

California Environmental
Protection Agency

California CUPA
Forum



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**ENFORCEMENT STEERING
COMMITTEE**



ADMINISTRATIVE ENFORCEMENT ORDER GUIDANCE

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I. INTRODUCTION

The Unified Program protects Californians from hazardous waste and hazardous materials by ensuring regulated businesses comply with applicable laws and regulations. Enforcement of the Unified Program is carried out by Certified Unified Program Agencies (CUPAs) and their Participating Agencies (PAs), collectively referred to as “Unified Program Agencies (UPAs).” Each CUPA is required to develop and implement an Inspection and Enforcement Plan (I&E Plan), which must, among other things, identify available enforcement options. (California Code of Regulations, title 27, section 15200(a)(5).) (For additional information about I&E Plans, see guidance at <https://calepa.ca.gov/cupa/resources/>.) One enforcement option that is available to UPAs is an Administrative Enforcement Order (AEO), which is a critical tool for ensuring that regulated businesses comply with Unified Program requirements. This ***Administrative Enforcement Order Guidance*** document has been prepared to assist UPAs in their use of AEOs. This guidance summarizes existing law and best practices.

This document is intended as guidance only; it does not establish, supersede, supplement, or revise, any applicable statute, regulation, standard, or rule.

UPAs have the authority to issue AEOs to address violations in five of the six program elements:

- Hazardous Waste Generator and Onsite Hazardous Waste Treatment,
- Underground Storage Tanks (USTs),
- Aboveground Petroleum Storage Act (APSA),
- Hazardous Materials Release Response Plans, more commonly known as “Hazardous Materials Business Plans” (HMBPs), and
- California Accidental Release Prevention (CalARP).

UPAs do not have the authority to issue AEOs to address violations of the Hazardous Materials Management Plans (HMMP) and Hazardous Materials Inventory Statements (HMIS).

UPAs that have corrective action authority that has been delegated by the Department of Toxic Substances Control (DTSC) may issue administrative orders requiring corrective action whenever the UPA determines that there is or has been a release of a hazardous waste or hazardous waste constituent into the environment pursuant to Health and Safety Code section 25187. Corrective actions orders are not discussed further in this guidance document.

The goals of AEOs include:

- Protect public health, safety, and the environment.
- Ensure prompt compliance by regulated businesses.
- Eliminate illegally obtained economic benefit.

- Punish the violator for non-compliance.
- Deter future non-compliance of both violators and the regulated community.
- Create a level playing field for businesses.

As will be discussed in this guidance document, AEOs have advantages as compared to civil and criminal enforcement.

This guidance document provides information about the preparation and issuance of AEOs; some guidance is specific to an individual program element. An AEO can be used to address all violations of the five program elements identified during an inspection.

UPAs may coordinate with other State and Federal enforcement agencies when pursuing enforcement (including both informal and formal enforcement). Nothing in this document is intended to preclude UPAs from pursuing other formal enforcement options available under existing law.

II. STATUTORY AUTHORITY

“If the unified program agency determines that a person has committed, or is committing, a violation of any law, regulation, permit, information request, order, variance, or other requirement that the UPA is authorized to enforce or implement pursuant to this chapter, the UPA may issue an administrative enforcement order requiring that the violation be corrected and imposing an administrative penalty...” (Health and Safety Code section 25404.1.1.)

III. ADMINISTRATIVE ENFORCEMENT ORDER ISSUANCE AND SETTLEMENT PROCESS

A. Introduction

Each CUPA is required to have an Inspection and Enforcement (I&E) Plan that details how the CUPA and its PAs, if applicable, is going to conduct inspections and take enforcement, as needed. For further information about I&E Plans see <https://calepa.ca.gov/cupa/resources/>. After an UPA conducts an inspection, if no violation(s) are observed, no enforcement is required. However, if violation(s) are observed, the UPA documents the violation(s) and determines the appropriate enforcement option. One of the options, as previously mentioned is that UPAs are authorized by Health and Safety Code section 25404.1.1 to issue AEOs requiring that violations be corrected and imposing penalties.

To expedite achieving the enforcement goals (e.g., protect public health, safety, and the environment; ensure a regulated business returns to compliance in a timely manner, etc.) as efficiently as possible, the UPA may provide an opportunity for the Respondent to enter settlement discussions. Settlement discussions can occur at any time during the enforcement process.

UPAs have several options to choose from to initiate enforcement as further explained below. The UPA must decide which enforcement option is appropriate given the circumstances. Alternative options not described in this guidance document may be used provided they adhere to applicable law.

B. Timeliness of Enforcement Actions

It is recommended that each UPA establish clear and appropriate timelines for major milestones throughout its inspection and enforcement process and ensure that enforcement is taken in a timely manner and within any applicable statutes of limitations. Established timelines help to ensure internal accountability and reduce unnecessary delays in achieving appropriate enforcement outcomes.

Timely enforcement is often measured from the date of the inspection when the violation(s) were initially identified. For example, DTSC's Enforcement Response Policy sets forth a target of initiating an enforcement action within 180 days of the inspection. (<https://dtsc.ca.gov/policies-and-procedures/>). It is recommended that each CUPA formulate a timely enforcement policy within its I&E Plan.

C. Assignment of Tracking Number

It is recommended UPAs implement a case tracking system to monitor the progress of each AEO. Such a tracking system typically encompasses the following elements, among others:

1. Docket # or case tracking #
2. Business/Respondent information
3. Facility ID number
4. CERS ID number
5. Legal business name
6. Unified Program element(s) violated
7. Date of enforcement action
8. Type of formal enforcement action (i.e., administrative, civil, or criminal enforcement action)
9. Final penalty assessed
10. Supplemental Environmental Projects, if applicable
11. Date violation(s) occurred that initiated the enforcement action
12. Date of actual return to compliance of violation(s) that initiated the enforcement action
13. Violation Return to Compliance Qualifier (i.e., Documented, Observed, Not Resolvable)
14. Cost recovery amount, if applicable
15. Date of final order or date of final resolution
16. Date case closed

D. Options for Notifying Respondent of Administrative Enforcement

When an AEO has been determined to be the best enforcement option to ensure compliance, a UPA may choose to notify the Respondent of its intention to conduct formal enforcement. This can provide an opportunity for the UPA and the Respondent to meet to discuss settlement. Three methods of notifying a Respondent that a UPA is considering formal enforcement are the Show Cause Letter, Draft Consent Order, and Draft Unilateral Order.

1. “Show Cause” Letter

The goals of the Show Cause Letter are to enter settlement discussions between the Respondent and the UPA; reach agreement on compliance, timelines, and penalties; and formalize the agreement in a Consent Order. While the Show Cause Letter may be part of the formal enforcement process, the letter itself is not considered formal enforcement.

It is recommended that UPAs be prepared to issue a Unilateral Order in cases where the Respondent fails to reply to the letter or settlement discussions fail to result in an agreement. When entering settlement discussions, it is recommended that UPAs should establish deadlines for reaching agreement. When deadlines pass, it is recommended that UPAs take the next step in the enforcement process by issuing Unilateral Orders.

a) Show Cause Letter Procedure often includes the following:

- Prepare Show Cause Letter and mail to Respondent.
- Provide a deadline by which the Respondent will notify the UPA of its intent to enter or not enter settlement discussions.
- If Respondent agrees, schedule a meeting to discuss settlement.
- Conduct settlement meeting.
- If an agreement is reached, prepare, and finalize a Consent Order.
- Collect penalties and ensure compliance tasks are completed.
- Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.
- If no agreement is reached, or there was no response to the initial Show Cause Letter, issue a Unilateral Order.

b) Advantages of the Show Cause Letter:

- Provides the Respondent with an expedited process for resolving the violation(s).
- Provides an opportunity for Respondent to discuss the violation(s).
- Allows for early discussion of the violation(s) and reduces the chance that the UPA will have to formally amend or retract an AEO.

c) Disadvantages of the Show Cause Letter:

- The statutory timeframes for filing a notice of defense are not triggered and as a result, the resolution of the enforcement action may be delayed.
- In an administrative hearing or in litigation, parties may attempt to use documents from the show cause process as evidence.
- Settlement communications may not be confidential.
- If no settlement is reached, then an enforcement action may be necessary.

If immediate action is required due to an increased threat to the health and safety of the public or the environment, this option may not be appropriate.

2. Draft Consent Order

The UPA sends an unsigned draft Consent Order with a cover letter to the Respondent. It is recommended that the cover letter state why the draft Consent Order is being sent, provide the Respondent with a specified number of days to sign the draft Consent Order, and state that if the Respondent fails to sign the draft Consent Order, the UPA plans to issue a Unilateral Order.

a) Draft Consent Order Procedure often includes the following:

- Prepare Draft Consent Order with penalty assessment and schedule for compliance, as applicable, and mail to Respondent.
- Provide a deadline by which the regulated business will sign the Draft Consent Order or notify the UPA of its intent to enter or not enter settlement discussions.
 - If Respondent signs the Draft Consent Order, the UPA signs the Draft Consent Order and sends the fully executed Consent Order to the regulated business.
 - If Respondent does not sign the Draft Consent Order but agrees to participate in a settlement meeting, schedule a meeting to discuss settlement.
 - Conduct settlement meeting.
 - If an agreement is reached, prepare, and finalize a Consent Order.
- Collect penalties and ensure compliance tasks are completed.
- Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.
- If no agreement is reached, or there was no response to the Draft Unilateral Order, issue a Unilateral Order.

b) Advantages of the Draft Consent Order:

- More formal than the Show Cause alternative because it contains all the details of the alleged violation(s) and the assessed penalties.

- Allows for early discussion of the violation(s) and reduces the chance that the UPA will have to formally amend or retract an AEO.
- Communicates to the regulated entity that the UPA is interested in resolving the matter without the need for any hearing or trial.
- Reduces the workload of the UPA as compared to the Draft Unilateral Order (option discussed below) if the parties do in fact reach a settlement.

c) Disadvantages of the Draft Consent Order:

- The statutory timeframes for filing a Notice of Defense are not triggered and therefore, a deadline date is not established and as a result, the resolution of the enforcement action may be delayed.
- In an administrative hearing or in litigation, parties may attempt to use the Draft Consent Order or other documents used during settlement discussions with the Respondent as evidence.
- If immediate action is required due to an increased threat to the health and safety of the public or the environment, this option may not be appropriate.
- Settlement communications may not be confidential.
- If a settlement is reached but the Respondent fails to comply with the Consent Order, then an enforcement action may be necessary.
- If no settlement is reached, then an enforcement action may be necessary.

d) A Draft Consent Order may be more appropriate than a Draft Unilateral Order (option discussed below) when:

- The penalty amount is low.
- Compliance has already been achieved.
- Prompt settlement is anticipated.

3. Draft Unilateral Order

The UPA sends an unsigned draft Unilateral Order with a cover letter to the Respondent. It is recommended that the cover letter would state why the draft Unilateral Order is being sent and provide the Respondent with a specified number of days to enter settlement discussions before the Draft Unilateral Order is finalized and issued.

a) Draft Unilateral Order Procedure often includes the following:

- Prepare Draft Unilateral Order with a penalty assessment and schedule for compliance, as applicable, and mail to Respondent.
- Provide a deadline in which the regulated business will notify the UPA of their intent to enter settlement discussions or not.
- If Respondent agrees to engage in settlement negotiations, schedule a meeting to discuss settlement.
- Conduct settlement meeting.

- If an agreement is reached, prepare, and finalize a Consent Order.
- Collect penalties and ensure compliance tasks are completed.
- Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.
- If no agreement is reached, or there was no response to the Draft Unilateral Order, issue a Unilateral Order.

b) Advantages of the Draft Unilateral Order:

- More formal than the Show Cause and Draft Consent Order alternatives because it contains all the details of the alleged violation(s) and any assessed penalties and schedule for compliance.
- Allows for early discussion of the violation(s) and reduces the chance that the UPA will have to formally amend or retract an AEO.

c) Disadvantages of the Draft Unilateral Order:

- The statutory timeframes for filing a Notice of Defense are not triggered and therefore, a deadline date is not established and as a result, the resolution of the enforcement action may be delayed.
- In an administrative hearing or in litigation, parties may attempt to use the Draft Unilateral Order or other documents used during settlement discussions with the Respondent as evidence.
- If immediate action is required due to an increased threat to the health and safety of the public or the environment, this option may not be appropriate.
- Settlement communications may not be confidential.
- If no settlement is reached, then an enforcement action may be necessary.

d) A Draft Unilateral Order may be more appropriate than a Show Cause Letter when:

- Complex compliance issues are present.
- A compliance schedule is required.
- Prompt settlement is not anticipated.

E. Unilateral Order Options

A UPA may issue a Unilateral Order requiring that a regulated business correct violation(s) and/or impose an administrative penalty. The UPA may issue a Unilateral Order with or without prior notice. There are two Unilateral Order options that are available to the UPA as further discussed below: (1) Unilateral Order (only) or (2) Unilateral Order accompanied by an unsigned Stipulation and Order.

1. Unilateral Order (Only)

a) Unilateral Order procedure often includes:

- Prepare the Unilateral Order. (Health and Safety Code section 25404.1.1(a).)
- Serve the following documents to Respondent by personal service or certified mail with receipt requested (Health and Safety Code section 25404.1.1(c)):
 - Cover letter to the Respondent.
 - Copy of the signed Unilateral Order. (Health and Safety Code section 25404.1.1(a).)
 - Copy of Proof of Service.
 - Statement to the Respondent stating (Government Code section 11505):
 - The Respondent has 15 days to request a hearing contesting the Unilateral Order by filing a Notice of Defense (NOD) with the UPA that issued the Unilateral Order. (Health and Safety Code section 25404.1.1(d).) “A notice of defense shall be deemed filed within the 15-day period...if it is postmarked within that 15-day period.” (Health and Safety Code section 25404.1.1(d).)
 - The UPA may provide the Respondent with an option to select the hearing officer (i.e., an administrative law judge of the Office of Administrative Hearings (ALJ) or a hearing officer designated by the UPA) if the UPA has, as of the date of the Unilateral Order is issued, selected a designated hearing officer and established a program for conducting a hearing. (Health and Safety Code section 25404.1.1(e).)
 - The location where the Respondent may submit a NOD either in person or via mail.
 - If the Respondent does not file a NOD, that this constitutes a waiver of the Respondent’s right to a hearing and the Unilateral Order becomes final and effective. (Health and Safety Code section 25404.1.1(d).)
 - Copies of Government Code sections 11507.5, 11507.6, and 11507.7 are attached. (Copies of the Government Code provisions should be included as part of the Unilateral Order package that is sent to the Respondent.)
 - Any other information deemed appropriate by the UPA.
 - Two copies of the NOD form. (Health and Safety Code section 25404.1.1(d).)
- If a NOD is received and is postmarked within the 15-day period:
 - The UPA shall schedule a hearing if the parties are not able to reach a settlement. The hearing must be scheduled within 90 days of receipt of the NOD. (Health and Safety Code section 25404.1.1(e).) The hearing shall be scheduled using one of the following: (1) ALJ or (2) the hearing officer designated by the UPA. If the Respondent has not selected a hearing option, the UPA may select the hearing officer. (*Id.*)
 - If the Respondent would like to engage in settlement discussions, schedule and conduct a settlement meeting. Settlement can occur at

any point in the enforcement process.

- If an agreement is reached after the Unilateral Order is issued, prepare a Stipulation and Order finalizing the agreement and notify the hearing officer that the hearing is no longer needed, if a hearing has already been scheduled.
- Collect penalties and ensure compliance tasks are completed.
- Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.
- If settlement is not achieved, continue the Administrative Hearing Process.
- If no NOD is received within the 15-day period, the Order becomes final and effective.
 - Collect penalties and ensure compliance tasks are completed.
 - Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.

b) Advantages of the Unilateral Order:

- Respondent may request a hearing to contest the Unilateral Order within 15 days.
- Imminent and substantial endangerment finding requires immediate compliance, even if an appeal is filed.
- Unilateral Order is a public document.

c) Disadvantage of the Unilateral Order:

If the Unilateral Order is issued prior to a settlement meeting that may result from a Show Cause Letter, Draft Consent Order, or Draft Unilateral Order, the UPA may not be able to consider the Respondent's position prior to initiating formal enforcement action. (However, the Respondent's position can be considered after the Unilateral Order is issued. If an agreement is reached after the Unilateral Order is issued, a Stipulation and Order can be prepared to finalize the agreement.)

d) The Unilateral Order alternative may be appropriate when:

- The Respondent is a repeat violator or has a history of non-compliance with environmental or public safety laws.
- The Respondent has been recalcitrant or uncooperative.
- The violation(s) pose an imminent and substantial threat to public health or the environment.
- The violation(s) have resulted in a release to the environment.
- Administrative enforcement is deemed appropriate by the UPA.

e) Serving the Unilateral Order

HSC sections 25404.1.1(c) and 25187(c) require that an order shall be served in person or by certified mail. When serving a Respondent, a UPA must inform the Respondent that the Respondent has the right to request a hearing.

2. Unilateral Order accompanied by an unsigned Stipulation and Order

As mentioned, an UPA may issue a Unilateral Order accompanied by an Unsigned Stipulation and Order.

a) Unilateral Order accompanied by an unsigned Stipulation and Order procedure often includes:

- Prepare the Unilateral Order and the unsigned Stipulation and Order. (Health and Safety Code section 25404.1.1(a).)
- Serve the following documents to Respondent by personal service or certified mail with receipt requested (Health and Safety Code section 25404.1.1(c)):
 - Cover letter to the Respondent.
 - Copy of the signed Unilateral Order. (Health and Safety Code section 25404.1.1(a).)
 - Copy of the unsigned Stipulation and Order.
 - Copy of Proof of Service.
 - Statement to the Respondent stating (Government Code section 11505):
 - The Respondent has 15 days to request a hearing contesting the Unilateral Order by filing a Notice of Defense (NOD) with the UPA that issued the Unilateral Order. (Health and Safety Code section 25404.1.1(d).) “A notice of defense shall be deemed filed within the 15-day period...if it is postmarked within that 15-day period.” (Health and Safety Code section 25404.1.1(d).) Alternatively, the Respondent can sign the Stipulation and Order and return it to the UPA for signature.
 - The UPA may provide the Respondent with an option to select the hearing officer (i.e., an administrative law judge of the Office of Administrative Hearings (ALJ) or a hearing officer designated by the UPA) if the UPA has, as of the date of the Unilateral Order is issued, selected a designated hearing officer and established a program for conducting a hearing. (Health and Safety Code section 25404.1.1(e).)
 - The location where the Respondent may submit a NOD (or alternatively, the Stipulation and Order signed by the Respondent) either in person or via mail.
 - If the Respondent does not file a NOD (or alternatively, the Stipulation and Order signed by the Respondent), that this constitutes a waiver of the Respondent’s right to a hearing and the Unilateral Order becomes final and effective. (Health and

- Safety Code section 25404.1.1(d).)
 - Copies of Government Code sections 11507.5, 11507.6, and 11507.7 are attached. (Copies of the Government Code provisions should be included as part of the Unilateral Order package that is sent to the Respondent.)
 - Any other information deemed appropriate by the UPA.
 - Two copies of the NOD form. (Health and Safety Code section 25404.1.1(d).)
 - If a NOD is received and is postmarked within the 15-day period:
 - The UPA shall schedule a hearing if the parties are not able to reach a settlement. The hearing must be scheduled within 90 days of receipt of the NOD. (Health and Safety Code section 25404.1.1(e).) The hearing shall be scheduled using one of the following: (1) ALJ or (2) the hearing officer designated by the UPA. If the Respondent has not selected a hearing option, the UPA may select the hearing officer. (*Id.*)
 - If the Respondent would like to engage in settlement discussions, schedule and conduct a settlement meeting.
 - If an agreement is reached after the Unilateral Order is issued, prepare a Stipulation and Order finalizing the agreement.
 - Collect penalties and ensure compliance tasks are completed.
 - Notify Respondent that all required actions have been completed and the Respondent has returned to compliance.
 - If settlement is not achieved, continue the Administrative Hearing Process.
 - Alternatively, if the Stipulation and Order signed by the Respondent is received:
 - The UPA shall sign the Stipulation and Order and return a copy to the Respondent.
 - Collect penalties and ensure compliance tasks are completed.
 - Notify the Respondent that all required actions have been completed and the Respondent has returned to compliance.
 - If no NOD or Stipulation and Order signed by the Respondent is received within the 15-day period, the Order becomes final and effective.
- b) Advantages of the Unilateral Order accompanied by an unsigned Stipulation and Order:
- Respondent is provided with options. Respondent may request a hearing to contest the Unilateral Order within 15 days or sign the Stipulation and Order or try and negotiate a revised Stipulation and Order.
 - Imminent and substantial endangerment finding requires immediate compliance, even if an appeal is filed.
 - Unilateral Order is a public document.
 - Respondent may be more inclined to settle the matter and sign the Stipulation and Order, which will resolve the matter.

- c) Disadvantages of the Unilateral Order accompanied by an unsigned Stipulation and Order:
- If the Unilateral Order is issued prior to a settlement meeting that may result from a Show Cause Letter, Draft Consent Order, or Draft Unilateral Order, the UPA may not be able to consider the Respondent's position prior to initiating formal enforcement action. (However, the Respondent's position can be considered after the Unilateral Order is issued. If an agreement is reached after the Unilateral Order is issued that included the unsigned Stipulation and Order, a revised Stipulation and Order can be prepared to finalize the agreement.)
 - The Unsigned Stipulation and Order is a public document and could be used by the Respondent as evidence at a hearing to try to reduce the amount of the penalty.
 - Issuing the Unilateral Order and providing the Respondent with an Unsigned Stipulation and Order may reveal information to the Respondent and the public about how the UPA calculates penalties.
- d) The Unilateral Order accompanied by an unsigned Stipulation and Order may be appropriate when:
- The Respondent is a repeat violator or has a history of non-compliance with environmental or public safety laws.
 - The Respondent has been recalcitrant or uncooperative.
 - The violation(s) pose an imminent and substantial threat to public health or the environment.
 - The violation(s) have resulted in a release to the environment.
 - Administrative enforcement is deemed appropriate by the UPA.
 - The UPA wants to take immediate action but also wants to strongly encourage settlement.

F. Settlement Discussions/Settlement Agreement

Settlement discussions between the UPA and the Respondent can occur at any time in the process. The UPA may want to provide an opportunity for settlement discussions when possible. Statutory time frames for requesting and proceeding to hearing may be stayed by agreement between the Respondent and the UPA.

The UPA shall set a time and place for any settlement meetings. If the UPA and the Respondent can reach a settlement, the UPA will prepare a Consent Order or a Stipulation and Order if a Unilateral Order has already been issued. Consent Orders and Stipulation and Orders often include the following:

- A compliance schedule including compliance with applicable laws and regulations.

- Payment of fees and/or costs to the UPA, if applicable.
- Payment to the UPA of any penalty assessed, if applicable.

IV. ADMINISTRATIVE HEARING PROCESS

A. UPA Issues an AEO

As previously stated, Health and Safety Code sections 25404.1.1(c) and 25187(c) require that an order shall be served in person or by certified mail. When serving a Respondent, a UPA must inform the Respondent that the Respondent has the right to request a hearing.

B. Respondent Submits NOD

Health and Safety Code section 25404.1.1(d) states that a Respondent may contest a Unilateral Order by filing an NOD with the UPA that issued the Unilateral Order. The Respondent must submit the NOD within 15 days of being served with the Unilateral Order. If the Respondent does not submit a NOD within 15 days after service, or after the allowed additional time has lapsed, the Unilateral Order becomes final and effective.

C. Selection of Presiding Officer

A Respondent that receives a Unilateral Order may request either an ALJ or a UPA hearing officer designated by the UPA (each a “Presiding Officer”) if the UPA has designated a hearing officer and established a hearing program at the time the Unilateral Order is issued to preside over a hearing. (Health and Safety Code section 25404.1.1(e).) If the UPA has not designated a hearing officer, the ALJ serves as the Presiding Officer. (Health and Safety Code section 25404.1.1(e)).

If the Respondent requests an ALJ as the Presiding Officer, the UPA shall comply with California Code of Regulations, title 1, section 1018 to request a hearing. Local Agency Request to Set form OAH 14 is available for download on the Office of Administrative Hearings’ website to assist the UPA in scheduling the ALJ.

If the Respondent does not select a Presiding Officer, the UPA may select the Presiding Officer. (Health and Safety Code section 25404.1.1(e)).

D. Hearing, Decision, and Appeal

If a Respondent files a NOD, a UPA must schedule a hearing within 90 days of receipt of the NOD. (Health and Safety Code section 25404.1.1(e).) Often settlement negotiations are initiated during this period and an agreement is reached and finalized before scheduling of the hearing is necessary. It is recommended that UPA staff discuss the enforcement matter with its legal counsel prior to scheduling the hearing.

It is recommended that the UPA be represented by counsel during the administrative

hearing process. Hearings are conducted in accordance with the Administrative Procedures Act, Government Code, Chapter 4.5 (commencing with section 11400). (Health and Safety Code section 25404.1.1(e).)

It is recommended that UPAs continue attempts to reach a settlement with the Respondent prior to the hearing date. Government Code section 11524(a) authorizes the ALJ to grant a continuance if requested by either party for good cause.

After the hearing, the ALJ issues a proposed decision within thirty (30) days to the UPA. (Government Code section 11517(c)(1).) “Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.” (Government Code section 11517(c)(1).) Within 100 days of receipt of the ALJ’s proposed decision, the UPA may: “(A) Adopt the proposed decision in its entirety. (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision. (C) Make technical or other minor changes in the proposed decision...(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence...(E) Reject the proposed decision and decide the case upon the record...” (Government Code section 11517(3)(c)(2).) The decision must be served to each party and his or her attorney by personal service or by registered mail. (Government Code sections 11517(d), 11518). If the UPA fails to act within the 100 days, the proposed decision shall be deemed adopted by the agency. (Government Code section 11517(c)(2)).

The Respondent may file with the Superior Court a Petition for Writ of Mandate challenging the agency’s final decision.

V. PENALTIES AND COST RECOVERY

A. Statutory Minimum and Maximums

UPAs are authorized to assess penalties for violations of the five Unified Program elements in accordance with statutory minimum and maximums that are contained in Health and Safety Code Division 20 as further discussed below.

1. Hazardous Waste Generator and Onsite Hazardous Waste Treatment Program

A person who violates Health and Safety Code, Chapter 6.5, is liable for a penalty not to exceed \$70,000 for each violation and for continuing violations, for each day that the violation continues. (Health and Code sections 25188, 25189, and 25189.2).

2. UST Program

An operator, owner, or person who violates Health and Safety Code, Chapter 6.7, is

liable for a penalty up to \$10,000. (Health and Safety Code section 25299.) For some UST violations, there is a statutory minimum of \$500. (*Id.*)

3. APSA Program

An owner or operator of an APSA tank facility who violates Health and Safety Code, Chapter 6.67, is liable for a penalty of not more than \$5,000 for each day on which the violation continues. (Health and Safety Code section 25270.12.1(a).) If the owner or operator commits a second or subsequent violation, the owner or operator is liable for a penalty of not more than \$10,000 for each day on which the violation continues. (*Id.*)

4. HMBP Program

A business that violates Health and Safety Code Chapter 6.95, Article 1, sections 25504 to 25508.2, is liable for a penalty up to \$5,000. (Health and Safety Code section 25515.)

5. CalARP Program

A person or stationary source that violates Health and Safety Code, Chapter 6.95, Article 2, is liable for a penalty up to \$5,000 and for violations committed knowingly, the person or stationary source is liable up to \$25,000. (Health and Safety Code section 25540(a) and (b).) Additionally, a person or stationary source is also subject to a penalty up to \$10,000. (Health and Safety Code section 25540.5.)

B. Penalty Calculations

Penalty maximums are set forth in statute for all Unified Program elements as discussed above. Penalties cannot exceed the statutory maximum (per day/per violation) for that program element.

When a UPA establishes a penalty amount, the UPA is required to consider “the nature, circumstances, extent, and gravity of the violation, the violator’s past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator’s ability to pay the penalty, and the deterrent effect that imposing the penalty would have both the violator and the regulated community.” (Health and Safety Code section 25404.1.1(b)) when establishing a penalty amount.

For hazardous waste violations, additional administrative penalty assessment procedures are contained in California Code of Regulations, title 22, sections 66272.60 - 66272.69 as further discussed below. The rationale and process (not the amounts) outlined in California Code of Regulations, title 22 penalty assessment regulations may also provide guidance for consistent calculation of penalties for other Unified Program elements.

1. Additional Hazardous Waste Considerations

Multiday Violations

California Code of Regulations, title 22, section 66272.65 addresses how penalties for multiday hazardous waste violations should be assessed. The process found in this regulation provides for two percent of the penalty calculated for the first day of violation to be multiplied by the total number of additional days the violation occurred to arrive at the total multi-day penalty. This penalty amount is then added to the amount calculated for the first day of violation.

Single Initial Penalty for Multiple Violations

California Code of Regulations, title 22, section 66272.64 gives a UPA the discretion to assess a single initial penalty for multiple instances of the same violation in certain cases.

2. Multi-Program Violations

It is recommended that the assessment of administrative penalties for violations of multiple program elements begin with assessment of initial and multiday penalties for each program element separately. Once the penalties within each program element have been assessed, add the totals together into a single penalty amount for all violations.

3. Ability to Pay

As mentioned above, when the UPA is establishing a penalty amount, the UPA shall consider the Respondent's ability to pay the assessed penalty. (Health and Safety Code section 25404.1.1(b)). During settlement negotiations, Respondents often claim they do not have the financial resources to pay the proposed penalty or that paying the penalty will lead to bankruptcy or severe economic hardship. If an inability to pay claim is made, it is recommended that the UPA should request any financial information from a Respondent that the UPA needs to evaluate the claim. A Respondent who asserts an inability to pay claim has the burden of providing information to support its claim.

It is recommended that the determination of ability to pay be made on the total assessed penalty for all violations rather than separately for the penalty for each program element. It is also recommended that any reduction to reflect the violator's inability to pay the entire penalty assessment be distributed proportionally to the assessed penalties for the individual program violations. Furthermore, penalties should not be reduced beyond any statutory penalty minimums such as the minimum penalty amounts for certain UST violations.

USEPA uses financial models to help assist in determining a Respondent's ability to pay. There are two applicable models accessible to UPAs – ABEL and INDIPAY. ABEL is used to assess a company's ability to pay proposed penalties. INDIPAY is used to assess an individual's or a sole proprietor's ability to pay proposed penalties. These

models can be found on USEPA's web site at <https://www.epa.gov/enforcement/penalty-and-financial-models>. However, the models do not consider all the variables associated with a Respondent's financial situation, and UPAs are not required to follow these models, but they provide UPAs with tools and guidance.

Financial information to request from a Respondent may include the most recent three to five years of:

- Tax returns.
- Balance sheets.
- Income statements.
- Statements of changes in financial position.
- Statements of operations.
- Retained earnings statements.
- Loan applications, financing agreements, and security agreements.
- Annual reports.
- Security and exchange filings.
- Credit reports.

The UPA may also use business service companies such as Dunn and Bradstreet to assist in determining a Respondent's ability to pay. If a Respondent refuses to give the UPA information to evaluate the Respondent's inability to pay claim or provides inadequate information to substantiate its claim, it is recommended that the UPA seek the full assessed penalty amount under the assumption that the Respondent has the ability to pay.

C. Supplemental Environmental Projects

While penalties play an important role in deterring environmental violations and providing a level playing field for industry, penalties do not address the environmental harms that communities suffer because of the violations. To address environmental harms, Respondents may voluntarily agree to fund a SEP.

"As set forth in a legal opinion by the California Attorney General in 2000, California law allows administrative agencies to settle cases on terms that could not be imposed if the case proceeded to trial or a hearing. (Attorney General Opinion No. 00-510, July 25, 2000.) However, the terms and provisions included in an administrative agency settlement cannot violate public policy and must be related to the regulatory enforcement responsibilities of the agency entering into the settlement. These threshold legal requirements mean:

1. A SEP cannot be inconsistent with any provision of the statutes being enforced by the agency or any other laws.
2. A SEP must be related to at least one of the declared objectives of the

environmental statutes that are the basis of the enforcement action.

3. A SEP should be clearly defined in the settlement agreement in order to assure that it is related to the regulatory enforcement responsibilities of the agency entering into the settlement.”

(California Environmental Protection Agency Supplemental Environmental Project Guidance available at https://calepa.ca.gov/wp-content/uploads/sites/6/2018/06/CalEPA_SEP_Guidance-June-2018.pdf.)

SEPs are projects that improve the environment or public health, are voluntarily taken by a Respondent in the settlement of an enforcement action, may offset a portion of a penalty, and go beyond compliance with the legal requirements. SEPs are an excellent tool to ensure an enforcement response addresses local challenges and CalEPA strongly encourages UPAs to consider use of SEPs when negotiating settlements.

“SEPs must have a nexus to the alleged environmental violation or violations that are being resolved in a settlement. A nexus, or relationship to the underlying violation(s), is important in order to support that the agency has discretion to reduce the legislatively authorized civil penalty for the violation. A nexus to an environmental violation exists if a SEP meets one of the following criteria:

1. It reduces the likelihood that similar violations will occur in the future.
2. It reduces the adverse impact, including cumulative impacts, to public health or the environment to which the violation being resolved contributes.”

(*Id.*)

Public Resources Code section 71118 also places additional requirements on CalEPA’s boards, departments, and office to establish SEP policies that benefits disadvantaged communities and “allow up to 50 percent of an enforcement penalty to be discharged through performance of a SEP.” (*Id.*)

CalEPA’s and CalEPA’s Board, Department, and Office (BDOs) SEP policies are available at:

<https://calepa.ca.gov/enforcement/supplemental-environmental-projects/>.

US EPA’s SEP policy can be obtained at:

<https://www.epa.gov/enforcement/supplemental-environmental-projects-seps>.

A UPA is encouraged to work with its legal counsel when developing and negotiating SEPs.

D. Cost Recovery

There is no statutory provision that provides UPAs with the ability to recover its costs associated with enforcement. However, costs may be recovered as part of a negotiated

settlement (e.g., as part of a Consent Order or a Stipulation and Order). It is recommended that cost recovery never exceed actual agency costs.

VI. ROLES AND RESPONSIBILITIES

A. County Counsel, City Attorney, or District Attorney

Health and Safety Code section 25404.1.1(j) requires each UPA to consult with the district attorney, county counsel, or city attorney on the development of policies to be followed in exercising its authority pursuant to Health and Safety Code section 25404.1.1 as it relates to the authority of the UPA to issue orders. It is recommended that the UPA be represented by counsel in any formal hearings. Counsel may also be able to assist UPAs with, among other things, developing enforcement strategy; preparing and reviewing formal enforcement documents; representing the UPA at settlement meetings; advising on the intersection of local ordinances with statutes and regulations; and analyzing legal documents received from other parties.

B. Signature Authority for Issuance/Settlement

It is recommended that each UPA designate who can sign enforcement-related documents. To see examples of enforcement-related documents, go to the California Environmental Protection Agency's (CalEPA's) Unified Program website at [Administrative Enforcement Orders](#).

If the parties are able to reach a settlement, the "Regulated Business" as that term is defined in California Code of Regulations title 27, section 15110(n) that committed the violation(s) would need to sign the Consent Order.

It is recommended that the identity of the Regulated Business (referred to as the Respondent) be verified. Review of title documents and information available on the California Secretary of State may be helpful. (See <https://bizfileonline.sos.ca.gov/search/business>.) In some situations, UPAs may need to consult with legal counsel to determine who can sign on behalf of the Regulated Business to ensure the AEO is binding and enforceable.

C. Internal Review/Approval

Internal UPA review and approval of AEOs are dependent on the size and complexity of the UPA. Generally, supervisors review all work, including draft AEOs. However, draft AEOs may warrant a higher level of approval and possible interaction between different sections or units before final approval is granted.

VII. RELEASING INFORMATION TO THE PUBLIC

A Respondent can claim confidentiality for financial information that the Respondent provides to the UPA. It is recommended that the UPA discuss any information marked

as confidential with its counsel prior to releasing it.

It is recommended that UPAs have a procedure in place for securing confidential business information in accordance with Health and Safety Code section 25173 and California Code of Regulations, title 22, section 66260.2 (Hazardous Waste) and/or Health and Safety Code sections 25511, 25538, and 25506(a) (Business Plan and CalARP).

While some information must and should remain confidential (both during the enforcement case preparation and after closure), there is a great deal of information that can be shared with the public regardless of the status of the enforcement matter. CalEPA Guidance for Sharing Enforcement Information with Communities is available at: https://calepa.ca.gov/wp-content/uploads/sites/6/2022/12/CalEPA-Enforcement-Sharing-Guidance_Nov2022.pdf.

VIII. FORMAL ENFORCEMENT SUMMARY

California Code of Regulations, title 27, section 15290(c) requires a UPA to submit a Formal Enforcement Summary Report to CalEPA for each formal enforcement case within 30 days after a final judgment. The Formal Enforcement Summary Report includes facility identification, violation summary(ies), formal enforcement action taken, and a description of the final disposition. The UPA shall submit the Formal Enforcement Summary Report to cupa@calepa.ca.gov.

IX. CASE CLOSURE

Final case closure includes collection of all penalties and verification of compliance.

A. Collection and Accounting for Penalties

Health and Safety Code section 25404.1.1(i) states “[a]ll administrative penalties collected from actions brought by a UPA...shall be paid to the UPA that imposed the penalty and shall be deposited into a special account that shall be expended to fund the activities of the UPA in enforcing [HSC, Division 20, Chapter 6.11].” It is recommended that UPAs have a system to track payment history.

B. Uncollected Penalties

It is recommended that each UPA discuss and evaluate options for pursuing uncollected penalties and consult its counsel, as necessary. Note some of the options for pursuing uncollected penalties are discussed below.

If the payment schedule identified in the AEO has expired and the Respondent has not paid the penalty, a Demand Letter may be sent to the Respondent requesting payment. While the Demand Letter cannot change the penalty amount, stipulated terms, or any other aspect of the AEO, it serves to notify the Respondent that the Respondent has not complied with the penalty payment schedule as mandated by the AEO. The Demand Letter demonstrates a good faith attempt to collect payment prior to asking a judge to intervene and take action.

DTSC's policies and procedures, including DTSC's policy on Collecting Overdue Administrative Penalties is available at: <https://dtsc.ca.gov/policies-and-procedures/>.

1. Conversion of a Final Order to a Civil Judgment

A final AEO or administrative decision may be converted to a civil judgment. (Health and Safety Code section 25404.1.3.). Civil judgments may then be used in a variety of ways such as to apply liens by collection agencies, etc. This is a relatively simple process, but it does require some involvement of the UPA's counsel. Judgments also accrue interest.

2. Small Claims Court

If the uncollected penalty amount is under \$5,000, this might be a good option to consider. However, UPAs will need to research the process for the Small Claims Court in its jurisdiction.

3. City or County Revenue Recovery/Collection Office

In some cases, UPAs have realized success in having its counsel send out notices. Depending on the agency, various tools might be available.

4. External Collection Agencies

These agencies will do the work of sending out collection letters and will often add its own fees on top of what is being requested by the agency (typically 30%-40%).

5. Withhold, Suspend, or Revoke Permit

A UPA may withhold, suspend, or revoke any Unified Program facility permit for, among other things, failure to comply with an AEO. (Health and Safety Code section 25404.1.1(k)(1).) CUPAs are required to have a permit revocation process and an appeal process. (California Code of Regulations, title 27, section 15190(b)).

6. Referral to a Prosecutorial Agency for a Civil Action

This action is to obtain injunctive relief and additional penalties (if violations continue). Criteria for referring non-compliant AEO cases should be coordinated beforehand with

the appropriate prosecutorial entity.

C. Verification of Compliance with the Administrative Order

It is recommended that the UPAs should verify compliance with the AEO at or near the dates specified in the AEO. This does not preclude a regulated facility from demonstrating compliance sooner. Verification can be done by a site visit, compliance certification by the Respondent, or other documentation as deemed appropriate by the UPA.

Multi-Agency

It is recommended that agencies discuss details of collection, penalty tracking, and distribution of penalties before case closure. It is recommended that a single agency be designated to collect, track, and distribute penalties.

D. Response to Non-Compliance with AEO

If any Respondent is found to be non-compliant with an AEO, it is recommended that the case be referred to the appropriate prosecutorial agency (i.e., District Attorney, County Attorney, City Counsel, State Attorney General, US Attorney). If no prosecutorial agency is willing to take the case, other formal enforcement options, including a referral to the appropriate state/federal agency may be considered. In addition, the UPA could consider issuing a second AEO to address non-compliance with the AEO.

Attachment: Definitions

Administrative enforcement: Allows a UPA to pursue an enforcement action independent of an outside prosecutorial agency.

Administrative Enforcement Order (AEO): A document the UPA may use to require a regulated business to correct violations and pay an administrative penalty. Types of AEOs include:

Consent Order: The parties voluntarily agree to resolve an enforcement action (e.g., the respondent agrees to correct violations, pay an administrative penalty, etc.).

Unilateral Order: The UPA issues a Unilateral Order to compel the regulated entity to resolve an enforcement action (e.g., compel the respondent to correct violations, pay an administrative penalty, etc.). A UPA can issue a Unilateral Order with or without first engaging or attempting to engage in settlement negotiations with the regulated business.

Stipulation and Order: The parties voluntarily agree to resolve an enforcement action (e.g., the respondent agrees to correct violations, pay an administrative penalty, etc.) with a respondent after a Unilateral Order has been issued.

Final Administrative Order: Consent Order, Stipulation and Order, or a Unilateral Order that can no longer be challenged by the Respondent.

Formal Enforcement: “means a civil, criminal, or administrative action towards the regulated business that mandates compliance, imposes sanctions, and results in an enforceable agreement or order. Enforceable agreement or order means the instrument creates an independent, affirmative obligation for the regulated business to comply and imposes sanctions for the prior failure to comply. Sanctions include fines and penalties as well as other tangible obligations, beyond returning to compliance, that are imposed upon the regulated business.” (California Code of Regulations, title 27, section 15110(e)(1)).

Informal Enforcement: “means a notification to the regulated business of non-compliance that establishes an action and a date by which that non-compliance is to be corrected. Examples include, but are not limited to, a letter, notice of violation (NOV), or notice to comply. Informal Enforcement does not impose sanctions.” (California Code of Regulations, title 27, section 11510(e)(2)).

Minor violation: “means the failure of a person to comply with a requirement or condition of an applicable law, regulation, permit, information request, order, variance, or other requirement, whether procedural or substantive, of the unified program that the UPA is authorized to implement or enforce pursuant to this chapter, and that does not

otherwise include any of the following:

- (A) A violation that results in injury to persons or property, or that presents a significant threat to human health or the environment.
- (B) A knowing, willful, or intentional violation.
- (C) A violation that is a chronic violation, or is committed by a recalcitrant violator. In determining whether a violation is chronic, or a violator is recalcitrant, the UPA shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to applicable regulatory requirements.
- (D) A violation that results in an emergency response from a public safety agency.
- (E) A violation that enables the violator to benefit economically from the noncompliance, either by reduced costs or competitive advantage.
- (F) A class I violation, as provided in Section 25110.8.5.
- (G) A violation that hinders the ability of the UPA to determine compliance with any other applicable local, state, or federal rule, regulation, information request, order, variance, permit, or other requirement.”

(Health and Safety Code section 25404(a)(3)).

Multi-Agency Enforcement: Enforcement conducted with agencies with jurisdiction over programs that are not specific to the Unified Program. Potential agencies include, but are not limited to, the Department of Resources Recycling and Recovery (CalRecycle), State Waterboards, Department of Toxic Substances Control (DTSC), local Air Quality Management Districts, Department of Pesticide Regulation (DPR), and United States Environmental Protection Agency (USEPA).

Respondent: The person or regulated business that is cited for a violation.

Supplemental Environmental Project (SEP): “means an environmentally beneficial project that a person subject to an enforcement action voluntarily agrees to undertake in settlement of the action and to offset a portion of a civil penalty [but which the Respondent is not otherwise legally required to perform].” (Public Resources Code section 71118(a)(3).)

Unified Program Agency (UPA): means the Certified Unified Program Agency (CUPA), or its participating agencies to the extent each PA has been designated by the CUPA, pursuant to a written agreement, to implement or enforce a particular unified program element specified in subdivision (c)...After a CUPA has been certified by the secretary,

the unified program agencies and the state agencies carrying out responsibilities under this chapter shall be the only agencies authorized to enforce the requirements listed in subdivision (c) within the jurisdiction of the CUPA.” (Health and Safety Code section 25404(a)(1)(C)).