Filed 8/24/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FARSHAD A. TAFTI, Plaintiff and Appellant, v. COUNTY OF TULARE et al., Defendants and Respondents.	F060098 (Super. Ct. No. VCU227939) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Farshad A. Tafti, in pro. per.; Mickey Jew for Plaintiff and Appellant.

Kathleen Bales-Lange, County Counsel, and Julia C. Langley, Deputy County Counsel, for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II. and III. of the Discussion.

Farshad A. Tafti (appellant), an individual doing business as Kaweah General Store, appeals from a judgment denying his petition for a writ of mandate in which he challenged the validity of $1,148,200 in civil penalties imposed against him by the County of Tulare and Tulare County Division of Environmental Health Services (collectively referred to as respondent). The civil penalties were imposed following an administrative hearing before an Administrative Law Judge (ALJ), whose findings were adopted by respondent, and were based on alleged violations by appellant of laws relating to underground gasoline storage tanks. Prior to the hearing, respondent had issued an enforcement order determining that appellant committed certain violations and owed civil penalties of $138,824. Appellant requested an appeal hearing after being notified by respondents that such a hearing would be an opportunity to challenge the enforcement order. When the hearing resulted in a massive increase of over $1 million in the total amount of civil penalties, appellant appealed. His appeal raises issues of notice, fairness, due process and statutory authority, among others. We conclude that under the unique circumstances shown in this case, appellant did not receive fair and adequate notice. Accordingly, we reverse the judgment of the trial court with instructions to grant the writ of mandate to the extent explained in our disposition below.

FACTS AND PROCEDURAL HISTORY

Appellant is the owner of the Kaweah General Store in Three Rivers, California, which had included a small gasoline station. When appellant purchased the property in 2000, it consisted of an 800 square foot building, three gasoline dispensers, and underground gasoline storage tanks. From approximately December of 2003 through September of 2006, respondent notified appellant of noncompliance with laws relating to underground storage tanks and sought to have appellant take steps to correct the specified violations.

Respondent is a local enforcement agency (also referred to as a unified program agency) that is certified under state law to implement the "Unified Hazardous Waste and

Hazardous Materials Management Regulatory Program" (see Health & Saf. Code,[1] §§ 25404-25404.9) in Tulare County. Respondent's enforcement responsibility includes laws regulating underground storage tanks. (See § 25404.1.1, subd. (a); cf. § 25299, subds. (a) & (b).)

On September 5, 2006, respondent issued an administrative enforcement order (the Enforcement Order) against appellant, assessing a penalty of $138,824. The Enforcement Order alleged several violations of administrative regulations that are codified at California Code of Regulations, title 23, chapter 16 (hereafter Regulations), which regulate underground storage tanks. The Enforcement Order notified appellant that respondent had "determined" that appellant committed the violations detailed in the Enforcement Order. According to the Enforcement Order, appellant violated Regulations, title 23, section 2670, subdivision (e) by the following conduct: (1) failure to follow applicable containment and monitoring requirements during the period of time between cessation of hazardous substance storage and actual completion of tank closure (with the period of violation from Sept. 30, 2004, until at least May 31, 2006, or 609 days); (2) failure to apply for temporary or permanent tank closure within the required time period (with the period of violation from Dec. 29, 2004, until at least May 31, 2006, or 519 days); and (3) failure to complete tank closure within a reasonable time period (with the period of violation from Nov. 3, 2004, until at least May 31, 2006, or 575 days). Further, the Enforcement Order cited appellant for violation of Regulations, title 23, section 2671, subdivision (a)(1) for failure to remove and handle all residual liquid, solids, or sludge from the underground storage tanks in accordance with the applicable provisions of chapters 6.5 and 6.7 of division 20 of the Health and Safety Code (with the period of violation from Nov. 3, 2004, until at least May 31, 2006, or

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1 Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

575 days). Finally, the Enforcement Order alleged that appellant violated Regulations, title 23, section 2671, subdivision (a)(2) by his failure to "inert" the underground gasoline storage tanks to safe levels that would preclude an explosion (with the period of violation from Nov. 3, 2004, until at least May 31, 2006, or 575 days).

Based on these determinations, the Enforcement Order ordered appellant to "remove the two 6,000-gallon [underground gasoline storage tanks] in accordance with Article 7 of Title 23, California Code of Regulations, Chapter 16." Appellant was also ordered to pay the sum of $138,824, of which $137,778 was a "penalty" for the violations noted in the Enforcement Order and $1,046 was for administrative costs.[2]

At paragraph 6 of the Enforcement Order, under the heading "RIGHT TO A HEARING," it stated: "[Appellant] may request a hearing *to challenge the Order*. Appeal procedures are described in the attached Statement …." (Italics added.) The attached statement advised appellant that he "may choose: [¶] [1] to comply with the Order immediately, [¶] [2] to discuss the matter with [respondent] at the Informal Conference scheduled below, or [¶] [3] to pursue a formal appeal." Under the heading "FORMAL APPEAL RIGHTS," it was explained that appellant may request a "hearing" by mailing or delivering a "Notice of Defense" within time limits indicated, otherwise the Enforcement Order would become final. The statement further explained: "If you file a Notice of Defense within the time permitted, a hearing on the allegations made in the Order will be conducted by the Office of Administrative Hearings of the Agency of General Services in accordance with the procedures specified in Health and Safety Code section 25404.1.1 and Government Code section 11507 et seq."

Appellant removed the underground gasoline storage tanks and gasoline dispensers. On October 26, 2006, the soil under the site of the underground storage tanks

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[2] For convenience, we refer to the entire sum of $138,824 as civil penalties.

and dispensers was tested and found not to have any contamination under United States Environmental Protection Agency standards.

Appellant timely filed a notice of defense requesting a hearing to challenge the Enforcement Order. On March 20, 2007, an administrative hearing commenced before ALJ Robert Walker (the ALJ) and was continued to May 14, 2007. Ultimately, the hearing was completed on January 29, 2008. The administrative hearing was bifurcated to separate issues of violation from those of penalty. After the portion of the hearing addressing the substantive violations, the ALJ made factual findings that appellant violated Regulations, title 23, sections 2670, subdivision (e), and 2671, subdivisions (a)(1) and (a)(2). Following the subsequent hearing addressing the civil penalties, the ALJ listed each of the violations, made findings of the number of days that the violations continued, and applied a per-day penalty amount as to each category of violation after considering the factors listed in sections 25299 and 25404.1.1. When the math was done, the ALJ determined that appellant owed a total civil penalty of $1,148,200. The ALJ's proposed decision was thereafter adopted by respondent as its decision and order, thereby imposing penalties against appellant of $1,148,200.

Appellant petitioned to Tulare County Superior Court for a writ of mandate seeking to overturn respondent's decision and order. The court reviewed the record as well as the proposed findings of fact submitted by appellant and respondent. It adopted findings 1 through 61 as submitted by respondent, concluded that appellant received adequate notice and due process of law, and it held that the findings of fact made by the ALJ and adopted by respondent were supported by substantial evidence. The court rejected appellant's contention that the civil penalties violated the excessive fines clause of the United States Constitution, since the importance of the interests protected and the potential for harm supported the imposition of the penalty. Thus, according to the court's findings, the civil penalty was not disproportionate to the offense. The court therefore affirmed the penalties and it denied the petition for writ of mandate in its entirety.

Appellant's timely appeal followed. He contends the trial court erred on the following grounds: (1) the ALJ and respondent lacked authority to impose civil penalties for violations of *regulations*; (2) the ALJ and respondent lacked authority to impose penalties greater than the amount imposed by the Enforcement Order; (3) appellant was not provided adequate notice and opportunity to be heard; (4) the penalties imposed were excessive and violated appellant's constitutional rights; and (5) the ALJ abused his discretion in failing to consider evidence of appellant's financial ability to pay the imposed penalties.

DISCUSSION

I. Standard of Review

In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. That limitation, however, does not apply to resolution of questions of law where the facts are undisputed. In such cases, as in other instances involving matters of law, the appellate court is not bound by the trial court's decision, but may make its own determination. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 502.) Additionally, a question of statutory construction is a legal issue that is reviewed de novo. (*Department of Corrections & Rehabilitation v. California State Personnel Bd.* (2007) 147 Cal.App.4th 797, 802.) We also independently review appellant's claims that he did not receive adequate notice or due process. (*Margarito v. State Athletic Com.* (2010) 189 Cal.App.4th 159, 166; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169-1170.)

II. Statutory Authority to Impose Civil Penalties for Violation of Regulations*

Appellant's first contention is that respondent did not have authority to impose civil penalties for violation of *regulations*. On this question, section 25299 is clear and unambiguous on its face. (See *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998 [if language of statute is clear, its plain meaning controls].) That section states: "Any operator of an underground tank system shall be liable for a civil penalty of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000) for each underground storage tank for each day of violation for any of the following violations: [¶] … [¶] (6) Violation of any applicable requirement of this chapter *or any regulation* adopted by the board pursuant to Section 25299.3." (§ 25299, subd. (a), italics added; see § 25299, subd. (b)(5) [same penalties apply to owner of underground storage tank, including for violation of regulations].) Section 25299.3 states, in relevant part: "(a) The board shall adopt regulations implementing this chapter." The referenced chapter is chapter 6.7 (commencing with § 25280) of division 20 of the Health and Safety Code, entitled "Underground Storage of Hazardous Substances."[3]

Here, the Enforcement Order imposed civil penalties against appellant based on his alleged violation of the provisions of Regulations, title 23, chapter 16—specifically,

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* See footnote, *ante*, page 1.

3 The problem addressed by the Legislature in chapter 6.7 was that "[u]nderground tanks used for the storage of hazardous substances … are potential sources of contamination of the ground and underlying aquifers," and that uncontrolled releases "have contaminated public drinking water supplies." (§ 25280, subds. (a)(2) & (a)(3).) The purpose and intent of chapter 6.7 was expressed as follows: "[I]t is in the public interest to establish a continuing program for the purpose of preventing contamination from, and improper storage of, hazardous substances stored underground. It is the intent of the Legislature, in enacting this chapter, to establish orderly procedures that will ensure that newly constructed underground storage tanks meet appropriate standards and that existing tanks be properly maintained, inspected, tested, and upgraded so that the health, property, and resources of the people of the state will be protected." (§ 25280, subd. (b).)

section 2670, subdivision (e), and section 2671, subdivisions (a)(1) and (a)(2) thereof. Said regulatory provisions were clearly adopted pursuant to the authority of section 25299.3 for the purpose of implementing chapter 6.7 of division 20 of the Health and Safety Code. (Regs., tit. 23, §§ 2610, 2620.) Accordingly, section 25299 plainly authorizes the imposition of civil penalties for violation of the particular regulations that were referred to in the Enforcement Order. (§ 25299, subds. (a)(6) & (b)(5).) Appellant's claim of lack of statutory authority therefore fails.

Of course, there must be a statutory basis for respondent, as the unified program agency, to impose the civil penalties against appellant. That authority is set forth in section 25404.1.1, subdivision (a)(2), which allows the imposition of an administrative penalty as part of an enforcement order, in accordance with the following: "If the order is for a violation of Chapter 6.7 (commencing with Section 25280), the violator shall be subject to the applicable civil penalties provided in subdivisions (a), (b), (c), and (e) of Section 25299." (§ 25404.1.1, subd. (a)(2).)

Appellant argues that since the reference in section 25404.1.1, subdivision (a)(2), to "Chapter 6.7" is to a chapter of the Health and Safety Code—i.e., to *statutory* provisions—respondent's authority to impose civil penalties was limited to violations of the statutory requirements of chapter 6.7. Although that argument has some surface appeal, it ultimately fails because section 25299, subdivisions (a)(6) and (b)(5), clearly manifests the intention that for purposes of enforcement of chapter 6.7, a "violation" includes violations of the implementing regulations. We therefore conclude that respondent had statutory authority to impose civil penalties under sections 25404.1.1 and 25299 based on the asserted violations of regulations.

III. No Statutory Bar to Imposing Greater Penalties Than Were Determined in the Enforcement Order*

Appellant contends that *as a matter of law* the ALJ lacked authority or discretion to impose civil penalties greater than those determined by respondent in the Enforcement Order. To evaluate this contention, we consider the statutory provisions defining the nature of the hearing in order to ascertain whether there is any rule or limitation that would preclude the ALJ from imposing the greater penalties. We have found none.

The focus of our inquiry is on the hearing mandated by statute when a party served with an enforcement order under section 25404.1.1, subdivision (a), thereafter *requests a hearing* on the matters cited in the enforcement order. Subdivision (d) of section 25404.1.1 states the right to such a hearing: "Any person served with an order pursuant to this section who has been unable to resolve any violation with the UPA,[4] may within 15 days after service of the order, request a hearing pursuant to subdivision (e) by filing with the UPA a notice of defense." Here, appellant filed a timely notice of defense pursuant to the above statutory provision and thereby formally demanded a hearing.

As to the nature of that hearing, subdivision (e)(1) of section 25404.1.1 specifies that the ALJ "shall conduct the hearing in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code …." (hereafter chapter 4.5). Chapter 4.5 contains the general provisions of the Administrative Procedures Act (APA), setting forth the basic procedural requirements for adjudicative hearings conducted by an administrative agency. (*Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 419; Gov. Code,

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* See footnote, *ante*, page 1.

4 UPA is the statute's abbreviation for a unified public agency. Respondent was a UPA.

§§ 11410.10, 11410.20, 11410.30, subd. (c) [chapter 4.5 of APA applies to local agencies in joint or unified action with state agency].)

We note that in addition to the general provisions found in chapter 4.5, the APA *also* has a formal adjudicative process that is delineated in chapter 5 (commencing with Gov. Code, § 11500), but chapter 5 applies only if the statute or regulation pertaining to the enforcement agency so provides. (Gov. Code, § 11501, subd. (a) [chapter 5 applies where statute relating to the agency so specifies]; *Patterson Flying Service v. Department of Pesticide Regulation*, *supra*, 161 Cal.App.4th at p. 419.) Here, the relevant statute defining the administrative hearing afforded by the agency—section 25404.1.1—refers only to chapter 4.5 of the APA, not to chapter 5. Therefore, chapter 4.5 of the APA (together with the provisions of § 25404.1.1) provides the statutory framework for the administrative process and hearing in this case.[5] (See Gov. Code, § 11415.10, subd. (a) ["The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding"].)

Unfortunately, the Government Code provisions in chapter 4.5 of the APA shed little, if any, light on the question of whether the ALJ could permissibly impose civil penalties in excess of those determined in the Enforcement Order. Appellant briefly argues that the nature of the hearing was limited by Government Code section 11410.10,

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5 We note that respondent's written statement describing the right to a formal appeal referenced a number of the provisions of chapter 5 of the APA. The statement arguably suggested that chapter 5 of the APA *was* applicable to the hearing, as we discuss later in this opinion. It appears from section 11425.10, subdivision (b) of the Government Code that respondent may adopt rules that are more protective of the rights of the person to which its action is directed (such as the provisions of ch. 5 of the APA), yet there is no mention in the record that respondent had formally done so. In fact, respondent denies that chapter 5 was applicable. We believe that in future cases, respondent should clarify and make explicit whether the procedures specified in chapter 5 of the APA are applicable to the adjudicative hearing in matters such as this. (Gov. Code, § 11425.10, subd. (a)(2).)

which is one of the sections found in chapter 4.5. That section provides that chapter 4.5 applies "to a decision by an agency if … *an evidentiary hearing for determination of facts* is required for formulation and issuance of the decision." (Italics added.) Appellant's argument is misplaced. While this section indicates the type of agency decision to which the APA applies, it does not limit the scope of the issues that may be adjudicated at such a hearing.

We note that article 6 of chapter 4.5, known as the "Administrative Adjudication Bill of Rights," sets forth a number of procedural safeguards for the hearing. These provisions outline the minimum procedural and due process requirements for administrative hearings under the APA, including the following: (1) notice and an opportunity to be heard, including the opportunity to present and rebut evidence; (2) the agency shall make available a copy of the governing procedure, including a statement whether chapter 5 of the APA is applicable; (3) the hearing shall be open and public; and (4) the decision shall be in writing, based on the record, and shall include a statement of the factual and legal basis for the decision. (Gov. Code, § 11425.10, subd. (a).) These provisions do not directly answer the question before us. Rather, they simply reflect that appellant was entitled to a fair evidentiary hearing on the merits of the allegations in the Enforcement Order, including adequate notice and an opportunity to be heard regarding same.

We have found no applicable statute or regulation indicating that the ALJ lacked authority or discretion to make the ruling it did on civil penalties. It appears to us that the real issue is not so much the extent of the ALJ's authority or discretion per se, but whether the basic elements of due process were fully satisfied in this case, including the question of adequate notice. Indeed, we believe the crux of the matter here was the adequacy of notice, which we turn to next.

IV. Adequacy of Notice

In essence, appellant contends that he did not receive fair or adequate notice of the following: (1) the nature of the administrative hearing on the question of the amount of civil penalties that could be decided therein (i.e., whether the hearing would merely test the merits of the Enforcement Order or decide anew the amount of appropriate penalties such that the posthearing penalties could greatly exceed the amount determined in the Enforcement Order); *and* (2) the statutory basis for the civil penalties that would be at stake. For the reasons expressed below, we agree with appellant's first contention.

A. Inadequate Notice of Nature and Scope of Hearing

The Enforcement Order issued by respondent pursuant to section 25404.1.1 was explicitly a "[d]etermination" made by respondent, as the unified program agency, that appellant had committed certain violations relating to underground gasoline storage tanks and, based on respondent's determination of said violations, that appellant must pay a monetary penalty of $138,824. Unless a hearing was requested, the order would become final and effective within 20 days. However, the Enforcement Order added: "[Appellant] may request a hearing to challenge the Order. Appeal procedures are described in the attached Statement to [appellant]."

Before addressing respondent's description of the appeal or hearing in its written statement provided to appellant, we first make a few preliminary observations to provide a helpful backdrop to our analysis of the notice issue. The first such observation is simply this: An administrative appeal or hearing to review an agency's order imposing civil penalties might logically be handled in more than one way. We can readily think of two ways to go about it, but they are quite different in terms of what is at stake in the hearing. One approach would be that the evidentiary hearing would provide an opportunity for the accused party to challenge the factual basis or *the merits* of the violations and penalties set forth in the order. If the violations are found to exist, the amount of the civil penalties previously determined by the agency would presumably be

affirmed, unless evidence of statutory factors relevant to imposition of civil penalties persuaded the ALJ that a lesser penalty was appropriate. Under this approach, the amount of civil penalties might be reduced by the ALJ, but they would not be increased. A second approach to such an appeal hearing would be that the ALJ would determine everything anew, including the amount of civil penalties. Under this second approach, which was the one used by the ALJ in the instant case, if the violations are found, the ALJ could then make *an entirely new determination of the amount of civil penalties* under all the circumstances and evidence presented at the hearing, including the imposition of substantially greater civil penalties than were determined by the agency in its enforcement order. Although either of these two alternative approaches would be reasonable, section 25404.1.1 unfortunately gives no indication of how the ALJ (or hearing officer) is to review the issue or what the parties should expect at the hearing.[6]

Secondly, we observe that the particular approach utilized at the hearing matters a great deal in terms of the potential financial detriment or penalty that would be at stake for the purported violator of the underground storage tank laws if a hearing is requested. The amount of a civil penalty is a discretionary determination of the enforcement agency (see *Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1347; *Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 967), and in the instant case it could have ranged from $500 to $5,000 per day, per violation, depending

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6 In other contexts in which an administrative hearing is provided to contest a civil penalty imposed by an agency, the applicable statutory provisions have defined the scope of what the ALJ may decide, limiting the result in a manner analogous to the first approach we noted above. (See, e.g., § 1428, subd. (c) [the ALJ "may affirm, modify, or dismiss the citation or the proposed assessment of a civil penalty"]; Bus. & Prof. Code, § 7099.5 [the hearing officer may "issue a decision, based on findings of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief"].) The second approach is more like a de novo hearing of all issues (such as when a party appeals from a small claims decision per Code Civ. Proc., § 116.770). Of course, here there had not been a prior hearing, but only an agency "determination" of civil penalties.

on the agency's evaluation of the relevant statutory factors (§§ 25299, subds. (a) & (g), 25404.1.1, subd. (b)). Here, the Enforcement Order included several discrete violations, each allegedly continuing over a period of at least 519 days to 609 days per violation. If requesting a hearing meant that appellant would have the opportunity to challenge the factual basis for the $138,824 in civil penalties, that is one thing; if it meant potentially risking a drastically greater civil penalty of $1,148,200 or more, that is altogether another.

We now take a closer look at the adequacy of notice in this case. The Enforcement Order provided that it would become final within 20 days unless appellant requested a hearing "*to challenge the Order*." (Italics added.) That wording, by itself, would lead one to expect that the hearing, if requested, would merely test or "challenge" the factual merits of respondent's assertion in the Enforcement Order that certain violations occurred for which appellant is required to pay the sum of $138,824. Further, at the time respondent served the Enforcement Order, it included a separate written statement to appellant describing his "FORMAL APPEAL RIGHTS." The written statement said that if a "Notice of Defense" was filed within the time permitted, "a hearing on the allegations made in the Order will be conducted …." This wording strongly suggested that the hearing, if requested, would be limited to or framed by "the allegations" made in the Enforcement Order, much as a pleading would operate in a civil case to limit the issues. Indeed, the written statement added that the filing of a "Notice of Defense" constituted "a specific denial of all parts of the Order," which pleading terminology (i.e., specific denial) further confirmed that the hearing was for the purpose of addressing the merits of the particular claims set forth in the Enforcement Order.

No other language in the written statement or in the Enforcement Order provided to appellant counteracted the above descriptions of what the hearing would entail. Nothing alerted appellant to the fact that if he requested a hearing, it would reopen the civil penalty issue and allow the ALJ to determine anew, without any limitation to the

amount set forth in the Enforcement Order, the total assessment of civil penalties, thereby exposing appellant to a potential of vastly expanded monetary liability.

We note further that respondent's written statement describing the applicable appeal procedures made specific reference to a number of provisions of the formal hearing process of the APA set forth in chapter 5 (commencing with Gov. Code, § 11500). For example, the written statement reflected that a "Notice of Defense" would be treated under the provisions of Government Code section 11506; the discovery rules of Government Code sections 11507.5 through 11507.7 would apply; and in other respects, the hearing would be conducted "in accordance with the procedures specified in Health and Safety Code section 25404.1.1 and Government Code section 11507 et seq." These statements appear to assume the applicability of chapter 5 or at least certain provisions thereof.[7] They were presumably communicated to appellant in an effort to comply with Government Code section 11425.10, subdivision (a)(2), which requires the agency to "make available to the person to which the agency action is directed a copy of the governing procedure, *including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding*." (Italics added.) As pointed out by appellant, Government Code section 11506, subdivision (c), states that if a notice of

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[7] As we discussed previously above, respondent is not legally required to comply with the formal hearing requirements of chapter 5 of the APA unless a statute or regulation so provides. We have found no such statute or regulation in this case. Section 11425.10, subdivision (b) of the Government Code would allow respondent to adopt rules that are more protective of the rights of the person to which its action is directed (such as the provisions of ch. 5 of the APA), yet there is no mention in the record that respondent had formally done so. Nevertheless, respondent's written statement to appellant suggested the provisions of chapter 5 were applicable. Although respondent now denies the applicability of such provisions, arguably the principles of equitable estoppel would preclude such a denial. In any event, our point here is *not* that these provisions were legally applicable, but that in the unique context of this case respondent's statements to appellant indicating these provisions of chapter 5 of the APA were applicable had an impact on the adequacy of notice.

defense is filed, that party is "entitled to a hearing *on the merits*." Government Code section 11507 adds that the agency may file "an amended or supplemental accusation."[8] We believe the references in the written statement to these provisions of chapter 5 of the APA would, in light of the other descriptions of the nature of the hearing, tend to reinforce the misleading notion that the hearing, if requested, would be limited to the merits of the factual issues set forth in the Enforcement Order, and that if the agency wanted to seek to impose a significantly greater liability or assert a new factual claim, it would so amend the order.[9]

For all of these reasons, we hold that respondent failed to provide adequate notice to appellant concerning the nature of the administrative hearing involved. In particular, it was unclear whether the hearing would simply be an opportunity to challenge the factual basis—i.e., the merits—of the allegations in the Enforcement Order; or conversely, whether the hearing would decide anew the full amount of the appropriate civil penalties, thereby subjecting appellant to the potential of increased civil penalties above and beyond

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8 Sections 11506 and 11507 of the Government Code both refer to the "accusation" (here presumably the Enforcement Order). Government Code section 11503, which was not mentioned by respondent in the written statement, states that an accusation must "*specify the statutes and rules which the [appellant] is alleged to have violated*." (Italics added.)

9 We are not suggesting that chapter 5 of the APA is incompatible with taking a de novo approach to the hearing on the issue of the amount of civil penalties. We are only saying that if that approach is going to be used by the agency, it must be clearly specified (especially where the statute authorizing civil penalties has a wide range of penalties that might be applied), so that the party who is deciding on whether or not to request a hearing is informed of the scope of what the hearing will address and what will be at stake. Apart from such a clarification, the wording of the sections of chapter 5 (including Gov. Code, §§ 11506 & 11507) would, at least in the circumstances of the present case, tend to confirm that the scope of the appeal regarding civil penalties would be limited to what was alleged or determined in the Enforcement Order.

what was determined in the Enforcement Order.[10] We think that basic fairness requires that when a party is ordered by an agency to pay substantial civil penalties, but is given a right to request an administrative hearing concerning said order, the party should be informed of which type of hearing is contemplated so that he or she will be able to ascertain what is at stake and intelligently decide on whether or not to request the hearing. That is particularly the case where, as here, the statute authorizing the civil penalties sets forth an expansive range of financial penalties that might be imposed per violation, per day.[11]

B. Adequate Notice of the Statutory Basis for Civil Penalties

Appellant also contends that the Enforcement Order failed to expressly inform him of the specific statutory basis for the imposition of the civil penalties (§ 25299) against him. Appellant argues that this failure constituted an additional ground for concluding that he did not receive adequate notice. We disagree. Appellant was notified in the Enforcement Order that respondent's determination was based on section 25404.1.1, and subdivision (a)(2) of that statute clearly refers to section 25299. Although it is true that

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[10] By the time the hearing commenced, appellant had come to learn that the ALJ could potentially impose penalties of over $1 million. That realization came too late and did not undo the prior lack of notice, since at that point in time the process was set in motion and the hearing was underway. Appellant should have been adequately informed of the scope of the appeal hearing—i.e., the type of hearing contemplated—at or before the time he had to make his election of whether or not to request such a hearing. Therefore, we reject respondent's argument that appellant's participation in the hearing (in which he contested all material aspects of the Enforcement Order) cured the particular notice defect that occurred in this case.

[11] Given the complexity of the statutory and regulatory provisions involved, it would further the due process rights of respective parties and the interest of justice in such administrative actions if the Legislature would either clearly limit the penalty exposure from such administrative appeals to the amount claimed in an underlying enforcement order or, alternatively, explicitly apprise parties of the fact that their decision to appeal could subject them to the risk of a much higher penalty determination.

section 25404.1.1 authorizes imposition of civil penalties based on a number of *other* statutory provisions, there could be no doubt in this case that the applicable section was 25299, which related to violations of laws regarding underground storage tanks—the very substance of the charges against appellant in the Enforcement Order. He was also informed of the applicability of section 25299 in some of the prior warning letters sent to him. Therefore, under the circumstances of this case, appellant was adequately apprised of the statutory basis for the civil penalties.

Although we do not agree with the conclusion argued by appellant on this particular issue, we agree that the better practice would have been for respondent to clearly and explicitly articulate in the Enforcement Order that the basis for the civil penalties was subdivision (a)(2) of section 25404.1.1, which references section 25299, and/or to directly state that the underlying statutory basis for the civil penalties was section 25299.

C. Conclusion

It is appropriate for this court to vacate administrative penalties where there has not been fair and adequate notice. (See *Smith v. State Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 245.) We hold that appellant did not receive fair and adequate notice in the present case because he was misled about the nature of the appeal hearing. He was told, in essence, that if he requested a hearing it would merely allow him to challenge the merits of the allegations of the Enforcement Order. In reality, the hearing would reopen the issue of the extent of civil penalties, subjecting appellant to liability for monetary penalties greatly exceeding what was determined in the Enforcement Order. As a result of the inadequate notice, we conclude that the portion of the civil penalties imposed by respondent above the amount it previously determined in the Enforcement Order must be vacated. Moreover, the error is prejudicial and not correctible by a mere remand to respondent for a new determination because the error prevented appellant from being able to make an informed decision on whether to request a hearing in the first place. Since the

portion of the civil penalties that were in violation of due process were those exceeding the originally determined sum of $138,824, they are readily *severable* from the remainder of the penalties. (See *Dyna-Med Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1383, 1404 [improper punitive damages severed from amount awarded by commission].) The remaining civil penalties ($138,824) were not affected by the notice defect and are accordingly affirmed.

In light of our disposition based on the notice issue, it is not necessary to decide appellant's additional arguments that the civil penalties ultimately imposed against him were excessive or unconstitutional or that they were improperly imposed without sufficient consideration of his ability to pay.

DISPOSITION

The judgment of the trial court is reversed, with directions that the court issue a writ of mandate commanding respondent to vacate and set aside that part of its decision imposing civil penalties exceeding the amount it originally determined of $138,824, but to affirm the civil penalties of $138,824. Costs on appeal are awarded to appellant.

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Kane, J.

WE CONCUR:

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Dawson, Acting P.J.

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Poochigian, J.