

Chapter I

Overview of Environmental Law

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I. Introduction

There is a vast body of law encompassing the area of environmental protection. Environmental laws, both federal and state, provide for such diverse activities as environmental review; protection of air and water resources; regulation of the exposure of workers to environmental hazards; control of the storage of hazardous materials in underground tanks; control of the use, marketing, and manufacture of pesticides; and the warning of the risks of exposure to hazardous substances. In many cases, state environmental statutes implement federal requirements; others go beyond federal requirements and stand as independent state law. Because of the interrelationship between federal and California law, this section will provide a brief overview of the federal environmental statutes.

II. The Federal Approach to Environmental Regulation

Federal environmental statutes and programs provide much of the framework used to develop, interpret, and enforce state environmental protection laws. For this reason, it is important to acquire a general understanding of federal environmental protection laws as they relate to state law. With the exception of National Environmental Policy and Endangered Species Act, California law preceded and was the basis for the development of federal environmental laws.

A. The Federal Environmental Protection Agency (U.S. EPA)

There are numerous agencies of the federal government such as the Department of Transportation, Department of Agriculture, Food and Drug Administration, and the Occupational Safety and Health Administration that have tangential authority over the environment. But primary responsibility for the nation's environment rests with the Environmental Protection Agency (U.S. EPA).

The U.S. EPA is the only major federal regulatory agency that was created not by an act of Congress, but rather by a Presidential Executive Order. (President Nixon's Reorganization Plan No. 3 of 1970, 5 U.S.C. App. at 1132-1137 (1982).) As such, the U.S. EPA is not an independent regulatory agency, but is purely a creature of the Executive Branch.

The U.S. EPA is among the most highly decentralized agencies in the federal government, operating through 10 regional offices. The regional office for the western

states is in San Francisco. Generally, U.S. EPA headquarters in Washington, D.C. sets policy and promulgates rules, while the regional offices implement U.S. EPA's programs. The regional offices pass on to the states the policies and requirements that are issued in Washington, D.C. The regional offices enter formal agreements with each state that include criteria for enforcement and for other conditions of financial assistance. Each regional office has a great deal of autonomy, especially in enforcement and permitting decisions. Where state programs do not meet federal standards or where the states have chosen not to assume responsibility, U.S. EPA regional offices may assume enforcement authority. Where states have implemented their own programs (as in California), U.S. EPA enforcement activity (at least as to administrative and civil enforcement) is fairly limited. US EPA has peace officer investigators in the Criminal Investigation Division .EPA CID one of only three of the 63 federal agencies with peace officers who have jurisdiction beyond their regulatory program and therefore can investigate and arrest for any federal crime.

B. U.S. EPA's Statutory Authority

U.S. EPA has direct responsibility under the following federal statutes:

- The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, which regulates sale and use of pesticides.
- The Marine Protection, Research and Sanctuaries Act (MPSRA, the "ocean-dumping" statute), 33 U.S.C. §§ 1401-1445.
- The Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j.
- The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991i, which regulates hazardous waste from "cradle to grave."
- The Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, regulating all emissions into the air.
- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9627, for cleanup of sites where hazardous materials were located in the past.
- The Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, which requires permits for all discharges into "the waters of the United States."
- The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2682, involves hazard assessment, labeling, and use restrictions relating to toxics.

U.S. EPA also has secondary responsibility under these statutes:

- The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. While NEPA is administered by the Council on Environmental Quality, U.S. EPA reviews Environmental Impact Statements (EISs) prepared by other federal agencies under NEPA.
- The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328. While SMCRA is administered principally by the Department of the Interior, U.S. EPA also has some regulatory authority.
- Under the Atomic Energy Act, 42 U.S.C. §§ 2014-2114, U.S. EPA has some authority to respond to radiation in the environment.
- The Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901-7942 and Exec. Order reprinted in 42 U.S.C. § 5201 at 837-839 (1982).
- U.S. Department of Transportation Regulations.

Under the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. sections 5101-5127), the Department of Transportation (DOT) has broad discretion to promulgate regulations regarding the packaging, labeling, and transportation of hazardous substances. (49 C.F.R. pts. 171-180.) DOT has issued those regulations in an extensive Table of Hazardous Materials published in the Code of Federal Regulations. (See 49 C.F.R. § 172.101.) The table identifies hazardous substances subject to regulation by chemical name, states their classification, and outlines their basic transportation requirements.

California statutes and regulations refer to the federal Table of Hazardous Materials in defining hazardous materials under California law. For example, the Table is expressly referenced in the California Highway Patrol regulations. (See Cal. Code Regs. tit. 13, § 1160.5.)

III. The Federal-State Relationship

While federal statutes have established national standards for the transportation, emission, discharge, and the disposal of harmful substances, implementation and enforcement of many of the large programs has been delegated by the U.S. EPA to the states. In turn, the states apply national standards to sources within their borders through permit programs that control the release of pollutants into the environment. Thus, while most implementation and enforcement occurs at the state or local level, the U.S. EPA maintains an overarching role with respect to the states by establishing federal standards and approving state programs.

In a few exceptions, states can set stricter standards than those required by federal law. Some of the programs that have been delegated (this term is used in a general sense, some of the programs use other terms) by the U.S. EPA to the states are the emissions standards for hazardous air pollutants (HAPs), Prevention of Significant Deterioration (PSD) Permits under the CAA, the Water Quality Standards and the National Pollution

Discharge Elimination System (NPDES) Programs under the CWA, the Hazardous Waste Program under RCRA, and the Drinking Water and Underground Injection Control (UIC) Programs under the SDWA.

IV. California Environmental Laws

A. Introduction

The summary that follows in the remainder of this chapter briefly describes many of California's environmental laws, including those that are analogous to the federal statutes and those that are unique to California.

B. The California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA) (Public Resources Code sections 21000 et seq.) is the California analog to NEPA. CEQA requires government projects and government-approved projects to be planned to avoid significant adverse environmental effects.

CEQA requires that prior to approval by a state or local agency of a project, an Environmental Impact Report (EIR) must be prepared to identify the significant effects of a project on the environment, the alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided. (Pub. Res. Code § 21002.1.) If no significant environmental effects are foreseen, a "negative declaration" (Neg Dec) briefly describing the proposed project and the reasons why an EIR should not be required may be submitted.

1. Designation of a Lead Agency

If two or more agencies are involved in implementing or approving a proposed project, one will be designated the "lead" agency. The lead agency will normally be the one with general governmental powers, such as a city or county, rather than an agency with a single limited purpose, such as an air-pollution-control district. The lead agency has the primary responsibility for approving or carrying out a project, decides whether an EIR or Negative Declaration will be necessary, and prepares the document. Other involved agencies are designated either "responsible" or "trustee" agencies. These agencies consult with and provide input for the decisions of the lead agency.

2. Public Notice

The CEQA statute and its implementing regulations, title 22 of the California Administrative Code sections 15000 et seq., provide detailed procedures for the environmental review. The procedures include notice to the public and an opportunity for public comment. The agency is required to respond to all public comments and to implement all feasible mitigation measures. But the agency retains discretion to approve

a project despite adverse environmental impacts that cannot be mitigated or avoided if the agency finds that there are overriding considerations justifying the project.

3. Enforcement

CEQA is enforced by private litigation and by the Attorney General's Office. There is no specific statutory authority for enforcement by district attorneys. Legal challenges to projects alleging violations of CEQA must show that either the agency failed to follow the required procedures in its environmental review or that the project approval constituted an abuse of discretion. In general, the courts require strict adherence to CEQA's procedures but defer to the agency's balancing of the benefits of a project against any adverse environmental impacts disclosed by the EIR.

C. Air Pollution

The California Air Resources Act, Health and Safety Code sections 39000 et seq., contains provisions required by the federal Clean Air Act as well as additional provisions to improve and protect the state's air quality. The Act provides for the establishment and enforcement of air quality standards and emission limitations. directs the State Air Resources Board (ARB) to divide the state into air basins of similar meteorological and geographical characteristics and to adopt ambient air-quality standards for each basin considering human health, aesthetic value, interference with visibility, and economic effects. (Health & Safety Code § 39606.) Investigation and regulation of sources and types of pollution occur at both the state and local levels.

1. Responsibility at the State Level

The State Air Resources Board (ARB) is responsible for developing the state implementation plan required by the federal CAA. (Health & Safety Code § 39602.) It also has general oversight powers to ensure pollution control by establishing state ambient air quality standards and by setting emission standards for mobile sources (vehicles). While primary responsibility for the regulation of stationary sources rests with the local air pollution control districts, the state ARB monitors air quality, adopts test procedures, conducts research, and regulates sandblasting material, various types of engines, motor vehicle emissions (including fuels), and emissions of various consumer products such as paint and hairspray. The ARB also enforces air related asbestos regulations in certain counties that do not have their programs.

2. Responsibility at the Local Level

Local Air Pollution Control Districts (APCDs) usually encompass a single county. But several county districts have merged into regional districts. These consolidated districts now cover the San Francisco Bay Area, the South Coast Air Basin, and the San Joaquin Valley. The APCDs have primary responsibility for the implementation of basin-wide plans by regulating stationary sources within their boundaries, such as industrial facilities and fixed equipment. Each APCD has a permit system for new and existing stationary

sources to insure that emissions sources do not prevent the attainment or maintenance of air quality standards.

3. Enforcement

See Chapter XXI Air-Pollution Law for these particular enforcement provisions.

D. Water Pollution

The Porter-Cologne Water Quality Control Act, California Water Code sections 13300-13999 and Title 23 of the California Administrative Code, is analogous to the federal Clean Water Act (CWA) in that it regulates discharges that may affect the quality of the state's waters. The California Act is broader in scope than the federal CWA, however, in that it includes groundwater, while the CWA regulates only surface waters. The Porter-Cologne Act is implemented by the State Water Resources Control Board and nine Regional Water Quality Control Boards (RWQCBs) that are responsible for planning, permitting, and enforcement. The State Board formulates state policies for water-quality control and implements the permit system required by the CWA.

The State and Regional Water Boards have broad authority to take a variety of enforcement actions under the Porter-Cologne Water Quality Control Act; the Toxic Pits Cleanup Act of 1984; Chapters 6.67, 6.7, and 6.75 of Division 20 of the Health and Safety Code regarding underground and aboveground tanks; Health and Safety Code section 25356.1; and Chapter 6 of Division 3 of the Harbors and Navigation Code.

Examples of enforcement actions include:

- violation of an effluent limit, receiving water limit, or discharge prohibition contained in an order or Water Quality Control Plan (Basin Plan) adopted by the State Water Board or a Regional Water Board;
- an unauthorized spill, leak, fill, or other discharge;
- failure to perform an action required by the State Water Board or a Regional Water Board, such as submittal of a self-monitoring or technical report or completion of a cleanup task by a specified deadline.

1. State Water Resources Control Board

The State Water Resources Control Board (SWRCB) is responsible for developing and implementing a statewide water-quality policy. (Water Code §§ 13140-13142.) The SWRCB also oversees the activities of the Regional Water Quality Control Boards. The SWRCB also licenses operators of local wastewater treatment plants, has an Underground Storage Tank Enforcement Unit, and has an Office of Statewide Enforcement.

2. Regional Water Quality Control Boards

Under the Porter-Cologne Act, the Regional Water Quality Control Boards have primary responsibility for the day-to-day administration of the laws and regulations protecting California's surface and groundwaters. Each Regional Board must develop a regional water-quality plan that establishes water-quality objectives for the region and provides a framework for all administrative actions taken by the board. (Water Code § 13241.) Each Regional Board has a person assigned as the Enforcement Manager who coordinates enforcement issues for that Regional Board.

3. The Permit System

National Pollution Discharge Elimination System (NPDES) permits are issued by the State or Regional Boards and are required for all point source pollution discharges into California's surface waters. Point source discharges are defined as planned nonagricultural waste discharges from man made conveyance systems.

The permit system in California is essentially the same as the federal permit system under the NPDES. Before proceeding with any waste discharge that could affect the quality of the groundwater or surface waters of the state, the potential discharger must first report to and receive a permit from the local Regional Water Quality Control Board. (Water Code §§ 13260; 13263; see also Cal. Code Regs. tit. 23, §§ 648 et seq.) As of 2000, California has approximately 2,250 active NPDES permits protecting the state's water resources from industrial and municipal waste discharges.

For discharges onto land that may affect water quality, Waste Discharge Requirements (WDRs) are issued by the State and Regional Boards to regulate waste-disposal impoundments and land disposal for liquid and solid wastes. The permitting system addresses many types of waste discharges, including municipal, industrial, and commercial sources. As of 2000, California has approximately 3,670 active WDRs protecting its groundwater resources.

4. Storm Water Program

Discharges of storm water associated with industrial activities require compliance with the General Industrial Activities Storm Water Permit (part of the NPDES system). Requirements include submission of a Notice of Intent for coverage under the general permit, a Storm Water Pollution Prevention Plan (SWPPP), implementation of the SWPPP, and annual reports.

5. Hazardous-Waste Facilities

In addition to administering the state's discharge permit system, the Regional Boards participate in the administration of the hazardous-waste-facility permit system. The Regional Boards are responsible for classifying all current and proposed hazardous-waste facilities within their regions in accordance with the classification system adopted by the State Board. (Water Code §§ 13225-13226.)

6. Administrative Enforcement

Regional Water Quality Control Boards have authority to inspect any facility discharging or proposing to discharge pollutants into the state waters and to require the owners of those facilities to prepare technical or monitoring program reports. (Water Code §§ 13267; 13383.) If the Regional Board discovers any discharge or proposed discharge in violation of the water-quality laws and regulations, it may, after notice and a hearing, issue an administrative cease-and-desist order directing the offending party to comply with the applicable titles and regulations. (Water Code § 13301.) Where appropriate, the Board may also issue a cleanup and abatement order. The Regional Board may itself undertake cleanup, abatement, and remedial work if it deems such work necessary to prevent substantial pollution, nuisance, or injury to the waters of the state. (Water Code § 13304.) The Board is authorized to seek reimbursement of any costs incurred in such work from the responsible parties through suit in state court. (Id.) If the Regional Board establishes that a party has failed to file a discharge report before discharging a pollutant, or has failed to abide by any requirements or orders issued by the Board, or has caused a discharge creating a condition of pollution or nuisance, the Board is authorized to administratively impose civil fines up to specified maximums. (Water Code §§ 13323 et seq.; 13350.) Alternatively, the Regional Boards may request the attorney general to seek injunctive relief in state court. (Water Code §§ 13340; 13350.) District attorneys are limited to bringing criminal actions or civil actions for unfair competition. (Bus. & Prof. Code §§ 17200 et seq.)

7. Criminal Enforcement

a. Water Code Section 13387 Cases

- **Constitutional Challenges:** *People v. Appel* (1996) 51 Cal.App.4th 495, 503-505: No ex post facto defense allowed where defendant's actions took place prior to EPA's formal determination of jurisdiction over the waters on defendant's property because the statute regarding jurisdiction existed prior to defendant's actions. Challenge based on vagueness refuted as defendant refused to cooperate with the federal and state agencies' investigations, so he may not later complain that he did not know that he was in violation.
- **Intent:** *People v. Ramsey* (2000) 79 Cal.App.4th 621, 632-633: Knowledge that a material discharged into navigable waters is a "pollutant" is not an element of the offense set forth in section 13387. Mistake or lack of knowledge that the material was a pollutant is not a defense as discharging a pollutant into navigable waters is not a specific-intent crime.
- **Defense of Necessity:** *People v. Buena Vista Mines, Inc.* (1998) 60 Cal.App.4th 1198, 1202-1203: Requirements of necessity defense not present because the holding pond was inadequately sized to hold the contaminated water, and defendant did not exhaust all reasonable alternatives prior to pumping the contaminated water into the creek.

- **Felony:** *People v. Buena Vista Mines, Inc.* (1996) 48 Cal.App.4th 1030, 1033-1034: Violation of section 13387(c) is a felony (statute wording was unclear). Note the statute was amended in 2002 to clarify that imprisonment is “in the state prison.”
- **Preemption:** *Appel*, 51 Cal.App.4th at 505: The Federal Water Pollution Control Act does not preempt state criminal conviction under this section for violations of the Federal Act.
- **Relationship to Federal Law:** *Buena Vista Mines, Inc.*, 48 Cal.App.4th at 1034: As the Porter-Cologne Water Quality Act refers to the Federal Water Pollution Control Act, federal authority is used to interpret the Act.

8. Penalties

a. Criminal -- Misdemeanors

The following violations are misdemeanors, i.e., fine of up to \$1,000 for each day of violation and up to six months in jail unless otherwise stated.

CAVEAT: Water Code Section 13271(d) provides use immunity for notification in all other criminal prosecutions. The State Board may grant use immunity to anyone who is subpoenaed to testify at its hearings. (See Water Code Sections 1105-1106.)

- **Water Code Section 13265(a):** Discharge without report or requirements (prior notice is required).
- **Water Code Section 13265(b):** Discharge of hazardous waste without report or requirements. Note: This may also be chargeable under Health and Safety Code section 25189.5.
- **Water Code Section 13525.5:** Recycling without requirements in violation of Water Code section 13524.
- **Water Code Section 13526:** Recycling without required permit.

The following reporting violations are misdemeanors, i.e., fine of up to \$500 and up to six months in jail, except as otherwise stated. (Water Code Sections 13260; 13267; 13522.5.)

- **Water Code Section 13261(a):** Failure to file report of waste discharge after demand.
- **Water Code Section 13261(b):** Failure to file or falsification of report of discharge of hazardous waste (up to \$1,000 fine per day).
- **Water Code Section 13268(a):** Failure to furnish or falsification of technical or monitoring reports (up to \$1,000 fine per day).

- **Water Code Section 13268(b):** Failure to furnish or falsification of technical or monitoring reports of hazardous waste (up to \$1,000 fine per day).
- **Water Code Section 13271(c):** Failure to report discharge of hazardous substances in greater than reportable quantities (fine up to \$20,000 and up to one year in jail).
- **Water Code Section 13272(c):** Failure to report discharges of oil (\$500-5,000 fine per violation and up to one year in jail).
- **Water Code Section 13387(b):** Falsification of reports of discharge to waters of U.S. or violation of any other discharge, dredge, or fill material permit requirements. (See also Water Code § 13261 -- false report.)
- **Water Code Section 13522.6:** Failure to file recycling report.

b. Criminal -- Felonies

- **Water Code Section 13387:** Violation of Clean Water Act program requirements (\$5,000 to \$25,000 fine for each day of violation and up to one year in jail; \$5,000 to \$50,000 fine for each day of intentional violation and up to three years in jail).
- Health and Safety Code Section 25284.4 (i): Perjury provision for fraud by underground tank testers.

c. Civil

Up to \$6,000 fine per day (unless otherwise stated). No district attorney authority, but a district attorney can charge violation as an unfair business practice pursuant to Business and Professions Code Section 17200 and other provisions such as the Fish and Game Code.

- **Water Code Section 13265(b):** Discharge of hazardous waste without report or requirements (up to \$5,000 fine per day).
- **Water Code Section 13385:** Violation of Clean Water Act requirements (up to \$25,000 fine [in lieu of Water Code section 13350]).
- **Water Code Section 13350(a)(3):** Unpermitted discharge of oil (up to \$15,000 fine for each day of violation).
- **Water Code Section 13350(b):** Unpermitted discharge of hazardous waste that causes or threatens to cause pollution or nuisance--strict liability (up to \$15,000 fine for each day of violation).

- **Water Code Section 13261(b):** Failure to file or falsification of a report of hazardous-waste discharge (up to \$25,000 fine per day).
- **Water Code Section 13268(b):** Failure to furnish or falsification of report of technical or monitoring programs relating to hazardous waste (up to \$25,000 fine per day).
- **Water Code Section 13350(a)(1):** Violation of cease-and-desist order (up to \$15,000 fine per day).
- **Water Code Section 13350(a)(2):** Discharges in violation of waste discharge requirements, orders, or prohibitions that create condition of pollution or nuisance (up to \$15,000 fine per day).
- **Water Code Section 13385:** Violation of orders implementing Clean Water Act (up to \$15,000 fine per day, up to \$25,000 fine per day [in lieu of Water Code section 13350]).

d. Injunctions

No district attorney authority (but remember Business and Professions Code section 17200).

- **Water Code Section 13262:** Enjoin discharge pending compliance with Water Code sections 13260 and 13264(a).
- **Water Code Section 13386:** Compel compliance with Clean Water Act requirements.
- **Water Code Section 13525:** Enjoin recycling in violation of Water Code section 13524.
- **Water Code Section 13262:** To compel report of waste discharge.
- **Water Code Section 13522.7:** To compel recycling report.
- **Water Code Section 13304:** Enjoin violations of cleanup and abatement order.
- **Water Code Section 13331:** Enjoin violation of cease-and-desist order.
- **Water Code Section 13340:** Compel abatement of pollution or nuisance in emergency.

e. Reimbursement

Water Code section 13304(c)--Reimbursement of costs under cleanup and abatement authority. Also, section 13305(f) provides for reimbursement of costs under cleanup and abatement authority for nonoperating business or industrial facilities.

E. Proposition 65

This initiative is codified at Health and Safety Code sections 25249.5 et seq. There are two separate parts to the act: one deals with requirements for warning labels to the public, the other with discharges to drinking water. The act prohibits businesses from knowingly discharging into water listed carcinogens or mutagens (substances that cause genetic alteration) without first giving a warning. The specific carcinogens and mutagens are listed in the California Code of Regulations Title 22, section 12000. Provision is made for civil penalties of up to \$2,500 per day for each violation. There is a significant amount of case law regarding Proposition 65. It is suggested that prosecutors contact the Attorney General's Office or the state Office of Environmental Health Hazard Assessment for more information. There is a provision for a private cause of action, but notice is required to be given to the local district attorney and the Attorney General. This is why your office may receive "Notices of Intent to Sue" under the provisions of Proposition 65 from private counsel.

F. Local Agencies--The Unified Program

The Unified Hazardous Waste and Hazardous Materials Management Regulatory Program (Unified Program) provides for local implementation of the following six regulatory programs:

- The Spill Prevention Control and Countermeasure Plan of the Aboveground Storage Tank program (SPCC)
- The Hazardous Materials Release Response Plan and Inventory program (HMRRP) (Business Plan)
- The California Accidental Release Prevention program (CalARP)
- The Uniform Fire Code Hazardous Materials Management Plan and Inventory Statement (HMMP/HMIS)
- The Underground Storage Tank program (UST)
- The Hazardous Waste Generator and Onsite Hazardous Waste Treatment program

The local implementing agencies are known as CUPAs (certified unified program agencies) or PAs (participating agencies).

G. Aboveground Storage Tanks

According to current laws, The Aboveground Storage Tank (AST) program, is to be implemented by the SWRCB and the RWQCBs. The program's requirements are found in Chapter 6.67 of Division 20 of the Health and Safety Code. "In general, the [AST program] requires owners or operators of aboveground petroleum storage tanks to file a storage statement, pay a fee ... and implement measures to prevent spills." The owner or

operator of an aboveground storage tank facility that has a petroleum storage capacity of more than 660 gallons in a single tank, or a total storage capacity of more than 1,320 gallons in more than one tank, is generally required by Health and Safety Code Section 25270.5 to prepare a Spill Prevention Control and Countermeasure Plan (SPCC) plan. The specific requirements for a SPCC are laid out in the Code of Federal Regulations Title 40, Section 112.7. However, funding and positions for this program were cut in 2002. There may be legislation to transfer this program to the CUPAs but as of this writing (2007) that has not yet occurred.

The Attorney General's Office may bring civil actions against violators of Chapter 6.67 (including violators of SPCC requirements). It may seek to enjoin violators and may seek civil penalties of up to \$5,000 per day for a first offense, up to \$10,000 per day for repeat violations. (Health & Safety Code Section 25270.12.)

H. Hazardous Materials Inventory and Reporting Requirements--Health and Safety Code Chapter 6.95

Experience has shown that prevention mechanisms are the most cost effective methods of reducing hazardous material incidents. Implementation of state and federal hazardous material planning laws and regulations can be effective in minimizing releases of hazardous materials. Proper enforcement is critical to the implementation of the hazardous material regulatory program and to ensure appropriate protection of public health and safety and the environment. Chapter 6.95 of the Health and Safety Code contains significant planning requirements for control of hazardous materials.

Every "person" who "handles" (defined terms) more than a specified quantity of hazardous materials must prepare a business plan, which includes a chemical inventory (including a site map), an emergency response plan and procedures, and information on the business's hazardous materials training plan for employees. The requirements for business plans are found in Health and Safety Code Sections 25500 et seq. These regulations are found in Chapter 4 of Division 2 of Title 19 of the California Code of Regulations.

Chapter 6.95 has several unique elements that include:

- The most comprehensive statutory definition of "hazardous materials":

"Hazardous material" means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety if released into the workplace or environment.

"Hazardous materials" include, but are not limited to, hazardous substances, hazardous waste, and any material which a handler or the administering agency has a reasonable basis for believing would be injurious to the health and safety of persons or harmful if released into the workplace or the environment. (Health & Safety Code § 25501(o).)

- A definition of “business” that includes “an employer” and government. (Health & Safety Code § 25501(d) and 25501.4.)
- A definition of “handler” to assist in defining the businesses covered. (Health & Safety Code § 25501(n).)
- A comprehensive definition of “release.” (Health & Safety Code § 25501(s).)
- Definition of “threatened release”--important for emergency-notification prosecution. (Health & Safety Code § 25501(v).) See the implementing regulations at California Code of Regulations Title 19, section 2703, however, for further definitions that limit reporting requirements to situations where the release or threatened release poses a hazard.
- Requirements to immediately report significant releases or potential releases of hazardous materials to the State Office of Emergency Services and to the local CUPA.

1. Required Planning Elements

Each business that handles any one hazardous material in an amount that is equal to or greater than 500 pounds, 55 gallons, or 200 cubic feet of gas must develop a business plan and submit it to the local unified program agency. This plan must include an inventory of hazardous materials and cover emergency response, preempt planning, training, and evacuation. (Health & Safety Code § 25503.5.) Note: This plan may be the same document used to satisfy the contingency plan requirement of the hazardous waste law. The Uniform Fire Code also requires a “plan.” The business plans and inventories of hazardous materials are held by the administering agencies and are available for review by the general public. (Health & Safety Code § 25503.)

Handlers of acutely hazardous materials (using U.S. EPA’s definition of extremely hazardous substances found in 42 U.S.C. section 11002(a)(2)) may be required to develop Risk Management and Prevention Programs (RMPPs) upon request from local CUPAs. These risk prevention programs may be required following an evaluation of the potential hazard presented by a specific facility to public health and safety or the environment. The quantities of extremely hazardous materials, the methods and processes involved, and the results of a hazard analysis will be used to determine the necessity for an RMPP. (Health & Safety Code §§ 25533-25534.) See discussion below under **California Accidental Release Prevention**.

Trade secrets have minimal protection from emergency responders needing the data for emergency response or medical personnel needing specific chemical data for specific medical treatment of patients. (Health & Safety Code § 25511.)

2. Acutely Hazardous Materials

An owner or operator of a new or modified facility that will be used for the handling of acutely hazardous materials must prepare an RMPP. (Health & Safety Code §§ 25531-25541.)

3. Reporting Requirements

Anyone required to file a plan is also required to report releases or threatened releases of hazardous materials to the administering agency. (Health & Safety Code § 25507; Cal. Code Regs. tit. 19, § 2703.)

4. Enforcement

a. Civil Liability

Businesses violating aspects of business plan development, review, or submission, or failing to yield inspection authority, or failing to provide adequate and updated chemical inventory data are civilly liable to the administering city or county for up to \$2,000 per day of violation. Costs of any necessary emergency response and the cost of cleanup and disposal may also be recovered. (Health & Safety Code § 25514.) Following reasonable notice, a defendant that knowingly violates the elements in Chapter 6.95 may be civilly liable for up to \$5,000 per day of violation. Civil actions may be brought by the district attorney, city attorney, or attorney general. (Health & Safety Code § 25516.1.) Injunctions, restraining orders, and other appropriate orders shall be issued without proof of irreparable damage or that the remedy at law is inadequate. (Health & Safety Code § 25516.2.)

b. Criminal Liability

Failure to notify of a significant release of hazardous materials is a misdemeanor punishable by a \$25,000 fine for each day and one year in jail. (Health & Safety Code § 25515.) Second offenses are wobblers. Full costs of the emergency response, cleanup, and disposal shall also be recovered.

Knowing failure to file a business plan is a misdemeanor punishable by a \$1,000 fine and one year in jail. (Health & Safety Code § 25514.3.)

Interference with authorized representatives of an administering agency carries misdemeanor liability. (Health & Safety Code § 25515.1.)

Health and Safety Code section 25515.2 deals with apportionment of criminal and civil penalties. Prosecutors receive 50 percent of the penalties; \$200 of every civil or criminal penalty must be sent to a state training fund.

c. Rewards--Persons Providing Information

Health and Safety Code section 25517 allows for the payment of up to \$5,000 for information that materially contributes to the imposition of civil penalties or the conviction of a person or business.

5. California Accidental Release Prevention (CalARP)

CalARP is California's program to implement the federal Accidental Release Prevention program (ARP) with certain additional provisions specific to California. CalARP requires businesses that handle more than a threshold quantity of any of a list of extremely hazardous substances to prepare a Risk Management Plan (RMP) in order to analyze "potential accident factors that are present and the mitigation measures that can be implemented to reduce this accident potential."

The requirements for CalARP are found in Article 2 of Chapter 6.95 of Division 20 of the Health and Safety Code. The state Office of Emergency Services has responsibility for developing regulations that establish statewide standards for CalARP. These regulations are found in Chapter 4.5 of Division 2 of Title 19 of the California Code of Regulations.

Violators of CalARP's requirements are subject to a variety of civil penalties. If these penalties are recovered from the violator, a statute prohibits criminal prosecution of the violator for the same offense, and any civil action pending against a violator must be dismissed upon filing of a criminal complaint. (Health & Safety Code § 25540.5.) A first-time violator may be held liable for up to \$10,000 per day of violation and any costs incurred for emergency response or cleanup resulting from the violation. A person who commits a violation after reasonable notice is liable for up to \$25,000 per day. (Health & Safety Code § 25540.)

Criminal misdemeanor penalties apply to anyone convicted of knowingly falsifying, destroying, altering, or concealing documents used for compliance with CalARP, including fines of up to \$25,000 per day of violation and/or imprisonment up to one year in county jail in addition to any costs incurred for emergency response or cleanup resulting from the violation. Second or subsequent convictions may be charged as misdemeanors or felonies. (Health & Safety Code § 25541.)

6. Other Reporting Requirements

Many statutes in addition to the above require emergency notification of hazardous chemical release, including:

- Health and Safety Code sections 25270.7, 25270.8 (aboveground tanks)
- Vehicle Code section 23112.5
- Government Code sections 51018, 8670.25.5(a)
- Water Code sections 13271-13272
- California Labor Code section 6409.1(b) (insurers to employees)
- U.S. Code, Title 42, sections 9603, 11004

- Federal Regulations--(e.g., 49 C.F.R. section 171.15 and 40 C.F.R. section 263.30)

I. Uniform Fire Code--Hazardous Materials Management Plan, Hazardous Materials Inventory Statement

The Uniform Fire Code (UFC) is published by the Western Fire Chiefs Association. The UFC “prescribes regulations consistent with nationally recognized good practice for the safeguarding ... of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises.” The State Fire Marshal, part of the Department of Forestry and Fire Protection since 1996, has adopted the Uniform Fire Code, with amendments, as the California Fire Code. Local fire departments are required to adopt local fire codes that are no less stringent than the California Fire Code.

Section 8001.3 of Article 80 of the California Fire Code pertains to hazardous materials permits. Pursuant to section 8001.3.1, a permit is required “to store, dispense, use or handle hazardous material in excess of” specified quantities. The actual issuance of these permits and compliance with their requirements are outside the scope of the Unified Program. Permit applicants may be required by a fire chief to prepare a Hazardous Materials Management Plan (HMMP) (section 8001.3.2a) and Hazardous Materials Inventory Statement (HMIS) (section 8001.3.3a); these two documents are included in the Unified Program. The requirements of the HMMP and HMIS are now essentially the same as those of the business plan (discussed above). The only enforcement mechanisms for Fire Code violations are those provided in local ordinance--usually infractions or misdemeanors. But see enforcement options under the discussion of business plans, above.

J. Underground Storage Tanks

The problem of hazardous substances leaking from underground tanks is not confined to California. Leakage from underground storage tanks containing hazardous material has contaminated groundwater and drinking water supplies throughout the nation.

One gallon of gasoline can contaminate one million gallons of drinking water to an unsafe level of one part per million. High groundwater and sandy alluvial soil accelerate the corrosion of steel underground tanks and piping. As a result, leaks may occur in some tanks that are less than 10 years old.

More than half the reported leaks occur in the pressurized piping associated with the tanks rather than in the tanks themselves. Gasoline leaking from a hole in a pressure line will do so at a much faster rate than gasoline dripping from a hole in a tank’s bottom. Moreover, because gasoline is so temperature sensitive and volatile, a 10,000-gallon tank can easily leak 100 gallons per month without being detected.

The requirements for the UST program are found in Article 2, Chapter 6.7, Division 20 of the Health and Safety Code. The SWRCB has responsibility for developing regulations that establish statewide standards for the UST program, which are found in Chapter 16 of Division 3 of Title 23, in the California Code of Regulations. The program is implemented on the local level by CUPAs. The owner or operator of a UST must obtain a permit from the CUPA prior to commencing operation of a tank. The permit includes conditions regarding design, construction, and installation of new USTs, monitoring, repairs, upgrades, release response, closure, and notification or reporting. (Health & Safety Code § 25284.)

1. The Role of the State Water Resources Control Board

The State Water Resources Control Board promulgates regulations to implement the standards for underground storage tanks outlined in Health and Safety Code section 25299.3. These regulations govern implementation of safety technologies, monitoring requirements, and reporting. The State Board is also required to develop standardized underground storage tank permit applications to be used by local authorities in monitoring the permit system and to keep records of all permit applications filed with local authorities. (Health & Safety Code § 25286.). The State Board has an underground tank enforcement unit that investigates violations related to USTs.

2 Tank Owners Requirements

Health and Safety Code sections 25280 et seq. lists the requirements for owners of tanks. (Note that agriculture is generally exempted.)

- Obtain a Permit to Operate and pay a fee to the local agency, i.e., install a leak-detection system on all existing tanks.
- On new tank installations, obtain a Permit to Install and provide secondary containment of the tank and piping.
- Upon abandoning a tank, obtain a Permit to Abandon, clean out the tank, remove it from the ground, and check the ground beneath for evidence of contamination and past leakage. (Health & Safety Code § 25298.)
- No permit is required for pits, ponds, lagoons. (Health & Safety Code § 25281(x).)

3. Permits

The local CUPA issues permits and oversees activities pertaining to underground hazardous material storage tanks. Agriculture is exempt from local agency permit requirements. The three kinds of permits and their requirements are as follows:

- Permit to Operate
 1. Installation of a leak-detection system.
 2. Compliance schedule for installation of leak-detection system.

3. Inspection of the leak-detection system installation and proper use, monitoring, and maintenance of the system. (Health & Safety Code § 25286.)

- Permit to Install

1. Review of plans for secondary containment of tanks and piping.
2. Inspection of installation to ensure proper construction of the secondary containment system.

- Permit to Close

This permit requires the tank to be completely emptied and removed from the ground and the soil around and beneath the tank sampled for contamination.

4. Leak-Detection Program

Applicants must file a plan and install a leak-detection system at their facilities. (Health & Safety Code § 25292.) The plan must incorporate one of the monitoring alternatives contained in the regulations. Requirements include:

- Description of proposed leak-detection system.
- Identification of monitoring alternatives.
- List of proposed equipment.
- Inventory schedule and procedures.
- Tank testing schedule.
- Monitoring of person responsible for leak-detection reporting procedures to be used if leak is detected.
- Name of the person responsible for leak detection reporting procedures to be used if leak is detected.
- Identification of duties to be performed by the owner of the tank and the operator of the facility. (Health & Safety Code § 25292.)

5. Enforcement

a. Civil

Health and Safety Code section 25299 states that an owner or operator of an underground storage tank facility shall be liable for a civil penalty of from \$500 to \$5,000 per day for any of the following violations:

- Operating the facility's tanks without a Permit to Operate.
- Failing to monitor the tanks as required by the permit.
- Failing to maintain inventory and other records.
- Failing to report leaks.
- Improperly closing/abandoning a tank.
- Improperly repairing a leaking tank.

b. Criminal

Misdemeanors

Anyone falsifying any monitoring records or knowingly fails to report a leak may be fined from \$5,000 to \$10,000 per day and/or imprisoned in county jail for not more than one year. (Health & Safety Code § 25299 (f) (1))

Anyone intentionally tampering with leak detection systems leak may be fined from \$5,000 to \$10,000 per day and/or imprisoned in county jail for not more than one year. (Health & Safety Code § 25299 (f) (2))

Felonies

Health and Safety Code Section 25284.4 (i): Perjury provision for fraud by underground tank testers

Alternative Penalties

In certain cases, an owner of a tank may be held liable for illegal disposal of hazardous waste under the Hazardous Waste Control Board Law with civil and criminal penalties similar to those described above.

K. Hazardous Waste

California's Hazardous Waste Control Act of 1972 was the first comprehensive hazardous waste control law in the United States. It has served as a model for other states as well as for the federal government. The Hazardous Waste Control Law, Health and Safety Code sections 25100 et seq., establishes standards for regulating the generation, handling, processing, storage, transportation, and disposal of hazardous wastes--a "cradle to grave" scheme. The purpose of the regulations is the management of hazardous waste from the moment it is generated by an individual or a business until it is recycled or discarded. The hazardous waste control program is administered by the state Department of Toxic Substances Control (DTSC) and by local CUPAs.

1. Hazardous Material vs. Hazardous Waste

The distinction between hazardous material and hazardous waste is important. Different regulatory schemes have different lists of what constitutes a hazardous material. For example, Health and Safety Code section 25501 provides its own particular definition of hazardous material.

Hazardous materials become hazardous waste when the material has been used for its original purpose and is about to be discarded or recycled. (Health & Safety Code § 25124.) California law subjects recyclable materials to many of the same restrictions as hazardous waste. (Health & Safety Code § 25143.2.)

Hazardous waste is defined as a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either:

- Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness.
- Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or
- otherwise managed. (Health & Safety Code § 25117; 25141.)

Criteria for specific types of hazardous waste are found in the California Code of Regulations at Title 22, sections 66261.10-66261.24. These regulations describe specific testing methods for toxicity, flammability, reactivity, and corrosiveness. .

2. The Manifest System

DTSC is responsible for maintaining and regulating the manifest system mandated by the Hazardous Waste Control Law. (Health & Safety Code § 25161.) The focus of the system is the requirement of a “manifest,” a document that tracks the movement and disposal of hazardous waste.

Manifest regulations are set forth at California Code of Regulations Title 22, sections 66262.20-66262.23 and 66262.40. The generator prepares the manifest that identifies the generator, the type and amount of waste to be shipped, the designated hauler, and the designated disposal site. (Cal. Code Regs. tit. 22, § 66482.)

The generator prepares six copies of the manifest. When waste is offered for transportation, the transporter acknowledges receipt of the waste by signing the manifest. The generator retains one signed copy and sends another copy to DTSC within 30 days of shipping the waste. The hauler carries the remaining four copies with him or her at all times during the transportation of the waste. (Cal. Code Regs. tit. 22, § 66263.20.)

Upon delivery to the disposal site, the owner or operator of the disposal facility inspects the waste to assure that it is accurately described in the manifest and then acknowledges receipt of the waste by signing the manifest. (Cal. Code Regs. tit. 22, §§ 66264.71-66264.72.)

3. Treatment, Storage, and Disposal Facilities (TSDFs)

a. Facility Permits

The state issues permits only to facilities engaged in the treatment, storage, disposal, or transportation of hazardous wastes. Generators are not required to obtain a permit, but are required to have a U.S. EPA generator ID number and must report to the federal Environmental Protection Agency if they produce more than 1,000 kilograms (2,200 pounds) of hazardous waste within a calendar month. Exceptions are made for hazardous wastes generated onsite and stored for less than 90 days or where the total hazardous waste generated is less than 5,000 gallons or 45,000 pounds.(Cal. Code Regs. tit. 22, § 66262.34.)

Transfer facilities holding hazardous waste for more than 144 hours and all other off-site facilities holding hazardous waste for any period of time must also hold a valid TSDF permit. (Health & Safety Code §§ 25201; 25123.3.)

b. Fees

Disposal fees are assessed on a per-ton basis. Fees are collected by the Board of Equalization, not the Department of Toxic Substances Control.

4. Generator Responsibilities

A generator is a person or business whose act or process produces a hazardous waste or whose act first causes a hazardous waste to become subject to regulation. (Cal. Code Regs. tit. 22, § 66260.10.)

Responsibilities include:

- Filing a hazardous waste notification statement with DTSC prior to generating, treating, storing, or disposing of hazardous waste.
- The generator determines if its waste falls within the definition of “hazardous” and treats it accordingly. (Cal. Code Regs. tit. 22, §§ 66260.200(c); 66262.11.) The generator must obtain a U.S. EPA Identification Number. (Cal. Code Regs. tit. 22, § 66262.12.) Variance procedures are available if the generator believes the waste need not be handled as hazardous waste. (Cal. Code Regs. tit. 22, § 66260.210.)
- A generator of extremely hazardous waste must notify DTSC of its intent to dispose it. (Health & Safety Code § 25153.)
- A generator may store hazardous waste at an outside facility for up to 90 days or at an offsite transfer facility for 144 hours without obtaining a facility permit. (Health & Safety Code §§ 25201, 25123.3; Cal. Code Regs. tit. 22, § 66264.1.) Extensions of the 90-day rule are available on application to DTSC if unforeseen circumstances cause delay.
- Small generators, defined as generators of less than 100 kilograms (220 pounds) of hazardous waste or less than one kilogram (2.2 pounds) of extremely hazardous waste per month, may store up to 100 kilograms of hazardous waste or one kilogram of extremely hazardous waste indefinitely without a permit. (Health & Safety Code § 25123.3(b).)
- Generators must dispose of all hazardous waste at a licensed facility using a registered hazardous-waste hauler for all transportation. (Health & Safety Code §§ 25203; 25163.)

- Generators must use a manifest for all transportation of hazardous waste and:
 1. Complete the generator portion (including a description of the waste) and sign the certification. (Cal. Code Regs. tit. 22, § 66262.32(a)(1).)
 2. Insure that the transporter signs and dates the manifest upon receipt of the waste. (Cal. Code Regs. tit. 22, § 66262.32(a)(2).)
 3. Keep two copies of the manifest (special rules apply regarding transport by ship, rail, etc.). (Cal. Code Regs. tit. 22, § 66262.34(a)(3).)
 4. Contact the transporter and disposal facility if the copy signed by the disposer is not received within 35 days of shipment.
 5. Submit an Exception Report to DTSC if a signed copy from the disposal facility is not received within 45 days of shipment. Maintain records.
- Generators must maintain copies of all manifests for three years, submit biennial reports, keep a copy of all biennial reports and exception reports for three years, and maintain copies of all chemical test reports for three years. (Cal. Code Regs. tit. 22, § 66262.40.)
- Generators must insure that hazardous waste is properly packaged and labeled for transport. (Cal. Code Regs. tit. 22, §§ 66262.30-66262.33.)
- Generators must insure that storage conditions comply with regulations during storage prior to disposal.

Comply with storage and container regulations for Interim Status and Permitted Facilities, including providing for adequate security, containment of spills, alarm systems, etc. (Cal. Code Regs. tit. 22, § 66262.34.) The date on which accumulation of waste began must be marked and visible on each container to assure compliance with the 90-day rule. Containers must be marked as containing hazardous waste.

- Generators must comply with regulations regarding preparedness and prevention for fires, spills, accidents, etc. and also with regulations regarding contingency plans for accidents, evacuations, emergency response, etc. (Cal. Code Regs. tit. 22, § 6262.34.) This may be the same document as the Hazardous Materials Management Plan prepared pursuant to Health and Safety Code Chapter 6.95.
- Generators must comply with training requirements for personnel who handle hazardous waste. (Cal. Code Regs. tit. 22, § 67105.)
- Generators must recycle all hazardous wastes for which DTSC determines recycling is economically and technologically feasible. (Cal. Code Regs. tit. 22, §

66266.1.) A list of such wastes appears at California Code of Regulations Title 22, section 66266.2.

- Generators who produce more than five tons of hazardous waste per year must pay generator fees.

5. Hazardous-Waste Transporters

a. Registration

DTSC has the responsibility for the registration of all transporters of hazardous waste in California. (Health & Safety Code § 25163.) All transporters must hold a valid registration permit from DTSC before carrying any hazardous waste. DTSC reviews applications for registration to ensure that:

All equipment to be used by the transporter for transporting hazardous wastes has passed inspection by the California Highway Patrol (CHP).

All persons who will operate any hazardous waste transportation equipment have received adequate safety training.

The transporter has established his or her financial responsibility.

The hauler has agreed to allow authorized agents of DTSC or the CHP to inspect his or her vehicle, transportation equipment, and records. (Health & Safety Code §§ 25163.)

b. Enforcement of Transportation Laws

DTSC shares responsibility for enforcing California's hazardous waste transportation laws and regulations with CHP. DTSC is authorized to inspect company records and, when accompanied by a uniformed police officer, to stop and inspect any vehicle reasonably suspected of transporting hazardous wastes. (Health & Safety Code § 25185(a)(3)-(4).) DTSC may suspend the transporter's registration absent proof of ability to respond to damage. (Health & Safety Code § 25169.) When DTSC determines that a violation has occurred or is about to occur, it may request the city attorney, district attorney, or the attorney general to seek injunctive relief or civil penalties in the California courts. (Health & Safety Code §§ 25181-25182.)

- California Highway Patrol

Under Vehicle Code section 34501(b), CHP has broad authority to promulgate regulations to ensure safety in the transportation of hazardous substances.

Pursuant to that authority, CHP has issued extensive regulations regarding:

1. Packaging and labeling of hazardous substances offered for transportation, the placarding of vehicles, the preparation of shipping papers, safety-equipment requirements, and routing restrictions. (Cal. Code Regs. tit. 13, §§ 1150-1154.)
2. CHP packaging and labeling requirements extensively reference federal Department of Transportation regulations. (See 49 C.F.R. parts 172-173; Cal. Code Regs. tit. 13, § 1160.5.)
3. Licensing: The CHP is responsible for licensing hazardous-waste haulers. (Vehicle Code § 2501.) No person may transport hazardous waste without first acquiring a license from CHP. The license is nontransferable and may be denied, suspended, or revoked if the hauler is found to be guilty of multiple violations of the hazardous waste transportation laws. (Vehicle Code §§ 2503; 2531.)
4. Suspensions: CHP is also authorized to suspend or revoke any license for the transportation of hazardous materials if it finds that the hauler has been found guilty of multiple violations of the Vehicle Code and that such suspension or revocation is in the public interest. (Vehicle Code § 2531.) The CHP commissioner is authorized to temporarily suspend any hauler's license when he or she deems such suspension necessary to prevent an imminent and substantial danger to the public health.

- Responsibilities of Transporters

1. Must be registered with DTSC and obtain CHP inspection/approval for all trucks and containers used in transport. (Health & Safety Code § 25163.) There is an exception for small quantities (under five gallons/50 pounds). (Health & Safety Code § 25163(c).)
2. Must comply with all regulations regarding manifests. (Cal. Code Regs. tit. 22, § 66541.)
3. Must ensure that the generator signs, dates, and describes the waste.
4. Must complete, sign, and date the transporter section and give a copy to the generator prior to the removal of the waste.
5. Must have a copy of the manifest in his or her possession during transportation and must provide a copy to the facility to which the waste is delivered.
6. Must obtain the signature and date of transfer of the waste to the licensed facility where it is disposed or to another registered waste hauler upon surrender of the waste.
7. Must keep a copy of the manifest for three years.
8. Must take immediate and appropriate action regarding spills during transport. (Cal. Code Regs. tit. 22, §§ 66263.30-66263.31.)

- Cleanup Superfund

Pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (the State Superfund), DTSC is responsible for formulating criteria for the selection and priority ranking of hazardous-waste sites for remedial action. (Health & Safety Code § 25356.) For this purpose, DTSC has adopted a modified version of U.S. EPA's hazard ranking system. DTSC has prepared a priority list of sites for cleanup that it updates monthly. In addition to this priority list, DTSC prepares site-specific plans of expenditures for removal and remedial actions to be paid for from the State Superfund. (Health & Safety Code § 25359.5.)

Whenever DTSC determines that a release of a hazardous waste has occurred or is about to occur, it is authorized to investigate the nature of the release or potential release, to plan and direct appropriate remedial action, and, if no other party has undertaken the appropriate remedial action, to undertake that action itself. (Health & Safety Code § 25358.3(b).) It is also authorized to require the property owner to secure the site. (Health & Safety Code § 25359.5.)

If DTSC determines that a site or release presents an imminent and substantial danger to the public health or the environment, it may immediately order remedial action by the responsible parties, request the attorney general to seek judicial relief, and/or take or contract for necessary remedial actions. (Health & Safety Code §§ 25356.1(g); 25358.3(a).) The attorney general has jurisdiction to recover all costs expended by the DTSC.

If the local district attorney has brought an action under the HWCL pursuant to Chapter 6.5 against any person for violating the provisions of that chapter or any rule, regulation, or order and the Department has spent money from the state account for immediate corrective action in response to a release or threatened release, the state account may be made a party to that action for the purpose of recovering such costs. (Health & Safety Code § 25361(b).)

- Enforcement

If DTSC finds any violation of the HWCL or its rules or regulations, or if it finds that the owner or operator of the facility has misrepresented or omitted any significant fact in its permit application or in any other information submitted to the Department, it may suspend or revoke the facility's permit. (Health & Safety Code § 25186.)

Alternatively, if DTSC or the CUPA director finds a violation of HWCL or its regulations, he or she may issue an administrative order against the owner or operator of the facility specifying a schedule for compliance. (Health & Safety Code § 25187.) If corrective action is not taken or if it is determined that immediate action is necessary to prevent an imminent and substantial danger to the public health or environment, DTSC is authorized to take action itself. (Health & Safety Code § 25187.5.)

If the director finds any violation of HWCL or its regulations, DTSC may request the local city attorney, district attorney, or the attorney general to file suit for injunctive relief or civil penalties. (Health & Safety Code §§ 25181-25182.) To the extent that criminal violations are involved, the inherent prosecutorial authority of the district attorney allows for independent criminal prosecution of any violations without regard to the above-listed requests from the DTSC.

Legislation passed in 1990 creates dual criminal jurisdiction in both the district attorney and the city attorney. (Health & Safety Code § 25191.2.) Coordination between district attorneys and city attorneys is critical to avoid double-jeopardy problems.

- Violations

Criminal Violations

Health and Safety Code Section 25190: Any violation of Chapter 6.5 of the Health and Safety Code or any regulation adopted under Chapter 6.5 (including all registration, certification, and manifesting requirements identified above) is a misdemeanor. A second conviction is punishable by up to 24 months in state prison and a fine of \$5,000 to \$25,000.

Health and Safety Code Section 25191: Covers transporter registration, vehicle certification, and manifesting requirements. Any owner or lessee of a vehicle in which waste is transported, or any person authorizing transportation who knowingly violates specified provisions, shall be fined \$2,000 to \$50,000 for each day of violation and/or serve up to 24 months in prison.

Health and Safety Code Section 25191(c): Covers transporting or authorizing transportation in an uncertified vehicle and carrying or authorizing the carrying of hazardous waste without a manifest. Any person who knowingly violates specified provisions shall be fined up to \$500 for each day of violation and/or serve six months to one year in prison.

Health and Safety Code Section 25191(d): Treatment or storage without a permit or at an unauthorized point. Any person who knowingly violates specified provisions shall be fined \$2,000 to \$50,000 and/or serve up to 24 months in prison. Second convictions shall be fined \$5,000 to \$50,000 and/or serve up to 24 months in prison—GBI enhancements.

Health and Safety Code Section 25189.5 (Felony): Where one knows or should have known of unlawful treatment, storage, transportation, or disposal, punishment is imprisonment for up to 36 months and a fine of between \$5,000 and \$100,000 for each day of violation—GBI enhancements. (*People v. Martin* (1989) 211 Cal.App.3d 699; *People v. Taylor* (1992) 7 Cal.App.4th 677 [lack of funds is not a defense to disposal].)

Note: Each day after an unreported illegal disposal is considered a separate offense until notice is given to DTSC. For a case upholding a similar statute against a Penal Code section 654 challenge, see *People v. Djekich* (1991) 229 Cal.App.3d 1213.

Health and Safety Code Section 25189.6 (Felony): Any person who knowingly or with reckless disregard of the risk treats, handles, transports, disposes, or stores hazardous waste in a manner that causes unreasonable risk of fire, explosion, etc. may be punished by a fine of not less than \$5,000 up to \$250,000 per day and 16, 24, or 36 months in prison. There is an enhancement for knowingly placing another in imminent danger that is punishable by three, six, or nine years in prison. This section may be used in illegal drug laboratory situations.

This is one of the few areas where there is a lot of California law on criminal cases. See *People v. Sangani* (1994) 22 Cal.App.4th 1120; *People v. Hale* (1994) 29 Cal.App.4th 730; *People v. Todd Shipyards Corp.* (1987) 192 Cal.App.3d Supp. 20; and *People v. Matthews* (1992) 7 Cal.App.4th 1052.

Health and Safety Code Section 25189.7 (Felony): This section provides that anyone who knew or should have known that he or she burned or caused the incineration of hazardous waste at an environmental facility may be fined up to \$100,000 and imprisoned for one, two, or three years--GBI enhancement.

Civil Violations--Civil violations may be brought by the district attorney when referred by the DTSC. (Health & Safety Code §§ 25181-25182.)

Health and Safety Code Section 25189(a): Intentional or negligent false statements on an application, manifest, etc. may be fined up to \$25,000 for each day of each separate violation.

Health and Safety Code Section 25189(b): Intentional or negligent violation of any provision of Chapter 6.5 of the Health and Safety Code or any regulation adopted pursuant to it relating to registration, certification, and manifesting as described above may be fined up to \$25,000 for each day of violation.

Health and Safety Code Section 25189(c): Intentional disposal or causing the disposal at an unauthorized point according to Chapter 6.5 of the Health and Safety Code may be fined from \$1,000 to \$25,000. Each day the waste remains deposited with the violator's knowledge constitutes a separate violation.

Health and Safety Code Section 25189.2(a)--Strict Liability: Any false statement on an application or manifest may be fined up to \$25,000.

Health and Safety Code Section 25189.2(b)--Strict Liability: Any violation of Chapter 6.5 of the Health and Safety Code or any regulation promulgated under it may be fined up to \$25,000.

Health and Safety Code Section 25189.2(c)--Strict Liability: Disposal or causing the disposal of hazardous waste at an unauthorized point may be fined up to \$25,000.

L. The California Fish and Game Code

1. Fish and Game Code Section 2080--Endangered Species

No person shall import, export, or take, possess, purchase, or sell within this state any species, or any part or product thereof that has been determined to be an endangered or threatened species, or attempt any of those acts. The term “take” is defined at Fish and Game Code section 86 as “hunt, pursue, catch, capture, or kill, or attempt to do the same.” (See *Department of Fish & Game v. Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554 [endangered fish spawn destroyed when water pumps activated during course of otherwise lawful activity--court held intent to take not required where actual taking occurs]. See also *Palila v. Hawaii Dep’t of Land and Natural Resources* (1988) 852 F.2d 1106 [habitat destruction that could drive endangered species to extinction constitutes “harm” and thus a “taking” within the meaning of the federal Endangered Species Act, 16 U.S.C. §§ 1532, 1538]; *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* (1995) 515 U.S. 687.)

2. Fish and Game Code Section 4500--Marine Mammals

It is unlawful to take any marine mammal except in accordance with provisions of the Federal Marine Mammal Protection Act. “Marine mammals” include sea otters, whales, dolphins, porpoises, seals, and sea lions.

3. Fish and Game Code Section 4700--Protected Animals

It is unlawful to take or possess at any time fully protected mammals or parts thereof (except where the Fish & Game Commission authorized the collection of those species for necessary scientific research). Fully protected mammals include the Morrow Bay Kangaroo Rat, Bighorn Sheep, Northern Elephant Seal, Guadalupe Fur Seal, Ring-Tailed Cat, Pacific Right Whale, Salt-Marsh Harvest Mouse, Southern Sea Otter, and Wolverine. For mountain lion protection, see Fish and Game Code section 4800.

4. Fish and Game Code Section 5650

a. Elements

This is the “granddaddy” of environmental statutes, originally enacted in the 1870s. It states that it is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this state any of the following:

- Any petroleum, acid, coal, or oil tar, lampblack, aniline, asphalt, bitumen, residuary product of petroleum, or carbonaceous material or substance.

- Any refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill, or factory of any kind.
- Any sawdust, shavings, slabs, or edgings.
- Any factory refuse, lime, or slag.
- Any cocculus indicus.
- Any substance or material deleterious to fish, plant life, or bird life.

b. Criminal Penalties

- Fish and Game Code Section 12002: Violations of subdivision (a) or (b) are misdemeanors punishable by a \$2,000 fine and one year in jail. Violations of subdivision (c) are misdemeanors punishable by a \$5,000 fine and six months in jail.
- Fish and Game Code Section 12011: In addition to punishment provided by Fish and Game Code section 12002, violations of section 5650(a) or (b) subject a defendant to an additional fine of not more than \$10 per gallon or pound of material discharged. The amount of the fine shall be reduced for every gallon or pound that is recovered and is properly disposed of by the defendant.

Defendant is also responsible for an amount equal to the reasonable costs incurred by the state or local agency for cleanup and abatement and to fully mitigate all actual damages to fish, plant, or animal life and habitat.

c. Civil Penalties

- Fish and Game Code Section 5650.1: This section allows for civil penalties of up to \$25,000 per violation. This penalty shall be imposed for each separate violation and is in addition to any other civil penalty imposed by law. It allows for obtaining a TRO, preliminary injunction, or permanent injunction without having to allege or prove irreparable damage or an inadequate remedy at law. Penalties collected shall be apportioned 50 percent to the county treasurer to be deposited in the county Fish and Wildlife Propagation Fund and 50 percent to the state Fish and Game Preservation Fund.

d. Laws and Cases

Section 5650 violations are strict-liability offenses requiring no proof of either intent or criminal negligence. (*People v. Chevron Chemical Co.*(1983) 143 Cal.App.3d 50.)

The discharge of silt could constitute a deleterious substance within the meaning of section 5650(f). In addition, the court rejected the defendant's argument that for a substance to be deleterious it must cause a permanent annihilation or displacement of fish or wildlife. Instead, it concluded that so long as a material, because of its nature or quantity, produces a harmful effect on fish, plant life, or bird life when it is deposited, then it is deleterious. (*People v. Guntert* (1981) 126 Cal.App.3d Supp. 1.)

Silt or sediment under certain conditions or certain quantities will constitute a material harmful to fish. (*Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163.)

“Fish” is defined in section 45 as wild fish, mollusks, or crustaceans, invertebrates or amphibians, including any part, spawn, or ova.

“Waters of the state” includes virtually every watercourse in the state. (*People v. Weaver* (1993) 147 Cal.App.3d Supp. 23.) (See discussion of definition of a stream below in part of chapter pertaining to section 1603.)

5. Fish and Game Code Section 5652

a. Elements

It is unlawful to deposit, permit to pass into, or place where it can pass into waters of the state, or abandon, dispose of, or throw away within 150 feet of the high water mark of the waters of the state, any cans, bottles, garbage, motor vehicle or parts thereof, rubbish, or the viscera or carcass of any dead mammal or the carcass of any dead bird.

b. Rebuttable Presumption

This section creates a rebuttable presumption that the last registered owner of any motor vehicle found in violation of the section is responsible for the abandonment and thereby liable for the cost of removal and disposition of the vehicle.

c. Criminal Penalties

A violation of this section is a misdemeanor, per Fish and Game Code section 12002(a), with a penalty of a \$1,000 fine and six months in jail.

6. Fish and Game Code Section 1602

a. Elements

- Unlawful Diversion

It is unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake or use any material from the stream beds without first notifying the Department of such activity.

- Unlawful Activity

It is unlawful for any person to commence any activity affected by this section until the Department of Fish and Game has found it will not substantially adversely affect fish or wildlife resources or until the Department’s proposals have been incorporated into the project.

- Failure to Abide by Terms of Section 1602 Agreement

It is unlawful for any person to engage in a project or activity affected by this section unless such project or activity is conducted in accordance with the Department of Fish and Game's proposals.

b. Criminal Penalties

Fish and Game Code section 12002 makes a first violation a misdemeanor with a penalty of six months in jail and a \$1,000 fine.

Fish and Game Code section 12007 makes a second or subsequent violation a misdemeanor with a penalty of one year in jail and a fine of \$5,000.

c. Case Law Issues

- Meaning of "Substantial"

In *Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1279, the term "substantial" was defined to include the commonly understood meaning as characterizing something as ample or of considerable amount, quantity, or size. The court held the use of this term was not unconstitutionally vague. As stated in *People v. Weaver* (1983) 147 Cal.App.3d Supp. 23, 36, "substantial" is a relative term, and its meaning must be gauged by the circumstances.

- Definition of "Stream"

The first case to tackle the definition of a stream within the meaning of this section is *Miller & Lux v. Madera Canal & Irrigation Co.* (1909) 155 Cal. 59, 78, overruled in part by *Peabody v. City of Vallejo* (1935) 2 Cal.2d 352:

Whether high or low, the entire volume at any time constitutes the land over which its current flows must be regarded as its channel; so that when swollen by rains and melting snows it extends and flows over the bottom in its course, that is its flood channel, and when by drought it is reduced to its minimum, that is its low water channel.

The court in *Weaver* used the following definition:

A water course having a source and terminus, banks, and channel, through which waters flow, at least periodically ... A stream does not lose its character as a water course even though it may break up and disappear. A continuous flow of water is not necessary to constitute a stream and its stream waters. Indeed a wash ... "is a water course in the legal sense although dry except in the winter and spring and very possibly at intervals even in those seasons."

(*Weaver*, 47 Cal.App.3d Supp. at 30.)

In *Rutherford*, the court gave a definition similar to that in *Weaver*; however, the court seemed to restrict the definition to that area extending between the ordinary high-water mark and low-water mark.

Black's Law Dictionary defines a "water course" as a natural stream fed from permanent or natural sources. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water.

- Legislative Intent

The purpose of Fish and Game Code sections 1601-1603 is set forth in section 1600:

[T]he protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people

In *Weaver*, the court noted that the state acts as trustee of all waters for the benefit of the people of the state. (*Weaver*, 147 Cal.App.3d Supp. at 29.)

M. The California Penal Code

Several sections under Chapter 10 of the Penal Code, "Crimes Against the Public Health and Safety," address environmental violations.

1. Penal Code Section 374

It provides general definitions of "littering" and "waste matter."

2. Penal Code Section 374.2

It provides for prosecution of persons who discharge harmful substances into public sewer facilities. It is unlawful to discharge:

[a]ny substance capable of causing substantial damage or harm to the operation of a public sewer sanitary facility, or to deposit in commercial quantities any other substance, into a manhole, cleanout, or other sanitary sewer facility, not intended for use as a point of deposit for sewage, which is connected to a public sanitary sewer system, without possessing a written authorization.

First-time violations result in a maximum fine of \$25,000 and/or one year imprisonment in the county jail. Second or subsequent violations result in a fine of not less than \$5,000 AND imprisonment in either the county jail or state prison for specified periods.

3. Penal Code Section 374.7

Provides for a misdemeanor fine of up to \$1,000 for a:

[p]erson who litters [o]r dumps any waste matter into any bay, lagoon, channel, river, creek, slough, canal, lake or reservoir or any other stream or body of water, or upon a bank, beach, or shore within 150 feet of the high water mark of any stream or body of water.

Similarly, under Fish and Game Code section 5652, it is unlawful to dispose of cans, bottles, garbage, motor vehicles and parts, or viscera or carcasses of dead mammals or birds within 150 feet of the high-water mark of any body of the waters of the state or where it can pass into the waters of the state.

4. Penal Code Section 374.8--Deposit of Hazardous Substances

The deposit of a hazardous substance onto public or private property or into the waters of the state is punishable by a maximum fine of \$10,000 and/or a defined prison term. Exception: The deposit occurred as a result of an emergency that the person promptly reported to the appropriate regulatory authority. This is a strict-liability offense.

“Hazardous substance” includes any material or waste that would be harmful to human health and safety or to the environment if released, any substance for which the manufacturer is required to prepare an MSDS, and radioactive substances.

5. Penal Code Section 387--The California Corporate Criminal Liability Act of 1989

Where a corporation or a “manager” of a corporation has actual knowledge of a serious concealed danger and fails to inform the Division of Occupational Safety and Health in the Department of Industrial Relations or its employees, the corporation or “manager” is subject to penalties. The corporation is liable for a maximum fine of \$1 million. The individual manager is subject to a fine and/or imprisonment. Exception: Where the corporation or manager in good-faith belief of compliance with this section notifies a government agency other than the Division of Occupational Safety and Health, no penalties apply.

N. Pesticides

Pesticides are regulated through the California Department of Pesticide Regulation (DPR). The laws are found in the Food and Agricultural Code. The Department supervises county agriculture departments. Pesticides and other chemicals used in agriculture are regulated as either “economic poisons” or “restricted materials.”

1. Economic Poison

An “economic poison” is any substance intended to prevent, repel, destroy, or mitigate the damage from insects, rodents, predatory animals, bacteria, fungi, or weeds capable of infesting or harming vegetation, humans, or animals. (Food & Agric. Code § 12753.) The cornerstone of economic-poison regulation is the requirement that every manufacturer, importer, or dealer, with very limited exceptions, register the substance with the DPR and file a statement about the kinds of economic poisons to be manufactured or sold. (Food & Agric. Code §§ 12811; 12821.) Each registrant must also include, with each separate economic-poison container, approved labeling that includes printed instructions for its use. (Food & Agric. Code §§ 12852; 12973.)

2. Restricted Material

A substance is a “restricted material” if it is listed as such by the DPR after investigation and public hearing. A restricted material is listed after consideration of hazards to applicators and farmworkers, hazards to the animals and the environment from direct application or drift into other areas, and hazards to public health. (Food & Agric. Code § 14004.5.) Use is limited to situations where it is “reasonably certain” that no injury will result or where no nonrestricted material is “equally effective and practical.” (Food & Agric. Code § 14006.) A user of a restricted material is required to have a permit from the local county agricultural commissioner. (Food & Agric. Code § 14006.5.)

3. Required Licenses

Pesticide Dealers (Food & Agric. Code §§ 11407 and 12001 et seq.)

Pest Control Operators (those who suggest use of pesticides) (Food & Agric. Code § 11701.)

Pest Control Advisors (those who suggest use of pesticides via a written recommendation) (Food & Agric. Code §§ 12001 et seq.)

4. Local Grower Permits

Farmers (usually called growers) must obtain a permit for listed restricted materials. Possessing or using such a material without a permit or in violation of permit conditions is prohibited. (Food & Agric. Code § 14006.5.)

5. Pesticide-Residue Restrictions

For each crop/commodity, there is a pesticide-residue limit set by federal regulation. (Cal. Code Regs. tit. 3, §§ 6490; 6492.)

6. Worker-Safety Regulations

These specify safety equipment, training, medical monitoring, and reentry intervals following pesticide application. (Cal. Code Regs. tit. 3, §§ 6700-6784.)

7. Penalties

Up to \$50,000 fine and state prison or county jail for intentional or negligent violations that could have created a hazard to human health or the environment. (Food & Agric. Code § 12996(b).) Violations of use restrictions are wobblers. (Food & Agric. Code § 12996.) There is a maximum \$5,000 fine and six-month sentence in county jail for the first violation and a \$10,000 fine and a six-month sentence for subsequent violations. (Food & Agric. Code § 12995(a).)

The attorney general has civil penalty authority. The district attorney must rely on Business and Professions Code section 17200 or request delegation or coprosecution from the attorney general's office.

V. Local Ordinances

A. Uniform Fire Code

Every fire jurisdiction (fire district, city, or county) has the authority to adopt its own fire code. (Health & Safety Code § 13869.) Most adopt all or part of the Uniform Fire Code (UFC), which was initially developed by the Western Fire Chiefs Association and is updated every three years. The UFC must be adopted by local ordinance or fire district, and the adopting ordinance will provide penalties (usually misdemeanors). The UFC has many restrictions on the manner in which hazardous materials are stored (Article 80) and requires permits from fire chiefs for many activities (such as storing hazardous materials) (Article 4). Warning--some of the violation sections are very poorly worded.

B. Uniform Building Code

The Uniform Building Code (UBC) has been adopted by local jurisdictions in a manner similar to the UFC. (Health & Safety Code §§ 18901-18949; Cal. Code Regs. tit. 24.) The UBC classifies buildings into different "occupancies" according to their use and has specific building specifications for each type of occupancy (e.g., firewalls, sprinklers, exits, etc.). For example, semiconductor fabrication is an H-6 occupancy that has many requirements not met by standard office buildings (which are a B-2 occupancy). All building activities, construction, and remodeling require building permits. If structural modifications or new equipment are required, the local building department may have to approve them.

C. Miscellaneous Uniform Codes

City and county building departments typically enforce other uniform codes, e.g., Uniform Electrical Code, Plumbing Code, and Mechanical Code. Illegal business activities often violate many of the provisions of these codes. Violations are usually misdemeanors.

D. Business Licenses

Most cities and counties require business licenses. Violations are designated by the adopting ordinance and are usually infractions or misdemeanors.

E. Planning/Zoning Restrictions

Zoning ordinances regulate types of business activities within a city or county. For example, an area may be zoned “light industrial” or “residential,” and individual parcels within that area must conform to the particular zone. Even if a business corrects all of its hazardous-waste violations, it would be prudent to check with the local Planning Department (other possible names include “Community Development Department”) to determine whether its presence is in conformity with the zoning ordinance. But even if not in conformity, the business may not be in violation if it has been granted a variance or a nonconforming use exception. Violations are usually infractions or misdemeanors.

NOTE: CEQA mitigation measures may be incorporated into the site plan or improvement plan, so enforcement of these conditions may be available through planning laws.

ABOUT THE AUTHOR

Lisa Brown is the Assistant General Counsel for Enforcement for the California Environmental Protection Agency (Cal/EPA). She has held that position since 2000. . Prior to her employment with Cal/EPA, Ms. Brown was Staff Counsel for the California Air Resources Board. She also worked as Staff Counsel for the California Department of Food and Agriculture.

Ms. Brown was a Deputy District Attorney in the San Joaquin County District Attorney’s Office for more than 10 years. In 1986, she created that office’s Environmental Prosecutions Unit. She was also a cofounder and Chair of the San Joaquin County Environmental Crimes Strike Force. In addition, Ms. Brown participated in the development of the first statewide training of environmental prosecutors.

Ms. Brown graduated cum laude with a Bachelor of Arts degree in History from the University of Santa Clara. She received a Juris Doctor degree from McGeorge School of Law.

Ms. Brown is a frequent instructor for CDAA, covering topics including environmental law, civil prosecution, search and seizure, and nuisance abatement. In addition to contributing to this manual, Ms. Brown has previously authored materials published by CDAA. She wrote a number of articles that appeared in *Prosecutor’s Brief*.