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TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

Financial Assurance Rulemaking

Department Reference Number: R-2007-06

Office of Administrative Law Notice File Number: Z-2009-0326-01

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to amend/adopt California Code of Regulations, title 22, sections 66260.10, 66264.101, 66264.117, 66264.141, 66264.143, 66264.144, 66264.145, 66264.147, 66264.151, 66265.117, 66265.141, 66265.143, 66265.144, 66265.145, 66265.147.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

A written comment period has been established commencing on *April 10, 2009*, and closing on *May 26, 2009*. DTSC will hold a public hearing on the proposed regulations at 10:00 a.m. on *May 26, 2009* in the *Coastal Hearing Room, 2nd Floor, 1001 "I" Street, Sacramento*, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on *May 26, 2009* will be considered.

Representatives of DTSC will preside at the hearing. Persons who wish to speak are requested to register before the hearing. Pre-hearing registration will be conducted at the location of the hearing from 9:30 a.m. to 10:00 a.m. Registered persons will be heard in the order of their registration. Any other person wishing to speak at the hearing will be afforded an opportunity after the registered persons have been heard.

Due to enhanced security precautions at the Cal/EPA Headquarters Building located at 1001 "I" Street, Sacramento, all visitors are required to sign in prior to attending any meeting. Sign-in and badge issuance occur in the Visitor and Environmental Services Center. This Center is located just inside and to the left of the building's public entrance. Depending on their destination and the building security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification cards. Depending on the size and number of meetings scheduled on any given day, the

security check-in could take from three to fifteen minutes. Please allow adequate time to sign in before being directed to your meeting.

If you have special accommodation or language needs, please contact Matt Rosenberg, Regulations Coordinator, Regulations Section, at (916) 322-2833 or by e-mail at regs@dtsc.ca.gov by May 12, 2009. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

In accordance with the California Government Code and Americans with Disabilities Act requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette, etc. as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact Adrian Recio at (916) 324-3095 or by e-mail at arecio@dtsc.ca.gov.

AUTHORITY AND REFERENCE

These regulations are being proposed under the following authorities:

Health and Safety Code section 25150. This section grants DTSC authority to adopt standards dealing with the management of hazardous waste.

Health and Safety Code section 25159. This section grants DTSC authority to adopt regulations allowing the state to maintain authorization to administer a state hazardous waste program in lieu of the federal program under the Resource Conservation Recovery Act.

Health and Safety Code section 25159.5. This section grants DTSC authority to adopt regulations that are more stringent or extensive than federal regulations.

Health and Safety Code section 25200.10. This section provides DTSC with implied authority to adopt regulations for corrective action of releases of hazardous waste from a solid or hazardous waste management unit at a facility.

Health and Safety Code section 25245. This section grants DTSC authority to adopt, and revise standards and regulations for financial assurance.

Health and Safety Code section 25355.2. This section provides DTSC with implied authority to adopt regulations for financial assurance for the operation and maintenance requirements of a response action.

Health and Safety Code section 58012 (Added by Gov. Reorg. Plan No. 1, §146, eff. July 17, 1991.) This section grants DTSC authority to adopt regulations to

execute its duties. (Note: this section enacted by Gov. Reorg Plan 1, see http://www.dtsc.ca.gov/LawsRegsPolicies/upload/OEARA_REG_GRP1.pdf)

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

Health and Safety Code section 25245, 25200.10, and 25355.2.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

At some point in time all hazardous waste facilities will cease operations. To protect human health and the environment from the negative impacts of abandoned hazardous waste sites, California law and regulations requires owners and operators of hazardous waste facilities to provide financial assurance for the closure and post-closure care of these facilities. The intent of these statutes and regulations is to ensure that the financial burden of closure and post-closure is borne by the party that caused and benefitted from the hazardous waste operation and not by the people or the State.

The owner or operator of a hazardous waste facility is required by regulation to develop a cost estimate for carrying out all necessary activities to clean and close the hazardous waste operations, as well as for monitoring and oversight of the closed facility if the closure plan calls for any waste or other contamination to remain in place. These costs must address the use of a third party to carry out all closure and post-closure activity. These cost estimates must be reviewed and updated annually.

Operators of active hazardous waste management facilities must additionally provide for up to \$2 million in liability coverage for damages to third parties for sudden accidental occurrences, and if a land treatment or land disposal unit, must provide up to an additional \$6 million in coverage for non-sudden accidental occurrences.

The following financial assurance mechanisms are available to a facility owner or operator to demonstrate financial assurance. None of these mechanisms require that any of the required financial assurance be held as liquid assets.

1. **Trust Fund** is an agreement between three parties wherein the owner or operator of a facility (the Grantor) sets aside a specific amount of cash or funds, which are held in trust by a third party (the Trustee) for the purpose of paying closure and post-closure expenses.
2. **Letter of Credit (LOC)** is a document issued by a bank or other financial institution that guarantees the payment of a customer's obligation for up to a stated dollar amount for a specified time.

3. **Surety Bond** is an agreement between two parties, similar to an LOC,. One party (the Surety) guarantees that the financial obligations of the second party (the Principal) will be met.
4. **Insurance is an agreement** where one party (the Insurer) agrees to pay, on behalf of a second party (the Policyholder) for claims made against the Policyholder or the policy.
5. **Financial Test** is a form of self-insurance where the owner or operator of a facility is not required to arrange with a third party or set aside cash funds for closure, post-closure, corrective action, or liability costs, provided that the owner or operator can pass one of two financial strength tests.
6. **Corporate Guarantee** is a form of the Financial Test in which a third party – either the direct or higher-tier parent corporation of the owner/operator, a firm whose parent corporation is also the parent corporation of the owner/operator, or a firm with a “substantial business relationship” with the owner/operator – “stands in the shoes” of the owner/operator in providing a guarantee that costs of closure, post-closure care, corrective action, and/or third party liability will be paid in the event that the owner/operator is unable to do so.

Captive Insurance

Current regulations allow for a "captive insurance company", which is a corporation organized for the purpose of insuring the liabilities of its owner. Therefore, a possibility may occur where the insured is both the sole shareholder and only customer of the captive. Other possibilities include less than 100% ownership or more than a single customer, although at some point the term "captive" is no longer appropriate. In the case of a “pure” or “single parent” captive insurer, the financial stability of the third party is completely dependent on the financial health of the parent. Commonly, the assets of such captive insurance companies consist only of the unsecured obligations of the parent facility. Thus, a failure of the parent facility will necessarily cause a failure of the captive insurer.

Financial Test

An owner or operator of a facility must satisfy the ratio test for liabilities or meet a rating standard for the most recent bond issuance and demonstrate a minimum tangible net worth of \$10 million. The financial test requires that assets pledged for financial assurance be compared to the owner or operator’s environmental obligations at the individual facility, each facility is judged individually and the same assets could be pledged for multiple facilities.

The existing regulation requires that there be a statement in the “special report from the owner's or operator's independent certified public accountant to the owner or operator”,

that “no matters came to the independent certified public accountant's attention which caused that accountant to believe that the specified data should be adjusted”.

Postclosure Care

Existing California law requires postclosure care of hazardous waste management units where hazardous wastes are not removed during the closure of the unit and requires postclosure cost estimates for the cost of maintenance and monitoring of groundwater and the environment after closure. Facilities must be closed and maintained for at least 30 years in a manner that protects human health and the environment and minimizes or eliminates the escape of leachate, contaminated rainfall, and waste to ground and surface waters and to the atmosphere.

Corrective Action

An owner or operator of a facility seeking a permit for the transfer, treatment, storage, or disposal of hazardous waste must perform corrective action as necessary to protect the human health and the environment for all releases of hazardous waste from any solid or hazardous waste management unit at that facility.

These California regulations are based on, but are not identical to, the following federal regulations: 40 Code of Federal Regulation parts 264 and 265.

Policy Statement Overview

Broad Objectives: The objectives of these regulation changes are to make the financial assurances more certain so that State funds will not be needed to compensate injured parties or to close facilities in an environmentally protective manner. The regulations also are intended to account for changed financial conditions since the original regulations were adopted and for inflation.

Proposed Regulations

The proposed regulations would make changes to two financial assurance mechanisms (insurance and the financial test) for closure, postclosure care and liability requirements; postclosure care period requirements; and financial assurance for corrective action at hazardous waste facilities. Specific changes are discussed below.

Insurance

Current regulations require that “At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.” DTSC proposes to require that the insurer be licensed in the State of California or eligible to provide excess or surplus lines of insurance in the State of California. This section further requires that excess or surplus lines of insurance be issued through a broker licensed by the California Department of

Insurance. The proposed changes to this financial assurance mechanism requires amendments to various form language in section 66264.151.

Financial Test

DTSC proposes to make the following changes to the financial test.

1. Add a requirement to demonstrate a minimum financial credit rating to the ratio test, this is equivalent to an existing requirement in the bond test.
2. Increase the minimum tangible net worth that must be demonstrated from \$10 million to \$20 million, to account for inflation.
3. Require that assets pledged for financial assurance be compared to the total of the owner or operator's environmental obligations.
4. Require that the bond test be evaluated against the most senior issued bond, thus making the test more relevant to the long term financial health of the facility.
5. Require that the independent certified public accountant identify the specific accounting standards and guidance relied upon to prepare the report examining a facility owner or operator's financial statements.
6. Require that 20% of the required financial assurance be held in a trust fund.
7. Amends various form language in section 66264.151 to reflect 1-6 above.

Postclosure Care Period Clarification

DTSC proposes that the current postclosure period of 30 years be clarified to a period to be determined by DTSC on a case-by-case basis and upon permit renewal to ensure that postclosure care continues until there is no longer a threat to human health or the environment. DTSC also proposes that the postclosure cost estimate use a time factor of 30 years and that the cost estimate may be recalculated with the 30 year time period reset upon permit issuance or renewal.

Financial Assurance for Corrective Action

DTSC proposes to clarify when financial assurance for corrective action must be demonstrated.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

DTSC has found this rulemaking project to be exempt under CEQA. A draft of the Notice of Exemption (NOE) is available for review with the rulemaking file and the NOE will be filed with the State Clearinghouse when the regulations are adopted.

PEER REVIEW

Under the provisions of Health and Safety code section 57004, peer review is not required because the proposed regulations do not establish a regulatory level, standard or other requirement subject to scientific peer review.

BUSINESS REPORT

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3(c).

FISCAL IMPACT ESTIMATES:

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies.

Cost or Savings to Any State Agency: DTSC has made a preliminary determination that the proposed regulations will have no impact on State revenue or costs.

Cost or Savings in Federal Funding to the State: DTSC has made a preliminary determination that the proposed regulations will have no impact on Federal revenue or costs.

Effect on Housing Costs:

DTSC has made an initial determination that there will be no impact on housing costs.

Cost Impacts on Representative Private Persons or Businesses:

A representative large California corporation would incur a yearly cost of \$2,002,974 over a ten year period, and a representative smaller company would incur a yearly cost of \$1,025 over a ten year period.

Significant Statewide Adverse Economic Impact on Businesses:

DTSC has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including

the ability to compete with businesses in other states. Analysis showed that the impact on the change in net income for both a representative large corporation (net income reduced by 0.0107%) and a small corporation (net income reduced by 0.001%) is negligible.

Assessment Statement:

- (A) **Creation or elimination of jobs within California** – DTSC has made a preliminary determination that no jobs will be created or eliminated in California as a result of the proposed regulations.
- (B) **Creation of new businesses or the elimination of existing businesses within California** – DTSC has made a preliminary determination that no businesses will be created or eliminated in California as a result of the proposed regulations.
- (C) **Expansion of businesses currently doing business in California** – DTSC has made a preliminary determination that no businesses in California will be expanded as a result of the proposed regulations.

Effect on Small Businesses:

DTSC has determined that provisions of this rulemaking will not have an effect on small businesses. No small businesses are affected by the proposed changes to the two financial assurance mechanisms (insurance and the financial test) for closure, postclosure care and liability requirements. DTSC only proposes to clarify when financial assurance for corrective action must be demonstrated; DTSC is not proposing any new requirements for corrective action. The proposed changes to the current postclosure period would remove ambiguity in the regulations.

CONSIDERATION OF ALTERNATIVES

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of DTSC would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action. DTSC invites interested persons to present arguments, with respect to the various options, at the scheduled hearing, or during the written comment period.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Matt Rosenberg of DTSC's Regulations Section as specified below. The information upon which DTSC relied is also available at the address listed below.

POST-HEARING CHANGES

After the close of the comment period, DTSC may adopt the proposed regulations. If substantial changes are made, the modified text will be made available for comment for at least 15 days prior to adoption. Only persons who request the specific proposed regulations, attend the hearing, or provide written comments on these specific regulations will be sent a copy of the modified text, if substantive changes are made.

Once regulations have been adopted, DTSC prepares a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed comments and includes other materials, as required by Government Code section 11346.9. Copies of the Final Statement of Reasons may be obtained from Matt Rosenberg at the address listed below. A copy of the Final Statement of Reasons will also be posted on DTSC's Internet site at <http://www.dtsc.ca.gov>, along with the date the rulemaking is filed with the Secretary of State and the effective date of the regulations.

CONTACT PERSONS

Inquiries regarding technical aspects of the proposed regulations or CEQA documents may be directed to James Grace of DTSC at (916) 255-3647 or, if unavailable, Nancy Long of DTSC at (916) 324-4154. However, such oral inquiries are not part of the rulemaking record.

Statements, arguments or contentions regarding the rulemaking and/or supporting documents must be submitted in writing or may be presented orally or in writing at the public hearing in order for them to be considered by DTSC before it adopts, amends or repeals these regulations. To be included in this regulation package's mailing list, and to receive updates of this rulemaking, please visit <http://www.calepa.ca.gov/Listservs/dtsc/> and subscribe to the applicable Listserv. You may also leave a message on the DTSC mailing list phone line at (916) 324-9933 or e-mail: regs@dtsc.ca.gov.

Please direct all written comments, procedural inquiries and requests for documents by mail, e-mail or fax to:

Matt Rosenberg, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control

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Fax Number: (916) 324-1808

Mr. Rosenberg's phone number is (916) 322-2833. If Mr. Rosenberg is unavailable, please call Nicole Sotak at (916) 327-4508.