

Stormwater Violations

Elements, Evidence, & Examples



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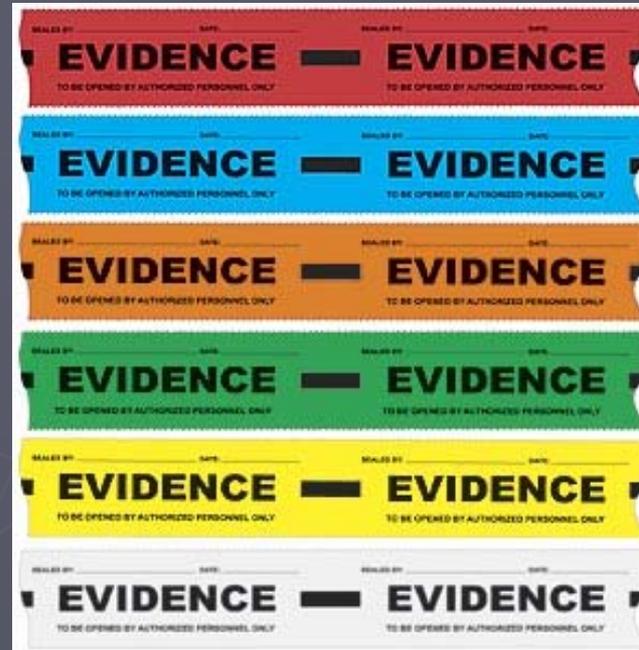
Lahontan Water Board

What is Evidence?



Evidence is....stuff

- Testimony
- Writings
- Materials
- Objects, or
- Things offered to prove the existence or the non existence of a fact



Three Types of Evidence

- ▶ Demonstrative

Describes or documents a condition or occurrence.

- ▶ Testimonial

A statement made by a witness to support the facts.

An inspector's observations presented as testimony.

- ▶ Physical

Evidence that can be tangibly examined by finder of fact.

(Evidence that can be touched, seen, smelled, etc.)

Examples of Evidence

- ▶ Demonstrative

 - photographs, maps, diagrams, documents, records
 - sample results

- ▶ Testimonial

 - testimony of observations
 - opinion of an "expert"

- ▶ Physical

 - samples, containers, equipment, piece of pipe?

When do you need evidence?

- ▶ In court
- ▶ In an administrative hearing
- ▶ To settle an enforcement action
- ▶ To write an NTC or NOV
- ▶ To check the box “non compliance” on an inspection report

Evidence 101

- 1) Establish relevancy of the evidence
- 2) Establish authenticity of the evidence

Step 1 Establish Relevancy

- prove or disprove any element of an alleged violation or
- is relevant to the credibility of a witness.

Step 2 Establish Authenticity

- ▶ The evidence you have is what you say it is.
 - Example: Showing that the sample in court is the same one taken at the facility.
 - Example: Stating that the photo accurately reflects the conditions at the facility on the day in question.

Typical Evidence

- ▶ Witness testimony (what you or a witness saw, heard, said, smelled)
- ▶ Documents (permits, inspection reports, contracts, correspondence)
- ▶ Photos
- ▶ Samples
- ▶ Test Results

Elements of the Violation

- ▶ To take any enforcement action or to find the facility in noncompliance you must have evidence as to each and every element of the violation

Generic Example

- ▶ What are the elements of violation of a permit condition?



Elements of a Violation

Permit Violation

Facility/Permitee***	inspector		records
Permit			records
Permit Condition			records
Condition Violated	inspector	samples photos	
Date***	inspector		
Location***	inspector		records

Dates of Violation

- ▶ Why needed?
 - Must be within the statute of limitations
 - Must give adequate notice of violation
- ▶ Dates for each day of violation must be documented
- ▶ It is typical to have exact date(s), but does not always have to be:
 - "We graded between May 1 and May 5."

Dates: One time vs. ongoing violations

- ▶ If you allege multi day violations, you must prove that on each and every day the violation occurred
- ▶ Compare
 - Failure to monitor (one day? many days?)
 - Operating without a permit/license (everyday?)

Location

Necessary to establish jurisdiction of the board (or hearing or the court) and/or the authority for you to inspect

- Inspection of the site was authorized by consent.
- " " " " " " " permit.
- " " " " " " " warrant.
- " " " " " " " WC 13267.

Example #1

Violation of Basin Plan Waste Discharge Prohibition for Turbidity

The discharge of waste which causes violation of any water quality objective contained in this Plan...is prohibited.

.

.

Increases in turbidity shall not exceed natural levels by more than 10 percent.

Elements of a Violation and Evidence

Example #1 : Basin Plan Violation

Who	Landowner, Developer	NOI, SWPPP, county records
When	January 1, 2009	Inspector observations & report
Where	ABC Construction Site	Photos, site map, report
discharge of waste	Sediment-laden SW discharge	Photos, discharge sample results, report
causes increase in turbidity	SW discharge exits site, enters RW, increases turbidity	Photos, up- & down-stream sample results, report
RW turbidity increase > 10%	turbidity downstream > 10% upstream	Photos, up- & down-stream sample results, report

Example #2

Violation of 99-08-DWQ Discharge Prohibition for Threatening to Cause Pollution

Stormwater dischargers shall not cause or threaten to cause pollution, contamination, or nuisance.

Elements of a Violation and Evidence

Example #2 : Permit Violation

Who	Landowner, Developer	NOI, SWPPP, county records
When	January 1, 2009	Inspector observations & report
Where	ABC Construction Site	Photos, site map, report
discharge of stormwater	Sediment-laden SW discharge exits site	Photos, discharge sample results, report
shall not threaten to cause pollution	SW discharge is laden with sediment, nearby receiving water is clear	Photos, discharge and RW sample results, report

Example #3

Violation of 99-08-DWQ Special Provision for Construction Activity No. 2: SWPPP Requirement

All dischargers shall develop and implement a SWPPP in accordance with Section A:

The SWPPP shall include:

An outline of all areas of soil disturbance...

Elements of a Violation and Evidence

Example #3 : Permit Violation

Who	Landowner, Developer	NOI, SWPPP, county records
When	January 1, 2009	Inspector observations & report
Where	ABC Construction Site	Photos, site map, report
SWPPP developed	SWPPP present on-site	Inspectors observation, copies of SWPPP excerpts
Does SWPPP include outline of all disturbed areas	Large areas of disturbance, not outlined in SWPPP are present	Inspector observations, photos copies of SWPPP excerpts

Example #4 Elements of Authority to Assess Administrative Civil Liability

WC 13385:

Any person who violates any of the following shall be liable civilly in accordance with this section.

- (1) Section 13375 or 13376.
- (2) Any waste discharge requirements...issued pursuant to this chapter...
- (3) Any requirements pursuant to Section 13383.
- (4) Any order or prohibition issued pursuant to Section 13243...

What are the Elements of the Authority for ACL?

- ▶ Any person (real or legal "person")
- ▶ who violates
- ▶ NPDES permit, Basin Plan, CAO, WC 13383, etc.
- ▶ **Date
- ▶ **Location

Example #5

Elements of Authority for Criminal Penalties

Any person who knowingly or negligently.... discharges pollutants...into the waters of the US within the State of California... and the discharge in violation of waste discharge requirements.

Water Code §13387 (a) (2).

What are the Elements of the Authority?

- ▶ Any one (real or legal "person")
- ▶ Knowingly or negligently
- ▶ Discharged
- ▶ Pollutants
- ▶ Into navigable waters of the US w/in Calif
- ▶ In violation of WDR
- ▶ **Date
- ▶ **Location

Evidence of "Person": Who Did It?

- ▶ Who are these people?
- ▶ Individual? Company?
- ▶ Land Owner? Developer? Contractor?
- ▶ Documents
 - Evidence of ownership (permits, contracts, county records)
- ▶ Public Records (licenses, permits)
- ▶ Photo

Witness Statements

- ▶ Potential witness statements
 - Permittee/Landowner
 - Developer's employees and contractors
 - Neighbors
 - Inspectors from other agencies
- ▶ Get names, position, experience

Paul Jones, the construction supervisor with ABC Developers for 3 years, said "We've been grading every day since last Friday."

Knowledge Requirements

- ▶ Most enviro statues and regs are strict liability; no knowledge or intent evidence is required
- ▶ Some violations or penalties have an element that requires proof of the person's mental state
 - "knowing, intentional, willful, negligent, should have known"
- ▶ for example WC 13387 "Criminal Penalties"

Knowing = Willful

The word "knowing" means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required. It does not mean that the act must be done with any specific intent and does not require any intent to violate the law, or to injure another, or to acquire any advantage

Knew or Should have Known

- ▶ Knew (see previous slide)
- ▶ Should have known = negligence; a reasonable person in the defendant's shoes would have known...
- ▶ You only have to prove knew of should have known of the hazardous nature of the substances not the exact chemical name or parts per million or the permit condition

Proving “Knew or should have known”

- ▶ Defendant statements
- ▶ Statements of others
- ▶ Written documents esp. prior notices of violation
- ▶ Standard of the industry
- ▶ Common knowledge

More knowledge proof...

- ▶ Statements of employees/co-workers
- ▶ MSDS/shipping papers
- ▶ Labels
- ▶ Training records
- ▶ Conversation with inspectors

"Pollutant"

- ▶ Test results (field tests, lab tests)
- ▶ Witness statements & photos
- ▶ Inspector observations & photos
- ▶ Documents
 - SWPPP
 - Inspection Reports
- ▶ Circumstances where pollutants were found
 - Ex: sediment-laden stormwater exiting site and traced to receiving water
- ▶ Effects
 - excessive streambed sedimentation and turbidity, dead fish, nuisance sediment deposits

Evidence of Who, Discharge, Waters of the US & Pollutant

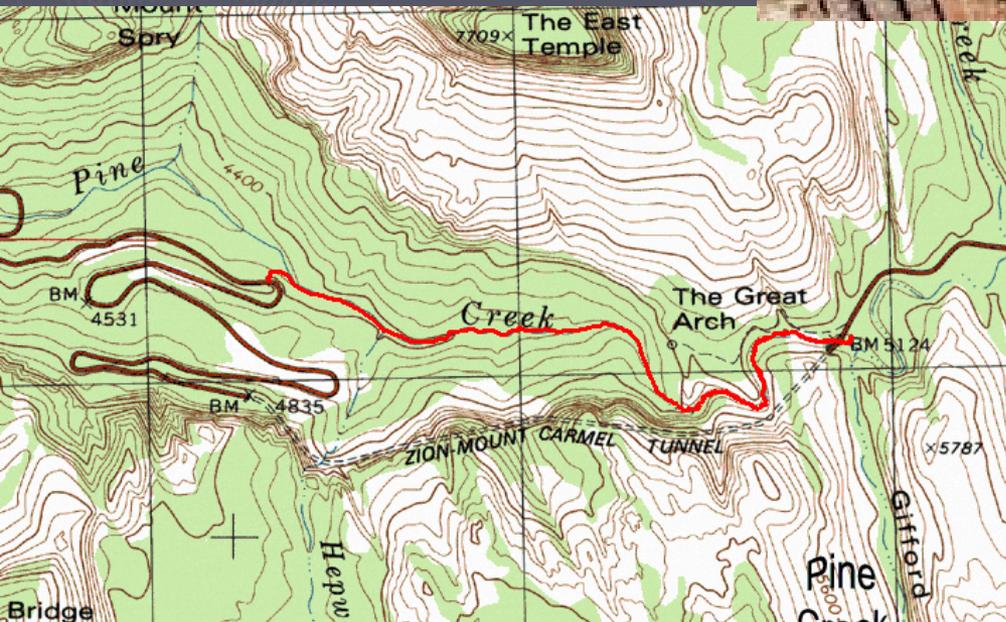


Upstream from facility



Downstream

Location



“Discharged”

- ▶ Proof: Statements, Documents, Photos, etc.



in violation of WDR

What were the permit requirements?

narrative limits?

testing issues?

Evidence of When

- ▶ Inspection Report
- ▶ Documents
- ▶ Statements (neighbors?)
- ▶ Photos

Rules to Remember

- ▶ Have evidence for each element
- ▶ Esp. evidence of who and when the violations occurred
- ▶ If you don't have all the evidence you need, check with another agency
- ▶ Any questions, talk to your supervisor, attorneys, enforcement unit