

State of California
AIR RESOURCES BOARD

Notice of Public Availability of Modified Text and Additional References

AMENDMENTS TO PROCEDURES FOR ADJUDICATORY HEARINGS AND ADMINISTRATIVE HEARINGS FOR CITATIONS ISSUED UNDER THE HEAVY-DUTY VEHICLE ROADSIDE SMOKE AND TAMPERING INSPECTION PROGRAM (ROADSIDE INSPECTION PROGRAM) AND ADOPTION OF PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR REVIEW OF COMPLAINTS AND PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

Public Hearing Date: September 24, 1998
Public Availability Date: January 29, 1999
Deadline for Public Comment: February 16, 1999

At a public hearing held on September 24, 1998, the Air Resources Board (ARB or Board) considered amendments to the existing administrative hearing procedures for citations issued under the heavy-duty vehicle roadside smoke and tampering inspection program (HDVIP) and adoption of procedures for administrative hearings for review of complaints and petitions for review of executive officer decisions, title 17, California Code of Regulations (CCR) sections 60040, et seq. The ARB staff proposed the rulemaking to implement recent legislation expanding the ARB's authority to assess and enforce administrative civil penalties, to incorporate recent amendments to the State Administrative Hearing Procedure Act (APA, Government Code section 11370, et seq.) into the governing hearing procedures of the ARB, and to clarify the existing hearing procedures where necessary. It is the intent of the ARB that the adopted regulations become effective 30 days after filing with the Secretary of State pursuant to Government Code section 11343.4.

The Board adopted Resolution 98-48 approving the proposed regulations with modifications. At this time, the staff is noticing for public comment modifications to the text that was publicly noticed on July 28, 1998. Many of the modifications were made available to the public at the September 24, 1998 hearing and were considered and approved for adoption by the Board. Additionally, the Board directed staff to make the following additional modifications: amend section 60055.15 consistent with Exhibit H of the Comments of the American Automobile Manufacturers Association and amend section 60055.17 to provide the Board with authority to consider petitions that a hearing be referred to the State Office Administrative Hearings on grounds that a party cannot receive a full and fair hearing before hearing officers of the administrative hearing office of the Air Resources Board. The proposed modifications to the initially noticed text are summarized below.

Summary of Proposed Modifications

Changes in Format:

The format of the administrative hearing procedures has been modified to incorporate all of the ARB administrative hearing procedures in one subchapter, Subchapter 1.25. Each of the four hearing procedures would be a separate article within the subchapter. Article 1, Adjudicatory Hearings; Article 2, Administrative Hearing Procedures for Petitions for Review of Executive Officer Decisions; Article 3, Administrative Hearing Procedures for Review of Complaints; Article 4, Administrative Hearing Procedures for Review of Citations.

Changes to Article 2, Administrative Hearing Procedures for Petitions for Review of Executive Officer Decisions:

Section 60055.2(b)(1): The definition of “administrative record” has been amended to include legal arguments submitted by the parties in support of issues material to the hearing. This reference was inadvertently excluded from the initially noticed rulemaking. Similar changes have been made to Articles 3 and 4, sections 60065.2(b)(1) and 60075.2(b)(1).

Section 60055.2(b)(8): The definition of “intervenor” has been added to the hearing procedures. Although the previously noticed procedures included provisions for intervention, section 60075.21, the definition of the term was inadvertently omitted. A similar modification was made to Article 3, section 60065.2(b)(11).

Sections 60055.2(b)(9) and (14): The definitions of “party” and “settlement agreement” have been modified to include “intervenor” to the extent permitted by the hearing officer. Similar amendments have been made to Article 3, sections 60065.2(b)(13) and (16). Also, the definition of party in section 60055.2(b)(8) has been modified to indicate that “executive officer” refers collectively to the executive officer and the staff of the ARB who are involved in the petition for review proceedings.

Section 60055.5(b): The section has been modified to specifically provide that the hearing office may serve other offices of the ARB by interoffice mail. This has been proposed to promote efficiency, without sacrificing reliability of process. Similar changes have been made to Articles 3 and 4, sections 60065.5(c) and 60075.4(b)

Section 60055.13(e): The section has been modified to clarify what communications between a hearing officer and other employees of the ARB are permissible. Similar changes have been made to Articles 3 and 4, sections 60065.13(e) and 60075.14(e).

Section 60055.15: To address concerns raised by stakeholders, the Board directed staff to modify subparagraph (a) to clarify the types of permissible communications that may be conducted between the Board, the hearing office, and staff while a matter is pending before the

Board. The amendments require that the parties to the proceedings be provided with notice and an opportunity to participate in communications involving the staff of the ARB. Subparagraph (b) has been deleted because the changes made to subparagraph (a) make the language redundant.

Section 60055.17(a): Two new subparagraphs have been added to the section. The Board directed that subparagraph (2) be added to allow a party to petition the Board to have a hearing transferred from the ARB administrative hearing office to the State Office of Administrative Hearings (OAH). To prevail, the petitioner would be required to present substantial evidence that it could not obtain a fair and impartial hearing before an ARB appointed administrative law judge. Subparagraph (3) has been added in response to stakeholder's testimony that it would be appropriate for stakeholders to bear one-half the fees charged by OAH.

Section 60055.25(b): Subparagraph (1)(B) was amended to clarify that for purposes of discovery, a party would be considered to be in possession, custody, and control of documents, writing or other things (e.g., data, test equipment) which are in the possession, custody and control of third-party agents of that party from whom discovery has been requested. It is believed that this modification should expedite discovery process and avoid unnecessary disputes over who is in possession or control of documents that are relevant to the matters in controversy. A similar change has been made to Article 2, section 60065.26(b)(1)(A).

Section 60055.25(d) and (e): A new subparagraph (d) was added to clarify the rights and responsibilities of third-parties claiming that certain information subject to a discovery request is confidential and should not be released. This section expressly sets forth the initial procedures to be followed in granting protective orders under subparagraph (e). A similar change has been made to Article 2, section 60065.26(d) and (e).

Section 60055.27: This section has been amended to clarify that the witness list requirement only applies to witnesses that a party anticipates calling during its case-in-chief. A second provision has been added requiring the parties to also provide copies of all exhibits that the party anticipates being placed in evidence as part of its case-in-chief. This requirement, like the one for witnesses, is intended to prevent surprise and to expedite the hearing process. Similar changes have been made to Articles 3 and 4, sections 60065.28 and 60075.26(c).

Section 60055.34: Subparagraph (a) has been amended to provide that affidavits or declarations that are intended to be used in lieu of oral testimony at hearing must be served at least 20 days before hearing, rather than 10 days. The provision presently requires a party to respond within seven days of receipt of the affidavit or declaration and the accompanying notice. Given the provisions of section 60055.4, which provide that a party receiving such notice by U.S. mail has five additional days in which to respond, the initially proposed language would not provide a party with adequate time in which to respond to a notice that had been sent just 10 days prior to hearing. Requiring a party to submit such affidavits or declarations 20 days prior to hearing would correct this problem and should not cause any hardship or undue prejudice to the party filing the affidavit or declaration. If it does, upon a showing of good cause, a party may always file a motion to shorten time.

Subparagraph (b) has been amended to clarify the notice requirements for use of affidavits and

declarations in lieu of oral testimony. The intent of the clarification is to provide better notice to the recipient party who could jeopardize its right to cross-examine potential witnesses if it failed to respond to the notice. Similar changes have been made to Articles 3 and 4, sections 60065.35(a) and (b) and 60075.35(a) and (b).

Section 60055.40: Subparagraph (b) was modified to add that mere constitutional allegations raised on reconsideration, without specific references to the record and how the constitution has been misapplied will be denied. Similar amendments have been made to sections 60065.42 and 60075.42.

Section 60055.41: The section has been modified to delete references to summary denials of reconsideration requests. The change has been made because the timing for summary denials is not consistent with the monthly schedule for Board hearings.

Section 60055.42(b): The time period that must pass from the date that the Board issues its decision to the date the decision becomes effective, if no request for reconsideration has been filed, has been extended from 20 to 30 days. This modification avoids potential conflict with section 60055.4, and section 60055.39. Similar changes have been made to Articles 3 and 4, sections 60065.44 and 60075.44.

Changes to Article 3, Administrative Hearing Procedures for Review of Complaints:

Section 60065.2(b)(1) and (11): See discussion above for section 60055.2(b).

Section 60065.2(b)(16): The definition of “settlement agreement” has been modified to include reference to intervenors, to the extent permitted by the hearing officer, as discussed in section 60055.2(b)(14) discussed above. The definition has been further modified to reference “terms and conditions of the settlement” in lieu of “penalty assessments. This modification has been made to allow the parties greater flexibility in fashioning appropriate remedies.

Section 60065.5(c): See discussion above for section 60055.5(b).

Section 60065.13(e): See discussion above for section 60055.13(e).

Section 60065.15: The section has been modified to clarify the permissible scope of communications that may occur between the executive officer, and the staff while a matter is pending. Similar changes have been made to Article 4, section 60075.16.

Section 60065.25(a): This subparagraph has been modified to add that a settlement agreement may be reached where the parties have reached agreement upon a civil penalty or other appropriate remedy. This amendment provides the parties with greater flexibility in determining an appropriate remedy for purposes of settlement.

Section 60065.26(b), (d), and (e): See discussion above for section 60055.25(b), (d), and (e).

Section 60065.28: See discussion above for section 60055.27.

Section 60065.35: See discussion above for section 60055.34

Section 60065.39: Subparagraph (e)(3) has been modified to clarify that a modified order or decision supersedes the initial order or decision issued by the hearing officer and that the date of service of the modified order or decision is the operative date for calculating the filling of requests for reconsideration and the effective date that a decision becomes final. A similar change has been made to section 60075.40(e)(3).

Subparagraph (g) has been deleted in that it has been determined that the language duplicates language set forth in section 60065.44. A similar change has been made to section 60075.40(g).

Section 60065.42: See discussion for section 6055.40 above.

Section 60065.44: See discussion for section 6055.42 above.

Changes to Article 4, Administrative Hearing Procedures for Review of Citations:

Section 60075.2(b)(1): See discussion above for section 60055.2(b)(1).

Section 60075.2(b)(3) and former section 60075.2(b)(13): The term “citee” has been added to the definitions. The term replaces the definition of and references throughout the procedures to “respondent.” “Citee” is a more appropriate appellation in the context of the citation hearing procedures than is “respondent,” given that a citee requests a hearing under the procedures rather than directly responds to charges filed by the Agency. It is also a less legal term that better fits the less formal citation hearing process. The definition of respondent in subparagraph (b)(13) has been deleted.

The definition of “citee” specifically references the definition of “owner” found in the heavy-duty vehicle roadside inspection program (HDVIP). This modification helps to clarify who is subject to a citation under the HDVIP regulations.

Section 60075.2(b)(14): In addition to substituting the term “citee” for “respondent,” the definition of “settlement agreement” has been modified to simply refer to “citations” and not “field citations.” The modifier “field” was inadvertently included in the definition when initially noticed. The definition has been further modified to reference “terms and conditions of the settlement” in lieu of “penalty assessments.” This modification has been made to allow the parties greater flexibility in fashioning appropriate remedies.

Section 60075.4: See discussion above for section 60055.4.

Section 60075.6: To avoid unnecessary burden on citees who do not have access to typewriters or computers, the section has been modified to allow submissions that are legibly printed.

Section 60075.10: Subparagraph (a) has been modified to clarify that “motions” includes requests (petitions) for hearing officer action on a matter pending before him or her. Subparagraph (b) has been modified to require that all proceedings be recorded. This is consistent with the intent of the hearing procedures that a record of all proceedings be made.

Section 60075.11: In addition to substituting “citee” for “respondent,” subparagraph (c) has been modified to clarify that the reference to \$5,000 and \$15,000 refers to Class I violations other than those arising under the HDVIP regulations.

Section 60075.12(b): The section has been modified to clarify the requirements for information that must be included in issued citations. Subparagraph (2) has been added to require that the citation expressly specify the statute or code provision that has been violated. Subparagraph (3) now requires that the citation include a specific statement of the facts that support issuance of each alleged violation, and subparagraph (5) has been rewritten to better clarify the requirement that the citation provide notice to the citee of the governing hearing procedure regulations.

Section 60075.14(e): See discussion above for section 60055.13(e).

Section 60075.16: See discussion above for section 60065.15.

Section 60075.17: In addition to substituting the term “citee” for “respondent,” subparagraph (c) has been modified to reinsert language that had been deleted in the initial notice or proposed rulemaking. The language, as modified, is consistent with section 60075.4, which provides that service is effective upon date of mailing.

Section 60075.21: The section has been amended to provide that the hearing officer may request the complainant to file a response to a request for hearing and that, if the complainant does file a response, it must do so within 20 days of being notified.

Section 60075.24(a): See discussion above for section 60065.25(a).

Section 60075.26(b): The subparagraph has been modified to reinsert language that had been deleted in the initial notice of proposed rulemaking. The modification has been made because the initially proposed amendment unnecessarily restricted access to discovery.

Section 60075.26(c): See discussion above for section 60055.27.

Section 60075.34(b): The subparagraph has been modified to delete language that required a party to make timely hearsay objections or the hearsay would be sufficient to support a finding of fact or conclusion of law. The modification has been made because parties to citation proceedings are typically not represented by legal counsel, and should not be expected to know the hearsay rules and exceptions.

Section 60075.35: See discussion above for section 60055.27.34.

Section 60075.40: See discussion above for subparagraphs 60065.39(b)(3) and (g).

Section 60075.42: See discussion above for section 60055.42.

Section 60075.44(b): See discussion above for section 60055.42.

Notice of Additional References

Resolution 98-48 and the modified portions of title 17, CCR, Subchapter 1.25, sections 60040, et seq., are respectively attached as Attachments A and B. Pursuant to Government Code sections 11346.9(a)(1) and 11346.8(d) and title 1, CCR, section 45, the ARB hereby provides further notice that it intends to add the following references to the rulemaking record: Letter from Michael Asimow, Professor of Law, UCLA School of Law, to Michael P. Kenny, Executive Officer of the Air Resources Board, dated September 24, 1998; Executive Order G-98-069, dated January 18, 1999. The letter and Executive Order are respectively attached hereto as Attachments C and D.

Opportunity to Comment

Comments regarding the proposed modifications and the identified references must be submitted to the Clerk of the Board, Air Resources Board, P.O. Box 2815, Sacramento, California 95812, **no later than February 16, 1999**, for consideration by the Executive Officer. Questions regarding this mail-out may be directed to Michael Terris, Administrative Law Judge, telephone number (916) 327-2032.

ATTACHMENT B

TITLE 17. CALIFORNIA AIR RESOURCES BOARD

PROPOSED MODIFICATIONS TO TEXT OF AMENDMENTS TO PROCEDURES FOR ADJUDICATORY HEARINGS AND ADMINISTRATIVE HEARINGS FOR CITATIONS ISSUED UNDER THE HEAVY-DUTY VEHICLE ROADSIDE SMOKE AND TAMPERING INSPECTION PROGRAM (ROADSIDE INSPECTION PROGRAM) AND ADOPTION OF PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR REVIEW OF COMPLAINTS AND PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

Note: The following document indicates modifications to the text initially noticed in the Notice for Public Hearing dated July 28, 1998. Additions to the text are indicated by **bold italic underline** and deletions by ~~***bold italic*** ***strikeout***~~ or, in the case of deletions to sections 60040 et seq. and 60075.1, et seq. by ~~***bold italic*** ***strikeout with underline***~~. The amendments to Title 17, California Code of Regulations, sections 60040, et seq., and 60075.1 et seq., that were initially proposed in the July 25, 1998, Notice for Public Hearing are indicated by underline and ~~strikeout~~, which respectively indicate additions and deletions to the text of the existing regulations that had previously been adopted by the Board. The language of the two new regulations, Title 17, CCR, sections 60055.1, et seq., and 60065.1, et seq., that were initially Noticed on July 28, 1998, is indicated by *italics*.

CALIFORNIA REGULATIONS FOR ADJUDICATORY HEARINGS

~~Amend Section 60040, Article 4, Subchapter 1, Chapter 1, Division 3,~~

Subchapter 1.25. Administrative Procedures -- Hearings

Article ~~4~~ 1. Adjudicatory Hearings

Subarticle 1. General Provisions

§ 60040. Applicability.

(a) The provisions of this article shall apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer (1) vehicle or engine recalls pursuant to Health and Safety Code Section 43105; (2) intention to revoke or suspend a license as a vehicle emission test laboratory pursuant to Section 2048 of Title 13, California Code of Regulations; and (3) to other decisions of the executive officer where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code Sections 11500, et seq. nor other hearing procedures are specified. The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts.

(b) The provisions of this article shall apply to the review of all decisions of the executive officer covered by subparagraph (a) issued prior to the effective date of article 2, sections 60055.1, et seq.. All subsequently issued executive officer decisions shall be subject to the procedures set forth in article 2 ~~4.5~~, sections 60055.1, et seq.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING PROCEDURES FOR
PETITIONS FOR REVIEW OF EXECUTIVE OFFICER DECISIONS

~~Adopt Article 4.25, Subchapter 1, Chapter 1, Division 3, Title 17,
California Code of Regulations, to read as follows:—
Administrative Hearing Procedures for Petitions
for Review of Executive Officer Decisions~~

Article 2. Administrative Hearing Procedures for Petitions
for Review of Executive Officer Decisions

Subarticle 1. General Provisions

§ 60055.1. Applicability.

(a) *The provisions of this article shall apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer to:*

(1) *Recall motor vehicles or motor vehicle engine families pursuant to Health and Safety Code Section 43105 and sections 2122, et seq., of Title 13, California Code of Regulations;*

(2) *Revoke or suspend a license as a vehicle emission test laboratory pursuant to section 2048 of Title 13, California Code of Regulations;*

(3) *Revoke or suspend a previously granted executive order certifying a motor vehicle engine family under Chapter 2, Part 5, Division 26 of the Health and Safety Code;*

(4) *Deny certification of a motor vehicle engine family under Chapter 2, Part 5, Division 26 of the Health and Safety Code; or*

(5) *Any other decision where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code sections 11500, et seq., nor other hearing procedures are specified.*

(b) *The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts, and final orders or decisions under this regulation and section 60075.45.*

(c) *The provisions of this article apply only to executive officer decisions issued on or after the effective date of this article.*

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105 ~~and 43028~~, Health and Safety Code; Sections 60075, et seq., Title 17 and 2048, Title 13, California Code of Regulations; Sections 11500, et seq., Government Code.

§ 60055.2. Definitions.

(a) *The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq.*

(b) *The following definitions also apply:*

(1) *“Administrative record” means all documents and records timely filed with the hearing office, pursuant to section 60055.4 and the time deadlines of these rules, including pleadings, petitions, ~~and~~ motions, **and legal arguments in support thereof**; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or the state board regarding the petition for review of an executive officer decision; administrative record does not include any prohibited communications as defined in section 60055.13, and any settlement discussions or offers of settlement pursuant to section 60055.24.*

(2) *“Days” means calendar days.*

(3) *“Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.*

(4) *“Discovery” refers to the process set forth in section 60055.25 allowing one party to request and obtain information relevant to the proceedings. The scope of discovery is limited by the express terms of that section.*

(5) *“Ex Parte Communication” means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.*

(6) *“Hearing Office” refers to the administrative hearings office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.*

(7) *“Hearing Officer” refers to an administrative law judge appointed by the state board to conduct hearings under these procedures or an administrative law judge appointed by the Office of Administrative Hearings.*

(8) **“Intervenor” means a person who is allowed to voluntarily enter into the**

proceedings with leave of the hearing officer.

(9) "Party" includes the petitioner, and executive officer and employees of the state board who have been authorized to investigate, represent or otherwise participate in proceedings of a petition for review **and an intervenor to the extent permitted by the hearing officer pursuant to section 60055.21. Notice to the executive officer shall constitute notice to all employees of the state board involved in the case.**

(10)(9) "Petition" means petition to review an executive officer decision.

(11)(10) "Petitioner" means a person directly affected by a decision of the executive officer who requests a hearing pursuant to Subarticle 5 to review that decision.

(12)(11) "Proceeding" means any hearing, determination or other activity before the hearing officer involving the parties to a petition for review.

(13)(12) "Response" means a document filed by the executive officer responding to the petition for review.

(14)(13) "Settlement Agreement" means a written agreement executed by the petitioner, **and** the executive officer, **and, to the extent permitted by the hearing officer pursuant to section 60055.21(b)(4), an intervenor** that respectively settles the allegations at issue in the petition for review.

NOTE: Authority cited: Sections 39600, 39601, 39010, et seq., Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39514; **and** 43105, ~~43028~~, Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., Title 13; Sections 60075.1, et seq., Article 5, Title 17, California Code of Regulations.

§ 60055.5. Service, Notice and Posting.

(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the designated hearing officer.

*(b) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class **or interoffice** mail, by overnight delivery, or by fax.*

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and 15 days if the place of address is outside the United States.

*(3) If served by overnight delivery, **or interoffice mail**, the document must be deposited in a box or other facility regularly maintained **for interoffice mail or** by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(c) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or facsimile.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of his or her person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(d) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(e) Proof of service made in accordance with Code Civil Procedure section 1013a complies with this regulation.

(f) Service and notice to a party who has appeared through a representative shall be made upon such representative.

NOTE: Authority cited: Sections 39600, 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code; Sections 11182, 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

Subarticle 3. Ex Parte Communications

§ 60055.13. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60055.37.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60055.5.

(c) For the purpose of this section, a proceeding is pending from the time that the petition for review of an executive officer decision is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60055.37.

(e) A communication between a hearing officer and an employee of the state board that would otherwise be prohibited by this section is permissible if:

(1) The employee is another hearing officer or other employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board—~~if such employee~~ has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, ~~or in any factually related proceedings,~~ and the purpose of the communication is to assist and advise the hearing officer in determining whether a document is a confidential business record (i.e., trade secrets) ~~and reviewing the evidence in the record and drafting a decision or order.~~ In obtaining such assistance and advice, the hearing officer shall give notice to the parties of the person consulted and shall provide the parties with as detailed a summary as possible of the substance of the advice received, while protecting the confidentiality of the business records at issue, and a reasonable opportunity to respond.

(3) The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to all employees covered by subparagraphs (1) and (2) above.

(4) Communications permitted under subparagraphs (1) and (2) above ~~In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.~~

NOTE: Authority cited: Sections 39600, 39601 and 43028, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43105 ~~and 43028~~, Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60055.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60055.15. Applicability to the State Board.

~~(a)~~ The provision of Subarticle 3 governing ex parte communications to the hearing officer also governs ex parte communications with members of the state board on matters that may come before them pursuant to Subarticles 4 and 9. **Nothing in this provision shall be construed to prohibit ex parte communications, after a proposed decision has been forwarded to the state board, between members of the state board and the hearing officer who prepared the decision, a hearing officer from the State Office of Administrative Hearings (OAH) not previously involved in the case, or outside legal counsel to the state board. Nor shall anything in this provision be construed to prohibit communications between members of the state board and staff of the state board (including staff counsel), provided reasonable notice and opportunity to participate in such communications either in person or by telephone has been provided to all parties. For purposes of this section, reasonable notice shall be deemed as 24-hours or greater advance notice.**

~~(b) Except as provided in Subarticle 10, while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the members of the state board regarding the merits of any issue in the proceeding.~~

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

**Subarticle 4. Filing and Initial Review of Petitions for Review and
Executive Officer's Response**

§ 60055.16. Filing of Petitions for Review Hearing.

(a) Within 30 days after receipt of a decision by the executive officer described in section 60055.1, a person directly affected by the decision may file a petition requesting a hearing to review the decision. The hearing officer may extend the time for filing for good cause.

(b) A petition shall be filed with the clerk of the board, at the offices of the state board in Sacramento and a copy served on the executive officer. The petition shall include the following information:

(1) The name and address of the petitioner;

(2) A copy of the executive officer decision for which review is requested;

(3) The date the decision was received by the petitioner;

(4) A statement of the objections to the decision upon which review is requested; a verified statement of the facts, data and other relevant evidence in support of the objections; a demand for the specific relief the petitioner seeks; a short, concise statement of legal argument, with citation to authorities, in support of the objections and the relief requested. The verification may be made on information and belief.

(c) The petitioner may request permission from the hearing officer to amend the petition. Such request must include an amended statement of objections and, as applicable, verified statement of facts, data, and other relevant evidence in support of the amended objections; demand for the specific relief the petitioner seeks; and amended statement of legal argument. The hearing officer **may shall** grant the request upon determining that good cause exists; **in granting the request the hearing officer shall take whatever steps necessary (e.g., continuing the hearing) to prevent any and that no party shall be from being** unduly prejudiced by the decision.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§ 60055.17. Appointment of a Hearing Officer; Initial Review of Petition.

(a) Initial Assignment:

(1) Upon receipt of a petition, the state board shall refer the matter to the administrative hearing office of the state board for assignment of a hearing officer. The hearing office shall assign an administrative law judge from the hearing office to hear the matter, unless staffing and other resources of the hearing office would prevent timely consideration of the matter. If the resources of the administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the State Office of Administrative Hearings (OAH) for assignment. For the two years immediately following the effective date of these hearing procedures, it shall be presumed that petitions requesting review of executive officer decisions ordering the recall of motor vehicles or motor vehicle engines or the suspension, revocation, or denial of executive orders certifying motor vehicles or motor vehicle engines are too resource intensive, given the present staffing of the administrative hearing office of the state board. For the two_ year period identified above, such matters shall be immediately referred to the OAH for assignment.

(2) In addition to the above, a party may petition the state board to request that hearings be referred to OAH. The state board shall grant the request upon the petitioner providing substantial evidence that it could not receive a full and fair hearing from any hearing officer employed by the administrative hearing office of the state board.

(3) In all cases referred to OAH, under paragraphs (1) and (2) above, the petitioner shall bear one-half of the fees charged by OAH for the services of the OAH hearing officer.

(b) Within 20 days of assignment of a hearing officer, the hearing officer shall review the petition and determine whether a hearing is required by law. Pursuant to section 60055.1(b), all petitions seeking review of executive officer decision to recall motor vehicles or engines under Health and Safety Code section 43105, to revoke or suspend a license as a vehicle emission test laboratory under Title 13, CCR, section 2048, or to revoke or suspend an Executive Order granting certification to a motor vehicle engine family under chapter 2, part 5, Division 26 of the Health and Safety Code shall have the right to a hearing. Petitions for review of executive officer decisions to deny applications for motor vehicle certifications shall be entitled to a hearing on the merits, unless the hearing officer finds that the petition and supporting data and information do not raise a substantial issue of fact or law. If the hearing officer determines that a hearing is not required, the petitioner shall be notified of the decision and there shall be no hearing under this article.

(c) A petitioner adversely affected by a hearing officer determination that a hearing is not required may request reconsideration by the state board under Subarticle 10.

(d) The clerk of the state board shall make arrangements to send a copy of the petition and any decision of the hearing officer or the state board to any person who was given written notice of the executive officer's decision.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§ 60055.25. Discovery.

(a) *The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.*

(b) *The names and addresses of witnesses; inspection and copying of documents and things.*

(1) *Unless otherwise stipulated to by the parties, within 30 days of the hearing officer's determination that a hearing is required under section 60055.17, a party may request:*

(A) *The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and*

(B) *The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (I) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible. **For purposes of this section, "any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody, or control of the other party" would include those items within the possession, custody, or control of a third-party who obtained or used such items while acting as a representative, contractor, or agent of the "other party".***

(2) *Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.*

(3) *All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.*

(4) *Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.*

(c) *Other Discovery.*

(1) *A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:*

(A) *The additional discovery will not unreasonably delay the proceedings;*

(B) *The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that*

(C) *The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding a matter at issue.*

(2) *The hearing officer may order the taking of oral depositions only under the following circumstances:*

(A) *After affirmatively making the findings in subparagraphs (c)(2)(A)- (C), and further finding that the information sought cannot be obtained by alternative methods; or*

(B) *There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.*

(3) *If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.*

(4) *Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.*

(d) **Third-Party Notice of Request for Disclosure of Information Identified as Confidential and Opportunity to Participate.**

(1) A third-party shall be notified whenever a party receives a request for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party, including, but not limited to, claims of

confidentiality asserted pursuant to the California Public Records Act (CPRA). This section creates rights and obligations in addition to, and does not affect, existing rights and obligations under the CPRA and applicable federal regulations.

(2) A third-party shall have the opportunity to be heard on all issues involving requests for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party. Within five days of receipt of notice pursuant to subparagraph (d)(1), a third-party may object to disclosure of the subject information and may seek a protective order pursuant to subparagraph (e). Objections to disclosure may be based on all legal grounds, including, but not limited to, lack of relevance to the issues for hearing.

(e) Protective Orders:

(1) Upon motion by a party ~~or by the person~~ from whom discovery is sought, a third-party who has made a claim of confidentiality regarding the information to be discovered, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.

(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves.

Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.

(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the state board or to the court review of the record.

(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

(e) Proceeding to Compel Discovery.

(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code.

§60055.26. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) **At the request of a party,** subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, **or the general counsel;** or executive officer **of the state board at the request of a party** or, if represented by an attorney, the attorney of record for **the a** party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it,

or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(I) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601 and 43028, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); ~~Sections 43150~~ Section 43105, and 43028, Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

§ 60055.27. Witness Lists and Exhibits.

(a) No later than ten days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties;

(1) A list of the names, addresses and qualifications of proposed witnesses to be called in making the party's case-in-chief and a brief summary of the testimony to be presented by each witness; and

(2) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence in making the party's case-in-chief.

(b) The hearing officer may prohibit any party from presenting any witness or exhibit that has not been included on that party's witness list or in the exhibits that have been submitted as required under paragraph (a) of this section.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§ 60055.34. Evidence by Affidavit or Declaration.

(a) At any time **ten 20** or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced, but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) **shall be a separate document concurrently served with the affidavit or declaration, entitled "Notice of Intent to Use Declaration or Affidavit in Lieu of Oral Testimony."** The title shall be in bold print. The content of the notice shall be **substantially** in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§ 60055.38. Proposed Order or Decision of the Hearing Officer after Petition for Review Hearing; Order or Decision of the Board.

(a) *Unless otherwise ordered, all hearings on petitions for review shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall make findings upon all facts relevant to the issues for hearing, and file a proposed order or decision with the reasons or grounds upon which the order or decision was made.*

(b) *The proposed order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.*

(c) *The hearing officer shall immediately certify the administrative record and forward it, together with a copy of the proposed order or decision, to the clerk of the board. Within 30 days after receipt of the proposed order or decision, the clerk of the board shall serve a copy of the proposed order or decision on each party to the proceeding or its representative and shall issue a public notice that the state board will conduct a public hearing to consider adoption of the proposed order or decision **of the hearing officer**. At the public hearing, the state board may take any of the following actions:*

(1) *Adopt the proposed order or decision in its entirety.*

(2) *Make technical or other minor changes to the proposed order or decision and adopt it as its own. Actions under this subparagraph are limited to clarifying or other changes that do not affect the factual or legal basis of the proposed decision.*

(3) *Refer the matter back to the hearing officer for the taking of additional evidence, or order that additional evidence be taken at a hearing before the state board itself. If the matter is remanded to the hearing officer, the hearing officer shall issue and serve upon the parties a new proposed order or decision based upon the new evidence that has been received. In such an event, the state board shall consider the newly proposed order or decision under the procedures set forth in this section.*

(4) *Issue its own written order or decision, based on the administrative record and any additional evidence presented during the public hearing, setting forth findings of fact and conclusions of law regarding all issues necessary to support the order or decision.*

(d) *The clerk of the state board shall serve a copy of the order or decision of the state board on the petitioner, other parties to the proceedings, and any member of the public who has requested a copy. The state board shall specify in the order or decision the date that order or decision becomes effective.*

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§60055.40. Requirements in Filing Request for Reconsideration; Comments Opposing Request.

(a) A request for reconsideration of a state board's order or decision regarding a petition for review of an executive officer decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:

(1) The hearing officer or the state board acted without or in excess of its powers;

(2) The order or decision was procured by fraud;

(3) The order or decision is not supported by the evidence or the findings of fact;

(4) The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or

(5) The hearing officer and/or the state board have misapplied applicable law.

(b) Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory or constitutional grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the state board. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

(d) The request for reconsideration may include a request that the order or decision of the state board be stayed pending resolution of the request for reconsideration. As provided in section 60055.41, the order or decision shall be automatically stayed for 20 days from the date of filing of the request for reconsideration.

(e) Within ten days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the clerk of the state board. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed six pages.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

§60055.41. Decision on Reconsideration; Stays; ~~Summary Denial.~~

(a) The state board may upon the request of a party or its own motion, stay, suspend, or postpone the order or decision that it has issued while the request for reconsideration is pending.

~~(b) The state board shall be deemed to have summarily denied the request for reconsideration if it fails to act upon the request for reconsideration within 20 days from the date of filing of the request. The state board may, for good cause, extend the time within which the petition for reconsideration must be acted upon for a period not to exceed ten days. The state board shall issue an order notifying the parties of its decision summarily denying the request for reconsideration.~~

~~(c) Upon summary denial of the request for reconsideration, the order or decision of the state board shall become final.~~

~~(bd) The state board shall consider If the request for reconsideration at the next scheduled board meeting at which the matter may be timely considered and may: has not been summarily denied pursuant to subparagraph (b) above, the state board may within 45 days after receipt of the request for reconsideration:~~

(1) Review some, but not all issues raised by the request;

~~(2) Delegate its review authority to one or more persons, subject or not subject to, further review by the state board;~~

~~(2 3) Affirm, rescind, or amend the findings and conclusions of law, of the order or decision; or~~

~~(3 4) Direct the taking of additional evidence either by submission or further hearing.~~

(A) If the state board orders the parties to submit additional evidence, notice and an opportunity to respond shall be given to all parties.

(B) If the state board orders that additional evidence be taken at a further hearing conducted by the state board or the hearing officer assigned to the case and that additional findings of fact be made, notice of the time and place of the hearing shall be given to all parties and to such other persons that may be affected by the order.

(C) The issues on further hearing shall be limited to those set forth in the order issued by the state board.

(D) The time limits in section 60055.38 of these rules for filing an order or decision shall not apply to further hearings during reconsideration.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Section 1140.10, Government Code.

Subarticle 10. Final Order or Decision; Judicial Review

§ 60055.42. Final Order or Decision; Effective Date.

(a) If no request for reconsideration of state board's order or decision is filed within ~~20~~ **30** days of the service of an order or decision, the initial order or decision of the state board shall become final. The effective date of the final order or decision shall be the date set forth in the state board's initial decision.

~~(b) If a request for reconsideration has been filed but summarily denied because the state board has not taken any action on the request within 20 days after receipt of the request, the initial order or decision of the state board shall become final. The effective date of the order or decision becoming final shall be the date that the order summarily denying the request for reconsideration was served on the parties.~~

(c) If reconsideration has **not** been requested ~~summarily denied~~, the order or decision of the state board that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision shall be the date that the order or decision was served on the parties.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF COMPLAINTS

~~Adopt Article 4.5, Subchapter 1, Chapter 1, Division 3, Title 17,
California Code of Regulations, to read as follows:—
Administrative Hearing Procedures for Review of Complaints~~

Article 3. Administrative Hearing Procedures for Review of Complaints

Subarticle 1. General Provisions

§ 60065.1. Applicability.

(a) This article governs hearings to review complaints issued by the state board pursuant to Health and Safety Code section 43028. The procedures outlined here do not apply to citations that are subject to review under Article 5, section 60075, et seq.

(b) The provisions of this article apply only to complaints filed on or after the effective date of this article.

Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code; Sections 60075, et seq., Title 17 and 2048, Title 13, California Code of Regulations; Sections 11500, et seq., Government Code.

§ 60065.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq.

(b) The following definitions also apply:

(1) “Administrative record” means all documents and records timely filed with the hearing office, pursuant to section 60065.4 and the time deadlines of these rules, including pleadings, petitions, ~~and~~ motions, **and legal arguments in support thereof**; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or executive officer regarding the complaint at issue; administrative record does not include any prohibited communications as defined in section 60065.13, and any settlement discussions or offers of settlement pursuant to section 60065.25.

(2) “Complainant” means the state board, acting through any of its employees that have been authorized to investigate, issue, and prosecute a complaint under this article.

(3) “Complaint” means a document issued by the complainant that alleges a violation(s) of Part 5 of the Health and Safety Code (other than a Class I violation for which a citation may be issued under Article 5 of this chapter) or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards.

(4) “Consent Order” means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(5) “Days” means calendar days.

(6) “Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(7) “Discovery” refers to the process set forth in section 60065.26 allowing one party to request and obtain information relevant to the complaint proceedings. The scope of discovery is limited by the express terms of that section.

(8) “Ex Parte Communication” means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.

(9) "Hearing Office" refers to the administrative hearings office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office of Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.

(10) "Hearing Officer" is an administrative law judge appointed by the state board to conduct hearings under these procedures. Only appointed administrative law judges shall act as hearing officers.

(11) **“Intervenor” means a person who is allowed to voluntarily enter into the proceedings with leave of the hearing officer.**

(12) **“Party” includes the complainant, and respondent”, and an intervenor to the extent permitted by the hearing officer pursuant to section 60065.22.**

~~(13)~~(12) “Proceeding” means any hearing, determination or other activity before the hearing officer involving the parties to a complaint.

~~(14)~~**(13)** “Respondent” means any person against whom a complaint has been filed under this article.

~~(15)~~**(14)** “Response” means a document, responsive to the complaint and signed by the respondent, in which respondent admits or denies the allegations of the complaint or asserts affirmative defenses to the action.

~~(16)~~**(15)** “Settlement Agreement” means a written agreement executed by **either** the complainant, **and** respondent, **and, to the extent permitted by the hearing officer pursuant to section 60065.22(b)(4), an intervenor,** that respectively settles the allegations of violation set forth in the complaint. Settlement agreements of a complaint should include:

- (A) Stipulations by the parties establishing subject matter jurisdiction;
- (B) An admission by respondent that it has committed the violations as alleged in the complaint or a statement by respondent that it neither admits nor denies such violation(s); and
- (C) **The terms and conditions of the settlement.** ~~Agreement as to the assessment of a stated civil penalty, with or without conditions.~~

NOTE: Authority cited: Sections **39010**, 39600, 39601, 43028, **and** 43031(a) **and** ~~39010~~, et seq., Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections **39010**, 39514, ~~43105~~, 43028 and 43031(a), Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., Title 13; Sections 60075.1, et seq., Article 5, Title 17, California Code of Regulations.

§ 60065.5. Service, Notice and Posting.

(a) *Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.*

(b) *The complaint and all accompanying information shall be served on the respondent personally or by registered mail.*

(c) *Except as provided in (b) above and unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class or interoffice mail, by overnight delivery, or by fax.*

(1) *Service is complete at the time of personal delivery.*

(2) *In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and fifteen days if the place of address is outside the United States.*

(3) *If served by overnight delivery, or interoffice mail, the document must be deposited in a box or other facility regularly maintained for interoffice mail or by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

(4) *If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.*

(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or fax.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of her person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(f) Proof of service made in accordance with Code of Civil Procedure section 1013a complies with this regulation.

(g) Service and notice to a party who has appeared through a representative shall be made upon such representative.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a.

Subarticle 3. Ex Parte Communications

§ 60065.13. Prohibited Communications.

(a) *Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60065.38.*

(b) *No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60065.5.*

(c) *For the purpose of this section, a proceeding is pending from the time that the petition for review of an executive officer decision is filed.*

(d) *Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60065.38.*

(e) *A communication **between a hearing officer and an employee of the state board** that would otherwise be prohibited by this section is permissible **if:***

(1) The employee is another hearing officer or other employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board—~~if such employee~~ has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or in any factually related proceedings, and the purpose of the communication is to assist and advise the hearing officer in determining whether a document is a confidential business record (i.e., trade secrets) ~~and reviewing the evidence in the record and drafting a decision or order.~~ In obtaining such assistance and advice, the hearing officer shall give notice to the parties of the person consulted and shall provide the parties with as detailed a summary as possible of the substance of the advice received, while protecting the confidentiality of the business records at issue, and a reasonable opportunity to respond.

(3) The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to all employees covered by subparagraphs (1) and (2) above.

(4) Communications permitted under subparagraphs (1) and (2) above—~~In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.~~

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~ 43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60065.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of *ex parte* communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section ~~43105~~, 43028 and 43031(a), Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60065.15. Applicability to Executive Officer.

(a) The provision of Subarticle 3 governing *ex parte* communications to the hearing officer also governs *ex parte* communications with the executive officer on matters that may come before him or her pursuant to Subarticle 9. **Irrespective of the prohibitions of section 60065.13(a), the executive officer may consult with state board personnel who are not involved as an investigator, prosecutor, or advocate in the proceedings or preadjudicative proceedings of the matter before the executive officer, or in a factually related case, and whose job duties include assisting the executive officer in his or her adjudicative responsibilities.**

(b) Except as **otherwise** provided in **Subarticle 10 these procedures**, while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the members of the state board regarding the merits of any issue in the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section ~~43105~~-43028 and 43031(a), Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

§60065.25. Settlement Agreements and Consent Orders.

(a) *At any time before a final decision of the hearing officer, the complainant and the respondent may settle an action, in whole or in part, by agreeing upon a civil penalty, with or without conditions **or other appropriate remedy.***

(b) *The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.*

(c) *The parties shall memorialize any agreement in writing.*

(d) *In a complaint proceeding, the hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.*

(e) *In a petition for review proceeding, if the parties resolve all issues raised by the petition, the petitioner shall agree to withdraw the petition and the case shall be dismissed.*

(f) *If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.*

(g) *Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.*

Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code; Section 11415.60, Government Code.

§ 60065.26. Discovery.

(a) *The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.*

(b) *The names and addresses of witnesses; inspection and copying of documents and things.*

(1) *Unless otherwise stipulated to by the parties, within 45 days of issuance of a complaint or amended complaint, a party may request:*

(A) *The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and*

(B) *The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (I) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible. **For purposes of this section, “any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody, or control of the other party” would include those items within the possession, custody, or control of a third-party who obtained or used such items while acting as a representative, contractor, or agent of the “other party”.***

(2) *Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.*

(3) *All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.*

(4) *Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.*

(c) *Other Discovery.*

(1) *A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the*

proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:

(A) The additional discovery will not unreasonably delay the proceedings;

(B) The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that

(C) The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding a matter at issue.

(2) The hearing officer may order the taking of oral depositions only under the following circumstances:

(A) After affirmatively making the findings in subparagraphs (c)(2)(A)- (C), and further finding that the information sought cannot be obtained by alternative methods; or

(B) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.

(4) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(d) Third-Party Notice of Request for Disclosure of Information Identified as Confidential and Opportunity to Participate.

(1) A third-party shall be notified whenever a party receives a request for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party, including, but not limited to, claims of confidentiality asserted pursuant to the California Public Records Act (CPRA). This section creates rights and obligations in addition to, and does not affect, existing rights and obligations under the CPRA and applicable federal regulations.

(2) A third-party shall have the opportunity to be heard on all issues involving requests for disclosure of information that is in the possession, control, or custody of the party subject

to a claim of confidentiality asserted by the third-party. Within five days of receipt of notice pursuant to subparagraph (d)(1), a third-party may object to disclosure of the subject information and may seek a protective order pursuant to subparagraph (e). Objections to disclosure may be based on all legal grounds, including, but not limited to, lack of relevance to the issues for hearing.

(e) Protective Orders:

(1) Upon motion by a party ~~or by the person~~ from whom discovery is sought, **a third-party who has made a claim of confidentiality regarding the information to be discovered,** or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.

(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the

order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.

(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the state board or to the court review of the record.

(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

(ef) Proceeding to Compel Discovery.

(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a). Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section ~~43105~~, 43028 and 43031(a), Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code.

§60065.27. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) **At the request of a party** subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, **or the** general counsel; or executive officer **of the complainant at the request of a party** or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43150~~, 43028 and 43031(a), Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

§ 60065.28. **Witness Lists and Exhibits.**

(a) No later than ten days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties;

(1) A list of the names, addresses and qualifications of proposed witnesses to be called in making the party's case-in-chief and a brief summary of the testimony to be presented by each witness; and

(2) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence in making the party's case-in-chief.

(b) The hearing officer may prohibit any party from presenting any witness or exhibit that has not been included on that party's witness list or submitted exhibits as required under paragraph (a) of this section.

NOTE: Authority cited: Sections 39600, ~~and~~ 39601, ~~43028 and 43031(a)~~. Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section ~~43105~~, Health and Safety Code.

§ 60065.35. Evidence by Affidavit or Declaration.

(a) At any time **ten 20** or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced, but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) **shall be a separate document concurrently served with the affidavit or declaration, entitled "Notice of Intent to Use Declaration or Affidavit in Lieu of Oral Testimony."** The title shall be in bold print. The content of the notice shall be **substantially** in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code.

§60065.39. Order or Decision of the Hearing Officer after a Complaint Hearing; Rehearing.

(a) Unless otherwise ordered, all complaint proceedings shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the alleged violations set forth in the complaint or the proposed penalty, or direct other relief as applicable.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to petition the executive officer, for reconsideration of the order or decision pursuant to section 60065.41 of these rules.

(e) (1) Within five days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of any modified order or decision on each party that had previously been served with the original order or decision. **The modified order or decision shall supersede the previously served order or decision, and the date of service of the modified order or decision shall be the effective date of the decision and order for purposes of sections 60065.41 and 60065.44.**

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

~~(g) The order or decision or modified order or decision of the hearing officer shall become effective 20 days after it has been served on the respondent, unless the executive officer, on his or her own motion, issues an order of reconsideration or grants a further stay, or a request for reconsideration has been filed by a party pursuant to 60065.41. If a request for~~

~~reconsideration has been filed, the effective date of the decision shall automatically be stayed for at least 20 additional days from the date of filing of the request for reconsideration.~~

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code.
Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code.

§60065.42. Requirements in Filing Request for Reconsideration; Comments Opposing Request.

(a) A request for reconsideration of a hearing officer order or decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:

(1) The hearing officer acted without or in excess of its powers;

(2) The order or decision was procured by fraud;

(3) The order or decision is not supported by the evidence or the findings of fact;

(4) The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or

(5) The hearing officer has misapplied applicable law.

(b) Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory **or constitutional** grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

(d) The request for reconsideration may include a request that the order or decision of the hearing officer be stayed pending resolution of the request for reconsideration. As stated in section 60065.48, the order or decision shall be automatically stayed for 20 days from the date of filing of the request for reconsideration.

(e) Within ten days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

Note: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code.

Subarticle 10. Final Order or Decision; Judicial Review

§ 60065.44. Final Order or Decision; Effective Date.

(a) If no request for reconsideration of a hearing officer's order or decision is filed within 20 days of the service of an order or decision, and no reconsideration has been ordered by the executive officer on his or her own motion the order or decision of the hearing officer shall become final. The effective date of the final order or decision shall be ~~20~~ 30 days from the date of service of the hearing officer order or decision on the parties.

(b) If a request for reconsideration has been filed but has been summarily denied because the executive officer has not taken any action on the request within 20 days after receipt of the request, the underlying hearing officer order or decision shall become final. The effective date of the order or decision becoming final shall be the date that the order summarily denying the request for reconsideration was served on the parties.

(c) If a request for reconsideration has not been summarily denied, the order or decision of the executive officer that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision shall be the date that the decision was served on the parties.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028 and 43031(a), Health and Safety Code.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF CITATIONS

~~*Amend Article 5, Subchapter 1, Chapter 1, Division 3, Title 17, California Code of Regulations, to read as follows: Article 5. Administrative Hearings Procedures for Review of Citations the Heavy-Duty Vehicle Roadside Smoke and Tampering Inspection Program*~~

Article 54. Administrative Hearings Procedures for Review of Citations the Heavy-Duty Vehicle Roadside Smoke and Tampering Inspection Program

§ 60075.1. Applicability.

These rules shall govern hearings to review citations issued by the state board pursuant to Health and Safety Code sections 43028, 43031(a) and 44011.6.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) ~~and in~~ Title 13, California Code of Regulations, section 2180.1., and Title 17, California Code of Regulations, sections 60040, et seq.

(b) The following definitions also apply:

(1) “Administrative record” means all documents and records timely filed with the hearing office, pursuant to section 60075.3 and the time deadlines of these rules, including pleadings, petitions, ~~and~~ motions, and legal arguments in support thereof; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer, executive officer, or the state board regarding the citation at issue; administrative record does not include any prohibited communications as defined in section 60075.14, and any settlement discussions or offers of settlement.

(2) “Citation” means an administrative action alleging one or more Class I violations as determined by the state board pursuant to section 60075.11.

(3) “Citee” means any person named in a citation as committing a Class I violation; in citations issued pursuant to Health and Safety Code section 44011.6 and Title 13, CCR, section 2180, et seq., the citee is the vehicle owner as defined in section 2180.1(a)(21).

(4) “Class I violation” means the type of violation for which issuance of a citation under this article is appropriate; it includes:

(A) All violations arising under Health and Safety Code sections 44011.6, et seq.; and
(B) Those violations that are less complex, less serious in nature as determined by one or more relevant factors listed in § 60075.11, and that the state board elects to address as “Class I violations.”

(5)(4) “Complainant” means the state board, acting through any of its employees that have been authorized by the state board or its executive officers, to investigate, issue, and prosecute a citation under this article.

(6)(5) “Consent Order” means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(7)(6) “Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(8)(7) “Discovery” means the limited right to exchange documents and taking of depositions, as provided in Subarticle 7.

(9)(8)(f) "Hearing Office" is the office established by the state board to conduct administrative hearings pursuant to Health and Safety Code section 44011.6(m) (f) and 43028 to implement the provisions of these rules. The H hearing O office shall include at least one administrative law judge who shall act as a hearing officer.

(10)(9)(ii) "Hearing Officer" is the person an administrative law judge appointed by the state board to conduct hearings pursuant to sections 44011.6 and 43028 of the Health and Safety Code and these rules. Only appointed administrative law judges shall act as hearing officers.

(11)(10)(iii) "Party" includes the owner of a vehicle cited pursuant to Health and Safety Code section 44011.6(b) and Title 13, California Code of Regulations, section 2180 et seq., who requests a hearing pursuant to section 60075.10 of these rules, and the staff of the state board. The staff of the state board shall be a party whether or not it has appeared or participated in the proceeding. includes the complainant and *citee respondent*.

(12)(11) “Penalty” means the civil penalty assessed against a *citee respondent* for one or more violations of the Act.

(13)(12) “Proceeding” means any hearing, determination or other activity before the hearing officer that involves the parties to a citation or consideration of the citation.

(13) “*Respondent*” means any person named in the field citation as committing a Class I violation.

(14) "Settlement Agreement" means a written agreement executed by complainant and *citee respondent that respectively settles the allegations at issue in the citation. The settlement agreement shall include, but not be limited to, the following: consisting of:* (1) stipulations by the parties establishing subject matter; (2) an admission by *citee respondent* that it committed the violations as alleged in the *field* citation or a statement by *citee respondent* that it neither admits nor denies that it committed such violations; and (3) *the terms and conditions of the settlement agreement as to the assessment of a civil penalty, with or without conditions.*

(iv) "~~Staff of the state board~~" includes the ~~inspector and any other employee of the state board whose primary duty is enforcing Health and Safety Code section 44011.6 and Title 13, California Code of Regulations, section 2180, et seq.~~

(v) "~~State board~~" has the same meaning specified in section 39053 of the Health and Safety Code. The term "~~state board~~" as used in these regulations includes the executive officer of the state board.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections ~~39515~~ 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.4. Service, Notice and Posting.

(a) Except as otherwise provided, the original of every pleading, letter, document, or other writing served in a proceeding under these rules shall be filed with the ~~H~~hearing ~~O~~office.

(b) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class *or interoffice* mail, ~~by~~ overnight delivery, or fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, ~~or overnight delivery~~ the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service, or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California, but within the United States, and 15 days if the place of address is outside the United States.

(3) If served by overnight delivery, *or interoffice mail*, the document must be deposited in a box or other facility regularly maintained *for interoffice mail or* by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service, or otherwise, at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days. ~~Each such document filed shall be accompanied by a proof of service on each party or his or her representative of record on the date of service. Proof of service shall be made by one of the following means, as appropriate:~~

~~(i) Affidavit or declaration of service by personal delivery or mail; or~~

~~(ii) Written statement endorsed upon the document served and signed under penalty of perjury by the party making the statement.~~

~~(iii) Proof of service by the Hearing Office may be made by endorsement on the document served, setting forth the fact of service and the signature of the person making the service.~~

(c) The proof of service shall be made by declaration by a person over the age of 18 years and shall state whether such service was made personally, or by mail, overnight delivery, or by fax, and the date of service

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(d) Service and notice to a party who has appeared through a representative shall be made upon such representative.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed *or legibly printed* and signed below this statement. Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid.

(f) Proof of service made in accordance with the Code of Civil Procedure section 1013a complies with this regulation. Service is complete at the time of personal delivery or mailing.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

§ 60075.6. Limitations on Written Legal Arguments or Statements

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be *legibly printed or* double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) 12 pages, for arguments in support of or opposition to motions; and

(2) Three pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections ~~43105~~, 43031(a) and 43028, Health and Safety Code.

§ 60075.10. Motions.

(a) Any motion, *including any-or* request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call or other electronic means. *These proceedings shall be recorded. The hearing officer may order that the proceedings be recorded.*

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

Subarticle 2. Issuance and Service of Citations

§ 60075.11. Determination of Class I Violations.

(a) A Class I violation includes:

(1) All violations arising pursuant to Health and Safety Code §§ 44011.6, et seq.

(2) Violations of the statutes and regulations pertaining to the motor vehicle fuel requirements and standards that the state board has determined, based upon its enforcement discretion, to be of a nature that is clear cut, and less complex and serious, in terms of size, scope, and harm to the public and environment.

(b) In determining whether violations are Class I violations under section (a)(2), the state board shall consider factors, including, but not limited to:

(1) The discernability of the violation;

(2) The potential risk of injury to the public and environmental harm from such a violation;

(3) Whether the violation is a single violation or has occurred in tandem with other violations;

(4) The frequency and duration of the violation;

(5) The time, effort, and expense required to correct the violation;

(6) The cooperation of the *respondent citee* in detecting and correcting the violation;

(7) The compliance history of the *respondent citee*

(8) Other factors as appropriate.

(c) The maximum civil penalty that may be proposed for each Class I violation, *described in subparagraph (a)(2) above*, may not exceed \$5,000 per day of violation and the maximum cumulative penalty that may be proposed in any single citation may not exceed \$15,000. See section 60075.39.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.12. Issuance and Service of Citations.

(a) The complainant may issue a citation to any person for Class I violations as defined in section 60075.11.

(b) A “Citation” shall include the following information:

(1) The names of the alleged *respondents citees*;

(2).The code section, rule or regulation that has allegedly been violated;

(3) A concise, but reasonably specific statement of the *facts that support issuance of each* alleged violation~~s~~;

(4)(3) A proposed penalty for the alleged violations that is to be assessed against the *citee* as authorized by applicable law;

(5)(4) Reference to these procedures, and notification that *Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings) and that a copy of the procedures are available from the ARB hearing office; the address and phone number of the hearing office shall be set forth in the citation which shall be designated, and that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings*;

(6)(5) Written notice to *respondent citee* that he or she:

(A) May respond to the allegations of the citation and request a hearing. It shall also inform the *respondent citee* of the consequences of failing to respond by the applicable deadline;

(B) Has the right to represent him or herself or to retain a representative, who is not required to be an attorney, at one's own expense; and

(C) If necessary, has the right to an interpreter.

(7)(6) The address of the office issuing the complaint; the address to which payment of the proposed penalty may be sent; and the address of the hearing office to whom a request for a hearing shall be submitted.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.13 7. Authority of Hearing Officers; Disqualification.

(a) In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold a prehearing and settlement conferences; conduct hearings to determine all issues of and ascertain facts; and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books,

documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

(b) The hearing officer or the executive officer, on a request for reconsideration, shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing. Any party may request the disqualification of a hearing officer by filing an affidavit or declaration under penalty of perjury;. A request for disqualification of the hearing officer must be made no later than five days prior to the commencement to the first day of hearing on the merits of the case. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be respectively determined by either the hearing officer or the executive officer against whom the request for disqualification has been filed.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11181-11182, 11425.30 and 11512, Government Code.

Subarticle 4. Ex Parte Communications

§ 60075.14. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60075.38.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60075.4.

(c) For the purpose of this section, a proceeding is pending from the time that the petition for review of an executive officer decision is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60075.38.

(e) A communication *between a hearing officer and an employee of the state board* that would otherwise be prohibited by this section is permissible *if*:

(1) The employee is another hearing officer or other employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board ~~if such employee~~ has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or in any factually related proceedings, and the purpose of the communication is to assist and advise the hearing officer in determining whether a document is a confidential business record (i.e., trade secrets) ~~and reviewing the evidence in the record and drafting a decision or order.~~ In obtaining such assistance and advice, the hearing officer shall give notice to the parties of the person consulted and shall provide the parties with as detailed a summary as possible of the substance of the advice received, while protecting the confidentiality of the business records at issue, and a reasonable opportunity to respond.

(3) The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to all employees covered by subparagraphs (1) and (2) above.

(4) Communications permitted under subparagraphs (1) and (2) above ~~In carrying out these functions, the employee of the state board shall not furnish, augment, diminish, or modify the evidence in the record.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, and 43031(a). Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections ~~43105~~, 43028, and 43031(a). Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60075.15. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section 43105, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60075.16. Applicability to Executive Officer.

(a) The provision of Subarticle 4 governing ex parte communications to the hearing officer also governs ex parte communications with the executive officer on matters that may come before him or her pursuant to Subarticle 11. ***Irrespective of the prohibitions of section 60075.13(a), the executive officer may consult with state board personnel who are not involved as an investigator, prosecutor, or advocate in the proceedings or preadjudicative proceedings of the matter before the executive officer, or in a factually related case, and whose job duties include assisting the executive officer in his or her adjudicative responsibilities.***

*(b) Except as **otherwise** provided in **Subarticle 10 these procedures**, while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the executive officer on a matter that is under consideration.*

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a). Health and Safety Code.
Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Section ~~43105~~, 43028 and 43031(a).
Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

Subarticle 5 3. Initiating Proceeding to Contest a Citation

§ ~~60075.17~~ 10. Filing a Request for Hearing.

(a) Upon receiving a citation the *citee respondent* ~~The owner of a motor vehicle cited pursuant to section 2180 et seq., Title 13, California Code of Regulations may:~~

(1) Initiate proceedings under these rules by filing a written request for hearing to contest a citation issued by the staff of the state board; or

(2) Pay the penalty demanded in the citation.

(b) For citations arising under section 44011.6 of the Health and Safety Code, the request for hearing shall be filed within 45 30 days of the *citee's respondent's* owner's receipt of the citation by personal delivery or certified mail.

(c) For all other citations issued by the state board, the request for hearing shall be filed within 30 days of the *citee's respondent's* receipt of the citation by personal delivery or certified mail.

(d) The hearing officer may extend the applicable filing period set forth in subparagraphs (b) and (c) for good cause.

(e) If the *citee respondent* vehicle owner fails to notify the Hhearing Ooffice of his or her intent to contest the citation within this the applicable period set forth in subparagraphs (b) and (c), and if the citation penalty amount has not been paid in full, the citation becomes a final order not subject to review by any court or agency.

(f)(e) The request for hearing shall be deemed filed on the date a communication the notice indicating a desire to contest the issued citation pursuant to section 44011.6(b) is delivered or mailed to, or if the date of delivery or mailing is not known, *is delivered or mailed to, or if the date of delivery or mailing is not known*, received by the Hhearing Ooffice. No particular format is necessary to institute the proceeding; however, the request shall include all of the information specified in section 60075.18 †† of these rules.

(g)(†) If the communication initiating the proceeding does not include the information required pursuant to section 60075.18 ††, the Hhearing Ooffice shall immediately acknowledge receipt of the communication indicating the desire to request a hearing and shall notify the *citee respondent* owner of the deficiencies in the submission which must be corrected before the request for hearing

may be filed and docketed. The *citee respondent* owner shall have 10 days from the date of mailing of the notice of deficiencies to submit a complete request for hearing; if the deficiencies are not corrected in the time provided the citation becomes final.

~~(h)~~ Upon timely receipt of a complete request for hearing, the ~~H~~hearing ~~O~~ffice shall assign a docket number to the proceeding, and shall notify the parties that the request for hearing has been filed and docketed.

(I) Upon a showing of good cause, the hearing officer may allow the *citee respondent* to amend the request for hearing after the deadline for filing has passed.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.18 H. Form of Request for Hearing.

(a) The request for hearing shall be signed by the *citee respondent* or its designated representative and contain at least the following information: a reference to the citation being contested, including citation number and date of issuance; date of *citee's respondent's* owner's receipt of the citation by personal delivery or certified mail; correct business address; a statement of the circumstances or arguments which are the basis of the request for hearing; identification of the facts the owner intends to place at issue; if applicable, the name and address of the designated representative; and identification of any other issues relating to the citation to be resolved in the proceeding.

(b) A separate request for hearing shall be filed for each citation contested.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.21 ~~14~~. Response.

(a) At the time that the hearing office deems a request for hearing filed under section 60075.17(h), the hearing office may request that the complainant file a response to the issues raised by citee in its request for hearing.

(b) If the complainant files a response, it shall be filed with the hearing office and served upon the citee within ~~Within~~ 20 days after receipt of notice of the filing of a request for hearing. ~~from the Hhearing Ooffice.~~ the staff of ~~the complainant~~ state board ~~shall file with the Hhearing Ooffice, and serve upon the respondent owner, a response to the request for hearing if ordered by the hearing officer in the notice of filing required pursuant to section 60075.17 10 (d) of these rules.~~ The response, ~~if required,~~ shall contain the reasons and facts in support of the issuance of the citation and any other information specified in the notice of filing.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

Subarticle 6 4. Resolution of Proceeding Without Hearing

§ 60075.22 ~~15~~. Withdrawal of Request for Hearing.

(a) The request for hearing may be withdrawn by the citee respondent owner by written request at any time before a decision is issued or by oral motion on the hearing record. The ~~H~~hearing ~~O~~fficer shall grant such withdrawal by order or decision served on the parties.

(b) The order or decision granting the motion to withdraw ~~is a final order effectively reinstates the citation. If the time period for filing a request for hearing has passed, the citation shall be deemed a final order not subject to review by the state board or any court. and not subject to review by any court or agency 30 days after service on the parties.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.24. Settlement Agreements and Consent Orders.

(a) At any time before a final decision of the hearing officer, the complainant and the *citee respondent* may settle an action, in whole or in part, by agreeing upon a civil penalty, with or without conditions, or other appropriate remedy.

(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.

(c) The parties shall memorialize any agreement in writing.

(d) The hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.

(e) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.

(f) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 11415.60, Government Code.

§ 60075.26. Discovery

(a) Exclusivity of Discovery Provisions.

The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by this chapter.

(b) Document Exchange.

(1) After initiation of a proceeding, a party, upon written request made to another party is entitled, prior to the hearing, to inspect and make a copy of any document, thing, statement or other writing relevant to the issues for hearing which is in the control of the other party and which is relevant and would be admissible in evidence, including, but not limited to, any statements of parties or witnesses relating to the subject matter of the proceeding, all writings or things which the party then proposes to offer in evidence, and any inspection or investigative reports prepared by or on behalf of any party.

(1) Each party may request within 30 days of respondent's filing of the request for hearing that the opposing party provide a copy of each document that the opposing party intends to introduce at the hearing.

(2) In addition, the complainant may request of a respondent the following information in writing who contends that it is unable to pay the penalty:

(A) Financial information in support of such claim, including, but not limited to, complete copies of its federal income tax returns for the previous three years; and

(B) The respondent's net profits, delayed or avoided costs, or any other form of economic benefit resulting from any activity or failure to act by the respondent which is alleged in the field citation.

(3) The parties shall exchange the requested information at a time mutually agreed to by the parties, or if no agreement has been reached, no later than 30 days after a request has been made. Documents shall be served upon the requesting party pursuant to section 60075.4(b).

(4) Unless other arrangements are made, the party making the request shall pay the reasonable costs of copying the requested materials.

(5) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.

~~§60075.19. Identity of Witnesses.~~

(c) Identity of Witnesses *and Exhibits*

(1) No later than 10 days before the scheduled hearing date, the parties shall submit to the Hearing Office and serve upon the other parties;

(A) ~~A~~ list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness; *and* .

(B) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence.

(2) The hearing officer may prohibit any party from presenting any witness *or exhibit* that has not been included on that party's witness list *or in submitted exhibits* as required under paragraph (c)(1) of this section.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 44011.6(m)(I), Health and Safety Code. Reference: Section and 44011.6, Health and Safety Code.

~~§ 60075.20. Access to Documents.~~

~~(a) After initiation of a proceeding, a party, upon written request made to another party is entitled, prior to the hearing, to inspect and make a copy of any document, thing, statement or other writing relevant to the issues for hearing which is in the control of the other party and which is relevant and would be admissible in evidence, including but not limited to, any statements of parties or witnesses relating to the subject matter of the proceeding, all writings or things which the party then proposes to offer in evidence, and any inspection or investigative reports prepared by or on behalf of any party.~~

~~(b) Parties shall arrange a mutually convenient time for inspecting and copying the writings or other statements. Unless other arrangements are made, the party requesting the writings must pay for the copying.~~

~~(c) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.~~

NOTE: Authority cited: Sections 39600, 39601 and 44011.6(I), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code.

~~§ 60075.21. Subpoena and Subpoena Duces Tecum.~~

~~(a) Before the hearing has commenced, the hearing officer assigned to a proceeding, general counsel or executive officer shall issue a subpoena and subpoena duces tecum at the request of a party for attendance of a person or production of a document or thing at the hearing. After the hearing has commenced, the hearing officer may issue a subpoena and subpoena duces tecum.~~

~~(b) Subpoenas and subpoenas duces tecum shall be issued in accordance with section 11510 of the Government Code.~~

~~(c) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard, upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.~~

~~NOTE: Authority cited: Sections 39600, 39601 and 44011.6(I), Health and Safety Code. Reference: Section 44011.6, Health and Safety Code; Sections 11185, 11191 and 11510, Government Code.~~

~~§ 60075.22. Depositions.~~

~~(d) Depositions.~~

~~The testimony of any witness necessary to the full adjudication of the issues who is unable to or cannot be compelled to attend the hearing may be obtained by deposition in accordance with the provisions of section 11511 of the Government Code.~~

~~(1) Unless otherwise stipulated to by the parties, depositions shall be limited to the following:~~

~~(A) A party may petition the hearing office to request that it be allowed to take the testimony of a material witness who is either unable to attend or cannot be compelled to attend a hearing on the merits may be obtained by deposition in the manner prescribed by law for depositions in civil actions;~~

~~(B) The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose;~~

(C) The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the date set for the deposition.

(2) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(e) Protective Orders:

(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all or part of the required showing in a meeting closed to the public. The hearing officer shall have discretion to limit attendance at any closed meeting to the hearing officer and the person or party seeking the protective order.

(4) If granted, the protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony covered by the protective order, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties.

(7) The hearing office shall make a record of all closed meetings that are ordered under this section. The record shall be sealed and made available, upon appropriate order, to the executive officer, on reconsideration, or to the court on review.

(8) If the hearing officer denies a motion for protective order or grants a protective order only in part, the order shall not become effective until 10 days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(†), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11185, 11191 and 11511, Government Code.

§60075.28. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) *At the request of a party,* subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, *or the general counsel;* or executive officer *of the complainant at the request of a party* or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections ~~43150~~, 43028 and 43031(a), Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

§ 60075.30 26. Time and Place of Hearing.

(a) Within 30 days of deeming the request for hearing complete and serving the notice of filing to the *citee respondent*, the filing of the request for hearing, the Hearing Office shall schedule the hearing date. A matter shall be scheduled to be heard as soon as practicable, but no later than 90 days after a request for hearing has been filed.

(b) The Hearing Office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code.

(c) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, grant such delays or continue a hearing to another time or place as may be necessary or desirable in the interest of fairly resolving the case.

(1) A party shall apply to the hearing officer for a continuance not less than 5 days prior to the scheduled hearing.

(2) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.

(d)(e) The Hearing Office shall set the place of hearing at a location as near as practicable to the place where the *citee respondent* owner resides or maintains a place of business in California. If the *citee respondent* owner does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The Hearing Office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

(e) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone or other electronic means.

(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.

(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Sections 11509 and 11440.30, Government Code.

§ 60075.31 27. Consolidation and Separation of Cases.

(a) The hearing officer may consolidate for hearing and decision any number of proceedings involving the same *citee respondent* owner.

(b) Upon motion of a party or upon his or her own motion, the hearing officer may consolidate for hearing and decision any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(c) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(†), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 11505.3, Government Code.

§ 60075.33 29. Conduct of Hearing.

(a) The hearing shall be presided over by a hearing officer and shall be conducted in the English language.

(b) The hearing officer shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.

~~(b) Hearings shall be recorded electronically.~~

(c) Each party to the proceeding shall have these rights: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut the opposing evidence against him. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.

(d) The complainant shall present the citation and the evidence supporting its issuance, and any other material that is pertinent to the issue to be determined by the hearing officer. *The citee respondent* has the right to examine, respond to, or rebut the citation and any proffered evidence and material. *The citee respondent* may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.
~~The hearing officer may call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.~~

(e) At the close of *citee's respondent's* presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(g) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement; and

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.

- (4) Exclude persons whose conduct impedes the orderly conduct of the hearing;
- (5) Restrict attendance because of the physical limitations of the hearing facility; or
- (6) Take other action to promote due process or the orderly conduct of the hearing.

(h) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(i) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing.

(1) The hearing office will not normally prepare a verbatim transcript of the official recording, but the hearing officer may order one if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one (1) copy to the hearing office and one (1) copy to the other party.

(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.34 30. Evidence.

(a) Testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(d) Consistent with the provisions of section 60075.26(e), ~~F~~ trade secret and other confidential information may be introduced into evidence. The hearing officer shall take all precautions to preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting ~~camera~~, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential. and other confidential information may be introduced into evidence.

(e) The hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or unduly prejudices the other party.

~~(f)(e)~~ In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the state board or the hearing officer.

~~(1)(i)~~ The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

~~(2)(ii)~~ The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

~~(3)(iii)~~ Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

~~(A)(1)~~ ~~t~~The propriety of taking official notice; and

~~(B)(2)~~ ~~t~~The effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 451, 452, Evidence Code.

§ 60075.35 ~~23~~. Evidence by Affidavit or Declaration.

(a) At any time ~~10~~ **20** or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within 7 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-

examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced into evidence, but if so allowed, it shall not only be introduced given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall ***be a separate document concurrently served with the affidavit or declaration, entitled "Notice of Intent to Use Declaration or Affidavit in Lieu of Oral Testimony."*** ***The title shall be in bold print. The content of the notice shall be substantially*** in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit ***or declaration*** to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.38 37. Default Order.

(a) A party may be found to be in default upon failure to appear at hearing without good cause.

(1)(i) No finding of default shall be made against the *citee respondent* owner unless the staff of the state board presents sufficient evidence to establish a prima facie showing that the citation was properly issued and the penalty appropriate.

(2)(ii) Default by the complainant ~~staff of the state board~~ shall result in dismissal of the citation with prejudice.

(b) If a default against a *citee respondent* in a complaint proceeding occurs, the state board, within 10 days, shall present written evidence supported by affidavits or declarations, substantiating the proposed penalty set forth in the complaint.

(c)(b) If the hearing officer determines that a default has occurred, he or she shall issue a default order against the defaulting party. Except as provided in section 60075.17(e), ¶ this order shall constitute a decision or order after hearing for purposes of section 60075.40 38 of these rules.

(d)(e) Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. The request for reinstatement shall be made by the defaulting party within 30 days of service of the default order pursuant to section 60075.38(d) of these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.39. Penalty Assessment Criteria.

(a) For citations issued under Health and Safety Code section 44011.6 and the regulation adopted pursuant thereto, Title 13, California Code of Regulations, sections 2180, et seq., the hearing officer shall follow the penalty schedule outlined in Title 13, CCR, section 2185.

(b) In determining penalties for citations issued under Health and Safety Code section 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:

(1) The extent of harm caused by the violation to public health and safety and to the environment;

(2) The nature and persistence of the violation, including the magnitude of the excess emissions;

(3) The compliance history of the *citee respondent*, including the frequency of past violations;

(4) The preventive efforts taken by *citee respondent*, including the record of maintenance and any program to ensure compliance;

(5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods;

(6) The efforts to attain, or provide for, compliance;

(7) The cooperation of the *citee respondent* during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation; and

(8) For the person who owns a single retail service station, the size of the business.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.40 38. Decision or Order After Hearing; Correction of Mistakes or Errors; Effective Date of Decision.

(a) Unless otherwise ordered, all proceedings shall be submitted at the close of the hearing. The hearing officer may extend the submission date and shall, within 30 days after the proceeding is submitted, ~~summarize the evidence received and relied upon,~~ make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the citation or penalty, or direct other relief as appropriate.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to request ~~a rehearing pursuant to section 60075.39 or to petition that the executive officer for reconsideration of the order or decision pursuant to sections 60075.43, et seq. 41~~ of these rules.

(e) (1) Within 5 five days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of the modified order or decision on each party that had previously been served with the original order or decision. ***The modified order or decision shall supersede the previously served order or decision, and the date of service of the modified order or decision shall be the effective date of the decision and order for purposes of sections 60075.41 and 60075.44.***

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

~~(g) The order or decision of the hearing officer shall become effective 20 days after it has been served on the citee respondent, unless the executive officer, on his or her own motion, issues an order of reconsideration or grants a further stay, or a request for reconsideration has been filed by a party pursuant to section 60075.41. If a request for reconsideration has been filed, the effective date of the decision shall automatically be stayed for at least 20 additional days from the date of filing of the request for reconsideration.~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(i), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.42 Reconsideration; Procedural Requirements.

~~(a)~~~~(c)~~ The ~~petition request~~ for reconsideration shall be signed by the party filing the request or its by his or her representative and verified upon oath. The petition request may only request reconsideration of issues that were raised before the hearing officer and may only shall be based upon one or more of the following grounds:

~~(1)~~~~(f)~~ ~~That by~~ In issuing the order or decision, the hearing officer acted without or in excess of his or her powers;

~~(2)~~~~(ii)~~ ~~That t~~The order or decision was procured by fraud;

~~(3)~~~~(iii)~~ ~~That t~~The evidence received by the hearing officer does not justify the findings of fact;

~~(4)~~~~(iv)~~ ~~That~~ The petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing;

~~(5)~~~~(v)~~ ~~That t~~The findings of fact do not support the order or decision; and

(6) The order or decision is contrary to applicable law.

~~(d) The petition for reconsideration may include a request that the decision of the hearing officer be stayed pending resolution of the petition for reconsideration.~~

~~(e) A party may, within 10 days of service of any notice of or petition for reconsideration, file an answer with the executive officer. The answer shall be signed by the party filing or by the representative and verified upon oath.~~

(b) (1) Any request for reconsideration shall set forth specifically and in full detail the grounds upon which the party making the request considers the order or decision to be unjust or unlawful and every issue to be considered by the executive officer on reconsideration. The party making the request shall be deemed to have waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the petition for reconsideration.

(2) The petition for reconsideration will be denied if it contains no more than allegations of the statutory *or constitutional* grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental requests or answers in response may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

~~(f) Upon reconsideration, the the executive officer may:~~

~~(i) Affirm, rescind, alter, or amend the findings, order or decision, or~~

~~(ii) Direct the taking of additional evidence either by submission or further hearing as provided in sections 60075.44 and 60075.45 of these rules.~~

~~(g) If he or she is satisfied that no additional evidence is necessary, after considering the record, the executive officer may enter his or her own order, findings, or decision after reconsideration.~~

(d) The request for reconsideration may include, and the executive officer may grant, a request that the decision of the hearing officer be stayed pending resolution of the petition for reconsideration.

(e) Within 10 days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer or the state board secretary, as applicable. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

§ 60075.44. Final Order or Decision; Effective Date

(a) Pursuant to sections 60075.17 and 60075.22(b), if a *citee respondent* fails to request a hearing to contest the issuance of a citation within the time period provided, the citation becomes a final order and the stated penalty due and payable.

(b) If no request for reconsideration of the order or decision of the hearing officer has been filed within 20 days of the service of an order or decision under section 60075.41(b) of these rules, and if the executive officer, on his or her own motion, has not issued a finding that reconsideration is appropriate under section 60075.41(a), the order or decision of the hearing officer shall become final. The effective date of the final decision or order shall be ~~20~~ 30 days after the date the order or decision of the hearing officer was served by mail on the parties.

(c) If a party has filed a request for reconsideration and it has been deemed summarily denied pursuant to section 60075.43(a), because the executive officer has not acted upon the request within the time provided, the order or decision of the hearing officer shall become final. The effective date of the hearing officer order or decision becoming final shall be 20 days from the date that the request for reconsideration was filed.

(d) If the executive officer issues a finding that reconsideration is warranted, the order or decision of the executive officer providing full disposition of the request for reconsideration pursuant to 60075.44(b) shall be the final order or decision and shall become effective on the date that it is served by mail on the parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code.

Subarticle 13 9. Judicial Review

§ 60075.45 47. Judicial Review.

~~The decision or order of the hearing officer, or if the decision or order has been issued by the executive officer after reconsideration, the executive officer, is the final decision or order unless the owner seeks~~

(a) Except for orders that have become final because a *citee respondent* has failed to request a hearing to contest a citation (see sections 60075.17, 60075.22(b) and 60075.44(a)), a party may seek judicial review of a final order or decision by administrative mandamus pursuant to section 1094.5 of the Code of Civil Procedure within 60 days after mailing of the decision or order. The right to petition shall not be affected by the failure to seek reconsideration before the agency.

(1) For citations arising under section 44011.6 of the Health and Safety Code, the *citee respondent* may file for judicial review within 60 days from the date the order or decision becomes final under section 60075.44.

(2) For all citations issued under section 43028 of the Health and Safety Code, the respondent may file for judicial review within 30 days from the date the order or decision becomes final under section 60075.44.

(b) The state board may seek to enforce a final order in accordance with applicable law or decision in Superior Court. ~~The final order or decision may be enforced in accordance with section 44011.6(j).~~

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m)(f), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 1094.5, Code of Civil Procedure.