

**Department of Toxic Substances Control
Official Policy**

**SHARING ADMINISTRATIVE
PENALTY CALCULATION INFORMATION**

DTSC-OP-0007

Subject/Title of Policy

Official Policy Number

DTSC-OP-007 (01/30/2009 and EO-03-001-PP)

07/15/2016

Supersedes Number(s)

Date Issued/Effective Date

All Staff

Hazardous Waste Management Program

Target Audience

Issuing Unit

Barbara A. Lee

Director

Name

Title of Approving Authority

Original signed by Barbara A. Lee

7/15/16

Signature

Date Signed

Statutory Reference(s):

Health and Safety Code section 25001, et seq., and its implementing regulations.

This Policy and any internal procedures adopted for its implementation are intended solely as guidance. This policy does not constitute a rulemaking by the Department and may not be relied upon to create a specific right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department may take action at variance with this policy or any internal implementing procedures.

This policy expires five years from the date of signature.

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I. PURPOSE

This policy provides the Department of Toxic and Substances Control (DTSC) staff guidance regarding how and when privileged penalty calculation information may be shared with Respondents (a party against whom a legal petition is filed) or their representatives during settlement negotiations for administrative orders under the Hazardous Waste Control Law (Health and Safety Code section 25100 et seq.).

II. BACKGROUND

This policy supersedes DTSC-OP-0007 (01/30/2009) and EO-03-001-PP.

III. STATUTORY AUTHORITY

The Health and Safety Code section 25187 authorizes DTSC or a unified program agency to issue an order requiring that a violation be corrected and impose an administrative penalty for any violation of chapter 6.5 of the Health and Safety Code or any permit, rule, regulation, standard or requirement issued or adopted pursuant to this chapter. The California Code of Regulations, title 22, division 4.5, article 3, provides for the calculation of administrative penalties in accordance with Health and Safety Code Section 25187.

IV. POLICY

- A. On a case-by-case basis, the following privileged penalty calculation information may be shared orally with the Respondent or the Respondent's representative to facilitate meaningful settlement negotiations regarding an administrative order.
1. Identification of the most significant violations, an explanation as to why these violations are considered significant, the percent of the total penalty attributable to each, and the base penalty for each of these violations. For the purposes of these guidelines, the "most significant violations" in any given negotiation shall mean those violations that DTSC determines to have the greatest relative potential for harm to the environment or to public health and safety. The "most significant violations" will normally include those violations that individually constitute 10 - 20 percent of the total proposed penalty amount.
 2. Identification of any factors (e.g., compliance history) for which penalty adjustments were increased or decreased and a brief explanation as to why these factors warrant penalty adjustments.
 3. Economic benefit information, including the amount of economic benefit and basis for the amount.

4. Identification of those violations for which multi-day penalties have been assessed, including the number of days.
- B. Penalty calculation information may be shared with the Respondent under the following conditions:
1. After consulting and with the concurrence of the assigned Office of Legal Counsel (OLC) Attorney. If the case does not already have an assigned OLC Attorney, all penalty information should be provided to OLC with a request for consultation.
 2. Subject to the provisions of California Evidence Code sections 1152 and 1154, and Federal Rule of Evidence 408, that restrict the admissibility of statements made in settlement negotiations; and an explicit waiver of attorney-client and attorney-work product privileges as to that specific information only. DTSC will explicitly retain all relevant privileges as to all other information.
 3. Orally, and with the admonition that penalty calculations remain subject to change until an agreement is reached.
 4. After substantial agreement on the facts and gravity of the violations has been achieved.
 5. After a case has been referred to the Office of the Attorney General and DTSC consults with the assigned Deputy Attorney General in all decisions regarding settlement negotiations.
- C. This policy is intended to foster open and productive negotiations while appropriately preserving DTSC's privileges with respect to future hearings, trials or Public Record Act obligations. However, this policy neither requires nor forbids the disclosure of penalty calculation information in full or in part. DTSC believes that there are circumstances where either complete disclosure or non-disclosure of penalty calculation information is appropriate; but these circumstances are not typical. The timing and extent of disclosure of information shall be within the sound discretion of the DTSC negotiating team, in consultation with the assigned Deputy Attorney General, if any.