

DTSC Official Policy Cover Page

**ENFORCEMENT RESPONSE POLICY**

**DTSC-OP-0006**

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Enforcement and Emergency Response Program

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Issuing Unit

Gale Filter, Deputy Director

Name and Title of Approving Authority

Original Signed by Gale Filter

January 30, 2009

Signature

Date Signed

Health and Safety Code, Division 20, Chapter 6.5 and its implementing regulations

Statutory Reference:

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## **I. PURPOSE**

This document describes the violation classification system and summarizes the enforcement options that the Department of Toxic Substances Control (DTSC) may pursue for violations of the Hazardous Waste Control Law (HWCL) and its implementing regulations. This policy allows flexibility to choose appropriate enforcement options based upon the circumstances of each case and the potential of the selected option to promote compliance. To assist violators to return to compliance and to initiate and complete enforcement actions in a timely manner, this policy provides completion schedules for steps in the enforcement process. This policy also addresses DTSC's practices to encourage Respondents to enter into settlement discussions.

## **II. BACKGROUND**

This policy supersedes EO-02-003-PP.

## **III. STATUTORY AUTHORITY**

DTSC's enforcement authority is established in article 8 of chapter 6.5 of division 20 of the Health and Safety Code, section 25180, *et seq.* Various sections of the HWCL provide enforcement authority, mandate certain actions by DTSC and its staff in specific situations, and detail the rights, responsibilities and liabilities of persons subject to the HWCL.

## **IV. POLICY STATEMENT**

It is the policy of DTSC to implement its enforcement actions to accomplish the following goals:

- Promote compliance throughout the regulated community;
- Treat generators, transporters, and operators of storage, treatment, transfer, and disposal facilities equally and consistently with regard to the same types of violations;
- Return violators to compliance in a timely manner;
- Penalize violators, as appropriate, and deprive violators of any economic benefit gained from non-compliance; and
- Initiate and conclude enforcement activities in a timely manner.

## V. RELATIONSHIP TO OTHER DOCUMENTS

This document should be used in conjunction with other United States Environmental Protection Agency (U.S. EPA), California Environmental Protection Agency (Cal/EPA) and DTSC documents, including the following:

- Policy, "Collecting Overdue Administrative Penalties" (DTSC-OP-0032);
- Policy, "Referrals to the California Compliance School" (DTSC-OP-0002);
- Policy, "Hazardous Waste Complaint Policy and Procedure" (DTSC-OP-0003);
- Policy "Guidelines for Calculating the Economic Benefit of Non-Compliance" (DTSC-OP-0004);
- Policy, "DTSC Policy for Conducting Inspections" (DTSC-OP-0005);
- "Cal/EPA Recommended Guidance on Supplemental Environmental Projects", October 1003
- "Cal/EPA Recommended Guidance on Incentives for Voluntary Disclosure", October 2003;
- U.S. Environmental Protection Agency, "Supplemental Environmental Projects (SEP) Policy," March 2002 (<http://www.epa.gov/compliance/resources/policies/civil/seps/sepguide-mem.pdf>); and
- U.S. Environmental Protection Agency, "Hazardous Waste Civil Enforcement Response Policy" December 2003. (<http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf>)

## VI. POLICY

### A. CLASSIFYING VIOLATIONS AND VIOLATORS

There are many factors that affect the selection and execution of enforcement actions by DTSC. The primary factors are the class of the violation and the type of violator. It is DTSC's policy to take a formal enforcement action for Class I violations and for Significant Non-Compliers.

#### 1. Classes of Violations

For purposes of selecting appropriate enforcement responses, DTSC divides violations into three broad categories: Class I violations; Class II violations; and

minor violations a subset of Class II violations. The categories of Class I and Class II violations were initially adopted to coincide with the United States Environmental Protection Agency's (U.S. EPA) terminology. Those terms are defined in California Code of Regulations, title 22, section 66260.10. Subsequent legislation (Senate Bill 1899, Chapter 1217, Statutes of 1994) set forth in statute definitions of Class I and minor violations (Health & Safety Code sections 25110.8.5 and 25117.6, respectively).

Health and Safety Code section 25110.8.5 defines "**Class I violation**" as follows:

"Class I violation' means any of the following:

(a) A deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter that is any of the following:

(1) The deviation represents a significant threat to human health or safety or the environment because of one or more of the following:

- (A) The volume of the waste.
- (B) The relative hazardousness of the waste.
- (C) The proximity of the population at risk.

(2) The deviation is significant enough that it could result in a failure to accomplish any of the following:

- (A) Ensure that hazardous waste is destined for, and delivered to, an authorized hazardous waste facility.
- (B) Prevent releases of hazardous waste or constituents to the environment during the active or postclosure period of facility operation.
- (C) Ensure early detection of releases of hazardous waste or constituents.
- (D) Ensure adequate financial resources in the case of releases of hazardous waste or constituents.
- (E) Ensure adequate financial resources to pay for facility closure.
- (F) Perform emergency cleanup operations of, or other corrective actions for, releases.

(b) The deviation is a Class II violation which is a chronic violation or committed by a recalcitrant violator."

Class I violations must be addressed through a formal enforcement action. Examples of potential Class I violations are provided in Attachment A to this document.

California Code of Regulations, title 22, section 66260.10 defines a Class II violation as:

" '**Class II Violation**' means a deviation from the requirements specified in Chapter 6.5 of Division 20 of the HSC, or regulations, permit or interim status document conditions, standards, or requirements adopted pursuant to that

chapter, that is not a Class I violation." Examples of potential Class II violations are included in Attachment B to this document.

Health and Safety Code section 25117.6 defines "**minor violation**," which is a subset of Class II violations:

- "(a) 'Minor violation' means a deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter that is not a Class I violation.
- (b)(1) A minor violation does not include any of the following:
- (A) Any knowing, willful, or intentional violation of this chapter.
  - (B) Any violation of this chapter that enables the violator to benefit economically from noncompliance, either by reduced costs or competitive advantage.
  - (C) Any Class II violation that is a chronic violation or that is committed by a recalcitrant violator.
- (2) In determining whether a violation is chronic or a violator is recalcitrant, for purposes of subparagraph (C) of paragraph (1), the department or the local officer or agency authorized to enforce this chapter, shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to the requirements of this chapter."

Except for minor violations corrected at the time of the inspection, (Health & Safety Code section 25187.8 (d)), minor violations must be addressed by a Notice to Comply, as specified in Health and Safety Code section 25187.8. Procedures for DTSC staff to implement this section of the law are detailed in "DTSC Policy for Conducting Inspections" (DTSC-OP-0005). Minor violations are generally not included in any enforcement action. The exception is when a facility fails to comply with the Notice to Comply, or if circumstances are such that public health or the environment or safety is threatened (Health and Safety Code, section 25187.8 (g)).

Examples of potential minor violations are included in Attachment B to this document.

## **2. Types of Violators**

A hazardous waste handler is classified as a "**Significant Non-Complier**" (SNC), according to the U.S. EPA's Enforcement Response Policy, based on the nature of the violations. A SNC is a handler who:

- Has caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous constituents; or

- Is a chronic or recalcitrant violator (a handler who actively refuses to comply with the regulatory requirements or has engaged in a pattern of neglect or disregard for the regulatory or statutory requirements); or
- Substantially deviates from the terms of a permit, order, settlement document, or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by the terms of permits, orders, settlement agreements, or decrees; or
- Substantially deviates from statutory or regulatory requirements.

SNCs represent the category of violators that merit the most stringent and timely enforcement response. DTSC will take formal enforcement action against all SNCs with Class I and II violations. SNCs will be tracked to ensure timely and appropriate enforcement and compliance. Examples of SNCs are provided in Attachment C to this document. DTSC will also classify all hazardous waste handlers with Class I violations as a SNC in the data system.

## **B. ENFORCEMENT RESPONSE OPTIONS**

### **1. Formal Enforcement Actions**

A formal enforcement action is an action that mandates compliance and initiates an administrative, civil, or criminal process that results in an enforceable agreement or order. Enforceable means the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the failure to comply. Sanctions include fines and penalties as well as other tangible obligations that are imposed upon the regulated community. Examples include administrative orders and civil orders or judgments.

#### **Criminal Enforcement Response Options**

Criminal prosecution provides the strongest punishment and greatest deterrent against unlawful conduct that harms or poses a threat of serious harm to public health or safety or the environment. Criminal actions are generally referred to DAs or CAs, but may also be referred to the AG, the Circuit Prosecutor, or the U.S. Attorney. Criminal cases are filed in the name of the People. DTSC provides technical support to the offices prosecuting these cases.

#### **Civil and Administrative Enforcement Response Options**

DTSC has several non-criminal enforcement options that can be matched to the severity of the violations to be addressed or the needs of litigation. Those options include, in descending order of stringency:

- **Civil Actions.** Civil actions are generally referred to the AG who files these cases as DTSC's attorney.
- **Administrative Enforcement Actions.** DTSC has statutory authority to take administrative action to order correction of violations and to impose penalties.

## **2. Informal Actions**

An informal action is an action other than a formal enforcement action that notifies the regulated business of its non-compliance and establishes a date by which that noncompliance is to be corrected. Examples of these include letters, Summaries of Violations (SOVs), and Notices to Comply (NTC) (see Health & Safety Code sections 25185 (c)(1) and 25187.8). SOVs shall identify all violations known at the close of an inspection. An amended SOV may be issued as appropriate. If possible criminal acts are identified during the inspection, an informal action such as an SOV shall not be left with the operator. When other enforcement actions are being pursued, informal actions will serve to notify the violator of the violations and required corrections. Informal actions do not impose sanctions.

## **3. Referral To Another Agency**

Different considerations come into play in deciding whether to refer a case to another agency. Listed below are some of the factors indicating that referral to another agency is appropriate.

- **U.S. EPA.** Referral of a case to U.S. EPA is appropriate where U.S. EPA is taking enforcement action regardless of DTSC's action, where the State does not have authority to enforce certain federal requirements (e.g., loss of interim status under the Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act (RCRA) of 1976), or where, by mutual agreement, the agencies determine that the case is best addressed by U.S. EPA.
- **Deputy Secretary for Law Enforcement and Counsel, Cal/EPA.** Referral to the Deputy Secretary may be appropriate for cases that have multimedia implications or cases that have cross-board/department/office implications necessitating Cal/EPA involvement for investigation and coordination purposes.
- **Other Cal/EPA Departments or Boards.** Referral of a case to another Cal/EPA department or board is appropriate where that Cal/EPA department or board has overlapping jurisdiction, is taking action, and has a strong interest in the case, or where DTSC does not have the authority to enforce and the case must be referred to another Cal/EPA department or board with the appropriate jurisdiction for full enforcement.

- **Certified Unified Program Agencies (CUPAs).** Referral of a case to a CUPA may be appropriate where the CUPA has jurisdiction or has received authorization, such as for enforcement cases involving certain generator activities or on-site, permitted activities.
- **Other Agencies.** Referrals to agencies not mentioned above may be made where appropriate. Any such referral should be made only upon approval of the Performance Manager.

#### **4. Other Administrative Actions**

##### **Temporary Suspension, Revocation, or Denial of a Grant of Authorization**

DTSC may deny, suspend, or revoke a permit, registration, license, etc., pursuant to Health and Safety Code section 25186, if the applicant or holder (or in the case of a business concern, any trustee, officer, director, partner, or any person holding more than 5% of the equity in or debt liability of that business concern) has engaged in certain acts, including:

- Violating the HWCL, RCRA, or other specified environmental statutes, if the violation shows a repeating or recurring pattern or may pose a threat to public health or safety or the environment;
- Aiding, abetting, or permitting such violations;
- Violating a relevant administrative or judicial order;
- Misrepresenting or omitting significant information in the application or subsequent submissions for authorization;
- Activities resulting in final criminal convictions significantly related to the fitness of the permit applicant or holder to perform under the permit; and/or
- Activities resulting in the revocation or suspension of any other relevant permit, registration, license, etc., held by the applicant or holder.

In addition, DTSC may temporarily suspend a permit to prevent an imminent and substantial danger to public health or safety or to the environment.

Permit denials, suspensions, and revocations are extremely strong enforcement responses because they may result in the permit applicant or holder losing the legal right to operate a hazardous waste business. Therefore, permit denials, suspensions, and revocations are only considered when the acts of the permit applicant or holder are criminal, pose a substantial threat to public health or safety or the environment, or show a clear unwillingness or inability to comply

with environmental laws. In an appropriate case, however, enforcement staff should recommend that DTSC deny a permit application or suspend and/or revoke a permit. These actions can proceed concurrently with civil or criminal actions because the former are licensing issues.

Pursuant to Health and Safety Code sections 25189.3(c) and (d), DTSC may suspend the permit of any facility for nonpayment of a penalty assessed or for delinquent payment of the penalty.

### **C. SELECTING AN APPROPRIATE ENFORCEMENT RESPONSE**

Choosing an appropriate enforcement response requires that a variety of factors be considered. Factors to be considered include the facts of the particular case, the interest and capacity of the various agencies to handle the case, the class of the violations involved and the type of violator.

Among the factors that should be considered are:

- The actual harm to human health and safety or to the environment;
- The potential harm to human health and safety or to the environment;
- The extent of deviation from legal requirements;
- The violator's compliance history;
- The violator's good faith efforts to comply or lack thereof;
- The prophylactic effect on the violator and on the regulated community;
- Any unusual circumstances and/or mitigating or aggravating factors; and
- Litigation factors such as the quality of the evidence and the need for judicial discovery and other enforcement tools.

The weight given to various factors in particular cases will vary depending on the circumstances. Where there are violations of varying severity or class by the same person, all violations should generally be included in one enforcement action based on the highest class of violation.

Cases with Class I violations will be evaluated for determination of the appropriate enforcement response in consultation with OLA at the time the inspection report is finalized. It is DTSC's policy to use a formal enforcement response for Class I violations and SNCs, as defined in Section VII of this policy. DTSC may also take enforcement action that includes all violations, except minor violations, identified in the inspection report(s), whether the violations are only

Class II violations, if the situation warrants it, or a combination of Class I and Class II violations.

The following provides **general** guidance for selecting the appropriate enforcement response. The selection of an appropriate enforcement response depends on the variety of circumstances that can surround a given violation or violator.

## **1. Criminal Action**

The factors indicating that a criminal action should be pursued include:

- Violations are severe;
- Acts are intentional;
- Conduct, whether intentional or not, that creates a significant harm or a high risk of harm to public health or safety or the environment;
- Fraud, false statements, misrepresentation, intentional destruction or concealment of evidence or use of a scheme that undermines the integrity of an agency's regulatory program;
- Illegal disposal, treatment, storage, or transportation;
- Violations of more than one media (e.g. air, solid waste, or hazardous waste);
- Serious violations at multiple facilities or locations;
- Civil or administrative remedies are inadequate;
- Evidence is sufficient to support the criminal burden of proof; and
- The prosecutor is willing and able to prosecute the case.

DTSC will pursue criminal actions through referrals to a DA, CA, the AG, a Circuit Prosecutor or other appropriate prosecutors.

## **2. Civil Action**

The factors indicating that a civil action should be pursued include:

- Need for injunctive relief to obtain compliance;
- One or more Class I violations;

- Multi-jurisdictional issues;
- Issues of statewide significance;
- Existing DTSC or CUPA administrative enforcement orders or settlements that were violated;
- Need to utilize judicial discovery;
- Major cleanup activity;
- Cases where the city or county is a possible defendant or where local factors make prosecution at the State level preferable (e.g., major employer in small county); and
- The desire to establish a judicial precedent.

DTSC will pursue civil actions through referrals to the AG, or other prosecutors or agencies as appropriate. DTSC uses California Code of Regulations, title 22, division 4.5, article 3, sections 66272.60 through 66272.69 as a guide for calculating civil penalties.

### **3. Administrative Enforcement Order**

If a formal enforcement action is appropriate, but the situation does not meet the criteria for criminal or civil action, or for referral to another agency, then use of DTSC's administrative enforcement order authority is indicated.

Penalties to be assessed in administrative enforcement orders shall be calculated utilizing California Code of Regulations, title 22, division 4.5, article 3, Assessment of Administrative Penalties regulations, sections 66272.60 through 66272.69.

### **4. Informal Action**

Informal actions are utilized for all (Class I, Class II, and Minor) violations. When other enforcement actions are being pursued, informal actions will serve to notify the violator of the violations, required corrections, and the date by which the violations are to be corrected. An informal action should never be pursued as the sole action for a Class I violation or for a SNC.

DTSC utilizes informal actions in an effort to achieve compliance where formal enforcement action may not be warranted (e.g., formal enforcement is seldom used where only Class II violations are identified). If an informal action fails to achieve compliance, then selection of a formal action is appropriate.

Health and Safety Code section 25185 mandates that DTSC provide a Summary of Violations at the conclusion of an inspection, prepare an inspection report, provide a copy of the inspection report to the operator of the facility, and reply to requests and responses made by the operator. Further, Health and Safety Code section 25187.8 requires an inspector to issue a Notice to Comply before leaving the facility for minor violations detected in the course of conducting an inspection of a facility. Other informal actions may be pursued as deemed appropriate by program management for a given circumstance.

DTSC may conduct re-inspections to confirm compliance in all cases where only informal actions have been taken.

## **5. Technical Support Team**

The purpose of the Technical Support Team (TST) is to review penalties of cases over \$30,000 to ensure that the penalty regulations are appropriately and consistently applied. The TST consists of at least one supervisor or Senior Hazardous Substances Scientist or Engineer from each of the EERP branches and offices, and a Staff Counsel.

For each case, there is a presentation of the penalty calculation and background that supports the proposed penalty amounts. The presentation will be made by an inspector or a Presentation Team that could consist of the inspector, a first line supervisor or senior scientist/engineer, and the Staff Counsel assigned to the case. In addition, there may be other attendees who may include the Deputy Attorney General assigned to the case, other Staff Counsels, or other department staff with a need to be involved in the penalty discussion.

The TST generally meets monthly. If a case needs to be presented prior to this scheduled meeting, a special meeting will be held. Cases may also be reviewed via e-mail.

## **D. TIMELINESS OF ENFORCEMENT ACTIONS**

To meet DTSC's goals of returning violators to compliance and initiating and completing enforcement actions in a timely manner, target dates for completion of certain steps in the enforcement process have been established.

### **1. Inspection Reports**

DTSC staff should complete all inspection reports as soon as possible following the completion of the inspection, and in no case more than 60 calendar days after the day a violation is identified, regardless of the duration of the inspection or record review, or the stage in the inspection when the violation is identified. The procedures for completing inspections are contained in "DTSC Policy for

Conducting Inspections” (DTSC-OP-0005). An inspection report is complete when it is signed by the inspector.

Under Health and Safety Code section 25185, DTSC is **required** to provide a copy of the inspection report to the person inspected within five days of completing the inspection report, and in no case more than 65 days from the date of the inspection, unless specific statutory exemptions apply. See Health and Safety Code Section 25185(c)(2). In the event that the report is delayed, the facility shall be notified in writing within 70 days of the date of the inspection.

## **2. Initiating Enforcement Actions**

DTSC staff should, in all cases, initiate formal enforcement action as early as possible, and in no case later than 240 days after the date of the inspection. Initiation of an enforcement action means issuing an administrative enforcement order or final settlement document, or referring the case for appropriate action to the DA, CA, AG, U.S. Attorney, the Circuit Prosecutor, or to another agency.

When DTSC initiates an enforcement action, rather than referring the case, DTSC will: (1) notify the respondent in writing by the 135th day after the inspection of DTSC’s intent to take enforcement and invite the respondent to meet and discuss the violations and proposed enforcement; (2) offer the respondent an opportunity to settle the case prior to the 240th day after the inspection; and (3) either finalize a settlement, or issue an administrative enforcement order to the respondent by the 240th day after the inspection.

DTSC may forego this approach and issue an enforcement order for violations of Phase 1 environmental assessment requirements, chronic violations, large and complicated cases, or where special circumstances make it appropriate to do so (as approved by the Performance Manager). “Special circumstances” may include: a violator who is uncooperative, has a questionable compliance history, or has been unwilling to negotiate or meet with DTSC; or gross contamination that requires extensive site characterization.

After referral to the AG, an administrative enforcement order should be issued or a civil complaint should be filed within 90 days of referral, unless an extension is approved by the Performance Manager.

## **3. Small Penalty Enforcement Actions**

Within ten calendar days of the date of inspection, the Supervisor will meet with the inspector to review the SOV and other issues identified in the inspection. The purpose of this conference is to determine if the case is a likely candidate for handling under the small penalty enforcement case procedures because the penalty is estimated to be less than or equal to \$30,000. If the case appears to be a candidate, the inspector will develop a penalty determination based on the

SOV for the case within twenty calendar days of the date of the inspection. If the penalties in the case will exceed \$30,000, or if the case involves complex regulatory compliance issues, the case will be handled under normal procedures outlined in this Enforcement Response Policy. This determination will be reviewed and approved by the Supervisor. The penalty determination may be reviewed by the Performance Manager, at the Performance Manager's discretion. The inspector will make any modifications to the penalty requested by their Supervisor or Performance Manager.

The inspection report should be completed and mailed as soon as possible, but no later than sixty calendar days after the date of the inspection. DTSC will send the report and invite the facility representatives to a meeting to discuss the report. If no meeting is scheduled within fifteen calendar days of sending the report, DTSC will send a Consent Order. If the report cannot be completed within sixty days, the inspector will either finalize a letter to the facility, or contact the facility by phone, requesting a meeting to resolve disputed violations. If the facility has sent DTSC a response to the SOV or other communication indicating a dispute with the violations in the SOV, a letter will be sent or a phone call made to schedule a meeting to discuss and resolve violations with the facility

If the facility is represented by counsel, the Supervisor or Senior Scientist or Engineer will request representation from the "small case attorney" designated by OLA. OLA has designated two "small case attorneys", one each for Northern and Southern California. These attorneys may be consulted for assistance in preparing the settlement documents. These attorneys shall also represent the DTSC as may be necessary.

If either DTSC or the facility requests a meeting, one will be held within forty calendar days of the inspection to resolve the case. The meeting will be conducted by EERP staff unless the facility is represented by counsel. Where the facility is represented by counsel, the Supervisor will request representation from the "small case attorney" designated by OLA. If an agreement-in-principal is reached, a Consent Order (ENF36-SC at T:\FORMS\ENF) will be sent to the facility incorporating the terms of the agreement. If an agreement-in-principal cannot be reached, an enforcement order will be issued to the facility.

A facility receiving a Consent Order may request to negotiate terms in the Consent Order. If a settlement meeting is requested, the procedures outlined in the "settlement meeting" paragraph above will apply. If technical legal changes are requested by the facility to the Consent Order, the "small case attorney" designated by OLA will be consulted. Any revised Consent Order will be sent to the facility for review and signature. After signature by the facility, the Consent Order will be signed by the Supervisor, Senior Scientist or Engineer, or Performance Manager on behalf of DTSC and posted on DTSC web page.

Consent Orders for small enforcement penalty cases are expected to be signed within sixty calendar days of the inspection. Additional time may be required when: 1) the facility does not respond promptly to Consent Order revisions; 2) compliance issues arise which require follow-up with other DTSC Programs; 3) technical and/or legal issues are raised; or 4) for other unforeseen occurrences. Consent Orders for cases requiring additional time should be signed within ninety calendar days of the inspection. If agreement cannot be reached on the terms of the Consent Order, an enforcement order will be issued to the facility and the normal procedures outlined in this Enforcement Response Policy will be followed.

#### **4. Settling Enforcement Actions**

In all administrative enforcement actions, OLA should request a hearing date in order to avoid delay if the case is not settled, unless a delay in setting the hearing is approved by the Performance Manager.

In all civil enforcement actions if DTSC and the respondent cannot settle the potential civil action within 90 days of initiating negotiations, a complaint should be filed unless an extension is approved by the Performance Manager.

Once an enforcement order or other enforcement document is signed by DTSC it shall be posted on DTSC's public website for three years from the effective date of the document. This period may be lengthened (e.g., in the case of a Stipulation and Order or Judgment) at the discretion of DTSC's representative or their successor.

#### **E. SETTLEMENT PHASE**

Although DTSC must always be prepared to litigate any enforcement action, it is DTSC's practice to encourage each respondent to enter into settlement discussions with DTSC in order to settle the case expeditiously and preclude the need for litigation.

##### **1. Admission of Violations**

Each enforcement action can include a number of violations. Some violations may be egregious, while other violations may be less significant. It is not equally important or worthwhile to DTSC to require admissions for all violations. It is DTSC's practice to require admission language for the most egregious violations, those violations that endanger public health or safety or the environment, and for serious repeat violations. In these cases, the Performance Manager or Deputy Director will decide whether to require that the violations be admitted.

## **2. Use of Supplemental Environmental Projects in Settlement Agreements**

In some cases, as part of a settlement agreement, DTSC may agree that violators undertake Supplemental Environmental Projects (SEPs)<sup>†</sup> such as pollution prevention/reduction measures to reduce risk to public health or safety or the environment. These SEPs may offset penalties that result from civil or administrative actions initiated by DTSC. DTSC staff should consult with the Office of Pollution Prevention and Technology Development or other appropriate offices when selecting and establishing SEPs for a given case. SEPs apply to public agencies and private parties, are considered by DTSC on a case-by-case basis, and are approved at the discretion of DTSC. The settlement agreement should accurately and completely describe the SEP to include the specific actions that the respondent will perform and to verify that the respondent has completed the project on time. Verification may include the submission of periodic reports to DTSC. Those reports may be prepared by an outside auditor/consultant; however, the respondent remains responsible for any costs incurred in the preparation of such periodic reports. A final report, signed by an appropriate corporate officer of the respondent's company, demonstrating the completion of the SEP and documenting SEP expenditures should be submitted to DTSC.

## **VII. ROLES AND RESPONSIBILITIES**

### **A. Deputy Director, Enforcement and Emergency Response Program (EERP)**

- Sign enforcement settlements of any amount, as appropriate
- Negotiate settlements of enforcement actions, as appropriate given the circumstances of the case;
- Counsel staff, and consult with the Director as needed, on appropriate response actions and settlements in complex, sensitive, or controversial cases; and
- Sign administrative enforcement orders for any cases with or without an assessed penalty, as appropriate.

### **B. Assistant Deputy Director**

- Sign enforcement settlements for \$250,000 to \$1,000,000;
- Negotiate settlements of enforcement actions, as appropriate given the circumstances of the case;

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<sup>†</sup> DTSC uses the CAL/EPA RECOMMENDED GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS October 2003 for general guidance in approving SEPs.

- Counsel staff, and consult with the Deputy Director as needed, on appropriate response actions and settlements in complex, sensitive, or controversial cases; and
- Sign administrative enforcement orders for any cases with or without an assessed penalty, as appropriate

C. Performance Manager and Supervising Criminal Investigator II

- Concur and sign off on litigation referral packages;
- Sign administrative enforcement orders for any case, as appropriate;
- Sign enforcement settlements for \$50,000 to \$250,000, as appropriate;
- Negotiate settlements of enforcement actions with an assessed penalty of \$50,000 to \$250,000, as appropriate given the circumstances of the case;
- Counsel staff, and consult with the Deputy Director and Assistant Deputy Director, as needed, on appropriate response actions and settlements in complex, sensitive, or controversial cases;
- Sign schedules of compliance;
- Make referrals of enforcement actions to other agencies; and
- Ensure that the integrity of the inspection, complaint and enforcement database (ICE), or successor database, is maintained.

D. Unit Chief (Supervisor)

- Review and approve violation classifications, enforcement responses, and Penalties;
- Review and approve inspection reports and statements of fact;
- May present penalty calculations to Technical Support Team;
- Sign administrative enforcement orders;
- Sign enforcement settlements of less than \$50,000;
- Negotiate settlements of enforcement actions of less than \$50,000;
- Monitor enforcement referrals and negotiate actions with the Attorney General (AG) until adjudicated;

- Notify the State Oversight and Enforcement Branch (SOEB) Performance Manager at least five days prior to issuance of the order so that the local jurisdiction can be notified;
- Provide Office of Criminal Investigations (OCI) with copies of all referrals to District Attorneys (DAs), City Attorneys (CAs), and the United States (U.S.) Attorney;
- Notify OCI quarterly of the status of referrals of to the DA, CA, and U.S. Attorney until adjudicated;
- Oversee return of violators to compliance on enforcement actions and/or Settlements; and
- Submit data for entry into the data system.

E. Senior Hazardous Substances Scientist and Senior Hazardous Substances Engineer

- Determine violation classifications, enforcement responses, and penalties;
- Prepare, review, approve, and sign statements of fact;
- May present penalty calculations to Technical Support Team;
- Sign administrative enforcement orders;
- Sign enforcement settlements of less than \$50,000;
- Negotiate settlements of enforcement action of less than \$50,000s;
- If delegated by the supervisor, provide OCI with copies of all referrals to DAs, CAs, and the U.S. Attorney;
- Monitor AG, DA, CA, and U.S. Attorney enforcement referrals until adjudicated;
- If delegated by the supervisor, notify the State Oversight and Enforcement Branch (SOEB) Performance Manager at least five days prior to issuance of the order so that the local jurisdiction can be notified;
- If delegated by the supervisor, notify OCI quarterly of the status of referrals of to the DA, CA, and U.S. Attorney until adjudicated; and
- Submit data for entry into the data system.

#### F. Inspector

- Determine and classify violations at the time of inspection;
- Notify within EERP of planned inspection work and/or complaint work;
- Issue Notice to Comply;
- Complete a Summary of Violations (SOV), Summary of Observations (SOO), or Notice of Violation (NOV) prior to preparing the inspection report;
- At the time of the inspection, provide persons inspected with clear information on observed violations and how to return to compliance;
- Prepare inspection report;
- Make recommendations to senior scientist or engineer on the class of violations, the types of violators, the appropriate enforcement response and return to compliance dates, and the appropriate penalties;
- Prepare enforcement orders, statements of facts, enforcement referral packages, responses to compliance submittals, and related documents;
- May present penalty calculations to Technical Support Team;
- Route draft orders for review and comment prior to issuance;
- Oversee return of violators to compliance on enforcement actions and/or settlements;
- Conduct compliance follow-up to ensure violators return to compliance with the law and comply with all terms of enforcement settlement;
- Participate in negotiations and provide draft settlement language, as appropriate and
- Ensure data is entered into the data system.

#### G. Criminal Investigator

- Conduct investigations of potential criminal activity related to hazardous waste management;
- May issue Summary of Violation;
- Write reports of investigation and statements of fact;

- Make recommendations to senior staff on the class of violations and type of violators for appropriate enforcement responses;
- Present Penalty calculations to Technical Support Team;
- Prepare enforcement orders, statements of facts, enforcement referral packages, responses to compliance submittals, and related documents;
- Route draft orders for review and comment prior to issuance;
- Work with violators to assist them to return to compliance;
- May conduct compliance follow-up to ensure violators return to compliance with the law and comply with all terms of enforcement settlement;
- Participate in negotiations and provide draft settlement language, as appropriate;
- Submit, for supervisor approval, data for entry into ICE or successor database (OCI currently maintains a separate database); and
- Monitor referrals to the DA, CA, and U.S. Attorney until adjudicated by completing supplemental reports on a quarterly basis (including copies of all pertinent documents).

#### H. Office of Legal Affairs (OLA)

- Review (or draft) and approve enforcement orders and prepare enforcement documents as required;
- Provide legal advice as needed in the development and settlement of enforcement actions;
- Represent DTSC and/or act as a liaison to the Attorney General's Office (AG), DAs, CAs, or the U.S. Attorney during enforcement actions, when appropriate (note: in cases with penalties under \$30,000, program staff will generally conduct informal conferences, unless legal assistance is requested or unless an attorney is representing the respondent.);
- Review and approve all referrals to the AG. Receive notifications of all DTSC referrals to DAs, CAs, and the U.S. Attorney;
- Provide other legal assistance, as required; and
- Annually update and revise enforcement forms.

I. Office of Criminal Investigations

- Investigate environmental crimes;
- Provide investigative advice and support as needed in the development of enforcement actions;
- Refer cases initiated by OCI to DAs, CAs, the U.S. Attorney, and the AG;
- Maintain a database to track all referrals made to DAs, CAs, the U.S. Attorney, and the AG, and maintain a central file for all such referrals;
- Support Cal/EPA in its cross-media investigation efforts;
- Support task forces around the State; and
- Participate in multimedia investigations, as appropriate.

J. Headquarters Office of Data Evaluation & Environmental Indicators

- Generate reports from the data system, that tracks all inspections and complaint investigations, administrative enforcement orders, civil referrals, and settlements.

K. Regional Branches, EERP - Regional Data Managers

- Obtain a docket number assigned from the data system, prior to issuing the order, and
- Maintain the data system. Provide data entry support, create specialized reports and tickler files for EERP management.

L. State Oversight and Enforcement Branch (SOEB)

- Receive notifications of pending orders;
- Notify Certified Unified Program Agencies (CUPAs) and Participating Agencies (PAs) of pending orders;
- Takes lead in exercising enforcement authority for the hazardous waste generator and onsite treatment elements of the Unified Program; and
- Conduct enforcement actions for cases that CUPAs decline.

**CONTACT:**

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***This policy is intended to provide guidance only. The policy does not replace or supersede relevant statutes and regulations. The information contained in this policy is based upon the statutes and regulations in effect as of the date the policy was signed. Interested parties are advised to keep apprised of subsequent changes to relevant statutes and regulations.***

***This policy expires five years from the date of signature.***

Attachment A

**EXAMPLES OF CLASS I VIOLATIONS**

DTSC considers the following to be examples of potential Class I violations, depending on the circumstances.

1. A release or serious threat of release of hazardous waste to the environment, or violation that causes a release or serious threat, for example:
  - Incompatible wastes stored or accumulated adjacent to each other with no physical barrier for separation;
  - Waste stored, accumulated or transported in an incompatible, damaged, or deteriorated container;
  - Evidence that a release to soil or water has occurred;
  - Failure to transfer wastes from deteriorated containers into sound containers; and
  - Ongoing releases of metal dusts to surrounding properties.
2. A violation that involves the failure to assure that groundwater will be protected, for example:
  - Failure to implement regularly scheduled sampling activities in a groundwater monitoring program.\;
  - Failure to analyze all required parameters in a groundwater monitoring program; and
  - Failure to perform the required statistical analyses of monitoring data.
3. A violation that involves the failure to assure that proper closure and postclosure activities will be undertaken, for example:
  - Failure of an owner/operator to develop closure or postclosure plans.
4. A violation that involves the failure to assure that hazardous wastes will be destined for and delivered to an authorized facility, for example:
  - Failure to manifest hazardous waste;
  - Use of an unregistered hazardous waste transporter; or

- Treatment, storage, or disposal at an unauthorized point.
5. Class I or II violations by a recalcitrant or chronic violator, including one who is violating outstanding enforcement orders, for example:
    - Failure to correct violations in accordance with a schedule of compliance.
  6. A violation that involves failure to establish or maintain appropriate financial mechanism to assure closure, postclosure, and liability coverage, for example:
    - Failure by an owner/operator to establish or maintain a financial assurance instrument.

Note: This is not intended to be an exhaustive list of potential Class I violations.

## Attachment B

### **EXAMPLES OF CLASS II VIOLATIONS**

Examples of potential Class II violations, depending on circumstances, are as follows:

- Failure of a generator to keep a copy of each manifest for at least three years;
- Failure to maintain a copy of the closure plan at the facility;
- Failure to submit the annual report in a timely manner;
- Failure to maintain an adequate contingency plan;
- Failure to adequately document hazardous waste training;
- Failure to note in the inspection log the date and nature of any repairs;
- Small deficiencies in other record keeping requirements; and
- Failure to update closure costs for inflation (although this may be a Class I violation if such costs are substantial).

Note: This is not intended to be an exhaustive list of potential Class II violations. Minor violations are a subset of Class II violations. These examples would also constitute minor violations, unless a particular occurrence meets one or more of the exceptions to the definition of minor violation (Health & Safety Code, section 25117.6).

## Attachment C

### **EXAMPLES OF SIGNIFICANT NON-COMPLIERS**

Depending on the circumstances, examples of Significant Non-Compliers include, but are not limited to, those who:

- Repeat Class I violation from a preceding inspection within 3 years;
- Fail to comply with an enforcement order;
- Repeat the same Class II violation within 3 years;
- Operate a facility without a permit or other grant of authorization;
- Dispose of hazardous waste at an unauthorized point;
- Fail to manage ignitable, reactive, or incompatible wastes as required by California Code of Regulations, title 22, section 66264.17;
- Fail to have a closure or postclosure plan or cost estimates for a treatment, storage, or disposal facility;
- Fail to establish or maintain financial assurance for closure and/or postclosure care;
- Fail systematically to comply with manifest requirements or deviate substantially from manifesting requirements;
- Fail systematically to follow container/tank labeling requirements;
- Systematically use containers in poor condition; and
- Transport hazardous waste without being a registered transporter.