CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD ENFORCEMENT ADVISORY

March 12, 1997

ENFORCEMENT ADVISORY

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I. INTRODUCTION

GOALS AND SUMMARY

The goal of this Local Enforcement Agency (LEA) Advisory (advisory) is to assist and guide LEAs in taking any necessary enforcement actions to achieve facility compliance with solid waste laws and regulations and protect public health and safety and the environment. This advisory discusses LEA enforcement responsibilities and describes various enforcement options available to LEAs to remedy violations of solid waste laws and regulations, including both State Minimum Standards (SMS) and Solid Waste Facilities Permit (SWFP) violations. Detailed guidance on developing and implementing each enforcement option is included as well as clarification of statutes and regulations where needed.

Changes and additions to the Public Resources Code (PRC) brought about by the passage of AB 59, effective October 16, 1995, have been incorporated into this advisory, including a separate section on procedures and guidance for pursuing Administrative Civil Penalties (ACP). It should be noted that changes in the PRC brought about by AB 59 necessitate changes and additions to Title 14, California Code of Regulations (14 CCR) regarding enforcement actions for solid waste facilities. Development of regulations to include those changes and additions will begin early in 1997. Once the regulations become effective, this advisory will be updated as necessary and reissued to all LEAs.

This advisory is an integral part of the Board's overall Enforcement Policy Framework as approved by the Board in October of 1996 and is intended to partially fulfill the Board's responsibility to provide assistance and guidance to LEAs in matters of enforcement. As a follow-up to this advisory, Board staff is planning joint Board and LEA training and workshop sessions designed to improve the effectiveness and efficiency of enforcement implementation and promote information sharing between LEAs regarding which enforcement strategies work best in particular situations.

LEA ENFORCEMENT RESPONSIBILITIES

Each **Local Enforcement Agency** (LEA), or the Board when acting as the enforcement agency, is responsible for enforcement within its jurisdiction regarding solid waste handling and disposal, pursuant to Division 30, Public Resources Code (PRC), § 43209, and Title 14 , California Code of Regulations (CCR) § 18081(c) and § 18084 including:

- Applicable Provisions of Division 30, Part 4 of the PRC
- Regulations adopted under Part 4, including 14 CCR sections 17200 - 17870 State Minimum Standards for Solid Waste Handling and Disposal (SMS), 14 CCR sections 18080 - 18224, and 18250 - 18277 Administration of Solid Waste Facilities Permits and Closure/Post Closure Maintenance Plans, and any local standards
- Solid Waste Facilities Permit (SWFP) Terms and Conditions

Whenever the LEA identifies SWFP or SMS violations at a facility they are required to take appropriate enforcement action. 14 CCR § 18081(c) requires that all facilities and disposal sites within an LEA's jurisdiction shall be in compliance with SMS, the terms and conditions of the SWFP, be permitted or exempted, or be under appropriate enforcement action(s) pursuant to 14 CCR § 18084 to remedy the violations. Furthermore, it is the policy of the Board to ensure that LEAs enforce SMS and SWFP terms and conditions consistently and equitably among public and private facilities. A variety of enforcement options are available to LEAs to bring facilities into compliance and are described in PRC sections 43000 - 45024 and 14 CCR sections 18301 - 18313.

LEA RECORDKEEPING

Pursuant to PRC § 43209(f) and 14 CCR 18020, LEAs are responsible for maintaining records for each disposal site and facility within their jurisdiction. Specifically, the LEA must maintain a separate and current chronological log of legal and enforcement actions. This file shall include, at a minimum, the following information: facility or site name, address, SWIS number, the action type, the date the action was taken, and the outcome of the action(s).

BOARD RESPONSIBILITIES

As required by PRC §§ 43101(b)(8), 43217, 43219(b), 43220, 43302 and 14 CCR § 18350(c), the **Integrated Waste Management Board's** (Board) primary functions regarding an LEA's inspection and enforcement program are to:

- Provide technical assistance, training, support and guidance to LEAs.
- Ensure an LEA's performance in keeping the facilities in their jurisdiction in compliance with applicable laws and regulations, by conducting periodic inspections at those facilities and, if necessary, encouraging LEAs to take enforcement actions.

Secondarily, the Board is to function in place of an enforcement agency when it is determined that the LEA has failed to take appropriate enforcement actions, and they are unable or unwilling to do so. Various statutes and regulations describe the Board's authority, responsibilities and options when an LEA fails to take appropriate enforcement action to remedy documented violations. These include PRC §§ 43214, 43215, 43216, 43216.5, 43219(c&d), 43300, 45012, and 14 CCR 18350

APPROPRIATE ENFORCEMENT ACTIONS

This advisory is intended to provide LEAs with a comprehensive reference document for use when taking enforcement actions at solid waste facilities. It is not intended to prescribe or define what the appropriate enforcement action should be for any particular situation. Each LEA has its own Enforcement Program Plan (EPP) which they follow when taking action on violations. LEAs have

flexibility and discretion in determining appropriate enforcement actions when dealing with individual jurisdictions, facilities and issues. Effective and efficient enforcement resulting in timely operator compliance should be the goal of any LEA actions with an emphasis on results rather than any particular process. There are however, specific cases where statutes or regulations require specific enforcement actions to be taken by an LEA for particular situations. Those are discussed below. In other cases where there is no mandated enforcement response, the LEAs may determine which actions are appropriate for a particular situation, consistent with their individual Enforcement Program Plans and in conformance with procedural and content requirements found in statutes and regulations.

In reviewing LEA enforcement performance, the Board will focus on chronic violations and violations which threaten public health and safety or the environment. A **chronic violation** is any violation for which a facility is listed in the Inventory or a Significant Change permit violation (PRC § 44004) which has remained uncorrected for 5 consecutive months. A chronic violation or a violation which threatens public health and safety or the environment will prompt Board staff to initially look at the operator's progress toward achieving compliance, rather than any particular action the LEA may or may not be taking. However, if progress toward compliance is not forthcoming, the Board will consult with the LEA to determine if they are increasing their enforcement response accordingly by taking additional action(s). If not, the Board will make every effort to assist and encourage the LEA to take appropriate enforcement action to remedy the violation. As a last resort, should the LEA be unwilling or unable to take appropriate enforcement action, the Board may take its own enforcement actions.

MANDATED ENFORCEMENT ACTIONS

LEAs must take the following enforcement actions for specific violations or situations:

If the LEA determines that a solid waste facility is operating without a permit, PRC § 44002 requires the LEA, as of October 16, 1996, to issue a cease and desist order pursuant to PRC § 45005 to immediately cease operations. For clarification on the applicability of this requirement, please refer to the August 20, 1996, letter from the Board to all LEAs on this subject, included as Attachment 1.

If a facility is included on the Inventory of Solid Waste Facilities Which Violate State Minimum Standards, the LEA is required to develop a compliance schedule which ensures that diligent progress is made by the operator to bring the facility into compliance. (PRC § 44106). Board staff is available to review and comment on draft compliance schedules upon LEA request. LEAs can contact their Board enforcement liaison for this type of assistance. The compliance schedule may be a stand alone document or it may be incorporated into a Notice and Order or a Stipulated Order of Compliance, both of which are discussed below under Enforcement Options.

II. ENFORCEMENT OPTIONS

Enforcement options which an LEA can use to bring a facility into compliance are described in this section. Some of the options such as a Notice of Violation or a Compliance Meeting are not found in statute or regulations. They are intended to serve as recommended examples of less formal intermediate steps between the inspection/inspection report and more formal and severe actions such as the issuance of a Notice and Order.

INSPECTIONS AND NOTIFICATION OF VIOLATIONS

This section discusses the most elementary level of enforcement which includes those actions that are meant to clearly document and notify a facility owner/operator of violations of laws or regulations and of the LEA's expectations regarding their correction. These actions may also notify the operator of the possible consequences of continued noncompliance. These actions include:

- Inspection/Inspection Report
- Notice of Violation
- Issuance of 90 day Notice of Intent
- Compliance Meeting/Compliance Agreement/Compliance Schedule

Note: The 90 day Notice of Intent is a mandatory action taken by Board staff pursuant to PRC § 44104, based on facility compliance information as documented in the LEA's inspection reports. (See details below)

■ Inspection/Inspection Report

LEAs are required pursuant to PRC § 43218 and 14 CCR § 18083 to inspect all solid waste facilities and sites at specified frequencies. Enforcement action typically starts with an inspection of the solid waste facility or site using applicable statutes and regulations. At the time of an inspection, the LEA should identify and document all violation(s) and areas of concern. During an exit interview, the inspector should discuss any violation(s) and areas of concern with the operator. After an inspection, an inspection report is issued to the owner and/or operator or mailed using the appropriate Solid Waste Information System (SWIS) inspection forms. The form identifies actual violations as well as areas of concern which have the potential of becoming a violation. Comments regarding the specific nature and location of the violations are also included as applicable. The report may generally direct the operator to take action to correct the violations or request a workplan for correction. In addition, all previously documented violations which have been corrected since the last inspection should be noted as such. (See LEA Advisory # 15 for further guidance on filling out SWIS forms and LEA Advisories # 20 and 23 for further guidance on conducting and documenting a landfill inspection or a transfer/processing station inspection respectively.)

■ **Notice of Violation**

A Notice of Violation (NOV) is a separate notice to the operator, usually as a follow up to an inspection report, which serves to focus the operator's attention on a particular violation and the need to correct it. It may be used for chronic violations where the operator has failed to respond to the LEA's inspection reports or for more serious violations. In the latter case, the LEA may wish to immediately impress upon the operator the seriousness of the violation and the need for quick corrective action.

The NOV should include comments regarding the specific nature and location of the violations, and, as applicable, may direct the operator to take corrective actions by a specified date or request a workplan for correction with a specified date for submittal by the operator for EA review and approval. The workplan should consist of a description of actions for correcting the violations and specific dates by which the actions will be completed. The NOV may also be used to request the operator to contact the LEA to set up a compliance meeting. Additionally, the consequences for continued non-compliance, such as the issuance of a Notice and Order by the LEA with potential assessment of ACPs, or a 90 day Notice of Intent to include the facility on the Inventory by the Board, may be spelled out in the NOV. A NOV is not specifically referenced in statute or regulation but can be considered a part of the process which provides the operator a reasonable opportunity to bring the facility into compliance (due process) prior to assessing Administrative Civil Penalties pursuant to PRC §§ 45010 and 45011. In this case, the LEA should include in the NOV, a notification to the operator of their right to a compliance meeting. An example of a NOV is included in attachment 2.

Note: Examples of enforcement documents in the appendices are offered in response to various LEA requests and are not intended to be mandated formats for all LEAs to conform with, but are merely one possible format.

■ **Issuance of a 90-Day Notice of Intent (NOI)**

Board and LEA staff implement the Inventory of Solid Waste Facilities Which Violate State Minimum Standards (Inventory) as required by PRC § 44104. Facilities are routinely surveyed every two months by Board staff using LEA inspection reports. Any facility which has a repeat violation for the same standard during the two month survey period is issued a NOI. For example, any facility violating one or more state minimum standards during September, which was not corrected in October, would be issued an NOI. The process would then be repeated for the next two months, November and December, then January and February etc. The NOI informs the operator of the continuing violations and gives them 90 days to correct them. Failure to correct the violations as documented by the LEA results in inclusion of the facility on the Inventory.

Once a facility is included on the Inventory, PRC § 44106 requires the LEA to develop a compliance schedule which will ensure that diligent progress will be made to bring the facility into compliance. The compliance schedule may be a stand alone document or in the form of a N&O pursuant to PRC § 45011. Should the owner/operator fail to comply with the compliance schedule, further enforcement action must be taken by the LEA as appropriate. Facilities already operating under an enforcement order prior to being included in the Inventory can continue to work under the existing order unless it needs to be revised.

- **Compliance Meeting/Agreement/Schedule**

There is a point in the enforcement process when compliance meetings may provide a valuable tool to bring about compliance. Relatively serious or repeat violations that have not been corrected as a result of previous inspection reports or a NOV could trigger a compliance meeting. Additionally, prior to the issuance of an order which imposes an administrative civil penalty, an operator may request a compliance meeting pursuant to PRC § 45011(b)(2).

If a previous enforcement action has been ineffective in gaining compliance or if a violation(s) is chronic in nature, or is seen as a potential threat to public health and safety or the environment, the LEA may schedule a formal meeting with the operator and/or owner, and other appropriate regulatory agencies. The purpose of the compliance meeting is to discuss the specific violation(s) and determine how compliance may be obtained without having to initiate further enforcement actions. The LEA should attempt to identify what kinds of obstacles, if any, are preventing the operator from correcting the violations, and work with the operator to find solutions to expeditiously correct them. All parties should agree on the corrective measure(s) and timetable for correction. If no agreement can be reached, a N&O may need to be issued. During the meeting, it should be explained that failure to make acceptable progress toward the correction of violations will result in enforcement action(s) such
as a N&O. Compliance meetings may be held with or without the benefit of prior enforcement action(s), as appropriate.

The LEA should draft a summary of the compliance meeting including the date, time, location, parties present, reason for the meeting, the violations or problems discussed, and the results of the meeting, including any agreements or resolutions regarding further actions by either party. It is requested that the LEA mail the summary to the participants and Board enforcement staff for inclusion in the facility file. By including it in the Board's facility file, a complete chronicle of LEA enforcement actions is made available to the public in the event of a records request regarding the subject facility. It also enables Board staff to document progress toward compliance in the SWIS database.

A compliance agreement may be the result of a compliance meeting. This is a written agreement between the owner/operator and the LEA including a workplan which specifies a timetable and remedial actions that are acceptable to both. The plan should outline a program for assuring continued compliance, including a description of the actions and resources, equipment, personnel, and quality control measures to be used to achieve compliance. When a compliance agreement is used, it is usually not acceptable for an operator to simply state that he or she will comply with a particular standard. The operator should be held to specific dates to report progress on the completion of each task and by which all violations will be corrected. (See attachment 3 for examples of a compliance agreement, and a compliance schedule).

A compliance schedule could be proposed by the operator and approved by the LEA or dictated by the regulatory agency. Operator agreement on the conditions and timeframes in the compliance schedule may not necessarily be sought if severe violations exist. Compliance schedules may result from compliance meetings/compliance agreements, from a NOV, or a Notice and Order (PRC § 45011(b) and 14 CCR § 18304). Also, when a site is included in the Inventory, the LEA must develop a compliance schedule to ensure that diligent progress is made to bring the facility into compliance (PRC § 44106).

NOTICE AND ORDERS

LEAs have the authority and responsibility to pursue more serious enforcement actions and legal measures to correct any SMS or SWFP violations, as necessary. This section describes the Notice and Order process, including specific guidance on development, issuance and follow up enforcement should the operator fail to comply.

In order to reduce overlap, LEA staff should be familiar with the regulations of other state and local agencies within its jurisdiction which have the authority to regulate the design, operation or closure of a solid waste facility. The LEA should coordinate action relating to solid waste management with the appropriate local, state, and federal agencies based upon jurisdiction and should request enforcement response by the appropriate agency when indicated (PRC § 43209(b)). This includes consultation with the local health agency concerning enforcement actions which involve health standards included in PRC § 43209(g). In addition, LEAs should coordinate with local Air Districts regarding responses to odor complaints from composting facilities pursuant to PRC § 43209.1 (see LEA advisories # 32 and 33 for Board guidance).

In rare cases when an enforcement response is anticipated by both the LEA and an additional regulatory agency (local, state, or federal), the action should be coordinated to avoid duplication. Examples of agencies which may regulate certain aspects of a solid waste facility are: State Department of Health Services, Department of Toxic Substance Control, State Water Resources Control Board, Regional Water Quality Control Boards, and the Local Air Pollution Control or Air Quality Management Districts.

■ Basic Information

The following information is required to be included in a N&O pursuant to 14 CCR 18304(b):

- The identity of the enforcement agency
- The name or names of each person to whom it is directed
- A description of the site of the violation
- A description of the violation
- The statutes, regulations or permit terms and conditions being violated
- The date of issuance and signature of an authorized employee of the EA

14 CCR 18304(c) requires the EA to attach to the N&O a declaration or affidavit of an employee of the EA stating that the allegations contained in the N&O are based upon either personal knowledge or information and belief. If the basis of the allegations is personal knowledge, the EA should state how that knowledge was obtained, including the date of any inspection. If the basis of the allegations is information and belief, the EA should state generally the source of the information. However, the EA is not required to divulge the identity of an informant.

■ Types of Orders

The LEA may issue a **Corrective Action Order** requiring the owner or operator of a facility to take corrective action to abate a nuisance, or to protect human health and safety or the environment. (PRC § 45000.) The LEA also has the authority to issue a **Cease and Desist Order** to the owner or operator to address SWFP or SMS violations, facilities operating without a SWFP, or situations which threaten to cause a condition of hazard pollution or nuisance. (PRC § 45005.)

A **Compliance Schedule Order** may also be issued pursuant to PRC § 45011(a)(1), to bring a facility into compliance with the PRC, 14 CCR regulations, any corrective action order or cease and desist order, or if the facility poses a potential or actual threat to public health and safety or the environment. The order establishes a compliance schedule according to which the facility will be brought into compliance with the documented violations. The order may also provide for Administrative Civil Penalties (ACP) to be imposed if compliance is not achieved within the established time schedule.

Note: Prior to issuing a N&O which proposes to levy ACPs for failure to comply by compliance deadlines, the LEA must do both of the following:

1) Notify the operator of the solid waste facility that the facility is in violation, specifying the PRC or CCR code section or the permit term or condition being violated. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator

notification. In the SWIS form or the NOV, the LEA should inform the operator of the right to request a compliance meeting. Also, the LEA may wish to include a statement that failure to correct the violations may result in the pursuit of ACPs.

2) Upon the request of the operator of the solid waste facility, hold a compliance meeting with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date. (Refer to the section on Assessing Administrative Civil Penalties for complete details on the ACP process).

The EA may choose to combine in one N&O any of the three types of orders discussed above. For example, an EA may wish for the operator to both cease and desist specified actions *and* take corrective action to clean up and abate specified conditions. An EA may also want to order the operator to take other actions as necessary to correct a violation by a specified date pursuant to a compliance schedule. Additionally, any of the various types of Notices discussed below can be incorporated into a N&O in different combinations in order to customize an EA's enforcement response.

When the owner/operator violates SMS which do not also constitute a hazard, pollution, or nuisance then a corrective action order cannot be issued. In such a case, the N&O may include an order to cease and desist or a time schedule by which the facility will be brought into compliance, and any applicable notices. (PRC §§ 45005, 45011 and 14 CCR § 18304.) The following are notices which may be included in a N&O:

■ Types of Notices

- Notice informing the owner/operator that the LEA may contract for corrective action if the owner or operator fails to comply by the deadline in a final order. (PRC § 45000.)

- Notice for Administrative Civil Penalties:

  - Option 1: Notice informing the owner/operator that the enforcement agency **may take action to impose** administrative civil penalties (ACPs) upon failure to comply with applicable compliance deadlines in a final order.

  - Option 2: Notice informing the owner/operator that the enforcement agency **is conditionally imposing** administrative civil penalties in a specified amount, and will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order. (PRC §§ 45011.) Under this option, the LEA would concurrently notify the governing body of its intent to impose ACPs. For more details

on options 1 and 2, please refer to the section on Assessment of Administrative Civil Penalties.

- Notice informing the owner/operator that failure to comply by the deadline in a final order may result in the LEA petitioning the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court. (PRC § 45014(a&b).)

- Notice informing the owner/operator that upon failure to comply with a compliance deadline, the enforcement agency may bring an action in the superior court to impose upon the owner/operator civil penalties. (PRC §§ 45014(c) & 45023.)

- Notice informing the owner/operator that the enforcement agency may take action to suspend or revoke the permit for the facility upon failure to comply with applicable compliance deadlines. (PRC §§ 44305 & 44306.)

The EA may incorporate any of the notices above in any combination into a N&O. It is recommended that the EA include as many notices as are applicable to the situation to give greater flexibility in enforcing the order should the operator fail to comply.

Please note that the LEA can only take corrective action or collect ACPs upon failure of the operator to comply with a final Notice and Order. (See section on Requests for Hearings; Final Orders, on page 12 for the definition of a final order). However, the last three potential actions listed in the Notices above (court action to enjoin violations, court action to assess Civil Penalties, or action to suspend or revoke a SWFP) can be initiated in one of two ways:

- upon failure of the operator to comply with a final order, or;
- independently of the N&O process

For example, an LEA can file an action in superior court to enjoin a violation or assess civil penalties at any time, regardless of whether a N&O has been issued, or, if one has been issued, whether or not it has become final. Although the statutes allow for the LEA to take these types of actions independent of the N&O process, it is recommended that the LEA only pursue this option in cases where the operator intentionally or negligently violates SWFP or SMS requirements which result in a threat to public health and safety or the environment.

■ Stipulated Notice and Orders

Typically, a Notice and Order is issued unilaterally by the LEA without the consent of the operator. A Stipulated Order of Compliance (Stip) has been used in the past by LEAs as an

alternative to the Notice and Order. A Stip is signed by the operator who agrees with its terms and conditions. Both types of enforcement actions describe the existing violation(s) and direct the operator to take specific corrective action(s) by a specific date(s), and include Notices that non-compliance may result in further enforcement action. The main difference between a Stip, and the compliance agreement discussed on page 6, is that the Stip contains notices or remedies regarding further enforcement action for non-compliance, whereas the compliance agreement does not. The Stip is generally for more serious violative conditions, or for when the LEA feels that a threat of more serious enforcement action for failure to comply is needed.

A Stip is not addressed in current statute or regulation. It is recommended that LEAs consult with their legal counsel to discuss whether a N&O or a Stip is more appropriate for any particular case. However, it may prove to be a valuable tool because an operator would be unlikely to request a hearing pursuant to PRC § 44307 regarding an enforcement action that it agreed to in the Stip.

Note: Templates of a Notice and Order, Stipulated Order of Compliance, and a Declaration were previously sent to all LEAs. Please contact your Board enforcement liaison should additional copies be needed.

■ N&O Development

Time frames for drafting and issuing a N&O will vary, depending on the type and severity of the violation, the existence of a threat or potential threat to public health and safety or the environment, the LEA's local policies and procedures for legal review and approval, and other factors. However, if a site is threatening public health or safety, and the LEA has decided to issue a N&O, a maximum of 24 hours is recommended for drafting and issuing the N&O.

Prior to issuing N&Os, the LEA should consult with the other appropriate environmental regulatory agencies. In addition, the EA should consult with the local health agency concerning enforcement actions which involve health standards. (PRC § 43209.) Written notification to other agencies is required 10 days prior to the issuance of a N&O which involves violations that may also be under the jurisdiction of another state regulatory agency. (Consult PRC § 45019 for the specific agencies and the details for noticing). Although not required by statute or regulation, it is requested that the EA provide their Board enforcement contact with a draft copy of enforcement orders for a 5 working day review and comment period. This time frame can be much shorter, particularly in an emergency situation, by working with the appropriate enforcement branch liaison at the Board. In addition, the LEA is required to transmit enforcement orders to the Board within 5 business days of issuance. (14 CCR § 18304.)

■ Requests for Hearings; Final Orders

When an operator receives a N&O, a request may be made to the LEA to hold a hearing pursuant to PRC §§ 44307 and 44310. The request must be made within 15 days of receipt of the N&O which should be sent return receipt requested. In order to satisfy due process, it is recommended that the LEA place language in the cover letter of the N&O regarding the operator's right to a hearing, including the time frame for requesting a hearing.

Should a hearing be held, the operator may subsequently appeal the decision of the hearing panel to the Board or to the Superior Court. During the local hearing panel and appeal processes, the effect of the N&O is stayed, unless there is a substantial or imminent threat to public health and safety or the environment. (PRC § 45017). If the LEA determines that there is a substantial or imminent threat to public health and safety or the environment, it should be so stated in the N&O. If the operator requests a hearing in this case, the LEA should still schedule one. However, during the hearing and appeal process, the LEA should proceed as if the N&O was final, taking further enforcement actions as stated in the N&O if the operator fails to comply by the deadlines. Once the hearing panel and appeal process is completed and the order becomes final, the LEA can make any necessary adjustments in their enforcement actions, depending on the hearing panel's or Board's decision.

If the operator requests a hearing when there is no threat, and the effect of the N&O is stayed, an order may not become final for 90-120 days, when the hearing panel issues its decision. If the operator appeals the hearing panel's decision to the Board, another 70-120 days could go by before the Board issues its decision and the order becomes final. PRC § 44305 also provides for an emergency appeal hearing, where an LEA has suspended a permit. An LEA Advisory providing detailed guidance on hearing panel and appeal procedures is currently planned by Board staff.

<u>An order becomes final when either;</u>

1) A N&O has been requested by the operator to be reviewed by the local hearing panel, and the hearing process has been completed pursuant to PRC §§ 44307 & 44310, and any subsequent appeals to the Board or Superior Court have been resolved pursuant to PRC § 45030 - 45042, or;

2) A N&O was not requested by the operator to be reviewed by the local hearing panel within 15 days of receipt. (PRC 44310).

■ N&O Timelines and Extensions

Notice and Order timelines should allow a reasonable time for correction, with intermediate timeframes established for specific document submittals or other EA requirements, including a date

certain for compliance with all SMS and/or SWFP terms and conditions. The dates are to be determined on a case by case basis, depending on the circumstances at each facility. No protracted compliance schedule should be incorporated into a N&O for any facility that has known environmental or public health and safety problems as a result of the violations. Timelines should generally not be extended when the owner/operator does not comply with the requirements specified in the N&O. Instead, the EA should take the next enforcement action step as stated in the order. However, N&O extensions may be warranted where the operator has made a good faith effort to comply with the N&O but has experienced extreme, unforeseen circumstances, outside their control which has directly resulted in failure to meet a N&O deadline. When extending deadlines, the LEA should document in the amended N&O the operator's good faith efforts, including tasks completed thus far, and the extenuating circumstances. Examples of extenuating circumstances outside of the operator's control might include acts of God such as inclement weather, earthquakes etc, or delays in obtaining discretionary permits or other government agency approvals.

ENFORCEMENT OF NOTICE AND ORDERS

The following actions to enforce a N&O may be taken by the LEA:

- Contract for Corrective Action to cleanup and abate
- Petition the Superior Court for injunctive relief
- Notify the operator and the governing body of the LEA's intent to impose Administrative Civil Penalties
- Petition the Superior Court for Civil Penalties
- Take action to Suspend or Revoke Permit

A determination of non-compliance with a Notice and Order should be made based on an LEA inspection documenting personal observation of failure to correct the conditions which caused the issuance of the N&O. If the owner and/or operator fails to comply by the deadline in a N&O, the LEA may take action as specified in the N&O. (14 CCR § 18305). Enforcement of the N&O will depend upon which notices were included, and which one(s) the LEA chooses to proceed with.

■ Legal Representation

It is recommended that when actions require legal representation, the LEA should have the case file ready for referral to the appropriate counsel within 15 days of failure to comply with any N&O deadline. Additionally, 14 CCR § 18084(c) states:

> "*If in the course of an enforcement action, the LEA deems legal counsel to be necessary to achieve enforcement, compliance, relief, or the assessment of monetary penalties through the courts, the LEA shall utilize legal counsel which will be prepared to initiate legal proceedings within 30 days of notification*" (14 CCR § 18084(c)).

The LEA should establish appropriate time frames with its legal counsel for the review of cases referred for legal action and the filing of further enforcement action. Details of this arrangement should be described in the Enforcement Program Plan. (14 CCR § 18077). The LEA should work with its legal counsel to identify all items to be included in the case file prior to referral. If the LEA is required to appear in court, the LEA staff who will appear should request legal counsel to provide a briefing on courtroom proceedings prior to the legal proceeding. The Board shall be notified within 5 business days of any actions taken by the LEA to enforce a N&O. (14 CCR § 18305).

Corrective Action Order Enforcement

If an operator fails to take corrective action as specified in a final order by the compliance deadline the LEA or the Board may contract for the corrective action to be completed by an outside party. The owner or operator shall reimburse the LEA or the Board for the amount expended, including, but not limited to, a reasonable amount for contract administration, and an amount equal to the interest that would have been earned on the expendable funds. The amount expended shall be recoverable in a civil action by the Attorney General, upon request of the LEA or the Board. (PRC § 45000).

Cease and Desist Order or Compliance Schedule Order Enforcement

Included in the Cease and Desist Order or the Compliance Schedule Order will be one or more of the last four types of notices described on pages 9 and 10 regarding actions that the EA may take if the operator fails to cease and desist illegal, unpermitted or violative activities or clean up violative conditions. On or after the date specified in the N&O, the local enforcement agency may take action. The action will of course depend on the notice(s) included in the N&O which are elaborated on below.

- **Administrative Civil Penalty (ACP) Notice Enforcement**

  Option 1: If the final N&O includes a notice which states "*the enforcement agency may, on or after a specified date, take action to impose upon the operator, administrative civil penalties*", then once the specified date has passed, the LEA may initiate enforcement of the notice by issuing a Notice and Order for Penalty Assessment (NOPA) to the operator with a copy sent to the governing body regarding its intent to impose ACPs.

  Option 2: If the final N&O includes a notice which states *the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, and will be due and payable upon failure to comply with applicable compliance deadlines in a final order*, then once the specified date in a final order has passed, the LEA will notify the operator of the exact amount of the penalties and that they are now due and payable.

Note: Please see the detailed section on ACP assessment for complete information on enforcement of this notice. A sample NOPA is included as Attachment 7 Also, for a summary comparison of Administrative Civil Penalties vs. Civil Penalties, please refer to the Civil Penalty section below.

- **Superior Court Injunction Notice Enforcement**

If the final N&O includes a notice which states that, "*the enforcement agency may, on or after a specified date, petition the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court*", then after the specified date, the LEA may refer the case to its legal counsel and enforce the N&O by appropriate petition or complaint filed in superior court. As an alternative, the LEA may contact the Board's legal counsel and request their assistance or the Attorney General's assistance to pursue the injunctive relief. The Attorney General is required by law in this case to pursue the injunction if so requested by the Board (PRC §§ 43215.1, 45014(a&b), & 14 CCR § 18305.)

- **Civil Penalty (CP) Notice Enforcement**

If the final N&O states that, "*the enforcement agency may, on or after a specified date, bring an action in the superior court to impose upon the owner, operator, or both civil penalties*", then once the specified date has passed, the LEA may refer the case to its legal counsel and enforce the notice by appropriate petition or complaint filed in superior court. Again, as an alternative, the LEA may contact the Board's legal counsel and request their assistance or the Attorney General's assistance to pursue civil penalties.(PRC § 45023, 14 CCR § 18305.)

<u>Comparison of Administrative Civil Penalties vs. Civil Penalties</u>: Administrative Civil Penalties are imposed directly by the LEA, and can only be pursued upon failure of the operator to comply with the deadlines in a final N&O. Penalty amounts are limited to $5,000 per day per violation with a $15,000 limit per facility per calendar year. In contrast, Civil Penalties are imposed by the courts upon petition by the LEA and may be pursued for failure of the operator to comply with the deadlines in a final N&O, or independently of the N&O process. The fines can be up to $10,000 a day per violation with no limit on the total fine amount.

- **Permit Suspension/Revocation Notice Enforcement**

Permit suspension or revocation proceedings can be initiated in one of two ways:

1) As the result of an operator's failure to comply with deadlines in a N&O. The

N&O would serve as the notification required by PRC §§ 44305 or 44306 and 44310.

2) At any time, as long as the LEA notifies the operator pursuant to PRC §§ 44305 or 44306 and 44310 of their intent to suspend or revoke the permit. The notification should be sent to the operator at least 15 days prior to taking any action to suspend or revoke the permit.

In either case, once any necessary hearings and appeals have been conducted, the LEA may take the applicable action. The hearing and appeal process for suspension or revocation is the same as that for the issuance of a N&O. **If the LEA determines that changed conditions at a facility necessitate a permit revision or modification to prevent or mitigate an imminent and substantial threat to the public health and safety or to the environment, the LEA may suspend the permit prior to holding a hearing**. The operator may appeal this action and a hearing must be conducted within three business days of the permit suspension (PRC §§ 44305).

Permit Suspension; Modification or Revision

The LEA may temporarily suspend a SWFP if the LEA determines that changed conditions at the facility necessitate a permit revision or modification to eliminate a significant threat to public health and safety or to the environment. (PRC § 44305(a)). The LEA would then cause the operator to apply for a permit revision or modification, process it in accordance with applicable statutes and regulations and forward the proposed permit to the Board for concurrence. The LEA may lift the suspension prior to the time the permit is modified or revised if the operator completes specified acts which eliminate the significant threat. (PRC § 44305(c)). Otherwise, the suspension is lifted at the time the permit is reissued.

Permit Revocation

The LEA may revoke a SWFP if the LEA determines any of the following:

- The permit was obtained by a material misrepresentation or failure to disclose relevant factual information

- The operator has, during the previous three years, been convicted of, or been issued a final order for, one or more violations of this division, regulations adopted pursuant to this division, or the terms or conditions of the SWFP, and the violation meets both of the following criteria:

  1) The violation demonstrates a chronic recurring pattern of

noncompliance which has posed, or may pose, a significant risk to public health and safety or to the environment.

2) The violations have not been corrected or reasonable progress toward correction has not been achieved.

If a permit has been revoked, it may be reinstated by application for a new permit no less than one year after the effective date of the revocation. (14 CCR § 18212(b).)

Note: The existing section of the CCR which addresses permit modification, suspension or revocation is inconsistent with the new laws in the PRC which address these actions. 14 CCR § 18307 requires the LEA to file an accusation with the hearing panel to initiate these actions. The PRC now requires the LEA to notify the operator of their intent to take action, then the operator must respond with a request for a hearing. If no hearing is requested, the LEA may proceed to take action without one. The CCR will be changed to conform with the existing statutes. In the interim, where a conflict exists between the PRC and the CCR, it is advised that LEAs follow the PRC when proceeding with these types of actions.

III. ASSESSMENT OF ADMINISTRATIVE CIVIL PENALTIES

INTRODUCTION

This section discusses two step by step approaches for the assessment of Administrative Civil Penalties (ACP), consistent with PRC §§ 44307-45042. When preparing a case for the assessment of ACPs, or for pursuit of an injunction or civil penalties through the superior court, or for permit suspension or revocation, LEAs may refer to Attachment 4 which contains detailed guidance on case development.

Previously in this document, under the sections on Notice and Order development and Notice and Order enforcement, we touched on two basic options for initiating the assessment of Administrative Civil Penalties (ACP). The option chosen by the LEA is determined by the type of notice included in the N&O:

- Option 1: Notice informing the owner/operator that the enforcement agency **may take action to impose** administrative civil penalties (ACPs) upon failure to comply with applicable compliance deadlines in a final order.

- Option 2: Notice informing the owner/operator that the enforcement agency **is conditionally imposing** administrative civil penalties in a specified amount, which will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order.

Option 1 is a less severe type of action and allows the operator two separate opportunities to request a hearing, once when the N&O is issued and once when the ACP is actually imposed. However, because it is less threatening, the operator may be less likely to appeal when the N&O is issued. Please refer to Attachment 5 which contains a flow chart of the overall administrative civil penalty process using option 1. Option 1 gives the LEA more flexibility in pursuing alternative enforcement choices should the operator fail to comply with the deadlines in the N&O.

Option 2 is a more severe type of action and may carry more weight in getting a recalcitrant operator to comply because failure to comply will automatically result in a known and calculable penalty being assessed. Additionally, it only gives the operator one opportunity to request a hearing, which is at the time the N&O is issued (see Attachment 6 for a flow chart of ACP process using option 2). It is relatively inflexible in that the LEA is locked into a course of assessing a penalty should the operator fail to comply with deadlines.

Following is a detailed discussion of the steps to take in implementing each option. Regardless of which option is chosen, the LEA may use the Guidance on Calculating Penalties section to establish the penalty amount for each violation.

OPTION 1

Pursuant to PRC § 45011, the following outline contains the basic steps leading up to the imposition of ACPs by the LEA using option 1:

1) Notify the operator of the solid waste facility that the facility is in violation of this division. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator notification.

2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.

3) Issue a N&O or a Stip containing a compliance schedule according to which the facility will be brought into compliance with the documented violations. The N&O will include a notice that failure to comply may result in the imposition of ACPs.
Note: At this point in the process, the operator may request a public hearing pursuant to PRC § 44307.

4) Document on SWIS inspection forms the failure of the operator to correct the violation(s) by the deadlines contained in the N&O.

5) Should the operator fail to comply with a N&O as described above and the LEA decide to proceed with the imposition of ACPs, a Notice and Order for Penalty Assessment (NOPA) or equivalent notification should be sent to the operator and copied to the governing body. The operator or governing body may request a duly noticed public hearing to provide an opportunity for the alleged violation(s) and the amount of any proposed civil penalty to be reviewed by the hearing panel.

Additionally, in developing the NOPA, and prior to imposing a penalty, the LEA must take into consideration the factors listed in Section 45016, including whether or not the operator has a self-auditing program in place. The LEA must also consider alternatives to the imposition of an administrative civil penalty that would bring the solid waste facility into compliance and would achieve the same result without imposing a penalty. Other alternatives that may be considered in lieu of a penalty are community service and/or public service announcements to be paid for by the responsible party.

Components of a Notice and Order for Penalty Assessment

1. When an LEA issues an order imposing penalties, they may use the CIWMB Notice and Order for Penalty Assessment (NOPA) template as a guide (Attachment 7). The cover letter for the NOPA or equivalent document should include information regarding the operator's right to a hearing, and the time frames for requesting a hearing.

2. Each NOPA should be accompanied by a copy of the following documents as applicable:

   a. SWIS Inspection Report that originally documents the violation(s). This document should be labeled as Exhibit 1.

   b. A subsequent SWIS Inspection Report that documents continued violation(s). This document should be labeled as Exhibit 2.

   c. Notice of Violation or other documentation which requests a Corrective Action Plan or other action from the respondent and the operator's response or lack thereof. (This step is optional). This document should be labeled as Exhibit 3.

   d. Notice & Order requesting all violations be remediated by the specified date. This document should be labeled as Exhibit 4. If the operator requested a hearing at the time of issuance of the N&O, the LEA should include a statement regarding the hearing panel decision in the NOPA, and should attach a copy of the hearing panel's decision to Exhibit 4.

e. Re-inspection report identifying the original violations/conditions as uncorrected since the initial inspection. This document should be labeled as Exhibit 5.

These exhibits will serve as documentation to indicate that all statutory requirements were followed prior to imposing an Administrative Civil Penalty.

Additionally, the NOPA should include the amount of the penalty to be imposed per violation per day, the number of days the violation(s) occurred subject to the penalty and the total penalty to be imposed. The start date for penalty accrual is up to the LEA, and could range from the date the original N&O was received by the operator, to the day after the compliance deadline in the N&O. The NOPA should state that the penalty is now due and payable. If the operator or Governing Body requests a hearing, the penalties will be stayed until the hearing is completed, any appeals have been resolved, and the NOPA becomes final. If no hearing is requested within 15 days of receipt of the NOPA, the NOPA becomes final and the penalty must be paid within 30 days pursuant to PRC § 45018.

OPTION 2

Pursuant to PRC § 45011, the following outline contains the administrative civil penalty assessment process using option 2:

1) Notify the operator of the solid waste facility that the facility is in violation of this division. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator notification.

2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.

3) Develop and issue a N&O or a Stip containing a compliance schedule according to which the facility will be brought into compliance with the documented violations. The N&O will include a notice informing the owner/operator that the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, which will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order.

In developing the N&O, and prior to imposing a penalty, the LEA must take into consideration the factors listed in Section 45016 , including whether or not the operator has a self-auditing program in place. The LEA must also consider alternatives to the imposition of an administrative civil penalty that would bring the solid waste facility into compliance and would achieve the same result without imposing a penalty.

The N&O should specify a start date for penalty accrual. This will generally be the date they receive the N&O, but is up to the discretion of the LEA. The N&O should also include for each violation, a dollar amount per day which will accrue for that particular violation as well as a compliance deadline. Please refer to the guidance on calculating the penalty below in determining the dollar amount per day for each violation.

4) The Governing Body in the city that the facility is located, or county if unincorporated, should be notified of the LEAs intent to impose ACPs at the time the N&O is issued.

5) Document on SWIS inspection forms the failure of the operator to correct the violation(s) by the compliance deadlines contained in the N&O.

6) Determine the total amount of penalty. For each uncorrected violation, multiply the dollar amount per day figure listed in the N&O by the number of days since penalty accrual began. Add the totals for each violation to get the grand total.

7) Send a notice to the operator informing them of the amount of the penalty. If the N&O is final, the notice should state that the penalty is now due and payable. If the order is not yet final, the notice should state that the penalty will be due and payable within 30 days of the order becoming final.

GUIDANCE ON CALCULATING PENALTIES

When assessing penalties, the LEA may wish to employ the Administrative Civil Penalty matrix. In order to use the matrix, violations should be classified in the following categories: minor, moderate and major.

Definitions of Violations

Minor violations for the purposes of this guidance are violations that do not pose any threat to public health, safety or the environment. This category includes violations which do not pertain to the actual design or operation of a solid waste facility or are procedural in nature.
Moderate violations are violations that pose a hazard or present the reasonable possibility of creating a hazard to public health, safety or the environment

Major violations are violations that are hazards to public health, safety or the environment as established by the LEA through inspection or direct observation.

The Administrative Civil Penalty Matrix

To better assist enforcement agencies in assessing amounts for a civil penalty, the

Administrative Civil Penalty matrix was created. The matrix contains two scales; a top and a side scale.

The top scale refers to the extent of "deviation" from a statutory or regulatory requirement. Deviation can be defined as the degree to which the requirement has not been complied with. For example, a violator could be in violation with an entire requirement or only a portion of that requirement. In addition, the violation may be either acute or chronic and the violator may be willing or unwilling to comply. In other words, there will always be a range of potential non-compliance with the subject requirement. The side scale of the matrix refers to the category of violations as defined above and as assessed by the enforcing agency. Under the matrix, the deviation range varies from a Minor/Minor to a Major/Major with penalties ranging from a minimum of $50 to a maximum of $5000 per violation per day. The three categories allow for a deviation from compliance, which in turn allow the enforcement agency greater flexibility in calculating an appropriate penalty.

CIVIL PENALTY TABLE - BASED ON USEPA RCRA GUIDELINES

DEVIATIONS

VIOLATIONS

	Minor	Moderate	Major
Minor	$50-250	$250-500	$500-1000
Moderate	$250-500	$500-1000	$1000-3000
Major	$500-1000	$1000-3000	$3000-5000

As outlined in section 45011 (a)(1) an enforcement agency may issue an order imposing a civil penalty of no more than $5000.00 per day per violation with a maximum of $15,000.00 per calendar year.

LEA Discretion

The decision to impose an administrative civil penalty, is solely left up to the EA. The

decision of how to define the violation, i.e. minor, moderate, major is more a matter of judgment since the facts of each situation must be applied logically to the three definitions.

Choosing the Right Category

The reviewing authority must, in each individual case, apply the facts of that case to the descriptions outlined in the penalty categories.

A. In order for the violation to placed in the "major" category, the violation must be the cause of the actual hazard, not just somehow be associated with the hazard.

B. The purpose of disposal site operation laws and regulations is to protect people and the environment from harm. Therefore, any violation of these laws and regulations creates at least the reasonable possibility of creating a health effect and should be placed in the moderate category.

C. Violations of administrative "procedural" requirements, (failure to keep a log of special occurrences, weight and volume records, etc.) are usually considered minor violations. There may be circumstance where an argument could be made that a procedural violation should be placed in the moderate category.

D. Inspections/investigations resulting from a complaint, illness or environmental catastrophe most often include "major" violations but also frequently reveal many procedural violations. These violations may or may not be associated in some way with the "major" violations. Reviewing authorities must guard against the tendency to classify all the violations as the same category.

E. Most of the statutory and regulatory requirements are designed to directly protect people and the environment. Procedural requirements are designed to be indirectly protective. Therefore, in almost all cases a violation of a substantive (i.e., non-procedural) requirement will be at least a moderate violation. Deciding whether that violation is "major" generally hinges only on identifying whether or not the conditions produced by a violation represent an actual hazard.

F. To classify all violations as minor unless there was actual injury or environmental damage is not appropriate.

Economic Benefit

In addition to the Matrix, the reviewing authority(ies) may want to also employ a calculation of the economic benefit of non-compliance. Economic benefit is defined as the benefit gained when a person or facility who violates the California Integrated Waste Management Act avoids or delays costs associated with facility operations and functions necessary to achieve regulatory compliance.

It should be understood that violators should not benefit economically from non-compliance or gaining a competitive advantage. Therefore, a penalty calculated under this component, must deprive violators of economic benefit gained by avoiding or delaying compliance with the law.

In many circumstances, the economic benefit of noncompliance may be insignificant, such as a procedural violation (e.g. paper work violation). In these instances, pursuit of penalties, may prove to be an inefficient use of staff resources. Professional judgment should be used to determine if any economic benefit should be imposed and if a penalty is the correct enforcement tool.

A. Delayed Costs Benefit:

These are expenditures that have been deferred by failing to comply with facility requirements. The violator will eventually have to spend the money in order to achieve compliance but has the benefit of having the money prior to that time. For example, by delaying a $50,000 expenditure for one year, at an investment rate of 5%, the violator has realized a $2500.00 economic benefit. Examples of violations that result in savings of delayed costs are:

- Failure to remediate existing gas control violation as required;
- Failure to install an adequate gas monitoring system,
- Failure to perform adequate grading operations.

B. Avoided Costs Benefit:

Avoided costs are expenditures that the violator avoids by failing to comply with facility requirements. For example, one type of avoided cost would be when a facility fails to pay necessary operating and maintenance costs, which may also include periodic costs (such as leasing monitoring equipment).

Examples of violations that result in savings from avoided costs are:

- Failure to perform routine gas monitoring;
- Failure to train personnel
- Failure to apply daily cover.

C. Economic Benefit Calculation:

In calculating the economic benefit for a violator, the basic assumption is that the violator did

realize some economic benefit, by either delaying or avoiding compliance. Although delayed and avoided costs are calculated somewhat differently, both calculations involve the use of an interest factor to account for use of money over time.

The interest factor may be derived from: 1) the use of interest earned if the violator put the necessary money for compliance in a bank, 2) in the form of profit if the money was invested, or 3) if the violator had no capital to comply, the benefit would be in the form of not paying the interest on a loan to pay for compliance.

Examples given in this policy illustrate benefit gained when the interest factor is 5%. However, when calculating economic benefit, the reviewing authority should research the current term loan rates, 90 day T-Bill rates or other appropriate interest or loan rates to use as the interest rate factor.

For avoided costs, the economic benefit equals the cost of meeting compliance requirements, adjusted to reflect anticipated rate of return.

For delayed costs, because the violator will eventually have to pay the costs of meeting compliance requirements, the economic benefit is the return realized using the interest factor. In either case, the reviewing authority should calculate the economic benefit for each year or partial year of noncompliance.

Below is an example of how one could use the economic benefit calculation:

Violation: Failure to Prepare a Closure Plan

This is a delayed cost.

Factors:

- Cost of plan;
- Period of noncompliance;
- Interest rate.

The ABC landfill is a medium size facility and was required to have a closure plan in January 1993, but did not have one until October 1994, three months after your inspection.

- Cost of plan: $35,000
- Period of Noncompliance: 21 months (1.75 years)
- Interest rate: 5%

Economic benefit: ($35,000 x 1.75) x (5%) = $3062.50

Statutorily Mandated Factors to Consider in Calculating Penalty Amounts

The enforcement agency must consider the factors listed in PRC § 45016(a-g) when calculating a penalty. The section reads:

45016 In making a determination regarding the allegations in, and the amount of any liability that may be imposed pursuant to, an order, petition, or complaint and determining the appropriate outcome, and when determining whether to deny, suspend, or revoke a permit or to deny a permit application, the issuing agency, the board, or a court, as the case may be, shall take into consideration:

(a) The nature, circumstances, extent, and gravity of any violation or any condition giving rise to the violation and the various remedies and penalties that are appropriate in the given circumstances, with primary emphasis on protecting the public health and safety and the environment.
(b) Whether the violations or conditions giving rise to the violation have been corrected in a timely fashion or reasonable progress is being made.
(c) Whether the violations or conditions giving rise to the violation demonstrate a chronic pattern of noncompliance with this division, the regulations adopted pursuant to this division, or with the terms and conditions of a solid waste facilities permit, or pose, or have posed, a serious risk to the public health and safety or to the environment.
(d) Whether the violations or conditions giving rise to the violation were intentional.
(e) Whether the violations or conditions giving rise to the violation were voluntarily and promptly reported to appropriate authorities prior to the commencement of an investigation by the enforcement agency.
(f) Whether the violations or conditions giving rise to the violation were due to circumstances beyond the reasonable control of the violator or were otherwise unavoidable under the circumstances.
(g) Whether in the case of violations of this division, or the regulations adopted pursuant to this division, the violator has established one or more of the following programs prior to committing the violation that will help to prevent violations of the type committed in the future:

(1) A comprehensive compliance program designed to prevent violations of this division, the regulations adopted pursuant to this division, and of the terms and conditions of the solid waste facilities permit.

(2) Employee training programs designed to educate the employees regarding their responsibilities under this division, the regulations adopted pursuant to this division, and the terms and conditions of the solid waste facilities permit.

(3) Regular internal audits to monitor the effectiveness of the comprehensive compliance

programs described in paragraph (1).

(4) Confidential systems for employee reporting of potential statutory, regulatory, or solid waste facilities permit violations and for protecting persons so reporting from retaliatory employment actions.

(5) Special incentive programs that promote and reward statutory, regulatory, and permit compliance.

In addition to the above statutory requirements, the July 8, 1996, Cal/EPA Policy on Incentives for Self-Evaluation (PISE) is available to LEAs as a guidance document in determining penalty amounts when a violator has a self auditing program in place. Should any inconsistencies be found between PRC § 45016 and PISE, the statute will of course prevail. The Cal/EPA PISE is available to LEAs through their Board enforcement staff contact.

HEARING AND APPEAL PROCESS

As with any legal proceeding, due process would not be complete if the accused did not have the opportunity to be heard. As mentioned earlier, a respondent has an opportunity to request a hearing regarding the issuance of an enforcement action. A Notice and Order for Penalty Assessment would allow a respondent an opportunity to be heard. Under current statutes, the following parties may request a hearing before a local hearing panel:

- any person subject to an action by the EA (PRC § 44310),
- the governing body prior to the EA imposing an administrative civil penalty (PRC § 45011)

Note: Any LEA enforcement action (including corrective action orders, cease and desist orders, notice and orders and imposition of administrative civil penalties) is cause for an operator to request a hearing (PRC § 44307).

Hearing Time Limits

Within 15 days of receipt of written notice of an enforcement action, the person subject to an Enforcement Action must:

- File a written request for a hearing.
- The person may decide not to request a hearing and waive his/her rights to a hearing and pay the assessed penalties.

Within 15 days of receipt of a written request for a hearing the EA must:

- Provide the person filing the request with a written notice of the date, time and

place of hearing, and

- Request a statement of the issues that require a hearing from the person. The statement of issues must be provided to the EA at least 20 days prior to the date of the hearing.

Within 30 days from the date of hearing, the hearing panel shall issue its written decision.

The hearing panel may take the following actions:

- affirm the enforcement action,
- modify the penalty amount, or
- rescind the enforcement action and refer the issue back to the EA.

Failure to Request a Hearing or Untimely Filing of Issue Statement

The EA may take the proposed action without a hearing or may, at its discretion, proceed with the hearing before taking the proposed action if (PRC 44310):

- The aggrieved person, applicant, or operator fails to request a hearing within the 15 day request period, or

- The aggrieved person, applicant, or operator fails to file a statement of issues at least 20 days prior the date of the hearing.

Effective Date of Decisions

If no appeal is filed, written Hearing Panel decisions are effective immediately upon the conclusion of the filing period for an appeal (generally 30 days, unless otherwise specified).

Appeals of Hearing Panel Decisions

<u>Appeal to CIWMB</u>

An aggrieved party may appeal a decision of the Hearing Panel to the California Integrated Waste Management Board (CIWMB). The CIWMB can choose not to hear the appeal in certain situations; if the CIWMB hears the appeal, the CIWMB may:

- Affirm the hearing panel's decision; or,
- Find the decision inconsistent with PRC and direct the EA to take appropriate action.

Appeals to Superior Court

An aggrieved party may also file an action with the superior court to contest any action of the EA or the CIWMB.

APPLICABLE GOVERNMENT CODE SECTIONS

The following Government Code sections may be applicable to the Hearing Panel procedures. It is recommended that persons involved in the hearing process review and familiarize themselves with the Government Code sections below, since these are only paraphrased in this document. Also, in order to fully interpret the hearing procedures, an attorney should be consulted.

Discovery

Sometimes, a party may wish to obtain information from the opposing party before the hearing about the alleged violation. Several sections of the Government Code provide a detailed explanation of the rights and procedures for discovery of information. Keep in mind that certain information cannot be discovered and should not be given to the opposing party, such as attorney-client privileged documents; completely irrelevant documents; attorney notes and research, etc. If an owner/operator makes a discovery request to the LEA, or if the LEA wishes to discover information from the owner/operator, the specific timing and procedural rules in Government Code sections 11507.5, 11507.6, 11507.7, & 11511 should be followed closely. Discovery can be accomplished through several methods:

- Depositions
- Request for detailed information, including:
  - List of witnesses that will be called to testify
  - Writings relevant to the hearing
  - Investigative reports
- Request for statements of certain people regarding the subject matter of the hearing

If a party refuses to cooperate in responding to discovery requests, the opposing party may file a petition in superior court to compel disclosure of the requested information.

Subpoenas

Witnesses may be subpoenaed to testify at the hearing and may be required to bring relevant documents. Government Code section 11510.

Hearing Procedures

The hearing is conducted with an Administrative Law Judge present, in a manner similar to a superior court trial, with examination and cross examination of witnesses. However, the strict rules of evidence used in superior court are not always followed. In addition, a party may use an affidavit containing the statement of a witness, unless the opposing party objects. Government Code sections 11513, 11514 & 11515.

Ex Parte Communication

The parties and their employees should not communicate with any member of the hearing panel while the hearing is pending. Government Code Section 11513.5

IV. BOARD ASSISTANCE

LEGAL ASSISTANCE

General Assistance

The Board may, upon the written request of the Enforcement Agency, provide legal counsel for the purpose of bringing solid waste facilities into compliance with applicable laws and regulations. (PRC § 43215.1). Where the county counsel has a conflict or other constraint preventing them from assisting an LEA, the LEA can contact the Board's chief counsel to discuss the possibility of legal advice and assistance.

Cost recovery for Corrective Action Expenditures

If an LEA expends funds to take corrective action at a facility, the amount expended shall be recoverable in a civil action by the Attorney General (AG) upon request of the LEA pursuant to PRC § 45000(d). The LEA should directly contact the AG's office to request representation in this type of case.

Petition for Injunction

a) If an owner/operator fails to comply with a final administrative order issued by the LEA, the LEA can contact the Board's legal counsel to obtain assistance from the AG. Upon the request of the Board, the AG shall petition the superior court for an injunction, restraining the operator from

continuing to violate the order. (PRC 45014(a)). As an alternative, The LEA can utilize its own legal counsel in petitioning the superior court for an injunction or request direct Board assistance. (PRC §§ 43215.1 & 45014(b)).

b) Apart from the administrative enforcement and penalty process, an LEA has the right to bypass the issuance of a N&O and go directly to superior court to obtain in injunction to enforce laws, regulations and the SWFP applicable to the facility. In this case, the LEA can utilize its own legal counsel, request board assistance or request AG assistance. However, in this case, the AG is not bound by law to assist, as in the case outlined above (PRC 45014(b)).

Petition for Civil Penalties

The LEA can utilize its own legal counsel in petitioning the superior court for the assessment of civil penalties, request board assistance or request AG representation. Civil penalties may be sought as the result of an operator failing to comply with a N&O or directly, without the prior issuance of a N&O. (PRC §§45014(c), 45023 and 45024).

TECHNICAL ASSISTANCE

Board staff have developed templates of the following documents for use by LEAs:

Notice and Order
Stipulated Order of Compliance
Declaration/Affidavit
Notice and Order for Penalty Assessment

These templates have gone through Board legal review. The Notice and Order for Penalty Assessment is provided as Attachment 7. The Notice and Order, Stipulated Order of Compliance and Declaration/Affidavit were previously provided to LEAs. Please contact your Board enforcement liaison for additional copies.

Additionally, Board staff is always available to assist LEAs upon request through review and comment on draft compliance schedules, N&Os, Stips or NOPAs. Board staff requests a 5 working day time frame for reviewing the document and sending the comments back to the LEA. Board staff is also available to confer with LEAs and assist in the development of overall enforcement strategies for a particular site or sites with multiple violations and/or complex enforcement issues. In cases where the LEA is unable to gain compliance through Notice and Orders or other appropriate actions, the Board is available to provide the LEA with technical enforcement assistance. In this case, it is strongly recommended that LEAs seek such assistance in a timely manner.

FINANCIAL ASSURANCES ASSISTANCE

The Board is directly responsible for enforcement of financial assurance violations. The Board's financial assurances section liaison for individual LEA jurisdictions should be contacted regarding enforcement of financial assurance violations at applicable facilities. Regulations designed to fully implement the financial assurances enforcement program have been developed and adopted by the Board and are pending final Office of Administrative Law approval.

Attachment 1

Cal/EPA

California Environmental Protection Agency

Integrated Waste Management Board

8800 Cal Center Dr.
Sacramento CA 95826
(916) 255-2200

Pete Wilson
Governor

James M. Strock
Secretary for Environmental Protection

August 20, 1996

LOCAL ENFORCEMENT AGENCIES

RE: Implementation of AB59 Cease and Desist Requirement for Unpermitted Solid Waste Facilities

Integrated Waste Management Board (Board) staff are aware that LEA's throughout the state have identified unpermitted solid waste facilities currently in operation. On October 16, 1995, Governor Wilson signed Assembly Bill 59 (AB 59). That bill would, among other things, require all solid waste facilities which are operating without a solid waste facilities permit (SWFP) on October 16, 1996 to close until such time that a valid SWFP is issued for the subject facility. The statute that requires compliance with this law is Public Resources Code (PRC), Section 44002. As you are aware, the responsibility for closing any such facilities in your jurisdiction would be the obligation of your agency.

For the purposes of fulfilling the obligation of this statute, the Board would like to clarify the definition of unpermitted facility. The appropriate use of the term would apply to traditional solid waste facilities, i.e., landfills, transfer stations, transformation and compost facilities which require a solid waste facilities permit and have never had a SWFP. It would also apply to non-traditional SWF's which have been slotted into the registration, standardized or full permit tier categories and have been required to be operating under one of these SWFP's. In other words, the non-traditional activity has been slotted into a SWF permitting tier of registration or above, regulations have been promulgated and any or all grace periods granted in regulation to obtain the appropriate level of SWFP have expired.

Recycled Paper

A few points of elaboration on the October 16, 1996 cease and desist (C+D) requirements:

- Notification tier operations are not subject to C+D provisions since they are not considered facilities.

- A change of owner or operator would not automatically require the issuance of a C+D. PRC 44005 now outlines a new process for a change of owner or operator.

- Non-traditional facilities are not subject to a C+D if regulations have not been promulgated which indicate whether or not these activities are facilities, operations, or whether the activity even falls within the Board's jurisdiction. Since there is no statutory or regulatory basis indicating that these non-traditional activities are subject to the 10/16/96 C+D requirements.

- If an LEA has determined that a new activity on a permitted facility will be addressed by a revision of the permit and can provide documentation in the record that an application has been submitted and that reasonable progress is being made to obtain the revised permit, the activity is not subject to the 10/16/96 C+D requirements.

- If an LEA has determined that a new activity on a permitted facility will require a new and separate permit, the activity is subject to the 10/16/96 C+D requirements.

- Finally, if a facility is operating outside the terms and conditions of its SWFP, that in itself is not cause for an LEA to necessarily issue a C+D. In such cases, appropriate enforcement actions pursuant to your EPP should be taken by your office to achieve compliance with permit conditions and a revision of the SWFP should be considered.

In the case of registration permits, because Board concurrence is not mandatory, LEA's will have up until the closure date of October 16 to issue such a document.

Please feel free to discuss any questions regarding this issue with Board staff from the Permits, CEQA or Enforcement Branches at your earliest convenience. Board staff look forward to working with you towards a solution which will lead to the issuance of valid SWFP's for all unpermitted facilities. If you have any questions regarding this letter, please contact Sue Happersberger of the Enforcement Branch at (916) 255-3893.

Sincerely,

Dorothy Rice

Dorothy Rice
Deputy Director
Permitting and Enforcement Division

Attachment 2

County of San Bernardino — Environmental Management Group
DEPARTMENT OF ENVIRONMENTAL HEALTH SERVICES
385 North Arrowhead Avenue
San Bernardino, CA 92415-0160

NOTICE OF VIOLATION

Name SOLID WASTE MANAGEMENT DEPARTMENT
COUNTY OF SAN BERNARDINO
Address ATTN: MIKE WALKER, INTERIM DIRECTOR
222 W. HOSPITALITY LANE
SAN BERNARDINO, CA 92415-0017

Date NOVEMBER 16, 1994
Zone District
Assessor's Parcel No.

An investigation of your premises was made on MONTHLY

Location of property MILLIKEN SANITARY LANDFILL #36-AA-0049
2050 S. MILLIKEN AVE.
ONTARIO, CA 91764

YOU ARE CHARGED WITH THE FOLLOWING VIOLATION(S)

PRC 44014(b); 14CCR 17616 & 17681, FAILURE TO SUBMIT COVER INFORMATION PLAN AND REVISE RDSI FOR MILLIKEN SANITARY LANDFILL

YOU ARE HEREBY ORDERED TO COMPLY by

SUBMITTING FOR APPROVAL THE FOLLOWING DOCUMENTS:

1. Update amendments to Milliken RDSI.
2. Cover importation plan to include description (analysis of composition of soil), address quality of material for daily cover usage; number of daily truckloads and volumes; and copies of any applicable excavation permits.
3. Mitigation and solutions to ameliorate sub-standard cover material.

COMPLIANCE OF VIOLATION MUST BE WITHIN 18 DAYS OF THIS ORDER. FAILURE TO COMPLY MAY RESULT IN LEGAL ACTION.

If you have any questions, contact Investigator Monday through Friday, 8:00 - 9:00 a.m.

Phone 909/387-4655

Address 385 N. Arrowhead Ave.
San Bernardino, CA 92415-0160

Environmental Management Group
ENVIRONMENTAL HEALTH SERVICES

James L. Trujillo, REHS, MPA

WASTE MANAGEMENT/LEA SECTION

12-14586-631 Rev. 2/91

Attachment 3a

SAMPLE COMPLIANCE AGREEMENT
Developed by Operator

July 22, 1994

Subject: Benson Sanitary Landfill Compliance Agreement

On July 17, 1994, Mr. Vern Maxon from your agency performed an inspection at the Benson Sanitary Landfill, Coombs County. Following this inspection, a compliance meeting was held on July 21, 1994 to discuss the results of the inspection and also the necessary compliance work to follow. The meeting was held at your office with the Public Works and LEA staff in attendance. The following list of violations,noted during the inspection, were discussed in detail:

1. 17682 - Cover

2. 17711 - Litter

3. 17708 - Drainage and Erosion Control

It was requested that a compliance agreement be submitted which will include the method and dates by which the violations will be corrected.

This letter is in response to your request for a compliance agreement. The methods by which the violations will be corrected are described in detail and the time frame for compliance does not exceed 90 days from the issuance of this letter. The following are the corrective measures and time frame for each violation:

1. <u>17682-Cover</u> Compliance Date: 7/29/94

Our agreement with the operator contract specifies that all refuse material shall be covered with a minimum of 6" of dirt and compacted by the end of each working day. This violation has been discussed with the operator and he is instructed to cover daily without exception, as spelled out in our agreement and to comply with all requirements. We have increased our monitoring of his performance to insure contractor compliance with the requirements.

2. 1771- Litter Control Compliance Date: 8/25/94

The operator has been instructed to pick up litter around the site. Public works will purchase and install litter fencing to prevent off-site migration in the future.

3. 17708- Drainage and Erosion Control Compliance Date: 10/21/94

The erosion is being repaired and the contractor has been instructed to look for and repair future erosion promptly. Additionally, a diversion ditch will be designed and constructed along the northwest portion of the landfill to prevent future occurrences.

All violations pointed out in your July 17, 1994 report are being corrected and the expected completion date is October 21, 1994. Should you have any questions, please contact this office.

Very truly yours,

M.K. Benson
Director

LDM:AAA:jb
DAY8
Enclosure - Schedule

Owner/Operator: Coombs County Public Works Department

By_____ Date:_____

Title: _____

LEA: Coombs County LEA

By_____ Date:_____

Title:_____

SAMPLE COMPLIANCE SCHEDULE
April 27, 1993

SUBJECT: To correct a violation of 14 CCR 17708 - Drainage and erosion control

We have investigated the drainage problems at the AAA Landfill and prepared this long range drainage plan.

We propose to complete the hydrology and hydraulic study of the area tributary to the wash out of the drainage system at the southwest corner of the landfill, determine the root cause of the wash out, design a permanent solution and, after the necessary approvals, construct the permanent solution. We estimate the required time schedule for this work will be 4 months, or until August 31, 1993, to completion of construction.

We propose to regrade decks and eliminate ponding onsite on north slope of the newer unit, on the top deck and the toe of slopes as required to drain all areas at a slope of 1% or greater. Our contractor will accomplish this work prior to May 31, 1993.

All waste material washed into the borrow pit because of failure in the southwest down drain system will be removed by our contractor from the soil after it has been excavated and hauled to the top deck working face as cover material. Timing will depend on the drying up of the standing water presently in the pit. We estimate that the excavation and haul will require approximately 3 months to complete in this area of the pit, or before July 30, 1993, provided the pit is dry enough for the equipment to operate in it on or before May 3, 1993.

The southeast corner collection basin will be excavated by our contractor beginning approximately June 4, 1993 and completed on or before July 30, 1993.

The southerly perimeter dike has been completed and will be dressed up by our contractor prior to April 30, 1993. This dike will prevent flow across the southerly property line.

The northeasterly property will be staked and graded by our contractor to flow to the east and southerly to the area north of the entrance road. This redirection of flow will prevent the erosion and breaching of the dike.

The northeast collection basin will be excavated by our contractor and the dikes reconstructed to prevent drainage from the north from flowing into the basin. This work will be accomplished between August 2, 1993 and approximately September 16, 1993.

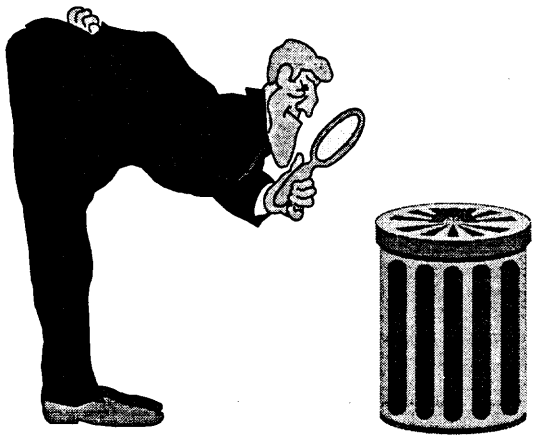
Our purpose is to make all necessary corrections as soon as is practicable.

Signed: Jerry Buckner
Operations Manger
AAA Landfill

Attachment 4

INTEGRATED
WASTE
MANAGEMENT
BOARD

CASE DEVELOPMENT GUIDANCE



Organizing is what you do before you do something, so that when you do it, it's not all mixed up.

— A. A. Milne

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I. ROUTINE COMPLIANCE INSPECTIONS

These inspections are normally conducted by state and local regulatory agencies as part of their compliance and enforcement programs, and are generally an excellent source of information concerning the identity of persons and entities involved in activities impacting the environment. In most jurisdictions, such inspections will include those businesses handling solid waste, such as landfills, transfer stations, material recovery facilities, and composting facilities. By developing contacts within these various agencies, agency personnel will have access to a large and constantly updated network of information. This information will identify which entities or persons are not in compliance with the various regulatory programs or are engaged in illegal or irresponsible activity.

II. USE OF INFORMATION FROM OTHER REGULATORY AGENCIES

Once a suspected environmental violation is detected, it is helpful to obtain background information or what could be termed an "environmental rap sheet" on the suspected violator. Both incriminating and vindicating information should be reviewed. The environmental violator might fail to comply with other environmental laws and regulations. Contacts should be made and maintained with other environmental regulatory agencies. Information gathered by each agency can be shared with the group. Local/regional environmental task forces are a good mechanism for distributing information.

III. GENERAL REVIEW OF RELEVANT ENVIRONMENTAL DOCUMENTATION

Unlike criminals committing traditional crimes, persons or entities involved in the commission of environmental violations generally have lengthy "paper trails" documenting their activities. These trails are comprised of permits, reports, or documentation on file with any number of regulatory agencies regarding the handling of environmental concerns. A review of that documentation can assist in developing important evidence including:

- The identity of the persons or entities involved in the suspected violations. (Often this reveals a connection because of involvement by the same individuals/entities);
- The extent of the violation, including its frequency of occurrence or size of the effected impacted area;
- The most effective means and best time of monitoring the suspect or suspect's unlawful activities;
- A history of noncompliance with environmental rules and regulations by the suspected violators, including prior notices of violations;
- Prior criminal, civil, or administrative violations by the suspected violators.

Documentary evidence may provide important incriminating information regarding the operator and the suspected violation. But the absence of documentation can also provide damaging evidence against the violator (e.g., tonnage records, log of special occurrences, RDSI, etc.)

IV. CONDUCTING INSPECTIONS/SEARCHES

Generally, a regulatory inspection is used to determine compliance of a regulated facility with the applicable laws and regulations. Regulatory inspectors are granted powers to ensure compliance with the law. In the case of solid waste facilities, inspections and/or searches can be done with or without a warrant, depending on the circumstances.

A. Warrantless Searches

Since an inspection may result in an enforcement action, the inspection essentially is a "search". The Fourth Amendment to the United States Constitution guarantees protection from unreasonable searches or seizures. The general rule is that searches must be conducted under the authority of a warrant. However, most inspections of solid waste facilities can be conducted without a warrant. Sufficient evidence can be collected through routine inspections, consensual searches or lawful observation, as described in paragraphs 1-3 below. In addition, in extreme cases, a search can be performed without a warrant under "exigent circumstances", as described in paragraph 4 below.

1. Routine Inspections

Most inspections are conducted pursuant to the statutory authority provided by PRC sections 44100 et seq. These searches involve the scheduled inspections of a solid waste facility, without any particular knowledge of a violation. Although the inspections are conducted pursuant to a certain regular timeframe, the inspector should first obtain consent from the operator. Keep in mind that the inspector can take samples only with the operator's consent. When attempting to perform a routine inspection, if entry and/or sampling is refused, then the inspector should leave the premises and seek assistance from legal counsel. At that point, inspection can be performed only if there is an emergency situation (see section A.4 below) or under an inspection warrant (see section B below).

2. Consensual Searches

An inspection can be performed at a time other than during the routine inspection if the LEA believes there is a reason to enter the facility due to some unusual circumstance or a violation is suspected. Regulatory inspectors may enter private property to obtain evidence when they have the voluntary consent of the property owner. In some circumstances, consent inspections may be the only option available to obtain evidence, especially where there exists no statutory provisions authorizing a warrantless inspection or where there is insufficient evidence to obtain an inspection warrant. The decision to seek a consent search during an environmental investigation should consider the following:

- The History of Operator: Information either obtained during the review of environmental documentation or knowledge already possessed may reveal that an operator has a history of failing to cooperate with environmental inspectors and would refuse to give consent.

(Example: An operator of a solid waste facility that consistently refuses to allow an inspector to view the composting area of the facility. The inspector knows that compliance has been an issue at the composting operation. This knowledge would be cause for the inspector to presume that consent would not be granted to enter and inspect the area.)

- The Purpose of the Request: A limited inspection may be conducted initially. The additional information for that inspection may lead to a more extensive inspection. (Example: While investigating a complaint regarding the exempt status of an unregulated composting facility, the inspector may conduct a preliminary site visit to establish volumes/types of operations to determine whether further investigation is necessary.)

- The Inherent Limitation: Consent must be granted at each stage of the search. The operator can refuse to allow the search to become more intrusive. (Example: The operator may give consent for general entry to the solid waste site, but not to inspect a particular location on the premises.)

Although it may have been granted at the beginning of the inspection, consent may be **withdrawn at any time** during the inspection. The more specific and intrusive the request to inspect, the more likely consent will not be granted. However, a simple request to "look around" and "take pictures" may be granted.

Some General Concepts To Remember About Consent:

Consent Must Be Voluntary
For consent to be voluntarily and knowingly made the consentor must be aware of the purpose of the requested entry. Furthermore, consent cannot be obtained by trickery or in response to an assertion of authority. *See, e.g.*, People v. James (1977) 19 Cal.3d 99; People v. Superior Court (1977)73 Cal.App.3d 65; People v. Superior Court (1969) 271 Cal.App.2d 524; People v. Tremayne (1971) 20 Cal.App.3d 1006. Note, however, that no warning need be given that consent may be refused. Scknecklоth v. Bustamonte (1973) 412 U.S. 218.

Scope of Consent
The request for consent must reasonably describe the scope and nature of the inspection. A consent inspection can be held invalid if the inspector attempts to enlarge the scope and nature of the inspection by seizing evidence or inspecting areas which were not mentioned in the initial request for consent. *See, e.g.*, People v. Hardwood (1977) 74 Cal.App.3d 460; *cf.* Florida v. Jimeno (1991) 500 U.S. 248; People v. Crenshaw 1994) 9 Cal.App.4th 1403; People v. Williams (1981) 114 Cal.App.3d 67.

- **Authority to Give Consent**
  The consent must be given by a person who reasonably appears to have authority to give consent. *See* U.S. v. Matlock (1974) 415 U.S. 164; Stoner v. California (1964) 376 U.S. 438; People v. Escudero (1979) 23 Cal.3d 800. The inspector cannot reasonably expect that a lower level worker has the authority to grant consent. Unlikely candidates would include a worker picking up on site litter, a sorter on the MRF line, a worker turning windrows, or an individual pulling scrap metals out of the solid waste on the tipping floor.

When conducting consensual inspections, inspectors should follow these guidelines:

- Obtain consent from the owner, highest ranking or specifically designated company representative or authorized person. When consent is granted, it should be noted on the inspection form or in field notes.

- Be as specific in the scope of the inspection as is reasonable. Identify areas, scope and duration of the inspection (i.e. active face, composting area, review of weight and volume records, photographing specific activities, getting copies of entries from the log of special occurrences, etc.).

3. Lawful Observation

An inspection can occur in the absence of a routine inspection, consent, emergency, or a warrant. If an operator has no reasonable expectation of privacy, the evidence collected during such an inspection may be valid.

a. Plain Sight/Plain View

If an area or activity is in public view, an operator or owner has no reasonable expectation of privacy, and therefore is not protected by the Fourth Amendment. *See* Katz v. U.S. (1967) 389 U.S. 347; Lorenzana v. Superior Court (1973) 9 Cal.3d 626. The "public view" must be reasonable. For example, an inspector cannot claim that a solid waste operation is in "plain view" if he/she must stand on his/her vehicle to see over a fence or other obstruction. However, discovery of evidence in "plain view" is not required to be inadvertent. *See* Horton v. California (1990) 496 U.S. 128; North v. Superior Court (1972) 8 Cal.3d 301, 308. An essential requirement of the "plain view" doctrine is that the inspector must have a legal right to be at the place from which the observation was made. *See generally* People v. Hill (1974) 12 Cal.3d 731; at North, 8 Cal.3d 301. Note, the "plain view" doctrine does not include a plain aided view. *See, e.g.,* Arizona v. Hicks (1987) 480 U.S. 321 (explaining that an officer's act of turning over a stereo to view the serial number was an invalid search, even though the stereo itself was in plain view).

b. Trespassing

Trespassing onto the property of a third party in order to view evidence on a suspect's property may not invalidate a subsequent search and seizure. People v. Superior Court (Stroud) (1974) *37* Cal.App.3d 836. However, inspectors should obtain consent of third parties to enter their premises in order to make observations of a suspect's property. Inspectors can be civilly liable for any damages caused by that trespass.

c. Sight Enhancing Devices

Where an operator or owner has no reasonable expectation of privacy in a location, (ie. certain types of waste that may be exposed, documents lying in open view, etc.) the use of binoculars, flashlights

and aerial surveillance does not violate the Fourth Amendment. *See* Florida v. Riley (1989) 488 U.S. 445; California v. Ciraolo (1986) 476 U.S. 207; Dow Chemical Co. v. U.S. (1986) 476 U.S. 227; Oliver v. U.S. (1984) 466 U.S. 170; People v. McKim (1989) 214 Cal.App.3d 766; People v. Mayoff (1986) 42 Cal.3d 1302; People v.Rogers (1978) 21 Cal.3d 542. *But see* People v. Arno (1979) 90 Cal.App.3d 505 (using binoculars from a nearby hill to view the inside of a residence held to be an invalid search).

d. Open Fields

No reasonable expectation of privacy exists in an unoccupied or underdeveloped area ("open fields") as opposed to a home, office or commercial structure. Open fields are accessible to the public and regulators, when they are not effectively protected by fences or "no trespassing" signs. See U.S. *v.* Dunn (1987) 480 U.S. 294: Oliver v. U.S. (1984) 466 U.S. 170; Hester v. U.S. (1924) 265 U.S. 57.

The Court in Dunn listed four factors to be considered in determining whether an area constitutes an "open field", and is thus outside the protections of the Fourth Amendment: (1) The proximity of the area to the home or protected structure; (2) whether the area is within an enclosure surrounding the home or protected structure; (3) the nature and uses to which the area is put; and, (4) the steps taken by the resident to protect the area from observation by a passerby.

Under the holdings of Dunn and Oliver, the Court has found that Fourth Amendment protections do not extend to areas outside the enclosed portion of a home or protected structure, even where these areas are surrounded by fences and/or "no trespassing" signs.

For example, suppose an inspector has information that a landfill operator is unlawfully storing and disposing of hazardous waste on the premises of the landfill. The premises consist of a main office, a repair shop and several Seavan containers that are used for recyclables storage. The premises are surrounded by a barbed wire fence posted with "no trespassing" signs. The inspector is aware that the wastes in question are allegedly stored and disposed of in one of the Seavan containers. The Seavan containers are located approximately 50 yards from the repair shop, neither of which is visible from outside the landfill premises. Under the holdings of Dunn and Oliver, the inspector's observations in the "open fields" of the premises, including the areas in the proximity of the Seavans, would not violate the Fourth Amendment.

4. Emergency/Exigent Circumstances

Emergency situations will at times mandate immediate warrantless entry and search of a property. There are two sources of authority for emergency searches. First, PRC 44101(b) provides for an inspection without consent or a warrant "in the event of an emergency affecting the public health or safety." Second, case law has developed the "exigent circumstances doctrine". "Exigent circumstances" are normally found to exist where there is a potential for public endangerment and/or destruction of evidence.

Warrantless entries and searches under the "exigent circumstances" exception can be made where there is a reasonable belief of danger to the public. *See, e.g.,* Michigan v. Tyler (1978) 436 U.S. 499; People v. Duncan (1986) 42 Cal.3d 91; People v. Osuna (1986) 187 Cal.App.3d 845.

Odors evidencing a potential explosion or fire will, in most instances, create a reasonable belief that the public is in danger and justify warrantless entry to mitigate the emergency. *See, e.g.,* People v. Lanthier(1971) 5 Cal.3d 751;People v. Avalos(1988) 203 Cal.App3d 1517;People v. Messina(1985) 165 Cal.App.3d 937; People v.Stegman (1985) 164 Cal.App.3d.936.

In People v.Stegman, the court held that a police officer's detection of an ether odor emanating from a residence coupled with his view of chemical vats on the premises consistent with the manufacture of illicit drugs, justified a warrantless entry under the exigent circumstances exception. The continuous re-entry of the premises was lawful in order to mitigate the potential for explosion or fire caused by the flammable chemicals on the site.

A delay in entering a property after an alleged "emergency" is detected may invalidate the entry search. *See* Michigan v. Clifford (1984) 464 U.S. 287; People v. Baird (1985) 168 Cal.App.3d 237. In Baird, a five hour delay in executing the search after discovery of an ether odor was deemed an indication that the situation did not constitute an "emergency". In Michigan v. Tyler, firefighters and investigators entering a business to extinguish and investigate the cause of a fire uncovered evidence of criminal violations. The Court held that the initial warrantless entries and investigations conducted within four hours after the start of the fire were lawful.

For example, suppose an inspector has information that a suspect is unlawfully storing a large volume of extremely hazardous chlorine waste on his premises. Upon surveilling the premises from offsite, the inspector determines there are dozens of drums of wastes stored on the premises. A number of these drums are in deteriorated condition and are off-gassing a vapor having a chlorine odor. The inspector, having a reasonable belief that the off-gassing might evolve into an uncontrolled oxidizing chemical fire releasing large volumes of potentially deadly chlorine gas, would be justified in entering the premises in order to mitigate the potential emergency as well as investigate its source.

B. Inspection Warrants

Inspection warrants are court orders granting government agents the right to conduct inspections of private property in the interest of public health and safety. Inspection warrants are authorized under Code of Civil Procedure sections 1822.50 through 1822.57 and are used by government agents to enter commercial properties that are subject to inspection under an administrative scheme. The LEA should contact its county counsel for assistance in obtaining an inspection warrant. An inspection warrant is required where consent to inspect is refused and there is not an emergency situation.

Under section 1822.51, an inspection warrant shall be issued only upon cause "supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made." In addition, Section 1822.51 requires that the affidavit contain either a statement that "consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent."

Under Section 1822.52, "[c]ause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to a particular place, dwelling, structure, premises, or vehicle..." See e.g.,City and County of San Francisco v. Municipal Court (1985) 167 Cal.App.3d 712. Generally, the affidavit supporting the issuance of a warrant to conduct an administrative inspection and search of commercial property is only required to establish cause, not the traditional probable cause necessary for a criminal search warrant. *See* Michigan v. Clifford (1984) 464 U.S. 287; *cf.* Salwasser Mfg. Co. v. Occupational Safety & Health App. Bd. (1979) 94 Cal.App.3d 223 (requiring a showing of probable cause for issuance of a Cal-OSHA inspection warrant due to the potential penal consequences of the inspection). The judge will issue the warrant which will specify the purpose and limitations of the search. The warrant is effective for 14 days. If an operator refuses to permit an inspection pursuant to an inspection warrant, the operator is guilty of a misdemeanor. Keep in mind that if an inspector suspects criminal activity, the inspector cannot perform a search for criminal evidence or seize evidence of a crime under an inspection warrant. In this case, the LEA should contact the local district attorney for investigation and prosecution of any criminal wrongdoings.

V. GATHERING EVIDENCE

A. Documentation

Documentation refers to all printed and mechanical media produced, copied or taken by the inspector to provide evidence of suspected violations. It is strongly recommended that the inspector record information collected during the inspection in only the following types of records: field notebooks, checklists, photographs, maps, and drawings. Recording information on other loose papers is discouraged; loose papers may be easily misplaced and the information discredited during hearings. Proper documentation and document control are crucial to the enforcement system, as the Government's case in a formal hearing or criminal prosecution often hinges on the evidence gathered by the inspector. Therefore, it is imperative that each inspector keep detailed records of inspections, investigations, photocopies, photographs taken, etc., and thoroughly review all notes before leaving the site.

The purpose of document control is to assure the accountability of all documents for the specific inspection when that inspection is completed. Accountable documents include items such as logbooks, field data records, correspondence, sample tags, graphs, chain-of-custody records, SWIS Inspection forms, analytical records and photos. To ensure proper document control, each document should bear a serialized number and should be listed, with the number, in a project document inventory assembled upon completion of the inspection. Water-proof ink should be used to record all data on serialized, accountable documents.

1. Field Notebook

In keeping field notes, it is strongly recommended that each inspector maintain a legible daily diary or field notebook containing accurate and inclusive documentation of all inspection activity, conversations, and observations. This will include any comments, as well as a record of actual or potential future sampling points, photograph points, and areas of potential violation. The diary or field notebook should contain only facts and observations because it will form the basis for later written reports and may be used as documentary evidence in civil or criminal hearings. Notebooks used for recording field notes should be bound and have consecutively numbered pages. It is highly recommended that a separate notebook be used for each facility inspected, in case the notebook has to be made available to the owner/operator and /or his or her attorney as part of a legal action (e.g., through discovery). Because field notebooks may be made available to the owner/operator and their attorneys, inspectors should be careful to avoid recording potentially embarrassing notes or notes which may weaken any future enforcement action.

2. Checklists, SWIS Forms and LEA Advisories.

In general, it is recommended that checklists be used in conjunction with field notebooks to record inspection observations.

In many cases, LEAs have preferred checklists that should be used as an aid in conducting the inspection. Checklists should not be used as a substitute for knowledge and understanding of regulations.

In general, it is important that inspectors remember that checklists are only a tool for organizing, conducting and recording the results of an inspection; the purpose and scope of an inspection is not limited to just completing the checklist. Inspectors should not restrict an inspection to items on a checklist, and should be observant of the general operation of the facility, waste management practices, and of potentially regulated activities not covered by checklists (e.g. new activities that the inspector was not aware of in planning the inspection) as they perform the record review and visual inspection.

The inspector should generally limit comments on the checklist to checking the relevant answers, although more extensive comments may be made if no alternative record is available for noting observations. It is recommended that comments or observations on checklist answers be recorded in the field notebook, where there is adequate room for explanations, sketches, etc., to expand upon checklist answers.

3. Photographs

Photographs provide the most accurate documentation of the inspector's observations. And they can be significant and informative source for the inspector, for review prior to future inspections, at informal meetings, and hearings. Documentation of a photograph is crucial to its validity as a representation of an existing situation. For each photograph taken, the following items should

subsequently be entered in the inspector's field notebook. Or on the facility map, as such information is crucial to the validity of the photograph's representation of an existing situation:

- Date
- Time
- Number of the photo on the roll
- Type of film, lens and camera used
- Photographed by (signature)
- Name and ID number of site
- General direction faced by inspector when taking photograph
- Location of checkpoint on site
- Other comments (e.g. weather conditions)

Comments should be limited to these pertinent facts because any discussion of the photograph in terms of its contents could jeopardize its value as evidence.

The type of camera used by the inspector is optional; however, 35 mm single lens reflex cameras are most common. Inspectors should also be aware that photographs taken with a telephoto lens may not be admissible evidence because these lenses may distort the scale of the photo or image. When taking photos, inspectors should include in the photograph a ruler or other item, as appropriate, for showing the scale of the object photographed.

4. Maps and Drawings

Schematic maps, drawings, charts and other graphic records can be useful in documenting violations. They can provide graphic clarification of a particular site relative to the overall facility; demonstrate spill or contamination parameters (e.g. the size of a contaminated area) relative to the height or size of objects; and other information that, in combination with other documentation, can produce an accurate and complete evidence package.

Maps and drawings should be simple and free of extraneous details. Basic measurements should be included to provide a scale for interpretation and compass points should be included. Generally, maps should also be used to show where photographs were taken, and in what direction; photo locations can be shown on the map using the roll number, exposure (photo) number, and a direction arrow.

B. Report Writing

In the area of environmental enforcement, reports are written for many reasons and with many objectives in mind. In most instances, reports document the normal monitoring of businesses, as well as the degree these businesses comply with various environmental statutes, codes, and regulations.

This section will focus on the "investigative report." This report should be an accurate written account of information received for ultimate presentation in administrative actions or hearings. It reflects observations made by the writer and statements made by witnesses interviewed. The writer of

this report should keep in mind that this document may be used before hearing boards or in court, and be subjected to close scrutiny. If the writer fails to recognize this when preparing the report, these reports can be used effectively by the violator to defeat the government's actions.

Many times, documents created for regulatory purposes are used in cross-examining a government witness. This is a good reason why all entries by regulators and enforcement personnel should attempt to conform to guidelines suggested for investigative reports.

1. Foundation of a Good Report

Effective reports, like all good writing, must be clear and concise. They must be free from ambiguity and any unnecessary complexity which would obscure their meaning. In addition to conforming to these general principles of exposition, the inspector's report must be accurate and self-explanatory.

2. The Form

The report form should be developed with the objective of environmental enforcement in mind. The form provides an outline to the writer in which the observations and statements can be placed in an orderly and organized fashion. An established report format insures that standard case data is always included. Such entries include; case File Number, Date of Report, Date of incident or interview, complainant, etc. In addition, the environmental investigatory report may also have headings pertaining to the taking of samples or scientific testing.

3. Notes

Good note-taking permits an accurate and thorough retrieval of information for a later report. Notes should provide the necessary "memory hooks" to permit the writer to later expand into narrative form. One should try to write the report shortly after the incident so that the memory of the event can quickly be reinforced with a review of the notes. A court appearance relating to these notes will often take place months, sometimes years, in the future. As a consequence, it is imperative to try to take notes which permit the writing of reports that refresh the recollection of the writer at the time he or she is called to testify.

If a tape-recording of a witness is unavailable, it is better to paraphrase a witness instead of directly quoting him. Paraphrasing increases understanding of the statements and helps in later recalling the event. Furthermore, interviews often take place under circumstances where noise and other distractions exist which may impeach the writer's claim of a verbatim notation. Such a notation should only occur when the witness' exact words are crucial, such as "Yes, I admit I destroyed evidence," etc.

4. Organizing the Report

The report should be organized and written as soon as possible. Sufficient time should be allowed to organize, write and review the report, with an attempt to eliminate as many interruptions to this process as possible.

The report form and all notes should be reviewed. These notes should be organized topically and/or chronologically. It may be helpful to further outline the notes before writing a narrative or summary. A beginning synopsis is helpful in focusing the writer on the essentials of the report. This will help determine which interviews and observations are important.

5. The Narrative

The narrative should answer the six basic questions: who, what, where, when, how and why. Observations and interviews should be made with these broad parameters in mind. While the breadth of the inquiry may be wide, the report writer must be precise and specific as to the individual parts of that inquiry.

If for example, an individual is named, all pertinent data relating to that individual's identity must be given; e.g. full name, driver's license number, date of birth, address, telephone number, vehicle license number, and title or responsibilities relating to employment. As to each incident, the specific time, location, individuals involved and samples taken must be indicated.

The language of the report must be clear and unambiguous. Write in the first person to avoid confusion and use the person's name if a pronoun may refer to more than one person in a sentence. Use short sentences and paragraphs, and try to limit a paragraph to one topic only. Chronological sequencing of events is often the easiest to follow.

Use simple everyday terminology when possible and avoid jargon or slang. Eliminate wordy and redundant expressions as well as clichés and replace them with simpler terms.

6. Editing

The report must reflect actual observations of the report writer or other identified agency personnel, including actual statements of witnesses or suspects. Further, the evidence must be gathered by the individual preparing the report. Avoid preparing a report a significant amount of time after the events in question. Reports need to be written as soon as possible, both for purposes of accuracy and to avoid objections as to credibility or competence. Heavy editing and revising of reports by anyone other than the report writer inevitably comes out on cross examination and can bring the accuracy of the report in question. Supervisors should not edit reports in a manner which changes material statements or observations/activities of the report writer.

C. Interviews

The purpose of the interview is to secure information which will further the investigation. Interviews are integral parts of investigations and provide evidence in a number of ways. The statements elicited, as well as the documentary and physical evidence obtained, form the basis of the environmental prosecution. Some of the main goals of the investigative interview are:

1. Identify Witnesses

All witnesses must be identified as clearly and accurately as possible. As stated previously, at minimum, obtain as much information relating to the individual as possible. Indicate whether any warnings, citations, etc. were issued(include dates) to any of these persons. Note the response (or lack of response) from the suspects. Include anything unusual about the witnesses which could affect his or her credibility or availability for trial. For example, indicate whether a witness lives out of the county or State, or if witness is 92 years old and in failing health. Also, include facts which could affect a witness's ability to communicate, perceive, and recollect. For example, indicate whether a witness is 7 years old; was fire by the suspect company, or is a competitor the suspect company; wears thick glasses and is testifying about something that happened 100 yards away; spoke through an interpreter (indicate language).

2. Understand the Weaknesses of the Case

An essential component of the interview is to quickly understand the limitations of the case and the limitations of its witnesses. This may involve uncovering disparity of testimony among witnesses or the inability of a witness to perceive or recall. If a suspect offers any defenses or explanations during the inspection, the inspector should include these remarks in the report and, if possible, investigate their truthfulness. Similarly, if an inspector is aware of mitigating circumstances based upon the inspector's own observations or research, the inspector should include a discussion of those circumstances.

3. Corroboration

The interview may confirm information received from other witnesses. It may reaffirm the complaint of an informant, or confirm the existence of certain events which up to that time were proven only by circumstantial evidence.

4. Knowledge/Intent

In many environmental statutes, the issue of knowledge and intent are key elements in establishing some of the major violations. One of the primary purposes of the interview is to identify those persons who ordered, participated in, knew, or should have known of the violations at issue.

5. Non-verbal Cues

Understanding body language and facial expressions can help guide the direction and method of questioning. Body language may indicate the attitudes of the interviewee. Voice inflection, nervousness, position of the body, and hostility may be indicators of the interviewee's credibility or truthfulness. However, one must be careful associating certain behavior as always relating to veracity. In many instances, nervousness will be exhibited as a result of the presence of authority, while cooperativeness may be only a form of manipulation.

6. Establishing a Rapport

It is important to establish a rapport with the interviewee in order to insure effectiveness of the interview. Begin with simple non-threatening questions. It is of primary importance to consider the education and language skills of the interviewee. Try not to use unfamiliar jargon or vocabulary. It is a mistake to also forget your professionalism and attempt to imitate the interviewee's profanity or accent. Consider the technique of empathy. If the individual works in management, it may be helpful to acknowledge how difficult the job must be considering its pressures. Under no circumstance should an investigator demean witnesses or be condescending.

7. Learn to Overcome Witness Hesitancy

Employees often fear loss of their jobs if they cooperate with the authorities. In order to overcome this reluctance, an interviewer should stress the harm to the environment or to themselves caused by the violations at issue. An inspector may wish to stress that the witnesses are giving corroborating evidence and not fresh evidence. They should understand their duties as witnesses to tell the truth, and that there are certain protections from retribution by the employer. While interviewees may seek immunity, they must understand that only prosecutors can offer immunity to them.

8. Use of Team Interviewers

Some agencies require two interviewers for every interviewee. When there are two interviewers, the team should decide who takes notes and who writes the report. Only one report should be written. During the interview, interruptions should be limited. Each interviewer should be prepared to take over questioning. It is often advantageous to have one-on-one interviews which may be less threatening and create an atmosphere of trust.

9. Keep the Witnesses Separate

It is essential that the witnesses be interviewed separately so that the statement can be attributed to one individual. In addition, separate interviews will avoid the potential for collusion or intimidation.

VI. NOTIFICATION OF VIOLATION

After the EA has determined that a solid waste facility has been found in violation and has collected ample evidence and documentation, they nay decide to issues an administrative order (Notice and Order) requiring the owner or operator to take corrective action as necessary. An administrative order shall not be issued for any minor violation which is corrected immediately.

The administrative order should be delivered in manner that will allow the sender to obtain some type of proof or verification that the order was received by the recipient; This is otherwise known as "service".

PROOF OF SERVICE

"Service" is the legal term for delivery. In order to start any legal action, including administrative actions, the initial documents such as the Notice and Order or a Notice of Proposed Action must be delivered to (served on) the owner and operator or an authorized representative within five business days after issuance.

If the site or facility has been issued a permit, or if an application for the site or facility is pending, service is by first class mail to the address last given by the owner and operator.

If no permit has been issued and no application is pending, service is by posting a copy at no less than one conspicuous place at the site or facility. Additional copies may be mailed to addresses of the owner or operator if known to the enforcement agency.

A copy of the document should be sent to CIWMB within five business days of issuance.

If the Respondent is a business entity, first find out who to serve. Some business entities, such as, corporations, limited partnerships and limited liability companies are required to have an agent listed with the Secretary of State for service of legal papers. You can call the Secretary of State to determine the agent for service of process. Then follow the rules above. If the Secretary of State does not have a record of the business, determining who may be served on behalf of a partnership, joint venture or unincorporated association is more difficult. Therefore, you should consult your local legal counsel on the details in this issue. Below are general rules regarding entities that are not listed with the Secretary of State.

A. General Partnership/Joint Venture

A partnership is an association of two or more person to carry on as co-owners of a business for profit. A partnership is simply a business arrangement for the purposes of the distribution of profit and the burden of debt generated by that business enterprise. Any general partner may be served.

B. Sole Proprietorship

A sole proprietorship is a business enterprise established by one individual, often times under a d.b.a. The sole proprietor should be served.

A standard form for Proof of Service is provided as **Attachment A**. The person who actually served the documents must fill out this form.

DEPOSITIONS

General Instructions

Under the law, the alleged violator's attorney has the right to take the inspector's "discovery deposition." This means that the inspector will be put under oath, just as he/she would be in court, and the alleged violator's lawyer will ask questions relating to the case. His/her questions and the inspector's answers will be taken down by a court reporter.

In a deposition there will be no judge or jury present. However, after the deposition is over, the court reporter will type out all of the questions and answers, and both attorneys on each side will receive copies. The original will be filed in court.

The information given during a deposition may be used during a hearing, particularly in cross-examination circumstances. The alleged violator's attorney may want to use the deposition should your testimony at the hearing be any different than your testimony at the time of the deposition. For this reason, it is extremely important that you have everything in mind concerning the inspection at the time of the deposition. It is extremely helpful to review the facts after the final report is completed. However, it is strongly advised not to read anything to refresh the inspector's memory prior to the deposition. If the alleged violator's attorney discovers that the inspector reviewed certain documents before the deposition, the attorney can subpoena these documents.

The alleged violator's attorney in a deposition can ask questions that may seem irrelevant to the inspector. The attorney is allowed to ask the inspector for "hearsay" and other things that will enable him to make further investigation of the case. The inspector's attorney will not object to these questions.

If the inspector's attorney instructs an inspector not to answer , then the inspector should REFUSE TO ANSWER THE QUESTION.

If you are going to be deposed, don't be afraid to ask you legal counsel to help you "practice." Your legal counsel can help you prepare for the deposition by giving you a "mock deposition." He/she can ask you questions that could be presented in the actual deposition. Remember, the only people who go to depositions all the time are attorneys and court reporters. You have a right to be nervous.

The following points may be particularly useful in guiding an inspector through a deposition.

1. Do not answer a question until you understand it. If the question is unclear, ask examining counsel to repeat it or phrase it in clearer language.

2. Think about each question before answering it. Do not supply information not requested by the question, even though you may think it is relevant. If examining counsel does not ask you all you know, do not volunteer information, or expand on the answer. If possible, try to answer "yes" or "no."

3. If you do not know the answer to a question, say "I don't know" or "I don't remember." Do not feel that just because a question is asked you are expected to answer it.

4. Give factual information in answer to a question only if you have first-hand knowledge of the facts. Do not base your answer upon so-called "hearsay" information, that is, something someone else said to you, unless you are specifically asked for hearsay information.

5. If an objection is made by your counsel, stop speaking. If you are instructed not to answer the question, do not answer it.

6. Do not argue with opposing counsel. Remain calm and natural. Never become angry or hostile. Avoid asking questions in your answers unless you are asking for clarification of a question.

7. Do not try to memorize your answers. Give factual straight-forward responses to the questions.

8. If a question of fact is asked, check it against any records you may have if you feel that it is necessary, but answer it briefly.

9. Dress neatly and according to your usual habit and style.

10. Exercise courtesy and good manners.

11. Remember that opposing counsel will be evaluating you constantly. From the very moment you appear, you will be under observation. You must, therefore, take great care in your appearance, manner and remarks at all times.

12. Do not look for traps in every question. There are not many trick questions, and if one comes along your counsel should help out by objection or other means. In trying to second guess each question you will create the appearance of calculation, hesitation, apprehension, or possibly, simple stupidity.

13. Be polite. It is unlikely that you will be insulted or brow-beaten, but if this seems to be happening, resist any urge to meet it with similar tactics. Even if the lawyer on the other side is acting outrageously, it will help your case if you maintain an attitude of courtesy and calm.

14. Speak up so that all can hear you. Keep your hands away from your mouth. Answer each question with a verbal response. The court reporter transcribing your testimony cannot take down nods or shrugs.

15. The law requires only that you testify according to your best memory. If you are uncertain about the answer to a question, indicate this uncertainty in your response. If you have no memory whatsoever on a given point, say so. Do not guess.

16. Don't be afraid to admit that you have had conferences with your lawyer about the case. Every good lawyer has conferences with his client. If examining counsel asks you, "Did your lawyer tell you what to say at this deposition?" you should answer truthfully and state that your lawyer told you to tell the truth.

17. Unless your lawyer makes an objection, you must assume that you are bound to answer a question, if you know the answer.

18. You can be required to give a simple "Yes" or a "No" answer to proper questions, but you will always have an opportunity to explain your answer if it needs explanation. If opposing counsel cuts you off in the middle of an important explanation, your counsel can ask you to amplify your answer during his cross-examination.

19. You must fight against showing any exasperation, boredom or fatigue, even though the questioning may be very extensive. You will be protected by your counsel, against unwarranted harassment. Let your counsel know, however, if you feel ill or overly tired during the course of the examination. He/she can arrange for a short break or, if necessary, the adjournment of the deposition until another day.

20. Be A Good Witness. Remember The Rules:

I. RULE OF KNOWLEDGE

1) Know who you are
2) Know what you do - general
3) Know why you do it - general
4) Know what you did (in this case) - specific
5) Know why you did what you did - specific
6) Know who is on your team
7) Know what is expected of you
8) Know who you are talking to

II RULE OF HAND

1) Listen to the question
2) Think about the question
3) Take your time

4) If unsure about what is being asked, request an explanation
5) Answer the question to the best of your ability truthfully
6) Be Prepared

Attachment A

PROOF OF SERVICE FORM

1. I served the: Docket No. _____

   a. ___ **Notice of Proposed Action**
   b. ___ **Notice and Order**
   c. ___ **Other (indicate)**

   _____

2. By serving:

   _____ Respondent
   _____ Other (Name and Title or relationship to Respondent):

   _____
   _____

3. a. ____ I personally delivered the copies at: (address):

   _____
   _____
   at (time) _____ on (date) _____

   or

   b. ____ I sent by first class mail a copy to: (address):

   _____
   _____
   at (time) _____ on (date) _____

4. My name, business address, and telephone number are:

   _____
   _____
   _____
   _____

I declare under penalty of perjury that the foregoing is true and correct and this declaration is executed on (date)
_____ at (place) _____, California.

I am a citizen of the United States and a resident of the County of _____.

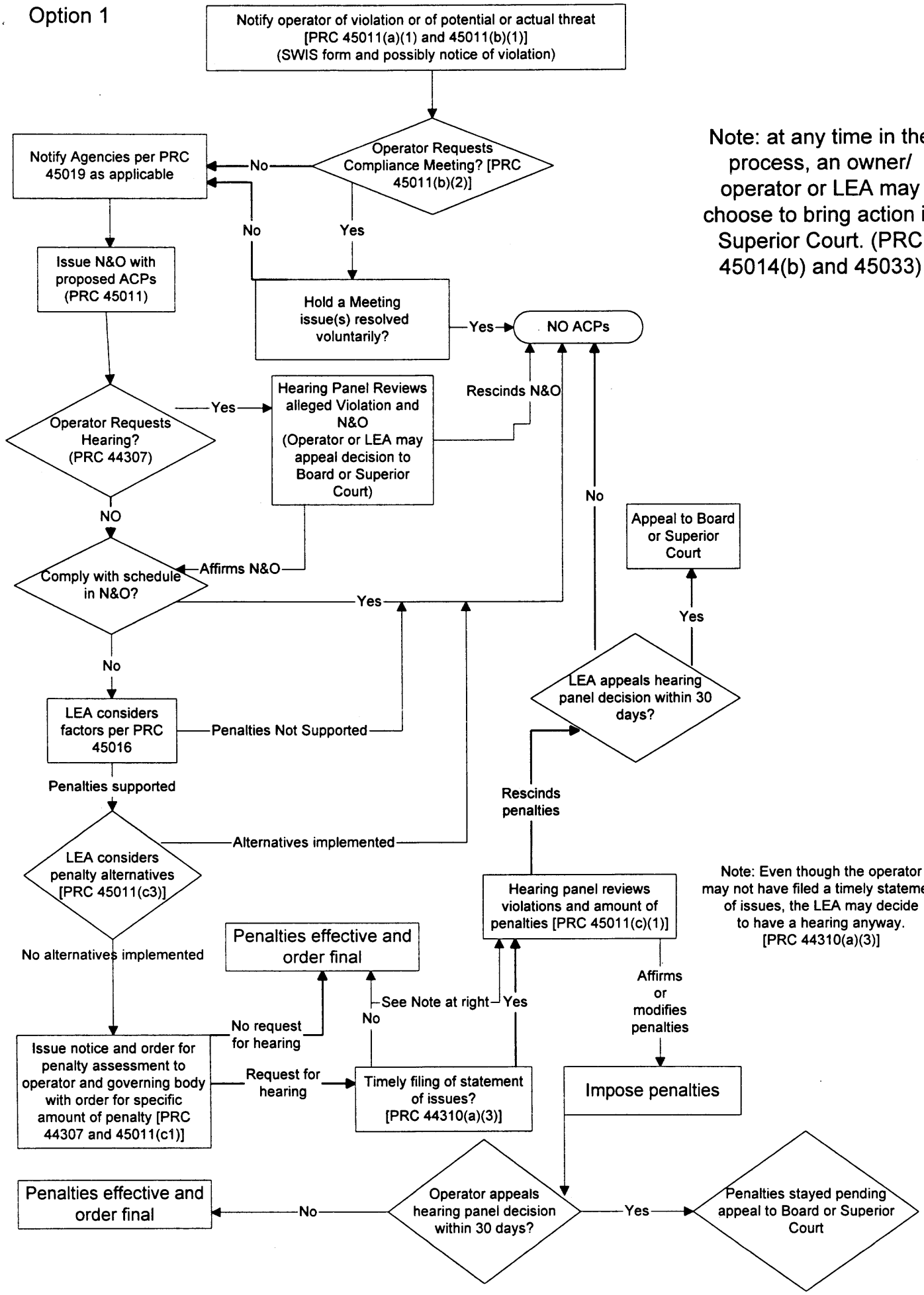
I am over the age of eighteen years and not a party to the within action; my business address is 8800 Cal Center Drive, Sacramento, California.

_____
Signature

Administrative Civil Penalty Process

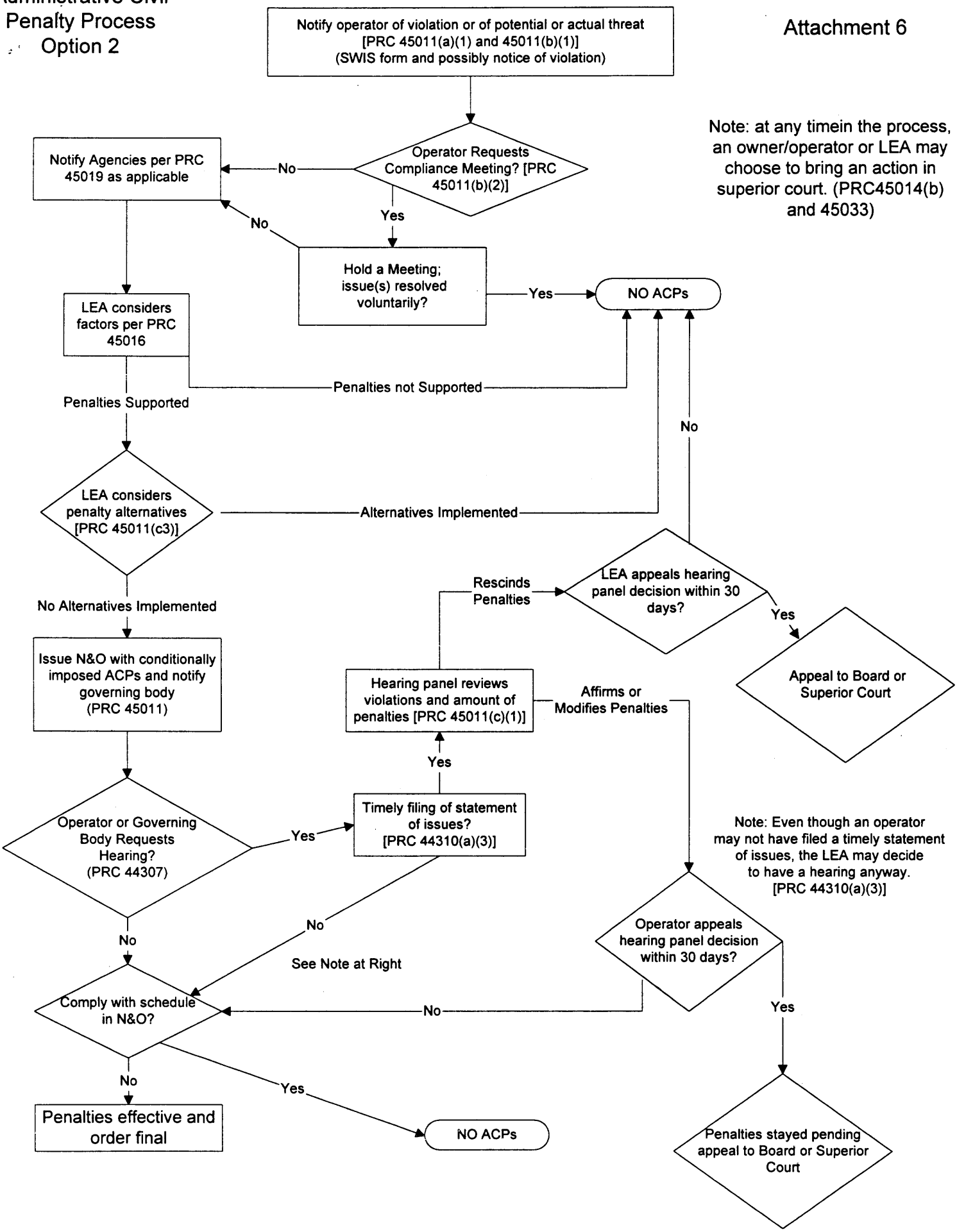
Option 1

Attachment 5



Administrative Civil Penalty Process Option 2

Attachment 6



ATTACHMENT 7

COUNTY OF **NAME OF COUNTY**

TITLE OF ENFORCEMENT AGENCY

In the Matter of:	NOTICE AND ORDER FOR PENALTY ASSESSMENT
NAME OF OPERATOR **NAME OF FACILITY**	**FILING NUMBER** PUBLIC RESOURCES CODE SECTION 45011

1.0 INTRODUCTION

1.1 The **NAME OF ENFORCEMENT AGENCY (EA)** issues this Notice and Order for an Administrative Penalty (ACP) Assessment to **NAME OF OPERATOR (HEREAFTER REFERRED TO AS RESPONDENT)**, as the operator of the **NAME OF SOLID WASTE FACILITY** (Solid Waste Facility).

1.2 Section 45011 of the Public Resources Code (PRC) authorizes the Enforcement Agency to issue an Order establishing a date certain for full compliance and assess a civil penalty to

be imposed administratively if any solid waste facility: 1) is in violation of Division 30 of the PRC, any regulations adopted pursuant to Division 30 of the PRC, any corrective action or cease and desist order, or 2) poses a potential threat or actual threat to public health and safety or the environment. This complaint is so issued based on the following facts:

2.0 STATEMENT OF FACTS

2.1 The Enforcement Agency has the authority to inspect, permit, and conduct enforcement actions against Solid Waste Facilities (SWFs) within the State of California under PRC section 43209, et Seq., and attendant regulations contained in Title 14 of the California Code of Regulations (CCR).

2.2 **RESPONDENT(S)** is/are the operator of the **NAME OF FACILITY** and is responsible for solid waste violations at **ADDRESS OF FACILITY**, in **CITY, TOWNSHIP OR COUNTY**, California.

2.3 This facility is in violation of Title 14 CCR § _____ and § _____ .

2.4 On _____, 19__, Mr./Ms. _____ **(OF THE EA)** accompanied by Mr./Ms._____ of the _____**(ACCOMPANYING AGENCY, IF THERE IS ONE)** conducted a solid waste facility inspection of the **NAME OF FACILITY** and documented violations of Title 14 CCR sections _____ and _____.

2.5 An **"Inspection Report"** dated _____ __, 19__ was addressed and posted by U.S. Mail, or hand delivered, by Mr./Ms._____ _____ of the **EA** to **RESPONDENT(S)** requesting correction of the violations(s) by _____ __, 19__. A true and

correct copy of that **"Inspection Report"** is attached hereto as "Exhibit 1". This Report states that the facility operator is violating PRC Section(s) and Title 14 CCR Section(s) _____, and _____. Correction of the violation(s) was not achieved as documented in an **"Inspection Report"** dated _____ __, 19__. A true and correct copy of that **"Inspection Report"** is attached hereto as "Exhibit 2".

2.6 A **"Notice of Violation"** dated _____ __, 19__ was addressed and posted by U.S. Mail by Mr./Ms. _____ _____of the **EA** to **RESPONDENT(S)** requesting that a Corrective Action Plan be submitted to the **EA** by _____ __, 19__. A true and correct copy of that **"Notice of Violation"** is attached hereto as "Exhibit 3". No Plan was ever received.**(Or other response as appropriate)**

2.7 Notice & Order #__-__ dated _____ __, 19__ was issued pursuant to 14 CCR 18304(b) by the **EA** to **RESPONDENT(S)** requesting that all violations be remediated by _____ __, 19__. A true and correct copy of that Notice & Order __-__ is attached hereto as "Exhibit 4".

2.8 A site inspection was conducted on _____ __, 19__ by Mr./Ms. _____ _____ and Mr./Ms. _____ _____ of the **EA**. The conditions remained the same as during the _____ __, 19__ inspection. A copy of the site visit or inspection report is attached hereto as "Exhibit 5".

3.0 ALLEGATIONS OF SPECIFIC VIOLATIONS

3.1 **RESPONDENT(S)** is/are in violation of Title 14, CCR § _____ which lists requirement(s) for this standard. **RESPONDENT(S)** has/have not complied with these requirement(s).

3.2 **RESPONDENT(S)** is/are in violation of Notice and Order No. __-__, issued to him/her by the **ENFORCEMENT AGENCY** on _____ ____, 19__. Notice and Order No. __-__ directed _____ _____ **RESPONDENT(S)** to remediate xxxxxxx violation by _____ __, 19__. Further, the Notice and Order required _____ _____ to _____ **(OTHER SPECIFIED ACTIONS AS NEEDED)** by _____ __ , 19__. **RESPONDENT(S)** has/have not complied with these requirements.

3.3 **RESPONDENT(S)** is/are in violation of PRC section 45000 or 45005 which requires any person, upon order of the **EA**, to clean up, abate, cease and desist or otherwise take remedial action at a SWF. **RESPONDENT(S)** has/have been ordered by the **EA**, by Notice and Order No. __-__, to take specific remedial action at the **NAME OF FACILITY** but has not complied with this requirement.

4.0 **PENALTIES**

4.1 The **ENFORCEMENT AGENCY'S** authority to assess administrative civil penalties (ACP) against **RESPONDENT(S)** is set forth in PRC section 45011, which states, in part:

> "the Enforcement Agency may issue an order establishing a time schedule according to which the facility shall be brought into compliance with this division. The order may also provide for a civil penalty, to be imposed administratively by the enforcement agency in an amount not

to exceed five thousand dollars ($5,000) for each day on which a violation occurs, and not to exceed a total amount of fifteen thousand dollars ($15,000) in any one calendar year if compliance is not achieved in accordance with that time schedule."

4.2 In setting an appropriate administrative civil penalty, the Enforcement Agency has taken into consideration the nature, extent and gravity of the violations, and the complete disregard of applicable statute and regulation on the part of the **RESPONDENT(S)**. The **Enforcement Agency** hereby orders that (name of respondent) be assessed an administrative civil penalty in the amount of ($?0,000)/day (in the total amount of $?0,000) for the violation of PRC section _____ or Title 14 Section _____ which occurred for ____ day(s). The penalty is due now and payable.

DATED:_____

_____
Mr./Ms. _____ _____
Staff Counsel
County of _____, EA

C) This part of the element will address a general need for clarification regarding what criteria should be applied to determine if a proposed permit is consistent with the State Minimum Standards (SMS). It will also address the following question: If a long term SMS violation raises doubt about the facility's ability to comply with SMS under the proposed permit, what criteria need to be met to get concurrence from the Board?

5) Field Inspection Program - This element has been in place for several years and consists primarily of Board staff inspections in conjunction with LEAs, and follow-up enforcement assistance to LEAs.

6) State Oversight Role Procedures - The purpose of this document is to lay out a clear process by which the Board can fulfill its statutory mandate to ensure that LEAs are taking appropriate enforcement actions to keep the facilities in their jurisdiction in compliance with applicable laws and regulations. This document describes the criteria which the Board will apply to determine when an LEA is not taking appropriate enforcement action and the procedures the Board will follow to encourage the LEA to take appropriate action and, if necessary, to initiate its own enforcement action and/or take other actions as required by law. This document was reviewed and commented on by key Board staff and by the four LEA representatives on the Enforcement Policy workgroup and is in final draft form for Board consideration.