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May 18, 2022

VIA U.S. MAIL

**Re: Department of Toxic Substances Control (DTSC) New Regulatory
Guidance Document for California Shooting Ranges**

Dear Range Owner/Operator:

As this law firm has often repeated in the past, California shooting ranges face a difficult challenge from the Department of Toxic Substances Control (DTSC) regarding lead reclamation projects. We have consistently advised ranges to be knowledgeable of the various environmental, land use and other laws that can harm ranges. And if you are a shooting range client of our firm, you no doubt are aware of the lead reclamation issue with the DTSC.

We believe that legal information is extremely important for every range to stay ahead of the curve. That is especially the case when the information is great news for shooting ranges. To that end, in an abrupt change of policy, the DTSC recently revised its position on allowing shooting ranges to return residual soil taken from backstops and shot fall zones, back to the origin from where they came after lead reclamation projects.

NEW DTSC GUIDELINES ON SHOOTING RANGE REGULATIONS

After over seven years of legal pressure, lobbying, and negotiations by Michel and Associates, DTSC finally adopted EPA's Guidance Document (*U.S. EPA's Best Management Practices for Lead at Outdoor Shooting Ranges*),¹ which allows lead impacted soil to be returned to the range after lead reclamation.² This is an enormous victory for California shooting ranges.

As we have previously informed ranges, DTSC had initially planned instead to publish an internal guidance document (i.e., Facts Sheet) outlining all the California regulations that apply to the operation of a shooting range. And in meetings with DTSC personnel on the planned Facts Sheet, DTSC confirmed that it would not adopt the EPA Guidance Document recommendation

¹ See EPA Best Management Practices for Lead at Outdoor Shooting Ranges
https://www.epa.gov/sites/default/files/documents/epa_bmp.pdf

² See DTSC Managing Hazardous Waste webpage at <https://dtsc.ca.gov/shooting-range-maintenance-guidance/>

as it applies to returning residual soil to the range after lead reclamation. We informed DTSC of the unintended consequences of its decision regarding the regulations that require ranges to dispose of residual soil exceeding hazardous waste threshold criteria levels for lead (1,000 ppm) after a lead reclamation project.

DTSC, however, was unpersuaded and maintained its position stating that it could not follow EPA's Guidance Document because of federal pre-emption law, which does not allow California to enforce hazardous waste laws in a less stringent manner than federal law. DTSC also cited California law regarding the scrap metal exemption for reclamation, which requires any contaminated material exceeding the hazardous waste threshold criteria, including soil, to be disposed at a hazardous waste facility after reclamation of recyclable metals is completed.

According to DTSC, it was legally bound by both federal and state laws. The basis of DTSC's legal conflict stems from the fact that it is the ultimate regulatory authority for environmental regulations enforcement at shooting ranges. The Resource Conservation and Recovery Act (RCRA) is federal law for managing and disposing hazardous waste, and California is a RCRA certified state. In other words, the DTSC takes the place of the United States Environmental Protection Agency (EPA) as the lead agency in California for enforcing hazardous waste laws.

The real problem in California regarding lead reclamation at ranges is that DTSC did not completely follow the EPA Guidance Document, ostensibly as it applies to the Military Munitions Rule (MMR), which is codified under RCRA. The MMR allows military ranges to return residual soil to the location from where it came after reclamation of spent lead ammunition, and EPA's Guidance Document recommends that the MMR "should" also apply to non-military ranges.

DTSC, however, claimed that the MMR cannot apply to non-military ranges, because the EPA Guidance Document is merely guidance and is not legally a binding federal regulation under RCRA. Meaning, unlike the MMR for military ranges, it is not codified under RCRA as it applies to non-military ranges. Accordingly, DTSC claims that California, as a RCRA certified state, is precluded from enforcing RCRA regulations in a less stringent manner under federal pre-emption.

Additionally, under California's scrap metal recycling exemption regulations, it states that once lead impacted soil is lifted (literally) to separate spent lead ammunition from the soil, the facility has technically generated the residual soil as a waste. Indeed, the reclaimed lead can be removed to recycle it, but the remaining lead impacted soil requires sampling to determine whether it is hazardous waste. If hazardous, the soil cannot be replaced to where it came, and it requires proper disposal at a hazardous waste facility. Accordingly, California's law also contradicts EPA's Guidance Document regarding the MMR as applied to non-military ranges.

If DTSC were to enforce the law, it would legally prevent the typical lead reclamation project used at all shooting ranges and it would discourage most ranges from recycling spent lead ammunition. For example, an average size shooting range in California with a fixed-target range (e.g., rifle and pistol), the soil disposal costs could easily exceed \$100,000 for just the transportation and disposal fees alone. And if a range did not follow the regulations, DTSC could implement enforcement proceedings against the reclaimer, the range operator and the property

owner who are all subject to regulatory violations, which could include illegal disposal of hazardous waste. This is a Class I Violation in California that carries heavy fines, penalties, and corrective action measures.

The unintended consequence from DTSC's previous ill-advised position would have been immediately apparent to all range operators. Most shooting ranges would stop lead reclamation projects at their ranges. However, this response would also be prohibited under the federal and state regulatory scheme. Also, part of the guidance in the very same EPA Guidance Document, which DTSC does agree on, the spent lead ammunition on the range is exempt from other federal and state laws that would require it to be cleaned-up, if it is properly contained and managed on the range. The management portion of this exemption requires the reclamation of the lead on a justifiably regular basis. If not regularly reclaimed, at some point in time the spent lead ammunition in the backstops and shot fall zones would become a "discarded" and "abandoned" waste and, thus, as a hazardous waste would require a complete clean-up of the lead impacted range.

This is the double-edged sword DTSC was willing to wield under its previous interpretation of the regulations. A range would have had to either reclaim its lead and dispose of the residual soil as hazardous waste or be susceptible to enforcement actions by the DTSC for discarding and abandoning hazardous waste, which carries the same illegal disposal of hazardous waste Class I Violations.

As a result of DTSC's contradiction of the EPA Guidance Document on the MMR, Michel and Associates initially filed a legal petition to change the regulations, but DTSC denied it. Then we twice introduced legislation with NRA and CRPA to change the law, however, both times it was shot down in committee for political reasons. Negotiations continued with DTSC in an ongoing attempt to resolve the issue, but every potential work around on the regulations produced additional regulatory and procedural red tape and costs that would be equally prohibitive for shooting ranges.

Not until the recent shooting range enforcement push by the Certified Unified Program Agencies (known as the CUPA, and typically the county health department, hazardous materials division) did DTSC's unintended consequences finally become apparent. Recently, a law enforcement agency sought to perform a lead reclamation project at a range it maintained on a military base, and DTSC personnel informed the agency that the residual soil would have to be properly disposed if it exceeded hazardous waste threshold criteria. It is not hard to imagine, this was not well received.

Again, Michel and Associates engaged DTSC personnel with the issue and finally DTSC relented and published the above referenced guidance materials on its website. Within the new DTSC guidelines the penultimate bullet point states: "Once shooting range maintenance activities are complete, the backstop material or material used in collection bins, if placed back on the range, is exempted from hazardous waste management requirements." In other words, DTSC adopted the EPA Guidance Document regarding the MMR.

This is a tremendous result for shooting ranges throughout the state as DTSC's previous policy position would have forced many shooting ranges out of business because they could not afford

to dispose of their residual soil as hazardous waste after lead reclamation. And ranges could not afford to not perform lead reclamation because of safety concerns and federal and state laws requiring it. Accordingly, Michel and Associates' determination, perseverance and diligence prevailed for all California shooting ranges.³

RANGES NEED TO KNOW THE REGULATORY AGENCIES AND THEIR OVERSIGHT OF RANGES

Despite this recent win for California shooting ranges regarding DTSC's adoption of the EPA guidelines involving residual soil after lead reclamation projects, ranges still need to be aware of who the regulatory agencies are and the regulations they enforce. Currently, the most pressing challenge for ranges still comes from the state and local environmental regulatory agencies. These agencies often have zealous bureaucrats who are doing the dirty work for anti-gun and environmental groups or unfriendly neighbors (NIMBYS).

The best example of the shooting range regulatory enforcement scheme is illustrated by the recent coordination of efforts between state and local agencies, including the DTSC, the Regional Water Quality Control Board (RWQCB) and the Certified, Unified Program Agency (CUPA). These regulatory agencies, singularly or collectively, have been actively enforcing increasingly restrictive laws against both outdoor and indoor ranges. The enforcement branches for these agencies have been aggressively confronting ranges with inspections and enforcement actions. The increased scrutiny by these regulatory agencies should be a real concern for every California range.

The following is a summary of the agencies and their role in enforcing regulations against ranges:

The Department of Toxic Substances Control (DTSC)

As discussed above, the ultimate authority for environmental concerns at shooting ranges is the DTSC. As the lead agency, the DTSC provides the CUPA's guidance on the regulations, and facilitates the CUPA's stepped up range inspection and enforcement actions.

The Certified, Unified Program Agency (CUPA)

Regulatory scrutiny of ranges increasingly starts with the local arm of the regulatory enforcement matrix. The CUPA's are the individual county Health Departments, typically under the Hazardous Materials or Environmental Division. Local CUPA's up and down the state have been coordinating their efforts state-wide to emphasize regulatory enforcement against shooting ranges.

Recently, increased regulatory inspections, along with corresponding notices of violations are being issued, and have occurred in several counties, including San Diego, Orange, Santa Clara, Sacramento, San Joaquin, Solano, Stanislaus, and Redding to name a few.

³ For any questions regarding this matter, you can contact helpdesk@michellawyers.com at Michel and Associates, P.C.

Most CUPA inspections are surprise visits where inspectors show up and ask to view the range. These no-notice visits typically result in the issuance of Notices of Violations (NOV) that carry a demand for corrective action, along with potentially heavy fines and penalties.

So far, the inspections have overwhelmingly involved indoor ranges concerning human health risks. Primarily, improper lead management and disposal are the number one concern for the CUPA's and the justification for the inspection.

The Regional Water Quality Control Boards (RWQCB)

The RWQCB also has jurisdiction over shooting ranges. Wherein the DTSC deals with land-side issues, the RWQCB deals with water quality issues. One of the RWQCBs' primary responsibilities is regulating storm-water runoff.

Since California is a certified Clean Water Act (CWA) state, it takes on the EPA's responsibilities for dealing with the CWA enforcement. In California, the State Water Board has an Industrial General Permit (IGP) program that requires certain potentially polluting industries, pursuant to a SIC Code (specifying the specific industries), to obtain a permit and comply with the IGP regulations for storm-water discharge. The IGP is enforced by the various local RWQCBs in the state.

Shooting ranges are not listed under a SIC Code and, thus, are not required to obtain a permit and comply with the regulations. But RWQCB Region 5, which stretches from south of Bakersfield to north of Redding, has begun inspecting ranges to evaluate stormwater and water quality issues. This program is run out of the RWQCB Redding office, wherein it has identified sixty-five (65) ranges within the region that require inspections and monitoring.

The RWQCB pilot program is evaluating shooting ranges to determine whether or not they are a threat to water quality due to potential lead-contaminated stormwater migrating off the shooting range (i.e., being transported off the range in storm-water runoff)

Storm-water discharge management at California shooting ranges is challenging, but achievable. As many California ranges are located in ravines and canyons, and with the rains tending to come in deluges, bare soil on backstops, range floors and shot fall zones are places where stormwater may cause problems during storm events. But stormwater can be contained, and runoff minimized or eliminated, if proper Best Management Practices (BMP) are implemented.

So be advised, shooting ranges are facing increasing regulatory oversight by the CUPA's, DTSC and RWQCB. And, complying with the labyrinthine and ever-changing federal, state, and local laws and regulations that govern range operations is a real challenge. However, ranges that do not take on this responsibility make their operations vulnerable, and they risk potential legal actions, regulatory fines/penalties and, unfortunately, closure.

LEGAL SERVICES AND REGULATORY COMPLIANCE ADVICE

MAPC has represented and assisted numerous shooting ranges throughout the country for more than two decades. We also represent major firearms industry organizations, manufacturers,

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retailers, FFLs, and individuals in a wide variety of firearm, environmental and land use matters, and we provide both environmental, land use and firearms-related regulatory compliance advice.

Environmental, noise (nuisance), zoning (land use and permitting), and range design (safety) complaints are the claims of choice that are most frequently used by the anti-gun forces seeking to close ranges. Encroaching neighbors (NIMBYS) who do not like shooting ranges near their property (even though the ranges were typically there long before the neighborhood) often use aggressive methods to try and shut ranges down. The most important issue for a range to address in preparation for an inevitable anti-gun offensive is environmental compliance.

If you face noise, zoning, permitting, environmental or other legal issues, our firm is uniquely qualified to assist your range. We are the only law firm in the country with a team of lawyers possessing extensive experience in firearms, land use, environmental, corporate governance, employment, and insurance law, which are all inherently involved and interconnected in operating a shooting range.

We welcome the opportunity to assist you in legal matters that may arise and look forward to discussing any questions or concerns you may have regarding your range. Please do not hesitate to contact us by phone or e-mail us at helpdesk@michellawyers.com.

We also have a variety of free reference materials available, including a range operations protection survey that will help you determine if you need to implement specific measures to maximize the protection of your range, its board of directors, officers and management. We are available to assist you in keeping your range ahead of the curve so that it remains safe, operational, and—most importantly—open.

Our mission is to keep shooting ranges open and operating for generations to come!

Sincerely,
Michel & Associates, P.C.



W. Lee Smith

WLS/cc