
Compliance Division
Mutual Settlement Program
Policy and Procedure



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Purpose

This document describes the Monterey Bay Air Resources District's (MBARD) mutual settlement procedures for violations of air quality rules and regulations and is intended to provide guidance to personnel regarding the duties associated with that process.

Program Description

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 MBARD and respondent interaction to settle violations and achieve compliance.

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

Statutory Provisions

The California Health and Safety Code (H&SC) grants authority to local Air Pollution Control Districts to impose civil penalties as set forth in H&SC sections 39674, 42401, and 42402 et seq for violations of air pollution rules and regulations. H&SC section 42403 provides guidance for determining the penalty amount assessed.

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. MBARD 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.

Notice of Violation

Violations are defined as noncompliance events which do not qualify for handling as minor violations as set forth in the MBARD's Minor Violation Rule 107, or for notices to correct issued to gasoline dispensing facilities in accordance with H&SC section 41960.2.

A notice of violation is sent to the person(s) legally responsible, as identified by the inspector, 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. 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 questionnaire response to the notice of violation is received by the inspector, it is included in the report routed to the Supervising Inspector and/or Engineering and Compliance Manager for review. All elements of the response are taken into consideration during the mutual settlement process when preparing settlement offers, 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.

Report Review

After issuing a Notice of Violation, 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 MBARD 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 review by the Supervising Inspector and/or the Engineering and Compliance Manager prior to issuance of penalties. This review is to assure the report adequately evidences an actionable violation by the party identified as being responsible.

Settlement Offers

Three distinct elements are 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 MBARD 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 factors used in the calculation are



derived from H&SC section 42403(b). The gravity based penalty calculation is contained in Appendix A and includes the following factors:

- 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 added to the economic benefit penalty and the partial cost recovery assessment, as applicable, 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. Once a settlement offer is issued, settlement options can be discussed with the source to arrive at a mutually acceptable resolution.

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 301. This amount will be determined by an estimate from the inspector.

When the settlement offer penalty calculation is complete, it is sent to the company with the option to meet with MBARD staff to discuss the violation and penalty or settle the violation by paying the penalty.

Office Conferences

Meetings between MBARD staff and respondents are encouraged 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.

Face-to-face, phone call, or Zoom type meetings between the respondent and MBARD staff are encouraged to enhance communication and cooperation during the mutual settlement process. Typically, management-level industry staff will meet with MBARD management and staff assigned to settle the violation. Any number of respondent representatives may attend the meeting to enhance the effectiveness of the communication process. Other MBARD staff may also attend office conferences when technical permitting or other issues are involved. These meetings may take place at the MBARD office, the offices of the respondent, via phone, Zoom type online meeting, 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.

Mutual Settlement

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, the settlement offer elements discussed above, and the outcome of an office conference. Settlements include civil penalties and/or a combination of alternative settlement options. Mutual Settlement is achieved when the penalty amount is paid or other settlement options, such as supplemental environmental projects, are complete.

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.

- MBARD filing suit in small claims court. A suit in small claims court may be filed against the responsible party to recover civil penalties.
- MBARD 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.
- MBARD referral to District Attorney's office. Cases considered by MBARD to be egregious, or those which may involve criminal culpability are referred to the District Attorney's office for prosecution.
- MBARD petition for abatement order or permit revocation. MBARD 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 MBARD, or when the investigation or prosecution requirements exceed the resources of MBARD, that case may be referred to either local, state or federal agencies.

Rewards Program

A rewards program was established for the payment of rewards to persons providing information contributing to the imposition of civil penalties in accordance with H&SC section 42405.1 and detailed in MBARD Rule 108.

APPENDIX A

Mutual Settlement Schedule

This section describes how MBARD calculates gravity-based penalties for violations.

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 MBARD 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 know 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. Gravity Based Penalty Calculation

The gravity-based penalty is calculated by multiplying a base rate minimum penalty amount (\$) by 6 factors as follows:

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

*Base rate changes annually as set forth in Rule 301.

Where:

- A** = The emission impact of the violation
- 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

Below shows the multiplier used for each factor:

Factor	Multiplier
Emission Impact (A)	
None	1
Minor	2
Significant	4
Degree of Willfulness (B)	
Negligence	1
With Knowledge	2
Intentional	4
Degree of Cooperation (C)	
Cooperative	1
No Cooperative	2
Prior Violations (D)	
None	1
One Violation	2
Two or More Violations	4



Business Size (E)

Less than \$1,000,000	1
\$1,000,000 to \$5,000,000	2
Greater than \$5,000,000	4

Number of Days (F) # days

II. Economic Benefit

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

III. Partial Cost Recovery Assessment

Costs of staff time exceeding four hours for actions such as additional investigation into a violation and to prepare report in support of an issued violation.

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

Increasing the numerical value of the five elements listed above (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.

H&SC sections 42400 through 42411 address the allowable penalty amounts based on the type of violation. For example, penalties for violations based on strict liability cannot exceed the limits in H&SC section 42402 unless the activity caused actual injury. Penalties associated with violations which caused actual injury are addressed in H&SC section 42402.1. H&SC section 42400.4 addresses penalties for violations of federally enforceable requirements that occur at a Title V source.

For intentional or persistent violations, including those involving a significant amount of toxic materials/emissions, 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 H&SC. Alternatively, these violations may be referred to the District Attorney's office for criminal and/or civil prosecution in accordance with the California H&SC or other applicable statutes. MBARD 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 MBARD's goal of compliance assistance. While a settlement offer generally has a punitive element, the focus of the program is to prevent reoccurrence of violations 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 include the following:

- 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 MBARD.

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 MBARD will settle the violation. At the discretion of MBARD, 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 MBARD. 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 MBARD.
- Other environmentally beneficial projects approved by MBARD.

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 Alternatives

Educational alternatives to monetary civil penalties promote future compliance through awareness training or education. For example, a first-time backyard burn violation could be settled by educating the resident about the backyard burning requirements as an alternative to civil penalties. Educational alternatives are reviewed with the Air Pollution Control Officer prior to implementation as an alternative to civil penalties.

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 MBARD approval.
- Other options approved by MBARD.

References

H&SC Sections 42400 et seq through 42411

Rule 107 Minor Violations