
Independent Review Panel

DEPARTMENT OF TOXIC SUBSTANCES CONTROL



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DTSC Independent Review Panel Second Report to the Governor and the Legislature Pursuant to Health and Safety Code Section 57014(f)

April 27, 2016

The Department of Toxic Substances Control (DTSC) Independent Review Panel (IRP) is submitting this report in compliance with Section 57014(f) of the Health & Safety Code, which requires the Panel to report to the governor and the Legislature 90 days after it was appointed and every 90 days thereafter on the department's progress in reducing permitting and enforcement backlogs, improving public outreach, and improving fiscal management. The Panel submitted its first report on January 28, 2016. This second report is due on April 27, 2016.

The first report, entitled Initial Report to the Governor and the Legislature Pursuant to Health and Safety Code Section 57014(f), addressed five DTSC topics: budget, permitting, enforcement, public outreach, and fiscal management. After providing some background information, the report made recommendations to the governor and Legislature, recommendations to DTSC, and information requests to the DTSC for each topic.

Initial Recommendations on Site Mitigation

Since January 28, 2016, the IRP has developed initial recommendations on site mitigation. As with the January 28, 2016 report topics, the site mitigation initial recommendations consist of a brief discussion of DTSC's Site Mitigation Program, recommendations to the governor and Legislature, recommendations to the DTSC, and information requests of the DTSC. All are included in this report.

Work Plan

The IRP has drafted a Work Plan covering the remainder of 2016 and all of 2017 until its January 1, 2018 sunset date as stipulated in Health & Safety Code Section 57014(i). The Work Plan devotes two or three months to intensive study and discussion of each of the following six topics: permitting, enforcement, public outreach, fiscal management, site mitigation, and source reduction/consumer products. The Work Plan calls for the Panel to make recommendations with performance goals and metrics to evaluate the department's performance on each topic, with each of six, 90-day reports under Health & Safety Code Section 57014(f) becoming the focus of one topic, beginning with this report, which focuses on permitting. Following up on this work, and during all of 2017, the Work Plan calls for the Panel to use these performance metrics to evaluate and publicly report on the department's progress in improving department backlogs and other needs.

In the Work Plan, the IRP selected permitting as the first topic to receive review. The Panel devoted the majority of its March 9, 2016 and April 7, 2016 meetings to permitting. It also asked DTSC to provide the IRP with permitting information in recent weeks and to make a presentation on the subject at the March 2016 meeting. This report, then,

includes a discussion of permitting as well as recommendations, information requests, and suggested performance goals and metrics for the DTSC Permitting Program.

Initial Site Mitigation Recommendations

[site mitigation initial recommendations from separate document to be inserted here]

Permitting Recommendations

DTSC issues hazardous waste facility permits to facilities that manage waste that is toxic, corrosive, reactive, and ignitable. When DTSC issues a hazardous waste facility permit, it establishes conditions that the facility must meet in addition to the applicable laws and regulations for the management of hazardous waste. There are 119 facilities permitted by DTSC to manage hazardous waste in California, with a total of 132 permits. Facility permits are issued for 10-year terms, and facilities are required to apply for renewal six months prior to a permit's expiration. If the permit renewal application is submitted on time, the facility may continue to operate under an expired permit, known as a "continued" permit. There are currently 37 facilities operating under continued permits. This permitting backlog is one of the chief reasons the IRP was created. In addition to these 37 permits, DTSC anticipates that it will receive 57 permit applications over four years beginning in fiscal year 2015-16, with the number of applications per year expected to vary between 10 and 16.

DTSC's Permitting Division also is experiencing a serious backlog in its program to review closure and post-closure cost estimates. This program is critical to ensure that facility owners provide adequate financial assurances for closure and post closure. According to DTSC, there was a backlog of 40 cost estimates in 2014, with a backlogged cost estimate defined as one that is over five years' old.

Members of the public have complained to the IRP that permitting standards are not rigorous enough or sufficiently clear to protect public health or the environment. They also have asserted that hazardous waste facilities are all too often situated near disadvantaged communities and that those communities are not provided with information on permit applications early enough in the process to participate in DTSC decision-making.

DTSC launched its Fixing the Foundation initiative in 2012 to identify practices and procedures in need of improvement, including permitting practices and procedures. This led to the development in 2014 of the Permitting Enhancement Work Plan, a two-year plan to improve the department's ability to issue protective, timely, and enforceable permits using more transparent standards and consistent procedures. The plan has 86 action items under 10 reform goals. According to the DTSC, the department had completed 78 percent of the action items by early March of 2016. The goal is to fully implement the plan by July 1 of this year.

Two laws, both of which went into effect on January 1, 2016, are also expected to improve DTSC's Permitting Program. SB 673 (Lara) requires DTSC, by January 1, 2018, to establish or update criteria for use in determining whether to issue a new or modified hazardous waste facilities permit or renewal of a permit, and to develop and implement, by July 1, 2018, programmatic reforms designed to improve the protectiveness, timeliness, legal defensibility, and enforceability of the department's permitting program. AB 1075 (Alejo) requires DTSC to consider, except under specified circumstances, three or more violations of, or noncompliance with, specified provisions for which a person or entity has been found liable or has been convicted, with respect to a single hazardous waste facility within a five-year period, as compelling cause to deny, suspend, or revoke a permit.

In its January 28 report to the governor and Legislature, the IRP made four suggestions that require legislation. They were:

- Require hazardous waste facilities to set aside adequate financial assurances for corrective action in addition to closure and post-closure.
- Consider whether to create a permit appeals board to decide on all hazardous waste facility permits that DTSC does not timely process within three years of expiration.
- Change the permitting fee structure so that fee income at least equals department permitting costs for each applicant. The IRP notes that legislation has since been introduced to address this issue. The March 17, 2016 version of AB 2794 (Santiago) would eliminate the flat fee option for applicants.
- Fund technical assistance grants to encourage public participation before a hazardous waste facility permit is prepared.

The IRP also made two permitting-related suggestions to the DTSC in the January 28 report. They were:

- Publish by January 1, 2017 draft SB 673 regulations and adopt the regulations by January 1, 2018.
- Adopt guidance or publish draft regulations by January 1, 2017 on DTSC's Violation Scoring Procedure (VSP). The DTSC subsequently presented a draft VSP to the IRP at its March 2015 meeting. The IRP, however, is unclear on the relationship between the VSP and the above-mentioned AB 1075, which requires DTSC to consider three or more violations of specified environmental laws as cause to deny, suspend, or revoke a permit. The IRP believes that draft regulations or guidance on the VSP should be consistent with AB 1075.

The IRP also made the following permitting-related information requests of the department:

- Provide a list of existing financial assurances for every hazardous waste facility permit site by March 1, 2016. The department has complied with this request. However, the IRP subsequently asked for information on financial assurances for corrective action, and the information received to date raises more questions than it answers.
- Provide a list of hazardous waste facility permit holders by April 1, 2016 that currently fall within AB 1075's violation categories, with specifics.

Recommendations to the Governor and Legislature to Improve Permitting

1. Augment the Hazardous Waste Control Account to fund _ limited-term positions to achieve the goal of making 16 permit decisions a year and processing 90 percent of permit decisions in a two-year period or less.
2. Require DTSC to review each permitted hazardous waste facility's financial assurances every five years.
3. Require DTSC to hold a public meeting within 60 days of every hazardous waste permit application submission to inform nearby communities about the application and facilitate meaningful understanding and dialogue about a facility's potential health, environmental, and other impacts.
4. Extend permit length to 15 years for hazardous waste facilities with no major violations.
5. Require owner or operator of a hazardous waste facility to submit an application for a permit renewal at least two years before the permit expiration. Require DTSC to respond by a date certain (e.g., 30 days, 9 months) to particular permitting actions/milestones (e.g., finding application complete, finishing technical review, etc.) with a notice of deficiency or acceptance, or the particular permitting action/milestone shall be deemed approved. If DTSC has

responded as required, and the final permit decision has not been issued within 2 years after the permit expiration, the permit shall be denied.

6. Amend Section 25200 of Health & Safety Code to give DTSC specific authority to require fence line monitoring by permit holders in appropriate cases.

7. Give DTSC ability to designate hazardous waste facilities that require more time, consideration, and resources to process than the typical facility. Create emergency permitting fund from general fund for DTSC to access for processing these facilities.

Recommendations to the DTSC to Improve Permitting

1. Using CalEnviroScreen, post clear and concise data on racial composition and income levels of communities in proximity to permitted hazardous waste facilities on DTSC website by January 1, 2017.

2. Post clear and concise information on website that lists all permitted sites with contamination, status of cleanup, and amount of financial assurances for cleanup by January 1, 2017.

3. Post all formal responses and permit processing documentation in EnviroStor to improve transparency and community understanding of permit application status by January 1, 2017.

4. To give hazardous waste facility permit applicants an incentive to renew their permits on a timely basis, assess hazardous waste facility violations from the time of the last permit renewal (not only the past five years) in determining whether past compliance should prevent the applicant from receiving a new permit, by January 1, 2017.

Recommended Performance Metrics for Permitting Program

1. Make 16 hazardous waste facility permit decisions during fiscal year 2016-17.

2. Send out reminder letter at least 18 months in advance of hazardous waste facility permit expiration date 100 percent of the time in fiscal year 2016-17.

3. Conduct a pre-application meeting with the hazardous waste facility permit applicant within three months after issuance of the reminder letter 100 percent of the time in fiscal year 2016-17.

4. Review hazardous waste facility permit application for administrative completeness within 30 days of receipt of the permit application and notify the applicant in writing whether the application is complete 100 percent of the time in fiscal year 2016-17.

5. Complete technical review for 80 percent of permit applications within 13 months after the application is determined to be administratively complete during fiscal year 2016-17.

6. Establish average processing time of 2 years or less for 90 percent of hazardous waste facility permits completed during fiscal year 2016-17.

7. Review 24 hazardous waste facility permit closure and post-closure plans and associated engineer's cost estimates in fiscal year 2016-17.

8. Experience less than five-percent staff turnover with permitting staff during fiscal year 2016-17.

Data Requests to the DTSC on Permitting

1. Provide IRP with information by July 1, 2016 on whether a Statement of Overriding Considerations was used, what type of CEQA document (EIR, addendum, negative declaration, exemption, etc.) was used, and whether a human health risk assessment was prepared for each permitted hazardous waste facility.
2. Provide IRP with list of sites on continued permit status by July 1, 2016.
3. Report to IRP by July 1, 2016 on the advantages, disadvantages, and feasibility of simplifying/reducing engineering review of hazardous waste permit applications and instead emphasizing more rigorous enforcement in the case of inadequately built hazardous waste facilities.
4. Report to IRP by July 1, 2016 on why DTSC has never adopted a state Hazardous Waste Management Plan, reviewed the plan on an annual basis, or revised the plan at least once every three years in compliance Section 25135 of the Health & Safety Code. DTSC also should indicate any recommended amendments to that code section.
5. Report to IRP by January 1, 2017 on whether DTSC is complying with the Health & Safety Code Section 25200.8 requirement to initiate proceedings to deny a permit application if an applicant does not respond to three or more notices of deficiency, or responds with substantially incomplete or substantially unsatisfactory information on three or more occasions. If the department is not currently complying, what are the reasons for not doing so, and should the code section be amended?
6. Adequately address IRP questions raised at April 7, 2016 meeting about March 23, 2016 data on financial assurances for corrective action. Provide clear information by May 1, 2016 on how many hazardous waste facility permit holders with known site contamination have provided financial assurances for site corrective action and how many have not.