



FACTUAL ELEMENTS AND DUE PROCESS

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We've all heard the term “due process,” but what does it really mean? Literally, it means “the process that is due.” The phrase comes from the Bill of Rights of the U.S. Constitution. The Fifth Amendment is well known to give a criminal suspect the right to remain silent, but it also says that no person may be deprived of life, liberty, or property, without due process of law. In other words, a person can't be executed or imprisoned or fined without a trial of some sort. When a civil penalty is assessed, we are depriving a person of property (money), so we must first follow the process that is due. The specifics of the process are found in 33 CFR 1.07. Those specific requirements are intended to ensure that the party receives notice of what they are accused of and the evidence against them, and the opportunity to respond to that accusation and evidence.

To ensure that the party has notice of what they are accused of, a very important part of the case file is Factual Elements. This is where the specific allegation against the party is to be stated. In a case where a person is charged with one or more simple violations (e.g. equipment requirements, boating under the influence), Factual Elements are simply stated and everyone knows what the party is accused of. However, when more complex or multipart regulations are violated, or a course of conduct constitutes the violation, Factual Elements require more thought.

A common example where this comes into play is 33 CFR 156.120, Requirements for Transfer pertaining to transfers of oil and other regulated bulk liquids. Section 156.120 has thirty-one subsections from a to ee, some of which are further subdivided. The citation in

MISLE is simply 33 CFR 156.120. The Factual Elements must clearly describe what was violated in that regulation, ideally the specific subsection or subsections alleged to have been violated.

There are many other sections in the Pollution Prevention Regulations, MTSA Regulations, Safety Management Regulations, to name just a few categories, that state more than one requirement. When a regulation containing more than one requirement is cited, it is essential that the Factual Elements make clear specifically what was done wrong and which part of the regulation

Another example where Factual Elements require special attention arises when a violation occurs in the course of a lengthy scenario. Consider the situation of a cruise terminal where a group of passengers arrived late for the sailing of a cruise ship. The passengers' baggage was screened through x-ray machines in the terminal, but the passengers were never screened ashore. They were escorted aboard the vessel, where they were screened by wand. The Factual Elements should give the regulation violated, 33 CFR 105.290, and a succinct statement of what was done wrong. Simply telling the whole story under Factual Elements does not serve the purpose of providing notice of what, specifically, the party is accused of. Simply state what they violated and how they violated it. Any lengthy narrative that may be necessary to convey the relevant circumstances of the violation may be placed in the narrative overview of the activity.

Similarly, it is insufficient for Factual Elements to simply say, "See enclosed statements." It is also insufficient to say, under a citation of 33 CFR 96.230 (Failure to establish and implement Safety Management System), "The validity and/or implementation of the vessel's SMS is in question based on numerous deficiencies issued during a routine Port State Control Boarding of the vessel." Factual Elements should make clear what is alleged to have been wrong that is a violation of the cited regulation, i.e. what conditions were found

that showed the Safety Management System was not really implemented.

While the typical recreational boat violation does not present much of challenge in formulating Factual Elements, the task should not be done mindlessly. Most of the citations used for recreational boat violations are in MISLE with text listing the generic elements of the offense. When Factual Elements are added for a specific case, they should not simply repeat the generic text.

For example, under Factual Elements for 33 USC § 2033(b) (Inland Navigation Rule 33(b)), “Failure to have some means of making an efficient sound signal for vessel less than 12 meters in length,” the following text automatically appears:

ACT: 1. Must be a vessel LESS THAN 12 METERS in length
2. not carrying a sound producing device.

For the above, when preparing a case involving a 22-ft. vessel, that text should not be repeated. Instead, the following is appropriate:

Vessel is 22 ft.
No SPD aboard.

Similarly, under Factual Elements for 33 CFR 175.15(a), “No person may use a recreational vessel unless at least one Type I, II, or III PFD is on board for each person,” the following text automatically appears:

ACT: 1. A recreational vessel.
2. Vessel is used without one PFD (may be Type I, II, or III) for EACH person onboard. EXCEPTION: vessel is one of the following: a foreign boat temporarily using U.S. waters; a military or public boat of the U.S.; a boat owned by a State and used principally for governmental purposes; a lifeboat; a seaplane on the water.

For the above, when preparing a case involving 4 POB and no PFDs, rather than repeating the above generic language, text such as the following should be filled in:

1. Recreational vessel, 4 POB.
2. No PFDs aboard.

In the same manner, equipment failures should be described in detail in the Factual Elements. For instance, don't say "Fire extinguisher was inoperable." Rather, describe how the fire extinguisher was inoperable. Don't say, "Visual distress signals expired." Rather, state the number of the visual distress signals and expiration month/year stamped on the visual distress signals. Always describe how the personal flotation device was unserviceable. For instance, state the length of the tear in the fabric or describe how much of the buoyancy material was deteriorated or missing. Describe how the vessel's numbers were improperly displayed rather than simply stating "Improper display of vessel numbers."

For those enforcing MTSA regulations, the Factual Elements should describe the actual offense under the cited regulation. As in all cases, the Factual Elements must be supported by evidence of each element of the offense. For example, 33 CFR 104.220, "Company or vessel personnel with security duties," specifies a number of subjects of which these personnel must have knowledge. Many of the subjects are vessel-specific or company-specific, such as "(g) Knowledge of emergency procedures and contingency plans," and "(k) Relevant provisions of the Vessel Security Plan (VSP)." Violations of these types of knowledge requirements are typically discovered during an inspection when facility or vessel personnel are asked questions and they fail to give the right answers. In such cases, the Factual Elements must state or describe the specific security plan provision(s) not known by the personnel and how the personnel showed they did not know the provision(s). The evidence should include either a copy of the provision, a restatement of the provision, or copy of the relevant VSP page(s), sufficiently identified. 33 CFR 105.210 works the same way for facilities. Other sections of the

MTSA regulations work this way too—where the violation relates to a security plan provision, you must specify the VSP or FSP provision, and provide evidence of it.

To sum up: Factual Elements should be a succinct statement of what the party has done wrong, so as to focus both the Hearing Officer and the party on the specific regulation allegedly violated and what the party did that violated it.

From the Factual Elements, the Hearing Officer should know what the field was thinking that caused them to believe a violation occurred, and the party should know what it is they allegedly did not do or did wrongly so they can appropriately respond in defense, mitigation or extenuation.