

Feather River Air Quality Management District

3.3.1 – Mutual Settlement Program Policy
Date Board Approved: 8/2/93, Amended: 7/7/99, 6/6/11, 12/4/17

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A. PURPOSE

This document establishes policy and procedures for the resolution of a Notice of Violation (NOV) including the preparation of base penalty amounts (based upon the gravity of the violation) and calculation of estimated economic advantage factors. A NOV documents violation(s) of Feather River Air Quality Management District (District) Rules and Regulations, District permit condition(s), the California Health and Safety Code (HSC), or the Federal Clean Air Act (CAA). The District does not guarantee any penalty established in this policy for all circumstances and the APCO or their designee may adjust all penalties as necessary. These procedures support compliance with the above statutes and rules and expedite resolution of disputed claims without the necessity of litigation while assuring consistent treatment of all persons. This is a settlement policy and the District does not intend its use by defendants, respondents, courts, or administrative law judges at a hearing or in a trial.

B. BACKGROUND

The District's policy is to negotiate a resolution of all alleged and documented violations referred to the Mutual Settlement Program (MSP). For the District to achieve its goal of clean air for Sutter and Yuba County residents, sources of air contaminants must operate in accordance with air pollution regulations and statutes. Compliant operators incur technical and financial obligations to achieve this objective. Sources failing to operate in accordance with all applicable regulations have a significant economic or competitive advantage over those that do. It is the District's intent to promote compliance for all sources and eliminate unfair advantages that noncompliant sources may possess.

These violations are potentially subject to civil litigation, and in certain cases, criminal prosecution. To provide a deterrent, it is necessary for the District to establish monetary penalties for documented violations of air pollution laws and regulations. The knowledge of the certainty of a penalty for any violation acts as an incentive for source operators to maintain compliance with District rules. However, some cases of minor infractions warrant only small penalties that the District may suspend for first-time violators. Non-monetary resolutions or Supplemental Environmental Projects (SEP's) may also be appropriate in certain situations. This policy uses criteria that conform to applicable state and federal guidance.

C. AUTHORITY

The authority for enforcement and settlement of violations by the District is contained in the following described sources.

- C. 1. Enforcement Authority** - The District is required to enforce its Rules and Regulations as set forth in HSC Sections 40000, 40001, and 40752.
- C. 2. Settlement Authority** - The District is empowered to settle violations under HSC

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Sections 42402.5, 42403, and the resolution of the Board of Directors adopting and amending this MSP, which provides for delegated District settlement authority.

D. DEFINITIONS

For the purposes of this policy, the following definitions shall apply:

- D. 1. **APCO** is the Air Pollution Control Officer of the Feather River Air Quality Management District and their duly authorized representatives.
- D. 2. **Board of Directors** are the Board of Directors of the Feather River Air Quality Management District.
- D. 3. **California Air Resources Board (ARB)** is the Air Resources Board for the State of California.
- D. 4. **Case** is the matter of facts involved and parties responsible for the violation(s) charged or alleged in a NOV.
- D. 5. **Counsel** is Legal Counsel designated in the District county unification agreement to serve as legal advisor to the District.
- D. 6. **District** is the Feather River Air Quality Management District and all their duly authorized representatives.
- D. 7. **EPA** is the United States Environmental Protection Agency.
- D. 8. **Health & Safety Code (HSC)** is the Health and Safety Code of the State of California.
- D. 9. **High Priority Violation (HPV)** is the same meaning as defined in EPA's "The Timely and Appropriate Enforcement Response to High Priority Violations", December 1998.
- D. 10. **Mutual Settlement Program (MSP)** is the process for informally resolving NOV's between the District and the recipient of the NOV.
- D. 11. **NOV** is a written Notice of Violation issued by the District.
- D. 12. **Penalty** is the monetary value of an assessment calculated for a violation under the MSP.
- D. 13. **Rules and Regulations** are the Rules and Regulations of the District adopted by the Board of Directors.

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- D. 14. Settlement Agreement** is the express terms, mutually agreeable in writing, between the recipient of a NOV, or their designee, and the District, resolving the consequences of the NOV.
- D. 15. Settlement Conference** is a voluntary meeting between the District and the recipient of a NOV, or their designee, for reaching a mutual settlement to resolve the NOV.
- D. 16. Supplemental Environmental Project (SEP)** is an environmentally beneficial project which a recipient of an NOV or their designee, agrees to undertake as settlement for an enforcement action, but which is not otherwise legally obligated to perform.
- D. 17. Source** is any recipient of a NOV issued by the District.
- D. 18. Violation** is any breach of a permit condition, the Rules and Regulations, or a statute enforced by the District.

E. ADMINISTRATION

The District shall administer this policy. The APCO has final settlement authority under this policy and may delegate these responsibilities as needed. Consistent with these guidelines, the delegated person may initiate and complete these settlement procedures with persons served with NOVs for fully settling NOVs without the necessity of litigation. Settlement of violations shall have an associated penalty. The penalty may be monetary in nature. The District may suspend a penalty or the source may mitigate a portion of the penalty, as described later in this policy. Any deviations from this policy must have APCO approval.

F. REVIEW OF VIOLATION

The District shall review all violations in the following manner:

- F. 1.** The District shall review all NOVs to determine if there is a sufficient basis to conclude reasonably that a violation occurred. If, after review, it is determined that the District issued the NOV in error or there is not a sufficient basis to reasonably conclude that a violation occurred, the District shall take no further action and the source shall be notified. If, after review, it is determined that there is sufficient basis to reasonably conclude that a violation has occurred, then one or more of the following shall occur:
 - i) process the violation internally through the MSP;
 - ii) refer the case to Counsel;
 - iii) refer the case to some other government agency. This could be the California Circuit Prosecutors, California Air Resources Board, U.S. Environmental Protection Agency, or other agency with oversight in the area of question for prosecution. It is the District's policy to refer all cases having the potential for

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successful prosecution as criminal to one of the agencies listed above for review.

G. BASIS FOR DETERMINATION

G. 1. MSP: The District shall process a NOV through the MSP when the District determines that such action is in the best interests of the public to deter future violations. The violation may be resolved in its entirety through the MSP. The District may assign the case to a Specialist for internal oversight and monitoring to ensure that the District appropriately documents the case and moves it efficiently through the MSP.

G. 2. CASES REFERRED TO COUNSEL. Upon request by the APCO or the delegated person, Counsel shall review a case to determine appropriate further action. Counsel may send a follow up letter to the source allowing a specified time for resolution. If the case is not resolved, District and Counsel shall jointly decide on disposition, which may include, but is not limited to the following:

- i) **Suspension of Enforcement Action** – If the District and Counsel jointly agree the case is not acceptable to pursue; the District may suspend the case pending actions by the source resulting in additional violations. If no additional violations occur after three years, the District will close the case with no further action.
- ii) **Small Claims Court** - If the District and Counsel agree to file a claim in small claims court, Counsel shall assist the District in preparing the case. The District shall send a letter to the source notifying them of the decision. The District shall file the claim and serve it upon the source; file proof of service with the court no later than five court days prior to the hearing; appear at the hearing and present the case to the judge; and if the court rules in favor of the District, attempt to collect the judgment.
- iii) **Civil or Criminal Court** - After approval by the Board of Directors, the District may refer a case to the District Attorney or Circuit Prosecutor when the violation resulted in conduct described in the Health and Safety Code 42402 et seq. and such action is necessary to deter future violations.

G. 3. CASES REFERRED TO OTHER AGENCIES - A case shall be referred to other agencies instead of being placed in the MSP or referred to counsel when it is determined by the District that such action is appropriate, required by law or agreement, or is necessary to deter future violations. To the extent required by law, the District shall consult with other affected government agencies concerning each case.

H. STEPS OF THE MSP

H. 1. Documentation to Accompany Each Case – The District files mutual settlement agreement records separately from the source's main file to facilitate retrieval of

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information necessary for case evaluation. The District can make this information available upon request by a member of the public under the Public Records Act. To the extent reasonable, each case shall contain at least the following documentation:

- i) the NOV;
- ii) a report of the staff investigation, including statements of witnesses; laboratory reports, photographs, staff assessments, and propriety information;
- iii) a brief history of source or facility including previous enforcement actions and permitting
- iv) the name, address, and telephone number of all consultants/experts who have reviewed this matter for either the District or the source and an indication of on whose behalf they participated;
- v) copies of all reports issued by such consultants/experts;
- vi) copies of all correspondence between the District and the source;
- vii) an analysis of costs deemed appropriate by the District to be assessed against the source; and
- viii) a detailed summary of all settlement efforts engaged by the District, if any.

H. 2. Settlement Proposal Letter - Violations shall result in the issuance of a settlement proposal letter to the source, transmitted by certified mail and return receipt requested.

- i) The purpose of the settlement proposal letter is to:
 - (a) inform the source of the facts associated with the NOV,
 - (b) specify the penalties prescribed by the H&SC for the violation,
 - (c) propose the terms upon which the District would be willing to resolve the violation, including the monetary component term based on the penalty structure described in this policy or in another District penalty policy.
- ii) The settlement proposal letter shall specify thirty (30) days during which the source may consider and either accept or reject the settlement proposal, after which time, if no response is received from the source, it shall be deemed rejected and the matter shall be evaluated by the District for the next appropriate action.

H. 3. Office Conference - The District may offer an office conference if requested by the source. The office conference shall be an informal meeting between the District and the source. The purpose of the office conference is to openly share with the source documentary and other support for the NOV in an effort to resolve the violation. The source may present evidence in defense or evidence of mitigation. The District shall take into consideration all evidence presented by the source during the course of the office conference in evaluating the terms of its proposed settlement as required in determining the monetary component of the Settlement Agreement.

Information produced at the office conference may cause the District to amend its

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proposed settlement. The District shall communicate to the source within fifteen (15) days the amended proposed settlement and shall specify fifteen (15) days during which the source may consider and accept or reject the amended proposed settlement. If the District receives no response from the source within such time, the amended proposed settlement shall be deemed rejected. If the settlement proposal is rejected or deemed rejected, the case shall be referred to Counsel.

If during the conference the source is able to establish to the reasonable satisfaction of the District that the actions causing a violation was immaterial and insignificant, resulted in negligible risk to health and environment, and was not the result of intentional or negligent conduct; the District may propose a suspended penalty agreement as described below.

- H. 4. Resolution** - In the event the District and source reach a mutual settlement, it shall not be binding until the settlement terms are set forth in a settlement agreement and signed by a representative of the source and the District. If the source and the District agree in writing to the consequences of the NOV, the source and the District may waive further enforcement proceedings pending compliance by the source with the terms of the settlement agreement. The District shall not deem resolution of the NOV through the MSP an admission of liability by the source. Upon completion of the terms of the settlement agreement, the District shall close the case and notify the source of the closure.

I. PENALTY STRUCTURE

The penalties assessed include initial penalties and economic benefit penalties. The economic benefit penalties include costs avoided by operating in violation and any avoided fees. A discussion of calculating economic benefit penalties begins in section I.4. Repeat or successive violations are violations of the same or related rule(s) or permit condition(s), violations following previous violations that occurred within the past three-year period, or instances where the source knew of the violations before the occurrence of additional ones.

For first-time violations of air pollution laws and regulations enforced by the District, initial penalty offers are typically 10-25% of the maximum allowed by the HSC, except as otherwise provided in this policy. The 10-25% initial offer guidance for first-time violations does not apply to violations that arise from an owner or operator's negligence, failure to take corrective action, and/or willful and intentional emission releases, or to the knowing and intentional falsification of records. The District reserves the right to seek settlement amounts up to the statutory maximums.

Pursuant to HSC 42411, all maximum penalties assessed by the District shall be increased annually based on the California Consumer Price Index as compiled and reported by the Department of Industrial Relations and as determined by the District as appropriate. These

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penalties will be compiled in Table 1 and updated as necessary by the APCO.

- I. 1. **Procedural (Administrative) Violations** - HSC Section 42402(a) establishes a maximum penalty as noted in in Table 1. The District will seek maximum penalties for all violations beyond the third occurrence. The District may consider each day, during any portion of which a violation occurs, a separate offense.
- I. 2. **Procedural (Administrative) Violations at a Title V Source** - HSC Section 42402 (b) (2) (B) establishes a maximum civil penalty as noted in Table 1. These maximums are for procedural violations of federally enforceable requirements that occur at a Title V source. The District will seek maximum penalties for all violations beyond the third occurrence. The District may consider each day, during any portion of which a violation occurs, a separate offense.
- I. 3. **Emission Violations** - The HSC identifies criminal and civil violations for the emission of air contaminants and specifies certain not-to-exceed penalties for these violations. When California legislature amends these not-to-exceed penalties, the District will adjust the penalty amounts in this policy under Table 1 to remain consistent with California regulations. This section addresses only civil violations since the District will refer cases that document emission violations arising from known or suspected criminal behavior to counsel for prosecution.
 - i) **Affirmative Defense** - HSC Section 42402 (b) (1) establishes a maximum civil penalty for emission violations and there is no liability under this section if the source alleges by affirmative defense that the violations were not the result of intentional or negligent conduct.. The District will seek maximum penalties for all violations beyond the third occurrence. The District may consider each day, during any portion of which a violation occurs, a separate offense.
 - ii) **Nuisance Causing Actual Injury** – [42402 (c)] Any person who operates an emission source in violation of HSC Section 41700 that causes actual injury to the health and safety of a considerable number of persons or the public is liable for a civil penalty as noted in Table 1]. Section 42400(d) defines “Actual injury” as, “any physical injury that, in the opinion of a licensed physician and surgeon, requires medical treatment involving more than a physical examination.” Prior to offering settlement for such violations, the District shall ensure that credible documentation of actual injury, as defined, exists from the appropriate medical personnel and is part of the violation file. Initial penalty offers for such violations shall be \$15,000. Only the APCO can authorize the reduction of this initial penalty. The HSC states that each day during any portion of which a violation occurs is a separate offense.

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- iii) **Negligent Emission Violation** - [HSC Section 42402.1(a)]The civil penalty for a negligent emission release is as noted in Table 1. . The H&SC states that each day during any portion of which a violation occurs is a separate offense.
- iv) **Negligent Emission Violation Causing Great Bodily Injury or Death** - Any person who negligently releases emissions in violation of HSC Section 41700 that causes great bodily injury or death to any person is liable for a civil penalty as noted in Table 1 [HSC Section 42402.1(b)]. The California Penal Code defines “Great bodily injury” in Section 12022.7 (e) and means “a significant or substantial physical injury”. The District shall ensure that credible documentation of great bodily injury or death exists in the form of medical records and/or other evidence and is part of the violation file. The District shall refer documented violations involving great bodily injury or death to the District Attorney for prosecution. The HSC states that each day during any portion of which a violation occurs is a separate offense.
- v) **Emission Violation with Failure to Take Corrective Action** - Any person who releases emissions in violation of any emission-limiting order, rule, regulation or permit of the California Air Resources Board, District, or its Hearing Board, and who knew of the emission but failed to take corrective action within a reasonable period of time is liable for a civil penalty as noted in Table 1. [HSC Section 42402.2(a)]. “Corrective action” is defined in HSC Section 42400.2.b. Prior to issuance of any initial penalty offer, the District shall review the basis and documentation of the violation with County Counsel and/or the District Attorney to consider referral and to ensure the offer is commensurate with the violation. The HSC states that each day during any portion of which a violation occurs is a separate offense.
- vi) **Emission Violation with Failure to Take Corrective Action (Injury or Death)** - Any person who owns or operates an emission source in violation of HSC Section 41700 that causes great bodily injury or death to any person, and who knew of the emission but failed to take corrective action within a reasonable period of time is liable for a civil penalty as noted in Table 1 [HSC 42402.2(b)]. Section 12022.7 (e) of the California Penal Code defines “great bodily injury” as “a significant or substantial physical injury”. The District shall ensure that credible documentation of great bodily injury or death exists in the form of medical records and/or other evidence and is part of the violation file. The District shall refer documented violations involving great bodily injury or death to the District Attorney for prosecution. The HSC states that each day during any portion of which a violation occurs is a separate offense.
- vii) **Willful and Intentional Emission Violation** - Any person who willfully and intentionally releases emissions in violation of any emission-limiting order, rule, regulation or permit of the California Air Resources Board, District, its Hearing Board is liable for a civil penalty as noted in Table 1 [H&SC 42402.3(a)]. Prior to issuance of any initial penalty offer, the District shall review the basis and documentation of the violation with County Counsel and/or the District Attorney to

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consider referral and to ensure the offer is commensurate with the violation. The HSC states that each day during any portion of which a violation occurs is a separate offense.

- viii) **Willful and Intentional Emission Violation (Risk of Injury or Death)** - Any person who willfully and intentionally, or with reckless disregard for the risk of great bodily injury or death, releases emissions in violation of H&SC Section 41700 that result in an unreasonable risk of great bodily injury or death to any person is liable for a civil penalty as noted in Table 1. If the violator is a corporation, the civil penalty may be more as noted in Table 1.[H&SC Section 42402.3(b)]. Section 12022.7 (e) of the California Penal Code defines “great bodily injury” as “a significant or substantial physical injury”. The District shall ensure that credible documentation of great bodily injury or death, or the unreasonable risk of such, exists in the form of medical records and/or other evidence and is part of the violation file. The District shall refer documented violations involving great bodily injury or death, or the unreasonable risk of such, to the District Attorney for prosecution. The HSC states that each day during any portion of which a violation occurs is a separate offense.
- ix) **Willful and Intentional Emission Violation (Injury or Death)** - Any person who willfully and intentionally, or with reckless disregard for the risk of great bodily injury or death, releases emissions in violation of HSC Section 41700 that result in great bodily injury or death to any person is liable for a civil penalty as noted in Table 1. If the violator is a corporation, the civil penalty may more as noted in Table 1 [H&SC 42402.3(c)]. Section 12022.7 (e) of the California Penal Code defines “great bodily injury” as “a significant or substantial physical injury”. The District shall ensure that credible documentation of great bodily injury (as defined) or death exists in the form of medical records and/or other evidence and is part of the violation file. The District shall refer documented violations involving great bodily injury or death to the District Attorney for prosecution. The HSC states that each day during any portion of which a violation occurs is a separate offense.
- x) **Falsification of Documents with the Intent to Deceive** - Any person who knowingly and with intent to deceive falsifies any document required to be kept pursuant to any rule, regulation, order or permit of the California Air Resources Board, District, or its Hearing Board, is liable for a civil penalty as listed in Table 1 [HSC 42402.4]. Prior to issuance of any initial penalty offer, the District shall review the basis and documentation of the violation with County Counsel and/or the District Attorney to consider referral and to ensure the offer is commensurate with the violation.

- I. 4. **Economic Benefit Penalties** - “Economic benefit” is the advantage a person gains over complying companies by operating in violation. This advantage can be in the form of costs deferred or avoided by the violator or by gaining a competitive advantage in the

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marketplace. Only the District may authorize the reduction or suspension of any portion of calculated economic benefit penalties.

- i) After determining that a violation or violations exist, the inspector should interview the operator and other associated parties to gather information necessary to estimate the length of time the non-complying conditions existed and the amount of time and costs saved because of the source failing to comply. This analysis should be included in the settlement file.
 - (a) Avoided or delayed costs can include:
 - (1) Permitting fees – see I.4.iii
 - (2) Control equipment purchase and installation costs
 - (3) Source testing costs
 - (4) Consultant costs
 - (5) Record keeping costs
 - (6) Maintenance costs
 - (7) Inspector time required to complete the inspection and all follow-up activities as a result of the violation
 - (b) Data to be gathered may include:
 - (1) Difference in costs of complying materials/fuels vs. non-complying
 - (2) Throughput for the period in violation
 - (3) Profit margin per unit of product sold or produced
 - (4) Number of hours to perform required tasks
 - (5) Cost of paying staff or consultants
- ii) For Title V sources incurring a High Priority Violation, the mutual settlement inspector shall utilize one of the EPA enforcement economic models to determine the economic benefit.
- iii) The District shall calculate fees avoided due to violations of operating without permits by the using the following formula:

$$P = N (H * B)$$

Where:
P = Back Permitting Fee
N = Number of years operated without a permit up to 3 years
H = Hours (avg.) billed for inspections in similar source categories
B = Current year Billable Hour Rate

The source shall pay avoided fees in addition to any economic benefit and initial penalties. The District may track the fee as permit revenue rather than penalty revenue.

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J. PENALTY REDUCTION

Penalty reductions are possible if there are extenuating circumstances that fall under HSC Section 42403 that the District has not already considered when computing the initial penalty. The District will consider all information presented by the source, including the costs of corrective action, when determining a final penalty.

J. 1. The District may reduce or suspend a penalty in some circumstances. In determining whether and how much of the penalty to reduce or suspend, the District will, in accordance with HSC Section 42403, take into consideration all relevant circumstances. These include, but are not limited to, the following:

- i) The extent of harm caused by the violation
- ii) The nature and persistence of the violation
- iii) The length of time of the violation
- iv) The frequency of past violations
- v) The record of maintenance
- vi) The unproven or innovative nature of the control equipment
- vii) Any action taken by the source to mitigate the violation
- viii) The financial burden to the source
- ix) Any other circumstances deemed relevant

K. PENALTY SUSPENSIONS

To ease the financial burden of penalty payments and to provide an incentive for future compliance, this policy establishes a penalty suspension program. Rather than requiring a source found in violation to pay the entire penalty at the time the District evaluates the violation, the District may offer a suspension of a percentage of their payment. If additional violations of related District rules or permit conditions occur within three years, the District may assess the suspended portion of the penalty against the source in addition to a penalty for the new violation. However, if there are no further violations within the three-year period, the source will no longer be liable for the suspended amount. The mutual settlement staff may allow penalties to be collected on an approved schedule of installments not to exceed six months duration. If a source has obtained variance relief from a District rule or permit condition, a suspension may start at the expiration of that variance.

K. 1. The District can offer penalty suspensions when the responsible party has taken steps to prevent future recurrences and the emissions did not result in a threat to public health, safety, or property damage. The District can suspend penalties according to the following criteria:

For first time procedural (administrative) violations, the entire penalty may be suspended. For all emissions violations, the following applies:

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- i) First time violation - up to 100% suspension.
 - ii) Second time violation - up to 50% suspension.
 - iii) Third time or greater violation - no penalty suspension.
- K. 2.** The percentages used to suspend the penalty described above can be evaluated by the following or a combination of the following not to exceed 100%:
- i) Actions Taken - Up to 25% of the penalty if the source takes swift actions to mitigate the violating situation
 - ii) Financial Burden - Up to 50% of the penalty if the financial burden to the responsible party is significant
 - iii) Record of Maintenance - Up to 25% of the penalty if the maintenance standards exceed standard modern practices for that particular operation
 - iv) Unproven/Innovative Control Equipment - Up to 25% of the penalty upon consultation with the engineering staff for applicability with this element
 - v) Length of Occurrence of Violation - Up to 25% of the penalty if the violator can prove that the violation occurred for only a brief period
 - vi) Other - Up to 25% of the penalty based on any other factors not previously mentioned