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*Secretary for
Environmental Protection*

California Environmental Protection Agency

Unified Program Bulletin
0910-02

DATE: March 29, 2010
TO: All Certified Unified Program Agencies
FROM: Unified Program Section
SUBJECT: Formal Enforcement Action Guidance for Environmental Violations

PURPOSE

The purpose of this bulletin is to clarify the Unified Program's standards regarding how to determine whether a Certified Unified Program Agency (CUPA) is taking appropriate enforcement actions where severe violations are identified.

BACKGROUND

The Unified Program consolidates, coordinates, and makes consistent the administrative requirements, permits, inspections, and enforcement activities of six environmental and emergency response programs. Its mission is to protect public health and safety, to restore and enhance environmental quality, and sustain economic vitality through effective and efficient implementation of the six programs. The Unified Program takes its fundamental enforcement structure from the implementing statutes of the six unified program elements. This creates a significant level of complexity because not only is each CUPA's enforcement program governed by the federal and state laws and regulations, but also by local ordinances and codes.

On a triennial basis U.S. EPA conducts an assessment, called the State Review Framework that provides a consistent tool by which EPA regions determine whether delegated state programs meet agreed upon performance levels that provide environmental and public health protection across the nation. Program elements within the Unified Program that are not federally delegated must meet the state compliance and enforcement standards as prescribed in state law and regulations.

The responsible state agencies for each program element are as listed.

- Hazardous Materials Release Response Plans and Inventories (Business Plans) – California Emergency Management Agency (CalEMA)
- California Accidental Release Prevention (CalARP) Program - (CalEMA)
- Underground Storage Tank Program – State Water Resources Control Board (SWRCB)
- Aboveground Petroleum Storage Act (APSA) Program - (Cal/EPA)
- Hazardous Waste Generator and Onsite Hazardous Waste Treatment (tiered permitting) Programs – Department of Toxic Substances Control (DTSC)
- California Uniform Fire Code: Hazardous Material Management Plans and Hazardous Material Inventory Statements – Office of the State Fire Marshal (OSFM)

U.S. EPA uses the December 2003 - Hazardous Waste Civil Enforcement Response Policy as guidance and policy to determine whether U.S. EPA Regions and States are addressing violations of environmental law with a timely and appropriate enforcement response. U.S. EPA expects that all RCRA hazardous waste violations, whether meeting the Significant Non-Complier (SNC) criteria or not, should be addressed by U.S. EPA or the States. DTSC is compelled to take formal action based upon the memorandum of agreement (MOA) between U.S. EPA and the state to follow the formal enforcement policies within U.S. EPA's Hazardous Waste Civil Enforcement Response Policy¹. This MOA was entered into pursuant to 40 CFR 271.8 and sets forth policies, responsibilities, and procedures for the administration and enforcement of the State of California's RCRA hazardous waste program that is authorized under section 3006 of the federal Resource Conservation and Recovery Act of 1976, as amended. DTSC retains ultimate responsibility for the delegated program, even if specific tasks are delegated to other state or local agencies. No similar MOA exists between DTSC and the CUPAs that mandate implementation of federal policy guidance for appropriate enforcement response.

In the course of conducting CUPA evaluations, Cal/EPA has noted recurring deficiencies exist for lack of appropriate enforcement in findings for Class I or Priority violations across all of the program elements. It has, however, been noted by several CUPAs that there is no law to compel them to do formal enforcement for Class I violations, more so within the RCRA hazardous waste programs. At issue is the clarification of California regulations and policy that provide for consistent and similar determinations of violation classifications and acceptable enforcement responses that are similar between one and all CUPAs throughout the state. Some CUPAs dispute the Cal/EPA Unified Program's requirement that formal enforcement for major/priority violations is required because of the absence of federal or state law dictating so within the program elements of the Unified Program.

This policy dispute creates an inconsistent enforcement policy between the state and the delegated local governments that risks the state's compliance with the State RCRA grant and the MOA between DTSC and U. S. EPA Region IX. This also causes inconsistent enforcement among the Aboveground Storage Tank, Underground Storage Tank, CalARP, HMRRP, and California Fire Code programs that are regulated by Unified Program Agencies.

ANALYSIS

California Code of Regulations (Cal. Code Regs.), Title 27, requires that CUPAs shall develop and implement an Inspection and Enforcement Plan. Within the Inspection and Enforcement Plan, Cal. Code Regs., Title 27, section 15200 (a)(8) requires identification of penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute or regulation. Section 15200 (a) (9) requires a graduated series of enforcement actions that may be taken, based on the severity of the violation. The requirement for appropriate enforcement response is addressed by the required use of a graduated series of enforcements for when violations of environmental law are noted and the statutory requirements for compliance and enforcement of each program element that is required with the Inspection and Enforcement Plan.

Some of the program elements within the Unified Program are required by federal and state law to impose specific enforcement action and sanctions for specific acts of non-compliance, while other environmental programs provide for more discretionary judgment in determining

¹ See <http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf>

appropriate enforcement actions for violations of environmental law. Statewide consistency among CUPAs and programs elements are program mandates in Cal. Code Regs., Title 27 and Health and Safety Code (Health & Saf. Code), section 25180(d). In addition, Health & Saf. Code, section 25404.6(b) instructs the Cal/EPA Secretary to implement the Unified Program only to the extent it does not endanger RCRA authorization.

The Unified Program developed a Violation Classification Guidance Document² that translates different terminology across the different Unified Program elements within agreed upon definitions of Class I, Class II, and minor violations. The Violation Classification Guidance Document for Unified Program Agencies was developed to create a standard classification protocol for all Unified Program violations.

A graduated series of enforcement actions based on severity of violation is interpreted by Cal/EPA to mean that for less severe violations, informal enforcement actions can be taken, but for more severe violations, the enforcement is elevated above informal enforcement. Equal enforcement actions for facilities with minor and Class I violations, is therefore contradictory to the statutory and regulatory requirement.

ACTION PLAN

In order to comply with the requirements of both federal and state program mandates, Cal/EPA shall require that CUPAs implement a consistent enforcement response that is in compliance with the individual program requirements and Cal/EPA regulations.

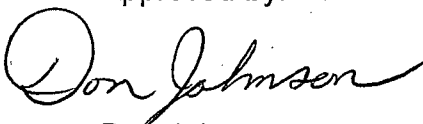
The standards for determining appropriate enforcement responses, while accommodating differing standards of implementation shall at a minimum include the implementation of graduated series of enforcements based on the severity of violation as prescribed with the Inspection and Enforcement Plan. The requirement to fully implement the Inspection and Enforcement Plan as mandated in Title 27, in addition to enforcement standards for individual program areas as defined by either federal or state law, will be verified by the CUPA evaluation process and annual report submittals as prescribed in state law.

Failure to initiate either formal enforcement action or to follow a graduated series of enforcement as prescribed within the CUPA's Inspection and Enforcement Plan is a contradiction of state law and shall be identified during the CUPA evaluation process as a deficiency of the CUPA's enforcement program.

QUESTIONS

Please direct all questions regarding this policy to Jim Bohon, Unified Program Manager, (916) 327-5097 or jbohon@calepa.ca.gov.

Approved by:



Don Johnson
Assistant Secretary
Local Programs and Emergency Response

² See <http://www.calepa.ca.gov/CUPA/Documents/Inspection/ViolationGuide.pdf>

STATUTORY REFERENCES:

Underground Storage Tanks (USTs). Health & Saf. Code, section 25292.3(a) defines Red Tag procedures, and additionally for violations of Health & Saf. Code Chapter 6.7, ...violators shall be liable for penalties as provided in section 25299 (a-c):

- a. Health & Saf. Code, section 25299 (a) and (b) call for penalties no less than \$500 or no more than \$5,000 per day, per violation, per Underground Storage Tank.
- b. For violations of Health & Saf. Code, section 25299 (c), the respondent is liable for no more than \$5,000 per day, per violation, per Underground Storage Tank.
- c. The following matrix will be used to determine initial penalty for an underground storage tank system violation:

Hazardous Waste - For violations of Health & Saf. Code, Chapter 6.5, the violator shall be liable for penalties as provided in section 25189.2 (a-d) and Cal. Code Regs., Title 22, sections 66272.60-.69. Hazardous waste violations are defined in Health & Saf. Code, §§ 25110.8.5, 25117.6, and Cal. Code Regs., section 66260.10

California Accidental Release Prevention (Cal-ARP) Program - a. Chapter 6.95, Article 2 of the Health & Saf. Code stipulates regulatory requirements that must be followed by businesses or facilities that store or maintain acutely hazardous materials in quantities above threshold levels.

Pursuant to Chapter 6.95, Article 2, section 25540(a) of the Health & Saf. Code, any stationary source that violates this article shall be liable in the amount of not less than \$2,000 per day in which the violation occurs. Pursuant to Chapter 6.95, Article 2, section 25540(b) of the Health & Saf. Code, any stationary source that knowingly violates this article after reasonable notice of the violation shall be liable in an amount not to exceed \$25,000 per day for each day in which the violation occurs.

Above Ground Storage Tank (AST) Program.

For violations of Health & Saf. Code, section 25270.12, the violator shall be liable for a penalty of not more than \$5,000 for each day on which the violation continues. If the violator commits a second or subsequent violation, a penalty of not more than \$10,000 for each day on which the violation continues may be imposed.

Hazardous Materials Business Plan Program (HMBP). For violations of Health & Saf. Code, section 25514.5. Any business/facility that violates Article 1, Chapter 6.95, Division 20 of the Health & Saf. Code is liable for an amount not greater than \$2,000 for each day in which the violation occurs, or greater than \$5,000 for each day in which the violation occurs for any business that knowingly violates after reasonable notice of the violation.