

INITIAL STATEMENT OF REASONS

Federal Post-Closure Rule Regulations, Addition of Enforceable Documents and Flexibility for Postclosure Requirements

Department of Toxic Substances Control Reference Number: R-2017-02
Office of Administrative Law Notice File Number: Z-2017-1003-03

PROBLEM, REQUIREMENT OR OTHER CONDITION ADDRESSED:

Senate Bill No. 1325 (de León), approved by Governor Brown and filed with the Secretary of State on September 26, 2016, amended Section 25247 of the Health and Safety Code. This Senate Bill restores the authority of the Department of Toxic Substances Control (DTSC) to impose postclosure requirements through an enforcement order or other enforceable documents and requires DTSC to adopt regulations on or before January 1, 2018, that define this authority and practice. The Bill requires DTSC to adopt regulations, by January 1, 2018, to impose postclosure plans requirements through the issuance of an enforcement order, enforcement agreement or postclosure permit. (Health & Saf. Code, §25247(f).)

Pursuant to State and federal laws, DTSC is the state agency charged with administering a state hazardous waste program in lieu of the federal Resource Conservation and Recovery Act (RCRA). (42 U.S.C. §6926; Health & Saf. Code, §§ 25101(d) & 25159; California: Final Authorization of State Hazardous Waste Program (57 Fed. Reg. 18827 (5/1/92).) In adopting regulations, DTSC is required to make the regulations conform with corresponding regulations adopted by the U.S. Environmental Protection Agency (EPA) pursuant to RCRA. (Health & Saf. Code, §25159.5.)

The State hazardous waste program requires an owner or operator of a hazardous waste facility to hold a hazardous waste facility permit or other grant of authorization from DTSC in order to accept, treat, store or otherwise dispose of hazardous waste. (Health & Saf. Code, §25200.) When closing, a facility that is unable to demonstrate that removal or decontamination standards have been met, or leaves waste at the facility, is subject to the requirement to obtain a postclosure permit. (Cal. Code Regs., tit. 22, §66270.1(c).)

In 1988, the EPA adopted the Federal Post-Closure Rule to allow authorized States to use a variety of authorities to impose requirements on facilities subject to postclosure care requirements. In adopting the Rule, EPA stated the regulations are not required to maintain authorization and, therefore, States are not required to adopt them. (63 Fed. Reg. 56710, 56728 (10/22/98).) Nevertheless, DTSC has determined it is in its best interests to adopt the Federal Post-Closure Rule and as required by Health and Safety Code section 25247(f).

The proposed rulemaking is based on the Federal Post-Closure Rule of 1998, specifically 40 C.F.R. Parts 264, 265 and 270. The proposed rule will provide flexibility

for DTSC to use enforceable documents to authorize hazardous waste postclosure activities at hazardous waste facilities subject to postclosure care, based on the particular needs at the facility. Under this proposal, DTSC would continue to impose the same substantive groundwater, postclosure care, and corrective actions requirements as it would under a permit, and would provide for adequate public participation.

EPA and DTSC have encountered two major difficulties when issuing postclosure permits. First, some facilities chose to close, or are forced to close, because they cannot comply with permitting requirements, particularly groundwater monitoring and financial assurance. If a facility cannot meet these requirements, DTSC cannot issue a permit to a facility that is not in compliance with applicable requirements at the time of permit issuance. (Health & Saf. Code, § 25200; see also, 42 U.S.C. § 6925(c).) Second, owners or operators often have little incentive to seek a postclosure permit because the facility is not operating and is not generating any revenue. Without a strong incentive on the part of the facility owner or operator to provide a complete application, the permitting process can be significantly protracted.

To address environmental risk at facilities, DTSC uses a variety of legal authorities, including permits, enforceable orders, and other enforceable documents. Prior to this rule, DTSC was still required to issue a postclosure permit even where the environmental risks associated with the facility were addressed through other authorities.

The Federal Post-Closure Rule limits the use of alternate mechanisms to facilities that have not received permits. (63 Fed. Reg. 56710, 56717 (10/22/98)). With this proposed rulemaking, DTSC is not limiting the use of alternate mechanisms to non-permitted facilities because about ten facilities are operating under expired postclosure permits or are already subject to an agreement or order that would require amendment to include postclosure requirements. DTSC believes this flexibility provided by the rule allows DTSC to use the appropriate authority available at all facilities. This choice may be based on many factors, including the specific conditions at the facility, availability of approved alternative cleanup authorities, and recalcitrance of the facility. DTSC believes this approach will provide environmental results and eliminate redundant processes without compromising enforceability for DTSC or for EPA.

The proposed regulation is not “broader in scope” than a federal requirement and would not impede the scope of EPA’s enforcement at permitted or previously permitted facilities. The ability to use an alternative enforcement mechanism, rather than a permit, is not a State requirement that “increase(s) the size of the regulated community or universe of waste beyond what is covered by the federal program through either directly enforceable (i.e., independent) requirements or certain conditions for exclusion.” (See, EPA OSWER Doc: Determining Whether State Hazardous Waste Requirements are More Stringent or Broader in Scope than the Federal RCRA Program (12/23/2014).)

For postclosure care, the requirement to conduct postclosure care does not lapse until the facility clean closes or removes all contamination at the facility. Any expiration of a permit or State failure to issue a permit is irrelevant. EPA retains authority to initiate an enforcement action or issue a new permit pursuant to 40 C.F.R. section 270.51(c). (See also, EPA OSWER Guidelines for Evaluating the Post-Closure Care Period for Hazardous Waste Disposal Facilities under Subtitle C of RCRA.) In short, DTSC is simply seeking a means of adding a legally permissible remedy for addressing environmental problems already sanctioned in the Federal Post-Closure Rule.

DTSC uses alternative enforcement mechanisms at these sites for a number of reasons including our ability to address releases, seek cost recovery, and compelling other responsible parties, such as generators to carry out response or remedial activities. In these cases, DTSC has made the decision that alternative enforcement mechanisms and statutory authorities are the preferred tool to seek superior environmental outcomes. DTSC is seeking to remove the redundant process of a postclosure permit that would be exclusively an administrative activity. In all these cases, the RCRA permitting requirements would not be terminated, but deferred while DTSC pursues response actions under enforcement or other authorities. This is analogous to the actions that EPA takes at Superfund sites. DTSC is aware of other states that have applied the alternative enforcement mechanism to facilities that previously had a permit.

The proposed rulemaking requires public involvement when DTSC becomes involved in a remediation at a facility as a regulatory or enforcement matter; on the proposed preferred remedy and the assumptions upon which the remedy is based, in particular those related to land use and site characterization; and prior to making the final decision that remedial action is complete at a facility. Within this framework, DTSC believes it has an opportunity to structure a reasonable approach based on the needs at the facility. At the same time, the public is put on notice early in the process that activities are taking place.

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS:

The proposed rulemaking, which allows DTSC's use of enforceable documents to authorize hazardous waste postclosure activities revises hazardous waste management requirements in California Code of Regulations (Cal. Code Regs.), Title 22, Division 4.5, Chapters 14, 15 and 20, consistent with federal requirements, specifically 40 C.F.R. Parts 264, 265 and 270.

ALTERNATIVES CONSIDERED:

Recommended Alternative: DTSC proposes to adopt regulations pursuant to Senate Bill No. 1325 (de León), approved by Governor Brown, and filed with the Secretary of State on September 26, 2016. The proposal would amend California Code of Regulations, title 22, Division 4.5. Environmental Health Standards for the Management

of Hazardous Waste, Sections 66264.90, 66264.110, 66264.121, 66265.90, 66265.110, 66265.121, 66270.1, 66270.14, and 66270.28.

The recommended alternative allows DTSC to use orders or other enforceable documents to be issued to owners and operators of both formerly permitted and non-permitted hazardous waste facilities subject to postclosure care requirements in lieu of a proposed or existing postclosure permit.

Alternative 2: This alternative would have allowed DTSC to use orders or other enforceable documents to be issued only to owners and operators of non-permitted hazardous waste facilities subject to postclosure care or permit requirements in lieu of a proposed postclosure permit. This alternative was not selected because DTSC regulates approximately 21 formerly permitted facilities or facilities with expired permits that would require amendment to include postclosure requirements.

Alternative 3: No change. DTSC would continue to oversee and regulate postclosure care and permit requirements at hazardous waste facilities as specified in current regulations.

This alternative was not selected because Senate Bill No. 1325 (de León) restored the authority of DTSC to impose those requirements through an enforcement order or enforceable documents and requires DTSC, on or before January 1, 2018, to adopt regulations to impose postclosure plan requirements. The ability to use orders and other enforceable documents would make enforcement of postclosure requirements more efficient and effective in most cases.

California Environmental Quality Act (CEQA): After a preliminary evaluation, DTSC determined a Notice of Exemption pursuant to California Code of Regulations, title 14, section 15061(b)(3), is applicable to fulfill CEQA requirements.

DETAILED STATEMENT OF REASONS:

All citations are to provisions of California Code of Regulations, Title 22, Division 4.5. These regulations address hazardous waste permitted facilities (Chapter 14) and for interim status facilities that have never received full authorization or a postclosure permit (Chapter 15). In general, Chapter 14 standards are quite similar, but not equivalent to, Chapter 15 standards. Often, the proposed revision found in Chapter 14 has a nearly identical revision proposed in Chapter 15, and both share the same basis for the proposed change. Changes to Chapter 14 for permitted facilities are discussed below. Changes to Chapter 15 for interim status facilities follow the Chapter 14 discussion.

Proposed Revision Language for Permitted Facilities Chapter 14. Standards for Owners and Operators of Hazardous Waste Transfer, Treatment, Storage, and Disposal Facilities

Add Subsection 66264.90(i): This new subsection is added to identify that DTSC has the authority to use enforceable documents and clarifies that references in the regulations to issuance of a permit includes issuance of enforceable documents.

New regulatory text allows flexibility, consistent with the Federal Post-Closure Rule of 1998, 40 CFR Section 264.90, for DTSC to utilize enforceable documents in lieu of permits at facilities subject to postclosure care requirements. This addition, by allowing another alternative to postclosure permitting, provides DTSC with flexibility to address the postclosure period at facilities subject to postclosure care requirements using a variety of legal authorities including enforcement mechanisms.

Add Subsection 66264.110(c): This new subsection is added to identify that DTSC has the authority to use enforceable documents and clarifies that references in the regulations to issuance of a permit includes issuance of enforceable documents.

Add Section 66264.121 This addition includes submittal and compliance requirements for facilities that seek to obtain an enforceable document in lieu of a postclosure permit. This regulation duplicates an existing federal regulation at 40 C.F.R. §265.121 except DTSC is applying the same standards and requirements to permitted facilities.

Unlike the Federal Post-Closure Rule, DTSC is not limiting the use of alternate mechanisms to non-permitted facilities because numerous facilities in California are operating under expired postclosure permits or are already subject to an agreement or order that would require amendment to include postclosure requirements. DTSC believes the flexibility provided by the rule allows DTSC to use the appropriate authority available at all facilities.

Add Subsection 66265.90(f): This new subsection is added to identify that DTSC has the authority to use enforceable documents and clarifies that references in the regulations to issuance of a permit includes issuance of enforceable documents.

New regulatory text allows flexibility, consistent with the Federal Post-Closure Rule of 1998, 40 CFR Section 265.90, for DTSC to utilize enforceable documents in lieu of permits at facilities subject to postclosure care requirements. This addition, by allowing another alternative to postclosure permitting, provides DTSC with flexibility to address the postclosure period at facilities subject to postclosure care requirements using a variety of legal authorities including enforcement mechanisms.

Add Subsection 66265.110(c): This new subsection is added to identify that DTSC has the authority to use enforceable documents and clarifies that references in the regulations to issuance of a permit includes issuance of enforceable documents.

Add Section 66265.121 This addition includes submittal and compliance requirements for facilities that seek to obtain an enforceable document in lieu of a postclosure permit. This regulation duplicates an existing federal regulation at 40 C.F.R. §265.121.

Amend Subsections 66270.1(c) and (c)(7): This subsection is amended by revising paragraph (c) introductory text and adding a new paragraph (c)(7). The purpose of the revision is to identify the allowance of an enforceable document in lieu of a postclosure permit for owners and operators subject to postclosure care requirements. Prior to this rule, owners and operators subject to postclosure care requirements had to obtain a permit for the postclosure period. This rule, by allowing another alternative to postclosure permitting, provides DTSC with flexibility to address the postclosure period at facilities using a variety of legal authorities, including enforcement mechanisms.

Amend Subsection 66270.14(a): This section is amended by adding a sentence to the end of paragraph (a) that specifies information that is required content of a Part B application for a postclosure permit.

Add Section 66270.28: This revision includes information requirements in the Part B of a postclosure permit. This section requires the owner or operator to submit the same information even when an enforceable document has been issued to them in lieu of a postclosure permit. This section specifies information DTSC believes will be important for all postclosure permits, and, in turn for all enforceable documents issued in lieu of postclosure permits, including groundwater characterization and monitoring data, information related to long-term care of the regulated unit and monitoring systems, and information on solid waste management units and possible releases subject to corrective action.

ECONOMIC IMPACT ANALYSIS:

Purpose: DTSC proposes to adopt California Code of Regulations (CCR), Title 22, Division 4.5, sections 66264.90, 66264.110, 66264.121, 66265.90, 66265.110, 66265.121, 66270.1, 66270.14, and 66270.28, pursuant to Senate Bill No. 1325 (de León), approved by Governor Brown and filed with the Secretary of State on September 26, 2016. The proposed draft rulemaking incorporates select text and concepts based on the Federal Post-Closure Rule of 1998.

Creation or Elimination of Jobs Within the State of California: The proposed regulations would provide flexibility for DTSC to use enforceable documents to authorize hazardous waste postclosure activities at hazardous waste facilities subject to postclosure care. The hazardous waste facilities, including some small businesses, which could be subject to the proposed regulations are already regulated by DTSC. The number of the affected facilities is small, approximately 21 facilities. DTSC anticipates minimal application/demonstration costs to be incurred by the facilities as a result of these regulations. In fact, some cost savings for the facilities is possible due to fewer required regulatory or administrative activities associated with issuance of enforcement documents as opposed to issuance of postclosure permits. Due to the small number of hazardous waste facilities that may be potentially affected by the proposed regulations and the relatively small difference in costs incurred by the facilities or by DTSC, DTSC has determined that the proposed regulations would not

have any impact on the creation or elimination of jobs within the State of California.

Creation of New Businesses or the Elimination of Existing Businesses Within the State of California: Due to the small number of hazardous waste facilities that may be potentially affected by the proposed regulations and the relatively small difference in costs incurred by the facilities or by DTSC, DTSC has determined that the proposed regulations would not have any impact on the creation of new business or the elimination of exiting business in the State of California.

Expansion of Businesses Currently Doing Business Within the State of California: Due to the small number of hazardous waste facilities that may be potentially affected by the proposed regulations and the relatively small difference in costs incurred by the facilities or by DTSC, DTSC has determined that the proposed regulations would not have any impact on the expansion of business currently doing business with the State of California.

Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment: The anticipated benefits of the proposed regulations are the continued protection of human health and the environment because they would allow DTSC to use an enforcement mechanism in lieu of a postclosure permit as long as the enforcement mechanism is adequate and the applicable federal and state requirements are met.

DETERMINATION OF NO SIGNIFICANT STATEWIDE ECONOMIC IMPACT
DTSC has made an initial determination, found through the economic impact assessment, that the proposed regulation will not have a significant statewide adverse economic impact directly affecting business, including the ability of California business to compete with businesses in other states.