REPORT OF THE CALIFORNIA AIR RESOURCES BOARD TO THE ASSEMBLY COMMITTEE ON NATURAL RESOURCES, THE ASSEMBLY COMMITTEE ON TRANSPORTATION, THE SENATE COMMITTEE ON CRIMINAL PROCEDURE, AND THE SENATE COMMITTEE ON TRANSPORTATION ON VIOLATIONS OF STATE FUELS SPECIFICATION REGULATIONS PURSUANT TO HEALTH AND SAFETY CODE SECTION 43032

In 1995, Senate Bill 163 established a new mechanism for assessing civil penalties for violations of the state's clean fuel laws. The provisions of this bill were to remain in effect until January 1, 1999, and then repealed unless the Legislature deleted the repealer clause or extended the sunset date. In 1998, the Legislature did extend the sunset date to January 1, 2003. To help the Legislature further evaluate the new penalty structure, it directed the Air Resources Board (ARB) to prepare a report on the implementation of the revised penalty structure:

> "Notwithstanding Section 7550.5 of the Government Code, on or before January 1, 2002, the state board shall report to the Assembly Committee on Natural Resources, the Assembly Committee on Transportation, the Senate Committee on Criminal Procedure, and the Senate Committee on Transportation all violations that are subject to this chapter, any settlements reached, and the rate of compliance with any requirements that are subject to this chapter." (Health and Safety Code § 43032)

This report is submitted in fulfillment of that requirement.

I. Background

In 1995, the Legislature passed Senate Bill 163 and the Governor signed it into law, adding Chapter 1.5 to Part 5 of Division 26 of the Health and Safety Code, which deals with vehicular air pollution control. The legislation revised the civil penalty structure for violations of ARB's motor vehicle fuel regulations to parallel the tiered structure of nonvehicular air pollution control penalties in Part 4 of Division 26, and added administrative penalties as an alternative enforcement mechanism. The new structure set different maximum penalties for different levels of offenses: $25,000 per day for falsification of records; $35,000 per day for strict liability violations; $50,000 per day when negligence is involved; and $250,000 per day for willful and intentional violations of the law.

Prior to that time the only penalty provision for fuels specification violations was contained in HSC § 43016, which was established in 1976 and has a per vehicle fueling penalty of $500. It would appear that in 1976 the Legislature anticipated that violations of these regulations would primarily be found at service stations, and would be pursued on the basis of documenting individual vehicle fuelings. However, as enforcement strategies were developed and refined, it quickly became apparent that violations could and should be discovered throughout the distribution chain, enabling ARB to take

noncomplying fuel out of commerce at the refinery and bulk terminal levels as well as at retail outlets. Further, the level of staffing for field inspectors and the nature of the industry made it impractical to devote field hours to observing vehicle sales. Although inappropriate to actual enforcement experience, HSC § 43016 was nevertheless workable, in that it is relatively simple to determine volumes of noncomplying fuel sold, and by simple calculation convert that figure to approximate numbers of vehicle fuelings. This was effective for purposes of negotiated settlements, but less so for cases that had to be litigated, and it was not straightforward. In addition, HSC § 43016 did not include any provision for modifying penalties according to the egregiousness of the violation. A simple human error on the part of an unsophisticated service station owner carried the same penalty as the deliberate scheme of a criminal downstream blender adulterating complying fuel with a petroleum waste product.

The nonvehicular penalties included a list of factors to be considered in determining appropriate penalties, including among other things the compliance history of the violator, the extent of harm to the public, the magnitude of excess emissions, and the remediation efforts made by the violator. While these factors were historically considered in establishing vehicular penalties, SB 163 made them formally part of the Part 5 penalty structure; now they can be more effectively used in settlement negotiations.

The new penalty structure uses a per day/per violation format that does not leave ARB without a means to include the volume of noncomplying fuel distributed as part of the penalty level determination, as it also includes additional penalties for incremental excess emissions based on a per ton multiplier: $9,100 per ton of excess emissions for gasoline, and $5,200 per ton of excess emissions for diesel fuel. These penalties are based on the cost-effectiveness of Phase 2 Reformulated Gasoline and low-sulfur, low-aromatics diesel fuel. The law provides for periodic adjustment of these penalties to reflect changing economic conditions.

II. Assessment

In approving SB 163 the Legislature intended to provide a penalty structure that would allow for the effective and equitable enforcement of the fuels specifications while giving proper consideration to the specific facts of each case, without altering the historic penalty assessments:

> "It is the intent of the Legislature in the enactment of this chapter to update the penalty provisions for violations of fuel regulations to ensure that the appropriate tools are available to effectively and fairly enforce state law. In enacting this chapter, it is not the intent of the Legislature to modify penalty settlements beyond historic levels. The civil and administrative penalty provisions in this chapter are designed to give the state board an effective, efficient, and flexible tool to fairly enforce all violations." (Health and Safety Code § 43025)

SB 163 is meeting the purposes for which it was enacted. The tiered penalty structure established by the statute proves a rational basis for assessing penalties and developing settlements that are fair, consistent, and effective at maintaining compliance. ARB enforcement staff have not perceived any significant change in the historic level of settlements achieved using the revised penalty structure, and the available data provide general support for this experience.

A. Data

The ARB has now had three additional years of resolving violations of the fuels specifications under the new penalty structure (since the original report to the Legislature), and legal and enforcement staff agree that it is serving the purposes for which it was enacted. Almost all of our cases are resolved via negotiated settlement in lieu of litigation. This clear and rational structure, which specifies the factors to be considered and weighed, is very easy to explain to industry executives and attorneys. It provides sufficient flexibility, and the penalty caps are sufficiently high, to maintain consistency over time, among different entities in the regulated industry and under a wide variety of relevant circumstances while assessing penalties that serve as an effective deterrent.

It is not possible, however, to provide data that can be used to demonstrate directly that penalty settlements have not been modified beyond historic levels, although it is the consensus of staff that they have not. This is because concurrent with the implementation of the new penalty structure, the Phase 2 Clean Fuels regulations became effective, and the nature of enforcement had to change. Prior to Phase 2, the fuels specification regulations had flat limits for a variety of parameters, and it was a simple matter to test and analyze fuel to determine if the limits had been exceeded. Phase 2 included options for alternate compliance methods, including predictive models, designated alternative limits, and averaging. Since fuel in California is routinely commingled, much of our enforcement effort is now based on batch reporting requirements of the regulations, and many more of our cases are self-reported rather than based on random sampling. Therefore, comparing cases settled prior to 1996 to cases settled after that is in effect comparing apples and oranges. Nonetheless, the table below showing representative cases settled under both HSC § 43016 and SB 163 demonstrates that a full range of settlements has been obtained, from minor cases to major cases. The range shown below includes average settlement amounts, but it should be noted that both prior to implementation of SB 163 and subsequently, many cases have been settled for $100,000 and more.

REPRESENTATIVE CASES SETTLED UNDER HSC § 43016					
Case	**Days in Violation**	**Amount of Fuel (gals)**	**Actual Settlement Under Pre-SB 163 Penalties**	**Potential SB 163 Strict Liability Penalty ($35,000 per day)**	**Would SB 163 Have Altered the Actual Settlement Reached?**
Don E. Keith (EPA diesel) ROV F94-7-3	5	37,734	$5,000	$175,000	No
Mike Roche (EPA diesel) ROV F94-5-7	8	87,901	$10,000	$280,000	No
Mock (EPA diesel) ROV F94-5-7	1	32,356	$5,000	$35,000	No
Chevron (diesel)	1	1,942	$1,000	$35,000	No
Beneto (Oxygen/Gasoline) ROV F95-6-1	4	34,833	$1,250	$140,000	No
Cool Fuel (Oxygen/Gasoline) ROV F95-6-3	3	16,404	$1,500	$105,00	No
Cosby (Oxygen/Gasoline) ROV F95-6-4	6	40,218	$3,000	$210,000	No
Arrow (AH/Diesel) ROV F94-7-1	11	151,061	$4,000	$385,000	No
Circle K (RVP/Gasoline) ROV F93-11-2	58	7,460	$3,500	$2,030,000	No
Day & Nite (RVP/Gasoline) ROV F95-6-17	9	4,682	$1,000	$315,000	No

REPRESENTATIVE CASES SETTLED UNDER SB 163					
Case	**Days in Violation**	**Amount of Fuel (gals)**	**Actual Settlement Under SB 163 Penalties**	**Potential SB 163 Strict Liability Penalty ($35,000 per day)**	**Did SB 163 Alter the Actual Settlement Reached?**
ARCO (AH/Gasoline) ROV F96-7-2	2	3,696,000	$5,000	$70,000	No
ARCO (Sulfur/Gasoline) ROV F99-4-3	3	4,229,274	$6,000	$105,000	No
Cash Oil (RVP/Gasoline) ROV F96-9-4	50	2,552	$1,000	$1,750,000	No
El Capitan Oil (Sulfur/Diesel) ROV F00-1-2	1	2,216	$1,503	$35,000	No
Equilon (RVP/Gasoline) ROV F01-3-1	8	447,258	$30,000	$280,000	No
ITL (EPA Diesel) ROV F98-8-3	1	3,971	$1,000	$35,000	No
Kern Oil (Sulfur/Diesel) ROV F97-3-1	3	678,174	$50,000	$105,000	No
Pro Petroleum (EPA Diesel) ROV F00-5-1	6	6,498	$2,044	$210,000	No
Shore Terminals (RBOB) ROV F99-4-4	4	1,166,124	$25,000	$140,000	No

B. Analysis

Since our last report on this matter, during calendar years 1998 through 2001, 79 cases have been opened. ARB collected and analyzed 9,620 samples of motor vehicle fuel during that time, yielding a compliance rate of approximately 99.2 percent. Please note that this is an approximation because some cases involve more than one violation. For example, especially during the earlier periods of enforcing Phase 2 regulations, a pattern of repeated batch reporting violations would trigger the opening of a case, with all of the violations alleged in one Report of Violation and settled jointly. The number of cases involving multiple violations is small enough to be statistically insignificant,

however. Also, many of these violations involved more than one day, and one of the provisions of SB 163 is that each day during which a violation occurs is considered a separate violation. For the purposes of determining compliance rates, these additional days were not counted, although they were considered in settlement negotiations and in calculating maximum potential penalties in the table above.

III. Conclusion

The new penalty structure has proved to be the useful tool intended by the Legislature, providing the flexibility needed to have the desired deterrent effect and to demonstrate to the regulated community our intention to fairly and evenly enforce the law. Its clearly outlined and rational approach lends itself to the settlement table as well as to the courtroom, and it should be retained.