

From: Rohlfes, Larry@DTSC
To: [Gideon Kracov \(gideon.kracov@dtsc.ca.gov\)](mailto:gideon.kracov@dtsc.ca.gov); [Mike Vizzier \(Mike.Vizzier@dtsc.ca.gov\)](mailto:Mike.Vizzier@dtsc.ca.gov); [Arezo Campbell \(Arezo.Campbell@dtsc.ca.gov\)](mailto:Arezo.Campbell@dtsc.ca.gov); [Arezo Campbell \(acampbell@westernu.edu\)](mailto:acampbell@westernu.edu)
Cc: [Singh, Mike@DTSC](mailto:Singh.Mike@DTSC)
Subject: Statutory Authority for Administrative Penalties
Date: Wednesday, June 29, 2016 11:25:00 AM
Attachments: [HSC 25187.pdf](#)
[CCR Assessment of Admin Penalties.pdf](#)

Hello Panel Members,

Attached to this message you should find a copy of Section 25187 from the California Health & Safety Code and the regulations pertaining to the assessment of administrative penalties in administrative enforcement orders issued pursuant to that code section in the California Code of Regulations, Title 22, Division 4.5, Chapter 22, Article 3.

I'm sending this to you in response to the Chair Kracov's request at the June 8, 2016 Independent Review Panel meeting for the statutory authority for DTSC administrative enforcement order penalties.

Larry Rohlfes

DTSC Independent Review Panel

CalEPA Headquarters

1001 I Street

Sacramento, CA 95814-2828

(916) 327-4493

Legislation/MS 22C

Health and Safety Code Section 25187

25187. (a) (1) The department or a unified program agency, in accordance with subdivision (1), may issue an order requiring that the violation be corrected and imposing an administrative penalty, for any violation of this chapter or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, whenever the department or Unified Program Agency determines that a person has violated, is in violation of, or threatens, as defined in subdivision (e) of Section 13304 of the Water Code, to violate, this chapter or Chapter 6.8 (commencing with Section 25300), or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter or Chapter 6.8 (commencing with Section 25300).

(2) In an order proposing a penalty pursuant to this section, the department or Unified Program Agency shall take into consideration the nature, circumstances, extent, and gravity of the violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the proposed penalty, and the prophylactic effect that the imposition of the proposed penalty would have on both the violator and the regulated community as a whole.

(b) The department or a unified program agency, in accordance with subdivision (1), may issue an order requiring corrective action whenever the department or Unified Program Agency determines that there is or has been a release, as defined in Chapter 6.8 (commencing with Section 25300), of hazardous waste or constituents into the environment from a hazardous waste facility.

(1) In the case of a release of hazardous waste or constituents into the environment from a hazardous waste facility that is required to obtain a permit pursuant to Article 9 (commencing with Section 25200), the department shall pursue the remedies available under this chapter, including the issuance of an order for corrective action pursuant to this section, before using the legal remedies available pursuant to Chapter 6.8 (commencing with Section 25300), except in any of the following circumstances:

(A) If the person who is responsible for the release voluntarily requests in writing that the department issue an order to that person to take corrective action pursuant to Chapter 6.8 (commencing with Section 25300).

(B) If the person who is responsible for the release is unable to pay for the cost of corrective action to address the release. For purposes of this subparagraph, the inability of a person to pay for the cost of corrective action shall be determined in accordance with the policies of the Environmental Protection Agency for the implementation of Section 9605 of Title 42 of the United States Code.

(C) If the person responsible for the release is unwilling to perform corrective action to address the release. For purposes of this subparagraph, the unwillingness of a person to take corrective action shall be determined in accordance with the policies of the Environmental Protection Agency for the implementation of Section 9605 of Title 42 of the United States Code.

(D) If the release is part of a regional or multisite groundwater contamination problem that cannot, in its entirety, be addressed using the legal remedies available pursuant to this chapter and for

which other releases that are part of the regional or multisite groundwater contamination problem are being addressed using the legal remedies available pursuant to Chapter 6.8 (commencing with Section 25300).

(E) If an order for corrective action has already been issued against the person responsible for the release, or the department and the person responsible for the release have, prior to January 1, 1996, entered into an agreement to address the required cleanup of the release pursuant to Chapter 6.8 (commencing with Section 25300).

(F) If the hazardous waste facility is owned or operated by the federal government.

(2) The order shall include a requirement that the person take corrective action with respect to the release of hazardous waste or constituents, abate the effects thereof, and take any other necessary remedial action.

(3) If the order requires corrective action at a hazardous waste facility, the order shall require that corrective action be taken beyond the facility boundary, where necessary to protect human health or the environment.

(4) The order shall incorporate, as a condition of the order, any applicable waste discharge requirements issued by the State Water Resources Control Board or a California regional water quality control board, and shall be consistent with all applicable water quality control plans adopted pursuant to Section 13170 of the Water Code and Article 3 (commencing with Section 13240) of Chapter 4 of Division 7 of the Water Code and state policies for water quality control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7 of the Water Code existing at the time of the issuance of the order, to the extent that the department or Unified Program Agency determines that those plans and policies are not less stringent than this chapter and regulations adopted pursuant to this chapter. The order may include any more stringent requirement that the department or Unified Program Agency determines is necessary or appropriate to protect water quality.

(5) Persons who are subject to an order pursuant to this subdivision include present and prior owners, lessees, or operators of the property where the hazardous waste is located, present or past generators, storers, treaters, transporters, disposers, and handlers of hazardous waste, and persons who arrange, or have arranged, by contract or other agreement, to store, treat, transport, dispose of, or otherwise handle hazardous waste.

(6) For purposes of this subdivision, "hazardous waste facility" includes the entire site that is under the control of an owner or operator engaged in the management of hazardous waste.

(c) Any order issued pursuant to this section shall be served by personal service or certified mail and shall inform the person so served of the right to a hearing. If the Unified Program Agency issues the order pursuant to this section, the order shall state whether the hearing procedure specified in paragraph (2) of subdivision (f) may be requested by the person receiving the order.

(d) Any person served with an order pursuant to this section who has been unable to resolve any violation or deficiency on an informal basis with the department or Unified Program Agency may, within 15 days after service of the order, request a hearing pursuant to subdivision (e) or (f) by filing with the department or Unified Program Agency a notice of defense. The notice shall be filed with the office that issued the order. A notice of defense shall be deemed filed within the 15-day period provided by this subdivision if it is postmarked within that 15-day period. If no notice of defense is filed within the time limits provided by this subdivision, the order shall become final.

(e) Any hearing requested on an order issued by the department shall be conducted within 90 days after receipt of the notice of defense by an administrative law judge of the Office of Administrative Hearings of the Department of General Services in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the authority granted to an agency by those provisions.

(f) Except as provided in subparagraph (B) of paragraph (2), a person requesting a hearing on an order issued by a unified program agency may select the hearing process specified in either paragraph (1) or (2) in the notice of defense filed with the Unified Program Agency pursuant to subdivision (d). Within 90 days of receipt of the notice of defense by the Unified Program Agency, the hearing shall be conducted using one of the following procedures:

(1) An administrative law judge of the Office of Administrative Hearings of the Department of General Services 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.

(2) (A) A hearing officer designated by the Unified Program Agency 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, and the Unified Program Agency shall have all the authority granted to an agency by those provisions. When a hearing is conducted by a unified program agency pursuant to this paragraph, the Unified Program Agency shall, within 60 days of the hearing, issue a decision.

(B) A person requesting a hearing on an order issued by a unified program agency may select the hearing process specified in this paragraph in a notice of defense filed pursuant to subdivision (d) only if the Unified Program Agency has, as of the date the order is issued pursuant to subdivision (c), selected a designated hearing officer and established a program for conducting a hearing in accordance with this paragraph.

(g) The hearing decision issued pursuant to subdivision (f) shall be effective and final upon issuance. Copies of the decision shall be served by personal service or by certified mail upon the party served with the order and upon other persons who appeared at the hearing and requested a copy.

(h) Any provision of an order issued under this section, except the imposition of an administrative penalty, shall take effect upon issuance by the department or Unified Program Agency if the department or Unified Program Agency finds that the violation or violations of law associated with that provision may pose an imminent and substantial endangerment to the public health or safety or the environment, and a request for a hearing shall not stay the effect of that provision of the order pending a hearing decision. However, if the department or Unified Program Agency determines that any or all provisions of the order are so related that the public health or safety or the environment can be protected only by immediate compliance with the order as a whole, then the order as a whole, except the imposition of an administrative penalty, shall take effect upon issuance by the department or Unified Program Agency. A request for a hearing shall not stay the effect of the order as a whole pending a hearing decision.

(i) A decision issued pursuant to this section may be reviewed by the court pursuant to Section 11523 of the Government Code. In all proceedings pursuant to this section, the court shall uphold the decision of the department or Unified Program Agency if the decision is based upon substantial evidence in the whole record. The filing of a petition for writ of mandate shall not stay any action required

pursuant to this chapter or the accrual of any penalties assessed pursuant to this chapter. This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction.

(j) (1) All administrative penalties collected from actions brought by the department pursuant to this section shall be placed in a separate subaccount in the Toxic Substances Control Account and shall be available only for transfer to the Site Remediation Account or the Expedited Site Remediation Trust Fund and for expenditure by the department upon appropriation by the Legislature.

(2) The administrative penalties collected from an action brought by the department pursuant to Sections 25214.3, 25214.22.1, 25215.7, in accordance with this section, shall be deposited in the Toxic Substances Control Account, for expenditure by the department for implementation and enforcement activities, upon appropriation by the Legislature, pursuant to Section 25173.6.

(k) All administrative penalties collected from an action brought by a unified program agency pursuant to this section shall be paid to the Unified Program Agency that imposed the penalty, and shall be deposited into a special account that shall be expended to fund the activities of the Unified Program Agency in enforcing this chapter pursuant to Section 25180.

(1) The authority granted under this section to a unified program agency is limited to both of the following:

(1) The issuance of orders to impose penalties and to correct violations of the requirements of this chapter and its implementing regulations, only when the violations are violations of requirements applicable to hazardous waste generators and persons operating pursuant to a permit-by-rule, conditional authorization, or conditional exemption, when the violations occur at a unified program facility within the jurisdiction of the CUPA.

(2) The issuance of orders to require corrective action when there has been a release of hazardous waste or constituents only when the Unified Program Agency is authorized to do so pursuant to Section 25404.1.

(m) The CUPA shall annually submit a summary report to the department on the status of orders issued by the unified program agencies under this section and Section 25187.1.

(n) The CUPA shall consult with the district attorney for the county on the development of policies to be followed in exercising the authority delegated pursuant to this section and Section 25187.1, as they relate to the authority of unified program agencies to issue orders.

(o) The CUPA shall arrange to have appropriate legal representation in administrative hearings that are conducted by an administrative law judge of the Office of Administrative Hearings of the Department of General Services, and when a decision issued pursuant to this section is appealed to the superior court.

(p) The department may adopt regulations to implement this section and paragraph (2) of subdivision (a) of Section 25187.1 as they relate to the authority of unified program agencies to issue orders. The regulations shall include, but not be limited to, all of the following requirements:

(1) Provisions to ensure coordinated and consistent application of this section and Section 25187.1 when both the department and the Unified Program Agency have or will be issuing orders under one or both of these sections at the same facility.

(2) Provisions to ensure that the enforcement authority granted to the unified program agencies will be exercised consistently throughout the state.

(3) Minimum training requirements for staff of the Unified Program Agency relative to this section and Section 25187.1.

(4) Procedures to be followed by the department to rescind the authority granted to a unified program agency under this section and Section 25187.1, if the department finds that the Unified Program Agency is not exercising that authority in a manner consistent with this chapter and Chapter 6.11 (commencing with Section 25404) and the regulations adopted pursuant thereto.

(q) Except for an enforcement action taken pursuant to this chapter or Chapter 6.8 (commencing with Section 25300), this section does not otherwise affect the authority of a local agency to take any action under any other provision of law.

25187.1. (a) (1) If the department or a unified program agency authorized pursuant to paragraph (2) determines, upon receipt of any information, that the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or the release of any hazardous waste from the facility or site may present a substantial hazard to human health or the environment, the department or authorized unified program agency may issue an order requiring the owner or operator of the facility or site to conduct monitoring, testing, analysis, and reporting with respect to the facility or site which the department or authorized unified program agency deems reasonable to ascertain the nature and extent of the hazard.

(2) The authority granted under this section to a unified program agency is limited to the issuance of orders pursuant to paragraph (1) to a unified program facility within the jurisdiction of the CUPA, and is subject to Section 25404.1.

(b) If a facility or site subject to subdivision (a) is not in operation at the time the determination is made and the department finds that the owner of the facility or site, could not reasonably be expected to have actual knowledge of the presence of hazardous waste at the facility or site and of its potential for release, the department may issue an order requiring the most recent previous owner or operator of the facility or site who could reasonably be expected to have the actual knowledge to carry out the actions specified in subdivision (a).

(c) Any order issued pursuant to subdivision (a) or (b) shall require the person to whom the order is issued to submit to the department or authorized unified program agency, within 30 days from the issuance of the order, a proposal for carrying out the required monitoring, testing, analysis, and reporting. The department or authorized unified program agency may, after providing the person with an opportunity to confer with the department or authorized unified program agency concerning the proposal, require the person to carry out the monitoring, testing, analysis, and reporting in accordance with the proposal, and with any modifications in the proposal as the department or authorized unified program agency deems reasonable to ascertain the nature and extent of the hazard.

(d) If the department or authorized unified program agency determines that there is no owner or operator specified in subdivision (a) or (b) to conduct monitoring, testing, analysis, or reporting satisfactory to the department or authorized unified program agency, if the department or authorized unified program agency deems the action carried out by an owner or operator is unsatisfactory, or if the department or authorized unified program agency cannot initially determine that there is an owner or operator specified in subdivision (a) or (b) who is able to conduct monitoring, testing, analysis, or reporting, the department or authorized unified program agency may do either of the following:

(1) Conduct monitoring, testing, or analysis, or any combination of these actions, which the department or authorized unified program agency deems reasonable, to ascertain the nature and extent of the hazard associated with the site.

(2) Authorize a local authority or other person to carry out the action, and require, by order, the owner or operator specified in subdivision (a) or (b) to reimburse the department or authorized unified program agency or other authority or person for the costs of the activity.

(e) The department or authorized unified program agency shall not issue an order pursuant to this section which requires the department or authorized unified program agency to be reimbursed for the costs of any action carried out by the department or authorized unified program agency to conduct monitoring, testing, and analysis to determine the results of the actions carried out by a person pursuant to an order issued pursuant to subdivision (a) or (b).

(f) For purposes of carrying out this section, the department, an authorized unified program agency, any other local agency, or other person authorized under paragraph (2) of subdivision (d), may take action pursuant to Section 25185.

25187.2. If an order or agreement issued by the department pursuant to Section 25187 to a potentially responsible party requires a person to take corrective action with respect to a release of hazardous waste or hazardous waste constituents into the environment, that person shall pay for the department's costs incurred in overseeing or carrying out the corrective action.

25187.5. (a) If corrective action is not taken on or before the date specified in an order issued pursuant to Section 25187, or if in the judgment of the department immediate corrective action is necessary to remedy or prevent an imminent substantial danger to the public health, domestic livestock, wildlife, or the environment, the department may take, or contract for the taking of, that corrective action and recover the cost thereof as provided in subdivision (c).

(b) (1) The department may expend up to one hundred thousand dollars (\$100,000) in a 12-month period of available moneys in the Hazardous Waste Control Account in the General Fund to take corrective action pursuant to subdivision (a).

(2) Notwithstanding any other provision of law, the department may enter into written contracts for corrective action taken or to be taken pursuant to subdivision (a).

(3) Notwithstanding any other provision of law, the department may enter into oral contracts, not to exceed ten thousand dollars (\$10,000) in obligation, when in the judgment of the department immediate corrective action is necessary to remedy or prevent an imminent substantial danger to the public health, domestic livestock, wildlife, or the environment.

(4) The contracts entered into pursuant to this subdivision, whether written or oral, may include provisions for the rental of tools or equipment, either with or without operators furnished, and for the furnishing of labor and materials necessary to accomplish the work.

(5) Any contract entered into by the department pursuant to this subdivision shall be exempt from approval by the Department of General Services pursuant to Section 10295 of the Public Contract Code.

(c) If corrective action is taken pursuant to subdivision (a), the person or persons who were subject to the order issued pursuant to Section 25187, or any person or persons whose violation resulted in the imminent and substantial danger to health or the environment shall be liable to the department for the reasonable cost actually incurred in taking corrective action. In addition, the person or persons shall be liable to the department for administrative costs in an amount equal to 10 percent of the reasonable cost actually incurred or five hundred dollars (\$500), whichever is greater. The amount of cost determined pursuant to this subdivision shall be recoverable in a civil action by the department, in addition to any other fees or penalties. Persons who may be liable pursuant to this subdivision shall include, but not be limited to, present or prior owners, lessees, or operators of the property where the hazardous waste is located and producers, transporters or disposers of the hazardous waste.

(d) Neither the department, nor any person authorized by the department to enter upon any lands for the purpose of taking corrective action pursuant to subdivision (a) is liable to civil or criminal action for trespass for any acts that are necessary to carry out the corrective action.

(e) This section does not impose any new liability associated with acts that occurred before January 1, 1981, if the acts were not in violation of existing law or regulations at the time they occurred.

25187.6. (a) If an authorized agent of the department has probable cause to believe that any hazardous waste, or any material which the authorized agent reasonably believes to be a hazardous waste, is stored, transported, disposed of, or handled in violation of this chapter or in a manner that will constitute a violation of this chapter, and that the violation may threaten public health and safety, or the environment, the agent may issue an order of quarantine by affixing a tag or other appropriate marking to the container containing, or to the vehicle transporting, the hazardous waste.

(b) Upon issuing an order of quarantine pursuant to subdivision (a), the authorized agent shall notify the person who owns the hazardous waste, or the owner or lessee of the vehicle in which the wastes are transported, of all of the following:

(1) The hazardous waste has been subject to a quarantine order because the hazardous waste is, or is suspected of being, stored, transported, disposed of, or handled in violation of this chapter.

(2) No person shall remove, transfer, or dispose of the hazardous waste until permission for removal, transfer, or disposal is given by an authorized agent of the department or by a court.

(3) The person so notified may request, and shall be granted, an immediate hearing before a person designated by the director to review the validity of the authorized agent's order. For purposes of this section, an immediate hearing shall be held within 24 hours after a hearing is requested by the person subject to the order.

(c) Any order of quarantine issued pursuant to subdivision (a) shall take effect upon issuance and shall remain effective for 30 days thereafter, until an authorized agent removes the quarantine order pursuant to subdivision (d), or until the quarantine order is revoked pursuant to a hearing conducted in accordance with paragraph (3) of subdivision (b), whichever event occurs first.

(d) If an authorized agent of the department determines that a hazardous waste subject to a quarantine order is not being stored,

handled, transported, or disposed of in violation of this chapter, or does not threaten public health and safety or the environment, the authorized agent shall revoke the order of quarantine.

(e) If an authorized agent of the department has probable cause to believe that a hazardous waste subject to a quarantine order will, or is likely to, be removed, transferred or disposed of in violation of this section, the authorized agent may remove the hazardous waste to a place of safekeeping.

(f) A hazardous waste in transit for which a quarantine order has been issued pursuant to subdivision (a) shall be stored or held at one of the following locations, which the authorized agent determines will represent the least risk to the public health and safety or the environment:

(1) The facility owned or operated by the producer of the waste, except when the producer is located outside the state.

(2) The transporter's yard, facility, or terminal.

(3) The treatment, storage, or disposal facility to which the hazardous waste is to be transported.

(4) Any other site designated by the authorized agent.

(g) All fees for storage and any other expenses incurred in carrying out subdivision (e) or (f) shall be a charge against the person who owns the hazardous waste or the owner or lessee of the vehicle in which the wastes are transported.

(h) For purposes of this section, "authorized agent of the department" includes any representative of a local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180.

25187.8. (a) An authorized representative of the department or local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180, who, in the course of conducting an inspection of a facility, detects a minor violation of any permit conditions, rule, regulation, standard, or other requirement, shall issue a notice to comply before leaving the site in which the minor violation is alleged to have occurred.

(b) A facility which receives a notice to comply pursuant to subdivision (a) shall have not more than 30 days from the date of receipt of the notice to comply in which to achieve compliance with the permit conditions, rule, regulation, standard, or other requirement cited on the notice to comply. Within five working days of achieving compliance, an appropriate person who is an owner or operator of, or an employee at, the facility shall sign the notice to comply and return it to the department representative or to the authorized local officer or agency, as the case may be, which states that the facility has complied with the notice to comply. A false statement that compliance has been achieved is a violation of this chapter pursuant to Section 25191.

(c) A single notice to comply shall be issued for all minor violations cited during the same inspection and the notice to comply shall separately list each of the cited minor violations and the manner in which each of the minor violations may be brought into compliance.

(d) A notice to comply shall not be issued for any minor violation which is corrected immediately in the presence of the inspector. Immediate compliance in that manner may be noted in the inspection report, but the facility shall not be subject to any further action by the department representative or by the authorized local officer or agency.

(e) Except as otherwise provided in subdivision (g), a notice to comply shall be the only means by which the department representative

or the authorized local officer or agency shall cite a minor violation. The department representative or the authorized local officer or agency shall not take any other enforcement action specified in this chapter against a facility which has received a notice to comply if the facility complies with this section.

(f) If a facility that receives a notice to comply pursuant to subdivision (a) disagrees with one or more of the alleged violations listed on the notice to comply, the owner shall give the person who issued the notice to comply written notice of disagreement. If the issuing agency takes administrative enforcement action on the basis of the disputed violation, that action may be appealed in the same manner as for other alleged violations under subdivisions (d) to (j), inclusive, of Section 25187.

(g) (1) Notwithstanding any other provision of this section, if a facility fails to comply with a notice to comply within the prescribed period, or if the department, or an authorized local officer or agency, determines that the circumstances surrounding a particular minor violation or combination of minor violations are such that immediate enforcement is warranted to prevent harm to the public health or safety or to the environment, the department or authorized local officer or agency may take any needed enforcement action authorized by this chapter.

(2) Notwithstanding any other provision of this section, if the department, or an authorized local officer or agency, determines that the circumstances surrounding a particular minor violation or combination of minor violations are such that the assessment of a civil penalty pursuant to this chapter is warranted or is required by the federal act, in addition to issuance of a notice to comply, the department or authorized local officer or agency shall assess that civil penalty in accordance with this chapter, if the department or authorized local officer or agency makes written findings that set forth the basis for the department's or authorized local officer's or agency's determination.

(h) A notice to comply issued to a facility pursuant to this section shall contain an explicit statement that the facility may be subject to reinspection at any time by the department or authorized local officer or agency that issued the notice to comply. Nothing in this section shall be construed as preventing the reinspection of a facility to ensure compliance with this chapter or to ensure that minor violations cited in a notice to comply have been corrected and that the facility is in compliance with this chapter.

(i) Nothing in this section shall be construed as preventing the department, or authorized local officer or agency, on a case-by-case basis, from requiring a facility to submit reasonable and necessary documentation to support the facility's claim of compliance pursuant to subdivision (b).

**California Code of Regulations, Title 22, Division 4.5, Chapter 22,
Article 3, Assessment of Administrative Penalties**

§ 66272.60. Applicability

(a) This article only applies to the assessment of administrative penalties in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187. This article does not apply to minor violations as defined in Health and Safety Code Section 25117.6 unless the minor violation is subject to a penalty in accordance with Health and Safety Code Section 25187.8(g). This article does not apply to penalties assessed pursuant to Health and Safety Code Sections 25244.18(d)(2), 25244.21(a) and 25244.21(b) regarding requirements for source reduction evaluation review, plans, and reports. This article does not apply to the settlement of any enforcement action.

(b) For purposes of this article, "Enforcement Agency" is defined as any department, unified program agency, local health officer, or local public officer having the authority to issue administrative orders pursuant to Health and Safety Code Section 25187.

(c) The Enforcement Agency shall, pursuant to Health and Safety Code Section 25180(d), determine whether the person being assessed a penalty is being treated equally and consistently with regard to the same types of violations previously assessed against other violators.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25117.6, 25180(d), 25187, 25187.8(g), 25189.2, 25244.18(d)(2), 25244.21(a) and 25244.21(b), Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.61. Penalty Calculation

Administrative penalties assessed in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187 shall be assessed following the procedures set forth in this article. The penalty assessed for any violation in accordance with this article shall not exceed the maximum penalty specified in statute.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.62. Determining the Initial Penalty for Each Violation

(a) The Enforcement Agency shall determine an initial penalty for each violation, considering potential harm and the extent of deviation from hazardous waste

management requirements. The Enforcement Agency shall use the matrix set forth in Subsection 66272.62(d) to determine the initial penalty for each violation.

(b) Potential Harm of the Violation

(1) The Enforcement Agency shall consider potential harm to public health and safety and the environment when using the matrix.

(2) The categories for degree of potential harm are defined as follows:

(A) Major - The characteristics and/or amount of the substance involved present a major threat to human health or safety or the environment and the circumstances of the violation indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is lacking or substantially below the required amount or it is certain or probable that the coverage would be absent or inadequate;

(B) Moderate - The characteristics and/or amount of the substance involved do not present a major threat to human health or safety or the environment, and the circumstances of the violation do not indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is significantly below the required amount or it is possible that the coverage would be absent or inadequate;

(C) Minimal - The threat presented by the characteristics and the amount of the substance or by the circumstances of the violation are low or, in the case of a violation of financial requirements, coverage is slightly below the required amount or it is unlikely that the coverage would be absent or inadequate.

(3) In determining the degree of potential harm, the Enforcement Agency shall consider the following factors:

(A) The characteristics of the substance involved,

(B) The amount of the substance involved,

(C) The extent to which human life or health is threatened,

(D) The extent to which animal life is threatened,

(E) The extent to which the environment is threatened, and

(F) The extent to which potable water supplies are threatened.

(4) Potential harm for violations of financial requirements shall be determined by considering the amount of closure, postclosure, or corrective action costs for which there is no financial assurance or the amount of required liability coverage that is absent, and the likelihood that injury or damages, if they occur, will not be compensated due to an inadequacy in the coverage.

(5) A violation must involve the actual management of hazardous waste including the absence of adequate financial assurance for closure, postclosure, corrective action or

financial liability coverage, as distinguished from being a “record-keeping” violation, for the violation to have a major potential for harm. “Record-keeping,” for purposes of this article, means a requirement to record information, to retain records, and to have documents available for inspection. “Record-keeping” does not include a substantive requirement such as the requirement to have a contingency plan, a waste analysis plan, or a closure plan. The following examples illustrate what is considered “record-keeping” and what is considered a violation that could have a major potential for harm.

(A) A failure to record inspections that were in fact completed is a record-keeping violation and would not have a major potential for harm. A failure to conduct inspections according to the schedule is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(B) A failure to retain a copy of a manifest is a record-keeping violation and would not have a major potential for harm. A failure to use a manifest for a shipment of hazardous waste is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(C) A failure to have available for inspection a waste analysis plan that does in fact exist is a record-keeping violation and would not have a major potential for harm. A failure to have a waste analysis plan, or a failure to have a waste analysis plan available to staff who are to implement the plan, is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(6) Financial violations that are strictly paperwork errors or omissions that do not affect actual functioning of adequate financial assurance for closure, postclosure, corrective action, or financial liability coverage are record-keeping violations. Violations involving the absence of adequate financial assurance for closure, postclosure, corrective action, or financial liability coverage are hazardous waste management violations, not record-keeping violations.

(7) Groundwater monitoring record-keeping is a fundamental part of the groundwater monitoring requirements. Groundwater monitoring record-keeping violations may have a major, moderate, or minimal potential for harm. The category selected for potential harm shall be based on the extent to which the violation may lead directly to environmental harm, have a potential for harm, or cause an inability to detect releases to groundwater.

(c) Extent of Deviation of the Violation

(1) The Enforcement Agency shall consider the extent of deviation from hazardous waste management requirements when using the matrix set forth in this section.

(2) The categories for extent of deviation from requirements are defined as follows:

(A) Major - The act deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with.

(B) Moderate - The act deviates from the requirement, but it functions to some extent although not all of its important provisions are complied with.

(C) Minimal - The act deviates somewhat from the requirement. The requirement functions nearly as intended, but not as well as if all provisions had been met.

(3) For requirements with more than one part, the Enforcement Agency shall consider the extent of violation in terms of the most significant requirement.

(4) For a single requirement, the range of potential deviation from the requirement may vary. For example, if a facility has no contingency plan, the deviation would be major. If a facility has a contingency plan but significant elements are omitted, the deviation would be moderate. If a facility has a contingency plan with only one or two minor elements missing, the deviation would be minimal.

(d) The matrix set forth in this subsection shall be used to determine the initial penalty for a violation. The Enforcement Agency shall select a penalty amount from the range provided in the matrix cell that corresponds to the appropriate extent of deviation and the potential harm categories. The numbers in parenthesis in each cell of the following matrix are the midpoints of the range.

DERTERMINATION OF INITIAL PENALTY MATRIX (IN DOLLARS)

EXTENT OF DEVIATION	POTENTIAL HARM	POTENTIAL HARM	POTENTIAL HARM
	<u>Major</u>	<u>Moderate</u>	<u>Minimal</u>
Major	25,000	20,000	15,000
	(22,500)	(17,500)	(10,500)
	20,000	15,000	6,000
Moderate	20,000	15,000	6,000
	(17,500)	(10,500)	(4,000)
	15,000	6,000	2,000
Minimal	15,000	6,000	2,000
	(10,500)	(4,000)	(1,000)
	6,000	2,000	0

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.63. Initial Penalty Adjustment Factors

(a) After determining the initial penalty, the Enforcement Agency shall adjust the initial penalty based on the violator's intent in committing the violation using the following guidelines:

ADJUSTMENT FACTORS FOR VIOLATORS INTENT

ADJUSTMENT FACTOR	CIRCUMSTANCE
Downward Adjustment of 100 percent	Violation was completely beyond the control of the violator.
Downward Adjustment of 0 to 50 percent	Violation occurred despite good faith efforts to comply with regulation(s).
No Adjustment	Violation indicated neither good faith efforts nor intentional failure to comply.
Upward Adjustment of 50 percent to 100 percent	Violation was a result of intentional failure to comply.

(b) Adjustment of the initial penalty in accordance with subsection (a) may result in an adjusted initial penalty that is higher or lower than the range presented in the originally selected matrix cell.

(c) The initial penalty shall be increased by the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance up to the statutory maximum for each violation. Economic benefit includes, but is not limited to, avoided costs, increased profits, having the use of capital from delayed or avoided costs, and avoided interest.

(d) The adjusted initial penalty for a violation shall not exceed the statutory maximum.
Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.64. Multiple Violations

(a) At the discretion of the Enforcement Agency, a single initial penalty may be assessed for multiple violations. Multiple violations subject to this section are multiple instances of the same violation, where each instance is a violation in itself.

(b) The assessment of a single initial penalty may be appropriate for multiple violations in the following cases:

(1) The facility has violated the same requirement at one or more locations (e.g. units) within the facility;

(2) The violation occurs on separate occasions, unless the facility has been notified of the violation and has had sufficient time to correct the violation, and the violation is not a violation that continues uninterrupted for more than one day;

(3) When violations are not independent or are not substantially distinguishable. For such violations, the Enforcement Agency shall consider the extent of violation in terms of the most significant violation.

(c) Where it is necessary to deprive the violator of the economic benefit of multiple violations, the Enforcement Agency shall cite such violations separately and assess an initial penalty for each violation.

(d) The single initial penalty for multiple violations is to be determined as provided in Sections 66272.62 and 66272.63.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.65. Multiday Violations

(a) Each day a violation continues is a separate and distinct violation. The penalty for a continuing violation shall be determined according to this section.

(1) The initial penalty for the first day of violation shall be determined as provided in Sections 66272.62 and 66272.63;

(2) For days following the first day of violation, the multiday component of the penalty shall be calculated by determining two percent of the adjusted initial penalty and multiplying that value by the number of days the violation occurred after the initial day.

(b) If the Enforcement Agency fails to respond in a timely manner to the violator's written response to an inspection report, the Enforcement Agency may not seek penalties for continuing violations in accordance with Health and Safety Code Section 25185(c)(3).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25185, 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.66. Minor Violations Subject to a Penalty

When a "minor violation," as defined by Health and Safety Code Section 25117.6, is subject to a penalty for any of the reasons specified in Health and Safety Code Section 25187.8(g), including that a penalty is warranted or required by federal law, the penalty for that violation shall be determined in accordance with this Article. Written findings that set forth the basis for the Enforcement Agency's determination to assess a penalty for a

minor violation shall be made in accordance with Health and Safety Code Section 25187.8(g)(2).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25117.6, 25187.8 and 25189 Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.67. Base Penalty

- (a) If a violation is a one day occurrence, the base penalty for that violation is the adjusted initial penalty as determined pursuant to Sections 66272.62 and 66272.63.
- (b) The base penalty for multiple violations is the adjusted initial penalty determined pursuant to Section 66272.64.
- (c) The base penalty for multiday violations is the adjusted initial penalty for the first day of violation determined pursuant to Sections 66272.62 and 66272.63 plus the penalty for the additional days of violation pursuant to Section 66272.65.
- (d) The total base penalty for an enforcement action is the sum of the base penalties for all violations.
- (e) The total base penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.68. Adjustments to the Total Base Penalty

The Enforcement Agency shall adjust the total base penalty considering each of the following adjustment factors:

- (a) Cooperation: The Enforcement Agency shall consider the violator's cooperation and efforts to return to compliance. Cooperation in achieving compliance is the standard and all necessary good faith efforts to comply with requirements must be made. Adjustments shall be based on the violator's efforts to return to compliance after being notified of the violations by the Enforcement Agency. The adjustment shall be made using the following guidelines:

ADJUSTMENT FACTORS FOR COOPERTATION

DEGREE OF COOPERATION/EFFORT	ADJUSTMENT FACTOR	CIRCUMSTANCE
Extraordinary	Downward adjustment of up to 25 percent	Violator exceeded the minimum requirements in returning to compliance or returned to compliance faster than requested.
Good Faith	No adjustment	Violator demonstrated a cooperative effort.
Recalcitrance	Upward adjustment of up to 25 percent	Violator failed to cooperate, delayed compliance, created unnecessary obstacles to achieving compliance, or the compliance submittal failed to meet requirements.
Refusal	Upward adjustment of 50 to 100 percent	Violator intentionally failed to return to compliance or to allow clean-up operations to take place. This does not include refusal to allow inspections.

(b) Prophylactic Effect: The total base penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole.

(c) Compliance History: The total base penalty may be decreased by five percent for each previous consecutive Enforcement Agency inspection report that has had no violations noted, up to a total reduction of ten percent. A separate, additional downward adjustment of 15 percent may be granted if the violator has a current International Organization for Standardization (ISO) 14001 Certificate. The total base penalty may be increased if the violator has demonstrated a history of noncompliance over the past five (5) years. The maximum adjustment factor for compliance history is an upward adjustment of 100 percent. When adjusting the penalty for compliance history, the Enforcement Agency shall consider the following criteria:

(1) Previous violations at the site in question receive more weight than previous violations at another site owned or operated by the same person;

(2) Recent violations receive more weight than older violations;

(3) The same or substantially similar previous violations receive more weight than previous unrelated violations.

(d) Ability to Pay: If the violator has provided the Enforcement Agency with the financial information necessary to assess the violator's ability to pay, the payment of the final penalty may be extended over a period of time if immediate, full payment would cause, in the judgment of the Enforcement Agency, extreme financial hardship. If extending the penalty payment over a period of time would cause, in the judgment of the Enforcement Agency, extreme financial hardship, the penalty may be reduced. No adjustment for ability to pay may be made if the penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or because of compliance history, pursuant to subsection (c).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

§ 66272.69. Final Penalty

The final penalty consists of the total base penalty, as defined in Section 66272.67, with any adjustments made pursuant to the adjustment factors set forth in Section 66272.68. The final penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.