

State of California
AIR RESOURCES BOARD

Second 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: April 2, 1999
Deadline for Public Comment: April 19, 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. On January 29, 1999, the ARB issued a first Notice of Availability of Modified Text and Additional References (First Notice). Comments on the First Notice have been received and reviewed. Upon consideration of the comments received and upon discovering the need for some additional clarification to the regulations, the staff is noticing for public comment this Second Notice of Availability of Modified Text and Additional References (Second Notice). The proposed modifications are summarized below:

Section 60055.2(b)(9) has been modified to make the definition of "party" consistent with the use of that term in section 60055.13. This modification was inadvertently omitted from the First Notice, which modified the scope of permissible ex parte communications in section 60055.13.

Section 60055.12 has been modified by adding a new subparagraph (b) to make it clear that a hearing officer must recuse him or herself from any case in which he or she has previously been involved in as an investigator, prosecutor, or advocate. The express recusal provision is consistent with the discussion in the staff report regarding impartial hearing officers and the general prohibition set forth in subparagraph (a) that a hearing officer disqualify him or herself in those cases in which he or she cannot accord a fair and impartial hearing.

Section 60055.17(a)(3) has been modified to make it clear that in a petition for review hearing, the petitioner is only responsible for bearing one-half of the fees charged by the Office of Administrative Hearings (OAH) when the assignment to OAH is a direct result of the petitioner having requested that the Board make such a referral.

Section 60065.12 has been modified similar to and for the reasons discussed above for section 60055.12.

Section 60065.16(b)(4) has been modified for purposes of clarity.

Section 60075.12(b)(5), like section 60065.16(b)(4), has been modified for purposes of clarity. The attempt for clarity in the First Notice was unsuccessful.

Section 60075.13(b), has been modified by adding a new sentence to make it clear that a hearing officer must recuse him or herself from any case in which he or she has previously been involved in as an investigator, prosecutor, or advocate. As stated above regarding the modifications to sections 60055.12 and 60065.12, the express recusal provision is consistent with the discussion in the staff report regarding impartial hearing officers and the general prohibition that a hearing officer disqualify him or herself in those cases in which he or she cannot accord a fair and impartial hearing.

Section 60075.16(b) as it was printed in the First Notice has been deleted and a new subparagraph (b) is being proposed that correctly reflects the modifications that were intended to be noticed in the First Notice.

Notice of Additional References

In the First Notice, the ARB provided public notice that it intended to add additional references to the rulemaking record, including Executive Order G-98-069, dated January 18, 1999. That Executive Order has subsequently been amended and superseded by Executive Order G-99-008. In accordance with Government Code sections 11346.9(a)(1) and 11346.8(d), and Title 1, CCR, section 45, the ARB hereby gives notice that it intends to add Executive Order G-99-008, a copy of which is attached, to the rulemaking record as Attachment B.

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 April 19, 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.

Attachments

ATTACHMENT A

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 and subsequently modified in the first Notice of Availability of Modified Text and Notice of Additional References dated January 29, 1999. In this Second Notice of Availability of Modified Text and Notice of Additional References, additions to the text are indicated by **bold double underline** and deletions by shaded text.

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

Note: In this Second Notice of Availability of Modified Text and Notice of Additional References, additions to the text are indicated by **bold double underline** and deletions by shaded text. The regulation, Title 17, CCR, sections 60055.1, et seq., is new, and the language initially noticed on August 7, 1998, was indicated by *italics*. In the First Notice of Availability of Modified Text and Notice of Additional References, additions to the text were indicated by **bold italic underline** and deletions by ~~***bold italic strikeout***~~.

§ 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 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.*

(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 the 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.

§ 60055.12. Disqualification.

(a) *The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.*

(b) **A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.**

(c) *Any party may request the disqualification of a hearing officer or the executive officer, on a request for reconsideration, by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state 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 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 11425.40 and 11512, Government 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 paragraph (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.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF COMPLAINTS

Note: In this Second Notice of Availability of Modified Text and Notice of Additional References, additions to the text are indicated by **bold double underline** and deletions by shaded text. The regulation, Title 17, CCR, sections 60065.1, et seq. is new, and the language initially noticed on August 7, 1998, was indicated by *italics*. In the First Notice of Availability of Modified Text and Notice of Additional References, additions to the text were indicated by ***bold italic underline*** and deletions by ***bold italic strikeout***.

§ 60065.12. Disqualification.

(a) *The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.*

(b) **A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.**

(c) *Any party may request the disqualification of a hearing officer or the executive officer, on a request for reconsideration, by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state 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 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 11425.40 and 11512, Government Code.

§ 60065.16. Violations Subject to a Complaint; Issuance.

(a) A complaint may be issued if:

(1) The violation alleged arises under Part 5 of the Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards;

(2) The state board has determined that the alleged violation is not a Class I violation that is subject to a citation under Title 13, California Code of Regulations, Article 5, section 60075.1, et seq.; and

(3) The penalty for each violation does not exceed \$25,000 for any day of violation and the total penalty for all violations alleged in a complaint does not exceed \$300,000.

(b) A complaint shall include:

(1) The names of each respondent alleged to have committed a violation(s) covered under this article;

(2) A statement of the facts, in ordinary and concise language, that specifically identifies the statutes and/or rules alleged to have been violated and the acts or omissions of the respondents that constitute the alleged violation(s). The statement shall be specific enough to afford the named respondents notice and information in which to prepare a defense;

(3) A proposed penalty that complainant seeks for the alleged violations committed;

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

(5) Written notice to the respondent that, within 30 days from the date of service, it may respond to the allegations of the complaint and request a hearing. It shall also inform the respondent of the consequences of failing to respond by the applicable deadline;

(6) Written notice to the respondent that it has under the hearing procedures the right to counsel; and, if necessary, the right to an interpreter; or

(7) 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.

(c) A complaint shall be served on the named respondent(s) by either personal service or certified mail.

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), Part 5, Health and Safety Code; Sections 60075.1, et seq., Title 13, California Code of Regulations.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF CITATIONS

Note: In this Second Notice of Availability of Modified Text and Notice of Additional References, additions to the text are indicated by **bold double underline** and deletions by shaded text. The amendments to Title 17, California Code of Regulations, sections 60075.1 et seq., that were initially proposed in the August 7, 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. In the First Notice of Availability of Modified Text and Notice of Additional References, additions to the text were indicated by **bold italic underline** and deletions by ~~**bold italic strikeout**~~ and ~~**bold italic strikeout with underline**~~.

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

(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.

Subarticle ~~3 2~~ Hearing Officers

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. **A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.** 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)(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 11181-11182, 11425.30 and 11512, 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.

(b) Except as otherwise provided in 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.