

Board Meeting
May 22-23, 2001

Agenda Item 17
Attachment 1

California Integrated Waste Management Board

Board Meeting

April 4, 2000

AGENDA ITEM 1

ITEM:

Discussion Of Compliance Procedures And Hearing Requirements For Board Programs, And Review Of Enforcement Activity

INTRODUCTION

This agenda item provides a broad overview of the Board's numerous enforcement activities and programs. This item does not request any Board action at this time. Instead, the purpose of this item is to function as a primer and discussion guide for recently appointed as well as long-standing Board members on various facets of the Board's many enforcement programs.

This item is presented in two separate sections.

Section 1:

- (a) Reviews the strategies that have been developed for carrying out the goals of the Board's many enforcement programs;
- (b) Summarizes the procedures that are in place for implementing these strategies; and
- (c) Recounts recent enforcement activity for each program.

With respect to Board programs where a violation of the statutes or regulations constitutes a direct and immediate threat to the environment, enforcement is directed toward accomplishing the primary goal of prompt remediation of the condition, with all expenses to be borne by the responsible party. With respect to Board programs related to diversion requirements, enforcement is directed toward accomplishing the primary goal of prompt implementation of diversion/market development programs by the jurisdiction or business involved.

Where the primary goal is prompt remediation of the condition, enforcement procedures include the negotiation of compliance agreements with cooperative parties, designed to obtain swift compliance. Where the primary goal is prompt implementation of diversion programs, enforcement procedures include the use of compliance schedules and technical assistance to select, design and carry out activities such as curbside recycling programs. The extent to which these procedures have produced the desired compliance results is reflected in the summaries of enforcement activities provided below.

Section 2 of this item examines why some Board actions require more complex procedural rules than other Board actions. The Board is well versed in the open meeting requirements, as these

procedural rules are applicable to all Board hearings. The Board is also familiar with the additional procedural requirements for items considering "legislative" action - such as the promulgation of regulations - which deal with policies which affect all or many of the Board's stakeholders.

However, over the last several years, the Board has occasionally encountered items which required an adjudicative hearing, which imposes an additional layer of procedure over the basic open meeting rules. An adjudicative hearing is a proceeding before an administrative agency in which the rights and duties of a particular individual or entity is determined after notice and an opportunity to be heard. Adjudicative proceedings involve the weighing of evidence by the Board or an ALJ, and the balancing of conflicting interests in reaching a decision. There are special procedural "due process" rules for these adjudicative hearings.

Section 2 of this item reviews the fundamental procedural requirements applicable to all Board hearings, and then examines in detail the special requirements imposed upon Board adjudicative proceedings.

SECTION 1

DISCUSSION OF STRATEGY AND PROCEDURES FOR BOARD ENFORCEMENT PROGRAMS

The Board has direct enforcement authority over a number of waste management programs with differing enforcement objectives. Program objectives are in large part dictated by the Legislature, as codified by statute. Program objectives are thus in part a product of the negotiation, compromise and lobbying that is inherent in the legislative process. Additionally, the Legislature has delegated to the Board the authority to adopt rules and regulations for the implementation of programs. Thus the Board, acting within the framework provided by statute, provides its own input into enforcement procedures and strategy.

As noted above, this first section of this agenda item: (a) reviews the strategies that have been developed for carrying out the goals of the Board's many enforcement programs; (b) summarizes the procedures that are in place for implementing these strategies; and (c) recounts recent enforcement activity for each program. In addition, a chart estimating the numbers and types of hearings which will be conducted during the course of this year is provided as "Attachment 1."

I. OVERVIEW

A. Programs Relating to Permitted and Unpermitted Solid Waste Sites

With respect to Board programs relating to solid waste sites, violations of the statutes or regulations often constitute a direct and immediate threat to the environment. Here the primary goal of the enforcement program is to promptly bring the facility into compliance. Enforcement strategy takes into consideration that the sites are physically fixed, are a product of substantial capital investment by operators, and fulfill a waste management need not typically found with other types of land uses. Thus, both the operators as well as the Board have a substantial interest in working together to correct violations as quickly as possible. Operators generally understand that their ability to profit from their substantial capital investment in the site is contingent upon their promptly addressing any concerns of the local enforcement agency (or the Board acting as LEA). In light of the above, violations are generally promptly remediated upon the issuance of a cease and desist order or a corrective action order, and without having to pursue penalty or revocation enforcement proceedings. This is consistent with the statutory directive that administrative penalties should only be imposed on an operator after "all feasible efforts" to bring the facility into compliance have been exhausted. (PRC Sec. 45010(a).)

B. Programs Relating to Planning (Diversion Requirements) and Markets

With respect to Board programs related to diversion requirements, such as SRRE implementation and the RPPC program, the primary goal of the enforcement programs is prompt implementation of programs by the jurisdiction or business involved. For example, this might involve implementation of a curbside recycling program by a city that had not reached the 25% requirement in 1995, or changes in purchasing by a product manufacturer to ensure that its packages contain at least 25% postconsumer material. Since the effects of these programs on the environment are indirect, it is important that they begin as soon as possible to minimize any delay in their impact.

Where a jurisdiction, or company, is willing to start new or expanded recycling programs, albeit later than they may have been required, prompt implementation may be accomplished through technical assistance and negotiated compliance schedules/agreements, short of holding hearings to impose penalties.

This strategy had resulted in a tremendously high rate of compliance with the need for only a handful of penalty hearings (four for SRRE/NDFE adequacy, six for newsprint, and one for RPPC). These few penalty hearings then also provide an example and deterrent for others.

C. Programs Relating to Permitted and Unpermitted Waste Tire Sites

With respect to Board programs relating to waste tire sites, the inherent safety issues presented by waste tire piles has dictated our objectives with respect to enforcement. The primary goal has been remediation of the site in the most timely fashion and at the responsible party's expense. The waste tire enforcement program is unique among other enforcement programs because the majority of violators are unpermitted operators who operate on the fringe of insolvency, or are landowners who either inherited a site after purchasing the property or unwittingly rent property to unpermitted operators. Because the vast majority of violators are people of limited means, this often results in an enforcement strategy that employs negotiated compliance. Such an agreement is desirable where the responsible party decides to be cooperative because,

- (a) Remediation and compliance occur voluntarily and often before an enforcement hearing, thus offering better protection for the environment; and
- (b) The responsible party can provide input as to the manner in which remediation is to be achieved, which means that the party: (i) is aware of the course of action mandated by the agreement; (ii) concurs that it is feasible and that the cost to remediate is not overly burdensome; and (iii) is more likely to comply and to bear a substantial portion (if not all) of the remediation costs.

Concurrent with these negotiations, program staff and the Legal Office continue to prepare the matter for a contested hearing, in the event the parties are unable to agree or the responsible party is uncooperative. This hearing may be a civil cost recovery action, an administrative penalty action or criminal proceeding against the responsible party, or any combination of the above.

II. SUMMARY OF STRATEGY AND PROCEDURES FOR EACH BOARD ENFORCEMENT PROGRAM

A. Solid Waste Facility Enforcement Program

1. Background

One key focus of the Legislature in adopting the Integrated Waste Management Act is to insure that solid waste facilities are adequately regulated to protect the public health, safety and the environment. The regulation occurs primarily at the local level, through solid waste facilities permits, within parameters set by the Board. With respect to solid waste facilities permits, most of the enforcement activity takes place at the local level, rather than the Board level. Local Enforcement Agencies ("LEAs") have primary responsibility for carrying out the Integrated Waste Management Act as it relates to solid waste facilities permits and the operation of solid

waste facilities. § 43209. Direct Board involvement in enforcement is thus primarily limited to appeals and permit denials, discussed below.

LEAs may, under appropriate circumstances, issue notices and orders that require facility operators to take certain corrective actions (§ 45000), issue cease and desist orders directing that facility owners or operators cease activities that violate state law, the terms and conditions of a solid waste facilities permit, or that threaten or cause environmental harms or nuisance (§ 45005), issue orders establishing a time schedule for a facility to achieve compliance plus imposing administrative civil penalties (§ 45011), obtain injunctive relief from the courts to enforce LEA orders (§ 45014) and impose civil penalties through judicial action (§ 45023). The Board may take these enforcement actions, too. Section 45012 authorizes such action by the Board after notice to the LEA and the violator, and after providing time for the LEA and violator to correct the violation.

2. Solid Waste Facility Enforcement Strategy

The Board has rarely taken any enforcement actions respecting solid waste facilities independently; enforcement actions have typically been taken by LEAs. The notable exception is where the Board itself is acting as the Enforcement Agency (EA). The Board serves as the EA for five jurisdictions. As EA, the Board, through its staff, has taken roughly 12-15 enforcement actions, primarily in the early 1990's. In 1998 and 1999, one or two enforcement actions were taken. It is anticipated that the Board will take one or two enforcement actions per year as EA for the next few years.

Board staff does sometimes play an informal role in triggering or crafting LEA enforcement actions. The Board, through staff, receives copies of and comments on all enforcement actions before they take effect. § 45019. This process provides an opportunity for LEA and Board staff to confer about an impending enforcement action. Further, on occasion, an LEA will discuss with Board staff a contemplated enforcement action, or Board staff will advise an LEA that enforcement action is appropriate. All such enforcement actions are recorded in the SWIS database.

Another opportunity for Board staff and LEA interaction is presented by the Board's publication of its statewide list of solid waste facilities that are in violation of state minimum standards (see § 44104). When a violation is maintained for two consecutive months, the Board notifies the operator that the facility will be included in the inventory of violators unless the violation is corrected within 90 days. § 44104. Prior to listing, Board staff generally discusses the violation and its circumstances with the LEA. The inventory of violators is presented to the Board semi-annually, and is published on the Board's web site. Once a facility is listed, the enforcement agency must develop a compliance schedule for the facility.

3. Solid Waste Facility Enforcement Procedures

Appeals of LEA Actions or Failure To Act: Section 44307 provides that any person can petition that a hearing panel hear a claim that the LEA has failed to act as required by law. In addition, under Section 45030, an "aggrieved person" may appeal to the Board to review a decision of a local hearing panel, a hearing panel's failure to consider a matter or failure to render a decision or the refusal of the local governing body to convene a hearing panel. Appeals to the

Board under these two provisions can include a wide range of issues, including LEA decisions on enforcement actions, LEA decisions on issuing a permit, permit conditions, permit revocations, failure to comply with state minimum standards, noncompliance with CEQA and many other matters. Nonetheless, and despite the easy avenue for appeals, the Board receives very few -- about one per year (Rancho San Elijo, Redwood Landfill, Pacific Southwest Farms (2) and Safety-Kleen). The Board considers such appeals through an informal hearing process (see Section 2, below).

Denial, Suspension and Revocation of SWF Permits: Under appropriate circumstances, and after a formal hearing under § 44310, an LEA may deny, suspend or revoke a solid waste facilities permit. §§ 44300, 44305, 44306. The Board plays a very limited role in this process. Board involvement is limited to appeals, discussed above, and to permit denials (including the denial of original permit applications and applications to modify or revise a solid waste facilities permit). Respecting permit denials of proposed solid waste facilities permits, the Board shall object to a proposed permit or revised permit if it determines that the requirements of Section 44009 are not satisfied. The LEA, then, should deny the permit or revision, following the appropriate hearing procedures.

B. Financial Assurances Enforcement Program

1. Background

The Public Resources Code and Title 27 regulations give the Board authority to assess administrative civil penalties for violation of the financial assurance requirements. All operators of solid waste disposal facilities in the state are subject to enforcement of these requirements.

2. Financial Assurances Enforcement Strategy

Penalties are based on the degree of non-compliance and the potential for harm i.e., the greater the degree of non-compliance and potential for harm, the larger the penalty. Penalties may go as high as \$10,000 per day, and may be assessed at a Board hearing pursuant to procedures set forth in Public Resources Code section 45010. This enforcement activity occurs at the Board level.

Because compliance with the requirements is the ultimate goal, the regulations allow for several compliance options prior to the assessment of civil penalties. These options include Stipulated Notice and Order (SNO), placing restrictions on current financial assurance mechanisms currently being used by the operator (such as more frequent reporting requirements), prohibiting use of current financial assurance mechanisms and requiring establishment of an alternate mechanism. The SNO may provide the operator the opportunity to pay off the financial assurance deficiency over time, with the proviso that if the payment schedule is not met, the full amount of the deficiency is deemed under the order to be due immediately. Staff also works closely with facility operators to obtain compliance prior to the issuance of any formal documents and has achieved some success with this approach.

The financial assurances enforcement program is relatively new. Regulations to set up the structure for enforcement of this program became effective in 1997, when it appeared that Board enforcement of the program would be more appropriate than having LEAs take these types of actions. Penalties have not yet been assessed on any operator for violations. Staff issued Notices of Violation (NOV), Notice and Orders, and entered into SNOs with a number of facility

operators (see chart below). A number of facilities have come into compliance after the NOV was issued, but prior to issuing an N&O or SNO. Program staff and the Legal Office are currently working together to further identify those facility operators who are out of compliance, including identifying the monetary degree of non-compliance. Staff is prioritizing their enforcement efforts and will pursue actions in accordance with the regulatory requirements.

Staff also enforces the financial assurance requirements for major waste tire storage facilities in accordance with Title 14.

3. Financial Assurances Enforcement Procedures

As set forth in 27 CCR 22270 et seq., the enforcement process begins with the issuance of a Notice of Violation to the operator. If the operator responds to the Notice of Violation within 10 working days from receipt of it with compliance measures acceptable to the Board, the Board may enter into a Stipulated Notice and Order with the operator. If the operator fails to respond to the Notice of Violation, staff sends a Notice and Order to the operator and notifies the LEA of the enforcement action. If the operator fails to respond to the Notice and Order within 10 working days from receipt of it, or fails to conform with any Stipulated Notice and Order, further enforcement action may be taken as specified in the Notice and Order or Stipulated Notice and Order. The Board may consider other compliance options that may be more effective than imposition of penalties.

4. Summary of Financial Assurances Enforcement Activity

| Notices Of Violation | Sites Now in Compliance | Stipulated Notices And Orders (Where Party Cooperative) | Notices And Orders (Where Party Not Cooperative) | Administrative Hearings | AG Referrals |
|----------------------|-------------------------|--|---|-------------------------|--------------|
| 22 | 12 | 2 | 6 | 0 | 1* |

* Enforcement of Stipulated Judgement in Related County Court Action

C. Diversion Planning Program

1. Background

One of AB 939's main provisions was the requirement that all cities and counties prepare and implement a plan to divert 25% of their solid waste by 1995 and 50% of it by 2000. (PRC 41780). Some flexibility was allowed, if certain conditions were met. Rural jurisdictions were allowed to petition for reductions in the 25% and 50% requirement, and for extensions to the deadline for reaching these thresholds. All jurisdictions were allowed to form Regional Agencies in order to have their diversion measurements combined. A few other flexibilities were also allowed, and SB1066 in 1997 added further flexibility. Although the number has varied somewhat since 1990, due to newly incorporating cities, the number of cities and counties

subject to these requirements is approximately 531. Currently, the Board has approved 15 Regional Agencies, and the number of jurisdictions (cities, counties, or regional agencies) that the Board must review for compliance is now 466.

There are two distinct phases of enforcement for the diversion planning requirements. First, each jurisdiction was required to submit their plans to the Board for review and approval by a specified date. Failure to submit an adequate plan potentially subjected the jurisdiction to a fine of up to \$10,000 per day. Second, the Board is required to review each jurisdiction's implementation of the Source Reduction and Recycling Element (SRRE) and Household Hazardous Waste Element (HHWE) to determine if it was being adequately implemented. In the case of the HHWE, this would mean that the programs selected for implementation were being carried out. In the case of the SRRE, it also includes meeting the 25% or 50% requirement. Failure to implement the SRRE or HHWE potentially subjects the jurisdiction to a fine of up to \$10,000 per day.

2. Diversion Planning Enforcement Strategy

(a) Plan Adequacy: In reviewing SRREs, HHWEs, and Non Disposal Facility Element (NDFE) submitted by jurisdictions between 1993 and 1998, the Board found less than 5% to be inadequate. To date, all SRREs and NDFEs have been submitted and have been approved. However, several hundred SRREs and NDFEs were submitted late. The Board employed a step-wise approach to obtaining compliance with these requirements in an attempt to avoid the need for penalty hearings. This was to ensure that programs were planned and implemented as quickly as possible. This approach resulted in the use of warning letters, and then, compliance schedules for late planning elements to focus jurisdictions' efforts on submitting the documents, in combination with offers of technical assistance, to assist jurisdictions in preparation of these documents. This strategy resulted in the additional filing of late elements, the need for only 45 compliance schedules for SRREs and NDFEs (out of 531 jurisdictions), and all of the SRREs and NDFEs being submitted by the end of 1997 except for 4 SRREs and 1 NDFE. (The due dates varied, but all SRREs and NDFEs were required to be submitted, no later than December 31, 1994). The Board held a public hearing for these four jurisdictions with delinquent documents that resulted in the imposition of penalties as follows (all delinquent documents were submitted either shortly before the hearing or within two months after the hearing):

| | |
|------------------|---|
| Point Arena | \$1740 (this penalty was waived due to extenuating circumstances) |
| Guadalupe | \$2,200 |
| Mariposa | \$2,500 |
| Santa Fe Springs | \$43,000 |

This step-wise approach also resulted in the submission of 17 compliance schedules for HHWEs (out of 531), 22 compliance schedules for SEs (out of 58), and 22 compliance schedules for SPs (out of 58), and the potential need for penalty hearings for only two jurisdictions. HHWEs, Countywide Siting Elements (CSE) and Summary Plans (SP) had a later due date than SRREs and NDFEs (the dates varied, but the latest due date was January 31, 1996). All HHWEs, CSEs, and SPs have been submitted except for the following:

Imperial County Siting Element & Summary Plan

Mono County Siting Element & Summary Plan

Ventura County's Siting Element & Summary Plan will be submitted shortly and was subject to certain special circumstances related to a dispute over CEQA.

A public hearing to consider penalties for these delinquent submittals may be scheduled and noticed within the next few months.

(b) SRRE/HHWE Implementation: Board review of plan implementation occurs through the biennial review process (based upon PRC 41825: "At least once every two years"). The first round of biennial reviews covered the years 1995 and 1996. This biennial review analyzed both program implementation and the jurisdiction's success in meeting 25% in 1995. In the case of plan implementation, statute requires the use of compliance orders prior to imposing penalties. Since January 1999, the Board has placed 66 jurisdictions on Compliance Orders, in accordance with PRC 41825. These orders require the jurisdictions to perform various tasks by a certain date (most of the due dates are in 2000). If a jurisdiction fails to fulfill the compliance order, the Board will hold a public hearing to determine whether or not to impose, and if so how much of, a penalty upon the jurisdiction.

3.- Diversion Planning Procedure

(a) Plan Adequacy: PRC 41810 et seq. provides that if a jurisdiction submits an inadequate plan element, the Board shall disapprove the document and issue a Notice of Deficiency which allows the jurisdiction 120 days to revise and resubmit the document. If the jurisdiction fails to do so, or if the document that it submits is still inadequate, the Board shall hold a public hearing to determine whether or not to issue a penalty of up to \$10,000 a day. Program staff also brings forward items where jurisdictions have failed to file. All hearings to date have been for the failure to submit the element at all. Legal Staff provides support to Program Staff regarding hearing notice, analysis of penalty recommendation, and portions of the presentation before the Board. Each of the hearings took approximately two hours.

(b) Plan Implementation: PRC 41825 requires the Board to determine if jurisdictions have adequately implemented their SRREs and HHWEs. If the Board determines that a jurisdiction has failed to do so, the Board, after holding a public hearing, shall issue a Compliance Order with a schedule of tasks that the Board believes are necessary for the jurisdiction to complete to adequately implement its SRRE or HHWE. If a jurisdiction fails to fulfill the Compliance Order, the Board shall hold a public hearing to determine whether or no to issue a fine of up to \$10,000 per day. PRC 41850 provides a number of factors for the Board to consider in making this decision. PRC 41850 also incorporates by reference the Plan Enforcement Policy adopted by the Board in 1995.

Program staff performs biennial reviews regarding SRRE and HHWE implementation and brings these forward to the Board for review. The agenda items will include proposed compliance orders if staff's recommendation is to find that the jurisdiction failed to implement. The Board then decides whether or not to issue. (A large number of compliance orders were also due to faulty diversion calculations which prevented a definitive determination about implementation - for example- negative diversion numbers). Legal Staff provides support to Program Staff

regarding Compliance Order language, agenda item analysis, and resolution language.

Program staff works with the jurisdictions under compliance orders, and reviews periodic reports. They will make a recommendation at completion of the schedule on whether or not compliance order was fulfilled for a final Board determination. Legal Staff will provide staff support for potential penalty hearings. That may need to be scheduled. It is anticipated that each of these hearings would take approximately four hours.

4. Summary of Diversion Planning Enforcement Activity

Plan Adequacy Enforcement Activity Summary

| | SRRE | NDFE | HHWE | SITING ELEMENTS | SUMMARY PLANS |
|----------------------|------|------|------|-----------------|---------------|
| Jurisdictions | 531 | 531 | 531 | 58 | 5 |
| Compliance Schedules | 45 | 40 | 17 | 22 | 22 |
| Penalties Hearings | 4 | 1 | 0 | * | * |
| Penalties Imposed | 3 | 0 | 0 | 0 | 0 |

Plan Implementation Enforcement Activity Summary

| | SRRE | HHWE |
|--|------|------|
| Biennial Reviews | 466 | 466 |
| Compliance Orders For Programs | 16 | 1 |
| Compliance Orders For Diversion Calculations | 49 | N/A |
| Total Compliance Orders | 65 | 1 |
| Penalty Hearings | * | * |
| Penalties Imposed | * | * |

D. RPPC Enforcement Program

1. Background

The RPPC statute allows the Board to require self-certification by product manufacturers of their compliance with one or more compliance options if the RPPC all-container recycling rate adopted by the Board for that compliance year does not meet or exceed 25%. PRC sections 42321 and 42322 allow for three options in taking enforcement action against violators of the requirements: 1) the Board must refer any provider of a false or misleading certification to the Attorney General for prosecution for fraud; 2) the Board may refer any violator of the requirements to the Attorney General for assessment of fines of up to \$100,000; and 3) the Board has authority to assess administrative penalties of up to \$50,000 per violation, after notice and hearing. The total amount of penalties under these options is limited to \$100,000 annually. The Board is also authorized to conduct compliance audits pursuant to PRC section 42320.

2. RPPC Enforcement Strategy

Enforcement of the RPPC statute is relatively new to the Board, with the first round for the 1996 compliance year just winding down. Much was learned in that first year. The entities randomly selected for certification were a small subset of the entire field of regulated entities, and the entire field is not yet known. Future enforcement will likely focus on targeted industries to ensure that competing entities are similarly treated. The Board chose not to pursue enforcement through the Attorney General for 1996, and it does not appear this approach will be used in the near future. It may be appropriate for chronic or severe violators.

The certification process itself as well as the threat of enforcement has engendered a significant response from the regulated community in moving toward compliance with the requirements. Word has apparently traveled that the Board will be enforcing the law and numerous companies have requested information on container manufacturers who are producing RPPCs that meet the postconsumer/lightweighting requirements.

For the 1996 compliance year, the Board expressed a willingness to work with regulated entities to seek future compliance by negotiating a number of compliance agreements. However, where a company did not cooperate, staff was directed to schedule public hearings for assessment of penalties. Only one company was uncooperative, and the Board assessed a \$20,000 penalty. It remains to be seen how assessment of this penalty will affect compliance, but staff anticipates that the assessment will send a message that the Board is serious about enforcing the law, which should be further incentive for the regulated community to comply.

3. RPPC Enforcement Procedures

A significant issue for enforcement of the RPPC statute is identifying the regulated product manufacturers. For the 1996 compliance year, staff initially identified Standard Industrial Classification (SIC) Codes that appeared to include companies that sell RPPCs. From those groups of companies, staff then identified ten sources for supplying company names, and used a random number generator to select 500 names from the identified sources. For future years the Board has indicated a desire to target a smaller number of specific industries that are most likely to sell RPPCs in California, but to choose a larger number of companies from those industries.

Once the companies are selected, certification packages are sent certified mail. The company has 60 days to submit its certification documentation to the Board, but may apply for a 30-day extension. Consistent with the 1996 compliance year, it is anticipated that in future years the

Board will be willing to enter into compliance agreements with companies that are out of compliance but wish to cooperate by coming into compliance on a date certain in the future. Uncooperative companies that are out of compliance will be scheduled for public hearings to assess administrative civil penalties.

The RPPC statute currently requires these hearings to be conducted under the formal hearing procedures of the Administrative Procedures Act, which requires that an Administrative Law Judge be present to rule on admissibility of evidence.

E. Recycled-Content Newspaper Enforcement Program

1. Background

The Recycled-Content Newspaper statute, Public Resources Code sections 42750 et seq., requires each consumer of newspaper to submit a certification, by March 1, documenting recycled-content newspaper used in each calendar year. "Consumer of Newspaper" is defined as a person who uses newspaper in a commercial printing operation or commercial publishing operation. Newspaper consumers are required to use at least 40% recycled-content newspaper on and after January 1, 1998, and at least 50% on and after January 1, 2000. Currently the Board has authority to assess up to \$1,000 in administrative civil penalties, after notice and hearing, for failure to submit the required certification or for filing the certification late. Violators may also be subject to prosecution by the Attorney General for late or non-filing of the certification (up to \$1,000 penalty), or for filing a false or misleading certification (prosecution for fraud). Significantly, penalties may not be assessed for failure to use the required amount of recycled-content newspaper.

2. Recycled-Content Newspaper Enforcement Strategy

Because historically a significant number of certifications were being submitted to the Board well after the March 1 deadline each year, the Board conducted hearings and assessed penalties for late and non-filers starting in 1998. With the help of printing trade associations and the threat of fines, companies have significantly improved the timeliness of the certifications since the initial penalty assessment. Also, beginning with the 1999 compliance year, regulations are now in place to allow the Executive Director to assess fines based on the number of days late the certification is submitted. Based on staff's discussions with newspaper consumers this past year, it is anticipated that there will be very few late certifications in the future.

The Board also has authority to conduct audits of newspaper consumers. Audits were conducted on 20 newspaper consumers who filed questionable certifications for 1997. The audits revealed that several consumers, who claimed they were unaware of the requirement, did not maintain adequate records to document their exemption claims. Staff has distributed a list of frequently asked questions with the 1999 certification package, and anticipate that exemption claims will be better documented in the future.

Legislation has been proposed for the upcoming year to increase the maximum penalties allowable from \$1,000 to \$10,000, and to allow assessment of penalties for failure to use the minimum recycled-content newspaper for a calendar year. It is hoped that the threat of higher penalties will increase compliance.

3. Recycled-Content Newsprint Enforcement Procedures

The list of newsprint consumers was compiled soon after the program was enacted and has been updated as new data comes in. A certification package is mailed annually to each consumer, with a reminder just before the March 1 deadline. The new regulations allow the Executive Director to assess penalties for late filings: at least 45 days late = \$500; more than 90 days late or not filed = \$1,000. Assessments will likely be completed in May or June. The assessment of penalties may be appealed to the Board within 10 working days of the notice of penalty. It is likely there will be few, if any, public hearings contesting the penalty assessments. Certification data is compiled and an annual report will be brought to the Board in August or September.

F. Waste Tire Enforcement Program

1. Background

Facilities: Public Resources Code (PRC) Sections 42822 and 42833 authorize the Board to issue major and minor waste tire facility permits. Sections 42823 and 42834 require a permit if the facility meets the definition of a major or minor site.

Section 42808(b) defines a major waste tire facility as a facility where, at any time, 5000 or more waste tires are stored, stockpiled, accumulated or discarded. Section 42808(c) defines a minor waste tire facility as one where, at any time, 500 or more, but less than 5000, waste tires are or will be stored, stockpiled, accumulated or discarded.

The thresholds for tire dealers and automobile dismantlers are slightly different. Tire dealers or automobile dismantlers who accumulate more than 4999 tires at any time must obtain a major waste tire facility permit. If they have more than 1,500 tires, they must obtain a minor waste tire facility permit.

Haulers: Read together, Public Resources Code Section 42952 and 42954 require that anyone who transports more than four waste tires, and who does not meet the exemptions of section 42954, must obtain a hauler registration from the Board. The Board issued registration and vehicle decals must be properly displayed at all times while transporting waste tires. The hauler is also required to manifest every load of tires from the point of generation to its ultimate disposal. The hauler is required to make these manifests available during business hours. Regulations require the hauler to submit applications for the registration in specified form.

2. Waste Tire Enforcement Strategy

The civil money penalty has become one of the most widely used techniques in the enforcement programs of administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary of function of compensating society for the harm caused by unlawful conduct.

Facilities: The primary objective of the Waste Tire Facility enforcement program is to achieve compliance and illegal facility cleanup at the expense of the violator or property owner.

Environmental regulations such as the Waste Tires Act are essentially an alternative method for the Legislature to exercise its power to declare certain activities nuisances *per se*, and to impose strict liability upon the violator. In such cases the fact of the violation in and of itself calls for strict enforcement for noncompliance.

The Board's primary strategy to date for dealing with waste tire facility violations, such as the illegal storage, disposal, accumulation, or stockpiling of tires, is through the pursuit of administrative penalties. This option has been the primary tool since the enforcement statutes were passed in 1990. Many other environmental regulatory agencies such as the Department of Fish & Game and the Air Resources Board are just beginning to move into this area of enforcement. Among these agencies, CIWMB is a leader in defining the nature and demonstrating the success of its enforcement program.

PRC Section 42850 imposes liability for negligent violations, and is enforced primarily against site owners who lease to operators. Section 42850.1 imposes liability for intentional violations, and is enforced primarily against operators. The statute provides for a penalty of up to \$10,000 per day per violation. We have sought and been awarded penalties from as little as \$500.00 to as much as \$300,000. These penalties may be pursued either administratively, through the Office of Administrative Hearings using in-house counsel, or civilly through court proceedings, by referral to the Attorney General's Office.

The use of the administrative penalties program for pursuing compliance has proved to have multiple benefits. Foremost, this method of enforcement has often resulted in the cleanup of the tires at the cost of the responsible parties. This has especially been the case when cleanup was pursued as a term of settlement. In order to avoid the large penalties, the Board is authorized to pursue, and thereby avoid the cost of outside counsel, imposition of liens or a costly collection process, respondents often opt for a settlement that is entered on the record for final decision by the Judge. This memorializes the agreement and ensures that the respondent understands his or her legal requirements. This method does usually require a compromise of the fine alleged in the complaint, but it has had a high success rate in garnering compliance and cleanup of illegal sites.

One advantage of pursuing penalties administratively is that our own staff attorneys can pursue them without any additional costs to the Board. However, if we pursue penalties civilly, we would be required to use the Attorney General's office to obtain the same penalties amounts as we obtain administratively. We are required to compensate the Attorney General (AG) for the handling of any actions referred to them. Thus the referral of tire penalty proceedings to the AG's Office results in increased costs to the Board, for the same results as we would be able to achieve in-house administratively. For example, in one case where such an action was referred to the Attorney General, the total cost for the action was approximately \$3,500.00 to finalize the imposition of a \$7,500.00 lien against the property.

For the above reasons, the Legal Office has limited referrals of tire enforcement items to the Attorney General's Office to those that are required to be heard in Municipal or Superior Court. These actions include the enforcement of cleanup and abatement orders, conversion of administrative decisions for over \$20,000 to enforceable liens, and appellate and bankruptcy proceedings.

Responsible parties who are recurrent violators are referred to the local District Attorney's office for the pursuit of penalties as well as jail time. The commission of repeated violations indicates

that penalties alone were not a sufficient deterrent, but the threat of incarceration and the imposition of a criminal record may be.

The imposition of administrative penalties is also a deterrent to others, by encouraging them to take the appropriate action themselves. We have had penalties in excess of \$300,000.00 imposed on a site, which can be quite an incentive to many violators to take action. These penalty judgments are also useful in notifying the public of the Board's proactive measures and as notice to other violators.

However, four years of actively inspecting sites and enforcing the codes has revealed that the majority of the individuals in violation of the waste tire laws are without the means to pay weighty fines and/ or penalties. When faced with a large penalty, many will simply disappear and remain completely unresponsive to any enforcement efforts. The result of uncompromising enforcement is that the Board is often left with many waste tire sites to abate using state funds. Through the experience of the past four years, we have learned that the use of threatened penalties as a stick and reduced penalties as a carrot have been very persuasive in achieving compliance from those with limited assets and/or those that were ready and willing to meet the requirement of the program.

Haulers: The primary objective in enforcing waste tire hauler registrations is the prevention of new illegal waste tire sites.

Waste Tire Hauler violations are difficult to detect because the business is so transient in nature. Proposed amendments to the statute under AB 603 will significantly enhance the Board's ability to track the movement of tires throughout the state and therefore will increase the need for enforcement activities.

The Board's primary enforcement strategy for detection of waste tire hauler registrations has been periodic review of manifests, response to citizen and LEA complaints or investigation of haulers who maintain illegal waste tire facilities.

3. Waste Tire Enforcement Procedures

Facilities: Waste tire sites are identified by several methods, including inspections by CIWMB staff, self-reported sites recorded in the SWIS system, CHP aerial surveillance and referrals by LEAs. When the CIWMB staff confirms that the site is not in compliance with the waste tire facility regulations, a letter of violation (LOV) is issued to the identified responsible party, often the current operator and/or property owner. The letter cites the violations and requests that the facility come into compliance.

If the violation is not corrected, the Special Waste Division issues a cleanup and abatement order as authorized by the Public Resources Code (PRC). The order sets forth a time schedule within which the site must comply with the waste tire facility requirements by either removal and proper disposal of the waste tires or by obtaining a waste tire facility permit. If the responsible party fails to come into compliance with the law within the specified time period, the tire enforcement staff prepares either an administrative complaint under the provisions of the PRC, or a referral to the District Attorney's Office for the appropriate county.

If the matter is forwarded to the Legal Office for administrative action, the penalty requested takes into consideration:

- the nature and extent of the violation, including the cost to remediate the site if the responsible party fails to come into compliance,
- the respondent's participation in the creation of the site (owner versus operator),
- the location of the site to populations,
- the respondents degree of cooperation in the investigation and previous record with the Board regarding enforcement actions,
- the threat to human health and the environment.

This formula has been routinely accepted by the Administrative Law Judges as a rational basis for supporting the requested penalty. The agenda item to follow sets forth these factors in a proposed bailment or penalty chart.

The administrative complaint is served by certified mail upon the named respondent(s). If the return receipt is not signed by the designated recipient or is returned unclaimed, the complaint is sent to a process server to be personally hand served on the respondent(s). After service has been effected, the matter is set for hearing with the Office of Administrative Hearings (OAH). Once the hearing date is set, only a formal motion made to the court can change the date.

In general, settlement prior to hearing is not entertained unless the responsible party has either already fully complied with the cleanup and abatement order, or has demonstrated substantial progress with the remediation. In the latter case, under the terms of the settlement the responsible party stipulates to a relatively small penalty if the party can come into compliance by fully remediating the condition within a specified period of time. The time period depends upon the characteristics of the site and the resources of the responsible party. As part of this agreement, the responsible party must also stipulate to the imposition of the full amount requested in the complaint if they fail to meet the agreed compliance date.

In most cases, the settlement terms are entered at the hearing on the record. The Judge then makes factual findings and reaffirms the terms of the settlement as an administrative decision. This facilitates collection of the settled amount in the event the responsible party defaults on his obligations.

If the matter is not settled and goes forward to a contested hearing, the Legal Office represents the CIWMB in a Formal APA hearing (see Section 2, below). Counsel presents witnesses and documentary evidence to establish the violations claimed. The respondent then presents their defense, using the same method, including possible cross-examination of CIWMB witnesses. After the conclusion of a hearing, the matter is taken under submission by the Administrative Law Judge (ALJ), who thereafter issues a final decision. In 1999, 18 out of 37 cases filed and served have been adjudicated in this manner, and six remain pending. Four of these cases resulted in liens totaling \$163,000. The remaining sites were settled for a lesser penalty and the sites were cleaned at the operator's expense.

Since the inception of the enforcement program in 1994, 5.8 million tires waste tires have been removed as a direct result of Board enforcement actions.

When the terms of a settlement or administrative order are not complied with and/or no financial arrangements are made to pay the penalty, the Legal Office will prepare a petition in the proper county court to convert the penalty to a civil judgment. Once the penalty is converted to a civil judgment, the CIWMB collects the penalty via a recorded abstract of judgment.

Haulers: When a violation of the waste tire hauler statutes or regulations is detected, investigators can issue a warning letter or refer the violations to the legal office for administrative penalty procedure. Penalties are employed where the violating activity comes after documented warnings to comply with the law or where the respondent has been through the penalty process before (e.g., the Vargas and Ball hearings). If the activity establishes a pattern of violations or where the respondent has been previously fined and continues to violate the law, their case is referred to the Board for revocation of the hauler's registration.

In addition to these ongoing investigations, staff annually reviews hauler performance when applications for renewal of the annual registration are received each fall. If staff detect that the haulers' activities during the year or in combination over a period of years violate of the law, the hauler receives a letter denying renewal of registrations pursuant to PRC Section 42959. If the haulers who received denials request a hearing, they receive the earliest date available for a full hearing before the Board.

4. Summary of Waste Tire Enforcement Activity Facilities

Facilities

| Years | Administrative Complaints | Settled - Subsequent Full Compliance | Settled - Compliance Process Ongoing | ALJ Orders After Hearings |
|-------|--|--------------------------------------|--------------------------------------|--|
| '98 | 14 | 10 | 2 | 2 |
| '99 | 37 (increase due to removal of exclusion) | 14 | 1 | 18 (an additional 4 remain pending) |

Haulers

| Years | Administrative Complaints | Settled - Subsequent Full Compliance | Settled - Compliance Process Ongoing | ALJ Orders After Hearings |
|-------|---------------------------|--------------------------------------|--------------------------------------|---------------------------|
| '98 | 4 | 2 | | 2 |
| '99 | 9 | 4 | | 5 |

SECTION 2

DISCUSSION OF HEARING REQUIREMENTS FOR BOARD ACTIONS

I. Overview

Some Board actions require more complex procedural rules than other Board actions. For example, the Board is well versed in the open meeting requirements under the Bagley-Keene Act, as these procedural rules are applicable to all Board hearings. The Board is also familiar with the additional procedural requirements for hearings considering the promulgation of regulations. These rules – which are found in the Rulemaking Chapter of California's Administrative Procedure Act (APA) - add another layer of procedure to the basic open meeting rules applicable to all meetings.

Over the last several years, however, the Board has occasionally encountered items which required a special set of procedural rules in addition to the standard open meeting rules. Recently, the Board conducted a hearing to impose penalties under the RPPC statutes with the participation of an Administrative Law Judge (ALJ). Other penalty hearings for violations of the tire facility statutes have been heard in front of an ALJ alone at the Office of Administrative Hearings. Finally, in January the Board conducted its first hearing concerning the denial of a waste tire hauler registration. These hearings are considered **adjudicative** proceedings, as they involve the weighing of evidence by the Board or an ALJ in matters where a legal interest of an individual is involved. There are special procedural "due process" rules for these adjudicative hearings, also found in the APA. These rules require that the Board follow particular "formal" or "informal" hearing procedures, designed to assure that the individual involved has been provided with a fair, judicial style of hearing.

This section examines the fundamental procedural requirements applicable to Board hearings, and the underlying basis for the special requirements imposed upon Board adjudicative proceedings. This section first examines the four main categories of actions which may be taken by the Board. The section then briefly summarizes: (a) the Bagley-Keene Open Meeting Act, which is applicable to all Board meetings; and (b) the rulemaking procedures under the APA, which are applicable to the Board's legislative actions. This section then discusses the one category of action requiring compliance with the APA's "formal" or "informal" hearing rules – adjudicative actions – and examines the principal requirements for each type of hearing. Finally, a chart listing the main adjudicative actions taken by the Board by category, and identifying the APA due process requirements for each action, is provided as Attachment 2.

II. Synopsis Of Categories Of Actions

There are four major categories of action which may be taken by the Board:

1. **Legislative Actions:** A Board action is considered legislative when the purpose of the action is to formulate general rules which are to be applied to future individual cases. Examples of quasi-legislative actions include:
 - (a) the promulgation and review of regulations; and

(b) the setting of criteria for loans and grants.

2. **Non-Adjudicatory Administrative Actions :** Certain of the Board's administrative actions do not involve the weighing of conflicting evidence, and do not rise to such a level of significance that the constitution or a statute calls for judicial style of hearing. Examples of these actions include:

- (a) the approval of loans and grants;
- (b) review of whether submissions of source reduction recycling elements and waste management plans meet the statutory criteria; and
- (c) the imposition of penalties for the failure to timely submit (or submit at all) source reduction recycling elements and waste management plans;

3. **Ministerial Actions:** A Board action is considered ministerial when the Board has no discretion; it must take a particular action as prescribed by statute or regulation. These actions involve the Board's application of objective standards to a matter, without any balancing of conflicting interests or exercise of judgment. These actions are usually delegated to the Executive Director and carried out by Board staff.

The Board is readily familiar with the above categories of action, as they regularly appear on the monthly agendas. The below final category of action, however - adjudicative actions - is less frequently encountered by the Board.

4. **Adjudicative Actions:** A Board action is considered adjudicative (also known as **quasi-judicial**) when the Board applies the general rules to a particular case, weighs the evidence and makes a decision effecting a legal interest of an individual. The statutes relating to these actions require an evidentiary hearing in which the Board balances conflicting interests and exercises its judgment in rendering a decision. Examples of quasi-judicial actions include:

- (a) the imposition of penalties for permit and registration violations;
- (b) the denial, suspension or revocation of permits and registrations;
- (c) the imposition of penalties for the submission of inadequate source reduction recycling elements and waste management plans;
- (d) the evaluation of the adequacy of the implementation of source reduction recycling elements and household hazardous waste elements (and the imposition of penalties for deficiencies); and
- (e) the imposition of penalties for violations of the rigid plastic packaging container provisions and of the recycled content newsprint provisions.

The APA due process requirements set forth in this agenda item apply only to adjudicative actions, and not to the other above three categories of actions.

III. Procedural Requirements for Board Hearings

A. Open Meeting Procedures Under Bagley-Keene – Applies to All Board Meetings

The Bagley-Keene Open Meeting Act applies to all Board meetings. The Act requires, subject to limited exceptions, that Board meetings be open and that agenda items be deliberated in public, so that all members of the populace may attend. In summary, the procedural requirements of the Open Meeting Act include:

Persons Entitled to Notice - The Board provides notice of regular meetings to all persons who have made a written request for notice, as well as to all persons or entities who are party to any administrative or adjudicatory hearing being conducted at the meeting.

Time of Notice – The Board provides notice to all persons or entities so entitled at least 10 days before the meeting.

Agenda Requirement – The Board's notice states a specific agenda for the meeting, which includes the items of business to be transacted or discussed.

B. Rulemaking Procedures under the California Administrative Procedure Act – Applies to Legislative Actions

Chapter 3.5 of the California Administrative Procedure Act (APA) sets forth the procedural requirements for the promulgation and review of regulations by the Board. In summary, the procedural requirements of this Rulemaking Chapter of the APA include:

Public Notice – Once the Board has developed the specific language of a proposed regulation, a Notice is drafted setting forth the scope of the changes the Board is proposing, including an analysis of any economic impact on business. Typically, the Board hears an agenda item to approve the beginning of the formal rulemaking process. The Board then delivers a copy of the Notice to the Office of Administrative Law (OAL). Upon OAL's approval the Notice is published in the California Regulatory Notice Register and mailed to persons who are interested and/or effected by the proposed action.

Public Response to Proposed Regulation – The APA provides a series of opportunities for the regulated public to comment throughout the various stages of the process. The first opportunity occurs at the time the notice of proposed action is published in the Notice Register. The Board accepts written comments during the 45 days following the publication of the Notice. The next opportunity for public comment occurs if the Board makes a substantial change to the text of the regulation. In this case the Board mails another Notice and accepts written comments during the 15 calendar days after mailing of the notice.

Public Hearing – Neither the APA notice procedure nor fundamental due process requires that the Board automatically schedule a public hearing. The Board, however, regularly holds such hearings so that interested persons may present their views directly to the members, and is required to hold such a hearing after the 45 day comment period if one is requested.

C. Administrative Adjudication Procedures under the California Administrative Procedure Act – Applies Only to Adjudicative Actions

For state agencies such as the Board, the due process procedures to be followed in conducting adjudicative hearings are found in the Adjudication Sections of California's Administrative Procedure Act (APA). The APA contains two types of hearing procedures – informal and formal. For state agencies such as the Board, the determination as to whether a matter requires an informal or formal hearing depends upon the wording of the particular statute calling for the hearing. Thus the Board is only bound to follow the APA's formal hearing procedures where the statute calling for the hearing specifically references all or a portion of Chapter 5 of the APA (the "Formal Hearing" Chapter).

1. Informal Hearing Due Process Procedures

The adjudicative due process requirements for informal hearings are predominately contained in the APA's "Administrative Adjudication Bill of Rights." The Bill of Rights, which also applies to formal hearings, sets forth the minimum due process and public interest requirements that must be satisfied in a state agency quasi-judicial hearing. The main tenets of the Bill of Rights are:

1. The person to which the Board's action is directed must be given notice and an opportunity to be heard, including the opportunity to present and rebut evidence. This requirement is subject to reasonable control and limitation by the Board, including: control over the manner of presentation of evidence (whether it be oral, written or electronic); limitations to curb lengthy or repetitious testimony or other evidence; and other controls or limitations appropriate to the character of the hearing;
2. The Board must make available to the person to which the Board's action is directed a copy of the governing procedure, including a statement as to whether the formal hearing requirements are applicable. This requirement may be satisfied by the Board's offer to provide a copy of the procedure upon request.
3. The hearing must be open to the public;
4. No Board member hearing a particular matter may act or have previously acted as investigator, prosecutor or advocate on that matter either during or prior to the hearing;
5. Board members hearing the matter are subject to disqualification for bias, prejudice or personal interest in the matter;
6. The Board's decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and
7. The Board's decision may not be relied upon as precedent unless the Board so designates the decision, and then indexes all so designated decisions for public review.

Informal hearings under the APA are simpler and more expeditious than formal hearings, and do not require the presence of an ALJ. The provisions of the APA pertaining to informal hearings also contain other procedures which a state agency may elect to follow, such as the issuance of subpoenas to compel third parties to appear and/or produce documents at hearings. These procedures, however, are optional, while the Administrative Adjudication Bill of Rights (and certain other minor procedures) are mandatory.

2. Formal Hearing Due Process Procedures

Compliance with the formal hearing procedures is only mandated where the Legislature by statute has expressly referenced either the formal hearing chapter of the APA in general, or certain sections of the chapter in particular. In the latter case the Board need only comply with the sections of the formal hearing chapter so specified. Formal hearing procedures include both the Administrative Adjudication Bill of Rights (see above), as well as the following additional main requirements:

- A. An Administrative Law Judge (ALJ) Must Preside:** An ALJ must preside over a formal hearing. The Board, however, determines whether it shall hear the case with the ALJ or whether the ALJ shall hear the case alone:
1. Where the Board hears the case with the ALJ, the ALJ presides over the hearing, rules on the admission of evidence and advises the Board on matters of law. The Board retains all other powers relating to the conduct of the hearing, though it may elect to delegate certain of these powers to the ALJ. The ALJ who presided at the hearing must, at a minimum, be present during consideration of the case, and may assist and advise on legal matters during the deliberations, if the Board so requests;
 2. Where the ALJ hears the case alone, all powers relating to the conduct of the hearing are reserved solely for the ALJ. The Board may elect to have the ALJ either issue a final decision, which is deemed adopted by the Board, or to issue a proposed decision. If the Board elects to receive a proposed decision, the ALJ has thirty days to submit the decision to the Board. Once the ALJ has submitted a proposed decision, the Board has several options:
 - (a) Adopt or reject the decision in its entirety;
 - (b) Reduce and/or mitigate the penalty; or
 - (c) Make technical or other minor changes to the decision for clarification or other purposes, so long as the change does not affect the factual or legal basis of the decision. The Board may thereafter adopt the decision as so modified.
- B. Right to Compel the Production of Witnesses and Documents:** A party has the right to subpoena individuals not party to the proceeding to compel their appearance and/or the production of documents at the hearing.

C. Rights To Pre-Hearing Discovery, Conferences And Motions: These rights include:

1. **Discovery (And Motions To Compel Failures to Comply With Discovery):** Formal Hearing procedures permit a party to conduct the following types of pre-hearing discovery:
 - (a) Written requests for discovery in interrogatory (i.e., question) format;
 - (b) Depositions or affidavits in lieu of testimony to be exchanged before the hearing (where a witness is unavailable for the hearing);
 - (c) Exchanges of witness and exhibit lists;
 - (d) Subpoenas Duces Tecum (i.e., demands for production of documents); and
 - (e) Requests for public records.

If a party does not comply with any of the above permitted requests for discovery, the opposing party may file a motion with the ALJ to compel the discovery:

2. **Prehearing Conferences:** If any party to the action or the ALJ desires to have certain procedural or other issues addressed prior to the hearing, a prehearing conference may be held. The ALJ may thereafter issue a prehearing order incorporating the matters determined at the conference.
3. **Settlement Conferences:** Most prehearing conferences are followed by a mandatory settlement conference with an ALJ who is not scheduled to hear the case. The purpose of the conference is to attempt to resolve the matter without the expense and uncertainty of a quasi-judicial hearing.
4. **Procedural Motions:** These include motions before the ALJ to consolidate (i.e., a joint hearing of two or more matters which involve common questions of law or fact) and motions to sever (i.e., separate hearings on one or more issues, so that an issue which is potentially determinative of the matter may be heard first).

IV. Administrative Procedure Act Requirements For Board Adjudicative Hearings

Attachment 2 lists the main adjudicatory actions taken by the Board by category, and identifies the APA due process requirements for each action. As previously discussed, the determination as to whether a matter requires an informal or formal hearing depends upon the wording of the particular statute calling for the hearing.

As is evident from Attachment 2, the statutes governing the suspension or revocation of a permit or registration call for a formal hearing, as such actions directly affect the vested right of an

individual to practice his or her trade. Thus in conducting such formal hearings the Board may either: (a) hear the matter with the ALJ presiding over the hearing and being present during the consideration of the case; or (b) elect to have the ALJ hear the case alone.

- The statutes are less consistent, however, in addressing other adjudicative matters, such as denials of permits and registrations and the imposition of penalties for violations of statutes or regulations. For example, while a hearing concerning the denial of a waste tire facility permit must be heard under the formal hearing rules, a hearing concerning the refusal to issue or renew a waste tire hauler registration may be heard informally by the Board alone (though the Board may in its discretion hear the matter formally, with an ALJ).

With respect to penalty hearings, while informal hearing procedures are permissible for solid waste facility and recycled content newsprint violations, compliance with the formal hearing requirements is required for waste tire facility and RPPC violations.

The legislative trend appears to favor requiring compliance with the formal hearing procedures for all adjudicatory proceedings. Thus, the APA expressly provides that the Formal Hearing Chapter of the Act applies to all adjudicative proceedings conducted by agencies created on or after July 1, 1997, unless the statutes relating to the proceeding provide otherwise.

V. Attachments

1. Hearing Calendar For 2000
2. Administrative Procedure Act Requirements For Board Adjudicative Hearings

VI. Contacts

Name: Kathryn J. Tobias

Phone: (916) 255-2188

Name: Steven J. Levine

Phone: (916) 255-2207

HEARING CALENDAR FOR 2000

PREPARED BY CIWMB LEGAL OFFICE

| DATE OF EVENT TRIGGERING POTENTIAL HEARING | TYPE OF HEARING (AND TIME PERIOD TO HEAR MATTER WHERE APPLICABLE) | ESTIMATE OF NUMBER OF HEARINGS (BASED ON PRIOR YEAR FIGURES WHERE APPLICABLE) |
|--|---|---|
| SOLID WASTE FACILITY PERMITS | No Triggering Date | Concurrence With or Objections to Solid Waste Facility Permits - Sixty Days from Receipt of Proposed Permit |
| | No Triggering Date | Appeals of LEA Denials of Solid Waste Facility Permits - Thirty Days from Date Appeal Filed with Board |
| | No Triggering Date | Suspension or Revocation of Solid Waste Facility Permits |
| | No Triggering Date | Penalties for Financial Assurance Violations |
| WASTE TIRE FACILITY PERMITS | No Triggering Date | Imposition of Penalties for Waste Tire Facility Permit Violations |
| | No Triggering Date | Denial, Suspension or Revocation of Waste Tire Facility Permits |
| WASTE TIRE HAULER REGISTRATIONS | No Triggering Date | Penalties for Waste Tire Hauler Registration Violations |
| | December 2000 Denial of Waste Tire Hauler Registrations | January 2001 Appeals of Denial of Waste Tire Hauler Registrations |
| | No Triggering Date | Suspension or Revocation of Waste Tire Hauler Registrations |

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| | DATE OF EVENT TRIGGERING POTENTIAL HEARING | TYPE OF HEARING AND TIME PERIOD TO HEAR MATTER | ESTIMATE OF HEARINGS |
|--|--|---|--|
| BIOMASS | JANUARY 2000 Completion of Compliance Order for 3 Jurisdictions. | FEBRUARY - MARCH 2000 Potential Hearings for Failure to Implement | Two cities have complied. The third was granted an extension. |
| | Triggering Date Passed Delinquent Countywide Siting Elements, Summary Plans | April 2000 Potential Penalty Hearings - Up to 2 Hearings for 4 Elements | It appears that elements will be filed shortly. |
| | APRIL 2000 Completion of Compliance Order for 34 Jurisdictions | MAY - JUNE 2000 Potential Hearings for Failure to Implement | Uncertain - there are no prior year figures upon which to estimate the number of hearings anticipated in 2000. |
| | MAY 2000 Completion of Compliance Order for 18 Jurisdictions | JUNE - JULY 2000 Potential Hearings for Failure to Implement | Uncertain - there are no prior year figures upon which to estimate the number of hearings anticipated in 2000. |
| | AUGUST 2000 Completion of Compliance Order for 5 Jurisdictions | SEPTEMBER - OCTOBER 2000 Potential Hearings for Failure to Implement | Uncertain - there are no prior year figures upon which to estimate the number of hearings anticipated in 2000. |
| | DECEMBER 2000 Completion of Compliance Order for 5 Jurisdictions | JANUARY - FEBRUARY 2001 Potential Hearings for Failure to Implement | Uncertain - there are no prior year figures upon which to estimate the number of hearings anticipated in 2000. |
| RIGID PLASTIC PACKAGING CONTAINERS (RPPC) | MARCH 2000 Mailing of Requests for Certification of Compliance With RPPC Requirements For Compliance Year 1997 | AUGUST 2000 Potential Penalty Hearings for Failure to Return Certification SEPTEMBER - OCTOBER 2000 Potential Penalty Hearings for Noncompliant Facilities With Whom Staff Was Unable to Negotiate Compliance Agreements | In 1998, requests for certification were sent to five hundred facilities, of which eighty were subsequently determined to be subject to the RPPC requirements for compliance year 1996. One facility failed to respond, resulting in a hearing in January, 2000. Seven others were determined to be noncompliant and subsequently entered into compliance agreements, which remain in effect. |
| | MARCH 2000 Submission By Facilities of Certifications of Compliance with Recycled Content Newsprint Requirements | AUGUST - SEPTEMBER 2000 Potential Appeals by Facilities of Board Assessments of Civil Penalties for Late Filings and/or or Nonfilings of Certifications | In prior years a hearing was required for assessment of penalties. Current procedures call for hearings only where a facility contests a penalty assessment. In 1998 there was one penalty hearing and in 1999 there were five penalty hearings. Of these hearings, only one facility affirmatively contested the imposition of penalties, and thus would have been likely to have appealed such an assessment under current procedures. |
| RECYCLED CONTENT NEWSPRINT | | | |

**ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS FOR BOARD ADJUDICATIVE HEARINGS
PREPARED BY CIWMB LEGAL OFFICE**

| | | | | | | |
|------------------------|---|--|--|--|--|--|
| <p>FORMAL</p> | <p>Board:</p> <ul style="list-style-type: none"> • Denials • Suspensions • Revocations <p>(where Board hears matter in lieu of LEA)</p> | <ul style="list-style-type: none"> • Penalties For Permit Violations or for Operating Facility Without Required Permit • Denials • Suspensions • Revocations | <ul style="list-style-type: none"> • Suspensions • Revocations | | <ul style="list-style-type: none"> • Penalties For Violations | |
| <p>INFORMAL</p> | <ul style="list-style-type: none"> • Penalties For Financial Assurance Violations • Board Penalties For Violations of Permit Conditions, Including State Minimum Standards, or for Operating Facility Without Required Permit (where Board hears matter in lieu of LEA) • Concurrence With or Objections to Solid Waste Facility Permits • Appeals of LEA Decisions Under AB 59 | | <ul style="list-style-type: none"> • Penalties For Registration Violations or for Hauling Without Required Registration • Refusals to Issue or Renew Registrations | <ul style="list-style-type: none"> • Penalties For Inadequate SRRE & Waste Mgt. Plans • Penalties For Failure To Implement SRRE & Waste Mgt. Plans | | <ul style="list-style-type: none"> • Penalties For Violations |

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