

TOXIC SUBSTANCES CONTROL PROGRAM

OFFICIAL POLICY/PROCEDURE

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TITLE: Procedures for Determination of  
Non-Compliance with Remedial Action Orders

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DESCRIPTION:

Procedures for Determination of Non-Compliance with Remedial Action Orders and/or Enforceable Agreements. This procedure is a companion policy to OPP #86-20\* Remedial Action Order Procedure.

\*Note: OPP # 86-20 has been superseded by EO-93-009-PP.

APPROVED BY:

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Chief Deputy Director

7/2/87  
Date

cc: C. David Willis, Deputy Director  
TSCP Technical Reference Center

OPP Form 005 (9/89)  
(blue)

OPP #87-1

PROCEDURES FOR  
DETERMINATION OF NON-COMPLIANCE  
WITH REMEDIAL ACTION ORDERS

Under Health and Safety Code Section 25355.5(a)  
(AB 129 Orders)

State of California  
Department of Health Services  
Toxic Substances Control Division

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I. PURPOSE

It is the purpose of this procedure to permit the Department of Health Services (DHS) to document compliance with Health and Safety Code (H&SC) Section 25355.5(a)(2). That section requires certain actions by the Department as a prerequisite to the Department expending funds for site remediation from the Hazardous Substances Cleanup (Bond) Fund or Hazardous Substances Account (HSA).

This procedure will help the Department to document its efforts to persuade Responsible Parties (RPs) to bear the costs of cleaning up hazardous substance release sites, and in so doing, will assist the Department in establishing its case if legal action for cost recovery becomes necessary.

II. BACKGROUND

Under H&SC Section 25355.5(a)(2), the Department must notify RPs of their non-compliance with a Remedial Action Order (RAO) or Enforceable Agreement (EA) and offer them an opportunity to return to compliance or explain why they think the order or agreement should be modified.

The Toxic Substance Control Division's (TSCD) legal staff advise that the requirements of Health and Safety Code Section 25355.5(a) apply to expenditures of both Bond and HSA funds. Compliance with this Section must occur before Bond or HSA funds are expended.

Sections 25355.5(b), (c), and (d) exempt the Department from the requirements of Section 25355.5(a) if any of the following conditions apply.

Under Section 25355.5(b), when:

1. DHS cannot find a responsible party,
2. DHS takes immediate corrective action under Section 25354,  
or
3. DHS determines the site presents an imminent and substantial endangerment to the public health or welfare or to the environment.

or under Section 25355.5(c), when the expenditure is for the cost of:

1. issuing an order,
2. entering into an agreement, or
3. reviewing, commenting upon, approving, or disapproving a remedial action plan (RAP).

or under Section 25355.5(d), when the expenditure is for the costs of:

1. oversight of removal and remedial actions conducted by the RPs, or
2. the State share of a removal or remedial action for sites on EPA's National Priority List.

### III. ROLES AND RESPONSIBILITIES

Regional Sections will be responsible for preparing and issuing Remedial Action Orders (RAOs), monitoring RP compliance with RAOs, preparing and issuing Preliminary and Final Notices of Non-Compliance to RPs, and preparing amendments to RAOs when appropriate.

The Headquarters Surveillance and Enforcement Unit, within the Program Policy and Evaluation Section, will be responsible for tracking issuance of RAOs and agreements, Notices of Non-Compliance, and amended RAOs/agreements.

The Site Mitigation Unit is responsible for maintaining the Bond Act Expenditure Plan including informing the Legislature of the status of RP sites based on compliance/non-compliance with orders or agreements.

#### PROCEDURES

##### Step 1. DHS initial action.

Regional Section staff will monitor RP compliance with RAOs or agreements. If an RP is out of compliance, then Regional Section staff will issue a Proposed Determination of Non-Compliance Notice and will forward copies of the Notice to the Headquarters Site Mitigation Unit and the HQ Surveillance and Enforcement Unit.

##### Step 2. RP response to initial notice.

The RPs must react to the Proposed Determination by either returning to compliance or requesting amendments to the RAO. If the RP does not comply or request changes, then the Regional Section Chief will automatically issue a Notice of Final Determination of Non-Compliance.

##### Step 3. DHS action based on RP response.

1. If the RP documents compliance or presents an adequate corrective action plan which does not require changing the order, then the Regional Section staff will issue a Withdrawal of Proposed Determination.

2. If the RP requests changes to the order, then the Regional Section Chief will review the request. If the Regional Section Chief concurs with the RP request, he will issue a revised order. If they do not concur, the Regional Section Chief will issue a Notice of Final Determination of Non-Compliance.

Step 4: DHS initial action

Determine non-compliance

Once a RAO or agreement becomes effective, Regional Section staff will monitor RP compliance with the terms of the document. This generally consists of receiving, reviewing, and evaluating required documents and periodic site inspections.

For example, an action required by the RAO is to provide to the Department the name and address of the project engineer or geologist who will be conducting the remedial investigation. Compliance will mean, then, that at least one RP submits the required name and address within the required time period. If no RP submits the required name, then all of the RPs are out of compliance.

As a matter of policy, the Department will consider issuing a determination of non-compliance with any instance of non-compliance by the RP of any provision of the order or agreement under H&SC Section 24355.5(a). The decision to actually issue a notice will be based on the judgment of the Regional Section Chief.

Prepare Proposed Determination

Having determined that RPs are out of compliance, the Regional Section staff will have five (5) days to prepare a Notice of Proposed Determination of Non-Compliance (model attached), to be signed by the Regional Section Chief. The Notice must include a specific description of the activities the RPs failed to perform and the specific dates for the required performance. The Notice will also inform RPs that they may request modifications to the order. This latter requirement is mandated by H&SC Section 25355.5(a)(2).

Issue Initial Notice of Non-Compliance.

Once the Notice of Non-Compliance is prepared, the Regional Section will send it via certified mail, (return receipt requested) to all identified RPs for the site who received the order or signed the agreement. If there is

reason to believe that the RPs may not respond to certified mail delivery, personal service should be used.

Step 5. RP response to initial notice (10 working days limit)

The Regional Section Chief is responsible for determining whether non-complying RPs have: (1) returned to compliance, (2) properly requested amendments to cleanup order, or (3) failed to take either action.

Step 6. DHS action based on RP response

If the RPs return to compliance by performing the required tasks by the specific due date, then the Regional Section will issue a Withdrawal of Proposed Determination (see Appendix B for model), using that part of the model which speaks to returning to compliance as the basis for the withdrawal. This withdrawal letter will be signed by the Regional Section Chief.

If the RPs request changes to the order, the Regional Section Chief will review the request, both in terms of the actual changes requested and the reasons for the requested changes. The Chief will then either accept the RPs' proposal, modify the proposal, or reject the proposal.

The Regional Section Chief may also modify the original RAO, based on more recently acquired information.

If RP amendments are acceptable, the Regional Section Chief will evaluate the RP's proposal and, as appropriate, sign the amended order and the withdrawal letter, using appropriate language contained in the model Notice in Appendix B.

If on the other hand, the Regional Section Chief intends to reject the requested amendments, he shall sign the Final Determination of Non-Compliance within 5 working days.

If RPs do not comply or request changes, the Department's position is that they do not intend to comply with the order and that further communication would be unproductive. Therefore, the Regional Section Chief will issue the final Notice to RPs.

In these cases, TSCD immediately assumes site cleanup responsibility.

NOTICES OF NON-COMPLIANCE

<u>Notices</u>	<u>Applicability</u>	<u>Approving Authority</u>
Proposed Determination of Non-Compliance	Notification to RPs that are out of compliance with the terms of the order to advise of need to comply or face penalties	Regional Section Chief
Withdrawal of Proposed Determination of Non-Compliance	Notification to RPs that the Department has withdrawn its Proposed Determination  or  notification to RPs of changes to order caused by review of RP request for changes	Regional Section Chief
Final Determination of Non-Compliance	Notification to RPs that the Department has formally determined them to be out of compliance and will invoke penalties as appropriate, and turn over work to a zone contractor.	Regional Section Chief

Instructions for Model Letters

The following Appendixes A, B, and C contain model letters on non-compliance issues.

Material in brackets -- [ ] -- is to be inserted by the Regional Section staff when preparing a letter.

Time limits are specified as calendar days. While the limits are not expressed as optional, Regional Section staff may substitute other time periods, if extraordinary circumstances warrant.

APPENDIX A

(regional section phone no.)

CERTIFIED MAIL

[date]

[name and address of RP]

IN RESPONSE REFER TO:  
[Site name]

Dear [responsible party name]:

NOTICE OF PROPOSED DETERMINATION OF NON-COMPLIANCE WITH  
ORDER [docket number]

On [date], the Department of Health Services sent you Remedial Action Order [docket number]. The order specified that you were to [optional language to describe non-compliance, see below].

As of [date], our records indicate that you have not submitted the required documents or taken the required action. Therefore, under the provisions of Health and Safety Code Section 25355.5(a)(2), we are providing you with this written notice that THE DEPARTMENT OF HEALTH SERVICES INTENDS TO DETERMINE YOU TO BE OUT OF COMPLIANCE WITH THE TERMS OF REMEDIAL ACTION ORDER [docket number].

If, within ten (10) calendar days from the date of this letter, you submit to the Department the documentation noted above or perform the actions noted above, the Department will withdraw this notice.

If, on the other hand, you believe the Department should modify its order, you may submit an explanation of your position to the Department, in writing, within ten (10) calendar days from the date of this letter. This explanation should include your reasons for the modification as well as a thorough description of the actual modification and proposed order amendment language. The Department, at its sole discretion, will make a determination of the merits of the proposed order change. If rejected, the Department will issue a Notice

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of Final Determination of Non-Compliance. If accepted, the order will be amended and reissued.

If you do not submit the required documentation, take required corrective action, or request changes to the order, the Department will issue a Final Notice of Non-Compliance. If the Department issues a Final Determination of Non-Compliance, the Department will perform the work stipulated in the order. In addition, the Department will seek cost recovery from the responsible parties for all costs incurred, including administrative costs.

Please forward any required documentation or request for changes to:

Department of Health Services  
Toxic Substances Control Division  
[regional section address]

If you have any questions on this notice, please contact [name, address, telephone number of regional section contact person for this site].

Sincerely,

Regional Section Chief  
[Regional Section name]  
Toxic Substances Control Division

[Certification Number]

[Optional language to be inserted in paragraph 1]:

submit, by [date], the name and address of the project engineer or geologist you chose to direct and supervise work under the order. (Phase 1, 2)

submit a remedial investigation workplan by [date]. (Phase 1)

submit a draft feasibility study/remedial action plan by [date]. (Phase 1)

submit a final remedial action plan by [date]. (Phase 1)

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submit a detailed engineering design by [date]. (Phase  
2)

submit a progress report by [date]. (Phase 1, 2)

[perform other required action by [date]. (Phase 1, 2)

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APPENDIX B

[regional section phone no.]

CERTIFIED MAIL

[date]

[name and address of RP]

IN RESPONSE REFER TO:  
[Site name]

Dear [responsible party name]:

WITHDRAWAL OF PROPOSED DETERMINATION OF NON-COMPLIANCE

This letter is to inform you that the Department of Health Services is hereby withdrawing its Notice of Proposed Determination of Non-Compliance, issued to you on [date].

Upon review of the documentation you submitted on [date], the Department has determined that you are no longer out of compliance with the terms of Remedial Action Order [docket number].

OR

Upon review of your written request for changes to Remedial Action Order [docket number], the Department has determined that revisions to the order are appropriate and hereby modifies the order, as specified in the attached document, Amendments to Remedial Action Order [docket number].

If this amended order is not complied with by [date], then you will again be out of compliance with the order. The Department will seek cost recovery on a regular basis from the responsible parties for all costs incurred, including administrative costs.

If you have any questions about this letter, please contact [name, address, telephone number of region section contact person for this site].

Sincerely,

Regional Section Chief

[Certification Number]  
[attachments]

APPENDIX C

[regional section phone no.]

CERTIFIED MAIL

[date]

[name and address of RP]

IN RESPONSE REFER TO:  
[Site name]

Dear [responsible party name]:

NOTICE OF FINAL DETERMINATION OF NON-COMPLIANCE WITH  
ORDER [docket number]

On [date], the Department of Health Services sent you Remedial Action Order [docket number]. The order advised you that your failure to comply could also result in penalties for non-compliance. On [date], the Department of Health Services sent you a Notice of Proposed Determination of Non-Compliance.

As of [date], our records indicate that you have not submitted required documents, taken required action, or requested a modification to the order or that your request for modification to the order is not acceptable. [We have rejected your request because: reasons for rejection go here].

Therefore, THE DEPARTMENT OF HEALTH SERVICES HEREBY DETERMINES THAT YOU ARE NOT IN COMPLIANCE WITH REMEDIAL ACTION ORDER [docket number]. Having so determined, the Department will seek cost recovery for all costs incurred, including administrative costs.

If you have any questions about this letter, please contact [name, address, telephone number of regional section contact person for this site].

Sincerely,

Regional Section Chief  
[Regional Section name]  
Toxic Substances Control Division

[Certification Number]

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APPENDIX D

Blind copies (bccs) are to be sent to:

Assistant Chief Counsel  
Office of Legal Services  
Toxic Substances Control Division  
1029 J Street, 5th Floor  
Sacramento, CA 95814

Unit Chief  
Surveillance and Enforcement Unit  
Toxic Substances Control Division  
1219 K Street  
Sacramento, CA 95814

Unit Chief  
Site Mitigation Unit  
Toxic Substances Control Division  
1219 K Street, 2nd Floor  
Sacramento, CA 95814

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