

**OFFICE OF ADMINISTRATIVE LAW**

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Kenneth J. Pogue  
Director

**ENDORSED - FILED**  
in the office of the Secretary of State  
of the State of California

FEB 05 2025

AB 2:05 PM



February 5, 2025

TO: Secretary of State, State of California

FROM: Timothy D. Findley, Attorney III, Office of Administrative Law *TDF*

RE: Erratum Notice, OAL Matter No. 2025-0117-02E; California Code of Regulations (CCR), title 22, sections 66260.40 and 66260.41  
Department of Toxic Substances Control  
Date filed with the Secretary of State: January 27, 2025

Subsequent to filing this approved rulemaking action with the Secretary of State, errors in the section numbers for newly adopted sections 66260.40 and 66260.41 were identified by the CCR publisher and confirmed by the Department of Toxic Substances Control (DTSC). Correction of these errors requires renumbering section 66260.40 to 66260.400, renumbering section 66260.41 to 66260.410, and changing four cross-references to those renumbered sections.

Attached to this memorandum, please find the following two documents.

- 1) A copy of the Form 400 endorsed by the Secretary of State for this action on January 27, 2025, with hand-written corrections to the filed CCR text.
- 2) An email from DTSC authorizing these corrections.

Secretary of State: please place and keep this memorandum with OAL Matter No. 2025-0117-02E.

Please contact me at 279-240-6499 or [Timothy.Findley@oal.ca.gov](mailto:Timothy.Findley@oal.ca.gov) if you have any questions. Thank you for your attention to this matter.

cc: Ruth Lafler, Barclays California Code of Regulations  
Gabby Nepomuceno, Department of Toxic Substances Control

Attachments

# Attachment 1

**EMERGENCY**

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z-</b>	REGULATORY ACTION NUMBER <b>2025-0117-08E</b>	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY Department of Toxic Substances Control			AGENCY FILE NUMBER (If any) R-2024-11E

**ENDORSED - FILED**  
in the office of the Secretary of State  
of the State of California

JAN 27 2025

*[Signature]***A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)**

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE		NOTICE REGISTER NUMBER
		PUBLICATION DATE	

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

1a. SUBJECT OF REGULATION(S) Generation and Handling Fee Requirements	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT see attached
	AMEND see attached
TITLE(S) 22	REPEAL see attached
3. TYPE OF FILING	
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input checked="" type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only	
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)	
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)	
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input checked="" type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____	
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY	
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input checked="" type="checkbox"/> Other (Specify) <i>see attached</i>	
7. CONTACT PERSON Gabriella Nepomuceno	TELEPHONE NUMBER (916) 251-8328
FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) Gabriella.Nepomuceno@dtsc.ca

1/27/2025  
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I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE  
*Katherine Butler*  
DATE  
1/02/2025  
TYPED NAME AND TITLE OF SIGNATORY  
Katherine Butler, Director, Department of Toxic Substances Control

For use by Office of Administrative Law (OAL) only

**ENDORSED APPROVED**

JAN 27 2025

Office of Administrative Law

# **FORM STD 400 - SECTION(S) AFFECTED ATTACHMENT**

## **Generation and Handling Fee Requirements**

**Department of Toxic Substances Control Reference Number: R-2024-11E**

### **TITLE**

22

### **ADOPT**

66260.40, 66260.41, 66269.10, 66269.11, 66269.12, 66269.20, 66269.21, 66269.22, 66269.30, 66269.32, 66269.33, 66269.34, 66269.35

### **AMEND**

66260.10, 66269.1 [renumbered to 66269.40], 66269.2 [renumbered to 66269.47], 66269.3 [renumbered to 66269.41], 66269.4 [renumbered to 66269.42], 66269.5 [renumbered to 66269.43], 66269.6 [renumbered to 66269.44], 66269.7 [renumbered to 66269.45], 66269.8 [renumbered to 66269.46]

### **REQUIRED CONSULTATIONS**

Board of Environmental Safety, pursuant to Health and Safety Code section 25205.5.4(b); California Department of Tax and Fee Administration, pursuant to Health and Safety Code section 25205.5.3(a)(1).



# REGULATORY TEXT

## Generation and Handling Fee Requirements

Department of Toxic Substances Control reference number: R-2024-11E

Office of Administrative Law Notice Reference Number: 2024-0117-02E

**Amend California Code of Regulations, title 22, section 66260.10:**

\*\*\*

“Continuous seal” means a seal that forms a continuous closure that completely covers the space between the edge of the floating roof and the wall of a tank. A continuous seal may be a vapor-mounted seal, liquid-mounted seal, or metallic shoe seal. A continuous seal may be constructed of fastened segments so as to form a continuous seal.

For the purposes of chapter 19, “Contractor” means the entity authorized by a contract between the entity and the governmental agency to address a release of a hazardous substance on behalf of the governmental agency.

“Control chart” means a graphical method for evaluating whether a process is or is not in a state of statistical control.

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“Generator” or “Producer” means any person, by site, whose act or process produces hazardous waste identified or listed in chapter 11 of this division or whose act first causes a hazardous waste to become subject to regulation.

For the purposes of chapter 19, “Generator” has the same meaning as in Health and Safety Code section 25205.1.

“Generator state” means the state where the waste is generated and from which the shipment originates. This definition takes effect on September 5, 2006.

\*\*\*

“Halogenated organic compounds” or “HOCs” means those compounds having a carbon-halogen bond which are listed under Appendix III or Appendix III-A to chapter 18 of this division.

For the purposes of chapter 19 and article 4 of this chapter, “Handler” means any person that generates, transports, offers for transport, treats, stores, or disposes of hazardous waste.

“Handling” means the transporting or transferring from one place to another, or pumping, processing, storing or packaging of hazardous waste, but does not include the handling of any substance before it becomes a waste.

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“Ignitable” means capable of being set afire, or of bursting into flame spontaneously or by interaction with another substance or material.

For the purposes of chapter 19, “Immediate action” means an activity initiated to address the release as soon as reasonably practicable upon the governmental agency’s discovery of the presence of the hazardous substance.

For the purposes of chapter 19, “Imminent” means a chain of events that may result in harm has been set in motion.

“Impoundment” see “Surface impoundment.”

\*\*\*

"Load" means the amount of waste transported by one truck, one railroad car or one barge to a hazardous waste facility.

For the purposes of chapter 19, "Load checking program" means an operation or operating procedure that is used by a person that receives and manages solid waste if all of the following apply:

(1) The operation or operating procedure is used to remove hazardous waste that is discovered and separated from solid waste.

(2) The operation or operating procedure is a requirement of a law, regulation, permit, or other grant of authorization.

"Major facility" means any facility or activity classified as such by the USEPA Regional Administrator in conjunction with the Department.

\*\*\*

For the purposes of chapters 14 and 15, "Repaired" means that equipment is adjusted, or otherwise altered, to eliminate a leak.

For the purposes of chapter 19, "Remedial action" has the same meaning as in Health and Safety Code section 78125.

"Remediation waste" means all solid and hazardous wastes, hazardous substances, and all media (including groundwater, surface water, soils, and sediments) and debris, that are managed for the purpose of implementing corrective action requirements under articles 6, 15.5, or 17 of chapter 14 or article 18 of chapter 15 of this division, Health and Safety Code sections 25200.10 or 25187, or section 25358.9 where as provided for under the provisions of that section the Department has excluded the removal or remedial action at a site from the hazardous waste facilities permit required by Health and Safety Code section 25201, or federal RCRA section 3005 [Title 42, U.S.C., section 6925]. For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing Health and Safety Code Sections 25200.10 or 25187, or section 25358.9 where as provided for under the provisions of that section the Department has excluded the removal or remedial action at a site from the hazardous waste facilities permit required by Health and Safety Code section 25201, or federal RCRA section 3005 [Title 42, U.S.C., section 6925] or 3004(v) [Title 42, U.S.C., section 6924(v)] for releases beyond the facility boundary.

For the purposes of chapter 19, "Removal action" has the same meaning as in Health and Safety Code section 78135.

\*\*\*

"Sudden accidental occurrence" means an unforeseen and unexpected accident which is not continuous or repeated in nature and results in bodily injury, property damage or environmental degradation.

For the purposes of chapter 19, "Substantial" means there is a reasonable cause for concern that the public or the environment would be exposed to a risk of harm.

"Substantial business relationship" means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A

"substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the Department.

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NOTE: Authority cited: Sections 25141, 25150, 25158.1, 25159, 25159.5, 25200.10, 25204, 25205.5.3, 25205.5.4, 25214.9, 25214.10.2, 25218.3(d), 25200.21, 25245, 25259, 25316, 25355.5, 25356.9, 25358.9, 58004 and 58012, Health and Safety Code; Governor's Reorganizational Plan #1 of 1991; and Sections 42475.1 and 42475.2, Public Resources Code. Reference: Sections 25110.02, 25110.1, 25110.5, 25111, 25112, 25112.5, 25113, 25114, 25115, 25117, 25117.1, 25117.3, 25117.8, 25117.9, 25117.11, 25118, 25119, 25120, 25121, 25121.5, 25122.7, 25123, 25123.3, 25123.5, 25123.6, 25141, 25150, 25158.2, 25159, 25159.5, 25174.8.1, 25200.1, 25201.6, 25204, 25214.9, 25218.1(f), 25218.3, 25200.21, 25205.5, 25205.5.3, 25205.16, 25229, 25245, 25259, 25316, 25354(b), 25355.5, 25355.6, 25356.9, 25358.1, 25358.9, 25359.8, 25361,

25501, 25529 and 58012, Health and Safety Code; and 40 CFR Sections 260.10, 261.1, 262.21, 264.551, 264.1031, 268.2, 270.2 and 273.6.

**Add article 4 to California Code of Regulations, title 22, division 4.5, chapter 10:**

2/5/2025  
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Article 4. Hazardous Waste Reporting Requirements

66260.400.Scope

(a) Except as provided for in (b), this article shall apply only to a handler, as defined in section 66260.10, who meets the following criteria:

(1) Had an active Identification Number, issued in California by either the U.S. Environmental Protectional Agency or by the Department, at any time during the prior calendar year; or

(2) Was a handler of hazardous waste in California at any time during the prior calendar year.

(b) This section does not apply to any of the following:

(1) A handler with an Identification Number for a site on tribal land;

(2) An occupant of a household that generates only household hazardous waste, as defined in section 66260.10;

(3) A handler with an Identification Number issued for the purpose of an emergency response for a geographical area identified in a state of emergency proclamation by the Governor pursuant to California Government Code section 8625.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Section 25205.16, Health and Safety Code.

66260.410.Reporting Requirements

(a) Handlers that meet the criteria listed in section 66260.400(a) shall report or verify the following information in the Department's electronic Verification Questionnaire on DTSC's website by March 31 of each year:

(1) Business information:

(A) Name;

(B) Mailing address;

(C) Facsimile number;

(D) Federal Employer Identification Number;

(E) North American Industry Classification System Code;

(F) California Department of Tax and Fee Administration account number;

(G) Operator type;

(H) Business structure;

(I) The number of employees of the firm or organization that worked at least 500 hours or more in California in the prior calendar year, including those that worked at locations that did not generate hazardous waste;

(J) Email address;

(K) Telephone number; and

(L) Any additional business-related information that the Department may deem necessary.

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(2) For each Identification Number issued to a handler, verify the corresponding site names and site addresses, and indicate whether the Identification Number is active.

(3) Requirements for Generators. Generators shall report or verify the following information for each site for the prior calendar year, as applicable:

(A) Manifested Waste Verification. Total quantity (in tons) of hazardous waste manifested, including the four largest hazardous waste streams, for each Identification Number.

1. All manifest discrepancies shall be resolved in accordance with section 66264.72 or 66265.72, as applicable.

2. For any converted tonnage that is not accurate, the generator shall report the correct tonnage and provide a justification for the discrepancy.

(B) Unmanifested Hazardous Waste Reporting. Total quantity (in tons) of each of the following unmanifested hazardous wastes:

1. Treated wood waste, as defined in Health and Safety Code section 25230.1(d); and

2. Any waste that has been granted a variance pursuant to Health and Safety Code section 25143 and that is not required to be manifested pursuant to the conditions identified in the variance.

(C) Consolidated Manifesting. The Identification Number of the transporter and total quantity of hazardous waste that was managed using consolidated manifesting procedures, pursuant to Health and Safety Code section 25160.2.

(D) Generation and Handling Fee Exemptions and Deductions. For any waste for which an exemption or deduction is claimed, the waste tonnage associated with each claimed exemption or deduction.

(4) Requirements for Transporters. Transporters shall report or verify the following activities for each site for the prior calendar year, as applicable:

(A) Manifested Waste Verification. Total quantity (in tons) of hazardous waste manifested, including the four largest hazardous waste streams, for each Identification Number.

1. All manifest discrepancies shall be resolved in accordance with section 66264.72 or 66265.72, as applicable.

2. For any converted tonnage that is not accurate, the transporter shall report the correct tonnage and provide a justification for the discrepancy.

(B) Consolidated Manifesting. Manifest tracking number(s), generator Identification Number(s), and total quantity (in tons) of hazardous waste that was managed using consolidated manifesting procedures pursuant to Health and Safety Code section 25160.2.

(C) Transporters that first cause a hazardous waste to be subject to regulation shall also comply with subsection (a)(3) of this section.

(5) Requirements for Treatment, Storage or Disposal Facilities. Facilities that conducted onsite treatment, storage, or disposal shall report or verify the following activities for each facility for the prior calendar year, as applicable:

(A) Manifested Waste Verification. Total quantity (in tons) of hazardous waste manifested, including the four largest hazardous waste streams, for each hazardous waste Identification Number.

1. All manifest discrepancies shall be resolved in accordance with section 66264.72 or 66265.72, as applicable.

2. For any converted tonnage that is not accurate, the owner or operator of the treatment, storage, or disposal facility shall report the correct tonnage and provide a justification for the discrepancy.

(B) Unmanifested Hazardous Waste Reporting. Total quantity (in tons) for each of the following unmanifested hazardous wastes:

1. Treated wood waste, as defined in Health and Safety Code section 25230.1(d); and

2. Any waste that has been granted a variance pursuant to Health and Safety Code section 25143 and that is not required to be manifested pursuant to the conditions identified in the variance.



(C) Generation and Handling Fee Exemptions and Deductions. For any waste for which an exemption or deduction is claimed, the waste tonnage associated with each claimed exemption or deduction.

1. Treatment, Storage, or Disposal Facilities that first cause a hazardous waste to be subject to regulation shall also comply with subsection (a)(3) of this section.

(b) The handler reporting pursuant to subsection (a) of this section shall certify, to the best of its knowledge, that the information provided pursuant to this section is true and correct under the penalty of perjury.

(c) Any handler that fails to comply with this section or fails to provide information required by the Department to verify the accuracy of hazardous waste activity data by the reporting deadline, shall be subject to suspension of any and all Identification Numbers assigned to the handler, penalties pursuant to article 3 of chapter 19 of this division, and an administrative enforcement order issued pursuant to Health and Safety Code section 25187.

(d) The information reported by a handler pursuant to subsection (a) of this section is subject to review by the department at its sole discretion.

NOTE. Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Section 25205.16, Health and Safety Code.

## **Add article 1 to California Code of Regulations, title 22, division 4.5, chapter 19:**

### Article 1. Generation and Handling Fee Exemption Requirements

#### 66269.10. Purpose and Scope

This article applies to all generators of hazardous waste pursuant to Chapter 6.5 of the Health and Safety Code. This article applies to the generation and handling fee imposed pursuant to Health and Safety Code section 25205.5(a) for hazardous waste generated on or after January 1, 2023.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25174.8.1, 25205.5, and 25205.5.3, Health and Safety Code.

#### 66269.11. Applicability

##### (a) Applicability to generators of hazardous waste.

(1) The generator for the purposes of the generation and handling fee assessed pursuant to Health and Safety Code section 25205.5 includes, but is not limited to:

(A) A generator that is liable for the fee, but did not pay the fee.

(B) A generator of any quantity of hazardous waste.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25174.8.1, 25205.5, and 25205.5.3, Health and Safety Code.

#### 66269.12. Exemption Requirements

(a) The exemption requirements in this section are in addition to, and do not alter, the exemption requirements in Health and Safety Code sections 25174.8.1 and 25207.12, and the deduction requirements in section 25205.5.

(b) Governmental Response Exemption: Hazardous waste generated when a governmental agency takes a removal, remedial, or corrective action to address a release of a hazardous substance is exempt from the generation and handling fee pursuant to Health and Safety Code section 25174.8.1(a)(1) if all of the following conditions are met:

(1) The threat posed by the release was both imminent and substantial.

(2) The governmental agency took necessary immediate action.

(3) The governmental agency did not cause the release of the hazardous substance.

(4) The governmental agency is not a responsible party for the release as described in Health and Safety Code section 78145 nor a person subject to an order relating to the release as described in Health and Safety Code section 25187(b)(5).

(A) For the purposes of subsection (b)(4) of this section, the governmental agency may assert the exclusions and defenses outlined in Health and Safety Code section 78145.

(5) The governmental agency files an annual return with the California Department of Tax and Fee Administration pursuant to Revenue and Taxation Code section 43152.7(b).

(c) Household Hazardous Waste Exemption: The fee exemption in Health and Safety Code section 25174.8.1(a)(2) applies only to the hazardous waste that a household hazardous waste facility collects from the public in compliance with the requirements in Article 10.8 of the Health and Safety Code.

(d) Load Checking Program Exemption: The fee exemption in Health and Safety Code section 25174.8.1(a)(3) applies only to load checking programs as defined in 66260.10. At the time the hazardous waste was received by the person operating the load checking program, the person operating the load checking program must have implemented operational procedures to minimize the amount of hazardous waste received.

(e) Pass Through Waste Deduction: The fee deduction in Health and Safety Code section 25205.5(a)(4) applies only to waste that is stored, bulked, and transferred by a permitted hazardous waste facility in accordance with the permit.

(1) The deduction applies only to waste that was generated offsite, even if the quantity of waste was below the minimum threshold for assessment of the generation and handling fee on the original generator pursuant to Health and Safety Code section 25205.5.

(2) The deduction is not applicable to hazardous waste that undergoes treatment, as defined in Health and Safety Code section 25123.5, at the permitted hazardous waste facility claiming the deduction.

(f) Exempted Banned, Unregistered, or Outdated Agricultural Waste: For the purposes of the generation and handling fee, a county operating a collection program pursuant to division 20, chapter 6.5, article 9.4 of the Health and Safety Code is not the generator of the hazardous waste collected as part of that program as specified in section 66269.11.

(g) Disaster Victims Exemption:

(1) Victims of disasters shall be exempt from the generation and handling fee imposed pursuant to Health and Safety Code section 25205.5 if all of the following apply:

(A) The hazardous waste is generated in a geographical area identified in a state of emergency proclamation by the Governor pursuant to Government Code section 8625 because of fire, flood, storm, earthquake, riot, or civil unrest.

(B) The hazardous waste is generated when property owned or controlled by the victim is damaged or destroyed as a result of the disaster.

(C)(i) The hazardous waste is not hazardous waste that is routinely produced as part of a manufacturing or commercial business or that is managed by a hazardous waste facility or a facility operated by a generator of hazardous waste that files a hazardous waste notification statement with the Department pursuant to Health and Safety Code section 25158(a).

(ii) For purposes of this paragraph "routinely produced" means a waste type that is regularly generated in the normal course of that business' operations. However, if a regularly generated waste type is generated as a direct result of the disaster and not in the normal course of business then that waste is eligible for this exemption.

(D) The hazardous waste is disposed of within 365 days from the date of the termination of an emergency proclamation issued by the Governor for the disaster which occurred in that geographical area.

(2) A person claiming an exemption from the generation and handling fee shall exclude hazardous waste meeting the requirements specified in subsection (g)(1) from the calculation of the generation and handling fee due pursuant to Health and Safety Code section 25205.5. A person that has paid a generation and

handling fee to the state for hazardous waste meeting the requirements specified in subsection (g)(1) may claim a refund in accordance with Chapter 5 (commencing with Section 43451) of Part 22 of Division 2 of the Revenue and Taxation Code.

NOTE: Authority cited: Sections 25205.5.1, 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25174.8.1, 25205.5, 25205.5.1, 25205.5.3, and 25207.12, Health and Safety Code.

**Add article 2 to California Code of Regulations, title 22, division 4.5, chapter 19:**

2/15/2025  
PER AGENCY  
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Article 2. Generation and Handling Fee Exemption Review Process and Recordkeeping Requirements

66269.20. Applicability

This article applies to all generators that claim any exemption or deduction from the generation and handling fee assessed pursuant to Health and Safety Code section 25205.5 in a report to the Department pursuant to section 66260.410, or in a return filed to the California Department of Tax and Fee Administration pursuant to Revenue and Taxation Code section 43152.7.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25174.8.1, 25205.5, 25205.5.3, and 25205.16 Health and Safety Code.

66269.21. Generation and Handling Fee Exemption Review

(a) Any claim of an exemption or deduction from the generation and handling fee assessed pursuant to Health and Safety Code section 25205.5 is subject to review by the Department at its sole discretion. The Department shall provide written notification to the generator notifying the generator of selection for exemption review and identifying the information that the generator is required to submit to the Department pursuant to section 66269.22.

(b) The Department shall provide written notification of selection pursuant to subsection (a) of this section to a generator within three years after the date when the return was due pursuant to Revenue and Taxation Code section 43152.7. However, if a generator willfully or knowingly made a false statement, withheld material facts, or failed to complete a report or file a return as described in section 66269.20, the written notification shall be provided to a generator within eight years after the date when the return was due pursuant to Revenue and Taxation Code section 43152.7.

(c) The generator shall provide information required in section 66269.22 within 30 calendar days of receipt of the Department's written notification. The deadline to provide information will be extended by 15 calendar days, but only if DTSC receives an extension request from the generator in writing before the end of the 30 calendar day deadline.

(d) If the Department finds that the information submitted by a generator pursuant to subsection (c) is incomplete or inadequate, the Department may provide the generator a written notification requesting additional information. The generator shall provide the additional information within 30 calendar days of receipt of the notification.

(e) If a generator does not provide the information required pursuant to section 66269.22 within the time required by subsections (c) and (d), the Department may issue a final evaluation finding that the requirements of the exemption are not met due to insufficient information. However, a generator that willfully or knowingly made a false statement or withheld material facts to the Department pursuant to this section shall be liable for penalties pursuant to article 3 of this chapter, and the Department may issue a final evaluation finding that the requirements of the exemption are not met due to insufficient information.

(f) The Department shall provide a written final evaluation to the generator and the California Department of Tax and Fee Administration. The final evaluation shall serve as the conclusion of the Department's exemption review pursuant to this section. The California Department of Tax and Fee Administration may consider the Department's evaluation in accordance with Part 22 of Division 2 of the Revenue and Taxation Code.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25174.8.1, 25196.1, 25205.5, 25205.5.3, and 25205.16, Health and Safety Code.

66269.22. Recordkeeping Requirements for Generators Claiming an Exemption from the Generation and Handling Fee

(a) A generator described in section 66269.20 shall retain the information specified by this section for the hazardous waste for each exemption or deduction claim, beginning when the hazardous waste is generated until at least three years after the date when the return was due pursuant to Revenue and Taxation Code section 43152.7.

(1) The time period set forth in subsection (a) shall toll automatically upon the issuance of the Department's notification issued under section 66269.21(b) or during the course of any unresolved enforcement action regarding the generator.

(b) For any exemption or deduction from the generation and handling fee, generators shall retain, and provide upon the Department's request, the following information:

(1) Facts about the source of the waste and the generation of the waste that are relevant to the claim;

(2) All documents required pursuant to section 66262.40(c);

(3) All shipping documents with details of the management of the hazardous waste including, but not limited to, manifest numbers, bills of lading, logs, invoices, and movement documents associated with the waste, as applicable;

(4) Explanation of the information provided and how it demonstrates the accuracy of the exemption claimed, including, but not limited to:

(A) Identification of the statute or regulation applicable to the claim;

(B) Facts meeting the requirements under the applicable statute or regulation.

(5) Any other documentation that supports the claim of the exemption.

(c) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(1) and section 66269.12(b) shall retain all information required under subsection (b) and all of the following:

(1) Documents demonstrating that the release was not caused by the governmental agency or its contractor;

(2) Documents demonstrating the necessity of immediate action;

(3) Documents demonstrating that the governmental agency took action to address the release as soon as reasonably practicable upon the governmental agency's discovery of the hazardous substance;

(4) If the governmental agency is the owner or operator of the site where the release occurred, documentation that the governmental agency qualifies for an exemption or a defense under Health and Safety Code Section 78145;

(5) Any other documentation that supports the claim of the exemption.

(d) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(2) and section 66269.12(c) shall retain all information required under subsection (b) and all of the following:

(1) Documentation of total tonnage manifested offsite in the calendar year the waste being exempted was generated;

(2) "Form 303 Household Hazardous Waste Collection Report" required pursuant to California Code of Regulations, title 14, section 18751.2.2, for the calendar year in which the waste being claimed as exempt was generated;

(3) Any other documentation that supports the claim of the exemption.

(e) A generator claiming an exemption under Health and Safety Code 25174.8.1(a)(3) and section 66269.12(d) shall retain all information required under subsection (b) and all of the following:



(1) Documents with information that the waste was generated as part of a load checking program, including, but not limited to, logs, inventory, and the written operating procedures for the program existing at the time the waste was generated;

(2) Documents with information that the load checking program is required in order for the facility to comply with a law, regulation, permit, or other grant of authorization, including, but not limited to, relevant page numbers in a permit;

(3) Any other documentation that supports the claim of the exemption.

(f) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(4) shall retain all information required under subsection (b) and all of the following:

(1) Documents with the following information:

(A) The amount of "household do-it-yourselfer used oil" that was collected during the calendar year, as required by Health and Safety Code section 25174.8.1(a)(4)(B);

(B) Authorization pursuant to Public Resources Code section 48660 as a certified used oil collection center at the time the "household do-it-yourselfer used oil" was collected.

(2) Any other documentation that supports the claim of the exemption.

(g) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(5) shall retain all information required under subsection (b) and all of the following:

(1) Documentation that demonstrates the hazardous waste was recycled and used onsite such as operating records or, for waste that meets the requirements in Health and Safety Code section 25143.2(c), a recyclable materials report pursuant to Health and Safety Code section 25143.10;

(2) Any other documentation that supports the claim of the exemption.

(h) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(6) shall retain all information required under section (b) and all of the following:

(1) Documentation of the facility permit to treat the hazardous waste;

(2) Documentation demonstrating the resultant waste from the treatment was nonhazardous;

(3) Any other documentation that supports the claim of the exemption.

(i) A generator claiming an exemption under Health and Safety Code section 25174.8.1(a)(7) shall retain all information required under subsection (b) and all of the following:

(1) Documents showing the total quantity of universal waste generated in the calendar year;

(2) Documentation of any transport of the universal waste identified in paragraph (1), including, but not limited to, the destination facility as defined under section 66260.10, name of the transporter, and date of transport;

(3) Documentation that the management of the universal waste was in compliance with universal waste management standards in chapter 23 of this division;

(4) Any other documentation that supports the claim of the exemption.

(j) A generator claiming an exemption under Health and Safety Code section 25207.12 and section 66269.12(f) shall retain all information required under subsection (b) and all of the following:

(1) Documentation demonstrating that the generator meets the definition of "eligible participant" pursuant to Health and Safety Code section 25207.1(c);

(2) Documentation demonstrating that the waste being exempted meets the definition of a "Banned or unregistered agricultural waste" or "Outdated agricultural waste" pursuant to the Health and Safety Code section 25207.1(a) and (d);

(3) Any other documentation that supports the claim of the exemption.

(k) A generator claiming an exemption under Health and Safety Code section 25144.6(b) shall retain all information required under subsection (b) and any other documentation that supports the claim of the exemption.

(l) A generator claiming an exemption under Health and Safety Code 25205.5.1 and section 66269.12(g) shall retain all information required under subsection (b) and all of the following:

- (1) Documentation demonstrating all conditions of section 66269.12(g)(1) have been met;
- (2) Any other documentation that supports the claim of the exemption.

(m) A generator claiming a deduction under Health and Safety Code 25205.5(a)(4) and section 66269.12(e) shall retain all information required under subsection (b) and all of the following:

- (1) Documentation of the facility permit to conduct the activities listed in Health and Safety Code section 25205.5(a)(4);
- (2) Documentation demonstrating payment of the annual facility fee for the calendar year the waste being stored, bulked, and transferred was generated;
- (3) Documentation demonstrating the facility the waste was en route to was authorized to conduct the activities listed in Health and Safety Code section 25205.5(a)(4)(A) through (D), inclusive;
- (4) Any other documentation that supports the claim of the deduction.

(n) Upon receipt of the documentation pursuant to this section, the Department may, at its discretion, request additional information to evaluate the claimed exemption or deduction.

NOTE: Authority cited: Sections 25205.5.1, 25205.5.3, 25205.5.4, and 58012, Health and Safety Code. Reference: Sections 25144.6, 25174.8.1, 25196.1, 25205.5, 25205.5.1, 25205.5.3, and 25207.12, Health and Safety Code.

## **Add article 3 to California Code of Regulations, title 22, division 4.5, chapter 19:**

### Article 3. Assessment of Penalties

#### 66269.30. Applicability

(a) This article applies to the assessment of penalties pursuant to Health and Safety Code section 25189.2 and 25196.1. Further, it applies to the assessment of administrative penalties in administrative enforcement orders issued pursuant to Health and Safety Code section 25187.

(b) Administrative penalties assessed in administrative enforcement orders issued pursuant to Health and Safety Code sections 25187 shall be assessed following the procedures set forth in this article.

(c) The Department shall, pursuant to Health and Safety Code section 25180(d), determine whether the person being assessed a penalty is being treated equally and consistently with regard to the same types of violations previously assessed against other violators.

NOTE: Authority cited: Sections 25180, 25205.5.4 and 58012, Health and Safety Code. Reference: Sections 25187, 25187 (d) and (e), 25189.2, and 25196.1, Health and Safety Code.

#### 66269.32. Determining the Initial Penalty for Each Reporting System Violation

(a) For the purposes of this article, "Reporting systems" refers to the systems that are used to fulfill a handler's reporting requirements pursuant to section 66260.40, Health and Safety Code section 25160.2(d), and Health and Safety Code section 25230.8(c), as applicable.

(b) The Department shall determine an initial penalty for each violation in a reporting system as identified in this section. A handler shall be subject to a violation for each Identification Number issued to the handler per reporting period that is out of compliance with the reporting system requirements. The Department shall use the matrices set forth in this section to determine the initial penalty for each reporting system violation.

(c) Violations for Delinquency in Reporting



(1) Failure to report by the reporting system deadline is a violation. A handler shall be assessed a separate violation for each Identification Number that does not comply with this requirement.

(2) The matrix set forth below shall be used to determine the initial penalty based upon the annual tonnage generated in the prior calendar year, beginning with 2024, and the days out of compliance.

#### Delinquency in Reporting

<u>Tonnage Tier</u>	<u>1-15 days after reporting deadline</u>	<u>16-30 days after reporting deadline</u>	<u>31-45 days after reporting deadline</u>	<u>46-60 days after reporting deadline</u>	<u>61+ days after reporting deadline</u>
<u>less than 5 tons</u>	<u>\$25</u>	<u>\$50</u>	<u>\$75</u>	<u>\$125</u>	<u>\$250</u>
<u>5 tons but less than 10 tons</u>	<u>\$100</u>	<u>\$200</u>	<u>\$350</u>	<u>\$550</u>	<u>\$1,100</u>
<u>10 tons but less than 25 tons</u>	<u>\$200</u>	<u>\$300</u>	<u>\$450</u>	<u>\$650</u>	<u>\$1,300</u>
<u>25 tons but less than 500 tons</u>	<u>\$300</u>	<u>\$400</u>	<u>\$550</u>	<u>\$750</u>	<u>\$1,500</u>
<u>500 tons but less than 1,000 tons</u>	<u>\$400</u>	<u>\$500</u>	<u>\$650</u>	<u>\$850</u>	<u>\$1,700</u>
<u>1,000 or more tons</u>	<u>\$500</u>	<u>\$600</u>	<u>\$750</u>	<u>\$950</u>	<u>\$1,900</u>

#### (d) Violations for Inaccurate Reporting

(1) Reporting systems. A handler that reports tonnage with a discrepancy of 15% or greater between the tonnage reported into a reporting system and the actual tonnage generated shall be assessed a violation.

(2) Fee return. A handler that reports a discrepancy of 15% or greater between the tonnage in the report submitted to the Department pursuant to section 66260.410 and the return filed with the California Department of Tax and Fee Administration shall be assessed a violation. A handler shall be assessed a separate violation for each Identification Number that does not comply with this requirement.

(3) The matrix set forth below shall be used to determine the initial penalty for each inaccurate reporting violation based upon the annual tonnage generated in the prior calendar year, beginning with 2024.

#### Initial Penalties for Inaccurate Reporting

<u>Tonnage Tier</u>	<u>Violation</u>
<u>less than 5 tons</u>	<u>\$750</u>
<u>5 tons but less than 10 tons</u>	<u>\$1,500</u>
<u>10 tons but less than 25 tons</u>	<u>\$2,500</u>
<u>25 tons but less than 500 tons</u>	<u>\$3,000</u>
<u>500 tons but less than 1,000 tons</u>	<u>\$5,000</u>
<u>1,000 or more tons</u>	<u>\$7,500</u>

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(e) Violations for Willfully or Knowingly Making A False Statement or Withholding Material Facts. The Department shall assess an initial penalty of \$70,000 for any handler that has willfully or knowingly made a false statement in, or withheld material facts from, information submitted to any of the reporting systems.

NOTE: Authority cited: Sections 25205.5.4 and 58012, Health and Safety Code. Reference: Sections 25187, 25189.2, and 25196.1, Health and Safety Code.

#### 66269.33. Determining the Initial Penalty for Each Exemption Review Violation

The Department shall assess an initial penalty of \$70,000 for a generator that has willfully or knowingly made a false statement or withheld material facts in the information submitted to the Department pursuant to sections 66269.21 or 66269.22.

NOTE: Authority cited: Sections 25205.5.3, 25205.5.4 and 58012, Health and Safety Code. Reference: Sections 25187, 25189.2, 25196.1, and 25205.5.3, Health and Safety Code.

#### 66269.34. Adjustment Factors

(a) The initial penalty assessed shall double for each violation as set forth in section 66296.32(c)(1) per Identification Number per reporting system based on the handler's tonnage tier in the most recent reporting period for which the handler is delinquent upon meeting all of the following conditions:

- (1) The delinquency in reporting is greater than 60 days;
- (2) The delinquency occurred in two or more consecutive reporting periods; and
- (3) The delinquency occurred in the same reporting system.

(b) The initial penalty assessed for inaccurate reporting shall double for each Identification Number per reporting system based on the handler's tonnage tier in the most recent reporting period for which the handler is in violation upon meeting both of the following conditions:

- (1) The violation occurred in two or more consecutive reporting periods; and
- (2) The violation occurred in the same reporting system.

(c) After determining the initial penalty, the Department shall adjust the initial penalty based on the violator's intent in committing the violation using the following adjustment factors for violator's intent:

<u>Adjustment Factor</u>	<u>Circumstance</u>
<u>Downward Adjustment of 100 percent</u>	<u>Violation was completely beyond the control of the violator.</u>
<u>Downward Adjustment of 0 to 50 percent</u>	<u>The extent to which the violation occurred despite good faith efforts to comply with regulation(s).</u>

(d) Prophylactic Effect: The initial penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole.

(e) Ability to Pay: Violators must provide financial information including, but not limited to, the violator's state and federal tax returns for the last three years, including all schedules, exhibits, and attachments; financial statements for three years; current financial statement; and the most recent 12 months of bank statements for all checking, savings, lines of credit, and investment accounts, to the Department to request extension or reduction of assessed penalties. After the violator has provided the Department with the financial information necessary to assess the violator's ability to pay, and upon the Department's determination that full payment in lump sum would cause extreme financial hardship to the violator, the Department shall extend payment of the penalty over a period of time. If the Department determines extending the penalty payment over a period of time would cause extreme financial hardship to the violator, the Department shall reduce the penalty. To evaluate whether payment will cause extreme financial hardship to the violator, the Department shall use the "Individual Ability to Pay Plus (INDIPAY+) Guide," May 2021, and the "Overview of Ability to Pay Guidance and Models," May 1995, hereby incorporated by reference.



(f) Adjustment of the initial penalty in accordance with the subsections (c) through (e), inclusive, may result in an adjusted initial penalty that is higher or lower than presented in the originally selected matrix cell, but shall not exceed the statutory maximum.

NOTE: Authority cited: Sections 25205.5.4 and 58012, Health and Safety Code. Reference: Sections 25187, 25189.2, and 25196.1, Health and Safety Code.

#### 66269.35. Final Penalty

The final penalty for each violation consists of the initial penalty, as defined in section 66269.32 and section 66269.33, with any adjustments made pursuant to the adjustment factors set forth in Sections 66269.34. The final penalty for each violation shall not exceed the statutory maximum.

NOTE: Authority cited: Sections 25205.5.4 and 58012, Health and Safety Code. Reference: Sections 25187, 25189.2, and 25196.1, Health and Safety Code.

### **Amend and renumber California Code of Regulations, title 22, division 4.5, chapter 19:**

#### Article 4. Fee Rates

##### 66269.1. 66269.40. Environmental Fee.

*[no changes to the text]*

NOTE: Authority cited: Sections 25205.6 and 58012, Health and Safety Code. Reference: Sections 25205.6, 25205.6.1 and 25501, Health and Safety Code.

##### 66269.3. 66269.41. Facility Fee Rates for Fiscal Year 2024–25.

*[no changes to the text]*

NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.2.1, Health and Safety Code. Reference: Section 25205.2, Health and Safety Code.

##### 66269.4. 66269.42. Generation & Handling Fee Rate for Fiscal Year 2024-25.

*[no changes to the text]*

NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.5.01, Health and Safety Code. Reference: Section 25205.5, Health and Safety Code.

##### 66269.5. 66269.43. Environmental Fee Rates for Fiscal Year 2024–25.

*[no changes to the text]*

NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.6.1, Health and Safety Code. Reference: Section 25205.6, Health and Safety Code.

##### 66269.6. 66269.44. Facility Fee Rate Limits.

(a) The fee rates established by the Board of Environmental Safety pursuant to subdivision (a) of Section ~~25201.2.1~~ 25205.2.1 of the Health and Safety Code shall not exceed the following limits:

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NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.2.1, Health and Safety Code. Reference: Section 25205.2.1, Health and Safety Code.

##### 66269.7. 66269.45. Generation and Handling Fee Rate Limit.

*[no changes to the text]*

NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.5.01, Health and Safety Code. Reference: Section 25205.5.01, Health and Safety Code.

##### 66269.8. 66269.46. Environmental Fee Rate Limits.

*[no changes to the text]*

NOTE: Authority cited: Sections 25125.2, 25125.4 and 25205.6.1, Health and Safety Code. Reference: Section 25205.6.1, Health and Safety Code.

~~66269.2.~~ 66269.47. Disaster Victims Hazardous Waste Fee Exemption.

*[no changes to the text]*

NOTE: Authority cited: Sections 25150, 25205.5.1 and 58012, Health and Safety Code; Reference: Sections 25158, 25174.1, 25174.2, 25174.6, 25174.7, 25205.3, 25205.5 and 25205.9, Health and Safety Code. Sections 8625, 8626, 8627, 8628 and 8629, Government Code.

**ADOPT**

**Individual Ability to Pay Plus (INDIPAY+)  
Guide**

**U.S. Environmental Protection Agency  
Office of Enforcement and Compliance  
Office of Site Remediation Enforcement and Office of Civil Enforcement**

**Updated May 2021**

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## Key Terms

**Ability to Pay (ATP)** is a general policy framework that deals with financial issues for settlements where a party's financial ability to pay is a significant consideration. The ATP analysis uses financial information to evaluate the financial condition of the party (entity) individual analyzed and its ability to pay for a cleanup, fines, and penalties.

**INDIPAY+** are tools that offer added and expanded analysis to evaluate an individual's financial ability to pay his or her environmental obligations. It goes beyond the INDIPAY screening model and is the second step in the ATP analysis. Like INDIPAY, INDIPAY+ should, generally, only be used for settlement purposes.

**Cash Flow Test** compares income to expenses.

**Debt Capacity** is an assessment of the amount of debt an individual can take on and repay on time from available resources without jeopardizing their financial viability.

**Individual** means any party or entity liable for environmental obligations who uses the Individual Income Tax form to submit financial data to the federal government. This Guide does not apply to business entities such as C- or S-corporations that file corporate tax returns. In this Guide, "individual" refers to a respondent, responsible party (RP), or potentially responsible party (PRP).

**Financial Hardship** refers to a situation in which an individual is having financial difficulties satisfying debt payments and/or meeting living expenses because of unexpected events or changes that affects their cash flow. For example, changes in income, expenses, employment status, or an emergency event signify potential strains on an individual's financial resources. An undue financial hardship occurs if "satisfaction of the environmental claim will deprive a PRP of ordinary and necessary assets or cause a PRP to be unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses." (Source: EPA. "General Policy on Superfund Ability to Pay Determination," 1997.)

**INDIPAY** is a computer-based model screening tool used to make a preliminary determination of an individual's financial health, which is the first step in an ATP analysis.

**Net Worth** equals Total Assets minus Total Liabilities.

## I. Introduction

- (a) The Environmental Protection Agency (EPA) takes an individual's claim of financial hardship seriously and does not seek to impose cleanup costs or a penalty that is beyond an individual's financial means. Instead, it is EPA's policy to work with such individuals in an effort to determine the appropriate level of contribution toward cleanup costs or a suitable penalty adjustment in light of their financial circumstances.<sup>1</sup> Therefore, it is essential for EPA to obtain the necessary financial information to inform the evaluations and assessments.
- (b) EPA developed the INDIPAY model to aid with evaluating an individual's ability -to-pay (ATP) claim (as opposed to a corporate claim evaluated using the ABEL model).<sup>2</sup> The purpose of an ATP analysis is to decide if there are financial resources (e.g., liquid assets, credit lines) available to an individual to pay for environmental obligations. The ATP analysis helps figure out whether an individual is in the financial position to pay the entire amount owed or only a part, if any.
- (c) You are not required to use the INDIPAY model to conduct a financial analysis of an individual. The INDIPAY computer model is a **screening** tool designed to give a quick and accurate determination based on data found on an individual's tax returns and the Financial Data Request Form (FDRF). The model is a conservative tool. If the INDIPAY model concludes that an individual has the resources to pay a penalty or cleanup cost, you may be confident in that result. However, in cases where the model gives a negative or ambiguous result, you may decide to go beyond screening and further evaluate the individual.
- (d) INDIPAY may serve as a useful screening tool in an ATP analysis. To help with those circumstances not easily screened out after using INDIPAY, **INDIPAY+** goes beyond by offering added advice and tips on how to conduct an expanded analysis of an individual's ATP. INDIPAY+ incorporates financial information disclosed by an individual and other financial information available from other sources that may help in completing the financial picture of an individual. It also discusses how to obtain and confirm the information used in the analysis. Further, it explains what information to use, what financial data to use in the analysis, and gives options to identify and consider all potential resources available.
- (e) This Guide identifies steps you may take to get a better understanding of an individual's financial situation. It provides you with a framework augmented by step-by-step guidance on how to evaluate an individual's ATP claim and offers suggestions for further evaluation where an individual's ability to pay is ambiguous. This Guide is intended to help you obtain, then evaluate, accurate and current financial information for an

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<sup>1</sup> See EPA's ability to pay guidance documents: *Guidance on Determining a Violator's Ability to Pay a Civil Penalty* (Dec. 16, 1986); *General Policy on Superfund Ability to Pay Determinations* (Sept. 30, 1997); and *Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (June 29, 2015).

<sup>2</sup> See the Agency's Penalty and Financial Models Web page at <https://www.epa.gov/enforcement/penalty-and-financial-models>

individual and whether an individual has an ability to fulfill their environmental obligations.<sup>3</sup>

## II. Objectives of INDIPAY+

- (a) **INDIPAY+** is a user-friendly, interactive tool for both non-financial personnel and experienced financial analysts when conducting financial analysis on an individual's ATP claim. OECA developed INDIPAY+ to aid case teams in collecting pertinent financial information and conducting helpful calculations. Please note that per EPA guidance, "[t]he case team should be mindful of the sensitivity of [an individual's] financial information as well as handling confidential business information (CBI)."<sup>4</sup>
- (b) This Guide is designed to evaluate the ATP of an individual, an officer of a company (personally liable), business (sole proprietorship), or an entity that files a U.S. Individual Income Tax Return (Forms: 1040, 1040A and 1040EZ). **Note:** EPA also has models available for corporations and municipalities.<sup>5</sup>

## III. Components of INDIPAY+

Four companion documents comprise **INDIPAY+**. Together, they offer interactive instructions, lists, and steps to conduct a financial analysis of an individual's ATP claim.

- 1. **Financial Analysis Spreadsheets** – Excel spreadsheets with built-in mathematical and financial calculations, uses financial information from the individual as well as other sources to help figure out whether the individual can pay for any environmental obligations. The Financial Analysis Spreadsheets consist of the following:
  - a. **Net Worth Test** – Provides a snapshot of an individual's financial health at a specific time. Net worth presents a summary of what an individual owns (assets) less what an individual owes to others (liabilities).
  - b. **Cash Flow Test** – Provides information about the cash received (inflows) and cash spent (outflows) by an individual. It helps determine if an individual can meet their obligations using cash on hand.
  - c. **Future Cash Flow Test** – Conducts the future cash flow calculations of expected in the near future (5 years). It calculates expected income (inflows) and expenses (outflows) that an individual might experience in the future that were not accounted for in the current evaluation because they have not yet happened.

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<sup>3</sup> Owners and/or operators of underground storage tank systems are financially responsible for cleaning up contamination should their system have a release.

<sup>4</sup> Page 12 of EPA's *Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (June 29, 2015) available at <https://www.epa.gov/enforcement/guidance-evaluating-ability-pay-civil-penalty-administrative-enforcement-actions>.

<sup>5</sup> See Penalty and Financial Models Web page at <https://www.epa.gov/enforcement/penalty-and-financial-models>.

- d. **Debt Capacity Test** – Determines the added debt that an individual can assume without compromising financial stability. It estimates how much monthly income the individual could spend repaying a debt without financial hardship.
- e. **Penalty or Contribution Payment** – Calculates the penalty or contribution payment amounts that an individual can pay based on their generated cash flow over some period of time (generally 5 years) and/or their ability to take on an added debt.
- 2. **Guide** – walks the user through the steps, explaining how to use the documents to complete the financial analysis of an individual.
- 3. **Checklist of Information Sources** (“Checklist”) – lists the sources of financial information available to a user, describes the information needed to conduct the ATP analysis, and gives tips on how to interpret certain facts/data and what to request as follow up.
- 4. **Reference Manual** – offers a more in-depth description of the process to assess an individual’s ATP claim, gives additional information on what financial information a user may need, where to find the information, and how to evaluate the financial data/information. It also provides more detail about the financial analysis as well as financial/accounting definitions and terminology.

#### IV. Data Needed for INDIPAY+ Analysis

##### **Basic Steps of INDIPAY+ ATP Analysis:**

**Step 1:** Gather financial data and other relevant information directly from an individual.

**Step 2:** Research independent sources of financial and related information to obtain a more complete financial picture of an individual.

**Step 3:** Consider and apply optional steps, if helpful, in the INDIPAY analysis (e.g., checking with other state or EPA regional programs for information on an individual).

**Step 4:** Review and verify accuracy of information to ensure that financial information provided by an individual is correct and authentic.

**Step 5:** Input the data and information from Steps 1-3 into the **Financial Analysis Spreadsheets** and conduct the financial analysis.

**Step 6:** Follow up (i.e., request more information and/or clarify data, as needed).

**Step 7:** Identify course of action(s), such as making an individual ATP determination.

#### V. How does INDIPAY+ ATP Analysis Work?

The INDIPAY+ ATP analysis **Guide** is a series of seven steps recommended to conduct an individual ATP analysis.

### **Step 1 - Gathering financial information and other relevant financial information.**

Request information directly from an individual such as tax returns, bank statements, FDRF, payroll statements, and W-2 Forms (see **Checklist**). The information you request will depend on what you are trying to accomplish. For example, verification of certain items versus a more thorough forensic financial investigation.

These sources furnish the core data you may need for an individual ATP analysis. The **Checklist** instructs you on what specific information you may need to conduct the ATP analysis along with the pertinent time period(s). These sources are not only fundamental to conducting an individual ATP analysis, they are crucial for other reasons. For example, they can corroborate data previously received. They also allow you to compare values from various sources (e.g., income information, tax return vs. FDRF) and fill in missing information on one document by getting it from another (e.g., salary information from the W-2 when the individual does not provide the tax return). To go ahead with this step, use the **Checklist** for sources under Primary and Secondary Sources.

### **Step 2 - Conduct independent research.**

Conduct independent research to identify an individual's assets and any business affiliations.

There are many third-party sources available to verify or augment the documentation received from an individual. These include, and are not limited to, LexisNexis, CLEAR, and Dun & Bradstreet. Other helpful resources include an individual's social media activity such as Instagram, LinkedIn, and Facebook. Information collected from these sources may help confirm the data from an individual and/or offer new and relevant financial information to the analysis. Because this part of the process can bring in new information, plan to conduct step 2 in conjunction with Step 1. You should confirm any information from independent research with an individual along with a request for any necessary supporting documentation or explanations.

The **Checklist** guides you through the information that may be available to support the analysis and describes the current known resources to obtain the information. It also includes instructions and offers tips on how to conduct a search. The types of sources you use depend on what is available to you. (See **Checklist**, Third Sources).

### **Step 3: Conduct supplementary internal and external research.**

- (a) Check your own office to learn if there is an existing file on an individual (agency or office archives).
- (b) Check with EPA Regional and state colleagues where an individual was/is operating to see if they have any information that may be relevant to your investigation and analysis. (See **Checklist** and ask the Regions/States if they already received or collected any information listed in the **Checklist**).



#### Step 4: Review and verify data and relevant information.

- (a) Compare the information and documents against the **Checklist** to see if any important items are missing.
- (b) Next, confirm relevancy, accuracy, and credibility of information.
  - Relevancy – determine if the information is relevant and sufficient to conduct the analysis. Not every analysis will need every piece of information in the **Checklist** or **Financial Analysis Spreadsheets**. The information necessary for the analysis will depend on the specific circumstances of each case. If needed information is missing, request information from the individual or conduct more research.
  - Accuracy – decide if the information is correct and reflects an individual's financial situation (See **Checklist**).
  - Credibility – determine if the information is dependable, trustworthy, reputable, and authentic. For example, credible information would be information/documents that are certified and/or signed, and/or issued by a third independent party (e.g., a bank or CPA) while less credible documents are self-reported (e.g., a mortgage statement issued by a mortgage company is more credible than a handwritten mortgage statement created by an individual). The Reference Manual explains several methods and lists resources for evaluating and cross-checking information.
- (c) Review sources of income to figure out how an individual generates money. An individual may have one or more sources of income (e.g., employment salary, investment, welfare, inheritance, and other sources).
- (d) Conduct a quick review of an individual's expenses to establish the necessary and ordinary expenses of an individual. According to the Internal Revenue Service (IRS), necessary and ordinary expenses are those expenses necessary to support a taxpayer's health and welfare and/or production of income, including that of the family.<sup>6</sup> Examples of unnecessary expenses include: (1) individual buys a high-end luxury vehicle to drive to customers' offices, and, (2) individual pays rental fees for a monthly air-conditioned storage unit that not used in years. Review of an individual's sources of income can suggest what expenses are reasonable and what expenses are unnecessary. For example, a self-employed individual may have a higher insurance expense, more tax deductions, and more frequent travel and entertainment expenses. A retired individual might have higher medical and insurance expenses and lower educational expenses and, typically, no childcare expenses.

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<sup>6</sup> According to the IRS, necessary expenses are food, housekeeping supplies, apparel and services, personal care products and services, miscellaneous, housing, utilities, and transportation. <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-food-clothing-and-other-items>

**Step 5: Input data and relevant information into the Financial Analysis Spreadsheets and evaluate the results.**

The **Financial Analysis Spreadsheets** have built-in formulas to supply results for each test. The **Financial Analysis Spreadsheets** offer flexibility by allowing you to base the analysis on the available information.

(a) Start with inserting data into the **Financial Analysis Spreadsheets**:

- Input the data and information collected from the individual, other agencies/institutions, and other sources (IRS Forms 1040 and 4506 and information that you collected from your independent research), into the **Net Worth, Cash Flow, Future Cash Flow, and Debt Capacity Spreadsheets found in the blue colored tabs.**
- Follow the structure and instructions built into the **Financial Analysis Spreadsheets.** The instructions are in the gray colored tabs. The working columns (places where you insert the data/information) are the white columns. The symbol "✓" in the gray columns shows fields where specific data or information could be available under the specific source.

(b) Analyze the results from the **Financial Analysis Spreadsheets.**

- While inserting data into the **Financial Analysis Spreadsheets**, consider the following:
  - Identify whether expenses are reasonable and necessary by considering the individual's employment status, their family size, amount/value of expenses, type of expense, timing of expense, etc. **Reasonable and necessary expenses** are essential, appropriate, habitual, normal, usual, and common expenses incurred by the individual.<sup>7</sup> You may consider an expense reasonable if the nature of the good or service acquired, and the amount involved, reflect the action that a prudent person would have taken under the same circumstances at the time the individual decided to incur the cost.
  - Depending on an individual's circumstances, these examples may represent unnecessary expenses. Clarify with the individual if you have questions about these types of expenses:
    - An individual gave a large charitable contribution of \$10,000, deducted from income, to a nonprofit organization owned by his spouse. This is a contribution expense because the organization is not a qualified organization by IRS and EPA may not consider this as a reasonable expense and/or necessary and ordinary expense. Add this contribution (\$10,000) back in the **Financial Analysis Spreadsheets** as additional income.
    - An individual spends money on gambling, vacations, a membership to an expensive golf club, rents a beach condominium, or regularly takes a taxi to work instead of available public transportation, etc. If these expenses are not

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<sup>7</sup> OSRE decided on what type of expenses are reasonable based on the IRS's publication titled [insert title here] at <https://www.irs.gov/publications/p535/ch02.html>.

reasonable, ordinary, and necessary expenses, you should add them back in the **Financial Analysis Spreadsheets**.

- An owner of an online consulting business working from home purchased a second or third car. The car purchase may be an unnecessary expense.
- Scan for large and/or unusual assets and liabilities of an individual. Some examples of unusual assets and liabilities include the sale of property, inheritance of a house/cash/car/other assets, additional loans, setting up a new business, large or very frequent money transfers or deposits.
- In some cases, if an individual's expenses exceed the National Standards<sup>8</sup> of expenses, it may show that an individual has financial difficulties, but not always. Since the individual provides most of the information on expenses, there is a possibility that he/she could overstate their expenses to intentionally, or unintentionally, prove their inability to pay. For example, an individual may report more expenses than usual in the "necessary" expenses section (e.g., excessive food/clothing expenses or travel expenses that an individual could postpone or avoid). In most cases, use this test as a guide to identify expenses or income needing further evaluation or explanation.
- On the other hand, an excess of individual's expenses over the National Standards may mean an individual has a financial hardship and is unable to pay their environmental obligation. As stated above, this is not the final determination of ability of pay; rather, it is an approximate determination. Further analysis such as net worth, cash flow, and debt capacity may provide a more accurate financial picture of an individual's ability to meet their environmental obligations.
- **Net Worth** – does an individual have a positive or negative net worth? This is the determination of an individual's financial position.
  - **Net Worth Test** – should include the most recent monthly data/information on the owner because this test gives a snapshot of an individual's financial health at a specific point in time.
    - Assets greater than liabilities (positive net worth) indicate that an individual is in good financial health and may be able to pay their debt and may be able to liquidate (sell) some of their assets to meet additional obligations such as cleanup costs. An individual, however, may identify certain personal assets such as a residential house or car as necessary assets. For other assets, you should conduct a more thorough search and clarify with the individual those assets that should be included or excluded in the Net Worth analysis. In addition, you may find it helpful to identify and verify with an individual any other assets that you should include or exclude from the net worth analysis.

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<sup>8</sup> See National Standards: Food, Clothing and Other Items Web page at <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-food-clothing-and-other-items>

- Liabilities greater than assets (negative net worth), indicate that an individual may have financial hardship with more liabilities than assets. This may indicate that an individual is unable to liquidate (sell) any assets or use them as collateral to borrow against to provide funds to fulfill their environmental obligation. Thus, we recommend you evaluate each asset to identify necessary assets (e.g., primary residence) versus unnecessary assets (e.g., a boat or expensive car collection). In some situations, there may be no liquidity. In others, an individual may be able to pledge some assets as collateral for a loan.
- **Cash Flow** – reports the sources and uses of cash by an individual during a specific period. For this manual, the time period covered is one year. Can an individual fully, partially, or not afford payment(s) to cover the environmental obligations?
  - **Cash Flow Test** – input the yearly data/information from an individual and his family. The test examines cash funds such as salary, dividends, royalties, and interest that an individual received against expenses during the one-year time period. In addition, it includes any changes (increases/decreases) to cash equivalents<sup>9</sup> by an individual during the one-year period.
    - The difference between “Cash In” and “Cash Out” is the amount of funds available to pay additional obligations. If an individual spends more than they receive, an individual has a negative cash flow. This may be due to unnecessary expenses, excessive debt, or possible unreported income. Negative cash flow may indicate an inability to pay, thus, it becomes important to identify any unnecessary expenses.
    - Positive cash flow may indicate an individual could pay some, if not all, of their environmental obligations. A final determination, however, calls for your judgment based on the results of the analysis and specific facts of the case.
  - **Future Cash Flow Test** – identifies future expected financial information to the individual and his or her family. The test examines any future expected or potential income and expenses that an individual might receive or incur in the future.
- **Debt Capacity Spreadsheet** – indicates the amount of money an individual may borrow to pay the environmental obligation.
  - **Debt Capacity Test** – builds on the Cash Flow Test. It uses the same data/information on an individual to conduct the Cash Flow Test (i.e., income and expense information). The ability to repay (or take on) added debt to pay for the environmental obligation is shown by the debt capacity ratio (%) ranging from less than 10% (excellent ability to take on more debt) to 43% or higher

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<sup>9</sup> Cash equivalents are short-term, highly liquid investments with a maturity of three months or less. Examples of cash equivalents are: foreign currencies, saving accounts, certificates of deposit, commercial paper, marketable securities, short-money market accounts, short-term government bonds, and treasury bills.

(inability to take on added debt).<sup>10</sup> The **Financial Analysis Spreadsheets** (Debt Capacity) incorporate and explain these ratios. Most banks will allow and provide a loan to an individual with a debt capacity ratio up to 36%. There are some banks and other financial institutions that allow loans to individuals with a debt capacity above 36%. EPA recommends 36% as a cut-off ratio for considering more debt (financing) to manage environmental liabilities.

- **Penalty or Contribution Payment Spreadsheet** – how much money, if any, an individual can afford to pay toward their environmental obligation?
  - Test A: Cash Flow – indicates the present value<sup>11</sup> of cash flow generated by an individual over a period of 5 years.<sup>12</sup> This test quantifies how much money the individual can give to meet their environmental obligations over the next 5 years based on their previous 5 years of generated cash.
  - Test B: Debt Capacity – indicates the present value of debt the individual can take on over a period of 5 years. This test quantifies how much added debt an individual can take on to fulfill their environmental obligations.
  - Test C: Cash Flow and Debt Capacity – combines both Test A and Test B to provide a more accurate and complete understanding of an individual's financial ability to meet their environmental obligations.
- Consider any future assets or expenses that may affect an individual's financial health in near future. Use your professional judgment whether to include or exclude them into the **Future Cash Flow** and **Debt Capacity Spreadsheets**. For example, upcoming student loan payments for a child may reduce cash flow of an individual while a child graduating from college may increase the cash flow in near future.

#### Step 6: Follow up.

If needed, request missing information from an individual and clarify any unclear or contradictory information from databases and the Internet to complete the **Financial Analysis Spreadsheet**. Some examples:

- You obtained an individual's savings account bank statement that shows a large transfer of money (e.g., \$50,000) to Company Z. The individual did not list or disclose Company Z in any documents provided by the individual. In this situation, you should run a search on Company Z using online sources (see **Checklist**) to ascertain whether the individual transferred the \$50,000 to a company owned or co-owned by the same individual, their spouse, or a relative. You should also ask the individual for clarification on Company Z and request a copy of Company Z's tax return to identify and/or confirm the ownership of Company Z. If confirmed through conversation

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<sup>10</sup> Debt capacity ratio is based on ratios established by The Consumer Financial Protection Bureau and Credit Union National Association, Inc.

<sup>11</sup> Present value (PV) is the current worth of a future sum of money or stream of cash flow given a specified rate of return.

<sup>12</sup> The period of 5 years is a timeframe to be identified by the case team, e.g., 4 years, 3 years, etc.



with the owner and review of Company Z's tax return that the individual wholly owns Company Z, add the full amount of positive income of Company Z to the individual's Cash Flow Test. If Company Z is a partnership, add the proportional amount of the partnership to the individual's Cash Flow Test. This is an example of a possible asset or profit you could further investigate and include as a source of funds for environmental liabilities. Depending on the situation, you may find it beneficial to consult with a financial expert.

- You learned from LinkedIn that an individual listed Company X on his personal profile as an employer. Company X was not disclosed in any documents (including tax returns) provided by the individual. You will need to confirm if Company X is an affiliated business to him/her or a business owned by him/her. In this scenario, you will run a search on Company X through CLEAR or Dun and Bradstreet.
- Your search shows that an individual owns stock in Company X. You can determine whether those assets are available from the Net Worth analysis of the individual's tax return or requesting the individual's stock certificate from Company X. You may want to confirm the individual's relationship to Company X by checking the Secretary of State database. If Company X was incorporated in the current year, it mostly likely will not show up on the individual's tax return filed in previous years. Assuming the individual provides the stock certificate showing ownership of some percentage of common shares in Company X, you should consider including (adding) this percentage in the **Net Worth Spreadsheets** as an additional source of investment assets and add any of the individual's dividends received from Company X to the Cash Flow Test as cash available.

Update and re-evaluate (due to latest information) the **Financial Analysis Spreadsheets**.

#### **Step 7: Decide on the best course of action based on spreadsheet results:**

The **Financial Analysis Spreadsheet** give you an estimate of the funds available for the environmental obligation. The final determination on whether an individual can fulfill the environmental obligation is case-specific. The final determination a separate and distinct determination, based on all information gathered and analyzed by using the best judgment relevant to the individual or case.

The above process of going beyond the INDIPAY screening model should help you assess an individual's ability to fully, or partially, fulfill their environmental obligation or their inability to repay the environmental obligation from:

- Accessing available cash (Test A) *(See: pg. 11, Guide)*
- Borrowing funds (Test B) *(See: pg. 11, Guide)*
- Combining available cash and borrowing funds (Test C) *(See: pg. 11, Guide)*
- Selling unnecessary assets (positive Net Worth Test)
- Decreasing current and/or planned expenses and investments
- Utilizing a combination of all the above

Please note that a negative net worth and a negative cash flow outcome would generally indicate an inability to pay. There are some situations, however, where a negative net worth can be viewed as a temporary hardship and not an inability to pay. For example, an individual may have had large expenses (e.g., machine, equipment, real estate purchases, medical, or school expenses) to start or support their business and/or family. These expenses are investments or temporary expenses that could later produce positive revenue to the business or represent a one-time expense or a discontinued expense.

Taking into consideration that each case has its own distinct facts, and after completion of the **Financial Analysis Spreadsheets**, the INDIPAY+ Guide suggests you undertake the following action(s):

- Consult with the case team and decide whether additional monitoring<sup>13</sup> of an individual's financial situation is necessary when the case team is uncertain of the financial health of the individual (negative net worth and positive cash flow or positive net worth and negative cash flow), or
- Recommend to the case team to seek full or partial payments from the individual to fulfill their environmental obligation when you determine an individual has a positive net worth and/or positive cash flow, or
- Consult with the case team and suggest closing the case when you determine an individual is unable to pay (negative net worth and negative cash flow), or,
- Consider debt capacity, how much access to credit an individual has, how much money he or she can borrow without any financial problems, and how easily he or she could exceed their debt capacity if they go over their credit lines (at or above 36%).
- Document your decision— whatever action(s) (listed above) the case team decided to take, explain why you chose this action for future reference.

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<sup>13</sup> Monitoring recommended for up to 3 years from the time you conducted the analysis for large dollar amounts.

# EPA Overview of Ability To Pay Guidance And Models

The purpose of this document is to identify and briefly describe documents that are relevant to Superfund ability to pay ("ATP") analyses. The documents fall into two general categories: (1) documents that require or provide for consideration of the ability to pay of potentially responsible parties ("PRPs"); and (2) documents that describe methods to determine ATP settlement amounts. The Regions should use documents in the first group in making Superfund ATP determinations. The Regions may also use documents in the second group in conducting ATP settlements until more specific Superfund ATP settlement guidance is provided by Headquarters. **[Note: Users should not rely solely on this summary document in making ability to pay determinations, but should instead read the relevant document(s) in their entirety.]**

## A. GENERAL POLICY DOCUMENTS

The following Agency documents describe situations in which a liable party's ability to pay should be considered. Although some of these documents do not deal specifically with CERCLA liability, they represent general Agency policy regarding the use of ability to pay in enforcement cases. For this reason, the documents should be relied upon in situations relating to the ability to pay potential of Superfund PRPs.

### 1. General Civil Penalty Policy

The *General Civil Penalty Policy* is composed of two documents: *Policy on Civil Penalties* and *A Framework for Statute-Specific Approaches to Penalty Assessments*.

#### a. *Policy on Civil Penalties*

(EPA General Enforcement Policy # GM-21)  
(February 16, 1984)

This is an Agency guidance document that "establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions." Although this document is intended to address penalty considerations, it is important because it sets forth the Agency's basic philosophy on ability to pay issues in enforcement cases.

This philosophy indicates that under the goal of fair and equitable treatment of the regulated community, the policy must allow for flexibility to adjust penalties. The policy lists certain factors that are to be considered in determining penalty amounts. One of these factors is "ability to pay." The policy also cautions that a reduction of a penalty based on ability to pay is only "appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation."

#### b. *A Framework for Statute-Specific Approaches to Penalty Assessments* (EPA General Enforcement Policy # GM-22) (February 16, 1984)

A companion to the *Policy on Civil Penalties*, this policy directs EPA staff on the development of medium-specific penalty policies for administratively-imposed penalties and judicial and administrative settlements under statutes enforced by the Agency. It restates and amplifies some of the concepts included in the *Policy on Civil Penalties* document.

Lack of an ability to pay is identified as one circumstance of "compelling public concern" based on which an enforcement case may be settled for less than the economic benefit of noncompliance. This document states that ability to pay settlements are allowed if "[r]emoval of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business."

Three additional requirements are provided for use in ability to pay determinations: 1) the violator has the burden of demonstrating an inability to pay claim; 2) "EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business"; and 3) documenta-

tion of all ability to pay adjustments must be included in case files and other relevant internal documents.

**2. Guidance on Determining a Violator's Ability to Pay a Civil Penalty** (EPA General Enforcement Policy # GM-56) [December 16, 1986]

This Agency guidance document amplifies the discussion in the *General Civil Penalty Policy* relating to the use of the ability to pay factor in the imposition of civil penalties. This guidance document is directed toward civil penalties imposed on for-profit entities that have not filed for bankruptcy. It establishes a standard for the evaluation of an inability to pay claim by stating that "EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship."

Although this document establishes a standard, it does not determine a specific dollar amount that a party can afford to pay. The guidance requires the examination of various options that a violator has for paying a civil penalty and provides that the Agency may request copies of tax returns and other financial documents to support claims of inability to pay. The document also states that if requested information is not provided, the Agency should seek the full penalty amount.

"ABEL," a computer program that evaluates the financial health of for-profit entities based on the estimated strength of their internally-generated cash flows, is introduced in this guidance. (A more detailed description of ABEL is provided below.) The document notes that, even if the ABEL analysis shows an inability to pay a penalty with internally generated cash flow, the Agency should evaluate other possible sources of payment.

**3.\* Interim CERCLA Settlement Policy**  
(OSWER # 9835.0) [December 5, 1984]

This Agency guidance document identifies ten criteria governing private party settlements under CERCLA. One criterion is "ability of the settling parties to pay." This document states that "the settlement proposal should discuss the financial condition of that party, and the practical results of pursuing a party for more than the government can hope to actually recover."

**4.\* Guidance on Documenting Decisions Not to Take Cost Recovery Actions**  
(OSWER # 9832.11) [July 7, 1988]

This document states that the decision to not take a

cost recovery action may be based on the finding that a PRP is not financially viable or that it is unable to pay a substantial portion of the claim. This guidance references the *PRP Search Manual* (OSWER # 9834.6).

**5.\* Transmittal of the Superfund Cost Recovery Strategy**  
(OSWER # 9832.13) [July 29, 1988]

The Superfund cost recovery strategy requires the Agency to consider the "financial ability of the potential defendants to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim" when deciding to issue a cost recovery referral.

**6.\* Submittal of Ten-Point Settlement Analysis for CERCLA Consent Decrees**  
(OSWER # 9835.14) [August 11, 1989]

Commonly known as the "ten point guidance," this document makes the same reference to ability to pay considerations as the *Interim CERCLA Settlement Policy* document: that the "settlement proposal should discuss the financial condition of [a] party, and the practical results of pursuing a party for more than the government can hope to actually recover."

**7.\* Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes**  
(OSWER # 9834.13) [December 6, 1989]

This Agency guidance document describes the Agency's interim policy for CERCLA settlements with municipalities. Included in the document is authority to include special settlement provisions "where a municipality has successfully demonstrated to EPA that they are appropriate (e.g., where valid ability to pay or procedural constraints that affect the timing of payment exist)."

**8.\* Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Compensation and Liability Act**  
(OSWER # 9841.2) [June 13, 1990]

This penalty policy allows for the reduction of a penalty that is "clearly beyond the financial means of the violator." It reiterates much of what is stated in earlier penalty policy documents, including the use of ABEL and the type of information that is to be relied upon in making an ability to pay determination.

## B. DOCUMENTS THAT ASSIST IN DETERMINING ABILITY TO PAY AMOUNTS

The following documents identify methodologies that may be relied upon in conducting an ability to pay analysis. Although the documents which follow provide much useful information for determining an ability to pay amount, none of these documents represent formal Agency guidance directed specifically at Superfund cases.

### 1. The ABEL Computer Model and Supporting Documentation

The Agency has developed a computer model that assists in identifying whether a settlement amount has the potential to create a financial hardship. The computer program is known as ABEL and the following three documents, *ABEL User's Manual*, *ABEL User's Guide*, and *Supplement to the ABEL User's Manual: Superfund ABEL*, describe the use of, and methodologies relied upon in performing, an ABEL ability to pay analysis.

ABEL conducts an ability to pay assessment of a for-profit corporation. ABEL projects the ability of the for-profit corporation to pay for the proposed settlement from future earnings and from a delay in reinvestment of capital assets.

The ABEL model will calculate certain common financial ratios that describe the financial strengths and weaknesses of the for-profit corporation. This part of the analysis is called a phase one analysis and can be performed with a minimum of one year of financial information. ABEL requires at least three years of tax data to make a phase two projection. The phase two projection compares the proposed settlement amount with projected future cash flows of a for-profit corporation. The phase two projection then provides the statistical probability that the corporation can pay the proposed settlement from the projected future cash flows.

ABEL is designed to be used by those who are not familiar with financial information. The ABEL documentation informs enforcement personnel that a person experienced in ability to pay analysis must examine the financial information prior to the reduction of a proposed settlement amount if the ABEL analysis indicates an inability to pay.

ABEL is not designed to evaluate the ability to pay of other financial entities such as municipalities, partnerships or individuals.

#### a. *ABEL User's Manual* [October 1991 Version]

This manual provides step-by-step instructions for using the ABEL model. The *ABEL User's Manual*

describes how the ABEL model can be used in assessing a for-profit corporation's ability to pay one or more of the following expenditures: civil penalty; environmental clean-up costs; and/or pollution control equipment costs. The *User's Manual* also provides background information on key assumptions used in the model (e.g., reinvestment rate), and how these can be altered by the user.

#### b. *ABEL User's Guide* [October 1991]

This guide is available in two versions, an "uncut" version for government users of the ABEL model (which contains confidential information) and a non-confidential version for outside users of the model (which is now available for purchase through the National Technical Information Service (NTIS)).

The government version of this document provides internal enforcement guidance on how EPA staff can effectively use the ABEL computer model in settlement negotiations. Specifically, this document describes what additional analyses should be performed if ABEL predicts that a violator's cash flow will not be sufficient to pay proposed penalty and/or cleanup costs.

The *User's Guide* relies upon 3-5 years of federal income tax returns to perform the analysis and also describes other documents that should be requested from a violator, as well as public sources of information.

#### c. *Supplement to the ABEL User's Manual: Superfund ABEL* [September 1992 Version]

This supplement to the *ABEL User's Manual* provides information on use of the ABEL model for Superfund calculations. The Superfund ABEL model is easier to use when estimating the present value of costs associated with the work that is agreed to be performed. However, the standard values utilized by the Superfund ABEL model relax the criteria for determining a financial hardship. Accordingly, the Superfund ABEL model may identify more financial hardship situations than the standard ABEL model. If the conclusion reached



by the Superfund ABEL model is that the for-profit corporation has the ability to pay, the chances of the corporation demonstrating an extreme financial hardship are small.

## **2. Beyond ABEL: Ability to Pay Guidance** [February 1993]

This guidance document is designed to assist EPA personnel to "go beyond ABEL" and assess ability to pay in cases where the ABEL computer model produces a negative or ambiguous result. Because ABEL is designed as a conservative screening tool that focuses only on internal cash flow, it may produce a negative or ambiguous result when a violator has the ability to pay through other means, such as reduction of unnecessary expenses, sale of or borrowing against assets, or assumption of additional debt.

The guidance gives step-by-step instructions on how to investigate potential sources of funds, and contains worksheets to guide this analysis and to draw attention to key information in tax returns and/or other financial statements. The analysis focuses on identifying luxury assets, undervalued assets, loans to or from officers and shareholders, unnecessary officers' salaries, and certain other expenses. The result is a more sophisticated analysis than that provided by ABEL.

The guidance suggests methods of adjusting an ABEL input to allow ABEL to estimate the ability to pay of sole proprietors, partnerships, and Subchapter S corporations. Also, the guidance provides additional cautions that help to clarify when a financial analyst should be consulted.

## **3. Individual Ability to Pay Guidance** [June 1992]

If a violator files only an individual federal income tax return, ABEL cannot be used. The *Individual Ability to Pay Guidance* was developed by Industrial Economics, Inc., the EPA contractor that supports the ABEL model, for sole proprietor, partnership and individual inability to pay claims in the State of Iowa's underground storage tank (UST) program.

Although this document was not written by EPA, it can be useful in a case involving an individual's inability to pay claim. This document is not a computer program but provides a method to determine an individual's ability to pay. In a method that is similar to the ABEL model, this document draws information from individual tax forms, including Form 1040, Form 1040A, or Form 1040EZ.

This document characterizes the financial strengths and weakness of an individual in comparison to averages determined from income level, family size and county of residence. The document relies on income and expense information to project the availability of income after the payment of identified expenses and to determine if additional debt capacity exists.

The guidance provides advice on how to make a final ability to pay determination, including instructions on topics such as: how to understand the results, when it is appropriate to do additional research and verification (including consultation with a financial analyst), and how to consider extenuating financial circumstances (e.g., current sale or purchase of real estate).

## **4. Guidance for Calculating Municipal and Not-for-Profit Organizations' Ability to Pay Civil Penalties Using Current Fund Balances** [March 1993]

This is a pilot guidance document developed by the Office of Prevention, Pesticides, and Toxic Substances (OPPTS) for use in determining the ability of governmental entities (municipalities) and other not-for-profit (NFP) organizations to pay civil penalties. The document suggests a method of determining the ability to pay from unreserved funds. It does not evaluate other methods of paying for the proposed settlement such as borrowing, raising taxes or paying over time.

The document describes how to use NFP financial statements to perform an ability to pay assessment for three types of organizations: (1) municipalities and states; (2) private colleges and universities; and (3) NFP hospitals. This document also contains background information on financial accounting practices and types of financial statements used by NFP entities, which differ from those used by for-profit companies.

## **5. The Road to Financing, Assessing and Improving Your Community's Creditworthiness** [September 1992]

Developed by the Office of Water, this document provides brief descriptions of municipal financial characteristics and discusses how changes in these financial characteristics will project improvement in a municipality's financial health. It is a useful tool in describing some of the concepts of assessing the ability to pay of a municipality. This document may be useful for those who are unfamiliar with municipal financial characteristics.

**6. Financial Capability Guidebook**  
[March 1984]

This Office of Water document is to be used to determine whether a municipality can demonstrate that it can ensure adequate building, operation, maintenance and replacement of a publicly owned treatment works. The most important section of this guidebook is the Supplemental Information Sheet and instructions (pages 52-68). The instructions allow for a characterization of a municipality that is equivalent to what the ABEL analysis does for a business. However, there is one major note of caution. The analysis is not intended for a Superfund ability to pay analysis but for the construction and operation of a publicly owned treatment works. For this reason, the *Guidebook* provides a higher ability to pay estimate than may be applicable.

**7. Financial Review Methodology for Wastewater Discharge Noncompliance Cases**  
[September 17, 1984]

This document was prepared by Peat Marwick, an accounting firm, for EPA Region V. The methodology is similar to that in the *Financial Capability Guidebook*, but it allows for a greater number of years of financial information to be examined and a more detailed discussion of the financial indicators. The document has the same limitation as the *Financial Capability Guidebook*, in that it subjects the municipality to a more rigorous standard than Superfund ability to pay settlements.

**8. Ability to Pay Interrogatories**  
[June 16, 1994]

This draft OECA document provides model interroga-

tories, requests for production, and judicial and administrative subpoenas for discovery of information and documents in cases where ability to pay is an issue. The interrogatories are intended to be tailored to specific cases, taking into account the size and structure of the violating entity.

Separate model interrogatories and requests for production of documents are provided for: (1) corporations; and (2) individuals and sole proprietors. Interrogatories to corporations request information on: corporate structure and management; equity and debt; parent and subsidiary entities; insurance coverage; tax and financial information; assets; liquidation of assets; and claims and judgments. Interrogatories to individuals and sole proprietors request information on personal and business assets, liabilities, income, expenses, and other financial matters. [NOTE: This document can be released only to government employees.]

**9. Ability to Pay Case Memorandum**  
[August 1, 1993]

This Office of Enforcement document summarizes all the significant cases in the area of ability to pay, as of the date of issuance. The memorandum summarizes environmental case law related to topics such as: application of statutory provisions that require ability to pay to be considered in civil penalty assessments (e.g., section 109(a)(3) of CERCLA); which party has the burden of proving an ability (or inability) to pay; factors that may be considered in assessing ability to pay; alternative payment plans; and types of financial information that may be presented to a court on ability to pay issues. [NOTE: This document can be released only to government employees.]

## ADDITIONAL INFORMATION

If you have any questions or comments on this Fact Sheet, please contact **Bob Kenney (703-603-8931)** or **Leo Mullin (703-603-8975)** of the OSRE Policy and Program Evaluation Division (PPED).

If you would like copies of the documents summarized in this Fact Sheet, they are available from the following sources. Documents identified by an asterisk (\*) are found in the *CERCLA Enforcement Policy Compendium*. Copies of the complete Compendium or individual documents may be ordered by EPA personnel from the **Superfund Document Center (703-603-8917)**. [If requesting the complete Compendium, ask for Documents # PB-93-963623 and PB-92-963623; if requesting specific documents, ask for the OSWER document number listed above.] Other referenced documents are available from **Tracy Gipson (202-260-3601)** of the OSRE Regional Support Division.

## Attachment 2

## Findley, Timothy@OAL

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**From:** Nepomuceno, Gabriella@DTSC <Gabriella.Nepomuceno@dtsc.ca.gov>  
**Sent:** Wednesday, February 5, 2025 9:31 AM  
**To:** Findley, Timothy@OAL  
**Subject:** RE: OAL Matter No. 2025-0117-02E; confirmation of corrections to section numbers

Hi Tim,

1. Yes, the hand-written corrections to the regulatory text are accurate.
2. Yes, I authorize you to make these corrections to the CCR.

Thanks so much!

-Gabby



**Gabby Nepomuceno** (*she/her/hers*)

Assistant Deputy Director of  
Legislative and Regulatory Affairs  
Office of Legislation and Regulatory  
Review

[gabriella.nepomuceno@dtsc.ca.gov](mailto:gabriella.nepomuceno@dtsc.ca.gov)

**Department of Toxic Substances Control**

1001 "I" Street, P.O. Box 806,  
Sacramento, California 95812-0806  
California Environmental Protection  
Agency

**From:** Findley, Timothy@OAL <Timothy.Findley@oal.ca.gov>  
**Sent:** Wednesday, February 5, 2025 9:26 AM  
**To:** Nepomuceno, Gabriella@DTSC <Gabriella.Nepomuceno@dtsc.ca.gov>  
**Subject:** OAL Matter No. 2025-0117-02E; confirmation of corrections to section numbers

Gabby,

Will you please confirm by reply:

1. that the attached hand-corrected copy of the final regulation text filed with the Secretary of State on January 27, 2025, accurately reflects the corrections requested by the Department of Toxic Substances Control (DTSC), to change the erroneously numbered section 66260.40 to 66260.400 (along with associated cross-references) and to change the erroneously numbered section 66260.41 to 66260.410 (along with associated cross-references), and;
2. OAL has DTSC's authorization to make these corrections to the CCR.

Thank you.

Timothy D. Findley, Attorney III

**Office of Administrative Law**

300 Capitol Mall, Suite 1250, Sacramento, CA 95814

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