
MONTEREY BAY AIR RESOURCES DISTRICT

< Protocol >

Subject: **Mutual Settlement Program**

Final:

Adoption Dates:

9-16-98; 6-21-00; 6-20-01; 6-19-02; 6-18-03; 6-16-04; 6-15-05; 6-21-06; 6-20-07; 6-18-08;
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This Protocol document describes the Monterey Bay Air Resources District's (District) mutual settlement procedures for violations of air quality rules and regulations, and is intended to provide guidance to District personnel regarding the duties associated with that process.

PURPOSE

The Mutual Settlement Program provides a forum to resolve significant violations of air quality regulations without formal legal proceedings. The operation of a local mutual settlement program provides an opportunity for direct District and respondent interaction to settle violations and achieve compliance.

PROGRAM DESCRIPTION

Notices of Violation are usually settled by mutual agreement between the District and the respondent. When a mutual settlement has been reached, and its obligations fulfilled, the respondent is released from further District liability for that incident. Settlements include civil penalties, emission reductions, and other alternatives detailed in the attached Mutual Settlement Schedule. The District's Mutual Settlement Program is operated from within the Compliance Division by District staff.

STATUTORY PROVISIONS

The California Health and Safety Code section 42403 grants authority to local Air Pollution Control Districts to impose civil penalties as set forth in section 42402 for violations of air pollution rules and regulations and provides guidance in assuring that penalties are commensurate with the severity of the violation.

CASE REVIEW

A mutual settlement case is initiated when evidence of a significant violation is discovered. Significant violations are defined as noncompliance events which do not qualify for handling as minor violations as set forth in the District's Minor Violation Rule 107, or for notices to correct issued to gasoline dispensing facilities in accordance with Health and Safety Code section 41960.2.

For significant violations, the Compliance Inspector documents the occurrence in a report of noncompliance. This report may include supporting documents, photographs and other evidence to document the incident. If a violation is discovered by District staff other than a Compliance Inspector, that person forwards a report of noncompliance along with any supporting evidence to the Compliance Division Supervising Inspector. The Supervising Inspector will advise the Compliance Inspector for the area in which the violation occurred of the incident, and may also forward all case documentation if additional case development or investigation is warranted.

The report of noncompliance is submitted for subsequent review by the Supervising Inspector, the Engineering and Compliance Manager and the staff coordinator of the Mutual Settlement program, prior to issuance of a notice of violation. This review is to assure the report adequately evidences an actionable violation by the party identified as being responsible.

Upon concurrence that the report of noncompliance contains the required elements for prosecution, a notice of violation is processed for certified mailing to the respondent, with a copy to the Compliance Inspector.

RESPONSIBILITY AND LIABILITY

California's air quality laws and regulations apply the legal doctrine of "strict liability," meaning a prohibited act constitutes a violation no matter one's intent or the amount of care taken to avoid violations. Under strict liability, the circumstances of a violation are taken into account to determine the appropriate penalty, not to excuse the violation. The doctrine is common to environmental laws nationwide (including the federal Clean Air Act), because pollution violations occur in the course of ongoing business activity and usually are not committed intentionally or even negligently. In some cases, higher maximum penalties are available for intentional or negligent violations. The District will make every effort to apply the requirements to those individuals or companies directly responsible for a violation, however, the property owner may be held ultimately responsible.

NOTICES OF VIOLATION

A notice of violation is sent to the person(s) legally responsible as identified in the investigator's report for the violation(s), detailing the date, place and circumstances surrounding the violation, and requesting information relating to the incident in the form of a questionnaire. The questionnaire is intended to allow the respondent(s) the opportunity to explain their perception of

the incident and to elaborate on any corrective actions and preventative measures initiated to achieve and maintain compliance. Office conferences are encouraged in the text of the notice of violation, in the belief that such meetings to discuss compliance issues and settlement options are often the most productive method, leading to a better understanding by all parties.

A written response from the respondent is requested in the notice of violation to be completed and returned within a two week period unless an extension has been requested and granted.

RESPONSES TO NOTICES OF VIOLATION

When the response to the notice of violation is received by the District, it is routed to the Mutual Settlement Program Coordinator for review. All elements of the response are taken into consideration during the mutual settlement process, including how the violation occurred, what actions were taken to remedy the violation, how rapidly corrective actions took place, and other circumstances important when considering settlement.

OFFICE CONFERENCES

Face-to-face meetings between the respondent and District staff are encouraged to enhance communication and cooperation during the mutual settlement process. Typically, management-level industry staff will meet with the District's Mutual Settlement Program Coordinator and the Compliance Inspector who documented the violation. Any number of respondent representatives may attend the meeting to enhance the effectiveness of the communication process. Other District staff may also attend office conferences when technical permitting or other issues are involved. These meetings may take place at the District office, the offices of the respondent, the physical location of the violation, or another site agreed upon by those involved.

During office conferences, the issues surrounding the violation, its correction and future avoidance are discussed. Reviewing the specific circumstances of the violation and the respondent's intentions at the time help to clarify the liability issues and to assure the respondent understands the compliance requirements. Settlement options are also discussed at these meetings to further that process. More than one such meeting may take place prior to settlement of any given case.

SETTLEMENT OFFERS

The program has three distinct elements which may be considered when determining a settlement offer:

- **Gravity Based Penalties** - related to the severity of the violation, emission impact, degree of willfulness, prior violations and business size. This is the most commonly used

method to assess a penalty.

- **Economic Benefit Penalties** - intended to remove any financial gains associated with noncompliance.
- **Partial Cost Recovery Assessment** - based on the District staff time expended over four hours.

Gravity Based Penalties - An initial gravity based penalty assessment is calculated using objective criteria to determine violation severity and to apply penalties of uniform impact commensurate with a respondent's ability to pay. The gravity based penalty calculation contained in the Mutual Settlement Schedule includes the emission impact of the violation, the willfulness with which the violation was committed, the violation history of the respondent, respondent's cooperation with the investigation, and the size of the respondent's business. The calculated gravity based penalty is then combined with the economic benefit penalty and the partial cost recovery assessment to establish a civil penalty used to guide the ultimate settlement of any given violation. The actual settlement offer may be entirely monetary, involve alternatives to monetary penalties, or incorporate both elements. Reductions in the gravity based penalty and the partial cost recovery assessment are available for sources who voluntarily enhance compliance through improved procedures, whereas economic benefit penalties are applied without reduction to assure any gains achieved through noncompliance have been removed.

While standard objective criteria are used to determine civil penalties, a case by case determination will guide the specific settlement offer for each individual notice of violation. Settlement options are discussed with the source to arrive at a mutually acceptable resolution. The mutual settlement is then formalized in a written offer and transmitted to the source.

Economic Benefit Penalties - Economic benefit is the term used to describe the financial gain realized by being out of compliance. It is important to remove any economic benefit of noncompliance in addition to the application of gravity based penalties. Economic benefit penalties are limited to the avoided costs that would have been incurred had the respondent operated in compliance. One example would be to assess the avoided landfill tipping fees when processing a violation of an open burn used to dispose of plastics or rubbish.

Due to the potential complexity of estimating the economic benefit of a particular activity, this method of assessment requires a case by case examination. This penalty will not be assessed every time a case is processed but is intended primarily as a tool to remove the incentive to save costs by violating District requirements.

Partial Cost Recovery Assessment – An assessment of the investigation costs may be included in the settlement offer if the expenditure of resources exceeds four hours. A partial or full recovery of these costs will be estimated at the staff rate as provided for in

Rule 300. This amount will be determined by an estimate from the investigator.

MUTUAL SETTLEMENT AGREEMENTS

Settlement of a notice of violation may be accomplished in a variety of ways. Each violation settlement is determined on a case by case basis depending on its circumstances. Settlements include civil penalties and/or a combination of alternative settlement options. When a respondent has accepted and executed the terms of the settlement offer, a written release from liability is issued by the District which finalizes the mutual settlement case.

EXPIDITED SETTLEMENTS

When the District deems appropriate, the respondent(s) may be offered an expedited option to settle alleged violations with payment of a monetary penalty. Expedited settlements will give the respondent(s) the option of waving response and/or conference requirements as long as the penalty is paid. The penalty will be assessed based on historic mutual settlement offers of similar alleged infractions which have been successfully resolved and which adhered to the mutual settlement schedule.

WHEN MUTUAL SETTLEMENT IS NOT ACHIEVED

If, during the course of mutual settlement negotiations, a settlement cannot be reached and the parties become deadlocked, or when the respondent has refused to participate, one or more of the following options will be utilized to bring closure to the mutual settlement case.

- **District filing suit in small claims court.** A suit in small claims court may be filed against the responsible party to recover civil penalties.
- **District filing of a civil suit in municipal or superior court.** A complaint may be filed against the respondent to recover civil penalties and/or to seek an injunction.
- **District referral to District Attorney's office.** Cases considered by the District to be egregious, or those which may involve criminal culpability are referred to the District Attorney's office for prosecution.
- **District petition for abatement order or permit revocation.** The District may petition the Hearing Board for an abatement order or permit revocation action in cases of continuing violations.
- **Violation placed into abeyance.** For enforcement actions in which the respondent cannot be contacted or located for settlement, and which contain no known criminal elements, the notice of violation will be placed in abeyance for the duration of the three year statute of limitations period.

REFERRAL OF CASES TO LOCAL, STATE OR FEDERAL AGENCIES

For any case in which it has been determined that there may exist a conflict of interest between the respondent and the District, or when the investigation or prosecution requirements exceed the resources of the District, that case may be referred to either local, state or federal agencies.

PENALTY SHARING WITH FIRE DEPARTMENTS

Civil penalties received by the District as part of mutual settlements in open burning cases shall be shared with fire departments under the following circumstances.

- If the notice of violation is based solely on the incident report provided by the fire department which responded to an illegal open burn, 50% of the civil penalty shall be shared with the fire department.
- If the notice of violation required additional District investigation beyond the documentation provided by the fire department, 25% of the civil penalty (not including cost recovery assessment) shall be shared with the fire department.

REWARDS PROGRAM

A rewards program has been developed to establish a process for the payment of rewards to persons providing information contributing to the imposition of civil penalties in accordance with Health and Safety Code section 42405.1, and detailed in District Rule 108.

MUTUAL SETTLEMENT SCHEDULE

DEFINITIONS

Minor emission	Failure to comply with emission control requirements, and/or; Emissions without significant impact or consequence to the environment, the public, or to property.
Significant emission	Emissions having a substantial impact or consequence to the environment, the public, or to property.
Non-Cooperation	When an individual or company elects to impede or obstruct an investigation.
Prior violation	A violation of the same District rule or regulation, permit condition state statute or Hearing Board order within the past 3 years.
Negligence	A failure to take reasonable measures to prevent a violation from occurring.
With Knowledge	Having knowledge of a violation and failing to take immediate remedial action.
Intentional	Deliberately participating in or directing a deliberate action known to be a violation.
Business Size	The gross annual business receipts reported to the IRS, or for government and non-profit organizations, the annual operating budget.

I. Economic Benefit Penalty

The economic benefit will be based on the approximate cost savings of the activity which caused the violation.

II. Gravity Based Penalty Calculation

$$\text{\$Base Rate} * (A)(B)(C)(D)(E)(F)$$

The gravity based penalty is calculated by multiplying a \$Base Rate minimum penalty value by six factors, where:

A = The emission impact of the violation

*Base rate changes annually with the Consumer Price Index as set forth in Rule 301.

B = The degree of willfulness of the violation

C = The degree of cooperation during an investigation

D = The violation history of the respondent

E = The business size of the respondent

F = Number of days of violation

Emission Impact	Multiplier (A)
None	x1
Minor	x2
Significant	x4

Degree of Willfulness	Multiplier (B)
Negligence	x1
With Knowledge	x2
Intentional	x4

Degree of Cooperation	Multiplier (C)
Cooperative	x1
Not Cooperative	x2

Prior Violations	Multiplier (D)
None	x1
One Violation	x2
Two Violations	x4

Business Size	Multiplier (E)
Less than \$1,000,000	x1
\$1,000,000 to \$5,000,000	x2
Greater than \$5,000,000	x4

Number of Days	Multiplier (F)
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III Cost Recovery

This is a portion of estimated investigative costs exceeding four hours.

IV. The total penalty offer is the sum of sections I, II and III.

Increasing severity in each of the five elements A-E increases the multiplier two fold. As an example, in a violation which did not result in any emissions, a multiplier of one is used. In a violation which resulted in minor emissions, the multiplier is doubled to two. Violations which resulted in significant emissions are doubled again resulting in a multiplier of four.

Any penalties for violations based on strict liability cannot exceed \$1,000/violation/day as limited by Health and Safety Code Section 42402 unless the activity caused actual injury. The \$1,000/violation/day limit does not apply to a violation of federally enforceable requirements that occur at a Title V source.

Any particularly offensive, flagrant or persistent violations, including those involving a significant amount of toxic materials or when an individual or company has a substantive disregard for regulations, may be prosecuted outside this Schedule using the maximum penalties codified in the California Health & Safety Code sections 42402 through 42402.5 or be referred to the District Attorney's office for criminal prosecution per sections 42400 through 42400.5. Likewise, the District may depart from this Schedule under unusual circumstances, including but not limited to "acts of God" or other circumstances where the cause of the violation was entirely beyond the respondent's control.

GRAVITY PENALTY REDUCTIONS

Compliance Enhancement

The mutual settlement program approaches resolution of violations with consideration to the District's goal of compliance assistance. While a settlement offer generally has a punitive element, the focus of the program is to prevent a reoccurrence of the violation by the individual or company and to dissuade others in their industry from causing similar violations. Therefore, the program endeavors to pursue settlement offers that consider the willingness of the individual or company to participate in the mutual settlement process by collaboratively exploring affirmative actions that will reduce or limit the potential for a reoccurrence of the violation.

Respondents who actively cooperate in the mutual settlement process by voluntarily implementing any or all of the below listed measures to assure future compliance may receive a penalty reduction. Compliance enhancement measures at a permitted facility may be included as permanent modifications to existing operating permit conditions where applicable.

Examples of affirmative actions to assure future compliance:

- Installation of emissions controls beyond minimum requirements.
- Installation of in-situ emission recording equipment.
- Improved maintenance procedures.

- Improved operational procedures.
- Improved office procedures.
- Other compliance measures approved by the District.

CIVIL PENALTIES

The calculated economic benefit penalty and any applicable cost recovery is added to the adjusted gravity based penalty to establish the civil penalty for which the District will settle the violation. At the discretion of the District, all or a portion of the civil penalty may be discharged using alternative options listed below.

ALTERNATIVE MUTUAL SETTLEMENT OPTIONS

Supplemental Environmental Projects (SEP)

Respondents who voluntarily reduce their facility emissions, or who undertake any other environmentally beneficial project, may apply the cost of such modifications or SEP to discharge all or part of an assessed civil penalty, if approved by the District. Respondents may also agree to take actions to improve air quality in lieu of paying monetary fines or penalties as part of a Settlement Agreement. Below are examples of qualifying SEP measures:

- Installation of more effective emission control technology.
- Reformulation of products to reduce emissions.
- Modification to utilize lower polluting alternative fuels.
- Innovative measures taken to substantially reduce emissions.
- Funding an emission reduction program approved by the District.
- Other environmentally beneficial projects approved by the District.

Emission reduction measures at a permitted facility may be included as permanent modifications to existing operating permit conditions where applicable, and are not eligible for emission reduction credits. To be approved, a SEP must be voluntary, beyond any already-applicable requirement, and must not result in an inappropriate collateral benefit to the respondent.

Educational Programs

Educational alternatives to monetary civil penalties promote future compliance through

awareness training. The District operates or promotes programs that include:

- For violations with less than significant impacts involving simple negligence, such as small open burning violations, the District operates educational alternatives to civil penalties through the Compliance Assistance program.
- For residential backyard burns that are in violation of Rule 438 a multiple choice burn test may be administered. This burn test is only available for first offenses of non-commercial backyard burn violations unless a burn permit has been issued.
- Other compliance promotion programs approved by the District

Economic Hardship

When a respondent has demonstrated that the payment of a monetary civil penalty would prove detrimental to their livelihood, economic hardship options are evaluated, which include:

- A periodic payment schedule within their budget.
- Performance of their trade at no cost to local government or nonprofit organizations, upon District approval.
- Other options approved by the District.
