

# Attachment A

## PROPOSED AMENDMENTS

COMPLAINTS, title 17, CCR sections 60065.1 et seq.

STATE OF CALIFORNIA  
AIR RESOURCES BOARD

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING  
PROCEDURES FOR REVIEW OF COMPLAINTS

**Note: Proposed new language is indicated by underline and proposed deletions are shown in ~~strikethrough~~.**

## **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 sections 42410, 43023, and 43028. The procedures outlined here do not apply to citations that are subject to review under Article 5, section 60075.1, 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathew v Eldridge 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 60075.1, 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, 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, other than a citation issued for a Class I violation pursuant to title 17, California Code of Regulations, section 60075, issued by the complainant that seeks administrative civil penalties as an alternative to judicial civil penalties, 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 either an administrative law judge appointed by the state board to conduct hearings under these procedures pursuant to Health and Safety Code section 43028, or an administrative law judge within the Department of General Services, State Office of Administrative Hearings (OAH) who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023. 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, respondent, and an intervenor to the extent permitted by the hearing officer pursuant to section 60065.22.

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

(14) "Respondent" means any person against whom a complaint has been filed under this article.

(15) "Response/Request for Hearing" means a document, responsive to the complaint and signed by the respondent, in which respondent requests a hearing before an administrative law judge and admits or denies the allegations of the complaint or asserts affirmative defenses to the action.

(16) "Settlement Agreement" means a written agreement executed by the complainant, 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.

NOTE: Authority cited: Sections 39010, 39600, 39601, 42410, 43023, 43028, and 43031(a), et seq., Health and Safety Code. Reference: Mathews v. Eldridge, Mathew v. Eldridge 424 U.S. 319 (1976); Sections 39010, 39514, 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code., 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.

### **§60065.3. Right to Representation.**

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following

notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 2180, et seq., title 13, California Code of Regulations.

#### **§ 60065.4. Time Limits; Computation of Time.**

(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day, unless otherwise provided.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60065.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be

extended as provided in section 60065.5(c).

(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times other than regular business hours will be filed on the next regular business day.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

### **§ 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~~ 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.

(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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

#### **§ 60065.6. Motions.**

(a) Any motion 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. 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.

(f) A request for a prehearing conference or a settlement conference under sections 60065.27 and 60065.28 does not constitute a motion within the meaning of this section.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

### **§ 60065.7. Form of Pleadings.**

(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code.

### **§ 60065.8. 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 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) Fifteen pages, for arguments in support of or opposition to motions; and
- (2) Five pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code.

#### **§ 60065.9. Records of the State Board.**

Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 6250, et seq., Government Code; Sections 91000, et seq., title 17, California Code of Regulations.

#### **§ 60065.10. Interpreters and Other Forms of Accommodation.**

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.

### **Subarticle 2. Hearing Officers**

### **§ 60065.11. Authority of Hearing Officers.**

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 prehearing conferences; conduct hearings to determine all issues of fact 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.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code.

### **§ 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11425.40 and 11512, Government Code.

### **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~~ complaint 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 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). 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 shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, 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 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a)-, 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

#### **Subarticle 4. Issuance of and Response to Complaints**

**§ 60065.16. Violations Subject to a Complaint; Issuance.**

(a) A complaint may be issued for violations: if

(1) Arising under part 5, chapters 1 through 4 and chapter 6 of division 26 of the Health and Safety Code, or violations of any rule, regulation, permit, variance, or orders of the state board adopted or issued pursuant to authority granted under those Health and Safety Code provisions; ~~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) Of regulations adopted and orders issued by the state board pursuant to authority granted under parts 1 through 4 of division 26 of the Health and Safety Code. ~~The state board has determined that the alleged violations 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~~

(b) ~~(3) Complaints issued pursuant to Health and Safety Code 43028 shall not seek penalties that The penalty for each violation does not exceed \$25,000 per violation for each any day of violation or and the total penalties penalty in excess of for all violation's alleged in a complaint does not exceed \$300,000.~~

(c) Complaints issued pursuant to Health and Safety Code sections 42410 and 43023 shall not seek penalties in excess of the lesser of the maximum amount allowed by statute for a violation or \$10,000 per violation for any day in which the violation occurs, with a total penalty assessment not to exceed \$100,000. In determining the amount allowed by statute, the ARB shall use the method of calculation set forth in the underlying statute (e.g., HSC §43016 states that penalties shall be assessed on a per vehicle basis.)

(d) The state board shall not issue a complaint for any violation if:

(1) The state board shares concurrent enforcement jurisdiction with a district and the district has commenced an enforcement action for that violation;

(2) The state board has determined the violation to be a Class I violation as defined in title 17, California Code of Regulations, sections 60075.2(b)(5) and 60075.11.

(e) ~~(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, notice that a copy of the procedures ~~are~~ is 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;

(5) Written notice to the respondent that, within 30 days from the date of service, it may respond to the allegations of the complaint by filing a ~~and~~ response/request for a hearing that the matter be heard by an administrative law judge. # The notice 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 response/request for a hearing may ~~shall~~ be submitted.

(f) A complaint shall be filed with the appropriate hearing office and served on the named respondent(s) by either personal or other form of service consistent with Code of Civil Procedure sections 415 through 417 service or by certified mail, restricted delivery.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Part 5, Health and Safety Code; Sections 60075.1, et seq., title 13, California Code of Regulations.

### **§ 60065.17. Withdrawal of or Amendment to the Complaint.**

(a) The complainant may without prejudice withdraw or amend the complaint once as a matter of right at any time before respondent has filed its response.

(b) After the response has been filed, the complainant may move to withdraw or amend the complaint. A motion to amend the complaint must include the proposed

amendment. The hearing officer may grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

**§ 60065.18. Response/Request for Hearing to ~~Complaint by Respondent~~.**

(a) Within 30 days after service of the complaint, the respondent or ~~counsel for the respondent~~ its representative may file a response/request for hearing to the complaint with the hearing office designated in the complaint. ; In addition to requesting a hearing before an administrative law judge, ~~in which~~ the respondent may:

(1) Object to the complaint on the ground that it does not state acts or omissions upon which the agency may proceed;

(2) Object to the form of the complaint on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense;

(3) Admit or deny the complaint, in whole or in part, specifying each allegation of fact or conclusion of law as to liability which is in dispute;

(4) Present new matters by way of affirmative defenses; or

(5) Oppose or agree to pay the penalty amount proposed in the complaint.

(b) The time period for response may be extended:

(1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or

(2) At the discretion of the hearing officer, for a period of up to 60 days, if the respondent can show good cause and if the complainant is not prejudiced by such a delay.

(c) Each uncontested allegation in the complaint shall be deemed admitted by the respondent.

(d) If the respondent fails to respond to the complaint in the time periods provided in this section, the matter shall be considered a default, pursuant to section 60065.41 and the respondent shall be considered to have waived his or her right to appear in the matter

covered by the complaint.

(e) If a complaint is amended prior to the time respondent's response was due under subparagraph (a), respondent shall have 15 additional days from the date of service of the amended complaint to file the response.

(f) The respondent may move to amend its response to the complaint. Such motion must include language of the proposed amendment. The hearing officer may grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.19. Issues for Hearing.**

The issues for hearing shall be limited to those raised in the complaint or amended complaint and the response or amended response. If the complaint alleges a repeat violation and the validity of the earlier violation(s) was not contested because of the respondent's failure to file a response/request for hearing the validity of the earlier violation(s) shall not be at issue.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.20. Cease and Desist Orders; Stays Pending Hearing.**

If the ARB enforcement staff has issued a cease and desist order against the respondent for alleged violations set forth in the complaint, the respondent may request a stay pending hearing from the hearing officer. The hearing officer may grant a stay - pending issuance of a hearing officer decision under section 60065.39, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a),

Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

## **Subarticle 5. Prehearing Procedures**

### **§ 60065.21. Scheduling of Hearings.**

(a) Upon filing of a complaint issued pursuant to authority granted under Health and Safety Code sections 42410 and 43023, with OAH, the matter shall be assigned to a hearing officer.

~~(a) (b) Upon issuance~~ filing of a complaint issued pursuant to Health and Safety Code section 43028, the hearing office of the state board shall assign ~~refer the matter to the administrative hearing office of the state board for assignment of a hearing officer of the state board. 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 state board's administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the OAH State office of Administrative Hearings for assignment.~~

~~(b) (c) The hearing office in which a complaint is filed shall as expeditiously as possible, but no later than 30 days after issuance a response/request for hearing of to the complaint has been filed or 45 days from the date that the complaint was issued if no response/request for hearing has been filed, assign the matter to a hearing officer and schedule the matter for hearing on the merits of the complaint. Except as provided in paragraph (f), below, a hearing shall on the merits of a complaint, in general, be scheduled for to be heard no later than 180 days from the date of issuance of the complaint or from receipt of the petition for review, unless the hearing officer determines, for good cause, that a later hearing date is necessary and in the interest of justice.~~

~~(c) (d) 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, and shall also provide notice of the availability of interpreters pursuant to section 60065.10 of these rules.~~

~~(d) (e) The hearing officer shall grant such delays or continuances as may be necessary or desirable in the interest of fairly resolving the case.~~

(1) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.

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

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

~~(e)~~ (f) The hearing office shall set the place of hearing at a location as near as practicable to the place where the respondent resides or maintains a place of business in California. If the respondent 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.

~~(f)~~ (g) 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.

(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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11509 and 11440.30, Government Code.

#### **§ 60065.22. Motion to Intervene.**

(a) A person may file a motion to intervene, and the hearing officer may grant such a motion if all of the following conditions are satisfied:

(1) The motion is in writing, with copies served on all parties named in the complaint ~~or the petition for review~~.

(2) The motion is made as early as practicable prior to the prehearing conference, if one is held, or the first day of the hearing on the merits of the complaint ~~or petition for review~~.

(3) The motion states facts demonstrating that the requesting intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that it qualifies as an intervenor under a statute or regulation.

(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(b) If motion is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a later time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Limiting or excluding the intervenors's participation in settlement negotiations.

(c) The hearing officer shall issue an order granting or denying the motion for intervention as soon as practicable in advance of the hearing, briefly stating the reasons for the order and specifying any conditions that he or she has determined as appropriate. The hearing officer may modify the order at any time, stating the reasons for the modification. The hearing officer shall promptly give notice of any order granting, denying, or modifying intervention to the applicant and to all parties.

(d) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made at the sole discretion of the hearing officer, based upon his or her knowledge and judgment. The determination is not subject to administrative or judicial review.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Section 11440.50,

Government Code.

**60065.23. Consolidation, Separation of Proceedings.**

(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for hearing and decision:

(1) Any number of proceedings involving the same respondent or petitioner;  
and

(2) 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 the parties.

(b) 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

**§60065.24. Prehearing Conference.**

(a) In any action in which the respondent timely responds pursuant to section 60065.18, ~~or a petition for review has been scheduled for hearing~~, the hearing officer may require a prehearing conference upon his or her own order or the request of any party. A request for a prehearing conference shall be in writing, addressed to the hearing officer and served on all parties.

(b) A prehearing conference shall be held no later than 30 days after an order of the hearing officer or a request by a party, but no later than 90 days from the date of respondent's filing of the response to a complaint ~~or receipt of the petition for review~~.

(c) The hearing officer may conduct the conference in person or by telephone.

(d) At least ten business days before a scheduled conference, each party shall file with the hearing office and serve on all other parties a prehearing conference statement which shall contain the following information:

(1) Identification of all operative pleadings by title and date signed;

(2) The party's current estimate of time necessary to try the case;

(3) The name of each witness the party may call at hearing along with a brief statement of the content of the witness's expected testimony;

(4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 60065.29, if known;

(5) The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resumé for each expert witness;

(6) Whether there is need for an interpreter or special accommodation at the hearing;

(7) A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence; and

(8) A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.

(9) If the matter is a complaint proceeding, the complainant shall specify the proposed penalty and state the basis for that penalty. The respondent shall provide all factual information it considers relevant to the assessment of a penalty.

(e) At the prehearing conference the hearing officer may:

(1) Establish a time and place for further proceedings in the action, but no hearing on the merits of the action shall take place sooner than 30 days following the date of the prehearing conference;

(2) Attempt to simplify issues and help the parties to stipulate to facts not in dispute;

(3) Explore the necessity or desirability of amendments to the pleadings;  
and

(4) Discuss any other appropriate subject.

(f) After the prehearing conference, the hearing officer shall issue a prehearing order which incorporates the matters determined at the conference. This order may be

issued orally if an accurate record can be made. Agreement on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the hearing officer. If no matters were determined or dates set at the prehearing conference, a prehearing order is not required. The hearing officer may, to aid the efficient administration of justice, modify the prehearing order as necessary.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety 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. For cases assigned to OAH, OAH may assign administrative law judges from the state board to assist in settlement discussions.

(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)~~ (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.

~~(g)~~ (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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 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 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.

(f) 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, 42410, 43023, 43028 and 43031(a)-, Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 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, 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11186 - 11188 and 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, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.29. Motions for Summary Determination of Issues.**

(a) Any party may file a motion for summary judgment or summary adjudication of

the issues. Such motions shall include supporting legal argument, and where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment on the issue(s) as a matter of law.

(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment on the issue(s) as a matter of law, the hearing officer shall issue a written decision or order that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. In a complaint proceeding, if the hearing officer decision finds the respondent to be in violation, the hearing officer shall follow the penalty assessment criteria set forth in section 60065.40.

(c) Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the hearing officer may deny the motion or may grant a continuance to permit affidavits to be obtained or to permit such additional discovery as provided under these procedures.

(d) The hearing officer shall deny a request for summary determination of the issue(s) if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact on the issue(s) and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

## **Subarticle 6. Contempt and Sanctions**

### **§ 60065.30. Contempt.**

If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the

oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.

Note: Authority cited: Sections 39600, 39601, 43028 and 42410, 43023, 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11455 and 11525, Government Code.

### § 60065.31. Sanctions.

(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(b) An order for sanctions may be oral on the record or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11455.30 and 11525, Government Code.

## **Subarticle 7. Hearings**

### **§ 60065.32. Failure to Appear.**

If after service of a Notice of Hearing, including Notice of Consolidated Hearing or Continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party, or on his or her own motion, issue a default order in a complaint proceeding in accordance with section 60065.38 of this article, ~~or adversely rule against the absent party in a petition for review hearing.~~

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

### **§ 60065.33. Conduct of Hearing.**

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

(b) The hearing shall be conducted in the English language.

(c) Subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:

- (1) Call and examine witnesses;
- (2) Introduce exhibits;
- (3) Question opposing witnesses on any matter relevant to the issues even

though that matter was not covered in the direct examinations;

(4) Impeach any witness regardless of which party first called the witness to testify; and

(5) Call and examine an opposing party as if under cross-examination, even if that party does not testify on his or her own behalf.

(d) Burden of Going Forth.

(1) The complainant shall have the initial burden of presenting evidence in support of issuance of the complaint, the requested penalty, and any other material that is pertinent to the issues to be determined by the hearing officer.

(2) At the conclusion of complainants case-in-chief, the respondent has the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. The respondent may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.

(3) At the close of 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 (e)(1) below.

(e) 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;

(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.

(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) Each matter in controversy shall be decided by the hearing officer upon a preponderance of the evidence.

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

(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.34. 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 upon 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) Trade secret and other confidential information may be introduced into evidence. The hearing officer shall preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential.

(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 hearing officer.

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

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

(3) 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) The propriety of taking official notice; and

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 451 and 452, Evidence Code.

### **§ 60065.35. Evidence by Affidavit or Declaration.**

(a) At any time 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.36. Exclusion of Witnesses.**

Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses not at the time under examination; but the parties or their representatives to the proceeding shall not be excluded.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.37. Oral Argument and Briefs.**

(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion, or upon motion of a party, grant and determine the length of oral argument.

(b) Motions to submit written closing argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. The hearing officer shall determine the appropriate page lengths of all post hearing briefs at the time he or she determines that the filing of closing arguments is appropriate. A party shall file a written closing brief within 15 working days from the date of the hearing. Opposing parties may file a reply brief within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

## **Subarticle 8. Decisions of the Hearing Officer**

### **§60065.38. Default Order.**

(a) Upon motion, the hearing officer may find a party to be in default upon failure, without good cause to file a timely response to the complaint as required under section 60065.18; to appear at a scheduled conference or hearing; or to comply with an order of the hearing officer.

(b) For purposes of a pending complaint action,

(1) A default by respondent shall constitute an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing of the factual allegations.

(2) A default by complainant shall constitute a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(c) No finding of default shall be made against the respondent unless the complainant presents sufficient evidence to establish a prima facie showing that the state

board and the hearing officer had jurisdiction over the matters at issue and that the complaint was properly served.

(d) Within 10 days, the complainant shall present written evidence, supported by affidavits or declarations explaining the proposed penalty set forth in the complaint.

(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 10 days of service of the default order.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 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.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.40. Penalty Assessment Criteria.**

(a) In determining penalties for complaints issued under Health and Safety Code section 42410, the hearing officer shall consider all relevant circumstances, including, but not limited to:

(1) The extent of harm caused by the violation;

(2) The nature and persistence of the violation;

(3) The length of time over which the violation occurs;

(4) The frequency of past violations;

(5) The record of maintenance;

(6) The unproven or innovative nature of the control equipment;

(7) Any action taken by the respondent, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation;

(8) The financial burden to the respondent; and

(9) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated.

(b) In determining penalties for complaints issued under Health and Safety Code sections 43023 and 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:

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

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

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

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

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

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

(g) (7) The cooperation of the 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~~

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

(9) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated.

NOTE: Authority cited: Sections 39600, 39601, 42403, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 44011.6, 43154, 43201, 43211, and 43212 Health and Safety Code.

## **Subarticle 9. Reconsideration**

#### **§ 60065.41. Reconsideration by Executive Officer.**

(a) A party aggrieved by an order or decision of a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules may, within 20 days of service of such order or decision, request that the executive officer reconsider the hearing officer decision with respect to any matters covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the executive officer.

(b) Within 20 days of issuance of an order or decision by a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules, the executive officer may, on his or her own motion, decide to order reconsideration of the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of this decision.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 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 30 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

## **Subarticle 10. Final Order or Decision; Judicial Review**

### **§ 60065.443. 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 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, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

#### **§ 60065.454. Judicial Review.**

(a) A party adversely affected by ~~the~~ a final decision of the hearing officer or the executive officer on reconsideration, may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the agency. Such petition shall be filed within 30 days after the order or decision becomes final.

(b) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Section 1094.5, California Code of Civil Procedure.