

Clearing The Air: Kelley Drye Helps Coalition Call For Transparency on CARB Penalty Policies

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A new business coalition will urge the California Air Resource Board (CARB) on Monday October 12th to craft a formal enforcement policy that spells out its structure for calculating penalties and make public how it assesses those penalties - rather than acting inconsistently on an ad hoc basis.

The group, Californians for Enforcement-Reform and Transparency (CERT), will appear at the state air quality public workshop to call for the board to spell out a clear enforcement policy and disclose how it allocates the money collected in settlements.

As part of improving the credibility of CARB's enforcement program, the group will call for the board to publish an annual or bi-annual report detailing precisely how it assesses penalties under the Air Pollution Control Funds and how it spends the money it collects - "consistent with proper oversight and authority."

The state board's discussion of enforcement policies grows out of comments by Chairwoman Mary Nichols of CARB in a July hearing in which she strongly supported "regularizing and formalizing (CARB's) penalty structures and procedures."

She noted, "If we are not enforcing our regulations in a way that is seen by the public to be effective and fair, we might as well not be passing all the regulation that this board works hard to adopt."

John Dunlap, a former chairman of CARB, supports the CERT goals and has endorsed the new group's aims for what he has described as a "needed reform process."

The goals of Chairwoman Nichols dovetail with CERT's aims, according to Dunlap.

"This needed reform process will help achieve our mutual goals of reducing air pollution," said Dunlap, "effectively prioritizing enforcement resources, and promoting compliance and integrity - through the adoption and implementation of a consistent, fair, and transparent penalty process."

CERT supports a crackdown aimed at the most serious and deliberate violations (typically imports from off-shore, new market-entrants). The group has pointed to the penalty structure used by the United States Environmental Protection Agency as a possible model for the state board. The EPA formula has been effective in focusing on cases where pollution violations are the worst.

The group advocates for a system that imposes the heaviest penalties on the most serious, prolific violations. Such pollution should be regarded as a more serious risk, for example, than administrative paperwork oversights that cause no harm to the environment. It is calling for a structure that is publicly visible, easily understood, and enforced in a clear and consistent manner of

good government.

George Lawrence, a former top official with the U.S. EPA, also supports CERT's goals and objectives. Lawrence, the former head of the EPA's Mobile Source Enforcement Branch, said the agency's penalty formula, which has focused on cases that are most significant, has "instilled an important perception of fairness."

"EPA's penalty matrix has proven highly effective in focusing enforcement on cases where the impacts on the environment and avoided compliance costs are most significant," said Lawrence. "It has also provided clarity to all stakeholders, including environmental groups."

A lawyer for CERT, [William Guerry](#), a partner with Kelley Drye & Warren LLP in Washington, said environmental, government and business leaders share a common stake in policy reforms that crack down on the most egregious polluters. Guerry argues that "CARB must adopt a more transparent system in terms of how they collect and spend penalty funds."

"There should be an evaluation of whether settlement funds should ultimately go to the state," Guerry said, "rather than being retained by CARB - in order to achieve CARB's core mission, which is protecting air quality and preserving its integrity and credibility."

See below for more information on CERT and its positions, as well as a comprehensive supporting "Note" by George Lawrence on the effectiveness of the EPA penalty policy.

[CERT Position Paper on Enforcement Reform](#)

[George Lawrence Note on EPA Penalty Policy](#)