



LOOKING FORWARD: The Evolution of Enforcement

ENFORCEMENT SYMPOSIUM 2019

Facts to Fines:

Starting with the end in mind . . .

Purpose of Inspections & Settlements

- Ensure public safety.
- Respond to complaints.
- Assess the level of compliance within the regulated community.
- Ensure a level playing field.
- Eliminate economic incentives to violate.
- Establish credibility within the industry and general public.

Starting with the end in mind . . .

There's a four-letter word that starts with "F" FACT!

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

Plain Language Concept

- Plain language involves using words that reflect the needs of the READER rather than the interest and needs of the WRITER.
- The ultimate goal is for EVERYONE to understand what is being conveyed.
- If you write how you speak it will be easier to testify later.
- This concept applies to both spoken and written communication.

In-Group Language

Academia – The atmospherically entrained fugitive particulates eventually become subject to gravitational forces and their subsequent return to earth on adjacent parcels is what constitutes the violation.

Slang – “He’s packing heat!”

Jargon – “He’s 417!”

Argot – “He’s 417 and 10-32, I’m gonna 10-15!”

Starting with the end in mind . . .

The inspection should be:

- Conducted legally and in accordance with policy and procedure.
- Void of prejudice or favoritism – impartial.
- Performed thoroughly, collecting/preserving all facts relevant to the violation/circumstances – inculpatory and exculpatory.

The settlement should be:

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

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?

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

So how do you get there . . .

Proving the violation(s)

- 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.

Disproving the defense(s)

- Eliminating defense strategies at the beginning of the case goes a long way towards refuting them at the end of the case.

Defense strategies . . .

- 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, everyone else does it.
- Nobody understands your rules.
- Nobody ever told me I couldn't do it.
- Everybody else does it.
- I've got no money! If I have to pay for this I will close my business!

Now for the inspection . . .

- Identify what elements must be present for a violation to be factually substantiated.
- Gather the facts that tend to prove or disprove the elements.
- Gather other facts that aid in the settlement process (California H&SC Sections 42400.8 and 42403).
- Document the manner in which you have gathered the facts and established the violation.

“Saw a violation.
Wrote a cite.”

“It was a balmy day. A day that made me appreciate my calling. A day that does not lend itself well to the notion of noncompliance by those who not only abandon the concept of the letter of the law, but also show wanton disregard for the purpose and intent of the regulations that have been enacted to save our world. Not exclusive to this reasoning, but rather influenced by a myriad of countless other psychological drivers, inasmuch as, and hence therefore, the undersigned embarked on a mission to seek out new violators and boldly go where no inspector has gone before.”

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

South Coast AQMD 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.	Jill: 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.	Jill: Said Valve ID #123 was part of permitted equipment. Said equipment had unique ID number engraved on 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.	Jill: 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 Wayne is owner and operator of the refinery. Corporation information in Secretary of State records shows Wayne is CEO. Observed business license for Wayne's Refinery on site.	Jill: 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.”

NOTICE OF VIOLATION REPORT

Facility: Wayne's Refinery

Violation: 203(b)

Description of Violation: Corroded equipment

Narrative:

Wayne's Refinery has a permit to operate. I went to Wayne's Refinery to conduct an inspection. I met COO Jill. Jill gave me permission to inspect.

I saw a valve that was corroded. The valve was subject to the permit. I took pictures and retained them.

I issued Wayne's Refinery an NOV. I gave the NOV to Jill and explained compliance.

I returned to Wayne's Refinery and saw the valve had been replaced. The facility is in compliance.

Detailing observations and actions . . .

How do you document researching facility history?

How do you document purpose for inspection?

How do you document obtaining consent?

How do you document taking digital images?

How do you document taking samples as evidence?

How do you document submitting attachments?

How do you document taking statements?

How do you document the egregiousness/harm of the violation?

How do you document duration of the violation?

Recording Facility History . . .

“Prior to my inspection, I researched the facility’s compliance history through South Coast AQMD records. I found the facility has one outstanding Notice to Comply (NTC) and two closed Notice of Violation (NOV). For details refer to a copy of the Facility History for Wayne’s Refinery, included as Attachment A, consisting of one page.”

Recording obtaining consent . . .

Expressed Consent

Upon arrival I met with the COO, Jill Whynot. I showed Ms. Whynot my credentials and told her I was there to conduct an inspection of the facility. I told her I would be looking at equipment, examining processes and reviewing documents. I told her I may be taking photographs, samples or asking for copies of records as part of the inspection. I asked her if I had her consent to conduct the inspection and she said, "Yes."

Recording obtaining consent . . .

Implied Consent

Upon arrival I met with the COO, Jill Whynot. I showed Ms. Whynot my credentials and asked her who would be my point of contact for the inspection process. She said she would be the facility representative.

Recording taking imagery . . .

I used my agency issued cell phone to capture three images of Valve ID #123. The first image depicts the valve and ID number (#001), the second (#002) is a close up of rust at the top flange and the third (#003) shows corrosion debris on the ground below the valve. Details for the images and a printed copy of each are submitted with the Photo Log* which is included as Attachment B, consisting of four pages.

*The Photo Log should include, at a minimum, the image ID#, person taking the image, location taken (general vs. specific), date/time, description of the depiction, and disposition.

Documenting duration of the violation . . .

The first date the violation was established was on 00/00/0000 when NTC #13 was issued. Since that time 240 days have passed. Ms. Whynot stated the valve had not been replaced since the NTC was issued. My observations support that statement. The minimum duration of the violation is 240 days. The total duration will be established once the valve is replaced.

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?
- Who knew about the violation and when did they know?
- 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 the end you got is the end you wanted . . .

You have:

- 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.”