WHY THE PROPOSED SUBSTANTIVE CHANGE SHOULD BE DELETED

The Tentative Recommendation includes a draft legislative proposal that would make changes to forty-two sections of the State's air quality statutes. As noted in the introduction, almost all of these changes are intended to correct erroneous cross-references or delete obsolete provisions. In the Tentative Recommendation, Commission staff notes that the proposed law would make two "minor substantive changes." The section referenced above would make one of the two substantive changes.

Existing Health and Safety Code Section 42402.5 authorizes air district to impose administrative penalties for specified violations. This authority is in addition to authority to impose civil and criminal penalties established under other provisions. The Tentative Recommendation would add language to provide that "each day in which a violation occurs is a separate offense."

CCEEB recognizes that the proposed added language is contained in other sections of the air quality statutes. However, **adding the same language to the section in question is a substantive change to state law that could affect the amounts of administrative civil penalties that are imposed. The language raises the policy issue of whether administrative penalty authority should be treated the same as traditional civil penalty authority. This proposed change is a significant substantive change that is outside the scope of this "Technical Revisions" effort. CCEEB accordingly recommends that the proposed amendment to Section 42402.5 on Page 23 of the Tentative Recommendation be deleted.**

Thank you for considering CCEEB's comments. If you have any questions, please call me at (415) 512-7890 or Ms. Cindy Tuck at (916) 446-3970.

Sincerely,

Victor Weisser /by CKT

VICTOR WEISSER
President

VW/CKT;ad
Law Revision Comm. 09.15.99

cc: Mr. Jackson R. Gualco
Ms. Cindy K. Tuck

Air Resources Board

Alan C. Lloyd, Ph.D.
Chairman
2020 L Street • P.O. Box 2815 • Sacramento, California 95812 • www.arb.ca.gov

Winston H. Hickox
Secretary for Environmental Protection

Gray Davis
Governor

September 24, 1999

Mr. Brian Hebert
Staff Counsel
California Law Revision Commission
3200 Fifth Avenue
Sacramento, California 95817

Dear Mr. Hebert:

The Air Resources Board (ARB) has carefully reviewed the tentative recommendation of the California Law Revision Commission dated June 1999. The purpose of the recommendation is to correct a number of technical defects in Parts 1 to 4 of Division 26 of the Health and Safety Code, relating to the air resources statutes that the ARB administers. The ARB supports each of the proposed amendments, with the technical corrections noted in the attachment to this letter. ARB greatly appreciates the work of the Commission and its staff in reviewing and updating these provisions; we are glad that ours were among the first set of statutes to be reviewed pursuant to Study E-100 so that we can receive the benefits of that effort.

We are aware that the California Council for Economic and Environmental Balance has written to oppose the proposed clarification to section 42402.5 of the Health and Safety Code, specifying that the administrative civil penalty of $500 may be levied on a daily basis for each day during which the violation occurs. (See page 23, line 22.) The proposed clarification conforms to all of the other penalty provisions in the penalties article and the legislative history of the provision, as is necessary to make the administrative penalties provision a viable alternative to the other, more time and resource-intensive penalty provisions and is consistent with the general practice of the air pollution control districts that have been utilizing the administrative penalties provision. We would urge the Commission to retain this clarification.

Again, the Air Resources Board wishes to thank you for the effort you expended on this project and we are certain the statutory provisions pertaining to air resources will benefit from the revisions. Please call Leslie Krinsk, Senior Staff Counsel, at (805) 473-7325 if you have any questions.

Sincerely,

Kathleen Walsh
General Counsel

TECHNICAL COMMENTS

With regard to the material provided in the tentative recommendation, we note that reference to section 41507 in Health and Safety Code section 39515(c)(1), as amended, should be eliminated, because that section is correctly repealed elsewhere in the document (see p. 19 of the Tentative Recommendation, lines 12 through 24). Section 39515(c) should be changed to read as follows:

> (c) The state board shall, upon receipt of a petition from any affected member of the public, affected district, or designated air quality planning agency, hold a public hearing to review any action taken by the executive officer pursuant to section 41650, 41651, or 41652.

Thus, paragraph (1) of section 39515(c) should be eliminated and paragraph (2) set forth in section 39515(c) as indicated above.

Second, the comma between "40716" and "or 40717" in Health and Safety Code section 40454 (page 11, line 33) should be eliminated.

We would also like to point out two additional corrections. The first is an erroneous cross-reference where the intended meaning is clear and can be corrected easily. Thus, the reference to paragraph (3) of subdivision (c) of section 41865 as set forth in section 41865(i) is incorrect; the proper reference is paragraph (4) of section 41865(c). Both provisions relate to rice crop acreage to be burned in the year 2001 and thereafter. The current defective reference does not make sense and is confusing and the correction would clarify a statute that is already sufficiently complex without also containing an incorrect cross-reference.

The second provision that should be attended to is section 42301.5(a) and (b). Both of these paragraphs are obsolete and should be eliminated. The remainder of section 42301.5 should be renumbered as appropriate.