

Department of Toxic Substances Control
Official Policy

STATUTORY LIEN POLICY AND PROCEDURES

DTSC-OP-036

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- Lien Placement Policy and Procedure (EO-96-007-PP) (Jan. 16, 1997)

Supersedes

All Staff

Brownfields and Environmental Restoration Program

Target Audience

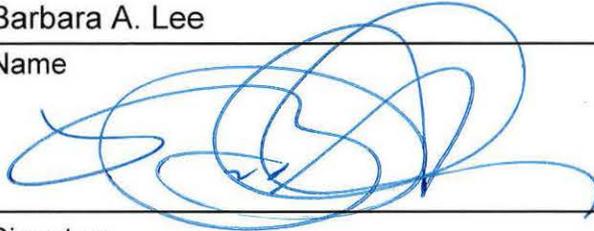
Issuing Unit

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Title of Approving Authority



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Signature

Date Signed

Statutory Reference(s):

California Health and Safety Code section 25365.6

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I. POLICY STATEMENT

It is the policy of the Department of Toxic Substances Control (DTSC or the "Department") to utilize statutory liens pursuant to Health & Safety Code section 25365.6 ("Section 25365.6") as a tool to secure unreimbursed response costs incurred by the Department in conducting or overseeing response actions pursuant to the Hazardous Substance Account Act, Health & Safety Code division 20, chapter 6.8, section 25300 et seq. (HSAA). A statutory lien is one cost recovery tool available to the Department and will be used, individually or with other available cost recovery tools, when appropriate and in the Department's sole discretion.¹

II. PURPOSE

The purpose of this document is to establish guidance on the use of statutory liens and set forth the Department's procedures for recording statutory liens pursuant to Section 25365.6 to secure recovery of the Department's unreimbursed response costs.²

III. STATUTORY AUTHORITY

Section 25365.6, "Lien for costs and damages," expressly provides:

(a) Any costs or damages incurred by the department or regional board pursuant to this chapter constitutes a claim and lien upon the real property owned by the responsible party that is subject to, or affected by, the removal and remedial action. This lien shall attach regardless of whether the responsible party is insolvent. A lien established by this section shall be subject to the notice and hearing procedures required by due process of the law and shall arise at the time costs are first incurred by the department or regional board with respect to a response action at the site.

¹ 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.

² This policy does not apply to judgment liens—liens imposed pursuant to judgments issued by a court of law, including Hazardous Waste Control Law administrative orders that have been converted to civil judgments.

(b) The department shall not be considered a responsible party for a hazardous substance release site because a claim and lien is imposed pursuant to this section.

(c) The lien provided by this section shall continue until the liability for these costs or damages, or a judgment against the responsible party, is satisfied. However, if it is determined by the court that the judgment against the responsible party will not be satisfied, the department may exercise its rights under the lien.

(d) The lien imposed by this section shall have the force and effect of, and the priority of, a judgment lien upon its recordation in the county in which the property subject to the lien is located. The lien shall contain the legal description of the real property, the assessor's parcel number, and the name of the owner of record, as shown on the latest equalized assessment roll. The lien shall also contain a legal description of the property which is the site of the hazardous substance release, the assessor's parcel number for that property, and the name of the owner of record, as shown on the latest equalized assessment roll, of that property.

(e) All funds recovered pursuant to this section shall be deposited in the state account.

IV. DEFINITIONS

Relevant terms are defined in Appendix A for ease of reference only. Statutory terms and definitions may change as a result of legislative amendments. The most recent statutory code sections should always be consulted for current definitions.

V. STATUTORY LIEN PLACEMENT PROCEDURES

Section 25365.6, subdivision (a), provides that “[a]ny costs or damages incurred by the department ... pursuant to this chapter [the HSAA] constitutes a claim and lien upon the real property owned by the responsible party that is subject to, or affected by, the removal and remedial action.” “A lien established by this section shall be subject to the notice and hearing procedures required by due process of the law and shall arise at the time costs are first incurred by the department ... with respect to a response action at the site.”

Although Section 25365.6 provides that a lien arises when response costs are first incurred by the Department, certain conditions must be met in order to create a legally enforceable lien for unreimbursed response costs. The Department must

“perfect” a statutory lien on real property “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSA by: (1) providing notice and an opportunity to be heard to the current property owner; and (2) recording the lien with the county recorder’s office in the county where the real property is located. (Health & Saf. Code, § 25365.6, subds. (a), (d).)

Remediating on-site contamination often increases the value of the real property, and recording a statutory lien protects the Department by securing any unreimbursed response costs incurred by the Department and providing an avenue for the Department to potentially recover those costs. The Department may record a statutory lien on real property during or after completion of the response action. However, if the Department records a statutory lien on real property during a response action, the Department may record another statutory lien to secure any unreimbursed response costs incurred by the Department after recording the initial lien (see Section VI, Statutory Liens for Subsequently Incurred Response Costs).

A. Initial Considerations

As discussed in more detail below, a statutory lien may be recorded if, based on the information available to the Department, the Department has a reasonable basis to believe that:

1. The current property owner is a “responsible party” or “liable person” as defined in Health & Safety Code section 25323.5;
2. The lien amount to be imposed or increased does not exceed the Department’s unreimbursed response costs;
3. The real property was “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSA;
4. The current property owner failed to establish a valid defense pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq. (CERCLA);³ and
5. A statutory lien may be recorded on the real property in compliance with Section 25365.6.

³ The current property owner bears the burden of establishing defenses to liability and challenging the Department’s unreimbursed response costs as inconsistent with the National Contingency Plan (see 42 U.S.C. § 9607(a)(4)(A)).

The decision to initiate the statutory lien process by issuing a Notice of Intent to Record Statutory Lien is discretionary, and the Department will carefully evaluate whether to record a statutory lien whenever the Department's response costs remain unreimbursed. A number of factors may be relevant to the Department's decision to record a statutory lien, including, but not limited to:

- The amount of response costs incurred by the Department that remains unreimbursed.
- The value of the property post-remediation.
- The likelihood that the current property owner will file for bankruptcy.
- The likelihood that the current property owner will sell the property.
- Whether the real property is the chief or a substantial asset of the owner.

B. Statutory Lien Filing Record

In order to determine whether it is appropriate to issue a Notice of Intent to Record Statutory Lien, the Department will compile a Lien Filing Record. The Lien Filing Record will form the basis for the Department's decision to issue a Notice of Intent to Record Statutory Lien and will consist of documents and information supporting the Department's position that recording a lien pursuant to Section 25365.6 is appropriate. At the time of the issuance of the Notice of Intent to Record Statutory Lien, the Lien Filing Record will include, at a minimum, the following:

1. Documents and information confirming the identity of the current property owner⁴ and documenting the current property owner's ownership of the property (e.g., through deed, title search, Tax Assessor and/or county recorder's office documents), as well as a legal description of the real property on which the Department seeks to record the statutory lien;
2. Documents and information supporting the Department's determination that the current property owner is a "responsible party" or "liable person" as defined in Health & Safety Code section 25323.5;

⁴ Section 25365.5, subdivision (d), requires the Department to identify the current owner of record as shown on the latest Tax Assessor's equalized assessment roll.

3. Documents and information demonstrating that the real property was “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSAA;
4. Documents and information demonstrating that the amount of the lien or lien increase reflects the unreimbursed response costs incurred by the Department; and
5. Invoices, collection letters, demand letters, invoice dispute letters, including Department responses, and any other documents demonstrating the Department’s billing and collection efforts and the current property owner’s opportunities to dispute the Department’s claimed response costs (see Section V.C.1, Billing and Collection Efforts).

If, based on the documents and information in the Lien Filing Record, the Department elects to issue a Notice of Intent to Record Statutory Lien, the following additional documents and information will be added to the Lien Filing Record:

1. The Notice of Intent to Record Statutory Lien package (see Section V.C.2, Issuance of a Notice of Intent to Record Statutory Lien to the Current Property Owner);
2. The current property owner’s response, if any, to the Notice of Intent to Record Statutory Lien package, as well as any written correspondence exchanged between the current property owner and the Department regarding the notice (see Section V.C.3, The Department’s Response to Objections by or Requests from the Current Property Owner);
3. If the current property owner requests a hearing challenging the recording of a statutory lien on real property:
 - a. The Notice of Assignment of Neutral DTSC Official package (see Appendix B, Section 2, Selection of Neutral DTSC Official);
 - b. The Notice of Statutory Lien Hearing (see Appendix B, Section 3, Scheduling the Statutory Lien Hearing);
 - c. Any and all documents evidencing communications between the Neutral DTSC Official and any parties or interested persons, including any ex parte communications that occurred, regarding the real property “subject to, or affected by,” a “response action”

conducted or overseen by the Department pursuant to the HSAA (see Appendix B, Section 4, Prohibition on Ex Parte Communications);

- d. The current property owner's request, if any, for disqualification of the Neutral DTSC Official and any and all documents evidencing communication between the Neutral DTSC Official and any parties or interested persons regarding the current property owner's request (see Appendix B, Section 5, Disqualification of Neutral DTSC Official);
 - e. The Notice of Statutory Lien Hearing Transcript package (see Appendix B, Section 6, The Statutory Lien Hearing); and
 - f. The Notice of Statutory Lien Hearing Decision (see Appendix B, Section 7, Statutory Lien Hearing Decision).
4. The Statutory Lien Transmittal Letter package and Notice of Recording of Statutory Lien package (see Section V.D, Recording the Statutory Lien); and
 5. The Release of Statutory Lien Transmittal Letter package and Notice of Recording of Release of Statutory Lien package, if the statutory lien has been released (see Section VII, Satisfaction and Release of Statutory Liens).

The Lien Filing Record will be maintained by Department staff in the regional office overseeing the response action for the real property that is subject to, or potentially subject to, the statutory lien, and will be maintained in connection with the site file. Upon reasonable notice to the Department, the Lien Filing Record will be made available to the public, including the current property owner, for review at the appropriate regional office. Alternatively, a person may pay the Department to make a copy of the Lien Filing Record and send it to the requestor within 10 business days of receipt of the request. The cost to the requestor is \$0.15 per page. A request for a copy of the Lien Filing Record must be made in writing. A person seeking a copy of the Lien Filing Record may also arrange for a copy service to make a copy of the record at the requestor's expense.

C. Decision to Record Statutory Lien

Department staff seeking to record a statutory lien on real property "subject to, or affected by," a "response action" conducted or overseen by the Department

pursuant to the HSAA will involve a "Department Attorney" in the decision-making process. The Department Attorney is assigned by DTSC's Office of Legal Counsel. The Department Attorney will also represent the Department in communicating, if necessary, with the current property owner, or the current property owner's legal representative, if one is identified, regarding the statutory lien and in the hearing before a Neutral DTSC Official, if a hearing is requested by the current property owner.

As further described below, prior to recording a statutory lien, the Department will:

1. Conduct billing and collection efforts directed at the current property owner;
2. If the Department's billing and collection efforts are unsuccessful, issue a Notice of Intent to Record Statutory Lien; and
3. Respond to objections and/or requests by the current property owner, and, if requested, hold a hearing and issue a final decision (issued by the Neutral DTSC Official) regarding the current property owners' challenges to the recording of the statutory lien.

1. Billing and Collection Efforts

Prior to issuing a Notice of Intent to Record Statutory Lien, the Department will conduct billing and collection efforts directed at the current property owner in an attempt to recover the Department's unreimbursed response costs.

The Department will attempt to issue at least one (1) invoice and two (2) collection letters to the current property owner for all unreimbursed response costs potentially subject to the lien prior to issuing a Notice of Intent to Record Statutory Lien. There may be circumstances, however, where it may not be feasible or reasonable for the Department to wait to issue one (1) invoice and two (2) collection letters to the current property owner prior to issuing a Notice of Intent to Record Statutory Lien. In such cases, the Department will send a demand letter to the current property owner via Certified Mail requesting reimbursement of the Department's unreimbursed response costs. Included with the demand will be a Cost Recovery Billing Unit-generated invoice for the unreimbursed response costs.

Included with every invoice, including those enclosed with a demand letter, will be a copy of the Department's Cost Recovery and Reimbursement Policy, which provides parties with 45 calendar days from the date of the invoice within which to submit an invoice dispute. The Department may not issue a Notice of Intent to Record Statutory Lien during the 45-calendar day invoice dispute period. If the

current property owner disputes the Department's invoice, then the Department may not issue a Notice of Intent to Record Statutory Lien until it ensures that it has reasonably attempted to respond to and resolve all inquiries and/or disputes from the current property owner regarding the unreimbursed response costs potentially subject to the statutory lien. If the response costs remain unreimbursed despite reasonable invoice dispute resolution efforts, then the Department may proceed to issue a Notice of Intent to Record Statutory Lien, provided the Department continues to have a reasonable basis to believe that a statutory lien may be recorded on the real property in compliance with Section 25365.6.

Department staff will place in the Lien Filing Record copies of invoices, collection letters, demand letters, invoice dispute letters, including Department responses, and any other documents or information demonstrating the Department's billing and collection efforts and the current property owner's opportunities to dispute the Department's claimed response costs.

2. Issuance of a Notice of Intent to Record Statutory Lien to the Current Property Owner

Section 25365.6, subdivision (a), provides that "[a] lien established by this section shall be subject to the notice and hearing procedures required by due process of the law" Accordingly, if any Department response costs remain unreimbursed after it has conducted the billing and collection efforts described above and the Department reasonably believes, based on documents and/or information contained in the Lien Filing Record, that it may record a statutory lien on the real property pursuant to Section 25365.6, then the Department will send the current property owner a Notice of Intent to Record Statutory Lien via Certified Mail.

The Notice of Intent to Record Statutory Lien will identify and describe the real property on which the Department seeks to record the statutory lien, outline the Department's basis for recording the lien pursuant to Section 25365.6, and detail the Department's previous billing and collection efforts. The Notice of Intent to Record Statutory Lien will also provide the current property owner with 30 calendar days within which to: (1) request to review or obtain a copy of the Lien Filing Record; (2) submit written objections, documents, or information challenging the recording of the lien; and/or (3) request a hearing before a Neutral DTSC Official to challenge the recording of the statutory lien.

Enclosed with the Notice of Intent to Record Statutory Lien will be a copy of the proposed Statutory Lien, marked "Draft." Pursuant to Section 25365.6, subdivision (d), the proposed Statutory Lien must "contain the legal description of the real property, the assessor's parcel number, and the name of the owner of record [of

the property subject to the statutory lien], as shown on the latest equalized assessment roll.” “The lien shall also contain a legal description of the property which is the site of the hazardous substance release, the assessor’s parcel number for that property, and the name of the owner of record, as shown on the latest equalized assessment roll, of that property.” The proposed Statutory Lien will also identify the amount of the Department’s statutory lien and a description of the scope and enforceability of the lien as stated in Section 25365.6.

A copy of the Department’s Statutory Lien Policy and Procedures will also be enclosed with the Notice of Intent to Record Statutory Lien.

The Notice of Intent to Record Statutory Lien package will be sent to the current property owner via Certified Mail.⁵ If the current property owner refuses to accept service of the package via Certified Mail, the Department will institute alternative service pursuant to California law. A copy of the Notice of Intent to Record Statutory Lien package, including proof of service, will be placed in the Lien Filing Record and uploaded to the EnviroStor⁶ profile for the site.

3. The Department’s Response to Objections by or Requests from by the Current Property Owner

Within 30 calendar days from the date of receipt of the Notice of Intent to Record Statutory Lien, the current property owner may:

- 1. Request to review or obtain a copy of the Lien Filing Record;**
- 2. Submit written objections, documents, or information challenging the recording of the statutory lien; and/or**
- 3. Request a hearing before a Neutral DTSC Official challenging the recording of the statutory lien.**

Although the Department’s response may differ depending on the current property owner’s response, general guidelines for responding are outlined below. The Department’s response(s) to the current property owner will be sent via Certified Mail unless the current property owner has consented to electronic service. Copies of all correspondence with the current property owner regarding the Department’s Notice of Intent to Record Statutory Lien will be placed in the

⁵ The Notice of Intent to Record Statutory Lien will also contain information on how the current property owner can elect to be served with future correspondence by email rather than Certified Mail.

⁶ The Department’s EnviroStor database is an electronic database that provide information to the public regarding environmental cleanups and permitted facilities in their communities. EnviroStor can be accessed at <http://www.envirostor.dtsc.ca.gov/public/>.

Lien Filing Record. If any documents were served via email, copies of the transmittal emails will also be placed in the Lien Filing Record.

a. If the Current Property Owner Fails to Submit Written Objections, Documents, or Information and/or Request a Hearing Before a Neutral DTSC Official Challenging the Recording of the Statutory Lien.

If, within 30 calendar days from the date of receipt of the Notice of Intent to Record Statutory Lien, the current property owner fails to submit written objections, documents, or information and/or request a hearing before a Neutral DTSC Official challenging the recording of the statutory lien and the Department continues to have a reasonable basis to believe that a statutory lien may be recorded on the real property in compliance with Section 25365.6, then the Department may proceed to record the statutory lien pursuant to the procedures outlined below (see Section V.D., Recording the Statutory Lien).

b. If the Current Property Owner Requests to Review or Obtain a Copy of the Lien Filing Record.⁷

If the current property owner requests to view the Lien Filing Record, then Department staff will work with the current property owner to identify a mutually acceptable date and time for the current property owner to visit the appropriate regional office to view the Lien Filing Record. Alternatively, the current property owner may pay the Department to make a copy of the Lien Filing Record and send it to the current property owner within 10 business days of receipt of the request. The cost for copies is \$0.15 per page. A request for a copy of the Lien Filing Record must be made in writing. The current property owner may also arrange for a copy service to make a copy of the Lien Filing Record at the current property owner's expense.

c. If the Current Property Owner Submits Written Objections, Documents, or Information Challenging the Recording of the Statutory Lien and Does Not Request a Hearing Before a Neutral DTSC Official.

If, within 30 calendar days from the date of receipt of the Notice of Intent to Record Statutory Lien, the current property owner submits written objections, documents, or information challenging the recording of the statutory lien and does **not** request a hearing before a Neutral DTSC Official, then the Department

⁷ A person may, at any time, request a copy of the Lien Filing Record or other public records pursuant to the California Public Records Act. (See Gov. Code, § 6250 et seq.)

will review the current property owner's written submission to determine whether the current property owner's contentions alter the Department's position that recording a statutory lien pursuant to Section 25365.6 is appropriate.

The current property owner's written correspondence must include a detailed statement of the legal and/or factual basis for the current property owner's challenge. Documents and information supporting the current property owner's contentions must be enclosed with the written correspondence.

If the Department agrees with the current property owner's contentions, then the Department will notify the current property owner in writing that the Department will not proceed with its plan to record the statutory lien.

If the current property owner's submission does not alter the Department's position that recording a statutory lien pursuant to Section 25365.6 is appropriate, then the Department will notify the current property owner in writing that the Department believes that recording a lien is appropriate. The Department will proceed to record the statutory lien pursuant to the procedures outlined below (see Section V.D, Recording the Statutory Lien).

If the current property owner submits written objections, documents, or information **and** requests a hearing before a Neutral DTSC Official challenging the recording of the statutory lien, then the Department will follow the Statutory Lien Hearing Procedures outlined in Appendix B. DTSC will not separately respond to the current property owner's written objections, documents, or information challenging the recording of the statutory lien.

d. If the Current Property Owner Requests a Hearing Before a Neutral DTSC Official Challenging the Recording of the Statutory Lien

If, within 30 calendar days from the date of receipt of the Notice of Intent to Record Statutory Lien, the current property owner requests a hearing before a Neutral DTSC Official challenging the recording of the statutory lien, then the Department will follow the Statutory Lien Hearing Procedures outlined in Appendix B.

If the current property owner requests a hearing before a Neutral DTSC Official, then the Department may not record a Statutory Lien in the county recorder's office for the county where the property is located unless and until, at the conclusion of the hearing process, the Neutral DTSC Official issues a Notice of Neutral DTSC Official Statutory Lien Hearing Decision concluding that the Department may appropriately record a statutory lien pursuant to Section 25365.6.

Failure of the current property owner to request a hearing before a Neutral DTSC Official within 30 calendar days from the date of receipt of the Notice of Intent to Record Statutory Lien waives the current property owner's right to a hearing and may result in the Department proceeding to record the statutory lien pursuant to the procedures outlined below (see Section V.D., Recording the Statutory Lien).

D. Recording the Statutory Lien

If, after following the procedures outlined above, the Department determines that recording a statutory lien is appropriate, then it will record the lien with the county recorder's office in the county where the real property is located.

The Department will "perfect" the statutory lien by sending a Statutory Lien Transmittal Letter to the county recorder's office in the county in which the Department seeks to record the statutory lien. Enclosed with the Statutory Lien Transmittal Letter will be the final and signed Statutory Lien, Verification of Statutory Lien, and Notary Acknowledgment of Statutory Lien. The Statutory Lien Transmittal Letter package may be sent to the county recorder's office via regular or Certified Mail.

Upon receipt of a copy of the recorded Statutory Lien from the County Recorder's office, the Department will send a Notice of Recording of Statutory Lien to the current property owner notifying the owner of the date the lien was recorded and enclosing a copy of the recorded Statutory Lien. The Notice of Recording of Statutory Lien package will be sent via Certified Mail unless the current property owner has consented to electronic service.

A copy of the Statutory Lien Transmittal Letter package, recorded Statutory Lien, and Notice of Recording of Statutory Lien package will be placed in the Lien Filing Record. A copy of the recorded Statutory Lien will be uploaded to the EnviroStor profile for the site. If any documents were served via email, copies of the transmittal emails will also be placed in the Lien Filing Record.

VI. STATUTORY LIENS FOR SUBSEQUENTLY INCURRED RESPONSE COSTS

If, after recording a statutory lien, the Department incurs additional response costs related to the same real property, then the Department may consider recording another statutory lien for any subsequently incurred response costs that remain unreimbursed. The Department will carefully evaluate whether to record a statutory lien for unreimbursed response costs subsequently incurred by the Department in

conducting or overseeing a response action pursuant to the HSAA, taking into consideration the same factors outlined in Section V.A, Initial Considerations.

Department staff will follow the same process outlined in Section V, Statutory Lien Placement Procedures, in recording a statutory lien for unreimbursed response costs subsequently incurred by the Department in conducting or overseeing a response action pursuant to the HSAA, including creating a new Lien Filing Record for the subsequent statutory lien.

VII. SATISFACTION AND RELEASE OF STATUTORY LIENS

A statutory lien is deemed satisfied when the Department is reimbursed for all of the costs secured by the lien. The Department may also agree to release all or part of the lien pursuant to a settlement with a party—typically, the current property owner—when all settlement conditions have been satisfied. Any settlement that contemplates the release of all or part of a statutory lien will be negotiated with the assistance of the Office of Legal Counsel. Prior to recording a Release of Statutory Lien with the county recorder's office in the county in which a statutory lien was recorded, which is required to release a lien, Department staff will verify that the Department has received payment for unreimbursed costs secured by the statutory lien and/or that all settlement conditions have been satisfied.

The Release of Statutory Lien will describe the statutory lien that was satisfied and/or is being released, including the amount of the lien, date the lien was recorded, and county recorder's office information (i.e., book and page number) of the lien, and the address of the real property, including the city, county, and Assessor's Parcel Number(s), as well as a legal description of the property.

The Department will send a Release of Statutory Lien Transmittal Letter to the county recorder's office for the county in which the statutory lien was recorded. Enclosed with the Release of Statutory Lien Transmittal Letter will be the Release of Statutory Lien, Verification of Acknowledgment of Release of Statutory Lien, and Notary Acknowledgment of Release of Statutory Lien. The Release of Statutory Lien Transmittal Letter package may be sent to the county recorder's office via regular or Certified Mail.

Upon receipt of a copy of the recorded Release of Statutory Lien from the county recorder's office, the Department will send a Notice of Recording of Release of Statutory Lien to the current property owner notifying the owner of the date the Release of Statutory Lien was recorded and enclosing a copy of the recorded Release of Statutory Lien. The Notice of Recording of Release of Statutory Lien

package will be sent will be sent via Certified Mail unless the current property owner has consented to electronic service.

A copy of the Release of Statutory Lien Transmittal Letter package, recorded Release of Statutory Lien, and Notice of Recording of Release of Statutory Lien package will be placed in the Lien Filing Record. A copy of the recorded Release of Statutory Lien will be uploaded to the EnviroStor profile for the site. If any documents were served via email, copies of the transmittal emails will also be placed in the Lien Filing Record.

VIII. INQUIRIES

Administration of this policy is the responsibility of the Deputy Director for the Brownfields and Environmental Restoration Program and the Chief Counsel of the Office of Legal Affairs. Specific questions regarding this policy should be directed to the Deputy Director for the Brownfields and Environmental Restoration Program and the Chief Counsel of the Office of Legal Affairs.

IX. TABLE OF APPENDICES

- A. Definitions
- B. Statutory Lien Hearing Procedures

APPENDIX A: DEFINITIONS⁸

As used in this policy, the terms below have the following meanings:

1. **"CERCLA"** means the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.
2. **"Damages"** includes any natural resource damages incurred by the Department pursuant to Health & Safety Code section 25352, as well as damages imposed by the Department pursuant to Health & Safety Code section 25359.
3. **"Department"** means the Department of Toxic Substances Control, or DTSC. (Health & Saf. Code, § 25312.)
4. **"Department Attorney"** is the Office of Legal Counsel (OLC) attorney a to: (1) assist the Department in the lien-placement decision process; and (2) represent the Department in communicating, if necessary, with the current property owner, or the current property owner's legal representative, if one is identified, regarding the statutory lien, and in the hearing before the Neutral DTSC Official, if a hearing is requested by the current property owner.
5. **"Hazardous substance"** is defined by Health & Safety Code section 25316. Certain exclusions from the definition of "hazardous substance" are outlined in Health & Safety Code section 25317. (Health & Saf. Code, § 25316.)
6. **"HSAA"** means the Carpenter-Presley-Tanner Hazardous Substance Account Act, Health & Safety Code division 20, chapter 6.8, section 25300 et seq.
7. **"Neutral DTSC Official"** is the OLC attorney assigned by the Chief Counsel of the Office of Legal Affairs to oversee a hearing requested by a current property owner, consistent with the Department's Statutory Lien Hearing Procedures (Appendix B).
8. **"Perfecting"** a statutory lien refers to the process of recording a statutory lien securing the Department's unreimbursed response costs on real property by: (1) providing the current property owner with notice and an opportunity to be heard; and (2) recording the statutory lien with the county recorder's office in the county where the real property is located.

⁸ Relevant terms are defined in this Appendix for ease of reference only. Statutory terms and definitions may change as a result of legislative amendments. The most recent statutory code sections should always be consulted for current definitions.

9. **“Remedy”** or **“remedial action”** includes “[t]hose actions that are consistent with a permanent remedy, that are taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance into the environment, as further defined in section 101(24) of CERCLA, 42 U.S.C. § 9601(24). . . .” “Remedy or “remedial action” also includes “[t]hose actions that are necessary to monitor, assess, and evaluate a release or a threatened release of a hazardous substance” and “[s]ite operation and maintenance.” (Health & Saf. Code, § 25322.)
10. **“Remove”** or **“removal”** “includes the cleanup or removal of released hazardous substances from the environment or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release, as further defined by” section 101(23) of CERCLA, 42 U.S.C. § 9601(24). (Health & Saf. Code, § 25323.)
11. **“Response,” “respond,”** or **“response action”** has the same meaning as defined in section 101(25) of CERCLA, 42 U.S.C. § 9601(25). “The enforcement and oversight activities of the department . . . are included within the meaning of ‘response,’ ‘respond,’ or ‘response action.’” (Health & Saf. Code, § 25323.3).
12. **“Responsible party”** or **“liable person,”** with certain exceptions outlined in Health & Safety Code section 25323.5, subdivisions (a)(2) and (c), includes those persons described in section 107(a) of CERCLA, 42 U.S.C. §9607(a), and generally includes the following categories of persons: (1) a current owner or operator of a facility; (2) a past owner or operator of a facility at the time of a disposal of hazardous substances; (3) an arranger for disposal or treatment of hazardous substances; and (4) a transporter of hazardous substances for disposal or treatment. (Health & Saf. Code, § 25323.5(a)(1).) “[T]he defenses available to a responsible party or liable person” include the defenses outlined in sections 101(35) and 107(b) of CERCLA, 42 U.S.C. §§ 9601(35), 9607(b). (Health & Saf. Code, § 25323.5(b).)
13. **“Statutory lien”** means a lien placed or recorded by the Department pursuant to Health & Safety Code division 20, chapter 6.8, section 25365.6, to secure the Department’s costs or damages in conducting or overseeing a response action on real property on which a release or threatened release of hazardous substances exists. (Health & Saf. Code, § 25365.6.)

APPENDIX B: STATUTORY LIEN HEARING PROCEDURES

The Department will follow the procedures outlined in this Appendix if a current property owner requests a hearing challenging the recording of a statutory lien by the Department on real property “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSAA. If a current property owner requests a hearing, then the Department may not record a lien in the county recorder’s office for the county where the property is located until, at the conclusion of the hearing process, the Neutral DTSC Official issues a written decision confirming that the Department has a reasonable basis to believe that the current property owner is a “responsible party” or “liable person” as defined in Health & Safety Code section 25323.5, the lien amount to be imposed or increased does not exceed the Department’s unreimbursed response costs, the real property was “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSAA,⁹ the current property owner failed to establish a valid defense pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq. (CERCLA),¹⁰ and a statutory lien may be recorded on the real property in compliance with Health & Safety Code section 25365.6 (“Section 25365.6”).

A copy of these Statutory Lien Hearing Procedures will be provided to the current owner of property on which the Department seeks to record a statutory lien as an enclosure to the following two documents: (1) Notice of Intent to Record Statutory Lien (see Section V.C.2, Issuance of a Notice of Intent to Record Statutory Lien to the Current Property Owner); and (2) Notice of Assignment of Neutral DTSC Official, Statutory Lien Hearing Procedures, and Availability of Lien Filing Record (see Appendix B, Section 2, Selection of Neutral DTSC Official).

1. AUTHORITY

Section 25365.6 requires that “[a] lien established by this section shall be subject to the notice and hearing procedures required by due process of the law” (Section 25365.6, subd. (a).) Accordingly, upon a timely request by the current property owner, the Department will conduct a hearing to address a current property owner’s contention that the recording of a statutory lien on the real property in question would be improper.

⁹ “HSAA” means the Carpenter-Presley-Tanner Hazardous Substance Account Act, Health & Safety Code division 20, chapter 6.8, section 25300 et seq.

¹⁰ The current property owner bears the burden of establishing defenses to liability and challenging the Department’s unreimbursed response costs as inconsistent with the National Contingency Plan (see 42 U.S.C. § 9607(a)(4)(A)).

The Department's hearing process complies with the mandatory informal hearing requirements of the California Administrative Procedures Act (APA) (Gov. Code, ch. 4.5, § 11400 et seq.). The formal hearing requirements of the APA (Gov. Code, ch. 5, § 11500 et seq.) do not apply to the Department's hearing process.

2. SELECTION OF NEUTRAL DTSC OFFICIAL

Within 10 business days of receipt of a request from a current property owner for a hearing, the Department will assign a "Neutral DTSC Official" to hear the matter. The Neutral DTSC Official will be an attorney with the Office of Legal Counsel (OLC) and will be assigned by the Chief Counsel of the Office of Legal Affairs.

The Neutral DTSC Official will not perform during the hearing process, and should not have previously performed, any prosecutorial, investigative, or supervisory functions in connection with the property or site on which the Department seeks to record the statutory lien. (See Gov. Code, § 11425.30, subd. (a)(1).) The Neutral DTSC Official will also not be subject to the authority, direction, or discretion of a person who has served as an investigator, prosecutor, or advocate in connection with the property or site on which the Department seeks to record a lien. (See Gov. Code, § 11425.30, subd. (a)(2).)

Once selected, the Neutral DTSC Official will obtain the Lien Filing Record from Department staff, which will contain the relevant documents noted in Section V.B, Statutory Lien Filing Record.

Within 15 business days of being assigned, the Neutral DTSC Official will issue a Notice of Assignment of Neutral DTSC Official, Statutory Lien Hearing Procedures, and Availability of Lien Filing Record ("Notice of Assignment") to the current property owner and the current property owner's legal representative, if any, and Department representatives¹¹ (collectively referred to as "parties") via Certified Mail. In the Notice of Assignment, the Neutral DTSC Official will:

1. Introduce him/herself as the Neutral DTSC Official—the Department representative charged with overseeing the hearing;
2. Notify the parties that the Neutral DTSC Official will contact the parties to set up a mutually acceptable date and time for the hearing;
3. Provide the parties with a copy of these Statutory Lien Hearing Procedures;
4. Request that the parties accept service of documents electronically; and

¹¹ For purposes of representing the Department in a hearing, "Department representatives" will generally include the Project Manager(s) and Department Attorney assigned to the matter. "Department representatives" may also include the Unit Supervisor and/or Branch Chief.

5. Remind the parties that the Lien Filing Record is available for review or copying.¹²

The Neutral DTSC Official will place a copy of the Notice of Assignment package in the Lien Filing Record.

3. SCHEDULING THE STATUTORY LIEN HEARING

Within 10 business days of issuing the Notice of Assignment, the Neutral DTSC Official will contact the parties to schedule the hearing. Scheduling of the hearing by the Neutral DTSC Official will occur via teleconference or by email correspondence with the parties. The hearing may be conducted in person or by telephone, or other electronic means, so long as all participants have an opportunity to meaningfully participate in the proceeding. The Neutral DTSC Official, however, will not grant a party's request to conduct the hearing by telephone or other electronic means if another party to the proceeding objects. (See Gov. Code, § 11440.30.)

The Neutral DTSC Official will issue a Notice of Statutory Lien Hearing to the parties confirming the date, time, location, and nature of the hearing (i.e., in person or telephonic). The Notice of Statutory Lien Hearing will be sent to the parties via Certified Mail unless the parties have consented to electronic service. The Neutral DTSC Official will place a copy of the Notice of Statutory Lien Hearing in the Lien Filing Record. If the Notice of Statutory Lien Hearing was served via email, the Neutral DTSC Official will also place a copy of the transmittal email in the Lien Filing Record.

4. PROHIBITION ON EX PARTE COMMUNICATIONS

The Neutral DTSC Official will comply with the provisions of article 7 of the Government Code, commencing with section 11430.10, which prohibits, with limited exceptions, direct or indirect communication regarding the proceeding between any party (or any interested person), including the Director (see Gov. Code, § 11430.80), and a fact-finder like the Neutral DTSC Official regarding the proceeding without notice and an opportunity for all parties to participate in the communication.

¹² If the current property owner requests to view the Lien Filing Record, then Department staff will work with the current property owner to identify a mutually acceptable date and time for the current property owner to visit the appropriate regional office to view the Lien Filing Record. Alternatively, the current property owner may pay the Department to make a copy of the Lien Filing Record and send it to the current property owner with 10 business days of receipt of the request. The cost for copies is \$0.15 per page. A request for a copy of the Lien Filing Record must be made in writing. The current property owner may also make arrangements for a copy service to make a copy of the Lien Filing Record at the current property owner's expense.

The Neutral DTSC Official will refrain from discussing the property or site that is the subject of the hearing with any parties to the proceeding or interested persons until the hearing concludes (i.e., when the DTSC Neutral Official issues the Notice of Neutral DTSC Official Statutory Lien Hearing Decision), unless all parties participate in the communication or the communication is authorized by article 7 of the Government Code. If the DTSC Neutral Official receives an ex parte communication, the Neutral DTSC Official will provide all parties with notice and opportunity to comment on the communication as provided in Government Code section 11430.50. The Neutral DTSC Official will place copies of any notifications and correspondence regarding potential ex parte communications in the Lien Filing Record.

5. DISQUALIFICATION OF NEUTRAL DTSC OFFICIAL

Receipt by the Neutral DTSC Official of an ex parte communication in violation of article 7 of the Government Code may be grounds for disqualification. (See Gov. Code, § 11430.60.) Additionally, pursuant to Government Code section 11425.40, the current property owner may seek to disqualify the Neutral DTSC Official for bias, prejudice, or interest in the proceeding at any time prior to the conclusion of the hearing. The presumption of impartiality of the Neutral DTSC Official may only be overcome by specific evidence demonstrating actual bias or circumstances creating an unacceptable risk of bias.

The following grounds, however, are not themselves grounds for disqualification of the Neutral DTSC Official without further evidence of bias, prejudice, or interest:

1. The Neutral DTSC Official is a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
2. The Neutral DTSC Official has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.
3. The Neutral DTSC Official has, as a lawyer or public official, participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(Gov. Code, § 11425.40, subd. (b).)

A request for disqualification of the Neutral DTSC Official must be made in writing and sent to the Neutral DTSC Official, with a copy to all parties. Upon receipt of a request for disqualification, the Neutral DTSC Official will immediately notify the Chief Counsel of the Office of Legal Affairs. The Chief Counsel will evaluate and make a decision regarding the request for disqualification of the Neutral DTSC Official. If the Chief

Counsel denies the request for disqualification, then the Neutral DTSC Official will proceed with the hearing as outlined herein. If the Chief Counsel approves the request for disqualification, then the Chief Counsel will appoint another OLC attorney to serve as the Neutral DTSC Official. Notice of the Chief Counsel's decision will be provided via Certified Mail unless the parties have consented to electronic service. The existing or, if the existing Neutral DTSC Official is disqualified, new Neutral DTSC Official will place a copy of the Chief Counsel's decision in the Lien Filing Record. If the Chief Counsel's decision was served via email, the existing or new Neutral DTSC Official will also place a copy of the transmittal email in the Lien Filing Record.

6. THE STATUTORY LIEN HEARING

A. Optional Pre-Hearing Briefing Schedule

The Neutral DTSC Official may, in his or her discretion, set a briefing schedule for the parties to submit written arguments in support of their respective positions prior to the hearing. The Neutral DTSC Official may allow the parties to submit written arguments concurrently (e.g., simultaneous briefs) or consecutively (e.g., with DTSC to submit the moving and reply briefs and the current property owner to submit the opposition brief) and may also ask the parties to respond to specific questions or issues identified by the Neutral DTSC Official.

If required to submit pre-hearing briefs, the parties will ensure that all parties to the hearing receive copies of the briefs. The Neutral DTSC Official will place a copy of the briefing schedule and copies of the parties' briefs in the Lien Filing Record. If the briefing schedule and/or parties' briefs were served via email, the Neutral DTSC Official will also place copies of the transmittal emails in the Lien Filing Record.

B. Hearing Participants

The persons at the hearing will include: (1) the Neutral DTSC Official; (2) Department representatives; and (3) the current property owner and/or the current property owner's legal representative, if any. The persons at the hearing may also include witnesses presented by the parties in support of their respective positions regarding the propriety of recording the statutory lien pursuant to Section 25365.6.

The hearing will be open to the public. (See Gov. Code, § 11425.20, subd. (a).) However, the Neutral DTSC Official may order the closure of or limit the hearing consistent with the provisions of Government Code section 11425.20.

C. Scope of the Hearing

The scope of the hearing is intended to be broad, encompassing all documents and information in the Lien Filing Record and all evidence and testimony introduced prior to and at the hearing related to the propriety of recording the statutory lien pursuant to Section 25365.6. The issues that may be raised include, but are not necessarily limited to, whether DTSC has a reasonable basis to believe that:

1. The current property owner is a "responsible party" or "liable person" as defined in Health & Safety Code section 25323.5;
2. The lien amount to be imposed or increased does not exceed the Department's unreimbursed response costs;
3. The real property was "subject to, or affected by," a "response action" conducted or overseen by the Department pursuant to the HSAA;
4. The current property owner failed to establish a valid defense pursuant to CERCLA;¹³ and
5. A statutory lien may be recorded on the real property in compliance with Section 25365.6.

D. Form of the Hearing

The hearing will be transcribed by a certified electronic reporter/transcriber retained by DTSC. The Neutral DTSC Official will begin the hearing by making the following opening statement, to be read verbatim:

This proceeding is informal, and is not bound by the rules of evidence or the provisions of the Administrative Procedure Act. By participating in this hearing or submitting objections, documents, or information regarding the propriety of the statutory lien, neither party waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding.

As the Neutral DTSC Official, I will make a decision, based on relevant documents and information in the Lien Filing Record and any relevant evidence and testimony introduced prior to or at this hearing, regarding whether DTSC has a reasonable basis to believe:

¹³ The current property owner bears the burden of establishing defenses to liability and challenging the Department's unreimbursed response costs as inconsistent with the National Contingency Plan (see 42 U.S.C. § 9607(a)(4)(A)).

1. *The current property owner is a “responsible party” or “liable person” as defined in Health & Safety Code section 25323.5;*
2. *The lien amount to be imposed or increased does not exceed the Department’s unreimbursed response costs;*
3. *The real property was “subject to, or affected by,” a “response action” conducted or overseen by the Department pursuant to the HSAA;*
4. *The current property owner failed to establish a valid defense pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq. (CERCLA); and*
5. *A statutory lien may be recorded on the real property in compliance with Section 25365.6.*

The Neutral DTSC Official will conduct an orderly and fair hearing, providing both parties with reasonable opportunities to introduce evidence and testimony regarding the propriety of recording the statutory lien. The Neutral DTSC Official should place no limitations other than reasonableness on the volume of evidence and testimony introduced during the hearing. The Neutral DTSC Official may also allow discussion and interchange between the parties, including responses to questions to the extent deemed appropriate. It is not the Department’s intent, however, to provide the parties with an opportunity to engage in direct examination or cross-examination of witnesses. The Neutral DTSC Official may also engage in discussion with and address questions to parties and witnesses during the hearing.

The Neutral DTSC Official may, in his or her discretion, allow the parties to submit post-hearing briefs to further address issues relevant to the hearing. If required to submit post-hearing briefs, the parties will ensure that all parties to the hearing receive copies of the briefs. The Neutral DTSC Official will place a copy of the briefing schedule and copies of the parties’ briefs in the Lien Filing Record. If the briefing schedule and/or parties’ briefs were served via email, the Neutral DTSC Official will also place copies of the transmittal emails in the Lien Filing Record.

After completion of the hearing, the certified electronic reporter/transcriber will provide the Neutral DTSC Official with a copy of the hearing transcript, including copies of any exhibits introduced by the parties during the hearing. Within 10 business days of receipt of the hearing transcript, the Neutral DTSC Official will provide the parties with a Notice of Statutory Lien Hearing Transcript enclosing a copy of the hearing transcript, including copies of any exhibits. The Notice of Statutory Lien Hearing Transcript will be sent to

the parties via Certified Mail unless the parties have consented to electronic service. The Neutral DTSC Official will place a copy of the Notice of Statutory Lien Hearing Transcript, including the hearing transcript, in the Lien Filing Record. If the Notice of Statutory Lien Hearing Transcript was served via email, the Neutral DTSC Official will also place a copy of the transmittal email in the Lien Filing Record.

7. STATUTORY LIEN HEARING DECISION

In making his or her decision, the Neutral DTSC Official will consider all documents and information in the Lien Filing Record and all evidence and testimony introduced prior to, at, or after the hearing relevant to the propriety of recording the statutory lien pursuant to Section 25365.6. The Neutral DTSC Official will issue a written decision regarding whether the recording of a statutory lien pursuant to Section 25365.6 is appropriate. The Neutral DTSC Official's written decision will outline in detail the legal and factual basis for his or her decision.

The Neutral DTSC Official will send the parties a Notice of Neutral DTSC Official Statutory Lien Hearing Decision within 90 calendar days of the date of the Notice of Statutory Lien Hearing Transcript. The Notice of Neutral DTSC Official Statutory Lien Hearing Decision will be sent via Certified Mail unless the parties have consented to electronic service. The Neutral DTSC Official will place a copy of the Notice of Neutral DTSC Official Statutory Lien Hearing Decision in the Lien Filing Record. If the Notice of Neutral DTSC Official Statutory Lien Hearing Decision was served via email, the Neutral DTSC Official will also place a copy of the transmittal email in the Lien Filing Record.

8. POST-STATUTORY LIEN HEARING PROCEDURES

Within 10 business days of issuing the Notice of Neutral DTSC Official Statutory Lien Hearing Decision, the Neutral DTSC Official will ensure that all relevant documents have been placed in the Lien Filing Record, close the Lien Filing Record, and send the Lien Filing Record to the Department Attorney. The Department Attorney will have 10 business days within which to review the Lien Filing Record for completeness and send the Lien Filing Record back to Department staff in the regional office overseeing the response action at the property or site that was the subject of the hearing.

Department staff will maintain the Lien Filing Record in accordance with applicable document management policies and procedures and records retention schedules, and, at a minimum, shall be kept for as long as the statutory lien remains in place. Department staff will make the Lien Filing Record available to the public upon request pursuant to the California Public Records Act or any other applicable provision of law.

The Department may issue a Notice of Intent to Record Statutory Lien with an opportunity to be heard with respect to the same property, following the procedures

outlined in the Department's Statutory Lien Policy and Procedures, if new information indicates that a previous decision not to record a lien was in error or to update a prior lien when the Department incurs additional response costs related to the same property pursuant to the HSAA that remain unreimbursed.