

**INITIAL STATEMENT OF REASONS**  
**Determining the Initial Penalty for Each Violation**  
**Department of Toxic Substances Control Reference Number: R-2018-01**

**PROBLEM STATEMENT**

A recent statutory change enacted by Assembly Bill No. 245 (AB 245; Chapter 499, Statutes of 2017) resulted in an inconsistency with a regulation that DTSC and other agencies rely on to enforce the California Hazardous Waste Control Law (HWCL; Health & Saf. Code, § 25100 et seq.) In determining an administrative initial penalty for a violation of the HWCL, DTSC relies on the requirements and procedures set forth in California Code of Regulations, Title 22, Article 3, Sections 66272.60 et seq.

Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2 to increase administrative and civil penalties from a maximum of \$25,000 per violation per day of violation to a maximum of \$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 from \$25,000 to \$70,000 per violation per day of violation was approved by OAL and became effective on July 5, 2018. On December 31, 2018, OAL approved the re-adoption of this emergency regulation with an expiration date of April 3, 2019.

If DTSC does not complete a Certificate of Compliance for this proposed rulemaking or obtain OAL's approval of another re-adoption of the emergency regulation by April 2, 2019, the administrative penalty regulation would revert to a maximum administrative initial penalty of \$25,000 per violation per day of violation. 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.

The proposed rulemaking is limited in scope in that it would only address the increase of the maximum administrative initial penalty from \$25,000 to \$70,000 per violation per day of violation. DTSC, however, may propose additional amendments in the future to the existing administrative penalty regulations, which have not been significantly amended since their initial adoption in July 1997, to address various issues and concerns identified as part of DTSC's efforts to improve its enforcement approaches and processes.

## **BACKGROUND**

In 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. (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 the Resource Conservation and Recovery Act (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 day per 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.)

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 the 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 HWCL. (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.)

In determining the administrative initial penalty for each violation, DTSC considers the potential harm and the extent of deviation from hazardous waste management requirements. (Cal. Code Regs., tit.22, § 66272.62.) Further, DTSC is required to use a matrix to select an initial penalty amount from the range provided in the matrix that corresponds to the appropriate extent of deviation and potential harm. (Id. at subd. (d).) Consistent with statutory authorities prior to the enactment of AB 245, the matrix provided that where a violation's extent of deviation and potential for harm is "major," the appropriate maximum administrative initial penalty is \$25,000. The enactment of AB 245 increased the statutory maximum from \$25,000 to \$70,000 per violation per day of violation. The penalty matrix in regulation (Cal. Code Regs., tit. 22, §66272.62) was

inconsistent with the statutory changes made by AB 245, before the emergency regulation became active on July 5, 2018. The emergency regulation has temporarily increased the maximum administrative initial penalty in regulation to match statute, increasing the maximum administrative initial penalty from \$25,000 to \$70,000 per violation per day of violation. The re-adopted emergency rulemaking will expire April 3, 2019. If DTSC does not complete a Certificate of Compliance for this proposed rulemaking or obtain OAL's approval of another re-adoption of the emergency regulation by April 2, 2019, the administrative penalty regulation would revert to a maximum administrative initial penalty of \$25,000 per violation per day of violation.

AB 245 was intended to make California's enforcement penalties for hazardous waste violations consistent with federal penalties by increasing both "administrative and civil penalties for state hazardous management violations to \$70,000." (Senate Bill Analysis (9/11/17) p. 1.) Further, another Senate Bill analysis cited a July 2016 report from a statutorily created Independent Review Panel (Health & Saf. Code, § 57014) that recommended an "[i]ncrease [of] the maximum penalties for violations of the Hazardous Waste Control Act [sic] to make them equivalent to the federal maximum penalties for similar violations, with an inflation allowance." (Senate Committee on Environmental Safety & Toxic Materials (undated), p. 2.)

### **SUMMARY OF BENEFITS**

Amendment of the regulation 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.

### **PURPOSE**

DTSC's primary enforcement authority is granted by Health and Safety Code section 25180. Pursuant to Health and Safety Code section 25185, DTSC has the authority to enforce hazardous waste laws by inspecting places or "environment where hazardous wastes are stored, handled, processed, disposed or, or being treated to recover resources." Local health officers and local agencies may also be authorized to enforce the state hazardous waste laws. DTSC conducts numerous inspections throughout the year, many of which may be the result of a complaint, a referral from a law enforcement agency, a regularly scheduled inspection, or a grant commitment to U.S. EPA to conduct the inspection.

Pursuant to state and federal laws, DTSC is the state agency authorized to administer the HWCL in lieu of RCRA. (42 U.S.C. § 6926; Health & Safety Code, § 25101, subd. (c), 25159; California: Final Authorization of state Hazardous Waste Program (57 Fed. Reg. 18827 (5/1/92).) DTSC is required to adopt regulations to maintain authorization that conforms with the federal program, but is not prohibited from adopting regulations that may be more stringent and broader in scope than the corresponding federal regulations. Any proposed regulation, required for authorization, is required to be

deemed a non-substantive change without regulatory effect for purposes of Section 100 of Title 1 of the California Code of Regulations. (Health & Saf. Code, § 25159.1.)

U.S. EPA and DTSC use different calculations in establishing a penalty so a change in DTSC's matrix in California Code of Regulations, title 22, section 66272.62(d) would not qualify as a non-substantive change. However, given the inconsistency and disparity between the recent statutory penalty maximums, effective January 1, 2018 and the prior regulatory requirements for assessment of administrative penalties, an emergency existed. OAL agreed that an emergency existed and approved the emergency rulemaking action on July 5, 2018.

### **NECESSITY**

On July 5, 2018, OAL approved an emergency rulemaking action submitted by DTSC to amend section 66272.62, Determining the Initial Penalty for Each Violation. On December 31, 2018, OAL approved the re-adoption of this emergency regulation with an expiration date of April 3, 2019. If DTSC does not complete a Certificate of Compliance for this proposed rulemaking or obtain OAL's approval of another re-adoption of the emergency regulation by April 2, 2019, the administrative penalty regulation would revert to a maximum administrative initial penalty of \$25,000 per violation per day of violation. 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.

The California Legislature determined that penalties should be increased to match the penalties assessed by U.S. EPA at the federal level. The adoption of the proposed regulation is necessary to ensure that the penalty regulations and the statute are consistent. This action would also make the state regulation consistent with federal law and regulations. Eliminating the inconsistency would allow DTSC and the authorized local agencies, to meet their statutory and regulatory mandate to initiate and complete timely enforcement actions to address hazardous waste violations. The proposed regulation would provide an added deterrent to the regulated community and encourage compliance with the HWCL. As a result, it would better protect 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.

### **REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

An alternative to the proposed regulation would be to do nothing. 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 that no alternative would be considered reasonable in providing a consistent and transparent approach to the assessment of administrative penalties. Finally, failing to adopt the proposed regulation would be inconsistent with

DTSC's obligation, as an authorized state, to adopt regulations to maintain authorization that conforms to RCRA.

### **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

After a preliminary evaluation, DTSC determined a Notice of Exemption pursuant to California Code of Regulations, title 14, section 15061(b)(3), is applicable to meet the CEQA requirements.

### **DETAILED STATEMENT OF REASONS**

Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2 to increase administrative and civil penalties from a maximum of \$25,000 per violation per day of violation to a maximum of \$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. On December 31, 2018, OAL approved the re-adoption of this emergency regulation with an expiration date of April 3, 2019. The emergency regulation will expire on April 3, 2019, absent the filing of a Certification of Compliance for the proposed regulation or OAL's approval of another re-adoption of the emergency regulation.

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 maximum administrative initial penalty to \$70,000 per violation per day of violation to be consistent with the statutory changes.

### **AMEND SECTION 66272.62 TO READ AS FOLLOWS:**

#### **§ 66272.62. Determining the Initial Penalty for Each Violation.**

(a) The Enforcement Agency shall determine an initial penalty for each violation, considering potential harm and the extent of deviation from hazardous waste management requirements. The Enforcement Agency shall use the matrix set forth in Subsection 66272.62(d) to determine the initial penalty for each violation.

...

(d) The matrix set forth in this subsection shall be used to determine the initial penalty for a violation. The Enforcement Agency shall select a penalty amount from the range provided in the matrix cell that corresponds to the appropriate extent of deviation and

the potential harm categories. The numbers in parenthesis in each cell of the following matrix are the midpoints of the range.

Determination of Initial Penalty Matrix (in dollars)

<i>Extent of Deviation</i>	<i>Potential Harm</i>		
	Major	Moderate	Minimal
	25,000 70,000	20,000 56,000	15,000 42,000
Major	(22,500) (63,000)	(17,500) (49,000)	(10,500) (29,400)
	20,000 56,000	15,000 42,000	6,000 16,800
	20,000 56,000	15,000 42,000	6,000 16,800
Moderate	(17,500) (49,000)	(10,500) (29,400)	(4,000) (11,200)
	15,000 42,000	6,000 16,800	2,000 5,600
	15,000 42,000	6,000 16,800	2,000 5,600
Minimal	(10,500) (29,400)	(4,000) (11,200)	(1,000) (2,800)
	6,000 16,800	2,000 5,600	0

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187, 25188, 25189, and 25189.2, Health and Safety Code; and Section 11425.50, Government Code; and 40 Code of Federal Regulations, Title 40, Section 19.4.

**TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

DTSC did not rely on any technical, theoretical, or empirical studies, reports, or documents in proposing the regulation.

**ECONOMIC IMPACT ANALYSIS**

In accordance with Government Code section 11346.3, subdivision (b), DTSC completed an economic impact assessment and determined that the proposed regulation would have an economic impact on businesses below \$10 million as detailed below and in the ECONOMIC AND FISCAL IMPACT STATEMENT (STD Form 399).

**CREATION OF NEW BUSINESSES OR ELIMINATION OF EXISTING BUSINESSES WITHIN CALIFORNIA**

DTSC does not anticipate that the revised regulation would create new businesses or eliminate existing businesses within California. The proposed regulation does not impose new or revised duties or burden on businesses that handle hazardous waste other than the present requirement to comply with the HWCL.

**CREATION OR ELIMINATION OF JOBS WITHIN CALIFORNIA**

DTSC does not anticipate that the revised regulation would create or eliminate jobs within California.

**EXPANSION OF CURRENT CALIFORNIA BUSINESSES**

DTSC does not anticipate any expansion of businesses currently doing business in California due to the proposed regulation.

## **BENEFITS OF THE REGULATIONS TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT**

An anticipated benefit of the proposed regulation is the continued protection of human health and the environment because facilities would have an added incentive to meet and comply with state hazardous waste laws. Penalties are applied only to businesses that violated the HWCL.

## **EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

As required by Government Code section 11346.3, subdivision (a), DTSC assessed the potential for adverse economic impact on California Businesses by completing an economic impact assessment as required by Government Code section 11346.3, subdivision (b). DTSC determined the proposed changes to the regulation would have an economic impact on businesses below \$10 million as detailed in the ECONOMIC AND FISCAL IMPACT STATEMENT (STD Form 399).

## **EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS**

Penalties under federal law can be found in Code of Federal Regulations, Title 40, Chapter I, Subchapter A, Part 19, Section 19.4. The amendment of this regulation does not conflict with, or modify, any federal law. Rather, it is consistent with federal law and regulations, specifically Code of Federal Regulations, Title 40, Chapter I, Subchapter A, Part 19, Section 19.4.