

TOXIC SUBSTANCES CONTROL PROGRAM

OFFICIAL POLICY/PROCEDURE

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PROGRAM MANAGEMENT MANUAL

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DESCRIPTION:

Establishes enforcement policy to accomplish cleanup of hazardous substance release sites by responsible parties (RPs) who are not willing to conduct the response action voluntarily.

APPROVED BY:

John J. Kearns
John J. Kearns
Deputy Director

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Date

cc: TSCP Technical Reference Center

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**TOXIC SUBSTANCES CONTROL PROGRAM
SITE MITIGATION ENFORCEMENT CASE MANAGEMENT**

OPP #90-7

PURPOSE

The purpose of the Site Mitigation Enforcement Case Management Policy and Procedure is to establish the enforcement policy that should normally be followed by the Site Mitigation Branch (SMB) of the Toxic Substances Control Program (TSCP). This enforcement policy will be implemented to accomplish cleanup of hazardous substance release sites by responsible parties (RPs) who are not willing to conduct the response action voluntarily.¹ These RPs are those who: (1) do not voluntarily stipulate to consent orders; (2) fail to comply with an enforceable agreement or other existing order; or (3) the regional office believes will not stipulate to a consent order.

In addition, this policy and procedure establishes a case management approach to be followed in developing an enforcement strategy at these sites. It also identifies and describes the various enforcement actions which may be taken against uncooperative RPs.

BACKGROUND

In June 1989, Management Memo #89-5 signaled a new direction in pursuing enforcement against unresponsive RPs. Management Memo #89-5 provided notice to affected programs in TSCP that enforcement will be used to accomplish cleanup of hazardous substance release sites by RPs where the RPs are not willing to conduct the response action voluntarily. Under this enforcement policy, the Department will take state-financed response actions only in circumstances where there is a threat to public health and/or the environment, and (1) a removal action is necessary on a site which has identified RPs, but the action cannot be postponed while enforcement proceedings are completed; or (2) it is determined that a small, incremental expenditure should be made to allow use of a civil suit for treble damages or cost recovery as an enforcement tool.

¹In this policy and procedure, the term "RPs" refers to one or more responsible parties.

POLICY

Enforcement will be pursued to accomplish cleanup of hazardous substance release sites by RPs where the RPs are not willing to conduct the response action voluntarily under a consent order issued pursuant to H&SC Section 25358.3. If RPs are currently conducting response action pursuant to a Remedial Action Order, Consent Order or Enforceable Agreement issued pursuant to H&SC Section 25355.5, this order need not be replaced by an order issued pursuant to H&SC Section 25358.3 so long as the RPs continue to comply with the order.

Each region will designate a case management team for each hazardous substance release site where enforcement action is anticipated.

In instances where the RPs are not willing to conduct response action voluntarily under a consent order issued pursuant to H&SC Section 25358.3, the case management team may delay pursuing enforcement if it determines that there is no immediate threat to public health or the environment and resources are not available to pursue enforcement immediately.

Case management teams will conduct enforcement evaluations on all sites with nonresponsive RPs and on all sites where the RPs are in violation of an enforceable agreement or an administrative order. As part of this evaluation, the case management team will consider the enforcement options which are described on pages 6 to 21 of this policy and procedure. If the decision is made to issue an order, the case management team may, at its option, issue a letter to the RPs instituting a maximum 90-day negotiation period. This letter will be issued where a limited negotiation period is likely to facilitate an agreement. The purpose of this negotiation period will be to obtain the agreement of RPs to the provisions of a consent order.

Effective immediately TSCP will no longer enter enforceable agreements exclusively pursuant to the authority in Health and Safety Code (H&SC) Section 25355.5. Rather, where RPs accede to enforcement of site cleanup, a consent order will be issued pursuant to H&SC Sections 25358.3 and 25355.5.

To facilitate the implementation of this enforcement policy, it is imperative that an adequate administrative record² be developed and maintained for each site where enforcement will be pursued. It will also be necessary for TSCP to develop evidence of the RPs' liability for the release or threatened release of hazardous substances at these sites.

Although large numbers of criminal referrals are not anticipated in the TSCP's SMB, where criminal activities are suspected pursuant to the crimes described in pages 5 to 6, the regional SMB will refer these cases to the Surveillance and Enforcement Branch (SEB) and the Office of Local Enforcement (OLE) which will investigate and make the referral if appropriate. Concurrent civil or administrative enforcement of site cleanup may proceed in these instances provided it is coordinated with SEB, OLE, and with the prosecuting agency.

PROCEDURE

Each region will designate a Case Management (CM) Team for each site where enforcement action is anticipated. (At its option, a region may also designate a Site Mitigation Enforcement Coordinator.) The CM Team will include, at a minimum, the SM senior, the project manager and an attorney from Toxics Legal Office (TLO). As needed, representatives from the regional SEB and/or Technical Services Support Branch (TSSB), the TLO team leader and/or an assigned Deputy Attorney General may be included on the CM Team. The CM Team will brief the appropriate Public Participation Specialist and Public Information Officer when an enforcement action is identified.

The CM Team will select the most effective enforcement option(s) for a particular site. Prior to the selection of an enforcement alternative for a site, the project manager will complete an enforcement case assessment outline such as that in Attachment A and complete or update a site summary such as that in Attachment B. Then the CM Team will evaluate the site and develop an enforcement strategy for the site. The evaluation will include an assessment of the need for additional potentially responsible (PRP) search activities and information demand letter(s) which may be necessary to develop the case for enforcement.

²See Glossary. A policy and procedure on the site mitigation administrative record will be developed in the near future.

A site summary will be initiated during the Preliminary Endangerment Assessment (PEA) and kept up-to-date throughout the entire site mitigation process. (See Attachment B for a sample site summary.) It is essential to the Department's enforcement effort that site summaries be complete and their information well-documented. A PRP search will often be required to provide the necessary information for each known PRP.

When the CM Team determines that adequate information exists to pursue compliance from the RPs, the SMB either will send a letter to the RPs which will trigger a 90-day negotiation period or select another enforcement option.

An administrative record will also be initiated during the PEA and kept up-to-date throughout the entire site mitigation process. The administrative record provides documentation of the bases for response action decisions at a site. Where guidance documents are relied upon, they should be cited with specificity. If written expert opinion is relied upon, it should be included in the administrative record. If the SMB relies on an oral expert opinion from within the Department, or from an outside agency such as a regional water board or an air district, the opinion should either be reduced to writing by the expert or summarized in writing by the project manager, giving the name and expertise of the expert. These documents should also be in the administrative record.

If the investigation and site assessment have already been completed at a site where the RPs are nonresponsive and the CM Team plans an enforcement action, the administrative record should be reviewed and updated where necessary and maintained throughout the entire enforcement process. A site summary also should be initiated or updated for these sites. This site summary should be maintained throughout the entire site mitigation process.

SITE MITIGATION ENFORCEMENT ALTERNATIVES

The Department's direct enforcement alternatives include criminal, administrative, and civil actions. These actions are described in this section.

While not direct enforcement mechanisms, there are also administrative actions which allow the Department to spend money on response action at a site. Once the Department has spent money it can bring a civil suit for cost recovery under either state law (H&SC Section 25360) or federal law (42 United States Code (USC) Section 9607). The administrative actions which allow the Department to spend money are also described in this section.

1. Criminal Actions

The following sections all are summaries of criminal violations of the Hazardous Waste Control Law (H&SC Section 25100 et seq., referred to hereafter as HWCL). It will not be common for crimes to be discovered at uncontrolled hazardous substance release sites. However, the following crimes all involve "hazardous wastes" which are included within the definition of "hazardous substances." Therefore, the violations may be found at uncontrolled hazardous substance release sites.

a. The knowing disposal, treatment or storage of hazardous waste without a permit is punishable as either a misdemeanor or a felony (H&SC Section 25189.5). This violation also carries a penalty of from \$5,000 to \$100,000 for each day of violation. (If the violation causes great bodily harm, both the prison term and the fine are enhanced.)

b. The knowing (or doing with reckless disregard for the risk) treatment, handling, transportation, disposal or storage of hazardous waste in a manner that causes any unreasonable risk of fire, explosion, serious injury or death is punishable as either a misdemeanor or a felony (H&SC Section 25189.6). This violation also carries a penalty of from \$5,000 to \$250,000 for each day of violation. (If the violation places a person in danger of death or serious injury, the prison term is enhanced.)

c. The knowing burning or incineration of any hazardous waste at a facility without a permit or at any unauthorized point is punishable as either a misdemeanor or a felony (H&SC Section 25189.7). This violation also carries a penalty of from \$5,000 to \$100,000 for each day of violation. (If the violation causes great bodily harm or a substantial probability of death, both the prison term and the fine are enhanced.)

d. The knowing commission of any of several violations can be either a felony or a misdemeanor (H&SC Section 25191). Many violations are specified which fall into the broad categories of (1) falsification, tampering or destroying records required by the HWCL; (2) withholding information regarding a real and substantial danger to public health or safety, when the information is requested by

the Department and is required to carry out the Department's responsibilities under the HWCL; and (3) various transportation and manifest violations. Most of the violations in H&SC Section 25191 are punishable as either misdemeanors or felonies. The penalty range for the violations is from \$500 to \$25,000 for each day of violation.

e. The willful doing of any of the following acts is punishable as a misdemeanor: (1) preventing, interfering with or attempting to impede the work of any authorized representative of the Department in the enforcement of the HWCL; (2) preventing or attempting to prevent this representative from examining any relevant books or records in the conduct of his or her official duties under the HWCL; or (3) preventing or interfering with this representative in preserving evidence of any violation of the HWCL or regulations adopted pursuant to the HWCL (H&SC Section 25195).

f. Except as provided in H&SC Sections 25189.5, 25189.6, 25189.7 and 25191, the violation of any provision of the HWCL or any permit, rule, regulation, standard or requirement issued or adopted pursuant to the HWCL is punishable as a misdemeanor. H&SC Section 25190. (These violations are also punishable in administrative or civil actions. See discussion below.)

2. Administrative Actions

a. Imminent or Substantial Endangerment Order (H&SC Section 25358.3(a)(1)). The Department may issue this order requiring RPs to take response action when it finds that a release or threatened release of hazardous substance at a site may be an imminent or substantial endangerment to public health, welfare or the environment. (See OPP 87-8. Where the circumstances at the site support the finding, this order will be issued as an Imminent and Substantial Endangerment Determination and Order. See Item 4.a.)

[If the RPs fail to comply with the order, the Department may seek any or all of the following in court: compliance with the order, penalties (H&SC Section 25367), cost recovery (H&SC Section 25360), and treble damages (H&SC Section 25359).]

b. Corrective Action Order (H&SC Section 25187). The Department may issue a corrective action order if it determines that there has been a release of a hazardous waste or constituents into the environment from a hazardous waste facility, or if there is a violation of any standard or requirement issued pursuant to the Hazardous Substance Account Act. The RPs may appeal this order and are entitled to an administrative hearing. If the RPs fail to comply with the final order, the Department may make a Determination of Noncompliance pursuant to H&SC Section 25355.5(a) and proceed with a state-funded stabilization action and cost recovery.

[If the RPs fail to comply with a final order the Department may seek penalties and/or an injunction in a court action.]

c. Order requiring owner or operator of a facility or site to conduct monitoring, testing, analysis, and reporting which the Department deems reasonable to ascertain the nature and extent of the hazard (H&SC Section 25187.1). If the Department determines that the presence of any hazardous waste at a facility or site or the release of any hazardous waste from a facility or site may present a substantial hazard to human health or the environment, the Department may issue this order. If the facility or site is not in operation at the time of the Department's determination, and the Department finds that the owner could not reasonably be expected to have actual knowledge of the presence of hazardous waste and of its potential for release, the Department may order the most recent previous owner or operator who could reasonably be expected to have the actual knowledge to carry out the actions specified above.

The order issued pursuant to H&SC Section 25187.1 shall require the person to whom it is issued to submit a proposal for carrying out the required monitoring, testing, analysis, and reporting within 30 days from the issuance of the order. After an opportunity to confer, the Department may require the person to carry out the activities in accordance with the proposal and with any modifications in the proposal the Department finds reasonably necessary to ascertain the nature and extent of the hazard.

If the Department determines that: (1) there is no owner or operator to carry out the activities specified in H&SC Section 25187.1; (2) the action carried out by an owner or operator is unsatisfactory; or (3) the Department cannot initially determine whether there is an owner or operator able to conduct the monitoring, testing, analysis or reporting, the Department may either conduct the activities it deems reasonable, or authorize a local authority or other person to carry out these activities. In either case, the Department may issue an order requiring the owner or operator to reimburse the Department, local authority or other person for the costs of the activities.

[If the RPs fail to comply with either of these orders, the Department may seek a court order directing compliance pursuant to H&SC Section 25181.]

d. Complaint for Penalties for failure to respond to an information request (H&SC Code Sections 25185.6, 25189.2, and 25189.3). If the RPs are "persons" as described in H&SC Section 25185.6 and fail to respond to a request for information from the Department concerning hazardous substances, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation. The RPs may appeal this penalty determination and are entitled to an administrative hearing.

[If an RP fails to pay an assessed penalty which is final, the Department may seek to enforce the penalty in court.]

e. Complaint for Penalties for provision of false information, unauthorized disposal of hazardous waste or other violations of the HWCL (H&SC Sections 25189.2 and 25189.3). If the RPs are "persons" as described in the relevant subdivisions of H&SC Section 25189.2 and provide false information, dispose of hazardous waste at an unauthorized point and/or violate any provision of the HWCL, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation. The RPs may appeal this penalty determination and are entitled to an administrative hearing.

[If an RP fails to pay an assessed penalty which is final, the Department may seek to enforce the penalty in court.]

3. Civil Actions

a. Civil action to abate the imminent or substantial endangerment to public health, welfare or the environment that may result from a release or threatened release of hazardous substances (H&SC Section 25358.3(a)(3)). The Department may request the Attorney General to secure the relief that may be necessary to abate an imminent or substantial endangerment. The Department's finding that an imminent and/or substantial endangerment may exist will be formalized in one of the following ways: an Imminent and Substantial Endangerment Determination and Order, an Imminent or Substantial Endangerment Order, an Imminent and Substantial Endangerment Determination, or an Imminent or Substantial Endangerment Determination. (The relief requested may include enforcement of an administrative I/SE Order, but this is not required.)

b. Civil action for penalties for violation of an administrative I/SE Order (H&SC Section 25367). If the RPs do not comply with an I/SE Order, the Department may file suit for penalties for violation of the order. The penalty available is \$25,000 for each separate violation or, for continuing violations, \$25,000 for each day during which the violation continues.

c. Civil action for treble damages for Department costs incurred when RPs do not comply with an I/SE Order (H&SC Section 25359). If the RPs do not comply with an I/SE Order, the Department may recover three times the amount of any costs incurred by the Department pursuant to the HSAA as a result of the RPs' failure to take action.

d. Civil action for declaratory judgment establishing liability of RPs for future response costs

³The terms "imminent and substantial endangerment" and "imminent or substantial endangerment" will in some cases hereafter be referred to "I/SE" where the term means either "imminent and..." or "imminent or...."

(H&SC Section 25358.3(a)(3) or 42 USC Section 9607). The Department may ask the court to issue a declaratory judgment that finds the RPs are liable for future cleanup costs. In state court this relief must be preceded by a determination that there may be an imminent or substantial endangerment at the site. (See Item 3.a. above.) This determination will be formalized in an I/SE Order or Determination. In federal court this relief is available when the Department brings a cost recovery action pursuant to CERCLA. (See Item 3.k. below.)

e. Civil action to enforce an enforceable agreement or consent order entered pursuant to H&SC Section 25355.5. The Department may seek to enforce an agreement or consent order entered pursuant to H&SC Section 25355.5, if the RPs violate the agreement or consent order.

f. Civil action for penalties for failure to respond to an information request (H&SC Sections 25185.6 and 25189 and/or 25189.2). If the RPs are "persons" described in H&SC Section 25185.6 and fail to respond to a request for information from the Department concerning hazardous substances, hazardous wastes or hazardous materials, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation.

g. Civil action for penalties for failure to respond to an information request (H&SC Sections 25358.1 and 25367(b)). If the RPs are "persons" described in Health and Safety Code Section 25358.1 and intentionally fail to respond to a request for information from the Department concerning hazardous substances, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation.

h. Civil action for penalties for providing false information (H&SC Sections 25189 and/or 25189.2 and/or 25358.1 and 25367(a)). If the RPs are "persons" as described in H&SC Sections 25189(a) and/or 25189.2(a) and provide false information to the Department, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation. If the RPs are "persons" as described in H&SC Section 25358.1 and provide false information to the Department, the Department may seek penalties of up

to \$25,000 per violation or \$25,000 per day for each continuing violation.

i. Civil action for penalties for unauthorized disposal of hazardous waste or other violation of the HWCL (H&SC Sections 25189 and/or 25189.2). If the RPs are "persons" as described in relevant subdivisions of Health and Safety Code Sections 25189 and/or 25189.2 and dispose of a hazardous waste at an unauthorized point or otherwise violate the HWCL, the Department may seek penalties of up to \$25,000 per violation or \$25,000 per day for each continuing violation.

j. Civil action to recover the Department's oversight costs, response costs and/or costs of pursuing enforcement under state law (H&SC Section 25360). The Department may seek recovery of its costs under either state or federal law. (See Item 3.k. below.) State law provides for apportionment of liability (H&SC Section 25363). State law also provides that where a court enters a judgment for past costs, the court must retain jurisdiction over the case to determine future liability and the amount of future costs owed by the RPs (H&SC Section 25360.4(c)).

k. Civil action to recover the Department's oversight costs, response costs and/or costs of pursuing enforcement under federal law (42 USC Section 9607). Joint and several liability is available under federal law. Further, CERCLA requires that in a cost recovery action brought pursuant to Section 9607 the court must enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent cost recovery action(s). (See Item 3.d. above.)

l. Injunction to abate a public nuisance (H&SC Section 206). If the circumstances at the site constitute a public nuisance, the Department may seek an injunction requiring the RPs to abate the nuisance.

m. Injunction to abate violations of the HWCL (H&SC Section 25181). If the RPs have committed violations of the HWCL or failed to comply with final orders issued pursuant to the HWCL, the Department may seek a court order enjoining the violations or an order directing compliance.

4. Administrative Actions that Allow the Department to Spend Money

As indicated in the introduction to this section, these actions which allow the expenditure of state funds, although not direct enforcement tools, may have the effect of achieving RP compliance when the Department pursues cost recovery.

a. Imminent and Substantial Endangerment Determination (H&SC Section 25355.5(b)(3)). The Department may spend money if it determines that a release or threatened release of hazardous substances at a site may constitute an imminent and substantial endangerment. The Department will formalize its finding that an imminent and substantial endangerment exists by issuing an Imminent and Substantial Endangerment Determination.

b. Remedial Action Order and Determination of Noncompliance (H&SC Section 25355.5(a)). The Department may issue a Remedial Action Order requiring the RPs to take a response action. If the RPs do not comply with the order, the Department may spend money after completing the Determination of Noncompliance Procedure (OPP #87-1).

c. Corrective Action Order and Determination of Noncompliance (H&SC Section 25355.5(a)). As indicated above in Item 2.b., if the RPs fail to comply with the final Corrective Action Order, the Department may make a Determination of Noncompliance (H&SC Section 25355.5(a)), conduct a state-funded stabilization action and pursue cost recovery.

GLOSSARY

1. Administrative Action
An administrative action is an enforcement action that is pursued administratively, rather than in court. The Department issues a complaint and/or order, and the hearing, if one is required by law and requested by the respondent, is conducted by the Office of Administrative Hearings. Administrative Law Judges preside over these hearings, which are similar to court trials, and render opinions. These opinions may be appealed to court by the respondent. Similarly, the Department may seek enforcement of the hearing decision in court. Where no administrative hearing is provided in law, the respondent may appeal the administrative order in court and/or the Department may seek enforcement in court.
2. Administrative Record
The administrative record contains the documents that indicate the basis for the selection of a response action to a release or threatened release of hazardous substances.
3. Civil Action
A civil action is any lawsuit which is not a criminal action. In this policy and procedure, the term civil action refers to an enforcement action in which the complaint is filed and the proceedings are conducted in court.
4. Crime
A crime is an act or public offense in violation of law which carries the following penalties upon conviction: death, imprisonment, fine, removal from office or disqualification to hold office (Pen. Code Section 15). Crimes include felonies, misdemeanors and infractions (Pen. Code Section 16).
5. Declaratory Judgment
A declaratory judgment is an action in which the court declares the rights of the parties or expresses the opinion of the court on a question of law without ordering anything to be done.

6. Injunction
An injunction is a court order requiring a person to do or refrain from doing a particular act. ("Enjoin" is the verb form of injunction.)
7. Penalty
A penalty is a provision in statute for the payment of money as a punishment.
8. Public Nuisance
Civil Code Section 3479 provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." Civil Code Section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."
9. Removal Actions
See H&SC Section 25323. The term "removal action" includes activities which are sometimes referred to as "interim remedial measures."
10. Treble Damages
A person who is liable for a release or threatened release of hazardous substances and who fails, without sufficient cause, to provide the removal or remedial action required by an order issued pursuant to H&SC Section 25358.3 is liable to the Department for punitive damages up to three times the costs incurred by the Department as a result of the failure. These punitive damages are sometimes referred to as treble damages. (See H&SC Section 25359.)