



Enforcement Symposium 2016

Facts to Fines: Intersection of Inspections and Settlement Cases

Start with the end in mind . . .

The settlement should be:

- Fair.
- Consistent.
- Serve as a deterrent.

The proper mindset . . .

- Every inspection is a process of developing facts.
- Every inspection report is a process of documenting facts.
- Every settlement is a process based on the evaluation of facts.

What you'll probably want to know at the end . . .

- What violations have you substantiated?
- What is the facility's compliance history?
- What is the harm?
- How pervasive is the violation?
- What is the frequency and/or duration of the violation?
- How sophisticated and responsible is the facility?
- What is the facility's financial situation?
- What is the extent of liability?

First you have to make a case . . .

Burden of proof is the obligation of a party to establish, by evidence, a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The degree of proof is established by the Standard of Proof.

Then you have to consider . . .

California H&SC Sections 42400.8* and 42403**

- (a) The extent of harm caused by the violation.
- (b) The nature and persistence of the violation.
- (c) The length of time over which the violation occurs.
- (d) The frequency of past violations.
- (e) The record of maintenance.
- (f) The unproven or innovative nature of the control equipment.
- (g) Any action taken by the person including the nature, extent, and time of response of any cleanup and construction undertaken, to mitigate the violation.
- (h) The financial burden on the defendant.
- (i) Any other circumstances the court deems relevant.

*Applies to H&SC Sections 42400, 42400.1, 42400.2, 42400.3, 42400.3.5, and 42400.4

**Applies to H&SC Sections 39674, 42401, 42402, 42402.1, 42402.2, and 42402.3

Then you'll hear from the facility . . .

- I didn't do it.
- If I did do it, it was by mistake.
- Even if it wasn't a mistake, it didn't cause any harm.
- Even if it caused harm, I didn't mean to do it.
- I've got no money.
- Nobody understands your rules.
- Nobody ever told me I couldn't do it.
- Nobody knows the trouble I've seen.

Now for the inspection . . .

- Identify what elements must be present for a violation to be substantiated.
- Gather the facts that tend to prove or disprove the elements.
- Gather other facts that aid in the settlement process.
- Document the manner in which you have gathered the facts and established the violation.

Using an investigative tool to gather facts . . .

A tool to help identify the elements of the Rule.

A tool to help document evidence in three primary areas:

- Observations
- Statements
- Supporting evidence

Violation Worksheet

Facility: _____ Rule/Code: _____ RE: _____

Rule Element	Inspector Observations	Witness Statements	Supporting Evidence

SCAQMD Rule 203 . . .

(a) A person shall not operate or use any equipment or agricultural permit unit, the use of which may cause the issuance of air contaminants, or the use of which may reduce or control the issuance of air contaminants, without first obtaining a written permit to operate from the Executive Officer or except as provided in Rule 202.

(b) The equipment or agricultural permit unit shall not be operated contrary to the conditions specified in the permit to operate.

Elements of violating a permit condition . . .

A specific valid permit containing;

A specific condition or conditions;

Was violated by specific circumstances, acts or omissions relevant to the condition;

By a specific person, persons, entity or entities to which the permit applies.

Violation Worksheet

Facility: _____ Rule/Code: _____ RE: _____

Rule Element	Inspector Observations	Witness Statements	Supporting Evidence
Possess permit;			
Permitted equipment;			
Operation contrary to permit;			
Responsible party.			

Valve ID #123 . . .



Rule Element	Inspector Observations	Witness Statements	Supporting Evidence
Possess Permit	Reviewed permit for status and conditions. Observed Notice to Comply #13 issued 8 months earlier for corrosion on Valve ID #123. Observed permit on site during inspection.	Scott: Said they had a permit. Showed permit. Permit matched. Acknowledged required to operate in accordance with permit. Acknowledged receipt of NTC #13.	Copy of Permit A1 (Identification of permitted equipment. Identification of Condition 1, permitted equipment shall be free of corrosion). Copy of NTC #13.
Permitted Equipment	Observed Valve ID #123 matched the permit description.	Scott: Said Valve ID #123 was part of permitted equipment. Said equipment had unique ID number engraved it for identification and maintenance tracking equipment.	Photograph of Valve ID #123 showing number. Copy of facility records for Valve ID #123. Copy of Permit A1.
Operation Contrary to Permit	Observed corrosive build up on Valve ID #123. Valve control lever broken. Corrosive debris on ground below valve.	Scott: Said Valve ID #123 was to be maintained every six months. Said valve had not been replaced after receiving NTC. Said facility maintained service records. Acknowledged corrosion. Agreed it was a violation.	Photograph of corrosion and condition of Valve ID #123. Facility maintenance records showing valve had not been replaced for 18 months. Copy of Permit A1.
Responsible Party	Permit on file shows Cher is owner and operator of the refinery. Corporation information in Secretary of State records shows Cher is CEO. Observed business license for Cher's Refinery on site.	Scott: Said facility has been operating at the location under the existing permit for the past ten years. Acknowledged the equipment is under the facility's dominion and control and has been for the last ten years.	Copy of Permit A1. Secretary of State records. Business license.

Final analysis . . .

Rule 203(b)

“Violation of Permit A1, Condition 1, failing to maintain equipment (Valve ID #123) free of corrosion.”

Now for the settlement . . .

Know your penalty schedule:

- **H&SC 42402.** (a) Except as provided in Sections 42402.1, 42402.2, 42402.3, and 42402.4, any person who violates this part, any order issued pursuant to Section 42316, or any rule, regulation, permit, or order of a district, including a district hearing board, or of the state board issued pursuant to Part 1 (commencing with Section 39000) to Part 4 (commencing with Section 41500), inclusive, is strictly liable for a civil penalty of not more than one thousand dollars (**\$1,000**).

Establishing the baseline . . .

The facility operates seven days a week.

8 months earlier the facility was issued a Notice to Comply for the same condition.

$$8 \times 30 \times \$1,000 = \$240,000$$

Is this a fair penalty?

What is fair?

What it's really worth and how you get there . . .

- What violations were substantiated?
- What is the facility's compliance history?
- What was the harm?
- How pervasive is the violation?
- What is the frequency and/or duration of the violation?
- How sophisticated and responsible is the facility?
- What is the facility's financial situation?
- How have other matters of similar circumstances been settled in the past?

Violation Worksheet

Facility: _____ Rule/Code: _____ RE: _____

Consideration	Inspector Observations	Witness Statements	Supporting Evidence
Harm (emissions)			
Negligence			
Duration			
Financial status			

When it all comes together . . .

- Inspections focused on the proper gathering of facts.
- Work product properly documenting and communicating facts.
- Settlements that are fair, balanced, based on facts and of sufficient adverse impact to deter future violations.
- Voluntary compliance.
- Enhanced relationships with the public and the regulated community.

Message at the end of the day . . .

“You can’t treat unequals equally, but
you can treat everyone fairly.”