



MANAGEMENT MEMO

Management Memo #EO-99-004-MM (formerly EO-92-012-MM)

Title: Review of Proposed Administrative Hearing Decisions

Affected Programs: Hazardous Waste Management Program,
Site Mitigation Program, and
Office of Legal Counsel

Under the California Administrative Procedure Act, Government Code section 11517, the Administrative Law Judge (ALJ) hearing a case for the Department of Toxic Substances Control (DTSC) pursuant to Health and Safety Code section 25186 or 25187 prepares a proposed decision. DTSC may then adopt the decision as DTSC's decision or take some alternative action such as changing parts of the decision, issuing a new decision, or remanding the case for additional evidence. The purpose of this management memo is to establish a procedure for handling cases while the proposed decision is being considered within DTSC, so that the respondent's constitutional due process and statutory rights are protected.

Administrative hearings conducted under the Administrative Procedure Act pursuant to Health and Safety Code sections 25186 and 25187 are adversary proceedings. One of the fundamental premises inherent in the concept of an adversary hearing is that neither party may engage in a communication concerning the merits of the case with those responsible for the decision unless all parties to the case are present (ex parte communications). Therefore, during the period when DTSC is considering whether to adopt a proposed hearing decision or take some alternative action, it is improper for there to be any ex parte communications concerning the merits of the case between the parties (persons representing the respondent or DTSC) and the decision maker (the Director of DTSC, any person delegated by the Director to make DTSC's decision, or any person advising the decision maker).

The following procedure is intended to assure that no improper communications take place regarding pending administrative hearing decisions. At the same time, this memo establishes the procedure by which the staff who are handling a case on appeal determine whether to recommend that the Director adopt the proposed decision or take some alternative action.

OVERVIEW:

When DTSC receives a proposed decision from an ALJ, it may adopt the decision (or allow it to become final without any action by DTSC) or take some alternative action. The first step in reviewing a proposed decision is consultation among the attorney and staff handling the case to decide whether to recommend adoption. Adopting the decision is a simple procedure of issuing an order. If DTSC decides to consider taking an alternative action, the record must be reviewed and possibly supplemented and the parties must be given an opportunity to submit

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argument. The procedure that follows specifies each step in more detail. In addition, a flow chart is attached as Attachment A.

Procedure:

1. Receipt of Decision. The ALJ who hears a case for DTSC sends the proposed decision to the attorney who represented DTSC at the hearing. The attorney might be from the Office of the Attorney General or the Office of Legal Counsel (OLC). When the attorney receives a proposed decision from the ALJ, the attorney immediately provides a copy of the proposed decision to his or her supervisor and to the affected Branch Chief and Division Chief.

2. Program Review of Proposed Decision. The attorney¹ and Branch Chief discuss the proposed decision and, after consultation with their respective management, determine whether to recommend that DTSC adopt the proposed decision or take alternative action, rather than adopting the proposed decision, if there is good cause. Examples of good cause include, but are not limited to:

- a. The ALJ made significant evidentiary or legal errors;
- b. The ALJ ignored obvious inconsistent statements that go to credibility;
- c. The penalty is inconsistent with the factual findings compared with DTSC penalty regulations and previous decisions.

3. Adoption of Proposed Decision. If the attorney and the affected Program recommend that DTSC adopt the proposed decision, the attorney drafts an order for the Director's signature adopting the decision.² (See Attachment B, Order.) If the Director decides to adopt the decision, the order and decision must be served on the respondent personally or by certified mail, and a copy must be mailed to the ALJ within 30 days of receipt of the proposed

¹If the attorney is from the Office of the Attorney General, the assigned OLC attorney will also participate in the decision.

²Pursuant to Gov. Code § 11517(b), DTSC may reduce or otherwise mitigate the penalty and make technical and other minor, non-substantive changes in the proposed decision, and adopt it as the decision.

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decision by DTSC. (Note: DTSC may also decide to adopt the proposed decision as the final decision after 30 days have passed, but in any event the attorney must mail the proposed decision to the respondent by certified mail within 30 days of receipt by DTSC).

4. Proposed Decision Final by Operation of Law. The attorney and affected Program may also recommend allowing the proposed decision to become final by operation of law without being adopted by DTSC. If the Director decides to choose this option, the proposed decision must still be served on the respondent within 30 days after receipt of the proposed decision by DTSC. The proposed decision is deemed adopted 100 days after delivery of the proposed decision to DTSC unless DTSC notifies the respondent that the proposed decision is not adopted and commences proceedings to decide the case. (Gov. Code § 11517(d).) The attorney should write a letter notifying the respondent when the decision has been deemed adopted. The attorney should also draft a memo to file explaining why this decision was made.

5. Procedure When Proposed Decision Not Adopted.

a. Authorization of Review of Decision. If the attorney and affected Program believe that good cause exists to recommend not adopting the proposed decision, this recommendation should be discussed with the Division Chief and Deputy Director for the affected Program. If they concur that the proposed decision should be reviewed, the Deputy Director authorizes the review.

b. Service of Proposed Decision. Within 30 days of receipt of the proposed decision by DTSC, the attorney must file a copy of the proposed decision as a public record, serve the proposed decision on the respondent, and notify the respondent that DTSC is reviewing the proposed decision. A draft cover letter is provided as Attachment C.

c. Assignment and Role of Review Attorney. When the Deputy Director authorizes review of the proposed decision, he or she will request that OLC assign an attorney to conduct an independent review of the case in order to recommend a final decision to the Director. To maintain the independence of the review attorney, he or she must not:

- have been involved in the case previously;
- have participated in or listened to discussions of the merits of the case previously; or
- engage in ex parte communications concerning the merits of the case with the respondent or the attorneys or program staff handling the case.

The review attorney should immediately order the transcript of the hearing. When the transcript is received, the review attorney should notify the respondent and DTSC, set a date by which they may submit written argument, read the entire record including the transcript and any written argument, write a recommended final decision, and discuss the recommended final decision with the Director, who makes the final decision.

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d. Options for Decision. If DTSC does not adopt the proposed decision, it may decide some or all of the issues in the case on the record, including the transcript with or without taking additional evidence or on an agreed statement of the parties, or DTSC may refer the case back to the ALJ who heard the case to take additional evidence and prepare a new proposed decision.

e. Due Date for Decision. If a final decision is not issued by DTSC within 100 days of the date of receipt of the transcript, the ALJ's proposed decision becomes final by operation of law, unless a further delay of no more than 30 days is required by special circumstances. (Govt. C. section 11517(d))

f. Service of Decision. When the final decision is made, the review attorney must immediately serve the decision on the respondent and send copies to the attorney who represented DTSC and to the ALJ.

6. Reconsideration. Government Code section 11521 establishes a process for an agency to "reconsider" a final decision:

- a. DTSC may order a reconsideration of all or part of a case on its own motion or on the petition of any party within 30 days of the delivery or mailing of a decision to the respondent.
- b. DTSC may extend the period to file a petition for reconsideration for no more than 30 days.
- c. If a petition for reconsideration is filed prior to expiration of the periods mentioned above, DTSC may also stay expiration of those periods for no more than 10 days, solely for the purpose of considering the petition.
- d. If DTSC fails to act on a petition within the time allowed for ordering reconsideration, the petition is deemed denied.
- e. DTSC may reconsider the case itself on the record and such additional evidence and argument as may be permitted, or DTSC may refer it to an ALJ.

7. A form to track proposed hearing decisions is Attachment D.

CONCLUSION:

This management memo describes the legal requirements that apply to reviewing proposed hearing decisions in summary fashion. If any questions arise, consult with OLC.

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CONTACT:

Office of Legal Counsel

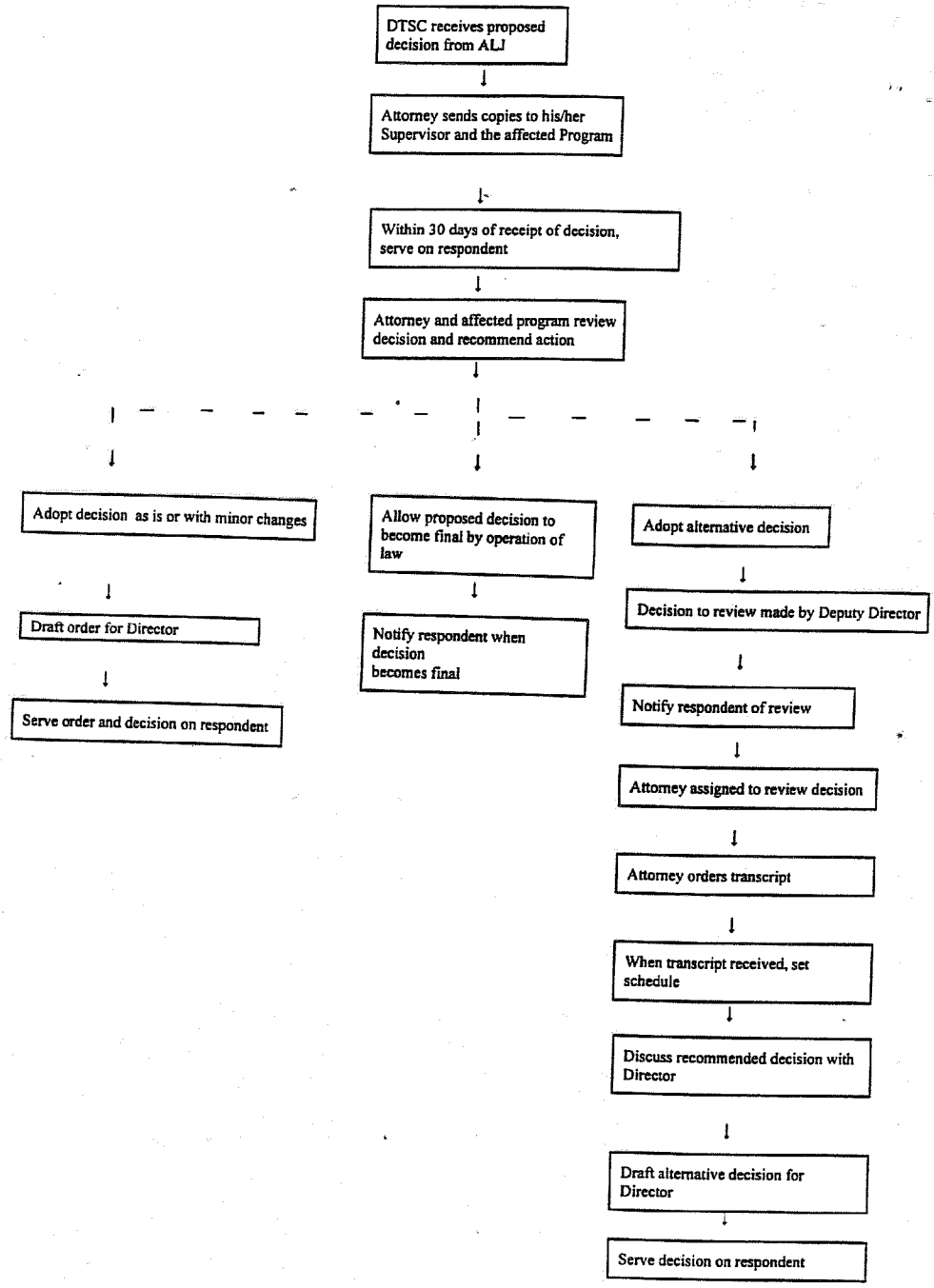
Michael Shepard, HQ-8
Office of Legal Counsel
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
(916) 324-5780/CN 8-454-5780

July 21, 1999
Date

/Original Signed by/ Edwin F. Lowry
Edwin F. Lowry
Director

ATTACHMENTS:

Attachment A Flow Chart
Attachment B Order
Attachment C Cover Letter
Attachment D Tracking Form



BEFORE THE
STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of:)
)
) HWCA No.
)
) OAH No.
)
)
)
)
 Respondent)
_____)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Toxic Substances Control as its Decision in the above-entitled matter.

This Decision shall become effective on _____.

IT IS TO BE ORDERED _____.

Edwin F. Lowry
Director

ATTACHMENT B



Department of Toxic Substances Control



Winston H. Hickox
Secretary for
Environmental
Protection

Edwin F. Lowry, Director
400 P Street, 4th Floor, P.O. Box 806
Sacramento, California 95812-0806

Gray Davis
Governor

(Date)

(Respondent)
(Address)

(Case Name & Number)

I am enclosing a copy of the Proposed Decision issued by the Administrative Law Judge in the above-entitled case. The Department of Toxic Substances Control (DTSC) is not adopting the Proposed Decision, but rather is commencing proceedings to decide the case on the record. DTSC is ordering a transcript of the hearing. You will be notified when DTSC receives the transcript. At that time you will be provided with an opportunity to submit written argument if you wish.

Please direct any inquiries about the review of your case to _____, the attorney assigned to assist the Director in deciding the case, (telephone number).

Sincerely,

Chief Counsel

Staff Counsel
Office of Legal Counsel

cc: Respondent's Attorney
DTSC Attorney

bcc: Program Staff

California Environmental Protection Agency
♻️ Printed on Recycled Paper

ATTACHMENT C

TRACKING FORM FOR
REVIEW OF PROPOSED DECISION

RESPONDENT: _____

FACILITY: _____

ADDRESS: _____

DTSC DOCKET #: _____

OAH #: _____

HEARING ATTORNEY: _____

ALJ: _____

DATE

REFERRED FOR HEARING: _____

HEARING HELD: _____

PROPOSED DECISION RECEIVED: _____

DECISION WHETHER TO REVIEW DECISION
(25 days after receipt of proposed decision) _____

SERVED PROPOSED DECISION:
(30 days after receipt of proposed decision) _____

TRANSCRIPT ORDERED:
(30 days after receipt of proposed decision) _____

TRANSCRIPT RECEIVED: _____

FINAL ARGUMENT INVITED: _____

FINAL ARGUMENT DUE: _____

DEADLINE TO SERVE DECISION:
(100 days after receipt of transcript) _____

SERVED: _____

RESPONDENT _____

ATTORNEY _____

OAH - ALJ
COPY TO HEARING ATTORNEY:
