Deficiency Progress Report – Update 5

Report Submitted: 1-5-10

CUPA: **San Luis Obispo County Environmental Health Services**

Evaluation Date: **May 13 and 14, 2008**

Evaluation Team:

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Corrected Deficiencies: 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12
Progress Report (Update 6) Due: June 7, 2010

Please update the deficiencies below that remain outstanding.

1. **Deficiency:** The CUPA has not completed a narrative self-audit that adequately summarizes the effectiveness of its permitting, inspection, enforcement, and single fee system activities for fiscal years (FYs) 04/05 through 06/07. The CUPA did utilize a self-audit checklist for FY 06/07 to fulfill the self-audit requirement for the CUPA and it's PA; however, no self-audits were completed for FYs 04/05 and 05/06.

   Note: The self-audit guidance questionnaire is only meant as a tool for completing the self audit process and is in no way meant to be a substitute for the narrative self-audit requirement.

   Preliminary Corrective Actions: By September 30, 2008, the CUPA will complete a FY 07/08 self audit that includes a narrative that summarizes the effectiveness of its activities. The CUPA will complete a self audit by September 30 of each year.

   Submit the CUPA's FY 07/08 self audit to Cal/EPA.

   CUPA's 1st Update (8-22-08): Cal-EPA provided an Audit checklist in 2007 to complete the audit. It was accepted as compliant by Cal-EPA in 2007. The assistance provided to complete the FY 06/07Audit in 2007 by JoAnn Jaschke, was appreciated. This Agency understands the checklist alone is no longer acceptable without the narrative.
   The FY 07/08 self audit with the narrative will be provided to Cal-EPA by September 30, 2008.

Cal/EPA's 1st Response: The CUPA's completion of the self audit checklist provided by Cal/EPA satisfies the specific self auditing requirement mandated by Title 27. The basis for this deficiency is that the CUPA's self audit lacked the narrative elements. This could have been explained in better detail as the CUPA was correcting the self audit deficiency cited in the 2005 Summary of Findings. In order for the self audit to be considered complete, it must include all the self audit elements listed in Title 27, Section 15280.

This deficiency will be considered corrected when the CUPA submits its FY 2007/2008 self audit that includes all of the narrative elements to Cal/EPA by September 30, 2008.

CUPA's 2nd Update (11-20-08): The annual self-audit was provided to Farida Rozy of Cal/EPA in October 2008.

Cal/EPA's 2nd Response: Please email the CUPA's FY 2007-2008 narrative self audit to Cal/EPA that was completed October 2008.

CUPA's 3rd Update (2-18-09): 2008 Audit narrative is attached.

Cal/EPA's 3rd Response: Cal/EPA considers this deficiency corrected.

2. **Deficiency:** The CUPA is not forwarding hazardous materials inventory data to emergency response agencies within 15 days of receipt and confirmation. CUPA management stated that inventory data is submitted to emergency response agencies on a quarterly basis.

   Preliminary Corrective Actions: By July 14, 2009, the CUPA will submit hazardous materials inventory data to emergency response agencies within 15 days of receipt and confirmation. CUPA management stated that inventory data is submitted to emergency response agencies on a quarterly basis.

   CUPA's 1st Update (8-22-08): Our Agency has been providing an updated copy of our CAMEO database quarterly, to emergency response agencies, since at least 1999. Our Agency understands this is no longer acceptable to Cal-EPA. Our Agency recognizes that access to the most currently updated information maximizes the efficiency for our emergency response agencies.
   Our Agency is planning on upgrading to a system, which allows instant access to hazardous materials inventory data to emergency response agencies via the Internet.

Cal/EPA's 1st Response: The CUPA is making progress towards correcting this deficiency. Please continue to update Cal/EPA on the correction status of this deficiency.

CUPA's 2nd Update (11-20-08): We have concluded our evaluation and selection process for the new system. We have selected The Public Portal System from Decade Software Company. We are now awaiting a cost estimate for services from Decade.

Cal/EPA's 2nd Response: The CUPA is making progress towards correcting this deficiency. Please continue to update Cal/EPA on the correction status of this deficiency.

CUPA's 3rd Update (2-18-09): We are finalizing our contract with Decade, which will be formalized soon. We have reached an agreement with Decade to deliver the Public Portal System by the end of the fiscal year (6-30-2009).

Cal/EPA's 3rd Response: The CUPA is making progress towards correcting this deficiency. Please continue to update Cal/EPA on the correction status of this deficiency.

CUPA's 4th Update (7-24-09): Decade and we are actively working on refining the Portal. We are scheduled to have beta testers test drive our system next week. We hope to be online in a few months.

Cal/EPA's 4th Response: The CUPA is working to have its Decade Public Portal System operational in a few months. The plan is for emergency response agencies to have immediate access to hazardous materials inventory data through the portal. Please continue to update Cal/EPA on the correction status of this deficiency.

CUPA's 5th Update (1-5-10): We provided Public Portal access to Hazardous Materials Response Team Members (emergency response agencies) in December 2009. They now have on-line access to our up to date hazardous material inventories, emergency contacts and facility maps for all of our regulated facilities.

Cal/EPA's 5th Response: Cal/EPA considers this deficiency corrected.

3. **Deficiency:** The CUPA does not have the following Unified Program (UP) administrative procedures:

    - Public participation procedures

- Procedures for responding to requests for information from government agencies with a legal right to access the information.

- Procedures for forwarding the HMRRP information in accordance with Health and Safety Code sections 25503.5 (d) and 25509.2 (a) (3).

    - The CUPA's current procedures do not specify that HMRRP inventory information should be forwarded to emergency response agencies within 15 days of receipt and confirmation.

- Financial management procedures

- Procedures for the withdrawal or removal of a PA

Preliminary Corrective Actions: By August 14, 2008, the CUPA will complete its administrative procedures.

The CUPA will submit a copy to Cal/EPA with its first progress report.

CUPA's 1st Update (8-22-08): All requested procedures are attached to this report except the amendment to our existing HMRRP procedure to forward HMRRP information in accordance with Health and Safety Code sections 25503.5 (d) and 25509.2 (a) (3). The HMRRP procedure was provided to the Evaluator from Cal-EPA during the evaluation. The existence of this procedure is not recognized on the evaluation report. This procedure is attached as well. Item 2 on the 2008 Evaluation allows our Agency until July 14, 2009 to have a system in place to provide Fire Agencies this information within 15 days of submittal rather than each quarter. This Agency is currently planning to go to a system, which allows immediate on-line access to this information from our database by Fire Agencies.

Cal/EPA's 1st Response: The CUPA currently has HMRRP procedures for forwarding the HMRRP information; however, the procedures are not in accordance with the HSC. This is reflected in the final evaluation report. The problem is that the CUPA's HMRRP procedural language states that the CUPA will "Provide updated Business Plan data via CAMEO to the hazardous materials response team satellite computer users every quarter." The CUPA should modify the language of its HMRRP procedures to definitively state that inventory information will be forwarded to emergency response agencies within 15 days of receipt and confirmation.

The CUPA's procedures for the withdrawal or removal of a PA are almost complete. The procedures should include some statements about the CUPA's submittal of the proposed change (PA withdrawal/removal) in its program to the Secretary for review and approval. Please refer to Title 27, Section 15300 for more details.

On the next progress report or sooner, please submit the CUPA's revised procedures for forwarding the HMRRP information and for the withdrawal or removal of a PA to Cal/EPA.

CUPA's 2nd Update (11-20-08): The CUPA requests Cal/EPA to accept the revision to the HMRRP Plan in 2009 when new system is online. Cal-EPA's acceptance of our solution to Deficiency #2 led us to believe this would be our course of action. Otherwise we would have a current policy that is contrary to current action. The updated procedure for the removal of a PA compliant with CCR Title 27, Section 15300 is attached.

Cal/EPA's 2nd Response: Cal/EPA will accept the revision to the HMRRP procedure in 2009 when the Public Portal System by Decade is online. Please continue to update Cal/EPA on the correction status of the HMRRP procedure. The CUPA's updated procedure for the removal of a PA is acceptable.

CUPA's 3rd Update (2-18-09): Please see #3.

Cal/EPA's 3rd Response: The CUPA has completed all but the procedure for forwarding HMRRP information. Cal/EPA will accept the revised procedure when the CUPA institutes its public portal system by the end of FY 08/09.

CUPA's 4th Update (7-24-09): Please see #3

Cal/EPA's 4th Response: The CUPA is working to have its Decade Public Portal System operational in a few months. The CUPA will develop its administrative procedure for forwarding hazardous materials inventory data to emergency response agencies when its new data management system is in place. The other administrative procedures listed in this deficiency have been corrected. Please continue to update Cal/EPA on the correction status of this deficiency.

CUPA's 5th Update (1-5-10): We provided Public Portal access to Hazardous Materials Response Team Members (emergency response agencies) in December 2009. They now have on-line access to our up to date hazardous material inventories, emergency contacts and facility maps for all of our regulated facilities. Each Team Member has a username and password to access the Public Portal at any time.

Cal/EPA's 5th Response: The CUPA has provided local emergency responders with immediate access to hazardous materials inventory information through the CUPA's new Public Portal. Please submit to Cal/EPA the CUPA's revised procedure for forwarding HMRRP information to emergency responders.

CUPA's 6th Update: Enter Update Here

4. **Deficiency:** The CUPA's Annual Summary Reports for FYs 04/05 through 06/07 contains incomplete or incorrect information. After a discussion with CUPA management, the following errors were discovered:

   - In the Annual Single Fee Summary Report (Report 2), the total amount of single fee waived (for CUPA and PA) and surcharge waived was reported incorrectly. Also, the total number of regulated businesses and UST facilities was reported incorrectly.

   - In the Annual Inspection Summary Report (Report 3), the number of regulated businesses reported for the UST program was incorrect.

   - In the Annual Enforcement Summary Report (Report 4), the number of facilities with violations was reported incorrectly for all UP elements.

   Preliminary Corrective Actions: By August 14, 2008, the CUPA will complete the Annual Summary Reports for FY 06/07 that contains all of the correct information.

   The CUPA will submit a copy to Cal/EPA with its first progress report.

   CUPA's 1st Update (8-22-08): Updated reports are attached. The update to Report 2 consisted of providing the total regulated businesses. The count provided on the original submittal included exempt facilities. The count of UST facilities was correct. There are 114 UST facilities within the County and 28 within the PA for a total of 142.
   .
   Cal/EPA's 1st Response: The FY 06/07 Annual Summary Reports submitted to Cal/EPA along with this progress report were the same "marked up" copies presented to the CUPA during the current evaluation to illustrate the discrepancies. The corrected information has simply been written onto the "marked up" copies.

   The submitted copies are unacceptable. Please use the Annual Summary Report forms provided in the response email to complete the FY 06/07

Annual Summary Reports. Submit the revised Annual Summary Reports to Cal/EPA by October 14, 2008.

CUPA's 2nd Update (11-20-08): The Annual Summary Reports are attached.

Cal/EPA's 2nd Response: Cal/EPA considers this deficiency corrected.

5. **Deficiency:** The CUPA's Inspection and Enforcement (I and E) plan does not include all of the required elements.

    - Coordination of inspection efforts between the CUPA and its participating agencies.

    - Identification of all available enforcement options.

    - Identification of penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute and regulations.

        - The current enforcement policy language suggests that formal enforcement may not be initiated for all Class 1 violations. This policy is in contrast with the state enforcement policy which requires all Class I violations to be addressed through formal enforcement.

        - Also, the CUPA's I and E plan allows any violation, including minor, up to 60 days for correction. The law states that a person who receives a notice to comply detailing a minor violation shall not have more than 30 days from the date of the notice to comply in which to correct any violation cited in the notice to comply.

    - Provisions for multi-media enforcement.

    - A description of how the CUPA minimizes or eliminates duplication, inconsistencies, and lack of coordination within the inspection and enforcement program.

Preliminary Corrective Actions: By November 14, 2008, the CUPA will complete its I and E plan that include all the required elements. In addition, ensure that the I and E plan is complete and meets all of the legal requirements. Please refer to the new I and E plan guidance that can be found on the Cal/EPA web site.

The CUPA will submit a copy to Cal/EPA with its first progress report.

CUPA's 1st Update (8-22-08): This Agency will provide a response by November 14, 2008, as requested.

Cal/EPA's 1st Response: Cal/EPA will review the CUPA's response November 14, 2008.

CUPA's 2nd Update (11-20-08): Our updated Inspection and Enforcement Plan draft is attached. The Draft includes all items requested and required by State law and regulations.

This Agency disagrees with your position on Class 1 violations for the following reasons:

- Initiation of a formal enforcement action is at the discretion of the UPA.
- The UPA is not obligated to enforce the State enforcement policy.
- This Agency cannot find any reference in State law or regulations that requires an administrative enforcement order in response to a Class 1 violation.

If you can provide this Agency with State law or regulations that support your position on Class 1 violations, we will reconsider our position on this matter.

Cal/EPA's 2nd Response: The CUPA's position on formal enforcement is that there is no legal standard compelling the CUPA to implement formal enforcement for serious violations. Cal/EPA, DTSC, and the SWRCB disagree with this position and have previously included citations in this progress report and in the CUPA's 2008 Summary of Findings to back the State's position on formal enforcement. Since interpretation of the law is at issue, Cal/EPA has requested for DTSC management to obtain a legal interpretation of state law regarding the formal enforcement of serious violations and the CUPA's role in abiding by the Memorandum of Agreement mentioned below. Cal/EPA will also seek legal counsel so that a resolution to this problem can be reached.

This deficiency will remain until a legal interpretation on formal enforcement of serious violations is acquired and the CUPA complies with the legal determination.

- **DTSC Response:** DTSC has been authorized to operate the State's hazardous waste control program in lieu of the Federal program since 1992.

  As a part of authorization, a Memorandum of Agreement ("Agreement") was executed between DTSC and Region IX of

EPA. The Agreement in place was entered into pursuant to 40 CFR 271.8 and sets forth policies, responsibilities and procedures for the administration and enforcement of the State of California's RCRA hazardous waste program authorized under section 3006 of RCRA of 1976, as amended.

DTSC's Enforcement Response Policy EO-02-003-PP is an integral part of this Agreement. According to DTSC's Enforcement Response Policy, Class I violations must be addressed through a formal enforcement action.

In addition, HSC, section 25404.6(b) instructs the Cal/EPA Secretary to implement the Unified Program only to the extent it does not endanger RCRA authorization. Adequate enforcement according to the Enforcement Response Policy is required of all RCRA authorized programs including California's. As agents of the State's authorized program, CUPAs are required to follow DTSC's Enforcement Response Policy.

CUPA's 3rd Update (2-18-09): The Agency respectfully maintains it's position stated on October 20, 2008.

Cal/EPA's 3rd Response: Please refer to DTSC's response.

- **DTSC's Response:** This deficiency will remain until a legal interpretation on formal enforcement of serious violations is acquired. DTSC is seeking legal counsel so that a resolution to this issue can be reached.

CUPA's 4th Update (7-24-09): The Agency respectfully maintains it's position stated on October 20, 2008. Please inform us as to the DTSC's legal counsel's official determination on this issue.

Cal/EPA's 4th Response: The CUPA amended its Inspection and Enforcement Plan to include the missing elements. The current enforcement language is acceptable. Cal/EPA considers this deficiency corrected. Please refer to Cal/EPA's 4th response to deficiency #8 for more details on the enforcement policy determination.

6. **Deficiency:** The CUPA is not conducting inspections with a frequency consistent with its I and E plan. Specifically, the CUPA is not meeting its scheduled annual inspection frequency for its business plan, CalARP and hazardous waste generator (HWG) programs. Unforeseen staffing developments have been the cause of the decrease in inspections. The CUPA is meeting the legally mandated inspection frequency for all program elements.

Upon review of the files, the following businesses were found not to have been inspected within the triennial cycle:

- Atascadero Transmission Service was last inspected on May 04, 2004.

- Templeton Steel Fabricators was last inspected on September 27, 2004.

Preliminary Corrective Actions: By December 14, 2008, the CUPA will hire addition staff to assist in meeting its scheduled inspection frequencies.

By February 14, 2010, CUPA will inspect all program element facilities annually.

CUPA's 1st Response (8-22-08): It is the goal of this Agency to complete an annual inspection of all facilities. Pursuant to current regulation, an annual inspection is only required of Underground Storage Tank (UST) facilities. This Agency can commit to completing it's statutory obligation to inspect facilities within the specified time frames for facilities that apply to the Above Ground Storage (AGT) Tank Program, the Cal-ARP Program and the Hazardous Materials Business Plan Program (triennial inspections) and the UST program (annual inspection). Our Agency is scheduled to run a list from our database every September to confirm which facilities are approaching their statutory due date, to ensure the inspection is completed. Our Agency added another inspector and we expect to have 4 able inspectors within a few months.

Cal/EPA's 1st Response: The CUPA's I and E plan states the following:

"It is the policy of the San Luis Obispo Unified Program Agency (CUPA) to conduct one inspection per year of each regulated facility."

The CUPA is required by law to develop and implement its I and E plan. That means that the CUPA is required to follow its scheduled inspection frequency of one inspection per year for each facility it regulates regardless of the state mandated frequency for each program element. The CUPA has the option to adjust its scheduled frequencies in its I and E plan to the state mandate; however, this may also cause the CUPA to adjust its fee structure as well. Cal/EPA suggests using a table in its I and E plan to display the mandated and scheduled inspection frequencies for each program element.

On the next progress report, update Cal/EPA on the CUPA's staffing progress and on its decision about whether or not it will amend its I and E plan to reflect the CUPA's preferred inspection frequencies.

- **DTSC's Response:** While there is not a mandated inspection frequency for the Hazardous Waste Generator Program, an inspection frequency greater than three years is inconsistent with the goal of coordinating inspections with the other programs, i.e. Hazardous Materials Business Plan Program. The facilities cited are all over three years since their last inspection. DTSC commends the CUPA's efforts in updating its database every September and in adding an additional inspector to its staff.

CUPA's 2nd Update (11-20-08): The CUPA now has 4 staff Inspectors and has revised the I and E Plan to address the inspection frequency. The Plan is attached.

Cal/EPA's 2nd Response: The CUPA's I and E plan states the following: "It is the policy of the San Luis Obispo County Certified Unified Program Agency (CUPA) to conduct inspections at the frequency required by law at a minimum with a goal of achieving one annual inspection per year of each regulated facility. " This statement suggests that the CUPA's inspection frequency for all program elements, except the Hazardous Waste Generator program, is 3 years with the goal of inspecting each regulated facility annually. The CUPA may change its scheduled inspection frequencies to the regulatory minimum, but keep in mind that the CUPA should also reevaluate its fee accountability program and make adjustments based on the change in regulatory activity. Also, the CUPA must schedule an inspection frequency for the Hazardous Waste Generator program regardless of the lack of a state mandated frequency.

Along with the next progress report, submit an amended I and E plan to Cal/EPA that contains the CUPA's scheduled inspection frequency for the Hazardous Waste Generator program.

- **DTSC's Response:** DTSC appreciates the CUPA's efforts in adding additional inspectors to its staff to address the inspection frequency.

CUPA's 3rd Update (2-18-09): Updated I and E Policy is attached.

Cal/EPA's 3rd Response: Cal/EPA considers this deficiency corrected.

7. **Deficiency:** The CUPA is unable to consistently document that facilities that have received a notice to comply citing minor violations have returned to compliance within 30 days of notification. Either the business must

submit a Return to Compliance Certification in order to document its compliance or in the absence of certification the CUPA must follow-up with the business to confirm that compliance has been achieved. For example, no Return to Compliance Certifications or follow-up actions could be found in the files for the following facilities documenting that all violations had been corrected:

- 02/23/2007 inspection conducted at Fender's Auto Service at 9090 El Camino Real in Atascadero, CA

- 03/10/2006 inspection conducted at San Luis Tallow Company located at 445 Prado Road in San Luis Obispo CA

- 09/06/2007 inspection conducted at California Polytechnic State in San Luis Obispo, CA.

Preliminary Corrective Actions: The CUPA will ensure that all facilities with minor violations return to compliance by documenting this in the file by either a return to compliance certificate or other follow-up documentation.

By September 1, 2008, please describe what procedural changes will be made by the CUPA to continuously improve return to compliance rates.

CUPA's 1st Update (8-22-08): This Agency has drafted an automated Notice of Violation designed for minor violations generated from our Envision database. The report capabilities will be tested. If the automated report proves to be viable the Agency will conduct a pilot test. For the pilot test, the Agency will select some facilities who have uncorrected minor violations and send this NOV to determine response to the letter.

Cal/EPA's 1st Response: Refer to DTSC's response.

- **DTSC's Response:** DTSC appreciates the CUPA efforts in addressing the deficiency. Please keep DTSC informed of the results of its pilot project.

CUPA's 2nd Update (11-20-08): The CUPA has generated a list of facilities with uncorrected minor violations. The CUPA is sending out a portion of the NOVs this month. The CUPA plans to send out a specified quantity of NOVs each month to address this issue.

Cal/EPA's 2nd Response: Refer to DTSC's response.

- **DTSC's Response:** DTSC appreciates the CUPA's efforts in addressing the deficiency. Please keep DTSC informed of the progress of its pilot project.

CUPA's 3rd Update (2-18-09): The Agency has found the Minor Violation NOV project did not increase efficiency as expected. The amount of time required to draft and review the Minor Violation NOVs by administrative staff was greater than estimated and it was determined that each inspector should produce the draft NOVs. The Agency has now scheduled a monthly NOV issuance day with each inspector to assist in reducing the quantity of facilities that have violations greater than 30 days old.

Cal/EPA's 3rd Response: Refer to DTSC's response. Please email to Cal/EPA the inspection reports and RTC documentation (RTC certification form, reinspection report, etc.) of two facilities cited for minor violations within the last four months that RTC.

- **DTSC's Response:** DTSC appreciates the CUPA's efforts in addressing the deficiency. Please keep DTSC informed on the new minor violation follow-up process.

CUPA's 4th Update (7-24-09): The monthly NOV project has been successful project in ensuring more timely compliance. The Agency has this monthly routine established.

Cal/EPA's 4th Response: Please email to Cal/EPA the inspection reports and RTC documentation (RTC certification form, reinspection report, etc.) of two facilities cited for minor violations within the last four months that RTC.

CUPA's 5th Update (1-5-10): Attached are the requested examples.

Cal/EPA's 5th Response: Cal/EPA considers this deficiency corrected.

8. **Deficiency:** The CUPA failed, in certain instances, to take enforcement in a manner consistent with state law. Examples of specific cases are:

   1) In the latest 04-24-2008 San Luis Obispo Progress Report, the CUPA stated that a worker at El Camino Gas asked the CUPA inspector if it was permissible to recycle his used oil at a neighboring shop. The CUPA inspector notified the business owner that this was not permissible and he must have the used oil picked up by a licensed hazardous waste transporter at the facility. Using an unlicensed hazardous waste transporter is a Class I violation. The CUPA inspector explained that the owner is new to the business and complied with the CUPA inspector's

direction. The CUPA is required to take formal enforcement against all facilities with Class I violations, regardless of whether or not the facility has come back into compliance.

2) During an August 22, 2002 inspection of Pacific Ag Group, the CUPA cited the facility for the following violations:

- failure to operate and maintain the facility to prevent and minimize the release of hazardous waste to the environment,
- failure to make hazardous waste determinations for wastes stored and disposed on site,
- failure to transport and dispose of hazardous wastes to a facility permitted through the State Department of Toxic Substances Control,
- failure to ship hazardous wastes under manifest,
- failure to properly label drums and containers of hazardous wastes,
- failure to maintain containers containing hazardous waste in good condition to minimize release or reaction, and
- failure to store hazardous wastes in closed and sealed containers.

Following the county's investigation, a work plan was prepared, and the buried pesticide containers and immediately surrounding soil were removed by hand excavation and placed in two 55-gallon drums. Additional soil was excavated by backhoe adjacent to and below the location of the containers with approximately 13 cubic yards of soil placed in roll-off bins. Excavated containers and contents were inventoried. The excavated soil and containers were later disposed at a Class I disposal facility.
No administrative enforcement order had been issued after the DA, US EPA, and the AG all declined to take the case.

3) During the December 15, 2005, January 05, 2006, and March 06, 2006 inspections of Water World Resorts Inc., the CUPA cited the facility for the following violations:

- disconnecting a UST monitor,
- failure to notify authorities of a release of hazardous material,
- supervising or performing work on a UST system without ICC certification,
- failure to obtain a permit to modify the UST system,
- working at a hazardous waste site without required training,
- failure to perform a hazardous determination,
- transporting hazardous waste without a license, and
- disposing of hazardous waste to an unauthorized point.

No administrative enforcement order had been issued after the DA declined to take the case.

All Class I violations must be addressed through a formal enforcement action.

Preliminary Corrective Actions: The CUPA will initiate and complete the appropriate formal enforcement for all Class I violations. For cases referred to the DA that are not being pursued, the CUPA will exercise another formal enforcement option.
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By November 14, 2008, the CUPA will add a process in its I and E plan for implementing formal enforcement administratively when other formal enforcement options have been initiated, but not continued to completion.

On the first progress report, submit an action plan to Cal/EPA for how the CUPA will ensure that all inspectors are trained in violation classification and evidence gathering techniques (for building successful enforcement cases).

CUPA's 1st Update (8-22-08): The cited codes do not require CUPAs to initiate or complete formal enforcement for Class 1 or other violations. Stating this as a deficiency is not supported in the cited codes. This Agency will enforce the requirements of the applicable laws and regulations. The Evaluator from Cal-EPA was provided with documentation that the Agency's citations of hazardous waste violations at Water World Resorts Inc were incorrect. No hazardous wastes were detected upon a hazardous waste analytical determination and therefore the cited violations of hazardous waste control law were incorrect. The Agency notified Cal-EPA that the Pacific Ag Group case was formally referred to the District Attorney (DA). The case was referred to the State Attorney General (AG) when the DA did not pursue the case. The AG did not pursue the case.

Cal/EPA's 1st Response: Cal/EPA's internal and management staff have reviewed this deficiency regarding of implementation of formal enforcement on facilities with Class 1 violations. This issue has also been discussed with the Co Chair of the Enforcement Steering Committee. The implementation of formal enforcement for Class 1 violations has been a point of some discussion between CUPAs and the state for some time.

The Unified Program management has determined that there is no specific statutory or regulatory requirement to take formal enforcement on facilities cited for Class 1 violations. With that being said, the law clearly states that the CUPA shall develop and implement an Inspection and Enforcement (I and E) plan that includes the following:

1. the identification of penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute and regulations and
2. a graduated series of enforcement actions that may be taken by the UPAs, based on the severity of the violation.

The CUPA's current I and E plan uses language that allows the CUPA to forego the elevation of enforcement actions on Class 1 violations, the most egregious of violations. Elevating the enforcement actions based on severity of violation means that for less severe violations, informal enforcement actions are taken, but for more severe violations, like Class 1, the enforcement is elevated above informal enforcement. Equal treatment of facilities with minor and Class 1 violations by the use of informal actions cross the board is a direct contradiction to regulation.

Regarding the Pacific Ag formal enforcement referrals, if the enforcement case is not being pursued by the DA, State Attorney General, or other agencies, then the responsibility for enforcement continues to lie with the CUPA. The lack of enforcement action by the other parties does not excuse the CUPA from implementing enforcement actions by other means (i.e. AEO).

On the next progress report, the CUPA will demonstrate how its I and E Policy addresses the regulatory requirement for a graduated series of enforcement based on the severity of the violation.

- **DTSC's Response:** 5/28/2008 and 05/29/08 draft comments provided by the CUPA after the evaluation were inadvertently not incorporated into the progress report. Class I violations are still pending under the UST program for Water World. Title 27 Section 15200 (a)(9) requires identification of penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute or regulation. Upon certification as a CUPA, the CUPA has incorporated DTSC State Enforcement Response Policy EO-02-003-PP. All Class I violations must be addressed through a formal enforcement action. A formal enforcement action is an action that mandates compliance and initiates a civil, criminal, or administrative process that results in an enforceable agreement or order. Enforceable means that the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the failure to comply. Sanctions include fines and penalties as well as other tangible obligations that are imposed upon the regulated community. When a case is declined by either the DA or AG, the case must then be pursued

administratively by the CUPA in order to satisfy Title 27, Section 15200 (a) (9).

CUPA's 2nd Update (11-20-08): The Agency respects the position of Cal/EPA on this matter. This Agency respectfully disagrees with your position on Class 1 violations and your definition of a formal enforcement action. This Agency agrees that compliance with Class 1 violations is mandated. However, initiating a civil, criminal or administrative process is at the discretion of the UPA (H&SC Section 25404.1.1 (a). In the cases cited, the Agency notified the responsible parties of their violations, issued corrective action and gained compliance. The Agency believes it has completed it's obligations in these cases.

With reference to Title 27 Section 15200 (a) (9) it states that the Inspection and Enforcement Plan shall include "a graduated series of enforcement actions that **may** be taken by the UPA's, based on the severity of the violation." Your reference to Title 27 Section 15200 (a) (9) is incorrect. You actually quoted Tile 27 Section 15200 (a) (8). The Agency believes that our Inspection and Enforcement Plan complies with Sections 15200 (a) (8) and (9).

This Agency has no documentation that states "Upon certification as a CUPA, the CUPA has incorporated DTSC State Enforcement Response Policy EO-02-003-PP. " Our letter of acceptance as a CUPA does not reference it and our application as a CUPA does not reference it. In addition, the UPAAG Guidance for Administrative Enforcement Orders and Hearing Procedures dated February 1, 2007 does not reference it. This Agency is concerned that your insistence on enforcement of the DTSC State Enforcement Response Policy E0-020-003-PP is not consistent with State law.

All current inspectors have been trained annually on violation classification since 2007. All inspectors have been trained on sample collection for enforcement cases. Since the Agency has completed this task, the need for an action plan is no longer necessary.

Cal/EPA's 2nd Response: Please refer to Cal/EPA's and DTSC's response to the CUPA's 2nd update in deficiency #5.

This deficiency will remain until a legal interpretation on formal enforcement of serious violations is acquired and the CUPA complies with the legal determination.

CUPA's 3rd Update (2-18-09): The Agency respectfully maintains it's position stated on October 20, 2008.

Cal/EPA's 3rd Response: Please refer to DTSC's response.

- **DTSC's Response:** This deficiency will remain until a legal interpretation on formal enforcement of serious violations is acquired. DTSC is seeking legal counsel so that a resolution to this issue can be reached.

CUPA's 4th Update (7-24-09): The Agency respectfully maintains it's position stated on October 20, 2008. Please inform us as to the DTSC's legal counsel's official determination on this issue.

Cal/EPA's 4th Response: DTSC legal counsel has confirmed that there is no specific statutory or regulatory requirement that compels a UPA to take formal enforcement on facilities cited for Class 1 violations. *See Cal/EPA's 1st response to this deficiency.* The UPA **is** compelled to develop and implement an Inspection and Enforcement Plan that includes:

1. the identification of penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute and regulations and

2. a graduated series of enforcement actions that may be taken by the UPAs, based on the severity of the violation.

Although the Cal/EPA evaluation team did not agree with the CUPA's enforcement decisions involving a few of the observed facility files, the CUPA has a history of regularly implementing the two inspection and enforcement elements listed as part of their draft enforcement policy 2-2009. Therefore, Cal/EPA considers this deficiency annulled.

Note: While title 27 offers UPAs flexibility to choose the types of graduated enforcement actions they will implement, it does not allow UPAs to abstain from elevating enforcement actions when violations are severe.

9. **Deficiency:** The CUPA did not provide a summary of violations/notice to comply on 02/23/2007 during the conclusion of the inspection of Fender's Auto Service, but the CUPA instead mailed the inspection report to the facility.

   Preliminary Corrective Actions: Please instruct staff by August 1, 2008, that a Summary of Violations must always be left on site at the conclusion of an inspection.

   CUPA's 1st Update (8-22-08): The Agency has implemented the use of tablet computers and portable printers since 2006. It is the Agency's

intention to always provide a report to a representative on site as required. In this case the battery to inspector's printer was deficient and a printed report could not be provided at the time of inspection.

Cal/EPA's 1st Response: Cal/EPA considers this deficiency corrected.

- **DTSC's Response:** DTSC accepts the CUPA's response; in addition, a handwritten report will suffice when a tablet/printer is inoperable out in the field.

10. **Deficiency:** The CUPA renewed an underground storage tank (UST) permit when the UST had been inspected by the local agency within the previous 12 months and the inspection verified that the UST did not comply with all applicable provisions and existing permit conditions. Specifically one facility, Port San Luis Harbor District, was red tagged on June 26, 2007 for a significant violation and was later closed with fuel removed from the tanks according to the CUPA. They were issued a permit renewal on January 1, 2008. Pismo Food Store was non-compliant for a minor violation during their 2007 inspection yet was issued a renewal permit on January 1, 2008. This facility was re-inspected in March 2008 as having returned to compliance.

    Preliminary Corrective Actions: By August 14, 2008, the CUPA will submit an action plan to Cal/EPA on how it will ensure that permits will not be issued to facilities out of compliance with regulations and permit conditions. The plan should include the follow-up inspection process used to verify that all violations have been corrected before the permit is renewed.

    CUPA's 1st Update (8-22-08): The Agency has addressed this as a training issue with the Inspector for these facilities. The two new Inspectors were notified not to issue permits under these conditions.

    Cal/EPA's 1st Response: Refer to SWRCB's response.

    - **SWRCB's response:** Although the CUPA only considers this a training issue, the SWRCB considers this a policy issue as well. The CUPA has no written policy in a training manual or its I and E plan that states that permits will not be issued to facilities found to be noncompliant during inspections. The policy should include a follow-up process to bring noncompliant facilities back into compliance before permits are reissued. The CUPA should add a permit issuance/renewal policy to its training manual or I and E plan so that newly hired inspectors will receive this information as part of their training program. On the next progress report, submit an action plan that includes the process used to verify

that all violations at a facility have been corrected before a permit is issued or renewed.

CUPA's 2nd Update (11-20-08): The CUPA's Plan is as follows: generate a report from the database in November to identify which UST facilities have outstanding violations; then a NOV will be issued to initiate correction; then permits will not be issued to facilities out of compliance; then appropriate enforcement will be initiated such as issuance of Red Tags for applicable violations.

Cal/EPA's 2nd Response: Cal/EPA and SWRCB consider this deficiency corrected.

11. **Deficiency:** The CUPA's permit does not include all the required UST specific elements. It is missing monitoring requirements of both tanks and piping or an attached approved monitoring plan (new Form D). The permit needs to specify if the tank annular space and the piping are VPH or has an Annular sensor, not just ATG. Also the permit should specify that the dispensers and sumps will have sensors.

    Preliminary Corrective Actions: By January 1, 2009, the CUPA will issue permits that either include all of the monitoring requirements or includes an approved Monitoring Plan (new Form D).

    CUPA's 1st Update (8-22-08): The Agency has permits with monitoring requirements on our permits already that comply with the cited code sections. A permit was reviewed with Cal-EPA. The permit reviewed did not have some of data populated. The Agency agreed to correct this data entry on the identified permit. The Agency has included a copy of a current UST permit. The cited sections do not have a requirement to attach an additional monitoring plan.

    Cal/EPA's 1st Response: Refer to SWRCB's response. Please contact the SWRCB if you require a permit example.

    - **SWRCB's response:** The CUPA's permit sample included with the update does include some monitoring conditions, but does not include all the required elements of monitoring at an UST facility. For pressurized piping in addition to the CIM (continuous interstitial monitoring) shown on the CUPA permit, it should also be indicated whether there is a mechanical or electrical line leak detector and whether there will be the annual 0.1 gph piping test or the CIM shuts down the pump or stops flow at the dispenser when a leak is detected in the UDC and CIM for all piping outside the UDC is fail safe and shuts down the pump when a leak is

detected. UDC monitoring should also be specified and what happens when a leak is detected.

CUPA's 2nd Update (11-20-08): The permit sent previously to Cal-EPA has monitoring conditions (1-11 on the permit) we consider compliant with the cites code sections, however we do believe the additional conditions (PLD monitoring, fail safe, positive shut down, UDC pump shutdown etc.) Cal-EPA has identified should be formally stated on the permit. The Agency will be modifying its automated permit to add these conditions. The Agency will provide a copy of this amended permit with the next progress report.

Cal/EPA's 2nd Response: Please refer to SWRCB's response.

- **SWRCB's response**: The SWRCB appreciates the CUPA's response and will consider this deficiency corrected when the amended permit is submitted and reviewed for compliance. In addition the following is provided for your information. CCR Title 23 Chapter 16, Appendix VI: requires Annual Monitoring Certifications to be accompanied by a Site plan which clearly identify locations of the following equipment, if installed: monitoring system control panels; sensors monitoring tank annular spaces, sumps, dispenser pans, spill containers, or other secondary containment areas; mechanical or electronic line leak detectors; and in-tank liquid level probes (if used for leak detection).

CUPA's 3rd Update (2-18-09): The UST operating permit with amended permit conditions is attached.

Cal/EPA's 3rd Response: Cal/EPA and the SWRCB consider this deficiency corrected. Please refer to SWRCB's response.

- **SWRCB's response**: The SWRCB appreciates the CUPA's response and submission of a sample Permit. The new permit template has the minimum detail to meet the standards as intended and contained in Title 23 code. The SWRCB considers this deficiency corrected.

12. **Deficiency:** The CUPA's UST facility files reviewed did not contain monitoring or response plans or they were not current.

    The facility files reviewed were Port San Luis Harbor District, Pismo Food Store, and Nipomo Market Place.

Preliminary Corrective Actions: The CUPA will request monitoring and response plans to be submitted during the annual inspections from the UST owner/operators as necessary.

By May 15, 2009 all UST facility files will contain approved monitoring and response plans.

CUPA's 1st Update (8-22-08): Agency inspectors review these plans during inspection and typically request a copy of these plans, as it is an item on the Agency inspection checklist. These were marked as compliant by the inspector on the inspection report but were not in the file. The cited code sections do not require an Agency to store these plans once compliance was verified.

Cal/EPA's 1st Response: Refer to SWRCB's response.

- **SWRCB's response:** CCR, Title 23 Section 2632 (d) requires that owners and operators do the following as copied from the code: "A written procedure for monitoring, submitted on the "Underground Storage Tank Monitoring Plan" in Title 27, Division 3, Subdivision 1, Chapter 6", the CUPA does not meet the requirement of having monitoring plans in their files pursuant to the above and Section 2711 (a) which requires plans to be submitted with permit applications. The CUPA should be aware of the requirement to have approved monitoring plans in their files without the SWRCB having to tell them so by citing the specific code section. CCR, Title 23 Section 2632 (b) requires approved monitoring plans of all owners and operators. Therefore, although the owner/operator may have an approved monitoring plan on site, if there is no monitoring plan in the UST file, approved or not, the CUPA is not complying with the law. The CUPA will meet the corrective actions listed above.

CUPA's 2nd Update (11-20-08): The Agency has reviewed the original (within the Evaluation) and currently cited code sections by Cal-EPA. The Agency has complied with these code sections. The Agency has reviewed and approved the required monitoring plans in the cited cases but did not have a copy of it for the particular site referenced. The Agency has been diligent in requiring monitoring plans where absent while conducting the annual inspection. As stated previously the Agency typically requests a copy of these plans. The cited codes do not require an Agency to store this document, even though we do recognize the utility of this. The Agency proposes to ensure the plan's retention by obtaining an approved copy for our files (when plans are missing) from the UST operator or UST owner during the 2009 annual inspection. This will allow the Agency to complete this in an efficient manner.

Cal/EPA's 2nd Response: Cal/EPA and the SWRCB consider this deficiency corrected. Please refer to SWRCB's response.

- **SWRCB's response:** The SWRCB appreciates the CUPA's plan to ensure a copy of the approved monitoring plan is retained in the facility file and will efficiently collect them if necessary during 2009 inspections. The SWRCB considers this deficiency corrected. The SWRCB wants to emphasize the requirement for written monitoring procedures (which includes all monitoring items in the data dictionary put into effect by Title 27 regulations adopted January 17, 2008). With the following citation: CCR Title 23 Section 2632 (b) says "Owners or operators of underground storage tanks subject to this section shall implement a monitoring program approved by the local agency and specified in the underground storage tank operating permit. The program shall include interstitial space monitoring as described in subsection (c) and shall include the items listed in subsection (d)" (emphasis added). As cited above Section 2632 (d) requires a written procedure for monitoring to be submitted.