

SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT MUTUAL SETTLEMENT PROGRAM

STAFF REPORT

INTRODUCTION

The Air Pollution Control District is responsible for the enforcement of rules and regulations promulgated by the Air Pollution Control Board, the State Air Resources Board (ARB) and the U.S. Environmental Protection Agency (EPA). The enforcement effort is carried out by District personnel through a comprehensive inspection program for regulated facilities and thorough investigation of complaints. Regular inspections verify the ongoing compliance of air pollution sources with applicable regulations. Complaint investigations ensure that regulated and unregulated facilities, operations and activities do not create nuisance or adverse health impacts to surrounding residents.

An inspection program is an effective strategy for ensuring compliance with adopted rules and educating source operators on the operational limitations created by those rules. However, inspections alone are not sufficient to ensure continuing compliance. Business owners and operators are primarily concerned with producing products or providing services at a profit. Most of them wish to conduct their operations in compliance with all laws but do not usually spend a great deal of resources (time and money) to ensure ongoing compliance. It is the District's responsibility to monitor compliance and identify repairs or operational changes needed to bring the source back into a condition consistent with federal, state and local regulatory requirements.

The District works with all operators of stationary sources of air pollution to inform them of new regulations that affect them and the potential consequences of violating those regulations, including financial penalties and/or legal action. Our Business and Compliance Assistance Program helps regulated facilities and individuals avoid violations and associated penalties by staying aware of key air pollution control compliance parameters and regularly maintaining all equipment in a manner consistent with permit conditions, rules and regulations.

A comprehensive quality control program for air pollution control equipment is an essential compliance tool for an emission source. Just as they constantly test and check the quality of their product, they should also check the operating efficiency of their air pollution control systems to ensure they are operating properly and in compliance with regulations. Over the years, the enforcement role of air districts has evolved to also become an instrument of quality control. When a violation is discovered at a regulated facility, it is often the result of inattention to regulated components of a facility's operations. Fines and penalties are an effective method of encouraging better attention to regulations through implementation of a good quality control program.

If a source operator understands that substantial penalties can result from non-compliance, that knowledge can provide significant motivation for the operator to carefully track all air pollution compliance parameters for their facility. When compliance with District regulations becomes part of the product and profit relationship, the owner/operator will usually focus the appropriate level of attention on the issue.

When a District inspector finds someone out of compliance with a rule, permit condition, or law relating to air pollution, either a Notice to Comply (NTC) or Notice of Violation (NOV) is issued as the District's official record of the violation. An NTC is issued to document a minor violation of administrative or procedural requirements that does not result in an increase of emissions or endanger public health or safety. It is analogous to a "fix-it" ticket and carries no financial penalties.

An NOV is issued for all other violations and has a similar look and feel to a traffic ticket issued by the California Highway Patrol. The primary purpose of the NOV is to initiate timely corrective action and help prevent future violations. To that end, NOV's typically result in monetary penalties. Serious or repeated violations that show blatant disregard for the law and for public health can lead to civil or criminal prosecution.

THE NOTICE OF VIOLATION

The written Notice of Violation documents a violation of District Rules or Permit Conditions, the California Health & Safety Code, or Federal air pollution law, and officially informs the violator of the specific occurrence or condition that is not in compliance. The NOV may be completed and issued by the inspector in the field or may be issued by certified mail. The NOV form contains a record of the key elements of the violation and may be used with other supporting background information and evidence as the referral document to our Mutual Settlement Program or to District Counsel or the District Attorney for penalty action.

NOV Issuance Procedures

The inspector will issue the NOV after the violation has been observed, documented, and evidence obtained, on film if possible. In the case that the violation was detected after a sample has been analyzed or a source test result has been received, the inspector will contact the individual or business as soon as practically possible. The NOV (white copy) and a brochure explaining the NOV and Mutual Settlement Program will be issued to a responsible person. In the case of a business, the NOV is issued preferably to a manager, supervisor, or officer of the company. The inspector will explain precisely what condition exists which is not in compliance with District Rules and what operational change must be made in order for the individual or business to come into compliance. The inspector will not offer engineering advice that would suggest repair methods or design modifications.

The inspector describes the violation on the NOV using specific language from the permit condition or rule that was violated. This description must be clearly written and should be understandable to the person receiving the NOV as well as to a judge if the case were to go to court.

Reports and Documentation

The inspector prepares a detailed inspection report to carefully document the observed violation following the District's inspection report guidelines. The report will contain sufficient detail to clearly explain the essential elements of the compliance status determination. Supplemental documentation in the form of photographs, visible emissions evaluations, sample analyses, and source test results will be attached to the report. Such a report typically includes: reason for inspection; contact person and title; inspector's observations; equipment or condition in violation; nature of violation; reference to all evidence; interview of individual or business operator; and enforcement action taken or recommended.

Once an NOV is issued a letter is sent to the affected business or individual describing the circumstances of the violation observed by our inspector and a request for response by a given date on actions taken to correct the violation. A fourteen (14) day deadline is normally given for the violator's written response. This response should include what specific action was taken to correct the violation and measures taken to prevent future, similar occurrences. Once a response is received, the case is typically moved forward to our Mutual Settlement Program to reach final resolution of the violation with the business or individual.

ASSESSING PENALTIES FOR VIOLATIONS

ARB requires districts to have a penalty policy that recommends a dollar amount for settling a violation in line with Health and Safety Code Sections 42400 and 42402. The penalty amount is to be based on a penalty schedule that reflects the factors in California Health and Safety Code (H&SC) Section 42403(b). Other requirements include:

- The penalty schedule is adjusted periodically to account for inflation and to ensure adequate deterrence for noncompliance.
- Asbestos violations shall be issued NOV's and penalties assessed shall be no less than \$1,000.
- Consideration for repeat or recalcitrant violators.
- Ensure prompt mutual settlement process but preserve due process.

- Maintain a tracking system for all violations from NOV issuance to final settlement or other actions.
- Periodic District review of their Mutual Settlement Program for purposes of maintaining consistency and ensuring less than 10 percent of NOVs are dismissed without penalty.
- Written policy and procedure for referring cases to District Counsel and the County District Attorney.

In the introduction from ARB publication Draft Recommendations on Guidance for Penalty Assessments at Petroleum Refineries (November 20, 2001) ARB states:

“Local air quality management districts and air pollution control districts (districts) have the primary responsibility to adopt rules and regulations to achieve and maintain state and federal ambient air quality standards in areas affected by emission sources under their jurisdiction. The districts have developed enforcement programs to assist in the implementation of, and ensure compliance with, the rules and regulations they adopt. The California Health and Safety Code establishes the penalties for air quality violations.

An effective enforcement program has many elements. One critical element is the dedication of sufficient staffing resources to carry out rigorous equipment inspections, verification of permits and operating conditions, and validation of equipment breakdowns.

The ultimate success of an enforcement program, however, depends on the fair and firm use of appropriate and meaningful penalties to address violations of local, state, or federal air quality rules, regulations or laws. The primary purpose of penalties is to deter future violations. The use of meaningful penalties provides a financial incentive for regulated industries to comply with air quality laws, and creates an environment where full compliance is the most cost-effective option available. Penalties must be commensurate with the nature, scope and seriousness of the violations.”

The Environmental Protection Agency’s Compliance Guidance – Clean Air Act Stationary Source Civil Penalty Policy (1993) outlines the Uniform Civil Penalty Policy generally applying to most Clean Air Act Violations. The EPA penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it provides for adjustment factors to be applied so that fair and equitable penalties will result. The Federal General Accounting Office report (Environmental Enforcement, June 1991) on EPA’s Uniform Civil Penalty Policy recommended State-delegated enforcement programs adopt the economic benefit calculation in settlement of violations.

Civil Penalty Statutes

In determining appropriate penalties for violation of air pollution rules and regulations, districts are bound by both statutes and case law. The H&SC establishes a range (up to a maximum) of civil penalties for violations of state and district air pollution laws, rules and regulations. Court decisions provide direction regarding application of civil penalty statutes and provide insight into how a court would interpret California’s air pollution penalty statutes.

Health and Safety Code sections 39674 and 42401-42402.5 establish maximum civil penalties for violations of state and local air quality requirements. The penalties vary depending on the actions and intent of the violator and the severity of the violation, as shown in Table 1, below.

TABLE 1
Maximum Civil Penalties for Violations of Air Quality Laws

| Severity of Violation | Maximum Civil Penalty (Per Violation per Day) | |
|---|--|-------------|
| | Individual/Small Source | Corporation |
| Strict Liability, No Fault Basis* | \$1,000 | \$1,000 |
| Liable | \$10,000 | \$10,000 |
| Nuisance, Injury | \$15,000 | \$15,000 |
| Negligently Emitting Air Contaminants | \$25,000 | \$25,000 |
| Negligent Emissions, Causing Injury or Death | \$100,000 | \$100,000 |
| Knowingly Emits, or Failure to Take Corrective Action | \$40,000 | \$40,000 |
| Knowingly Emits, Causing Injury or Death | \$250,000 | \$250,000 |
| Willfully and Intentionally Emitting Air Contaminants | \$75,000 | \$75,000 |
| Willfully and Intentionally Emits Causing Significant Risk of Injury or Death | \$125,000 | \$500,000 |
| Willful and Intentional Emitting Air Contaminants Causing Great Injury or Death | \$250,000 | \$1,000,000 |

*Can establish by affirmative defense that the violation was not the result of intentional or negligent conduct.

Health and Safety Code Section 42403(b) lists several factors that must be considered in setting civil penalties for air quality violations:

"In determining the amount assessed, the court, or in reaching any settlement, the district, shall take into consideration all relevant circumstances, including, but not limited to the following:

- (1) The extent of harm caused by the violation.
- (2) The nature and persistence of the violation.
- (3) The length of time over which the violation occurs.
- (4) The frequency of past violations.
- (5) The record of maintenance.
- (6) The unproven or innovative nature of the control equipment.
- (7) Any action taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation.
- (8) The financial burden to the defendant."

Case Law on Civil Penalties

Air quality laws protect the public health, safety and welfare. Health and Safety Code section 39000 states:

"The Legislature finds and declares that the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California."

This summarizes broadly the important public policy objective of district programs to enforce the laws, rules, regulations, permits and other regulatory requirements enacted or promulgated to protect public health through improving and maintaining air quality. In the appendix following this report is a discussion of specific cases that illustrate the intent of penalties to serve as motivation for compliance and deterrence for recurring violations.

Criminal Penalties

In SB 1865, the Legislature increased criminal penalties commensurate with the increases in civil penalties, and created a felony for air pollution violations. Courts have held individuals, as well as corporations and corporate officers, to extremely high standards of conduct in these situations, willingly punishing both the corporation and the responsible corporate officers criminally. In *United States v. Park* (1975) 421 U.S. 650, 672, the United States Supreme Court held that a corporate officer may be held criminally liable along with the corporation even though he or she had neither personal involvement in, nor knowledge of, the crime. The Park court reasoned: "The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." (Id.)

THE MUTUAL SETTLEMENT PROGRAM

Programs for addressing penalties associated with Notices of Violation have historically been handled by most Districts through mutually agreed-upon settlements between the District and violator via office conferences or correspondence.

Statewide Programs

One of the earliest Mutual Settlement Programs was developed by the South Coast Air Quality Management District in December 1981. Since then, most of the Districts throughout the state have adopted similar programs. On September 30, 1988, Section 42402.5 was added to the Health and Safety Code setting out the authority of Districts to administer Mutual Settlement Programs. ARB's Criteria for Assessing District Enforcement Programs (1999) states that the district shall establish a mutual settlement program (Subvention Criteria - California Code of Regulations Section 90115).

These programs were developed to effectively process the majority of Notices of Violation issued by inspectors to sources violating District Rules. The premise for the program is that the majority of violations are unintentional, non-recurrent incidents that do not warrant criminal or civil actions. These types of violations are, for the most part, quickly corrected and do not recur if the violator is given the opportunity to meet, discuss the circumstances of the violation and come to a joint resolution with District personnel.

The California Air Pollution Control Officers Association (CAPCOA) created a Mutual Settlement Taskforce with the purpose of providing information and guidelines for the handling of Notices of Violation through mutual settlement programs. Examples of procedures, techniques, correspondence, penalty calculations and alternative settlement options obtained throughout the State of California were included in a handbook. CAPCOA published this Mutual Settlement Handbook in 1994, which is used as a guide by all districts in implementing and revising their mutual settlement programs.

San Luis Obispo County APCD Mutual Settlement Program

The District established its Mutual Settlement Program with Board approval and in coordination with the San Luis Obispo County Counsel and District Attorney Offices in 1987. The program includes established policies and procedures for resolving a Notice of Violation (NOV) issued by the District. The District maintains a tracking system for all violations from NOV issuance to final settlement or other actions. District performance indicators for enforcement and legal action ensures prompt action, but with due process.

The District's Mutual Settlement Program (MSP) is a voluntary program designed to settle violations without the time and expense of litigation. We implement the mutual settlement process for most sources that violate State law or District Rules, provided the violator has not refused to settle previous civil penalties. The first step in handling a

MSP case is to classify it as either a "minor" or "major" case. A case is considered minor when a preliminary calculation of the monetary component of the proposed settlement is \$250 or less. A case is considered major if the proposed settlement is greater than \$250. Minor cases are typically handled directly by the Supervisor of the Enforcement and Compliance Division. Major cases always include direct oversight and involvement by the Air Pollution Control Officer in all aspects of the settlement.

A penalty calculation formula is used to determine the amount of the proposed settlement. The Monetary Component Formula (MCF) is based on factors that must be considered in recovering civil penalties, as specified in California Health & Safety Code § 42403(b) and the Environmental Protection Agency's Compliance Guidance – Clean Air Act Stationary Source Civil Penalty Policy (1993).

The MCF is a balanced penalty formula that uses five "aggravating" and five "mitigating" factors.

The aggravating factors are:

- extent of harm caused by the violation;
- nature & persistence of the violation;
- length of time the violation occurred;
- past violations; and
- economic benefit of noncompliance.

The mitigating factors are:

- degree and record of maintenance;
- innovative control equipment;
- action taken to mitigate the violation;
- good faith effort to comply; and
- financial burden to the violator.

Settlement Process

Once a penalty has been calculated using the MCF, a letter is sent to the violator advising them of the penalties as prescribed by law and the proposed terms and conditions for settling the violation. The source or violator must respond to the settlement letter within 14 days. Options at this point include:

- Sign the settlement agreement and return it to the District with a check in the amount of the penalty assessed, and agree to the terms and conditions.
- Request an office conference to present additional, mitigating information.
- Fail to respond. This will result in the case being referred to District Counsel for evaluation of further enforcement action. Normally, the case will no longer be governed by the MSP; any penalties will be established through litigation.

If an office conference occurs and the violator presents new, mitigating information that affects the MCF factors listed above, then the proposed penalties could be reduced within the framework of the Mutual Settlement Program. If a modification to the penalty and/or conditions is agreed upon, a revised settlement agreement letter will be prepared and mailed. Sources or violators will then have 14 days to respond to the revised settlement proposal. If the revised settlement agreement is not signed and returned to the District with the penalty payment, it is referred to District Counsel for evaluation of further enforcement action.

Supplemental Environmental Programs

Some California air districts use penalties exclusively in negotiating settlements, while others also include environmental benefit programs called Supplemental Environmental Programs (SEP). We incorporate both strategies in our Mutual Settlement Program.

SEPs typically consist of an emission reduction, pollution prevention or community air quality benefit project that the violator agrees to implement to help mitigate the impacts of their violation. The SEP may replace or supplement the potential financial penalty; however, unlike a penalty, a SEP is a business expense that is tax deductible. SEPs with a non-monetary settlement can contribute to improved air quality or to overall community welfare; examples of these include establishment of a preventative maintenance program, sponsoring educational or training sessions to prevent violations by other operators in their industry, and public service programs such as community asthma screening. Settlement options under a SEP can also include "in kind" settlements, such as production of a professional educational video on air pollution, offering a site for placement of an air monitoring station, etc.

CIVIL LITIGATION OF VIOLATIONS

The first and preferred alternative of a civil action is the Mutual Settlement Program. If the violator refuses to settle or the violation is a serious and repeat offense the case may be filed with the District Counsel for civil litigation. This is done in the same manner as filing a criminal case via District Counsel with the District Attorney. If the District does enjoin the violator in a civil action, the provisions of section 42400(c) of the Health & Safety Code preclude criminal proceedings.

SUMMARY OF MUTUAL SETTLEMENT PROCESS

1. The inspector observes a violation, issues a Written Notice of Violation and gathers evidence according to District guidelines. A copy of the NOV is filed in the NOV log and an entry made in the log book tracking form. An electronic record is started in the District's tracking database.
2. The inspector prepares an inspection report to carefully document the observed violation following the guidelines in Section C above.
3. Inspector returns to the source for compliance verification as soon as equipment is repaired or is returned to compliance.
4. Violator sends a written reply to NOV describing corrective action taken, when equipment was back in compliance (if applicable), and measures taken to prevent further similar occurrences. This letter is entered in the case file. Normally a 14-day deadline is given for the violator's response on the NOV.
5. The inspector prepares a mutual settlement case file for review and approval by the Enforcement Supervisor and the APCO. This file is placed in a tracking file folder and labeled appropriately. The following documents should be included in the file:
 - Copy of NOV and cover letter if applicable
 - Case tracking sheet
 - Letter of offer for settlement
 - Violator's response letter
 - Original inspection report
 - Follow up compliance inspection report
 - Memo to APCO summarizing case, compliance history, and proposed settlement
 - Letter to fire protection agency (if applicable)

6. The inspector proposes a penalty to the Enforcement Supervisor and APCO to settle the violation following guidelines described in the Civil Penalty Policy and Procedure. Additional conditions and stipulations of settlement may also be proposed which require corrective action and continued compliance. Conditions of settlement may include actions to be taken by the source to help prevent future violations, or actions that can be shown to result in a net air quality benefit (Supplemental Environmental Program). These conditions may be placed on the Permit to Operate during the next renewal period, if needed.
7. Clerical staff sends a settlement letter via certified mail signed by the APCO to the violator stating that the violation has been designated for civil penalty action. This letter offers to settle under terms of the District Civil Penalty Policy and Procedure and gives a fourteen (14) day deadline.
8. The settlement letter also offers the violator the opportunity to meet with District staff in a voluntary office conference to discuss the settlement offer prior to paying the penalty. The purpose of the office conference is to openly share documentation and other support for the Notice of Violation, in an effort to reach mutual resolution. The violator may present evidence in defense or mitigation, which will be taken into consideration in further evaluating the proposed settlement and may result in amendments to the proposed settlement.
9. If settlement is reached the Enforcement Supervisor or APCO executes a written release.
10. If a violator fails to respond within the 14-day period, a reminder letter is sent certified mail with a five (5) day deadline to respond. If there is still no response, efforts are made to contact the violator by telephone.
11. If settlement cannot be reached, the case is referred to District Counsel for evaluation of enforcement options, including filing a complaint for criminal or civil penalties under the provisions of Sections 42400, 42402, and 42403 of the California Health & Safety Code.
12. When the violation is settled, the completed mutual settlement case file is entered and logged in the facility's inspection file or in Enforcement files on unpermitted sources. The electronic tracking record is updated and closed.

APPENDIX

Case Law on Civil Penalties

Courts have not interpreted H&SC sections 39674, 42401-42402.5, or 42403, but they have considered other civil penalty statutes. In doing this, courts have recognized that civil penalties have several purposes. Among them are punishment, deterring future violations and motivating compliance, and preventing unjust enrichment and unfair business advantage. A civil penalty is “unquestionably intended as a deterrent against future misconduct and does constitute a severe punitive exaction by the state....” (*People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431.) Civil penalties “do partake of the nature of punishments for wrongdoing [,] accomplish a chastisement of the wrongdoer and act as a deterrent against similar misconduct” by the violator and others. (*People v. Superior Court (Kardon)* (1973) 35 Cal.App.3d 710, 713.) “[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives.” (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [279 Cal.Rptr. 318] cited in *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1315 [92 Cal.Rptr. 418].)

These concepts have been applied in interpreting California air quality law. Discussing civil penalties for violations of California’s vehicular air quality requirements, the court in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, explained at page 1351 that maximum penalties are in the nature of liquidated damages, and that the obligation to demonstrate that a lesser amount is appropriate lies with the violator: “In addition to disgorging illicit gains and obtaining recompense, a civil penalty also has the purpose of deterring future misconduct. (*State of California v. City & County of San Francisco* (1979) 94 Cal.App. 3d 522, 531 [156 Cal.Rptr. 542]; *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 924 [132 Cal.Rptr. 767].)

Regulatory statutes would have little deterrent effect if violators could be penalized only where a plaintiff demonstrated quantifiable damages. (*State of California v. City & County of San Francisco, supra*, 94 Cal.App.3d at p. 531.) Further, “A penalty statute presupposes that its violation produces damages *beyond that which is compensable.*” (*Ibid.*, italics added.) The burden of proving that actual damages are less than the liquidated maximum provided in a penalty statute lies with the defendant, and in the absence of evidence in mitigation a court is free to assess the full amount. (*Id.* at pp. 531-532.)” To accomplish their intended goals, civil penalties must bear some relationship to the violator’s financial condition.

The relevance of a violator’s financial information was established in *People v. Toomey* (1985) 157 Cal.App.3d 1, 24-25. In *Toomey* the court reiterated the holding in *People v. Superior Court (Kardon)* (1973) Cal.App.3d 710, 713, that civil penalty provisions are sufficiently similar to exemplary damages as to permit discovery of a violator’s financial condition. The *Kardon* court explained the necessity of financial information: “a relatively small penalty might suffice for the small operator, while the same penalty would be paid with little hurt by the wealthy one” (*Kardon*, at p. 713.) Recently, the court observed in *City and County of San Francisco v. Sainez, supra*, at p. 1319: “Accordingly, we hold that, as in the case of substantive due process protection against excessive punitive damages awards, substantive due process protection against civil penalties under the rationale of Hale and Kinney allows inquiry into a defendant’s full net worth, not just the value of the particular property at issue in the case.” Applying this holding, the *Sainez* court upheld a civil penalty that totaled 28.4 percent of the violators’ net worth and 120 percent of the illegal rents they charged. The court took note of *U.S. v. Lippert* (8th Cir. 1998) 148 F.3d 974, 976, 978 where “[a] net worth of about \$500,000 has been held enough ability to pay to uphold a penalty of \$353,000....”