

Attachment B

PROPOSED AMENDMENTS CITATIONS, Title 17, CCR SECTIONS 60075.1 ET SEQ.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF CITATIONS

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

Article 4. Administrative Hearing Procedures for Review of Citations

Subarticle 1. General Provisions

§ 60075.1. Applicability.

These rules shall govern hearings to review citations issued by the state board pursuant to Health and Safety Code sections 42410, 43023, 43028, 43031(a) and 44011.6.

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

§ 60075.2. Definitions.

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

(b) The following definitions also apply:

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

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

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

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

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

(A) All violations arising under Health and Safety Code sections 44011.6, et seq.; and

(B) Those violations that are less complex, less serious in nature as determined by one or more relevant factors listed in section 60075.11, and that the state board elects to address as "Class I violations."

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

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

(7) "Days" means calendar days.

(8) "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.

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

(10) "Executive Officer" is the executive officer of the state board.

(119) "Hearing Office" is the office established by the state board to conduct administrative hearings pursuant to Health and Safety Code sections 44011.6(m) and 43028, or the Department of General Services, Office of Administrative Hearings ("OAH"), established pursuant to Government Code section 11370.2. to implement the provisions of these rules. The hearing office shall include at least one administrative law judge who shall act as a hearing officer.

(1240) "Hearing Officer" is an administrative law judge appointed by the state board to conduct hearings pursuant to sections 44011.6 and 43028 of the Health and Safety Code and these rules, or an administrative law judge within OAH, who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023 and these rules. ~~Only appointed administrative law judges shall act as hearing officers.~~

(1344) "Party" includes the ~~complainant~~ citing party and citee.

(1442) "Penalty" means ~~the civil~~ an administrative penalty assessed against a citee for one or more violations of the Act.

(1543) "Proceeding" means any hearing, determination or other activity before the hearing officer that involves the parties to a citation or consideration of the citation.

(1614) "Settlement Agreement" means a written agreement executed by ~~complainant~~ citing party and citee that respectively settles the allegations at issue in the citation. The settlement agreement shall include, but not be limited to, the following: (1) stipulations by the parties establishing subject matter; (2) an admission by citee that it committed the violations as alleged in the citation or a statement by citee that it neither admits nor denies that it committed such violations; and (3) the terms and conditions of the settlement.

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

§ 60075.3. Time Limits; Computation of Time.

(a) All actions required pursuant to these rules shall be completed within the times specified in these rules, unless extended by the hearing officer upon a showing of good cause, and after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing must be received in advance of the date on which the above is due to be filed 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 performed, the day of the event from which the designated right or act begins shall be excluded 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.

(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, letter, document, or other writing is by mail, overnight delivery, or by facsimile transmission (fax), pursuant to section 60075.4(b), 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 60075.4(b). Such extensions shall not apply to extend the time for requesting a hearing pursuant to section 60075.17 of these rules.

(f) Papers received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that day. Papers 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.4. Service, Notice and Posting.

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

(b) If a hearing is assigned to OAH, a copy of every pleading, letter, document or other writing served in a proceeding under these rules shall also be filed with the state board.

(c) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class or interoffice mail, overnight delivery, or 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, 10 days if the place of address is outside the State of California, but within the United States, and 15 days if the place of address is outside the United States.

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

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

(c) The proof of service shall be made by declaration by a person over the age of 18 years and shall state whether such service was made personally, by mail, overnight delivery, or by 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 the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

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

deposited in the mail with the postage fully prepaid.

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

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

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

§ 60075.5. Form of Pleadings.

(a) Except as provided in this section, or by order of 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, 43031(a) and

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

§ 60075.6. Limitations on Written Legal Arguments or Statements

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

- (1) 12 pages, for arguments in support of or opposition to motions; and
- (2) Three pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(1), 43154, 43421, 43211, 43212 Health and Safety Code.

§ 60075.7. 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~~ title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 6250, et seq., Government Code; sections 91000, et seq., title 17, California Code of Regulations.

§ 60075.8. 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 provisions of 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.9. 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, or any other form of reasonable accommodation that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than 10 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, 43031(a) and 44011.6(m) Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.

§ 60075.10. Motions.

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

sought, together with the grounds therefore.

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

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

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

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

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

Subarticle 2. Issuance and Service of Citations

§ 60075.11. Determination of Class I Violations.

(a) A Class I violation includes: those violations that the state board has determined, based upon its enforcement discretion, to be of a nature that is clear cut, and less complex and serious, in terms of size, scope, and harm to the public and environment. Class I violations may cover:

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

(2) Violations arising under Part 5, chapters 1 to 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 by the state board pursuant to the authority granted by those provisions of the Health and Safety Code.

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

(3) Violations 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.

(b) In determining whether violations are Class I violations under section (a)(2) and (a)(3), and the penalty levels of a citation, the state board shall consider factors, the civil penalty amounts prescribed by statute and all relevant circumstances surrounding the violation, the penalty criteria set forth in section 60075.39, supra, and the following: , including, but not limited to:

- (1) The discernability of the violation;
- (2) The potential risk of injury to the public and environmental harm from such a violation;
- (3) Whether the violation is a single violation or has occurred in tandem with other violations;
- (4) The frequency and duration of the violation;
- (5) The time, effort, and expense required to correct the violation;
- (6) The cooperation of the citee in detecting and correcting the violation;
- (7) The compliance history of the citee;
- (8) Other factors as appropriate.

(c) The maximum civil penalty that may be proposed for each Class I violation, described in subparagraph (a)(2) and (a)(3) above, may not exceed the lesser of the maximum allowed by statute for a violation or \$5,000 per day for each day that a violation occurs. In addition, and the maximum cumulative penalty that may be proposed in any single citation may not exceed \$15,000. (See section 60075.39.) 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 citation for a Class I violation covered by section (a)(3) for any violation if the state board shares concurrent enforcement jurisdiction with a district and the district has commenced an enforcement action for that violation.

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

§ 60075.12. Issuance and Service of Citations.

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

(b) A "Citation" shall include the following information:

- (1) The names of the alleged citees;
- (2) The code section, rule or regulation that has allegedly been violated;
- (3) A concise, but reasonably specific statement of the facts that support issuance of each alleged violation;
- (4) A proposed penalty for the alleged violations that is to be assessed against the citee as authorized by applicable law;
- (5) Reference to these procedures, notice that the procedures are available from the ARB hearing office (the address and phone number of which shall be set forth), and notice that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings;
- (6) Written notice to citee that he or she:
 - (A) May respond to the allegations of the citation and request a hearing. It shall also inform the citee of the consequences of failing to respond by the applicable deadline;
 - (B) Has the right to represent him or herself or to retain a representative, who is not required to be an attorney, at one's own expense; and
 - (C) If necessary, has the right to an interpreter.

(7) The address of the office issuing the ~~complaint citation~~; the address to which payment of the proposed penalty may be sent; and the address ~~where of the hearing office to whom~~ a request for a hearing shall ~~may be filed if a citee so elects submitted~~.

(8) A citation shall be served on the named citee by either personal or other form of service consistent with Code of Civil Procedure sections 415 through 417 or by certified mail, restricted delivery.

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

Subarticle 3. Hearing Officers

§ 60075.13. Authority of Hearing Officers; Disqualification.

(a) In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing and settlement 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.

(b) The hearing officer or the executive officer, on a request for reconsideration, shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing. A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate. Any party may request disqualification by filing an affidavit or declaration under penalty of perjury. A request for disqualification of the hearing officer must be made no later than five days prior

to the commencement to the first day of hearing on the merits of the case. A request for disqualification of the executive officer must be included in the request for reconsideration.

The affidavit or declaration must state 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11181-11182, 11425.30 and 11512, Government Code.

Subarticle 4. Ex Parte Communication.

§ 60075.14. Prohibited Communications.

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

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

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

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

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

(1) The employee is another hearing officer or other employee of the hearing

office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board 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*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a)-, 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60075.15. Disclosure of Communication.

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

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

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

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

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

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

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

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60075.16. Applicability to Executive Officer.

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11430.70 -

Subarticle 5. Initiating Proceeding to Contest a Citation

§ 60075.17. Filing a Request for Hearing.

(a) Upon receiving a citation, the citee may:

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

(2) Pay the penalty demanded in the citation.

(b) A citee shall file a request for hearing to contest a citation with the executive officer.

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

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

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

~~(f)~~ If the citee fails to notify the executive officer ~~hearing office~~ of his or her intent to contest the citation within the applicable period set forth in subparagraphs (b) and (c), and if the citation penalty amount has not been paid in full, the citation becomes a final order not subject to review by any court or agency.

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

~~(h)~~ If the communication initiating the proceeding does not include the information required pursuant to section 60075.18, the executive officer ~~hearing office~~ shall immediately acknowledge receipt of the communication indicating the desire to request a hearing and shall notify the citee of the deficiencies in the submission which must be corrected before the request for hearing may be filed and docketed. The citee shall have

10 days from the date of mailing of the notice of deficiencies to submit a complete request for hearing; if the deficiencies are not corrected in the time provided the citation becomes final.

(ih) Upon timely receipt of a complete request for hearing, the executive officer hearing office shall notify the citee or its representative that a request for hearing has been deemed complete and shall assign the case and forward copies of all relevant documents, including copies of the citation and request for hearing to: a docket number to the proceeding, and shall notify the parties that the request for hearing has been filed and docketed.

(1) The Administrative Hearing Office of the state board if the citation has been issued pursuant to authority granted under Health and Safety Code sections 43028 and 44011.6.

(2) OAH if the citation has been issued pursuant to authority granted under Health and Safety Code sections 42410 and 43023.

(ji) Upon a showing of good cause, the executive officer or the hearing officer assigned to the case may allow the citee to amend the request for hearing after the deadline for filing has passed.

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

§ 60075.18. Form of Request for Hearing.

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319

(1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.19. Issues for Hearing.

(a) The issues for hearing shall be limited to those raised by the citation and the docketed request for hearing.

(b) If a citation is classified as a repeat violation, ~~pursuant to section 2185, title 13, California Code of Regulations,~~ the validity of the earlier citation established by failure to request a hearing or the entry of a final disposition by the state board shall not be at issue. However, if the citation imposes a penalty pursuant to section 2185(a)(3), the staff of the state board shall be required to demonstrate the existence of the prior citation or citations.

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

§ 60075.20. Stays PendingEffect of Filing a Request for Hearing.

(a) The requirements to immediately correct deficiencies specified in a citation issued under section 44011.6(b) of the Health and Safety Code and to pay a civil penalty within 45 days of receipt of a citation (~~title Title~~ 13, California Code of Regulations, section 2185) shall be stayed on timely receipt of a request for hearing until a final decision or order has been issued pursuant to section 60075.44 of these rules.

(b) For all other citations of noncompliance, if a cease and desist order has been issued, the hearing officer shall issue a stay pending issuance of a final decision, 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.21. Response by Citing Party.

~~(a) Within 20 days from the date At the time that the executive officer hearing office deems a request for hearing filed under section 60075.17(h); and assigns the case to the appropriate the hearing office, may request that the citing party complainant may file a response to the issues raised by citee in its request for hearing. The citing party shall file the response with the hearing office assigned to hear the case and shall serve a copy of the response on the citee or its representative.~~

~~(b) If the complainant files a response, it shall be filed with the hearing office and served upon the citee within 20 days after receipt of notice of the filing of a request for hearing. The response shall contain the reasons and facts in support of the issuance of the citation and any other information specified in the notice of filing.~~

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

Subarticle 6. Resolution of Proceeding Without Hearing

§ 60075.22. Withdrawal of Request for Hearing.

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

~~(b) If at the time that the The order or decision granting the motion to withdrawal request is granted, effectively reinstates the citation. If the time period for filing a request for hearing has passed, the citation shall be deemed a final order not subject to review by the state board or any court.~~

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

§ 60075.23. Withdrawal of Citation.

(a) At anytime before the hearing officer issues a decision on the merits of the citation, the citing party complainant may withdraw the citation by written notice at any time or by oral motion on the hearing record.

(b) If a notice of withdrawal is issued prior to the hearing, the citing party

complainant shall serve a copy of the notice of withdrawal on each party and on any authorized representatives.

(c) The notice of withdrawal or motion to withdraw a citation shall be accepted by the hearing officer and is a final order. A citation that which has been withdrawn may not be reinstated.

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

§ 60075.24. Settlement Agreements and Consent Orders.

(a) At any time before a final decision of the hearing officer, the citing party complainant and the citee 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 hearing officers from the state board to assist in settlement discussions.

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

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

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11415.60, Government Code.

§ 60075.25. 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 as to liability 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 as to liability as a matter of law, the hearing officer shall issue a written order or decision that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. If the decision finds liability, the hearing officer shall follow the penalty assessment criteria set forth in section 60075.39.

(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 grant a continuance to permit affidavits to be obtained, or to permit discovery as provided under these procedures.

(d) The hearing officer shall deny a request for summary determination of liability 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 as to liability 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154,

Subarticle 7. Discovery and Subpoenas and Subpoenas Duces Tecum

§ 60075.26. Discovery

(a) Exclusivity of Discovery Provisions.

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

(b) Document Exchange.

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

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

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

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

(c) Identity of Witnesses and Exhibits

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

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

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

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

(d) Depositions.

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

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

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

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

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

(e) Protective Orders:

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

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

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

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

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

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

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

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

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

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

(8) If the hearing officer denies a motion for protective order or grants a

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code; Sections 11185, 11191 and 11511, Government Code.

§ 60075.27. Proceeding to Compel Discovery.

(a) 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 state facts showing the party has failed or refused to comply with a discovery request or stipulation, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable, that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made, and the grounds of the noncomplying party's refusal so far as known to the moving party.

(b) The motion shall be filed within 15 days after the date the requested materials were 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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 10 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.

(g) 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11186 - 11188 and 11507.7, Government Code.

§60075.28. Subpoena and Subpoena Duces Tecum.

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

(b) At the request of a party, subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding; or the general counsel or executive officer of the citing party 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

Subarticle 8. Contempt and Sanction Orders

§ 60075.29. Contempt.

(a) 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 sections 11455.20, and 11186 through 11188.

(b) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including authorized representation 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.

(c) 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 5 days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on grounds 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.

(d) 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 12.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11525, Government Code.

Subarticle 9. Hearings

§ 60075.30. Time and Place of Hearing.

(a) Within 30 days of the executive officer deeming the request for hearing complete and assigning the case to the appropriate hearing office, ~~servicing the notice of filing to the citee~~, the hearing office shall schedule the hearing date. A matter shall be scheduled to be heard as soon as practicable, but no later than 90 days after assignment of the case to the hearing office. ~~a request for hearing has been filed.~~

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

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

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

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

(d) The hearing office shall set the place of hearing at a location as near as

practicable to the place where the citee resides or maintains a place of business in California. If the citee does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing officer may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

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

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

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

NOTE: Authority cited: Sections 39600, 39601, 43028, 42410, 43023, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11509 and 11440.30, Government Code.

§ 60075.31. Consolidation and Separation of Cases.

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

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

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319

(1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11505.3, Government Code.

§ 60075.32. Failure to Appear.

(a) 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 accordance with section 60075.38 of these rules.

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

§ 60075.33. Conduct of Hearing.

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

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

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

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

(e) At the close of citee's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material

fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

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

(g) The hearing officer may:

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

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

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

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

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

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

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

(2) The official recording of the hearing and transcript of the recording,

together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

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

§ 60075.34. 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 shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

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

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

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

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

officer.

(1) 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 451, 452, Evidence Code.

§ 60075.35. 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 7 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced into evidence, but if so allowed, it shall 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 or declaration to the opposing party]."

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

§ 60075.36. Exclusion of Witnesses.

(a) Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses, other than the parties themselves or their representatives, not at the time under examination.

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

§ 60075.37. 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 oral argument.

(b) Motions to submit written 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. If granted, a party shall file written argument within 15 working days from the date of the hearing. Opposing parties may file an answer 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, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154,

43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 10. Decisions After Hearing

§ 60075.38. Default Order.

(a) A party to a case that has been assigned for hearing pursuant to section 60075.17(i) may be found to be in default upon failure to appear at a scheduled hearing without good cause.

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

(2) Default by the citing party complainant shall result in dismissal of the citation with prejudice.

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

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

(d) 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 shall make the request for reinstatement within ~~30~~ 10 days of service of the default order pursuant to section 60075.38(d) of these rules.

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

§ 60075.39. Penalty Assessment Criteria.

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

CCR, section 2185.

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

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

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

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

(43) The compliance history of the citee, including the frequency of past violations;

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

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

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

(87) The cooperation of the citee 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

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

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

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

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

(3) The nature and persistence of the violation;

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

(5) The frequency of past violations;

(6) The record of maintenance;

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

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

(9) The financial burden to the respondent.

NOTE: Authority cited: Sections 39600, 39601, 42410(f), 43203(f), 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42403, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

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

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

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

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

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to request that the executive officer reconsider the order or decision pursuant to sections 60075.43, et seq. 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 the modified order or decision on each party that had previously been served with the original order or decision. The modified order or decision shall supersede the previously served order or decision, and the date of service of the modified order or decision shall be the effective date of the decision and order for purposes of sections 60075.41 and 60075.44.

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

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

Subarticle 11. Reconsideration by the Executive Officer

§ 60075.41. Reconsideration; On Motion of Executive Officer or by Request of Party.

(a) At any time within 20 days of the filing of an order or decision of the hearing officer, pursuant to section 60075.40 of these rules, the executive officer may, on his or her own motion, determine that reconsideration is appropriate with respect to any matters determined or covered by the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of his or her determination.

(b) A party aggrieved by an order or decision of the hearing officer, pursuant to section 60075.40 of these rules, may, within 20 days of service of such order or decision, request that the executive officer reconsider any matters determined or covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties in accordance with section 60075.4 of these rules, except that the original of the request shall be filed with the executive officer, and the hearing office shall receive a copy. The request shall be deemed filed the date it is

delivered or mailed to the executive officer.

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

§ 60075.42 Reconsideration; Procedural Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 60075.43. Reconsideration; Orders and Decisions by the Executive Officer.

(a) Unless the executive officer expressly finds otherwise, a request for reconsideration shall be deemed summarily denied if the executive officer does not issue a finding that reconsideration is warranted within 20 days of filing of the request. For those matters deemed summarily denied, the order or decision of the hearing officer issued pursuant to section 60075.40 shall be considered final pursuant to section 60075.44.

(b) If the request for reconsideration has not been summarily denied pursuant to subparagraph (a) above in reconsidering the decision or order of the hearing officer, the executive officer may:

- (1) Review some, but not all, issues raised by the request;
- (2) Grant an order to stay, suspend, or postpone, the order or decision of the hearing officer, findings, or decision after reconsideration;
- (3) Affirm, rescind, or amend the findings, order or decision of the hearing officer; or
- (4) Direct the reopening of the hearing for the taking of additional evidence and issuance of supplementary findings of fact. The executive officer may direct that the taking of such evidence be done by either written submission or further testimony under oath before the executive officer or a hearing officer. The hearing shall be reopened for the limited purposes identified by the executive officer in his order. Notice of the time and

place of further hearings shall be given to all parties and to such other persons as the hearing officer may direct.

(c) For those decisions and orders of the hearing officer for which reconsideration is undertaken, the executive officer shall issue his or her final disposition of the request as expeditiously as possible. A decision or order that is the final disposition of the request for reconsideration shall be in writing and any modifications to the order or decision of the hearing officer shall be supported with additional findings, facts and conclusions of law.

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

Subarticle 12. Final Orders and or Decisions

§ 60075.44. Final Order or Decision; Effective Date.

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

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

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

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

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

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

Subarticle 13. Judicial Review

§ 60075.45. Judicial Review.

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

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

(2) For all citations issued under sections 42410, 43023, and 43028 of the Health and Safety Code, the respondent may file for judicial review within 30 days from the date the order or decision becomes final under section 60075.44.

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

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 1094.5, Code of Civil Procedure.

§ 60075.47. Judicial Review.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(i), Health and Safety Code. Reference: 44011.6, Health and Safety Code; Section 1094.5, Code of Civil Procedure.

HISTORY

1. New section filed 11-27-91; operative 11-27-91 pursuant to Government Code section 11346.2(d) (Register 92. No. 8).

2. Renumbering of former subarticle 9 to subarticle 13 and renumbering of former section 60075.47 to section 60075.45 filed 9-1-99; operative 10-1-99 (Register 99, No. 36).
3. Repealer filed 9-1-99; operative 10-1-99 (Register 99, No. 36).