

Siskiyou County Air Pollution Control District Mutual Settlement Policy

The District's Mutual Settlement Program establishes 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.

The District's Mutual Settlement Program (MSP) is a voluntary program designed to settle violations without the time and expense of litigation. The District implements 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. Conferences are typically handled directly by the Air Pollution Control Officer (APCO) in all aspects of the settlement.

Settlement Process

Once a penalty has been calculated, 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 15 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; penalties will be established through litigation.

The following aggravating and mitigating factors are considered by the District during office conference negotiations when the violator presents new, mitigating information:

The aggravating factors are:

- extent of harm caused by the violation
- nature & persistence of the violation
- length of time the violation occurred
- past violations
- failure to comply
- 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
- financial burden to the violator

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 15 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.

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, and/or filing a criminal case via District Counsel with the District Attorney.

SUMMARY OF MUTUAL SETTLEMENT PROCEDURE

1. The inspector completes an inspection.
2. The inspector observes a violation.
3. The inspector gathers evidence according to District guidelines.
4. The inspector issues a written Notice of Violation (NOV), which also outlines response requirements.
5.
 - A. Violator replies to the District, describing corrective action taken, when completed, and measures taken to prevent similar occurrences. This information is entered into the case file.
 - B. Violator does not reply to the District. This information is entered into the case file.
6. The inspector completes compliance inspections as appropriate.
7. The inspector prepares a mutual settlement case file for review and approval by the APCO. The following documents are included in the file:
 - Original inspection report.
 - Copy of all evidence.
 - Copy of NOV.
 - Follow up compliance inspection report(s).
 - Documentation of violator's response.
8. A penalty is proposed to the APCO to settle the violation. Additional conditions and/or stipulations may also be proposed. Conditions and/or stipulations may include actions to be taken by the source to help prevent future violations, and amendments to the Permit to Operate.
9. A settlement letter is sent via certified mail to the violator stating that the violation has been designated for the Mutual Settlement Program (MSP). This letter includes an offer to settle under terms of the District Mutual Settlement Program and has a fifteen (15) day deadline to respond.
10. The settlement letter outlines the opportunity to agree to the MSP, complete all conditions and/or stipulations and pay the penalty.
11. The settlement letter outlines the opportunity to meet with District staff in a conference to discuss the MSP. The purpose of the conference is to present documentation and other evidence supporting the NOV, and gives the violator an opportunity to present evidence and/or mitigation in defense.
12. The APCO or authorized District Staff considers all information and makes a decision. If a settlement is reached, the APCO executes a written release, and the case is closed.
13. If a violator fails to respond within the 15-day period, efforts are made to contact the violator by telephone.
14. 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.
15. 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.

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....”