

POLLUTERS: TO FINE OR NOT TO FINE



SUMMARY

The Hazardous Materials Section of the San Luis Obispo County Environmental Health Services Certified Unified Program Agency is empowered by the California Environmental Protection Agency to levy fines for violations of county environmental regulations. The Grand Jury received a complaint alleging that the fines collected are insufficient to assure compliance with the regulations. The fines originally assessed are included in an Administrative Enforcement Order and are generally dictated by a state formula. However, a final decision to impose, reduce or eliminate environmental fines lies in the hands of the Director of County Environmental Health Services.

Businesses and regulated agencies who readily comply with environmental codes, and those who do not comply, should be dealt with by the county's program in a firm and fair manner, consistent with the state regulations. Fines plus permit fees should be sufficient to support the program without drawing money from the county's general fund.

METHOD

The Grand Jury conducted interviews with both present and former officials from the County Environmental Health Services Certified Unified Program Agency (SLO CUPA). In addition, documents reviewed and used in this report include:

- SLO CUPA AEOs for 2007 and 2008
- SLO CUPA Inspection and Enforcement Policy
- Select 2003, 2005 and 2006 SLO CUPA files
- County Health Agency memoranda
- Evaluations of SLO CUPA by Cal/EPA, the California Department of Toxic Substances (DTSC) and State Water Resource Control Board (SWRCB, Cal/EPA, DTSC and SWRCB Deficiency Progress Report to CUPA

NARRATIVE

State Oversight

It is vital to the health and safety of county residents that potential polluters comply with environmental regulations, and know that county government will do its best to ensure compliance. To this end, the California Environmental Protection Agency is charged with developing, implementing and enforcing the state's environmental protection laws that ensure clean air, clean water, clean soil, safe pesticides and waste recycling and reduction. The Cal/EPA website states that the California Department of Toxic Substances Control is authorized to operate the State's hazardous waste control program in lieu of the federal program since 1992. As agents of the state's authorized program, local certified unified programs (CUPAs) are expected to follow the Department of Toxic Substance Control's Enforcement Response Policy.

CUPA Enforcement

The San Luis Obispo County Certified Unified Program Agency (SLO CUPA) conducts yearly inspections of regulated entities and responds to hazardous waste spills to check for violations.

The hazardous materials unit of San Luis Obispo County Environmental Health Services employs four hazardous material inspectors, a supervisor and a director to oversee the program.

Inspectors have options in their code enforcement arsenal to bring businesses that violate environmental regulations into compliance. They include:

- Informal enforcement procedures
- Formal enforcement procedures
- Civil or criminal action
- Permit revocation
- Facility closure.

The issuance of a Notice of Violation is an informal enforcement method used to gain compliance before formal hearings or civil or criminal actions are considered. A formal Administrative Enforcement Order (AEO) is reserved for serious violations.

Class I (Serious) Violations

Environmental fines imposed against businesses who commit the most serious pollution violations, known as Class 1 violations (see Appendix A) are calculated according to a state-mandated formula. However, according to an official of County Environmental Health Services, the county administrator of the local CUPA program is empowered to reduce or eliminate the fine at his own discretion. This regulatory approach has, in years past, resulted in originally assessed fines in the millions of dollars reduced to a few thousand dollars. In four of the five years from 2003 through 2007 the total originally assessed fines for the year ranged from \$13.5 million for the total of five serious enforcement cases in 2003 to \$38.3 million for ten serious enforcement cases in 2005. The county ultimately collected \$100,000 in all of 2003's five cases and \$120,000 in 2005's ten cases.

In individual cases in those years, some of the originally imposed amounts did not seem to take into consideration the ability to pay, although that factor is listed in regulations as one of the criteria for fines under a Class 1 Administrative Enforcement Order (Appendix B). For example, in 2006 a corner store was originally assessed a \$13.7 million fine, later reduced to \$5,000.

Sometimes the reduction was less dramatic. In 2007 a food mart was originally assessed a \$1.9 million fine ultimately reduced to \$156,000 in a settlement agreement.

In 2008, the SLO CUPA enforcement division experienced staff changes and enforcement actions declined significantly. Three 2008 cases resulted in a total of \$67,662 originally assessed fines and \$41,922 in fines collected.

The Grand Jury is not sufficiently educated in this regulatory effort to determine the level of fines required to obtain compliance with regulations regarding potential polluters. Some violations are no doubt the result of one-time accidents. Others, like leaking fuel tanks, may stem from long-standing conditions recently discovered. Some instances may result in an immediate threat to the health and safety of employees or the general public. If it is the discretion of the director of the local CUPA program to make this determination, it seems appropriate that the CUPA should assess and collect large fines in the case of willful or frequent violations or untimely delays in cleanup.

On the other hand, when violators take timely action to eliminate and clean up pollution, a minimal fine may be in order.

These are judgments that are at the discretion of a local CUPA official. The policy has been to assess the minimum penalty necessary to assure compliance and to protect the public health. Since the 2007-2008 staffing changes, the number of fines levied and the amounts collected have substantially decreased.

CAL/EPA Evaluation of SLO CUPA

Cal/EPA recently criticized SLO CUPA's actions in the case of Class 1 violations. In a June 26, 2008 "*Evaluation Summary of Findings*" document, Cal/EPA reported that the local "CUPA's Inspection and Enforcement plan does not include all of the required elements. The Cal/EPA standards mandate penalties and enforcement actions that are consistent and predictable for similar violations and no less stringent than state statute and regulations.

The agency concluded that current *SLO CUPA* policy fails to comply with state regulations that require all Class I violations to be formally enforced, since it suggests that enforcement may not be initiated for all such violations.

State Regulatory Policy

State Department of Toxic Substances Control policies state that Class 1 violations must be addressed through an AEO--a formal enforcement action. Class 1 violations include threats to human health, safety or the environment. Under current *SLO CUPA* policy, not all Class 1 violations are formally addressed. A local CUPA official reiterated that the policy and practice of the department is to assess the minimum penalty necessary to gain compliance and protect the public health environment.

Covering the County's Cost of Enforcement

Final penalties collected in the years 2003 through 2007 --- which ranged from \$100,000 to \$649,660 -- built up a substantial reserve of money that the local CUPA program draws down on each year to help pay the enforcement program. Present enforcement policies which are likely to result in total fines on the order of the \$41,922 collected in 2008 mean that the reserve of carryover fines may soon be depleted. Permit fees would then need to be increased to avoid funding the program out of county general funds. However, increasing permit fees means placing the burden of enforcement costs equally on those who pollute and those who do not, whereas increasing fines, puts the burden primarily on the polluters.

CONCLUSION

State enforcement policy requires all Class 1 CUPA violations be addressed through formal (AEO) enforcement procedures. In San Luis Obispo County, not all Class 1 environmental violators are being issued a formal AEO enforcement order. Nor are the original fines often as large as the amount suggested by state regulatory formulas. Even when an AEO is issued and violators fined, they may have that fine reduced to a minimal amount or totally eliminated by the local CUPA management. The Grand Jury is not in a position to judge the appropriateness of a fine levied in any individual instance. The local CUPA's policy of focusing on clean-up and

ultimate compliance rather than on fines may be the reason for a dramatic drop in the number of serious Class 1 cases. The total of fines collected is also declining. As a result, a local CUPA official has said that under current policies the cost of enforcement could soon use up the reserve of funds from the larger fines collected in prior years.

FINDINGS

1. All Class 1 violations are not treated the same by a local CUPA official because some violators are administered a formal AEO, while others are cited with an informal NOV.
2. The CUPA director does not administer the process for all Class 1 pollution violations consistent with Cal/EPA and the state Department of Toxic Substance Control policies.
3. The result of current enforcement policies suggests the local CUPA program may soon need additional support from the county general fund to continue its enforcement efforts at the current level.

RECOMMENDATIONS

1. To be fair and ensure compliance with health and safety codes, local CUPA officials should address all Class 1 pollution violations through formal enforcement procedures consistent with Cal/EPA and DTSC policies.
2. The County Board of Supervisors should monitor the local CUPA program on an annual basis to assure the board that fines and permit fees are assessed at a level sufficient to assure that county general funds will not be required to sustain the program.
3. If total funds being collected are insufficient to assure that the program is self-supporting, the Board of Supervisors should consider convening a task force to study the appropriate mix of fines and permit fees to assure compliance with hazardous material health and safety regulations.

REQUIRED RESPONSES

Responses to all Findings and Recommendations are required from:

- San Luis Obispo County Health Agency
- San Luis Obispo Board of Supervisors

The responses from the San Luis Obispo County Health Agency shall be submitted to the Presiding Judge at the San Luis Obispo Superior court by August 20, 2009. Please provide a copy of all responses to the Grand Jury as well.

The response from the San Luis County Board of Supervisors shall be submitted to the Presiding Judge at the San Luis Obispo Superior court by September 19, 2009. Please provide a copy of all responses to the Grand Jury as well.

The mailing addresses for delivery are:

Presiding Judge	Grand Jury
Presiding Judge Martin Tangeman Superior Court of California 1035 Palm, Room 385 San Luis Obispo, CA 93408	San Luis Obispo County Grand Jury P.O. Box 4910 San Luis Obispo, CA 93403

APPENDIX A: CLASS I VIOLATION DEFINITION

Health and Safety Code section 25110.8.5 defines in part “Class 1 violation” as **follows:**

(a) (1) ...a significant threat to human health or safety or the environment because of one or more of the following:

- (A) The volume of the waste.
- (B) The relative hazardousness of the waste.
- (C) The proximity of the population at risk.

APPENDIX B: AEO PENALTY/AMOUNT OF FINE

Health and Safety Code Section 24504.1.1(b) directs the local CUPA to consider the following conditions when setting an AEO penalty:

- Nature, circumstances, extent and gravity of the violation,
- Violator’s past and present efforts to prevent or clean up conditions posing a threat to the public health, safety or the environment,
- Violator’s ability to pay,
- The deterrent effect the penalty has on both the violator and the regulated community.