

**ATTACHMENT TO ECONOMIC AND FISCAL IMPACT STATEMENT (STD. 399)**  
**Determining the Initial Penalty for Each Violation Regulations**  
**Department of Toxic Substances Control**

This document details the background of the economic and fiscal impacts of the Department of Toxic Substances Control's (DTSC) proposed amendment to California Code of Regulations, title 22, section 66272.62, Determining the Initial Penalty for Each Violation. This rulemaking proposal would address the statutory changes made by Assembly Bill 245 (AB 245). The proposed amendment to the penalty regulation would increase administrative penalties to a maximum of \$70,000 per violation per day of violation to be consistent with State statutory and federal regulatory changes. The amendment to the regulation is intended to provide consistency, fairness, and transparency to the regulated community and regulatory agencies.

**Background**

On January 12, 2017, the United States Environmental Protection Agency (U.S. EPA) amended the federal penalty regulations as mandated by the Federal Civil Penalty Inflation Act of 1990, as amended in 2015, which prescribes a formula for adjusting statutory civil penalties to reflect inflation, maintaining the deterrent effect of statutory civil penalties, and promoting compliance with the law. In amending the federal penalty regulations, U.S. EPA raised the maximum civil penalty amount, adjusted for inflation, for violations of federal hazardous waste management requirements of the Resource Conservation and Recovery Act (RCRA) to \$71,164 per violation per day of violation.

On October 5, 2017, Governor Edmund G. Brown, Jr. signed AB 245. Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2. The amendments made by AB 245 increased the maximum administrative and civil penalty for hazardous waste violations in California from \$25,000 to \$70,000 per violation per day of violation. Since the existing penalty regulations apply only to administrative penalties, the statutory changes to the civil penalties are self-implementing upon the effective date of the statutory changes.

DTSC and other agencies, including a unified program agency, local health officer, or local public officer have the authority to issue and enforce administrative orders for violations of the California Hazardous Waste Control Laws. (HWCL; Health & Saf. Code, § 25100 et seq.). (Cal. Code Regs., tit. 22, § 66270.60, subd. (b).) DTSC and other agencies rely on regulations to assess administrative penalties for enforcement purposes. The penalty assessed for any violation is required to not exceed the maximum penalty specified in statute. (Cal. Code Regs., tit. 22, § 66272.61.)

On July 5, 2018, the Office of Administrative Law (OAL) approved an emergency rulemaking action submitted by DTSC to amend section 66272.62, Determining the Initial Penalty for Each Violation. The emergency rulemaking will expire January 3, 2019 if DTSC does not complete a Certificate of Compliance or readopt the emergency rulemaking by January 2, 2019. If no emergency regulation extension is filed and a Certificate of Compliance is not completed, the

emergency regulation will expire causing the regulation to revert to a maximum initial administrative penalty of \$25,000. This would lead to uncertainty for DTSC, local agencies, regulated communities, and the public. Regulatory certainty must be provided to all stakeholders regarding the state's hazardous waste management requirements and the related administrative penalties.

### **Need for Regulation**

As previously stated, effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2 to increase the maximum administrative and civil penalties from \$25,000 per violation per day of violation to \$70,000 per violation per day of violation. Since the existing penalty regulations apply only to the administrative penalties, the statutory changes to the civil penalties are self-implementing upon the effective date of the statutory changes.

The statutory changes to the administrative penalties enacted by AB 245 resulted in a conflict between the statutory language and the regulations governing the administrative penalties, which still provided a maximum administrative initial penalty of \$25,000 per violation per day of violation. Therefore, DTSC determined that this conflict posed an emergency necessitating immediate action to amend the penalty regulations to avoid serious harm to public peace, health, safety, and general welfare. DTSC's proposed emergency regulation increasing the maximum administrative initial penalty to \$70,000 per violation per day of violation was approved by OAL and became effective on July 5, 2018. The emergency regulation will expire on January 3, 2019, if a Certification of Compliance is not filed by January 2, 2019.

This rulemaking proposal would address the statutory changes made by AB 245 and finalize the emergency regulation adopted on July 5, 2018. The proposed amendment to the penalty regulation would increase the administrative initial penalty to a maximum of \$70,000 per violation per day of violation to be consistent with the statutory changes.

### **Economic Impact Statement**

#### **B. 5. Are there comparable Federal regulations?**

Yes, the U.S. EPA granted final authorization to California to implement its own hazardous waste program or HWCL in lieu of the RCRA. California must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. In maintaining its authorization, DTSC is required to adopt and revise standards and regulations that conform with corresponding federal regulations but DTSC is not prohibited from adopting standards and regulations that are more stringent or more extensive than federal regulations. (Health & Saf. Code, §§ 25159 & 25159.5.)

As previously stated, in 2017, U.S. EPA amended the federal penalty regulations as mandated by the Federal Civil Penalty Inflation Act of 1990, as amended in 2015, which prescribes a formula for adjusting statutory civil penalties to reflect inflation, maintaining the deterrent

effect of statutory civil penalties, and promoting compliance with the law. (82 Fed. Reg. 3633 (1/12/17).) As a result, U.S. EPA amended a table that provides civil monetary penalty inflation adjustments, including a statutory maximum for violations of RCRA. (40 C.F.R. § 19.4.) U.S. EPA also made amendments to raise the penalty amount for other environmental statutes, including the Clean Water Act (33 U.S.C. § 1251 et seq.) and the Comprehensive Environmental response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.)

In amending the federal penalty regulations, U.S. EPA raised the maximum civil penalty amount, adjusted for inflation, for violations of federal hazardous waste management requirements of RCRA to \$71,164 per violation per day of violation (42 U.S.C. § 6928, subd. (g),) and amended other regulations adopted to implement RCRA. Another example in the amended federal penalty regulations is the increase in the maximum penalty of \$57,391 for violations of a corrective action order issued pursuant to RCRA Section 3008, subdivision (c) (42 U.S.C. § 6928, subd. (c); 40 C.F.R. § 19.4 at Table 2).

As a result of the federal regulatory amendments, the California Legislature amended State statute to be consistent with the federal changes. As a state agency authorized to implement RCRA, DTSC is required to amend its regulations to be consistent with the corresponding federal regulations.

### **C. 1. Estimated Benefits.**

The regulation amendment provides an added deterrent to the regulated community and encourages compliance with the HWCL. As a result, the regulation protects California's people and environment from harmful effects of toxic substances by enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products.

### **C. 3. What are the total statewide benefits from this regulation over its lifetime?**

Based on assumptions associated with prior penalty amounts collected by DTSC and local agencies who administer portions of the HWCL, DTSC calculated the following annual statewide benefits:

DTSC calculated an average by adding up administrative penalties collected by State and local agencies between 2013 and 2017, and dividing the total by five (number of years). The only change made by the regulation is a 2.8 factor increase to the maximum penalty amount.

**Calculations for State government (DTSC):**

Average DTSC settled penalties (annual year 2013-2017) = \$913,065.60

(5 year average settled penalties) X (% penalty increase) = Total projected penalty settlements annually for State of California after penalty increase – (Initial five year average) = Projected increase in penalties received by the state annually

$\$913,065.60 \times 2.8 = \$2,556,583.68 - \$913,065.60 = \$1,643,518.08$

**Calculations for local government (Certified Unified Program Agencies (CUPA)):**

Average CUPA settled penalties (annual year 2013-2017) = \$186,713.96

(Five year average settled penalties) X (% penalty increase) = Total projected penalty settlements annually for local governments after penalty increase – (Initial five year average) = Projected increase in penalties received by local governments annually

$\$186,713.96 \times 2.8 = \$522,799.10 - \$186,713.96 = \$336,085.14$

**Summary:**

Average administrative penalties settled annually 2013-2017:

State of California: \$913,065.60

Local governments: \$186,713.96

Total = \$1,099,779.56

Projected administrative penalties settled annually after amending 66272.62:

State of California: \$2,556,583.68

Local governments: \$522,799.10

Total: \$3,079,382.78

Projected increase in settled administrative penalties annually:

State of California: \$1,643,518.08

Local governments: \$336,085.14

Total = \$1,979,603.22

**D. 1. List alternatives considered and describe them below.**

An alternative to the proposed regulation would be to do nothing or adopt a regulation that would be inconsistent and less stringent than State and federal law. DTSC believes that doing nothing would lead to uncertainty between the regulated community and regulatory agencies that administer the HWCL due to the inconsistency between statute and regulations. DTSC believes no alternative would be considered reasonable in providing a consistent and

transparent approach to the assessment of administrative penalties. Further, if DTSC were to allow the emergency regulation to expire, additional uncertainties would be created for DTSC, the regulated community and the regulatory agencies that administer the HWCL. Finally, as a State authorized to administer the HWCL, in lieu of the federal RCRA program, DTSC is required to maintain a program that is equivalent to, consistent with and no less stringent than the Federal program.

**D. 3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives.**

Because this rulemaking package is proposing to amend a regulation that already has established penalties, there is no cost to the State by changing the penalty amount. DTSC already allocates money to perform the prescribed enforcement.

**Fiscal Impact Statement**

**A. 6. Fiscal Effect on Local Government: Other: Explain**

Health and Safety Code section 25187, subdivision (k) provides that all administrative penalties collected from an action brought by a unified program agency, or its participating agencies such as a local health officer or local public officer, shall be deposited into a special account that shall be expended to fund enforcement activities of the unified program agency. As previously indicated in the Economic Impact Statement and based on assumptions from prior years, DTSC anticipates the increased penalty amount may result in a 2.8 factor increase in the total penalties a unified program agency collects. The projected annual increase in penalties based on the regulation amendment is \$336,085.14.

However, due to the increased penalty amount, DTSC anticipates that there may be an increase in litigation costs due to businesses contesting the increased penalty which would offset an increase in collected penalties. An increase in litigation may result in additional costs to local agencies to defend any increased litigation due to the increased penalty.

**B. 4. Fiscal Effect on State Government: Other: Explain**

Health and Safety Code section 25187, subdivision (j)(1) and (2) provide that all administrative penalties collected from an action brought by DTSC shall be placed in separate DTSC subaccounts for expenditure by DTSC upon appropriation by the Legislature. As previously indicated in the Economic Impact Statement and based on assumptions from prior years, DTSC anticipates the increased penalty amount may result in a 2.8 factor increase in the amount of total penalties DTSC collects. The projected annual increase in penalties based on the regulation amendment is \$1,643,518.08.

However, due to the increased penalty amount, DTSC anticipates that there may be an increase in litigation costs due to businesses contesting the increased penalty which would offset an

increase in collected penalties. An increase in litigation may result in additional costs to DTSC to defend any increased litigation due to the increased penalty.