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Department of Toxic Substances Control

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Edmund G. Brown Jr.
Governor

TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

**FEDERAL POST-CLOSURE RULE
DRAFT STATE REGULATIONS,
ADDITION OF ENFORCEABLE DOCUMENTS AND FLEXIBILITY FOR
POSTCLOSURE REQUIREMENTS**

Department Reference Number: R-2017-02

Office of Administrative Law Notice File Number: Z-2017-1003-03

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (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.

PUBLIC WORKSHOP

DTSC will hold one public workshop on the proposed regulation at the following time and location:

DATE: November 2, 2017
TIME: 2:00PM – 4:00PM PDT
LOCATION: 8800 Cal Center Drive
Sacramento, California 95826
Board Room

WEBCAST LINK: <https://video.calepa.ca.gov/>

At the time and location listed above, any person(s) may ask questions about the proposed rule and a workshop setting. The workshop will convene at 2:00PM PDT and will remain open until 4:00PM PDT, or until attendees have no further questions, whichever occurs first. Attendees are also welcome to attend the public hearing to have questions or comments on record.

PUBLIC HEARING

DTSC will hold a public hearing on the proposed regulation at the following time and location:

DATE: December 1, 2017
TIME: 2:00PM – 4:00PM PDT
Or until attendee testimony concludes, whichever occurs first.
LOCATION: 8800 Cal Center Drive
Sacramento, California 95826
Board Room
WEBCAST LINK: <https://video.calepa.ca.gov/>

At the time and location listed above, any person(s) may present statements or arguments, orally or in writing, relevant to this proposal described in the Informative Digest. The public hearing will convene at 2:00PM PDT and will remain open until 4:00PM PDT, or until no attendees present testimony, whichever occurs first.

Representatives of DTSC will preside at the hearing. DTSC requests persons who wish to speak to please register before the hearing. Pre-hearing registration is conducted at the location of the hearing from 1:00PM PDT until the hearing commences. Registered persons will be heard in the order of their registration. Anyone else wishing to speak at the hearing will have an opportunity after all registered persons have been heard.

All visitors are required to sign in upon arrival to the Sacramento DTSC Regional Office at the administration desk on the first floor of the building. Please ask the guard at the security desk for directions. Be sure to allow adequate time to sign in and receive a visitor badge before the public hearing begins.

NOTICE PERTAINING TO ACCESSIBILITY & REASONABLE ACCOMMODATION

All documents related to this regulation can be made available in alternate format (e.g. Braille, large print, etc.) or in another language, as requested, in accordance with State and Federal law. Further, to ensure the public has equal access to all available services and information, DTSC will provide disability related reasonable accommodations and/or translator/interpreter needs, upon request. For assistance, please contact the following staff person as soon as possible, preferably no later than 10 business days prior to the scheduled hearing:

Ms. Litiana Patino
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
Litiana.Patino@dtsc.ca.gov
Phone: (916) 324-3095

TTY/TDD/Speech-to-Speech users may dial “7-1-1” for the California Relay Service.

WRITTEN COMMENT PERIOD

A 45-day public comment period for this rulemaking file, as described above, will commence on October 13, 2017 and close on December 1, 2017 at 11:59 p.m. PDT. During this time, DTSC will accept statements, arguments, or contentions and/or supporting documents regarding this rulemaking that must be submitted in writing, or may be presented orally or in writing at the public hearing. Comments must be received by the deadline in order for them to be considered before DTSC adopts, amends, or repeals these regulations.

Any interested person(s) or their authorized representative(s) may submit written comments relevant to the proposed regulatory action to DTSC in either electronic or hard-copy formats.

Written comments may be submitted electronically through the DTSC regulations email address at mary.gaspari@dtsc.ca.gov or please direct hard-copy written comments to:

Ms. Mary Gaspari
Engineering Geologist
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826
Attn: Postclosure Rule
E-Mail: mary.gaspari@dtsc.ca.gov
Fax Number: (916) 255-3734

AUTHORITY & REFERENCE

Authority

These regulations are being adopted under the following authorities:

Senate Bill No. 1325 (de León), approved by Governor Brown and filed with the Secretary of State on September 26, 2016, which amended Section 25247 of the Health and Safety Code.

Reference

These regulations implement, interpret, or make specific the following statutes:

- Health and Safety Code sections 25150 and 25159. These sections require DTSC to adopt, and revise when appropriate, standards and regulations for the management of hazardous wastes to protect against hazards to the public health, to domestic livestock, to wildlife, or to the environment.
- Health and Safety Code sections 25245. This section requires DTSC to adopt, and revise when appropriate, standards and regulations that specify financial assurances for owner and operators of hazardous waste facilities that close or leave hazardous waste in place for long-term containment and monitoring.

- Health and Safety Code sections 58012. This section allows DTSC to adopt and enforce rules and regulations for the carrying out of DTSC's duties.
- Health and Safety Code sections 25247(f) (Stats. 2016, c. 676 (SB 1325) §1.5, eff. 1/1/17)). This section allows DTSC to use enforcement agreements or orders to impose postclosure plan requirements until January 1, 2009.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Policy Statement Overview

Senate Bill No. 1325 (de León), approved by Governor Brown, and filed with Secretary of State on September 26, 2016, amended Section 25247 of the Health and Safety Code. This Senate Bill restores the authority of DTSC to impose postclosure requirements through an enforcement order or an enforceable agreement and requires DTSC, on or before January 1, 2018, to adopt regulations to impose postclosure plan requirements.

The proposed draft rulemaking incorporates select text and concepts based on the Federal Post-Closure Rule of 1998. 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.

Proposed regulation

The proposed rulemaking would provide flexibility for DTSC to use enforceable documents such as agreements or orders at facilities with hazardous waste left in place that need or already have a hazardous waste postclosure facility permit. The rule allows the use of alternative mechanisms, such as an order, a plan, or other document issued consistent with a corrective action order or a remedial action order issued pursuant to Health and Safety Code sections 25187 or 25355.5(a)(1)(B). The ability to use enforceable documents provides flexibility and allows DTSC to use the appropriate authority available at all facilities. DTSC believes this approach will provide environmental results and eliminate redundant processes.

Anticipated Benefits

Pursuant to the proposed regulations, DTSC is allowed flexibility to issue an enforcement mechanism in lieu of a postclosure permit as long as the enforcement mechanism is adequately protective of human health and the environment, and the Federal and State requirements, including this new rule, are met. Cost of managing waste in place at each facility varies. Facilities currently subject to hazardous waste permitting requirements are regulated by DTSC. Most, if not all, facilities where the proposed regulations could be applied have been documented by DTSC and DTSC anticipates minimal application/demonstration costs.

The proposed regulation would improve the efficiency and effectiveness of DTSC's process to impose postclosure care requirements with well-known and widely used tools. Enforcement orders and other enforceable documents are commonly used to require and assure compliance with other Federal and State hazardous waste control requirements, and to mitigate environmental risks at regulated facilities. In certain circumstances, the enforcement orders and other enforceable documents will provide a more efficient and

effective mechanism to impose postclosure care requirements. In particular, when a facility has closed, the former owner or operator may not have the resources or incentive to promptly provide a complete application for a postclosure permit, which can significantly delay the permit process. In addition, if the facility closed because it could not meet all applicable requirements, particularly those for groundwater monitoring or financial assurance, DTSC may not be able to make the required compliance findings to approve and issue the postclosure permit.

Summary of Existing Statutes and Regulations

The proposal would amend CCR, Title 22, Division 4.5. Environmental Health Standards for the Management of Hazardous Waste, Sections 66264.90, 66264.110, 6264.121, 66265.90, 66265.110, 66265.121, 66270.1, 66270.14, and 66270.28. These regulations govern the applicability and performance standards for owners and operators of hazardous waste transfer, treatment, storage and disposal facilities.

All citations are to provisions of CCR, Title 22, Division 4.5. These regulations address hazardous waste permitted facilities (Chapter 14) and 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.

Relation to Existing Federal Regulations

The proposed draft rulemaking allows use of alternate mechanisms for facilities that were formerly permitted or never received a permit. DTSC believes this flexibility 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 the U.S. Environmental Protection Agency (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 non-RCRA 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.

Relation to Existing State Regulations

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 draft proposed rulemaking, DTSC is not limiting the use of alternate mechanisms to non-permitted facilities because about ten facilities (Permitting EnviroStor; March 2017) 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.

Evaluation of Inconsistency or Incompatibility With Existing State Regulations

DTSC has reviewed existing state regulations and evaluated whether the proposed regulations are inconsistent or incompatible with existing state regulations. DTSC has determined that the proposed regulations are the only state regulations governing the use of alternative enforcement mechanisms such as orders in lieu of postclosure permits. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

DISCLOSURE REGARDING THE PROPOSED ACTION

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DTSC determined that the proposed changes to these regulations will not impose a local mandate on local agencies or local school districts.

OTHER NON-DISCRETIONARY COST OR SAVINGS IMPOSED ON LOCAL AGENCIES

There are no other nondiscretionary cost or savings imposed on local agencies.

COST TO ANY LOCAL AGENCIES OR SCHOOL DISTRICT REQUIRING REIMBURSEMENT PURSUANT TO GOVERNMENT CODE SEC. 17500 et seq.

The proposed regulations are not anticipated to result in any cost to local agencies or school districts requiring reimbursement pursuant to Government Code section 17500 et seq.

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE

DTSC does not anticipate any changes to Federal funds that the State of California receives. DTSC does not receive any Federal funds for water pollution control.

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.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The cost of managing waste in place at each facility varies. Facilities currently subject to hazardous waste permitting requirements are regulated by DTSC. Most, if not all, facilities where the proposed regulations could be applied have been documented by DTSC and DTSC anticipates minimal application/demonstration costs.

The number of hazardous waste owners/operators affected by the proposed regulation is small, approximately 21 facilities. Although the total fiscal impact to facilities is unknown, a small cost savings is possible due to fewer required administrative activities associated with orders relative to permits.

EFFECT ON SMALL BUSINESSES

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. DTSC has determined that the proposed regulations would not impact small businesses.

EFFECT ON HOUSING COSTS

DTSC determined that the proposed changes to the regulations will not impact housing costs.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

Pursuant to the proposed regulations, DTSC is allowed flexibility to issue an enforcement mechanism in lieu of a postclosure permit as long as the enforcement mechanism is adequately protective of human health and the environment and the Federal and State requirements, including this new rule, are met. Costs of managing waste in place at each facility varies. Facilities currently subject to hazardous waste permitting requirements are regulated by DTSC. Most, if not all, facilities where the proposed regulations could be applied have been documented by DTSC and DTSC anticipates minimal application/demonstration costs.

The proposed regulations do not affect local or Federal regulatory agencies. DTSC currently has sole oversight responsibility for all facilities subject to the proposed regulations and is the only State agency affected by the proposal. Increased workload for preparation and oversight of orders and enforceable documents would be offset by the reduction in permitting activities at land disposal sites. Affected facilities would pay costs associated with issuance of the enforceable documents in lieu of permit fees. DTSC anticipates approximately 21 postclosure care sites are candidates to be affected by this rule.

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 (1) the creation or elimination of jobs within the State of California; (2) the creation of new business or the elimination of existing business in the State of California; or (3) the expansion of business currently doing business with the State of California.

CONSIDERATION OF ALTERNATIVES

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to

affected private persons and equally effective in implementing the statutory policy or other provision of law.

The recommended alternative allows DTSC to use orders or other enforceable documents to be issued to owners and operators of hazardous waste management units subject to postclosure care or permit requirements in lieu of a proposed or existing postclosure permit. In the event the rule does not go into effect, Senate Bill No. 1325 would not be met as the postclosure regulation is required to be in place on or before January 1, 2018.

OTHER APPLICABLE REQUIREMENTS PRESCRIBED BY STATUTE

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

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.

CONTACTS

Inquiries regarding technical aspects of the proposed regulation or CEQA documents may be directed to Ms. Mary Gaspari at (916) 255-6423 or by email at mary.gaspari@dtsc.ca.gov. If Ms. Gaspari is not available, contact Peter Bailey at (916) 255-6552 or by email at peter.bailey@dtsc.ca.gov. If, however, both project managers are unavailable, you may contact Ms. Jackie Buttle at (916) 255-3730 or regs@dtsc.ca.gov. Note: oral inquiries are not part of the official rulemaking record.

AVAILABILITY OF TEXT OF PROPOSED REGULATIONS, INITIAL STATEMENT OF REASONS, and RULEMAKING RECORD

Copies of the Notice of Proposed Action, Initial Statement of Reasons, the text of the proposed regulations, all the information upon which its proposal is based, and the express terms of the proposed regulation will be posted to DTSC's Internet site at <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/index.cfm>, or may be obtained from Ms. Jackie Buttle, Regulations Coordinator, as specified below.

AVAILABILITY OF MODIFIED TEXT; AVAILABILITY OF FINAL STATEMENT OF REASONS

After the close of the comment period, DTSC may adopt the proposed regulation. If substantial changes are made, the modified full text will be made available for comment for no less than 15 days prior to adoption. Only persons who specifically request notification of any modifications to the regulations, attend the hearing, submit oral or written comments at the public hearing, or provide written comments on the specific regulation will be sent a copy of the modified text if substantive changes are made.

Once the regulation has been adopted, DTSC will prepare a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed

comments, and includes other materials required by Government Code § 11346.9. Copies of the Final Statement of Reasons may also be obtained from the Regulations Coordinator at the address listed below. A copy of the Final Statement of Reasons, along with the date the rulemaking is filed with the Secretary of State, and the effective date of the regulation will also be posted on DTSC's Internet site at:
<http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/index.cfm>.

To be included in this regulation package's mailing list and to receive updates of this rulemaking, please visit <http://www.dtsc.ca.gov/ContactDTSC/ELists.cfm> and subscribe to the applicable e-List, or, to subscribe directly, e-mail: regs@dtsc.ca.gov.

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Office of Planning and Environmental Analysis
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If Ms. Buttle is unavailable, please contact Ms. Gaspari at (916) 255-6423 or by email at mary.gaspari@dtsc.ca.gov.