45-DAY PUBLIC COMMENT PERIOD SEPTEMBER 22, 2017 – NOVEMBER 6, 2017

RESPONSE TO COMMENTS

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I. SUMMARY OF PROPOSED REGULATIONS

Health and Safety Code section 25200.21 was enacted into law as part of Senate Bill 673 (Stats. 2015, chapter 611, section 1, effective January 1, 2016.) Section 25200.21 is part of the California Hazardous Waste Control Law (HWCL), Health and Safety Code section 25100 et seq. Section 25200.21 requires the Department of Toxic Substances Control (DTSC) to adopt regulations establishing criteria used for the issuance of a hazardous waste facility permit or a permit modification, which may include criteria for the denial, suspension, or revocation of a permit. Section 25200.21 further requires DTSC to consider a facility's past violations (compliance history,) cumulative impacts to the surrounding community (including vulnerable populations,) financial responsibility, facility personnel training, and completion of a health risk assessment in DTSC's permit decisions. The proposed regulations impose the following requirements on facilities: (1) new violations scoring procedure requirements; (2) new community involvement profile to enhance public participation requirements; (3) additional financial assurance requirements for corrective action; (4) additional training requirements; and (5) new health risk assessment requirements.

The benefits and purpose of the proposed regulations include DTSC's fulfillment of its legislative mandate to adopt these regulations and the enhanced transparency and consistency in DTSC's permit decisions. The enhanced transparency and consistency would, in turn, foster greater public confidence in DTSC's administering of its hazardous waste facility permitting program. The proposed regulations are also intended to have a deterrent effect on the hazardous waste facilities and to encourage them to comply with applicable law and regulations.

II. OVERVIEW AND ORGANIZATION

This document summarizes and responds to public comments submitted to the Department of Toxic Substances Control (DTSC) on the Proposed Rulemaking entitled *Hazardous Waste Facility Permitting Criteria*, which was released to the public on September 22, 2017.

- The proposal was released to the public on September 22, 2017 for comment for forty-five (45) days that ended on November 6, 2017.
- A public hearing was held on November 6, 2017.
- A revised proposal was released to the public on June 29, 2018 for a public comment period that ended on July 16, 2018. DTSC then extended the public comment period for an additional seven days. Thus, the public comment period for the June 29, 2018 version of the proposed regulations ended on July 23, 2018.
- DTSC then released another version of the proposed regulations for a public comment period that ran from July 27, 2018 to August 13, 2018.

This response to comment document addresses the comments received during the public comment period that ended on November 6, 2017 and the public hearing held on November 6, 2017. There were 12 letters commenting on the proposal released on September 22, 2017, and 12 commenters during the

public hearing. A list of commenters in alphabetical order, their affiliations, and the number assigned to their correspondence is included in Table 1.

For a list of commenters and response to comments received on the proposed regulations, please refer to the following:

- Second Public Comment Period June 29, 2018 – July 23, 2018 Response to Comments (June 2018 Response to Comments) document; and
- Third Public Comment Period July 27, 2018 – August 13, 2018 Response to Comments (July 2018 Response to Comments) document.

Each comment letter was issued a number. DTSC subsequently numbered each of the comments contained in the letter and collated similar comments together. The designation "1-1" means comment letter number 1, comment number 1 and so forth. Each commenter who presented oral comments during the public hearing was issued a number and his or her comments start with PH-then the commenter number followed by the comment number. For example, PH-1-1 means public hearing, commenter number 1, comment number 1.

For the purpose of orderly presentation, the comments have been categorized by the article in the regulation that they address. The comments that are general in nature or have overarching applicability have been addressed under General Comments. For all other comments related to a specific article or section, please refer to the respective article or section.

All referenced section numbers are found in Division 4.5 of Title 22 of the California Code of Regulations, unless otherwise specified.

An index has been provided at the end of the document for quick reference to the page number(s) on which responses to the comments appear.

Table 1. List of Commenters

#	Name of Entity	Number of comments
1	California Chamber of Commerce	109
2	California Council for Environmental & Economic Balance	32
3	Clean Harbors	48
4	Center for Race, Poverty and Environment	20
5	Department of Defense	11
6	Kings County	3

Table 1. List of Commenters		
#	**Name of Entity**	**Number of comments**
7	RCRA Corrective Action Project	14
8	US Ecology	6
9	Wactor & Wick LLP	2
10	Waste Management	87
11	Western States Petroleum Association	29
12	Lighting Resources, LLC	1
PH-1	Department of Defense - James Specht	3
PH-2	Department of Defense - David Bell	1
PH-3	Navy Region Southwest - Randal Friedman	3
PH-4	Waste Management - Charles White	10
PH-5	California Council for Environmental & Economic Balance - Janet Whittick	7
PH-6	Chemical Industry Council of CA - Tom Jacob	2
PH-7	California Chamber of Commerce - Louinda Lacy	7
PH-8	Clean Harbors - Chris Mowrer	6
PH-9	Green Action for Health and Environmental Justice - Bradley Angel	7
PH-10	People for Clean Air & Water of Kettleman City – Maricela Mares-Alatorre	3
PH-11	Center for Race, Poverty and Environment - Ingrid Brostrom	7
PH-12	Cynthia Babich	1

III. ACRONYMS

40 CFR	Title 40 of the Code of Federal Regulations
AB 1075	Assembly Bill Number 1075, Health and Safety Code section 25186.05, added by Statutes 2015, Chapter 460, section 2.
CalARP	California Accidental Release Prevention Program
CalEPA	California Environmental Protection Agency
CEQA	California Environmental Quality Act
CIP	Community Involvement Profile
COPC	Chemical of Potential Concern
DTSC	Department of Toxic Substances Control
EFIS	Economic and Fiscal Impact Statement
FSOR	Final Statement of Reasons
HRA	Health Risk Assessment
ISOR	Initial Statement of Reasons
OEHHA	Office of Environmental Health Hazard Assessment
OAL	Office of Administrative Law
RCRA	Resource Conservation and Recovery Act, Title 42, United States Code, commencing with section 6901
SB 673	Senate Bill number 673, Health and Safety Code section 25200.21, added by Statutes 2015, Chapter 611, section 1
U.S.C.	United States Code
U.S. EPA	United States Environmental Protection Agency
VSP	Violation Scoring Procedure

IV. GENERAL

A. INDUSTRY DESCRIPTION

Comments Summary:

Hazardous waste facilities are not a "niche industry," and DTSC's description of them as such dismisses the significant contributions of these facilities to California's economy and environment.

Comments: 1-3, 5-8, 10-89, PH-4-3, and PH-6-1

Response:

DTSC apologizes for the unintended offense that the above language appears to have caused. It was certainly not DTSC's intent to dismiss or diminish the role hazardous waste facilities have in the management of California's hazardous waste. Rather, DTSC's goal was to characterize the relatively small number of entities directly affected by these regulations. More specifically, these regulations affect fewer than 100 hazardous waste treatment, storage and disposal facilities in active operation in California. By comparison, DTSC estimates that at any given time, there are 50,000 to 60,000 hazardous waste generators subject to DTSC regulations. DTSC did not make any changes to the regulations in response to these comments.

B. OPERATIONS OF HAZARDOUS WASTE FACILITIES

Comments Summary:

The comments assert that there has been a steady decline in the number of hazardous waste facilities in California. One comment claims that this decline is attributable to an unspoken policy to export California's hazardous waste. Other comments attribute this decline to costs imposed by DTSC's regulatory requirements, and assert these regulations would prompt an additional number of facilities to close or leave California.

Comments: 1-7, 3-1, PH-7-1, PH-7-5, and PH-8-5

Response:

DTSC acknowledges that there has been a decline in the number of hazardous waste facilities in California. However, the comments provide no evidence to support that this decline is due to costs imposed by DTSC. Moreover, DTSC has implemented significant process improvements to increase its program efficiency and costs. Regarding the disposition of hazardous waste, DTSC does have a policy to reduce the quantity of hazardous waste generated in California but the focus of that policy is on reducing generation, not on shipping waste elsewhere. There are myriad other possible explanations for this decline in the number of hazardous waste facilities in California, including but not limited to market forces within the specific industry and technological and business changes that may be responsible for fewer hazardous wastes being generated in the first place. DTSC did not make any changes to the regulations in response to these comments.

C. COST OF HAZARDOUS WASTE OPERATIONS

Comments Summary:

The comments state that the proposed regulations are costly and burdensome, and would drive operations out of business. Some of the comments continue by asserting that some of the businesses would relocate to other states. They also claim that the regulations would lead to delays with permit issuance. Finally, some of the comments assert that the closing of some hazardous waste facilities would lead to adverse environmental impacts, largely due to increased air pollution from trucks hauling wastes across state lines.

Comments: 1-5, 1-31, 3-1, 3-3, 5-1, 5-3, 10-1, 10-7, 10-88, 10-90, 10-91, 11-18, PH-1-1, PH-2-1, PH-3-2, PH-4-1, PH-7-2, PH-7-4, PH-8-5, and PH-10-1

Response:

DTSC acknowledges that the proposed regulations impose new requirements on hazardous waste facilities operating in California, and that many of these new requirements may result in new compliance costs. DTSC anticipates the increase in costs would range from trivial (e.g., the requirement to make a *de minimis* number of new entries into the facility training log) up to significant (e.g., for some facilities, the requirement to prepare a comprehensive Health Risk Assessment (HRA)). However, each of the provisions DTSC is proposing was based on careful consideration of: the legislative mandate to consider changes in each of the enumerated aspects of regulation; DTSC's experience in implementing the current statutory and regulatory requirements; and input from interested parties. DTSC also structured key requirements and associated costs commensurate with the public health and environmental concern being addressed. For example, HRA requirements are tiered so regulated entities perform only the level of inquiry and evaluation that is appropriate for the risks posed by a given facility.

While the comments raise concerns that the proposed regulations are unduly costly and overly burdensome, they do not identify which provisions are the subject of the comment. (Where a comment addresses a specific regulatory provision, DTSC has responded to the specific concern elsewhere in these responses to comments.) Nor do the comments offer any evidence for the assertion that the proposed regulations would cause hazardous waste facilities to be forced to close.

DTSC agrees with the comment that there could be some delays in the permit application and processing timelines due to the proposed regulations, at least in the initial implementation. The length of any potential delays can't be accurately predicted, however DTSC is concurrently implementing process improvements and other measures to mitigate the impact of such potential delays. For example, DTSC anticipates that pre-application meetings between the permit applicant and DTSC may alleviate much, if not all, of any minimal additional delay attributable to these new requirements. More importantly, the benefits of improved protection of public health and the environment outweigh the negative impacts that could result from potential delays in permit review. For all these reasons, DTSC did not make any changes to the regulations in response to these comments.

D. STREAMLINED PERMIT RENEWAL

Comments Summary:

The comments state that permit renewal process should be more streamlined than the process for granting a new permit to operate a hazardous waste facility. On a related note, one comment suggested

that DTSC should take into consideration the good operational history of a facility in making permit decisions.

Comments: 5-9, 5-10, 5-11, and PH-1-2, PH-1-3, and PH-3-1

Response:

DTSC has no discretion to adopt a streamlined permit renewal process for Resource Conservation and Recovery Act (RCRA) facilities. This is because DTSC's authorization to implement RCRA hazardous waste management requirements provides that DTSC's program must be at least as stringent as the RCRA program and have equivalent or greater scope. The RCRA program does not provide for streamlined permit renewal review.

However, DTSC already implements simplified permitting process steps and operational requirements for non-RCRA facilities consistent with state law and commensurate with their potential impacts on human health and the environment.

In general, the permit application and review process would be expected to proceed more quickly and easily for a facility with a good track record. For example, the permit applicant with few operational problems or violations would have fewer changes to make to its Operations Plan and other portions of the permit. The proposed regulations further incentivize good compliance through the Violations Scoring Procedure, which publicly recognizes facilities with few or no significant violations and provides them less intensive compliance monitoring obligations than facilities with poorer compliance histories. DTSC did not make any changes to the regulations in response to these comments.

E. SENATE BILL 673 (SB 673)

Comment Summary:

The comment states that Senate Bill 673 (SB 673, Stat. 2015, ch., 611, commencing with Health and Safety Code § 25200.21) was enacted in response to public and legislative concern over DTSC's implementation of the hazardous waste facility permitting program in California. The Legislature required DTSC to adopt regulations establishing or updating criteria used in determining whether to issue a new or modified hazardous waste facilities permit, or to renew a permit, which may include criteria for the denial or suspension of a permit. SB 673 criteria reflect sound policy objectives that should guide DTSC in its permitting program, and indeed all of them are already embodied in the existing hazardous waste permitting regulations and/or enforcement policies. The statute directed DTSC to consider (but not necessarily adopt) all the specified criteria.

Comment: 3-2

Response:

DTSC agrees with this comment and is not making any changes to the regulations in response.

F. APPLICABILITY OF REGULATIONS

Comment Summary:

The comment states that all comments made for permitted facilities under chapter 14 are applicable to interim status facilities under chapter 15 because the requirements repeat.

Comment: 10-55

Response:

DTSC agrees with this comment and has made revisions to both chapter 14 and chapter 15 accordingly.

G. EXPEDITED PERMITTING REVIEW

Comment Summary:

The comment questions why it is necessary for a permit renewal to complete all documents again when 90 percent of the information has not changed. The commenter asks why DTSC can't streamline the permit application and add a category for "no changes" and states that DTSC should reduce permit times and costs.

Comment: 12-2

Response:

DTSC implemented a Permitting Enhancement Workplan[1] that improved the permit review time while maintaining and enhancing quality and protectiveness. Specifically, DTSC is on track to decrease technical review time to 13 months for most permits and reduce permit processing time to an average of two years for 90 percent of permits. DTSC has not revised the regulations in response to this comment.

V. LEGAL

A. AUTHORITY TO ADOPT REGULATIONS

Comments Summary:

The comments assert that DTSC is not required to mandate the criteria in Health and Safety Code section 25200.21 and lacks the authority to adopt the proposed regulations. One of the comments focuses, in part, on the claimed lack of authority for Financial Assurance provisions; that portion of the comment will be addressed in more detail in the Financial Assurance portion of this Response to Comments document.

One comment notes: "Accordingly, section 25200.21 allows DTSC to use its discretion given the totality of existing laws, regulations, and requirements to determine appropriate permitting criteria in light of the costs and consequences of implementing those regulations."

Comments: 1-4 and 7-6

Response:

[1] https://www.dtsc.ca.gov/InformationResources/upload/Permitting_Enhancement_Workplan.pdf

DTSC respectfully disagrees with the above assertions. Health and Safety Code section 25200.21 provides in pertinent part: *"… the department [DTSC] shall adopt regulations establishing or updating criteria used for the issuance of a new or modified permit or renewal of a permit, which may include criteria for the denial or suspension of a permit."* While it is true that this same section goes on to provide that DTSC shall "consider" the seven enumerated criteria, including evidence of financial responsibility, as part of its legislative mandate to adopt these regulations, that does not weaken or diminish the mandate in the excerpted text to adopt regulations related to DTSC's permitting program. The comments seem to acknowledge this fact.

DTSC's proposal of the regulations, which address five of the seven criteria statutorily required for consideration, is a lawful exercise of DTSC's discretion. Any other interpretation is without any basis in SB 673's text, legislative history or intent. DTSC did not make any changes to the regulations in response to these comments.

B. PERMIT PROGRAM REFORMS

Comment Summary:

The comment asserts that Health and Safety Code section 25200.23 does not require DTSC to adopt the regulations as proposed. Rather, it calls on DTSC to make programmatic reforms to its permitting processes. The comment further states the regulations do not meet the directives of section 25200.23.

Comment: 1-6

Response:

DTSC agrees that Health and Safety Code section 25200.23 does not require DTSC to adopt the regulations as proposed. DTSC has not cited section 25200.23 as either "Authority" or "Reference" for any of the provisions being proposed here. (It is should be noted that section 25200.23 was enacted as part of the same bill enacting section 25200.21—Senate Bill 673.) DTSC acknowledges that the specific new authority for these regulations is in Health and Safety Code section 25200.21 and not section 25200.23. DTSC did not make any changes to the regulations in response to the comment.

C. EVIDENCE TO SUPPORT PROPOSED REGULATIONS

Comment Summary:

The comment contends that the rulemaking is devoid of evidence to support the proposed regulations.

Comment: 1-8

Response:

DTSC respectfully disagrees with the comment. Government Code section 11349(a), which specifies the "necessity" standard for the adoption of regulations, reads in its entirety: *"'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, considering the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion."* (Gov't. Code §

11349(a).) DTSC has cited approximately 20 studies, reports, analyses, etc. in support of the proposed regulations. The regulations also reflect the collective input of DTSC staff, other California Environmental Protection Agency (CalEPA) employees, academics, members of the regulated community, and the public. Therefore, DTSC has a strong evidentiary basis for conducting this rulemaking.

DTSC also notes that the agency adopting a rulemaking need not show that the proposed regulations constitute the least burdensome means of accomplishing the purpose of the regulations. Rather, the standard of review that a challenger to the "necessity" standard must meet is the following: *"[T]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence."* (Gov't. Code § 11350(b)(1).) DTSC's ISOR contains multiple types of substantial evidence for these regulations. To the extent there are additional comments regarding the "necessity" standard directed to specific provisions within the regulations, DTSC will respond with more specificity when addressing those provisions. DTSC did not make any changes to the regulations in response to these comments.

D. APPLICATION OF RULEMAKING

Comment Summary:

The comment states that the application of the proposed rulemaking to existing or current "in progress" permit actions would be inappropriate, and the proposed rulemaking should not apply retroactively. The comment goes on to state: "We further request an express statement that the proposed rulemaking's provisions do not apply to pending permit applications, and a clarification that the compliance assessment is as of the date DTSC deems the application technically complete."

Comment: 1-9

Response:

DTSC respectfully disagrees with the comment and the premise of the request. The comment does not point to any provision of the authorizing legislation, the Administrative Procedure Act, or any other controlling statute or regulation that supports this comment. By enacting SB 673, the Legislature intended DTSC to develop and implement programmatic reforms for permit decisions. SB 673 provides specific authority to DTSC, in addition to DTSC's existing authority in statutory provisions that include Health and Safety Code section 25186, to make permit denial, suspension, and revocation decisions. There is nothing in the authorizing legislation to limit DTSC's ability to apply the new regulatory standards to only those facilities that have not yet begun the new permit or permit renewal process. There is no need for excluding the applicability of the proposed regulations to permit applications that are undergoing review.

Under the applicable rules of construction, DTSC intends to apply the proposed regulations upon their effective date. The proposed regulations for training, financial assurance, and the VSP apply upon the effective date of the regulations. The proposed regulations for the community involvement profile and the HRA in section 66270.14 would apply to permit applications submitted after the effective date. Therefore, DTSC will apply the regulations as of their effective date. DTSC did not make any changes to the regulations in response to these comments.

E. AUTHORITY TO DENY, REVOKE, OR SUSPEND PERMITS

Comment Summary:

The comment states: "Under existing law, DTSC has the authority to deny, revoke, or suspend hazardous waste permits for any violation of or noncompliance with certain laws if the violation or noncompliance shows a repeating or recurring pattern" (Health & Saf. Code, § 25186(a).) The comment goes on to say that there has been dissatisfaction with DTSC's permitting program due to a perception that the program does not deny, revoke or suspend permits as often as it should.

Comment: 1-30

Response:

The Legislature, fully aware of DTSC's existing authority under Health and Safety Code section 25186, and other statutes and regulations, nonetheless passed SB 673, which authorizes DTSC to adopt regulations regarding its permitting program to bring more transparency and certainty to the permitting process and outcomes. This is especially true regarding the number and types of violations that would result in a denial. SB 673 sets out criteria for consideration by DTSC in adopting regulations that are in addition to, and more specific than, the factors that may lead to denial, suspension, or revocation of a permit pursuant to Health and Safety Code sections 25186. These regulations do not depend on Health and Safety Code section 25186 as authority and do not in any way contravene or conflict with that law. DTSC did not make any changes to the regulations in response to these comments.

F. ASSEMBLY BILL 1075

Comments Summary:

The comments claim that Assembly Bill 1075 (AB 1075, Stats. 2015, ch. 460, commencing with Health & Saf. Code § 25186.05) was introduced by Assembly Member Alejo in response to the perception that DTSC failed to deny, suspend, or revoke permits as frequently as it should. The comments go on to note that the commenter expressed concerns about the bill to the author, but ultimately removed its opposition to the bill.

Comments: 1-31, 1-32, and 1-33

Response:

DTSC agrees with the comment that AB 1075 addresses the specific bases for DTSC to deny, suspend, or revoke a hazardous waste facility permit. As noted previously, DTSC did not cite any of the sections amended or added to the Health and Safety Code by AB 1075 as Authority or Reference for any of the provisions in the proposed regulations. DTSC finds that the proposed regulations and AB 1075 are two complementary approaches to address noncompliant owners or operators. DTSC did not make any changes to the regulations in response to these comments.

G. LEGISLATIVE TIMELINE

Comment Summary:

The comment asserts that DTSC is not in compliance with the legislative timeline set out in SB 673, and that DTSC is not in compliance with its obligations under the Title VI Civil Rights settlement agreement entered between DTSC, the California Environmental Protection Agency, Green Action for Health and Environmental Justice and El Pueblo para el Aire y Agua Limpia of Kettleman City.

Comment: PH-9-2

Response:

Please see Response to Comments 4-1, 4-20, PH-9-7, and PH 11-7 regarding DTSC's alleged failure to meet any timeline to adopt additional permitting criteria. Although the comment does not specify which provision of the Kettleman Agreement DTSC is alleged to be out of compliance with, DTSC assumes the comment is referring to Section IV, Paragraph D. of the Kettleman Settlement Agreement of August 2016. This portion of the Kettleman Settlement Agreement has the same deadline set out in SB 673. DTSC is committed to adopting these regulations as expeditiously as is feasible.

DTSC did not make any changes to the regulations in response to these comments.

H. CIVIL RIGHTS LAWS

Comment Summary:

The comment states that DTSC must comply with myriad civil rights laws, including: California Government Code section 11135, the state's civil rights laws, Title VI of the United States Civil Rights Act of 1964, and its implementing regulations. The commenter states that this means DTSC must refrain from making decisions that have an adverse disparate impact on people of color and non-English speakers.

Comment: PH-9-4

Response:

DTSC agrees that it is subject to myriad civil rights laws, including those identified by the comment. These regulations, and those that would follow based on other provisions of SB 673, are being adopted to ensure DTSC's compliance with the civil rights requirements. DTSC did not make any changes to the regulations in response to this comment.

I. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Comment Summary:

The comment states that DTSC may not rely on a 26-year-old Environmental Impact Report (EIR).

Comment: PH-9-5

Response:

DTSC takes its obligations under the California Environmental Quality Act seriously, including the obligation to develop timely and complete environmental analyses, such as EIRs. DTSC did not make any changes to the regulations in response to these comments.

J. CONSIDERATION OF COMMUNITY VULNERABILITY

Comments Summary:

The comments state that DTSC should consider disproportionately impacted minority communities.

Comment: PH-10-2, and PH-10-3

Response:

DTSC agrees with the comment. Please see Response to Comments 4-1, 4-20, PH-9-7 and PH-11-7. These proposed regulations include a CIP to help evaluate the communities that surround a facility and an HRA to assess risk associated with the facility's operations. Furthermore, as part of its responsibility to comply with SB 673, DTSC is actively developing a regulatory framework to evaluate and address "the vulnerability of, and existing health risks to, nearby populations." Vulnerability is to be determined using available tools and other indicators of community vulnerability, cumulative impacts, and potential risks to health and well-being. (Health & Saf. Code § 25200.21(b).) The framework also considers possible regulatory criteria for "minimum setback distances from sensitive receptors, such as schools, child care facilities, residences, hospitals, elder care facilities, and other sensitive locations." (Health & Saf. Code § 25200.21(c).)

DTSC is committed to the fair treatment of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. DTSC has adopted and implemented these concepts across its various programs and policies and strives to further foster and advance these concepts over time. DTSC did not make any changes to the regulations in response to these comments.

VI. ADMINISTRATIVE PROCEDURE ACT

A. PUBLIC ENGAGEMENT

Comments Summary:

The comments assert that DTSC failed to provide an adequate opportunity for public engagement regarding the proposed regulations. The variations of this comment include: DTSC denied a request from some interested parties to extend the 45-day public comment period; DTSC should have held separate public workshops on every major component of the proposed regulations; DTSC failed to hold a public workshop during the 45-day public comment period; DTSC developed the regulations "behind closed doors;" one 45-day public comment period is an insufficient amount of time; the rulemaking package is, in effect, five different rulemakings. The comments acknowledged that DTSC had held two symposia regarding the proposed regulations, but argued that they should have been more focused on these proposed regulations, and that they should have been public workshops rather than symposia.

Comments: 1-1, 1-2, 1-71, 2-1, 2-2,3-4, 3-5, 3-6, 3-48, 10-2, 11-29, PH-4-2, PH-4-7, PH-5-1, PH-6-2, PH-7-6, PH-7-7, PH-8-1, PH-8-2, PH-8-4, PH-9-1, and PH-9-6

Response:

DTSC has provided numerous opportunities for meaningful public engagement during all phases of the regulatory process and has complied with all its responsibilities under the Administrative Procedure Act (APA; commencing with Gov't. Code § 11340). More specifically, DTSC has complied with the public notice requirements in Government Code section 11346.4 and the public discussion provisions in Government Code section 11346.45. DTSC went beyond the statutory requirements to engage in extensive, additional public engagement. DTSC held no fewer than nine separate opportunities for public discussion regarding one or more components of the regulations.

To elaborate, DTSC held a presentation in Bakersfield at the monthly meeting of the Kern Environmental Enforcement Network in October 2015 regarding early development of the Violation Scoring Procedure (VSP). This meeting was held in an environmental justice community. DTSC also hosted a VSP presentation in Sacramento at the State Capitol for staff and legislative members from both the Assembly and the Senate committees in November 2015. DTSC also presented a draft VSP to the California Council for Environmental and Economic Balance (CCEEB) at its monthly meeting in December 2015. CCEEB offered significant and extensive comments on these regulations. In January 2016, DTSC gave a presentation regarding the VSP to the Los Angeles Environmental Network for its members. Later that month, DTSC gave a presentation on the VSP to the California Chamber of Commerce and other members of the regulated community, including representatives of permitted hazardous waste facilities. The California Chamber of Commerce also submitted significant and extensive comments on these regulations. The VSP was then, and continues to be, a regulatory element of great interest to stakeholders. In fact, the VSP portion of the regulations garnered a predominant share of attention from the interested parties and the lion's share of the public comments.

In addition, DTSC held two regulatory concepts workshops regarding this rulemaking. The first was held on December 14, 2016 at the CalEPA headquarters building in Sacramento. The second was held on December 15, 2016 in DTSC's Cypress office. DTSC also held two symposia regarding this rulemaking and future, additional regulatory actions that DTSC intends to take regarding related provisions in Health and Safety Code section 25200.21. It is worth noting that Government Code section 11346.45 does not specify that the agency undertaking a rulemaking conduct "public workshops," as some of the comments assert or imply. Rather, that section provides, "In order to increase public participation and improve the quality of regulations, state agencies proposing to adopt regulations shall, prior to publication of the notice required by section 11346.5, involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations, when the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period." (section 11346.45(a).) This is noteworthy because DTSC referred to two of its public meetings as "symposia," as discussed above. Some of the comments seem to question the notion that symposia satisfy the public engagement requirements. Clearly, based on section 11346.45(a), they do.

DTSC exercised its lawful discretion in denying the request for extension of the 45-day public comment period. Those entities requesting the extension were able to amass lengthy and thoughtful public comments. DTSC is under no legal obligation to hold public workshops during the 45-day public comment period, and did not think it would be a prudent use of limited time and resources for all concerned, especially considering the extensive public engagement it had already undertaken.

While it is true that DTSC drafted the regulations through its normal internal processes, DTSC provided substantive opportunities for public engagement in the regulatory process. The Executive Branch of the State of California, through its various agencies, has the exclusive duty and ability to draft regulations. Following the extensive public engagement discussed above, DTSC then drafted these proposed regulations, as it was required to do. DTSC acknowledges that the proposed rulemaking package covers several different aspects of DTSC's permitting program. However, there is no evidence to support the idea that this rulemaking required five separate rulemaking packages. There is nothing in SB 673, the authorizing legislation, or in the APA to support this contention. DTSC did not make any changes to the regulations in response to these comments.

B. MANDATORY CRITERIA

Comments Summary:

The comment asserts that DTSC failed to adopt mandatory criteria required under Health and Safety Code section 25200.21.

Comments: 4-1, 4-20, PH-9-7, and PH-11-7

Response:

Health and Safety Code section 25200.21 authorizes and requires DTSC to adopt these proposed regulations. More specifically, section 25200.21 reads in pertinent part, "…the department [DTSC] shall adopt regulations establishing or updating criteria used for the issuance of a new or modified permit or renewal of a permit, which may include criteria for the denial or suspension of a permit. In addition to any other criteria the department may establish or update in these regulations, the department shall consider for inclusion as criteria all of the following: …" The statute goes on to specify seven distinct criteria identified as subdivisions (a) through (g) of Health and Safety Code section 25200.21. DTSC carefully considered all seven of the criteria and incorporated five of the criteria in this rulemaking: the number and types of past violations that would result in a denial; evidence of financial responsibility and qualifications of ownership; provision of financial assurances; training of personnel in the safety culture and plans; and completion of an HRA.

DTSC continues to develop a regulatory framework to address the two remaining criteria enumerated for consideration. These criteria include "The vulnerability of, and existing health risks to, nearby populations. Vulnerability and existing health risks shall be assessed using available tools, local and regional HRAs, the region's Clean Air Act attainment status, and other indicators of community vulnerability, cumulative impact, and potential risks to health and well-being" and "Minimum setback distances from sensitive receptors, such as schools, child care facilities, residences, hospitals, elder care facilities, and other sensitive locations."

This development includes extensive engagement with sister agencies within CalEPA, especially the Office of Environmental Health Hazard Assessment (OEHHA) and the California Air Resources Board (CARB). DTSC has engaged academic research partners to support this work, and stakeholder engagement resources for early and robust participation by interested parties. Further, DTSC is aligning these efforts with parallel efforts in regulatory and tool development at CARB and OEHHA. DTSC did not make any changes to the regulations in response to these comments.

C. ANALYZING IMPACTS

Comments Summary:

The comments assert that DTSC has not adequately analyzed the consequences of adopting the proposed regulations, and there is a lack of evidence in the Initial Statement of Reasons (ISOR) regarding the potential impacts of the regulations on persons and facilities, including the costs of complying with the regulations. The comments also claim that DTSC failed to consider reasonable alternatives to the proposed regulations.

Comments: 7-5, 7-9, and PH-8-3

Response:

DTSC cannot determine which specific section(s) or portion(s) of the regulations the comments are addressing. The comments lack sufficient specificity for DTSC to focus on any portion of the ISOR or the draft regulatory text in responding to the comments. However, DTSC notes that it cited approximately 20 different studies, reports, analyses, and other materials in the ISOR in support of the proposed regulations. This does not include all the internal discussions held with DTSC staff that have extensive experience and expertise in the various subjects set out in the regulations. In addition, DTSC provided a statement of necessity for every regulatory provision down to the subsection level, and to a finer level in some cases. DTSC also included a consideration of reasonable alternatives section in the ISOR.

DTSC has summarized the cost of compliance in the notice for proposed action and in the ISOR, and provided all the calculations for the cost of compliance in the attachments of the Form STD 399, Economic and Fiscal Impact Statement (EFIS).

For all these reasons, DTSC did not make any changes to the regulations in response to these comments.

VII. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

A. APPROPRIATENESS OF NOTICE OF EXEMPTION (NOE)

Comments Summary:

The comments assert that: (1) owners and operators would close facilities in California because it would be more costly to manage hazardous waste in the state; (2) DTSC's conclusion that the proposed rulemaking has no environmental impacts necessitating a CEQA analysis does not consider the environmental impacts related to hazardous waste facility closures; (3) DTSC did not consider the unintended consequences of additional facility closures would have an environmental impact in California; and (4) closures may result in improper disposal of hazardous waste in California, or increased transportation congestions and air emissions when hazardous waste is shipped out of state. In this regard, the comments claim that by making it more costly to manage hazardous waste in the state, more facilities would simply be forced to close their doors in California, as evidenced by the continuing downward trend in the number of operating facilities.

Comments: 1-25, 1-26, 1-27, 1-28, 1-29, 3-47, 10-3, 10-5, PH-4-5, PH-8-6

Response:

DTSC is still planning to file a Notice of Exemption (NOE) under CEQA. But based on the comments DTSC received, DTSC has elected not to pursue the exemption authorized by the CEQA Guidelines found in section 15061(b)(3) of title 14 of the California Code of Regulations. Instead, DTSC anticipates using the categorical exemption found in section 15308, known as the Class 8 categorical exemption. The Class 8 categorical exemption is for "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (Cal. Code of Regs., tit. 14, § 15308.)

SB 673 authorizes DTSC to set regulatory requirements for Hazardous Waste Facility Permit decisions by considering a hazardous waste facility's compliance history, cumulative impacts to the surrounding community, including vulnerable populations, financial responsibility, facility personnel training, and completion of an HRA. DTSC has determined that the proposed regulations are actions taken by DTSC to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.

In addition to filing a NOE under CEQA, DTSC notes that its hazardous waste facility permit decisions are discretionary decisions for projects under CEQA and that it complies with CEQA each time it makes a permit decision. DTSC did not make any changes to the regulations in response to these comments.

B. NEED FOR ENVIRONMENTAL IMPACT REPORT (EIR)

Comments Summary:

The comments claim that DTSC must prepare an EIR or some other form of environmental documentation that satisfies the requirements of CEQA. The commenters disagree with DTSC's conclusion that the rulemaking is exempt under the "general rule" in CEQA (Pub. Res. Code, § 15061(b)(3)).

The comments point out that one of the legislative findings in Health and Safety Code section 25146.5(c) is that decreases in the number of existing hazardous waste facilities increases the distance that it is necessary to transport hazardous waste to properly dispose of it, and that under CEQA, such potential effects must be identified and considered prior to adoption.

The comments assert that the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision. The question whether alleged physical changes are reasonably foreseeable requires an examination of the evidence presented in the administrative record. The comments note that an agency obviously cannot declare with certainty that there is no possibility that the activity in question may have a significant effect on the environment if it has not considered the facts of the matter.

Comments: 3-46, 10-3, 10-5, PH-4-6

Response:

DTSC respectfully disagrees with the comments that an EIR or other form of CEQA documentation is required for this project. DTSC is still planning to file a Notice of Exemption (NOE) under CEQA. But

based on the comments DTSC received, DTSC has elected not to pursue the exemption authorized by the CEQA Guidelines found in section 15061(b)(3) of title 14 of the California Code of Regulations. Instead, DTSC anticipates using the categorical exemption found in section 15308, known as the Class 8 categorical exemption. The Class 8 categorical exemption is for "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (Cal. Code Regs., tit. 14, § 15308.)

SB 673 authorizes DTSC to establish and update regulatory requirements for Hazardous Waste Facility Permit decisions by considering a hazardous waste facility's compliance history, cumulative impacts to the surrounding community, including vulnerable populations, financial responsibility, facility personnel training, and completion of an HRA. All of these considerations are directed to the maintenance, restoration, enhancement, or protection of the environment where DTSC's regulatory process involves procedures for protection of the environment.

In addition, since each application for a hazardous waste facility permit is a project subject to DTSC's discretionary decision, DTSC will comply with CEQA each time it makes a permit decision. DTSC did not make any changes to the regulations in response to these comments.

C. ENVIRONMENTAL IMPACTS IN OTHER STATES

Comments Summary:

The comments assert that when hazardous waste is disposed of in other states and countries, the waste is not treated there in the same manner as required under California law. It is estimated by the commenters that as much as 50 percent of non-RCRA waste flows out of California for disposal in adjacent states due to lower regulatory standards and state fees. Finally, the comments claim that DTSC cannot reasonably dispute that California's exported hazardous waste would have environmental impacts in other states and countries.

Comments: 1-28 and 1-29

Response:

DTSC respectfully disagrees with the comment. The comment about the amount of non-RCRA hazardous waste going out of state and the impact on other states is not supported by evidence and is speculative. DTSC did not make any changes to the regulations in response to the comments.

D. CITATION CORRECTION

Comment Summary:

The comment states that in the Notice of Public Action, one of the two citations for the NOE was incorrect.

Comment: 10-4

Response:

DTSC thanks the commenter for bringing this matter to its attention. DTSC has revised the subsequent Notices of Public Action accordingly.

VIII. ECONOMIC AND FISCAL IMPACT STATEMENT (FORM 399)

A. EVIDENCE OF MINIMAL IMPACT

Comment Summary:

The comment asserts that DTSC's conclusion that the proposed rulemaking would have minimal economic impact is unsupported. DTSC states it anticipates two types of costs being imposed on representative businesses relating to the proposed rulemaking: 1) between $4,000 and $5,500 in annual costs for a typical business and between $64,000 and $117,500 in additional direct costs for permit applications. The comment goes on to say that without any analysis, evidence, or discussion, DTSC concludes that "the proposed regulations would not have a significant economic impact on small businesses."

Comment: 1-10

Response:

Any increase in DTSC's permit application processing costs due to the proposed regulations would primarily be for DTSC's review of the HRA required to be submitted with the permit application.

The estimates for the EFIS assume the HRA would involve an HRA Questionnaire and a Screening Level HRA. Based on DTSC's records, DTSC estimates that for a small business with no onsite contamination, it would cost from $8,000 to $13,000 to prepare these two documents, plus $9,000 to $13,000 for DTSC's review time. For a small business with onsite contamination, DTSC estimates it would cost from $37,200 to $52,000 to prepare these two documents, plus $26,800 to $ 35,700 for DTSC's review time. These costs are expected to be incurred every ten years. In the Notice of Proposed Action, DTSC stated that, "Generally speaking, the proposed regulations would not have a significant economic impact on small businesses. However, those small businesses with a pattern of violating hazardous waste laws and regulations may experience a significant economic impact." In other words, a small business that has a contaminated site needs to prepare an appropriate HRA and may experience a significant economic impact due to the new requirements.

For additional clarification, DTSC has revised the Form 399 (EFIS.) and the narrative explanation found in Attachment 1 to the Form 399. The cost estimates in Attachment 2 to the Form 399 have been added to address the increase in DTSC's permit application processing costs. DTSC did not make any changes to the EFIS in response to these comments.

B. CHARACTERIZING SCOPE AND IMPACT OF THE REGULATIONS

Comment Summary:

The comment states that the proposed rulemaking imposes new requirements and claims that as a result, facilities operating outside of California would have a competitive advantage over the facilities operating in California.

Comment: 1-11

Response:

California hazardous waste law and regulations are more stringent than the federal hazardous waste requirements. California regulates more waste streams and more activities than RCRA's hazardous waste permitting program. Hazardous waste facilities outside of California may already have a competitive advantage because the federal government and other states do not regulate used oil, recycling of hazardous waste, onsite hazardous waste treatment, etc. While these regulations do increase regulatory requirements, the economic burden imposed by the regulations is primarily on facilities that are not complying with California hazardous waste law and regulations. DTSC did not make any changes to the regulations based on this comment.

C. FIVE YEAR TERM

Comment Summary:

The comment questions why DTSC used a five-year period for estimating costs when permits are issued for a 10-year period; and states that it is unclear how a five-year period comports with costs relating to compliance with the regulation "over its lifetime."

Comment: 1-12

Response:

The project horizon is the time over which the cost of a proposed regulation is estimated. For situations in which capital investment is necessary to comply with a proposed regulation, this time should correspond to the useful life of the capital investment. These proposed regulations do not mandate a capital investment. DTSC considered a five-year cost period consistent with procedures used by CARB for identifying the project horizon and estimating non-capital costs of compliance (see "Economic and Fiscal Impact Statement Guidance Package" dated 2009).

CARB is a sister agency within CalEPA with a specialized unit of economists with significant and relevant expertise in this arena. CARB's guidance states that if the proposed regulation requires new equipment to comply, the number of years should span the life of the equipment. However, if there is not equipment required, then the default should be five years for the calculation of costs that businesses may incur to comply with the regulation over its lifetime. This treatment of assets conforms to the federal Internal Revenue Service's laws on the recovery period for capital and fixed assets (26, U.S.C., pt. 167). DTSC did not make any changes to the EFIS in response to these comments.

D. FEE FOR SERVICE (REIMBURSEABLE PERMIT APPLICATION PROCESSING COST)

Comments Summary:

The comments continue from the above points to argue that DTSC's economic analysis of purported "direct" costs on permittees and the "indirect costs" based on "DTSC review" (which the commenters assert would be passed through to permittees via DTSC's "fee for service only" reimbursement requirement) are substantially underestimated. The comments also state that DTSC's cost estimates for HRAs does not reflect the DTSC resources required to review the HRA, and the costs associated with

those resources would likely be billed back to the permittee. Thus, the comments argue, significant financial burden is being placed on both DTSC and the regulated community were this process to be adopted.

Comments: 1-14, 1-16, and 11-10

Response:

DTSC had noted in the analysis that DTSC's permit application processing costs are reimbursable by the permit applicant. The estimate of DTSC's costs include salaries and overhead. DTSC appreciates the comments, and DTSC has revised the cost estimates in the Form 399 to reflect facility costs, state costs, and cost recovery estimates.

E. HOURLY WAGES

Comments Summary:

The comments assert that there is no evidence, discussion, or analysis in this regard to owner's or operator's hourly staff or DTSC's hourly staff costs, and the commenters believe these costs are greatly underestimated. The comments request DTSC to provide greater transparency on how DTSC derived these costs estimates.

The comments continue, claiming that the labor costs do not match the fee for service costs. They state DTSC's labor costs would presumably be recouped through the assessment of fee for services on the affected facilities, and for many facilities, DTSC's permit processing cost estimates are more than $275,500. The comments assert that a more rigorous and thorough analysis of estimated costs of compliance must be completed and provided to stakeholders before the Office of Administrative Law reviews the regulations. Commenters believe this is especially important because they anticipate these costs in addition to what they characterize as extremely large cost increases resulting from the new law that replaces a flat permit fee with fee for service (Senate Bill 839, 2016).

Comments: 1-13, 1-14, 3-44, and PH-7-3

Response:

DTSC provided the requested details in Attachment 1 to Form 399. DTSC has revised Attachment 1 reflect the revised private and state hourly staff costs and include the additional costs for DTSC's permit application processing time. DTSC labor costs specified in the revised Form 399 include estimates using the following:

- Private hourly staff cost based on the federal Contract Awarded Labor Category (CALC) tool which provides hourly rate prices on the eight GSA professional services schedules and returns comparable labor categories and prices. We included hourly costs for environmental scientist, environmental engineer, senior environmental scientist or engineer, toxicologist, and environmental managers;
- DTSC's "fully loaded" salary costs used to estimate fiscal impacts to state government. Fully loaded costs include salaries, operating expenses an equipment; and
- DTSC's contract estimate cost rates based on the highest salary rate for each employment class including pay, equity raises, and the indirect rate for permitting activities.

The revised estimates also include the DTSC's reimbursable costs for reviewing the community involvement profile and the HRA submitted with a permit application.

F. WORKLOAD ESTIMATES

Comments Summary:

The comments question the accuracy of the workload estimates associated with implementing the regulation. The comments note that DTSC based the estimates in part on existing workload standards for permit review and request further clarification about those standards. They question estimates associated with implementing the VSP provisions of the regulation, specifically asserting that: (1) not all VSP implementation costs were included; (2) the number of 28 facilities impacted is inaccurate which would affect calculations of direct and indirect costs; (3) the basis for the number of 45 facilities to be reviewed in the first year is not adequately described; and (4) the VSP workload estimates do not match the hours used in the economic impact analysis, which would cause the impacts to be underestimated.

Comments: 1-15, 1-16, 1-17, and PH-7-3

Response:

DTSC has extensive experience preparing cost estimates not only for permit decisions, but also for other reimbursable activities performed by DTSC. For example, DTSC uses its existing workload standards and hourly rates as the basis for preparing federal RCRA grant applications, which include estimates for work to be completed to meet grant commitments, and for estimating costs under in Health and Safety Code section 25206.2. Moreover, DTSC has routinely completed community profile assessments, inspections, and HRAs while processing permit applications.

As to DTSC's costs related to the VSP, the majority of the workload occurs in preparation for permit review and is therefore not directly reimbursable. For estimating direct costs for the economic impact analysis, DTSC only included costs for reimbursable activities that occur during permit review.

DTSC estimated the number of Facility VSP Scores that would be calculated in the initial year of implementation based on the number of facilities that have Class I violations. Facilities that do not have Class I violations do not need to be evaluated because their Facility VSP Score is zero (0). At the time the original Form 399 was prepared, 40 of 113 permitted hazardous waste facilities had a Class I violation during the 10-year period from January 2007 through December 2016 (see Table 5 of Attachment 1 to the Form 399.) DTSC based the cost analysis on 45 facilities, however, to account for uncertainty associated with violations that may have occurred after January 2017.

Since then, DTSC has revised the estimate of initial-year Facility VSP Scores that will be calculated up to 55 in the Revised Form 399 to account for any potential change or uncertainty in the data for either the 10-year cycle—January 2008 to December 2017 (actual) or January 2009 to December 2018(estimated). DTSC also adjusted the estimate of the total number of facilities would be scored; the total number of facilities was initially adjusted from 113 to 109 and then lowered again to 82 facilities because post-closure facilities have been excluded from the Facility VSP Score.

Once all the facilities have been scored, there would be additional inspections each year. DTSC has estimated that the annual number of impacted facilities is 28 because the variability in the number of

facilities that have Class I violations, which changes year to year. For the revised Form 399, the number 28 has been revised up to 32 and represents a worst-case scenario for any specific year.

DTSC's "workload standard" for the VSP calculation has been revised and the workload standards stated in Table 11 of attachment 1 to Form 399 now match the hours used in the calculations in Attachment 2 to Form 399. Both hourly estimates have also been revised down from 20 hours to 16 hours for a small facility, and 30 hours has been revised down to 28 hours for a larger facility if Class I violations are found.

G. VSP AUDIT COSTS

Comment Summary:

The comment states that DTSC provides no basis or reason why it identified seven as the number of facilities associated with VSP audits for purposes of the EFIS calculation, or why it then uses "2-4" audits as the basis for the final calculation, or why it assumes one audit in the current year, two audits in Year 2, and three audits in Years 3-5 for the summary of the five-year total (EFIS, Attachment 2 at p. 5).

The comment goes on to say that while DTSC uses staff and management hours to prepare the cost estimate, it fails to include an estimate for the cost of the independent auditor, even though DTSC expressly states "[t]he owner or operator must hire and pay for an independent third-party auditor that must complete two audits."

Finally, the comment asserts that DTSC does not discuss the "assumptions" relating to the VSP audits in Attachment 1, and that while the audits also consist of two phases and the regulations require that two audit reports be submitted at different times, there appears to be no consideration for two audit reports in the EFIS.

Comment: 1-17

Response:

The calculation for the VSP audit has been revised. The yearly number used is an average that can range from 2 to 4. DTSC created tables in attachment 2 of the Form 399 to assess the cost estimates based on yearly variability for each of the requirements. For example, the new revised cost estimate for the total listed on line B.1 of Form 399 is based on the average number of facilities required to undergo an audit multiplied by the average cost per requirement, which equals $7,193,000. This is compared to the total using different yearly estimates for the number of facilities impacted, which equals $7,167,000. These two numbers are not significantly different, and the higher number was used in Form 399.

DTSC assumes that the cost for the VSP auditor is external to the facility because auditors are required to be independent third-party entities. The costs for the third-party auditor was included in the cost for the facility. The estimated staff hours are based on external staff performing the audits, and internal staff time to coordinate the audits and complete the compliance implementation plan, as specified in section 66271.56(a) and (b).

DTSC has revised attachment 1 to Form 399 to include more detailed assumptions and calculations.

H. SPECIFIC AUDIT COSTS

Comment Summary:

The comment states that independent, highly qualified professional with extensive experience in federal and state hazardous waste management regulations, audit all of the commenter's facilities nationwide. These audits are conducted on a regular basis, with the frequency determined by the size, complexity and compliance history of the facility. Audit costs typically range from between $5,000-$7,000 for a small treatment/storage facility to $20,000 for a major treatment, storage and disposal facility, such as the Class I landfill owned and operated by the commenter near Buttonwillow, California. These costs are predictable and are taken into consideration during the commenter's annual budget processes.

Comment: 3-21

Response:

DTSC greatly appreciates the commenter's willingness to share this information. The economic analysis estimated audit costs to be about $11,000 for a small, $21,000 for a medium, and $31,000 for a large, complex facility.

I. COMMUNITY INVOLVEMENT PROFILE (CIP) COSTS

Comment Summary:

The comment states that the estimated number of community involvement profiles to be performed is unsubstantiated but that DTSC is aware of the number of facilities with expiring permits in a given year. Additionally, the commenter questions why DTSC states that the number of yearly permit applications ranges from "6 to 15 a year" but the total cost analysis is based on six in the Current Year plus one for each year between Year 2 and 5.

Further, the comment asserts that the workload hours further seem significantly shy of what would be required, and as an example, notes the profile must include "the identification of other offsite sources of potential exposures to hazardous waste or hazardous materials," including all entities that generate and store hazardous waste.

Comment: 1-18

Response:

The number of facility permits expiring has been revised to 10 to 16 per year with an average of 13 per year. The estimates have been recalculated using these higher estimated facility numbers for both the number of community involvement profiles and the number of permit application estimated for the coming years.

The workload number represents what DTSC feels is appropriate to compile the required information based on census data that is readily available. Envirostor is the other tool that can be used by facilities to determine other entities that generate and store hazardous waste within the same census tract where the hazardous waste facility is located.

J. FINANCIAL ASSURANCE COSTS

Comment Summary:

The comments say that DTSC only includes an analysis of "[a]dditional time to update financial documents" and "[m]anagement's review of documents." The commenters assert that DTSC does not perform an analysis of the cost impacts relating to changes in the financial assurance requirements and believes these costs are direct additional operating costs resulting from the proposed rulemaking and should be included in the EFIS.

Additionally, the comments state that DTSC used an hourly staff rate of a $50 in this calculation instead of the hourly staff rate of $80 identified in the assumptions, and failed to provide any explanation or analysis for this discrepancy.

Comment: 1-19

Response:

The proposed regulations only amend the financial assurance provisions for the financial test mechanism and insurance for closure and post-closure of facilities. Although DTSC knows how many facilities use these mechanisms, DTSC does not know the specific costs for each facility. The estimated additional financial assurance cost for all facilities is unknowable at this time. There are too many variables to determine costs relating to changing financial assurance mechanisms. Although we know the financial mechanisms used by each facility, what remains unknown includes the following:

- how many facilities may change from financial test or corporate guarantee mechanisms;
- the reasons for the change;
- the cost of the current financial mechanism;
- the cost of the new financial mechanism;
- financial information on companies that are not publicly available; and
- the future financial responsibility costs associated with post-closure or corrective action.

Furthermore, the cost of each financial responsibility instrument is case-specific and depends on several parameters. The specific characteristics of each facility include, but are not limited to, the financial health of the facility's owner or operator, the corresponding fee structure of the specific financial instrument, the facility's overall liability for the required facility closure and remediation, and the estimated timing and amounts of costs likely to be due over the life of the facility.

DTSC has revised the cost estimate for the EFSI and the hourly staff rate of $50 has been changed to $80 in the revised Form 399. The estimates have been recalculated using these higher costs.

K. TRAINING COSTS

Comment Summary:

The comment notes that training requirements appear to apply to more facilities than just the one-hundred-and-thirteen hazardous waste permitted facilities identified in the ISOR, including the large quantity hazardous waste generators. The comment states that accordingly, DTSC would have to adjust the financial impact from the training requirement to include the impact on those additional facilities as well or adjust the language in the proposed rulemaking to serve its intent that the provision applies to hazardous waste permitted facilities only.

Comment: 1-20

Response:

DTSC has revised the proposed regulations to expressly exempt large quantity generators from some of the training requirements found in section 66265.16. Large quantity generators are not hazardous waste facilities and are not subject to Hazardous Waste Operations and Emergency Response (Cal. Code Regs, tit. 9, § 5192). Furthermore, the Certified Unified Program Agencies (CUPAs) administer and enforce the hazardous waste generators' requirements at the local level. It was not DTSC's intent to require a training certification to be sent either to DTSC or the CUPAs.

DTSC is currently drafting regulations to implement the U.S. EPA's final Hazardous Waste Generator Improvements Rule, which was signed on October 28, 2016 and published in the Federal Register on November 28, 2016. DTSC would be proposing this new rulemaking under section 100 of title 1 of the California Code of Regulations to reorganize the hazardous waste generator requirements so that all the generator regulations are in one place. When these generator regulations take effect, the exemption in these regulations provided for large quantity generators would no longer be needed.

L. HRA COSTS

Comments Summary:

These comments question the basis and accuracy of DTSC's estimates of costs associated with the requirements for HRAs. The comments question the estimate of six yearly permits subject to the costs when annual permit applications range from six to 15, the detailed basis for the workload hours (80/120/120) estimated for the different tiers of requirements, and in particular, why the estimates for Screening Level and Baseline HRA tiers are the same. The comments question how DTSC estimated that 12 percent of permitted facilities would meet the HRA requirements by simply submitting the HRA Questionnaire when approximately 26% of the permits are standardized permits and 24% of the permits are post-closure permits. The comment also asked for the screening protocol DTSC used for in its analysis. Finally, the comments assert that DTSC's cost estimates for HRAs ($64,000 to $117,500) do not consider facility complexity are significantly underestimated, particularly for complex facilities, and do not reflect the DTSC resources required to review the HRA.

Comments: 1-21, 1-22, 1-97, 1-98, 1-100, and 11-10

Response:

DTSC has revised the cost estimates for the HRA costs. First, DTSC has revised the regulations to exempt post-closure facilities that have closed with hazardous waste remaining in place. These facilities have completed health assessments, so no additional HRA is necessary. By exempting post-closure facilities from the requirement to complete an HRA, the cost range of facilities for HRA questionnaires is reduced. While the number of facilities subject to the HRA is reduced, the projected number of permit

applications per year was revised up from an average of 8 facilities per year[2] to 11 facilities per year due to DTSC's commitment to the Legislature to increase the number of permits per year.

DTSC has estimated that the completion of the HRA questionnaire is about 80 hours for a standardized permit or small storage facility and 120 hours for a treatment or landfill facility. The questionnaire is mostly a compilation of existing data that is part of the permit application submittal. The workload standards for DTSC to review a risk assessment work plan is 112 hours for small, medium or large facility permits. DTSC calculated the 80/120/120 workload hours based on permitting experience.

DTSC has revised the workload assumptions for a Screening Level HRA and a Baseline HRA. DTSC's estimated time to review the Screening Level HRA has been reduced.

DTSC has also revised additional estimates. First, only 82[3], instead of 113, facilities would be subject to the HRA requirements. This is because the post-closure facilities are no longer included. The original estimate assumed 27 percent of 113 permitted facilities would meet the HRA requirements by simply submitting the HRA Questionnaire because the facilities have no known contamination, wastewater discharge permits or air permits. This is still the criteria used, but the overall number of facilities has been reduced and the percentages have changed accordingly. The revised estimate is that now 22 percent of the facilities would have no further action required after the completion of the HRA Questionnaire. This estimate is a broad assumption based on DTSC's records and experience, and does not represent a known number based on specific facilities or site-specific conditions.

DTSC also calculated that a low estimate for costs to a facility would be the cost of the HRA Questionnaire and a Screening Level HRA. The cost estimated for a typical facility included the cost of the HRA Questionnaire plus the average of a Screening Level HRA and a Baseline HRA. For a complex HRA, DTSC calculated the cost of the HRA Questionnaire and a Baseline HRA. The estimates for each HRA Questionnaire, Screening Level HRA, and Baseline HRA includes the initial submittal or the work plan submittal and the final report submittal.

DTSC has revised the estimates for all the facilities. DTSC's estimated range of $64,000 to $117,500 is an estimate per year for a facility to complete an HRA Questionnaire. DTSC has revised the numbers to include the additional cost reimbursement estimates that would be invoiced to the permittee in the revised the Form 399. See Attachment 2 to the Form 399 for additional details.

The new estimate for a complex facility to complete the HRA Questionnaire and the Baseline HRA ranges from $150,000 to $225,000. This revised estimate includes DTSC resources required to review the HRA. This could potentially be a significant burden to those facilities that have extensive onsite or offsite environmental impacts that need to be quantified to ensure protection of human health. In general, this level of HRA analysis would only apply to a small fraction of the facilities, and only once every ten years.

M. TOTAL COSTS

[2] Eight per year is the number used to calculate the estimated costs in the Form 399 dated September 2017. The commitment DTSC made to the Legislature is 16 facility permits per year. The number 16 per year has been adjusted down to 13 per year for the HRA to account for excluding the post-closure facilities.

[3] The total number of facilities used to calculate the estimated costs in the Form 399 dated September 2017 was 113. Since then the total number has dropped to 109 as of June 2018, the total number of operating facilities that excludes post-closure facilities is 82 on the Form 399 dated June 2018. These numbers are subject to change.

Comment Summary:

The comment states that DTSC estimates its annual costs relating to the proposed rulemaking to be between $319,200 and $330,700 per year. The comment asserts that DTSC did not analyze the impact of those annual costs being passed on to permitted facilities as a fee for service.

The comment advises that, if DTSC believes that such costs would be absorbed within its budget, it should consider the Administration's directive and heed its caution that "[a]dding new responsibilities to DTSC must be undertaken holistically while considering the resources and funding available. (see Veto Messages on AB 248 and AB 1179 (2017 Legislative Session).)

Comment: 1-23

Response:

DTSC has revised Form 399 to include DTSC's reimbursable permit application processing costs (fee for service.) These reimbursable costs are affected by the content and complexity of a permit application, such as the community involvement profile and the HRA. DTSC's reimbursable costs are not applicable to the VSP, neither are they applicable to the requirements imposed on the facility for providing training and obtaining financial assurance mechanism(s) unless any related documentations are included in a permit application.

N. MAJOR RULEMAKING

Comment Summary:

The comment states that DTSC's EFIS fails to appropriately analyze all the direct and indirect costs associated with the proposed rulemaking. The commenter believes that, if DTSC performed an adequate analysis, it would conclude that the proposed rulemaking qualifies as a "major regulation" and would have an impact of more than $10 million.

Additionally, the comment says that to evaluate the impact of the costs associated with the proposed rulemaking, it is important and appropriate to analyze the percentage increase these costs represent in comparison to what facilities have historically been paying. The comment provides as an example: if a small facility previously paid $6,000 to renew its permit, an addition of between $64,000 and $117,500 could hardly be deemed insignificant. The comment also states that DTSC should review the cumulative impact of these costs in relation to the "fee for service only" costs now being imposed on permittees.

Comment: 1-24

Response:

DTSC has revised the Form 399 to adjust for both all the direct and indirect costs associated with the proposed rulemaking. The revised costs do not exceed $10 million and do not qualify as "major regulation," as defined in Government Code section 11342.548. For purposes of the Administrative Procedure Act, a "major regulation" is defined (Gov't. Code § 11342.548) to have an economic impact on California business in an amount exceeding $50 million. This statute requires agencies to conduct a Standardized Regulatory Impact Assessment (SRIA) for major regulations prior to filing a Notice of Proposed Adoption with the Office of Administrative Law (OAL).

Furthermore, the revised cost on the EFIS for the proposed regulations does not meet the definition of "major regulation" in Health and Safety Code, section 57005. This second definition means any regulation that would have an economic impact on the state's business enterprises in an amount exceeding $10 million. This statute requires each board, department, and office within CalEPA to evaluate the alternatives to the requirements of the proposed regulations and consider whether there is a less costly alternative or combination of alternatives which would be equally as effective in achieving increments of environmental protection in a manner that ensures full compliance with statutory mandates within the same amount of time as the proposed regulatory requirements.

DTSC has evaluated two alternatives to the proposed regulations and cost estimates are presented in Attachments 2.1 and 2.2. Attachment 3 presents additional alternatives for each of the major provisions of this regulation but does not estimate a specific cost associated with each alternative.

SB 839 (Chapter 340, Statutes of 2016), eliminated the flat fee option for a permit application. The statute requires an applicant to enter into a reimbursement agreement to pay all costs incurred by DTSC for processing the application, including, but not limited to compliance with CEQA. DTSC has included the additional reimbursable costs in its calculations in accordance with Health and Safety Code section 25205.7. The economic analysis evaluates the additional costs, but does not analyze the percentage increase these costs represent in comparison to what facilities have historically been paying because the baseline for the comparison is now what is required by Health and Safety Code section 25205.7.

O. VIOLATION SCORING PROCEDURE (VSP) COSTS

Comment Summary:

The comment states that the new Violation Scoring Procedure would likely result in the unwarranted placement of many existing facilities in the "conditionally acceptable" or even "unacceptable" category. This classification would subject these facilities to mandatory "independent third-party audits" and, possibly, denial or suspension of their permits.

Comment: 3-3

Response:

DTSC disagrees that the VSP or the assignment of compliance tiers is unwarranted. Consistent with the requirements of SB 673, the VSP provides a clear and transparent framework by which DTSC would consider compliance history when making permit decisions. SB 673 recognized that the consideration of compliance history (which was already mandated under (Health & Saf. Code § 25200.21) is a critical element of permit review to ensure the protection of public health and the environment. Further, the public has an interest in assuring this critical review is undertaken consistently and appropriately. DTSC has included in the economic analysis the cost of the third-party audits. As for permit denials, the proposed regulations do not mandate denial or suspension, but require that DTSC initiate a process to deny, suspend, or revoke a permit. The facility has the opportunity to demonstrate during this process that the permit should be granted.

P. COST OF REGULATIONS

Comments Summary:

The comment asserts that DTSC underestimates the cost associated with implementing and complying with the proposed regulations, and wrongly concludes there would be no consequences to investments in the state. The analysis does not include any increase in litigation costs that would result from the VSP regulations. There is the disparity between how you manage California-generated hazardous waste in California versus those in adjacent states.

Comments: 3-3, 3-45, 10-10, 10-12, and PH-4-4

Response:

DTSC has revised the economic analysis and included additional reimbursable costs for DTSC's processing of permit applications or renewal applications. DTSC has concluded the proposal would not have any significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Furthermore, DTSC disagrees that the regulations threaten a facility's ability to remain in business. The facilities with the greatest economic burdens under these regulations would be those facilities that may have onsite or offsite contamination because of their operations.

Q. ESTIMATING REGULATION COSTS

Comments Summary:

The comment asserts that DTSC's Economic Impact Statement significantly underestimates the probable cost of the proposed regulation. The comment states that DTSC estimates that the total statewide costs that businesses and individuals may incur to comply with the proposed regulations over their lifetime is $4,545,000, while initial costs for a "typical business" are estimated at $117,500, with annual ongoing costs of $5,500 over a period of five years. The commenter believes that these costs are significantly underestimated, and that total actual annual costs, particularly for a facility in the "conditionally unacceptable" or "unacceptable" compliance tier, would substantially exceed these amounts.

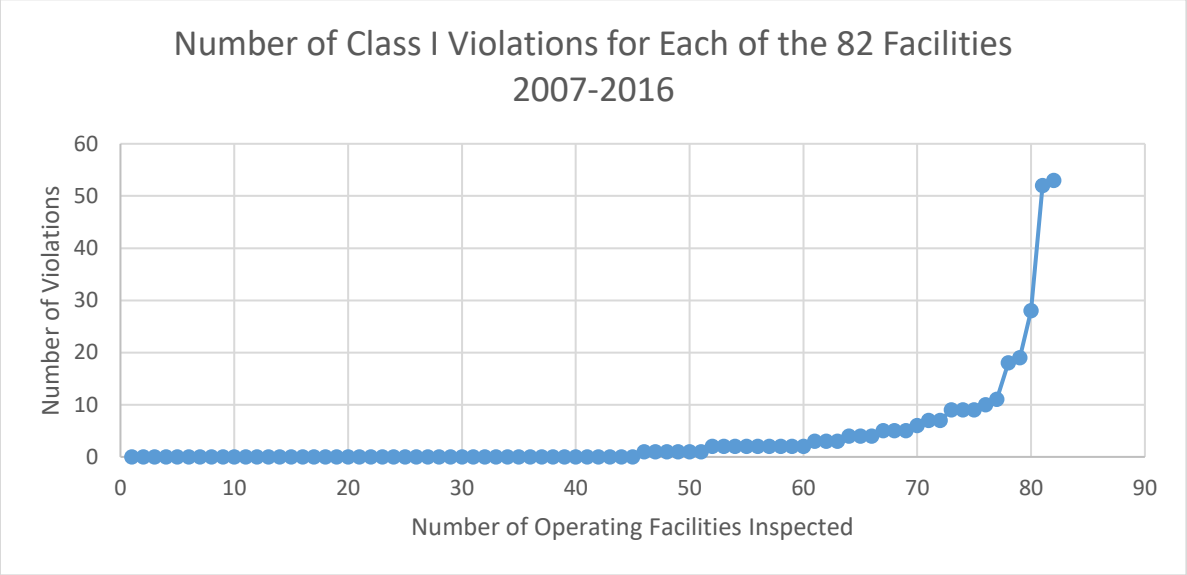
Comments: 3-43 and 3-45

Response:

DTSC has revised the Form 399 to reflect the change in the number of facilities to account for the 109 facilities instead of 113, and for the exemption of post-closure facilities from both the HRA and the VSP provisions which only impacts 82 facilities. DTSC has also added DTSC's reimbursable costs for reviewing the HRA and the community involvement profile. The statewide costs have been revised up to $7,193,000. The typical costs for a facility, as reflected in the Form 399, have been revised up to $128,800. The comment is partially correct in that these costs may underestimate facilities that are assigned to the "conditionally unacceptable" or "unacceptable" compliance tier. The typical costs do include audit costs that are mandated for facilities that are considered "conditionally unacceptable." However, typical costs do not include a facility that is considered "unacceptable" because DTSC does not consider these facilities to be typical. Over half of all facilities have not had a single Class I violation in the past ten years.

Figure 1 below represents 82 facilities ranked from the lowest number of Class I violations to the highest number of violations. Each dot represents a single facility. This figure illustrates that about half of the facilities have been able to operate in the last ten years without a single violation.

FIGURE 1



R. CONTRIBUTION TO LOCAL ECONOMY

Comments Summary:

The comments state that the requirements for corrective action and financial assurance would cost businesses exponentially more than DTSC has assumed, to date, which would force business out-of-state and in turn would adversely impact a local county. The comments further state that these facilities contribute millions of dollars annually to the local economy through payroll, purchases of goods/services from local vendors, and through disposal fees and taxes, most of which is allocated for public safety.

A specific comment asserts that the economic analysis does not consider the extensive role of the military in California's economy and the importance of both the national defense mission and our contribution to the economy.

Comments: 6-1, 6-2, 6-3, and PH-3-3

Response:

Commenters have not provided evidence or precise information to support the economic impacts alluded to in the comments. Corrective action to investigate and clean up any release of hazardous waste at a facility is a legal requirement for all facilities, and the regulations simply specify the timing for owners or operators to provide the financial mechanisms for the costs associated with corrective action. For financial assurance, please see the response to Comment 1-19. DTSC did not make any changes to the EFIS in response to these comments.

S. IMPLEMENTATION QUESTIONS

Comment Summary:

The comment poses general questions regarding implementation of the regulations, cost implications, and further information on the proposed regulations.

Comment: 12-1

Response:

The EFIS provides the details for the estimated costs of implementation of the various provisions of the proposed regulations and the assumptions used for economic analysis. DTSC did not make any changes to the regulations in response to these comments.

IX. DEFINITIONS

Section 66260.10

A. COPC DEFINITION

Comment Summary:

The comment expresses concern with what the commenter states is regulatory ambiguity, redundancy, and overreach in the proposed regulations. The commenter specifically states the definition for "chemicals of potential concern" (COPC) as currently proposed in section 66260.10 is too broad, extending beyond substances in the facility's permitted hazardous waste streams.

The comment further states that for purposes of the hazardous waste facility human risk assessment, the COPC definition goes beyond and includes any number of potential transformation products, degradation products, and emissions. The comment asserts this unnecessarily broad regulatory definition vastly expands the permitting and scope of the HRA, beyond any other U.S. EPA definition of COPC, and that hundreds, potentially thousands, of hypothetical "transformation products, degradation products and emissions" could now be required to have measurements, fate and transport data, toxicity data, modeling, and quantitative results.

The comment proposes the definition of COPC in section 66260.10 be revised to read: "Chemical of Potential Concern or COPC means a chemical at or from the facility that is present in the facility's permitted hazardous waste streams, soil, water or air, at a concentration that may pose a risk and is potentially due to facility related activities or contamination. This definition is solely for purposes of the HRA process pursuant to section 66.270.14(e)."

Comment: 11-12

Response:

DTSC disagrees that the definition of COPC includes transformation and degradation products. DTSC, however, did revise the definition to include chemical constituents to clarify that the HRA must include them. For example, if the waste stream accepted at the facility is treated by a boiler, industrial furnace

or incinerator, the airborne emissions being released by the facility are transformation products, such as dioxins. Dioxin and chemically-related compounds then become the COPCs that need to be addressed in an HRA. When the hazardous waste stream includes the solvent tetrachloroethene (PCE), PCE can potentially be released into water or soil. The degradation products of PCE in the environment are then included in calculated risk posed by PCE. The degradation products of PCE are hazardous to human health and the environment as is PCE.

The commenter has not provided any information or evidence to support the assertion that potentially thousands, of hypothetical transformation products, degradation products, and emissions would need to be addressed in the HRA. DTSC did not make any changes to the definition in response to the comment.

X. TRAINING

Section 66264.16 and 66265.16

A. TRAINING REQUIREMENT APPLICABILITY

Comments Summary:

Generally, these comments state that the proposed training requirements are too broad and request clarification of the training requirements' applicability. These comments express concern that the proposed training requirements have been expanded to apply to generators, post closure permits, and nonhazardous waste treatment, storage, or disposal facilities. They state the ISOR does not contain an explanation for these perceived expansions of applicability, and the descriptions in the ISOR are only applicable to hazardous waste treatment, storage, and disposal facilities. The comments further express concern that the proposed training changes would subject generators, including those that are also hazardous waste facilities that operate under generator requirements for hazardous waste generation, to unnecessary training requirements. The comments specifically identify hazardous waste shipping training requirements imposed by the federal Department of Transportation, general awareness training for all facility personnel, and job- specific training for all facility personnel.

One comment indicated support for the inclusion of "online training" in the proposed regulations. These comments also request clarification of the term "all facility personnel" and whether administrative personnel are subject to the proposed training requirements. If so, the comment questions the necessity of such training and its relevance to those administrative employees' responsibilities at the permitted facility.

One comment suggests that DTSC should address training requirements for generators by adopting the U.S. Environmental Protection Agency (U. S. EPA) Hazardous Waste Generator Reform Rule, which went into effect May 2017.

Comments: 1-70, 2-3, 2-4, 2-5, 2-6, 2-7, 2-8, 2-9, 2-10, 2-11, 2-12, 2-13, 2-14, 2-15, 9-1, 11-19, 11-20, 11-21, 11-22, 11-23, PH-5-2, and PH-5-3

Response:

DTSC appreciates these comments and has revised the proposed regulations to clarify the training requirements' applicability. The training of personnel is necessary to ensure hazardous waste operations are conducted in a manner that meets regulatory standards, prevents releases of hazardous waste, ensures appropriate emergency response actions are taken, and protects health and safety of all facility personnel and the public.

DTSC acknowledges the comment that supports the inclusion of "online training" in the proposed regulations. DTSC has revised the term "online training" to "computer-based or electronic" instruction in sections 66264.16(a) and 66265.16(a) for added specificity.

DTSC notes that the proposed regulations addressing hazardous waste shipping training (e.g., federal Department of Transportation requirements), are applicable to facility personnel only if they are engaged in shipping hazardous waste. This is based on title 49, Code of Federal Regulations, part 172.704. Similarly, function-specific job training is applicable to only those facility personnel who are involved with hazardous waste management activities. The proposed general awareness training applies to all facility personnel, including administrative staff. To ensure the safety of all personnel (including administrative personnel), an overview of the facility description and operations is necessary as well as any security and safety considerations appropriate for specific personnel job duties. This is especially true for emergency situations. For their safety, facility administrative staff need to know what to do in emergency situations, such as fires, earthquakes, and upsets to hazardous waste operations. This training, as well as the annual review of the initial training, may be conducted orally, in written form, online, through on-the job exercises or drills, or any other methods or formats that are practical or applicable to the hazardous waste operations. The method of training and length of initial and annual refreshers is left up to the owners/operators of the facility, but needs to be appropriate to the job function of personnel, whether hazardous waste operations staff or administrative staff.

DTSC acknowledges that the proposed training requirements would apply to generators who store hazardous waste without a permit if generators operate under the conditions of section 66262.34. DTSC has clarified that the proposed training requirements, for the most part, are not applicable to a hazardous waste generator. This clarification appears in the revised section 66265.16(g). The amended proposed regulations clarify that generators, who store hazardous waste pursuant to section 66262.34, are not subject to training requirements pursuant to title 8, California Code of Regulations, section 5192(p) or to the requirement to submit an annual statement to DTSC certifying that the training requirements have been met. However, other aspects of the proposed training requirements, such as federal Department of Transportation training regarding shipping hazardous waste in section 66265.16(a) and general awareness and job-specific training of all facility personnel in section 66265.16(a)(4)(A) and (B) are still applicable. DTSC also notes that these training requirements are similar to the hazard communication training required by title 8, California Code of Regulations, section 5194; however, these proposed training requirements in section 66265.16(c) specify that an annual review of the training must be conducted (unlike the hazard communication requirement in title 8, Cal. Code Regs. § 5194).

Hazardous waste facilities that operate under generator requirements for hazardous waste generation, are in the business of handling hazardous waste and as a result, are subject to all these proposed

training requirements. The exemption in section 66265.16(g) does not apply to hazardous waste facilities; only to hazardous waste generators.

DTSC has not changed the general applicability of personnel training requirements in title 22, California Code of Regulations, chapters 14 and 15, (standards that govern entities operating under a permit or grant of interim status for owners or operators of hazardous waste transfer, treatment, storage and disposal facilities.) This includes post closure permits. If facility personnel training is required in current post closure permits, then the proposed training regulations are applicable. For example, if the current post closure permit includes operations and maintenance of equipment, appropriate facility personnel training regarding the equipment is required, under both existing regulations and the proposed regulations. Additionally, the new training requirements, such as general awareness training, function-specific job training, and annual certifications of training for the previous year are applicable.

In response to the comment regarding the applicability of hazardous waste training to personnel at "nonhazardous waste treatment, storage, and disposal facilities," DTSC notes that these training requirements are only applicable to hazardous waste operations. DTSC does not regulate the management of non-hazardous waste.

In response to the comment that DTSC should address generators of hazardous waste by adopting U.S. EPA's Hazardous Waste Generator Reform Rule, DTSC is in the process of adopting U.S. EPA's rule in a separate rulemaking named "Generator Improvement Rule Adoption" (additional information on DTSC's proposed rulemaking for the Generator Improvement Rule is available at: https://www.dtsc.ca.gov/HazardousWaste/Generator_Improvement_Rule.cfm). This rulemaking would conform to U.S. EPA's Hazardous Waste Generator Reform Rule. DTSC is preparing the proposed Generator Improvement Rule regulations to ensure consistency and to avoid conflicting with federal regulations. DTSC did not make any changes to the regulations in response to these comments.

B. TRAINING AND CONTRACTORS

Comment Summary:

The comment states the new training and certification requirements are unclear regarding their applicability to facility contractors who are hired to perform functions that facility staff would otherwise perform.

Comment: 11-24

Response:

These proposed training regulations apply to hazardous waste facility personnel only. Contractors are responsible for the training of their own employees, who are involved with hazardous waste operations, which includes those covered by Title 8, California Code of Regulations, section 5192(p). The owner or operator of the hazardous waste facility may require as a condition of its contract that contractors provide proof of the training completed by the contractor's employees. DTSC did not make any changes to the regulations in response to these comments.

C. ANNUAL VERSUS BIANNUAL

Comments Summary:

These comments suggest that the general awareness and job-specific training be required every 24 months, rather than annually. They also suggest that the function-specific job training requirements regarding jobs with standard operating procedures be clarified to specify that they are only for hazardous waste management activities. The comments indicate concern that the standard operating procedures could be interpreted to apply to all facility personnel, not just those involved with hazardous waste management activities.

Comments: 10-82 and 10-83

Response:

DTSC appreciates these comments, and has revised section 66264.16(a)(4) (and 66265.16(a)(4).) DTSC has revised the proposed regulations to state that the general awareness and function-specific job training are required every 24 months, rather than annually. Additionally, the request for function-specific job training has been clarified to state: "… any relevant hazardous waste standard operating procedures applicable to job tasks and functions performed by the employee…" to alleviate the concern that these may apply to any facility personnel.

Sections 66264.16(f) and 66265.16(f)

D. TRAINING CERTIFICATION

Comments Summary:

These comments assert that the requirement to submit an annual personnel training certification to DTSC's proposed regulations are duplicative because DTSC performs annual facility inspections; burdensome because other state and federal reports that are due on March 1; and the certification is of little value because of facility staff turnover and staff changes in job position within the facility. One comment expresses concern with personal privacy of staff if employee names are included in the annual personnel training certification and requests that this provision be deleted.

Comments: 2-16, 2-17, 2-18, 9-2, 10-84, 10-86, and 11-25

Response:

DTSC proposed these changes to the training requirements in response to DTSC reviews of compliance issues related to common training violations or violations that were the result of lack of training for hazardous waste facility personnel. The proposed regulations are not duplicative of compliance inspections, but are intended to ensure compliance at hazardous waste facilities with training requirements at all times, including during compliance inspections. DTSC believes this requirement is of value to ensure appropriate training of facility staff particularly when there is high staff turnover or other changes in staff positions.

In response to the comments that the proposed regulations are burdensome, DTSC has clarified the proposed regulations to require annual training certifications beginning March 1, 2021, for the previous calendar year, i.e., 2020. In so doing, owners/operators of hazardous waste facilities would have adequate lead time to make necessary adjustments in their operations to prepare their federal and state reports, as well as complying with these proposed training reporting requirements.

DTSC appreciates the concern raised regarding protecting employee's privacy. DTSC takes very seriously its obligation to protect privacy rights of individuals and businesses in responding to requests for records under the Public Records Act. DTSC has a long history of complying with the Public Records Act while still protecting legitimate privacy rights of parties affected by the disclosure of DTSC records. DTSC believes the annual training certification is needed to ensure that proper safety training is provided at the facility.

E. IMPLEMENTATION OF CERTIFICATION

Comments Summary:

The comments state that the regulations are unclear regarding the reporting period and the effective date for the annual training certification. They further state that to certify that the new training requirements have been met, the facility needs a year to implement the new requirements before the facility can certify that facility staff have met the new training requirements.

Comments: 8-4 and 10-85

Response:

DTSC appreciates these comments, and has revised the reporting period and effective date of the reporting requirements in the proposed regulations. DTSC has clarified in the proposed regulations when the effective date to submit training certifications would become effective. The regulations have been clarified to require annual training certifications beginning March 1, 2021, for the previous calendar year, i.e., 2020. In so doing, owners/operators of hazardous waste facilities would have adequate lead time to make necessary adjustments in their operations to prepare their federal and state reports, as well as complying with these proposed training reporting requirements.

XI. FINANCIAL ASSURANCE

Section 66264.101

Section 66264.101(b)

A. SCOPE OF CORRECTIVE ACTION

Comments Summary:

The comment states that DTSC does not distinguish between corrective action under Health and Safety Code section 25187 and facility-wide corrective action. The comments assert the intent is to apply the requirement only to facility-wide corrective action under Health and Safety Code section 25200.10, and request a clarification in the regulations to this effect.

Comments: 1-82, 3-32, and 3-33

Response:

There is no substantive distinction as to the scope of corrective action that DTSC may require under Health and Safety Code section 25187 or section 25200.10. As such, DTSC respectfully rejects the

premise of the comments. DTSC also cannot be sure what change the comments are requesting. DTSC did not make any changes to the regulations in response to the comments.

B. LANDFILL REQUIREMENTS

Comment Summary:

The comment claims that the "financial assurance requirements for corrective action ignore the parallel and largely duplicative financial assurance required by the State Water Resources Control Board (SWRCB)." The comment goes on to state that the SWRCB already requires financial assurance for corrective action, and; therefore, the proposed regulation fails Government Code section 11349.1(a), which requires regulations to meet certain standards including, but not limited to, necessity and non-duplication.

Comment: 10-52

Response:

DTSC notes that the claimed parallel financial assurance requirements of the SWRCB do not apply to the same scope and number of facilities that are subject to DTSC's permitting requirements for hazardous waste facilities. The SWRCB financial assurance requirements apply to entities required to comply with Waste Discharge Requirements (WDRs). Not all hazardous waste facilities are subject to WDRs; thus, not all hazardous waste facilities are subject to the SWRCB's financial assurance requirements. Therefore, this requirement is not duplicative, and it is not in conflict with Government Code section 11349.1(a). Finally, in this regard, DTSC must have requirements equivalent to and at least as stringent as the parallel federal RCRA program requirements overseen by U.S. EPA for DTSC to maintain authorization from U.S. EPA to administer the California hazardous waste program in lieu of RCRA in this state. This provision is an example of a requirement that DTSC must have in its program to maintain RCRA authorization. DTSC did not make any changes to the regulations in response to these comments.

C. CORRECTIVE ACTION FINANCIAL ASSURANCE APPLICABILITY

Comments Summary:

The comments state that the regulations are unclear as to whom the corrective action requirements apply. Specifically, the comments identify tiered permit facilities to which DTSC has applied some regulatory requirements, which are not subject to the requirement to obtain a permit under RCRA. The comments further claim that the newly proposed section 66264.101(b) provisions duplicate title 22, California Code of Regulations, section 66264.90(b), which requires a facility's permit to "contain assurances of financial responsibility for completing corrective action for all releases from any regulated unit at the facility." The comments urge DTSC to reconcile or combine these two provisions to avoid any ambiguity.

Comments: 1-79 and 10-47

Response:

The proposed regulations apply to the owners or operators of hazardous waste facilities as specified in subsection (a) of section 66264.101. DTSC respectfully disagrees with the comment to the extent it

asserts that the proposed regulations create uncertainty regarding which entities are subject to corrective action requirements.

Finally, the comments assert that the proposed section 66264.101(b) duplicates existing section 66264.90(b). DTSC disagrees because the financial assurance requirement in section 66264.90(b) is only for "assurances of financial responsibility for completing corrective action for all releases from any regulated unit at the facility." The term "regulated unit" is defined in section 66260.10 and 66264.90(a) to mean a surface impoundment, waste pile, land treatment unit, or landfill. In contrast, the proposed section 66264.101(b) applies to all hazardous waste facilities and solid or hazardous waste management units. DTSC has complied with the non-duplication standard in the Administrative Procedure Act.

D. TIMING OF CORRECTIVE ACTION

Comments Summary:

Most of the comments raise concern with the proposed new requirement for a facility owner or operator to make an initial payment to cover anticipated corrective action costs "at the earliest time [DTSC] is able to make a reasonable determination" of actual costs. These comments assert that such a standard is inherently ambiguous and likely to subject owners or operators to demands for financial assurance before an accurate assessment of the nature, extent, and cost of the corrective action can be made. Other comments support this approach being proposed by DTSC.

Comments: 3-32, 3-34, 4-4, 4-5, 1-82, 7-3, 7-12, 10-48, 10-49, 11-7A, and PH-11-6

Response:

DTSC agrees with the comments. DTSC has revised the proposed regulations to require that the initial payment shall be due within ninety (90) days of DTSC's approval of the Corrective Measures Implementation Work Plan.

E. ADVANCE PAYMENT

Comments Summary:

The comments claim that DTSC has not provided any basis for the 25 percent advance payment for corrective action, and that the requirement does not make sense. The comments question how the mechanics of this provision would work, to whom the money is paid, how the money due is reassessed as payments are made and work is performed, and related questions.

Comments: 1-79, 3-33, 7-7,10-50, 10-51, and 11-7B

Response:

Regarding the 25 percent advance payment, DTSC based this approach on its long-standing practice of requiring 25 percent advance payment to cover DTSC's costs in overseeing corrective action work performed by owners or operators. This is a reasonable upfront payment to limit some of the financial risk to DTSC. An advance payment is necessary to cover DTSC's initial costs in processing a permit application since DTSC would have incurred substantial costs before the first quarterly invoice is issued to the applicant. DTSC, however, has reconsidered this provision and has determined that DTSC would

address this advance payment issue later. DTSC has deleted the advance payment requirement from section 66264.101(b). DTSC has reconsidered this provision has deleted the advance payment requirement from section 66264.101(b).

Sections 66264.143 and 66265.143

Sections 66264.143(e) and 66265.143(d)

F. CAPTIVE INSURANCE

Comments Summary:

The comments variously assert that there is no evidence in the record to support DTSC's proposal to eliminate captive insurance, thus, DTSC's proposal fails the necessity standard within the APA. The comments also pose certain questions about the current number of facilities utilizing this mechanism to satisfy financial assurance requirements. (As such, these questions are not comments on the proposal.) In addition, the comments describe the commenters' understanding of what captive insurance is and how it works. They note the increased use of this mechanism, as reported by AM Best Captive Center. The comments also claim that the State of Vermont, with whom many captive insurers are licensed, is vigilant and responsive in the face of information that there are problems with a given captive insurer. For all these reasons, the comments assert that captive insurance is an appropriate mechanism for satisfying DTSC's financial assurance requirements and should be allowed under these regulations.

Comments: 1-71, 1-72, 2-20, 7-2, 7-4, 7-8, 7-11, 10-35, 10-36, 10-37, 10-38, 10-53, PH-4-9, and PH-4-10

Response:

Captive insurance has inherent limitations that necessarily raise concerns about parties relying on it. More specifically, as the court noted in *Amerco, Inc. v. Commissioner of Internal Revenue*, two of the fundamental purposes of insurance are risk shifting and risk distribution. Captive insurance, by its very essence, is somewhat in conflict with these two purposes due to the lack of separation of risk from the events that may lead to a loss and the parties that are the hook to pay in the event of such a loss. The *Amerco* court put it this way, …" It is fair to say that '[r]isk-shifting' means one party shifts his risk of loss to another, and 'risk-distributing' means that the party assuming the risk distributes his potential liability, in part, among others. An arrangement without the elements of risk-shifting and risk-distributing lacks the fundamentals in a true contract of insurance." (*Amerco*, 979 F. 2d, 162 (9th Cir. 1992.) In other words, captive insurance lacks risk-shifting and risk-distribution and cannot be considered as insurance.

As the court wrote in *Clougherty Packing Co. v. Commissioner*, "A 'captive insurance company' is a corporation organized for insuring the liabilities of its owner. At one extreme is the case presented [in Clougherty], where the insured is both the sole shareholder and only customer of the captive. There may be other permutations involving less than 100 percent ownership or more than a single customer, although at some point the term 'captive' is no longer appropriate." (*Clougherty Packing Co. v. Commissioner*, 811 F. 2d 1297 (9th Cir. 1987.) The Environmental Financial Advisory Board (EFAB) in a March 2007 Report wrote about captive insurance as follows: "There are two forms of insurance:

'commercial insurance' and 'captive' insurance. Captive insurance is distinguished by the initial funding and restriction of its coverage either to one company (so-called 'pure' captive insurance where the parent establishes a captive for its exclusive use) or to an enterprise or risk retention group (e.g., brownfields redevelopment projects or a consortium of interests developing an affordable housing development)." (EFAB Report, March 2007, p. 2.)

Again, this fundamental lack of separation of risk of loss from the parties that may be responsible for the loss is one of the reasons that many governmental entities and others with expertise on the subject matter disfavor captive insurance. For instance, in the report of the EFAB workshop held by U.S. EPA on June 27, 2006, one of the workshop participants, Rodney J. Taylor, Principal, Breitstone & Co., Ltd., described several factors that made the use of [captive insurance policies] difficult. One was that, "Environmental liability is not well-suited for [captive insurance policies] because they occur infrequently and in large losses. [Captive insurance policies] are best at frequent and small losses." (EFAB Report, June 27, 2006, pp. 16-17.) DTSC did not make any changes to the proposed regulations in response to these comments.

Sections 66264.143(f) and 66265.143(e)

G. FINANCIAL TEST MECHANISM

Comments Summary:

The comment questions whether DTSC has evaluated the proposed changes to determine what the costs and effects of the changes would be for those using the financial test mechanism. The proposed changes include: raising the minimum net worth of a company from $10 million to $20 million, changing the calculation of assets that must be in the United States, requiring submittal of financial statements, and a requirement to have a trust fund. The comments critique DTSC's statements indicating a small, but unknown number of facilities, may choose to use a different financial mechanism in response to these proposed changes.

Comments: 1-74, 1-78, 1-80, 3-28, 3-29, 3-30, 1-38, 7-10, 10-39, PH-4-10, and PH-5-4

Response:

DTSC appreciates the concerns. DTSC's experts that administer and enforce the financial assurance requirements participated in drafting this portion of the regulations, and helped characterize the potential effects on facilities associated with this change. DTSC studied how many facilities rely on this financial assurance mechanism and gained a general understanding of their financial status. There are 22 distinct entities that utilize the financial test mechanism for one or more financial assurance obligations. (Please note that many entities rely on this mechanism for several financial assurance requirements, including closure and post-closure requirements. In such instances, the entity is counted only once for these purposes, since it is only one entity that is using the financial test mechanism to satisfy multiple requirements.) Of these 22 entities, the overwhelming majority are large utilities or Fortune 100 companies.

DTSC does not believe that any of these entities would have difficulty demonstrating that the owner or operator has a tangible net worth of greater than $20 million to meet the proposed financial test

requirement. On the contrary, almost all these companies are capitalized in the hundreds of millions of dollars or more. As DTSC noted in the ISOR, there are some smaller companies that rely on this mechanism that may no longer meet the new threshold. However, DTSC remains convinced that the correct thing to do is to adjust for thirty years of inflation to better reflect the risk to the State in the event of insolvency of the regulated entity.

In addition, DTSC notes that the primary driver of the costs of satisfying this mechanism is the cost of the "agreed upon procedures" letter prepared by a certified public accountant. DTSC understands that the cost of preparing such a letter typically runs from $5,000-$10,000 for a small company and $20,000 to $30,000 for a larger firm. The cost of that letter should not increase due to the proposed change because the nature of drafting the "agreed upon procedures" letter should stay the same. DTSC did not make any changes to the regulations in response to these comments.

H. CREDIT RATING

Comment Summary:

The comment supports the newly proposed credit rating language for the two sections cited. The commenter has supported such an idea as a way of reducing the risk of any financial instability of an owner or operator.

Comment: 2-21

Response:

DTSC appreciates the comment. DTSC did not make any changes to sections 66264.143(f)(1)(A)2 & (f)(2) or 66265.143(e)(1)(A)(2) in response to these comments.

Sections 66264.143(f)(1)(A)(4) and 66265.143(e)(1)(A)(4)

I. ADJUSTMENT TO FINANCIAL TEST

Comment Summary:

The comment supports the newly proposed increase in net worth that is required to satisfy the financial test mechanism. The regulations propose an increase from $10 million to $20 million. The comment states this is a reasonable adjustment.

Comment: 2-22

Response:

DTSC appreciates the comment. DTSC did not make any changes to the regulations in response to these comments.

Sections 66264.143(f)(1)(A)(5) and 66265.143(e)(5)(A)

J. CUMMULATIVE LIABILITIES

Comments Summary:

One comment expresses support for the newly proposed requirement that the owner or operator provide asset information for the cumulative liability of all sites owned by a business entity in the state as an improvement that is long overdue. The comment goes on to note that very few regulatory agencies require such information, and that cumulative liability could be a problem since some companies have multiple, large liabilities in California.

The other comment takes a diametrically opposed view. More specifically, that comment states that the phrase "for all of the owner's or operator's hazardous waste facilities regulated by the Department" is unnecessary, less stringent than the corresponding federal regulation, and makes the financial test and corporate guarantee mechanism more expensive than other financial assurance mechanisms. For these reasons, commenter urges DTSC to remove this provision.

Comments: 2-23 and 11-8

Response:

DTSC appreciates the comment in support of this provision. DTSC believes that the comment in opposition is based on a misreading of the provision. DTSC's proposal is more stringent than the parallel federal provision. In addition, the provision is intended to require full disclosure of all liabilities. DTSC continues to believe it is necessary to understand the owner or operator's overall financial picture for DTSC to gain an accurate view of the company's potential liabilities. Without a full financial picture of all the owner or operator's potential liabilities, DTSC could mistakenly underestimate a company's liabilities. This increases the risk to the State and, ultimately, the taxpayers in the event of insolvency by the owner or operator. DTSC did not make any changes to the regulations in response to these comments.

K. FINANCIAL STATEMENT

Comment Summary:

The comment asserts that requiring "a copy of the owner and operator's financial statements" be submitted to DTSC as part of the financial test mechanism raises several problems. The comment goes on to point out three specific potential problems with this proposed requirement including: (1) that the time and expense of DTSC's review of this information would be passed on to the permit applicant; (2) there may be a lack of expertise within DTSC to conduct these reviews; and (3) these confidential documents would be made available by DTSC in response to Public Record Act requests.

Comment: 1-75

Response:

DTSC agrees that DTSC's costs incurred in reviewing any financial documents required to be submitted as part of a permit application would be subject to reimbursement by the permit applicant. But DTSC respectfully disagrees that it lacks the expertise to review such documents. DTSC has a long-standing organizational unit with staff specialized in reviewing financial documents to ensure compliance with financial assurance requirements.

DTSC acknowledges that companies have legitimate reasons to be concerned about disclosure of their private financial data. However, there is no reason to assume that DTSC would release financial

documents inappropriately in response to a Public Records Act request. DTSC has extensive experience and expertise in managing Public Records Act requests, and ensuring that confidential information is protected, consistent with the provisions of the Act. In addition, DTSC has put in place various internal administrative mechanisms to further ensure that documents that are exempt from disclosure under the Public Records Act are not inadvertently or inappropriately released to a member of the public. DTSC did not make any changes to sections 66264.143(f)(3)(B) and 66265.143(e)(3)(B) in response to these comments.

L. REASONABLE BELIEF STANDARD

Comment Summary:

The comment states that the current regulations require DTSC to have a "reasonable belief that the owner or operator may no longer meet the requirements" of its financial obligations before DTSC may require reports regarding the financial condition of the owner or operator. The comment states that DTSC should strike this language. DTSC should be able to examine the financial condition of the owner or operator at any time, without having to meet the "reasonable belief" standard.

Comment: 4-8

Response:

DTSC acknowledges the commenter's concern that DTSC should not limit its enforcement or oversight authority. However, DTSC believes the language as written provides adequate protection of the public's interest in ensuring that regulated entities are capable of meeting their financial obligations for corrective action, while at the same time providing certainty and limiting the burden this requirement may place on affected businesses. DTSC plans to monitor outcomes associated with this requirement and will propose changes if needed in the future. DTSC did not make any changes to sections 66264.143(f)(7) or 66265.143(e)(7) in response to these comments.

M. FINANCIAL ASSURANCE PROVISIONS

Comments Summary:

The comments assert that SB 673 does not require DTSC to adopt regulations establishing or updating criteria used for the issuance of new, modified or renewed permits that shall "consider," among other things, "provision of financial assurances pursuant to Health and Safety Code section 25200.1." The comments conclude there is no requirement to amend the financial assurance requirements.

Specifically, the comments state that (1) the legislative history of SB 673 focuses on billing of responsible parties so that the financial assurances are in place and realistic; (2) the trust fund is not necessary to secure assurances through the financial test, a test that has proven effective over many years; (3) captive insurance is an effective form of financial assurance; and (4) corrective action financial assurance already is required when there is sufficient certainty as to the action to be conducted.

Comments: 7-13 and 7-14

Response:

DTSC also agrees that while the statute does not mandate that regulations be adopted that amend financial assurance requirements, DTSC is required to consider the specified criteria in adopting regulations pursuant to SB 673. See Response to Comments 1-4 and 7-6 for additional clarification of the DTSC's intent to implement SB 673. DTSC did not make any additional changes to financial assurance in sections 66264.143(f)(11), 66264.145(f)(12), 66265.142(e)(10), or 66265.145(e)(11) in response to these comments.

N. 20 PERCENT TRUST FUND

Comments Summary:

The comments state broadly that it is unclear how the trust fund mechanism requirement in the financial test mechanism would work or why it is required. The commenters believe this proposed requirement would add significant new costs to the owners and operators that use the financial test mechanism, and that these costs are not justified. The comments contend that the financial test mechanism is working fine currently, and is not in need of modification. Other comments point out their calculations of what it would cost to finance a 20 percent trust fund for the financial test mechanism. And the comments claim that imposing a 20 percent trust fund on top of the other financial test requirements would still not guarantee that closure or post-closure costs would be covered. Further, the comments state that these added, unnecessary costs would drive facilities to use other financial assurance mechanisms. The comments assert that the financial management test mechanism and trust fund requirement should not prevent a facility from switching to another mechanism and terminating the trust fund.

Comments: 1-77, 2-24, 2-25, 2-26, 7-1, 10-41, 10-42, 10-43, 10-44, 10-45, 11-1, 11-2, and 11-3

Response:

DTSC agrees with the comments that the imposition of a 20 percent trust fund on top of the net worth requirements of the financial test mechanism is unwarranted. DTSC has deleted this requirement from sections 66264.143((f)(11), 66264.145(f)(12), 66265.143(e)(10), and 66265.145(e)(11).

O. USE OF SAME ASSESSTS

Comments Summary:

The comments state that DTSC should not adopt the proposed provision that precludes the use of a specific financial asset to serve as the basis for satisfying a given financial assurance requirement if that same asset is being used to satisfy the financial assurance requirements of another governmental agency. Rather, the regulations, they contend, should allow facilities to rely on the same assets to satisfy the financial management test mechanism as are used to satisfy financial assurance requirements to other agencies for the same closure, post-closure, or corrective action requirements. The comments assert the preclusion against so-called "double-dipping" is not necessary when the covered activity is the same activity taking place under multiple regulatory schemes; they offer as an example that while both the State Water Resources Control Board and DTSC have financial assurance requirements for the closure of a landfill, a landfill can be closed only once.

Comments: 1-76 and 10-40

Response:

DTSC respectfully disagrees with the comments. As noted in the response to comment 10-52, while sister agencies may have partially overlapping requirements, these requirements are not identical to those imposed by DTSC. DTSC's requirements are specific, distinct, and different from those imposed by the State Water Resources Control Board and other agencies. The principle that underlines the proposal is that facilities should not be able to pledge an asset as collateral if that collateral is already impaired by serving as collateral for another financial obligation. That remains true even if some of the obligations are similar to each other. DTSC did not make any changes to sections 66264.143(f)(12), 66264.145(f)(13), 66265.143(e)(11), or 66265.145(e)(12) (September 2017) in response to these comments.

Sections 66264.144 and 66265.144

Sections 66264.144(a) and 66265.144(a)

P. POSTCLOSURE CARE

Comment Summary:

The comment states that the proposed changes related to post-closure care are unnecessary and should be deleted. The comment states that the current post-closure regulations already authorize DTSC to shorten or extend the post-closure period depending on site-specific considerations. (Cal. Code Regs., tit. 22, §§ 66264.117 and 66265.117) The comment further expresses concern that the rolling 30-year post-closure period would become the default standard, requiring the owner or operator to maintain financial assurance on an indefinite basis.

Comment: 3-31

Response:

DTSC appreciates the concern raised in this comment. Sections 66264.117 and 66265.177 address the post-closure period as noted in the comment, but do not address the cost estimate for post-closure care outlined in sections 66264.144 and 66265.144. By referencing sections 66264.117 and 66265.117 in the proposed sections 66264.144(a)(2) and 66265.144(a)(2), DTSC has clarified that the default multiplier for post-closure cost estimate is 30 years. The commenter is correct in its assertion that the rolling 30-year post-closure period may become the default period and that financial assurance may be required on an indefinite basis. DTSC believes this is necessary because hazardous waste or constituents may remain at the facility after closure and continue to pose a risk to human health and the environment. However, any determinations about the appropriate post-closure estimate must be consistent with the determination made in sections 66264.117 and 66265.117. DTSC did not make any changes to sections 66264.144(a)(2) or 66265.144(a)(2) in response to these comments.

Q. ROLLING 30-YEAR POSTCLOSURE REQUIREMENT

Comments Summary:

The comments collectively note that the proposed rolling 30-year post-closure reset upon renewal of a permit would require facilities to carry the obligation on their books in perpetuity and creates an expectation that a site would never be removed from post-closure care. One of the comments suggested alternative language for this provision to clarify a purported ambiguity. The comments also suggest that determinations whether to shorten or extend the post-closure care period for a facility made under section 66264.117 should serve as the basis for determining the number of years for post-closure care financial assurance that are required.

Comments: 1-73, 2-27, 10-46, 11-4, 11-5, and 11-6

Response:

The commenters are correct about the post-closure-related requirements in the proposed regulations. Just as CalRecycle has established a rolling post-closure care period for landfills under its jurisdiction, DTSC is proposing the same for hazardous waste facilities under its jurisdiction. This may result in a postclosure period that lasts into perpetuity only if hazardous waste is left in place. This is because that is the period in which the hazardous waste or constituents remain at the facility after closure and continue to pose a potential risk to human health or the environment. DTSC did not make any changes to the regulations in response to these comments.

Sections 66264.147 and 66265.147

R. EXPANDING LIABILITY COVERAGE

Comment Summary:

The comment states that DTSC should expand the concept of liability coverage to include liability for the cost of corrective action associated with potential sudden accidental occurrences and non-sudden accidental occurrences. The comment further states that DTSC should require additional liability coverage to include potential remediation costs at the time an applicant seeks a permit, and increase the minimum amount.

Comment: 4-6

Response:

The comment appears to conflate the two distinct concepts and purposes served by financial assurance for corrective action and financial assurance for third party liability. The former concept is intended to ensure that an owner or operator has the financial means, provided by one of the acceptable mechanisms, to pay for costs related to cleaning up environmental contamination from releases at a hazardous waste facility. The latter is intended to ensure that the owner or operator of a facility has the financial means, provided by one of the acceptable mechanisms, to pay for costs related to bodily injuries or property damage to third parties caused by the facility operations.

U.S. EPA, in a 1980 rulemaking, stated, “Sudden accidents that cause damage to third parties are clearly a possibility during the operation of a hazardous waste management facility. (Federal Register, Vol. 45, No. 98, p. 33263, May 19, 1980.) Again, in 1981, in a rulemaking addressing financial assurance, U.S. EPA

stated, "[US] EPA believes that liability insurance is the most appropriate mechanism for assuring the public that there would be a pool of funds available from which third parties can seek compensation from injuries arising from the operations of hazardous waste management facilities." (Federal Register, Vol. 46, No. 7, p. 2827, January 12, 1981.) Clearly, the fundamental premises of third party liability financial assurance and financial assurance for corrective action are distinct. In addition, the way the financial assurance is procured and maintained also reflects this fundamental difference. DTSC cannot envision that the marketplace is able to change, or interested in changing, the way in which these two types of risks are dealt with — to put them under one single financial assurance mechanism. DTSC did not make any changes to section 66264.147 in response to these comments.

Section 66264.151

S. WORDING OF THE INSTRUMENT

Comment Summary:

The comment states that the wording of the financial instrument should be revised using language consistent with other changes suggested, and further states that if DTSC were to make changes to the underlying substantive provisions addressing financial assurance, this section would need to be amended with conforming changes.

Comment: 10-54

Response:

DTSC has carefully reviewed all the comments received. Where DTSC has made changes to underlying provisions, DTSC has made conforming changes to the corresponding requirements for the financial instrument.

Sections 66264.143-66264.146 and 66265.143-66265.146

T. FINANCIAL ASSURANCE CHANGES

Comments Summary:

The comments assert that DTSC has failed to provide evidence in support of the decision to change the existing financial assurance mechanisms.

Comments: 1-72, 2-20, 10-3, 10-32, and 10-33

Response:

DTSC has cited approximately 20 studies, reports, analyses, and other materials in support of the proposed regulations. In addition, DTSC notes that it relied on DTSC staff's experience and expertise in drafting these regulations. DTSC also considered information regarding the number of entities using some of the financial mechanisms and their financial worth. DTSC also relied on the information available from U.S. EPA as well as its Environmental Financial Advisory Board. DTSC cited related

information and evidence from other agencies, including CalRecycle, and from the United States government regarding rates of inflation and related financial information. In short, DTSC has provided an extensive amount of evidence in support of its proposed changes to the financial assurance mechanisms. Finally, to the extent the comments imply that DTSC has not pointed to incidents in which current financial assurance mechanisms have failed, DTSC notes that over time it has identified weaknesses and vulnerabilities with certain aspects of the current financial assurance mechanisms and does not want to wait until any of these predicted adverse outcomes occurs before acting to prevent them. DTSC did not make any changes to the regulations in response to these comments.

U. PRIOR RULEMAKING

Comment Summary:

The comments assert that DTSC ignored comments and evidence from prior rulemaking efforts regarding financial assurance. And the comment goes on to assert the proposed regulations ignore the regulatory burdens imposed and the advantages of out-of-state facilities.

Comment: 10-34

Response:

Please see Response to Comments 7-5 and PH-8-3 regarding "Analyzing Impacts," asserting DTSC has an informal policy of encouraging exporting of hazardous waste out of California, and that the proposed regulations are too costly and burdensome. In addition, the commenter is directed to DTSC's response to comment 1-8 that the rulemaking package is devoid of evidence in support of these regulations. DTSC did not make any changes to the regulations in response to these comments.

V. FEDERAL FINANCIAL ASSURANCE PROPOSED REGULATIONS

Comment Summary:

The comment recommends that DTSC postpone a portion of the proposed regulation until the U.S. EPA has finalized its financial assurance regulations, as well as: (1) eliminate the trust fund requirements in the financial test; (2) tighten the threshold criteria to qualify to use the financial test; and (3) permit companies to obtain third party insurance from insurers licensed outside of California.

Comment: 2-19

Response:

In December 2017, the U.S. Office of Inspector General completed a report titled, "Self-Insurance for Companies with Multiple Cleanup Liabilities Presents Financial and Environmental Risks for EPA and the Public, Report No. 18-P-0059." The Office of Inspector General identified problems and recommendations for the financial test and corporate guarantee. While U.S. EPA decided not to proceed with rulemaking at this time, DTSC believes it is prudent to strengthen financial assurance requirements. DTSC did not make any changes to the regulations in response to these comments

W. STRENGTH OF FINANCIAL ASSURANCE

Comments Summary:

The comments state DTSC should incorporate the 2006 Legislative Analyst Office's report recommendations found in "Strengthening Public Safety of Waste Facilities and Surface Mines[4]" into the proposed regulations. The comments further state that the legislative analyst found that none of the current financial assurance mechanisms provides a complete assurance to the state that the owner/operator would have the financial resources to complete the required environmental mitigation once the facility ceases operations.

Comment: 4-2, 4-3, and PH-11-5

Response:

It is not clear which provision of the regulations that the comment addresses. DTSC did consider and rely on the recommendations of the Legislative Analyst Office in drafting the proposed regulations. And DTSC cited the report from the Legislative Analyst Office in its compendium of "Reports Relied On" in the ISOR. (See p. 8 of that document.) DTSC did not make any changes to the regulations in response to these comments.

X. PERMITTING PROCESS

Comment Summary:

The comment suggests that DTSC should de-link Financial Assurance Review from the permit renewal process.

Comment: 4-7

Response:

DTSC respectfully disagrees with the comment. DTSC believes that permit renewal process is an appropriate time for a review of a facility's financial assurance situation. The permit renewal provides an important opportunity for DTSC to conduct a full review of the operations at the facility, including compliance with financial assurance requirements. DTSC may also conduct financial assurance reviews based upon any specific concerns DTSC may have about whether a facility is in compliance with financial assurance requirements. DTSC did not make any changes to the regulations in response to these comments.

XII. STANDARD OPERATING PROCEDURES

Section 66270.14(b)(23) (September 2017)

A. STANDARD OPERATING PROCEDURES

Comments Summary:

The comments state that the requirement for the submittal of all standard operating procedures ("SOPs") to be added to the Part B application is unclear and needs to be defined. The comments state the requirement would require that SOPs are maintained as part of the operating record at the facility

[4] Available at https://lao.ca.gov/2006/site_assurances/site_assurances_042606.pdf

and may require permit modifications to update or lead to additional permit conditions. The commenters note that SOPs can be extensive and very large, which would add time for permit renewal resulting in greater permit application processing costs. The comments assert that submittal of SOPs may compromise confidential and proprietary competitive business information.

Comments: 1-102, 1-103, 1-104, 3-38, 3-39, 3-40, 3-41, 3-42, 8-2, 10-56, 10-57, and 10-58

Response:

DTSC has reconsidered this requirement and has revised the proposed regulations to delete the requirement that standard operation procedures be submitted with permit applications. If DTSC determines that this information is needed, DTSC can request any additional information related to the proposed activity or facility pursuant to section 66270.14(b)(19).

XIII. COMMUNITY INVOLVEMENT PROFILE (CIP)

Section 66270.14(b)(24) (September 2017)

A. IMPACT OF THE CIP REQUIREMENT

Comments Summary:

The comments assert that the CIP is overly broad, unduly burdensome, and costly. The comments also claim that the CIP process delays and increases the cost of processing permit applications. The comments go on to say that DTSC did not identify evidence to suggest that the burden the CIP imposes would yield any tangible or necessary public benefit. The comments state this is because assessing the community is done as a part of the public participation process when a draft permit is posted for public comment (at a cost, for example, of $75,000 for a RCRA permit). Along these same lines, the comments state that DTSC does not provide evidence or an analysis demonstrating that the CIP is needed for non-RCRA facilities. The comments also assert that there is a failure to examine duplicative and redundant requirements with other environmental laws, such as CEQA.

The comments also claim that much of the information required in the CIP is not “readily available” and would require facility owners/operators to hire consultants or other qualified experts to conduct extensive research to gather necessary information, which potentially includes interviews with local governmental officials, civic leaders or other community members.

Comments: 1-83, 1-84, 1-95 and 3-35

Response:

DTSC appreciates the concerns these comments raise, and has provided clarification in the revised proposed regulations to address them. DTSC is adopting the CIP regulations in response to Senate Bill 673 to address concerns regarding hazardous waste facilities, which includes both RCRA and non-RCRA hazardous waste facilities. SB 673 authorizes DTSC to consider community vulnerability, cumulative impact, and potential risks to health and well-being in drafting these regulations governing DTSC’s permit decisions. DTSC believes that the public benefit of the CIP is early identification of the potential vulnerable communities and the potential health impacts caused by the facility’s presence in the

community and its operations. This information would support a more robust assessment of impacts, and more informed permit decision making. In addition, the HRA requirement in the proposed regulations would also support DTS's efforts to assess vulnerable populations.

The proposed regulations have been revised to be more specific in describing the required information. DTSC has revised the proposed regulations to require the permit applicant to provide "reasonably available" information. Sources for "reasonable available" information are more fully described in the ISOR and Final Statement of Reasons (FSOR). Additionally, "reasonably available" information also allows for new and updated information to be used as it becomes available. By using the information sources as described in the ISOR and FSOR, hiring consultants or other experts may not be necessary. Permit applicants may also want to arrange for pre-application meetings with DTSC which could provide additional clarification regarding the type and amount of information needed to meet this requirement. Specific decisions regarding what constitutes "reasonably available" information can be considered on a case-by-case basis in accordance with existing section 66270.14(a).

DTSC has examined possible duplication with other environmental statutes, such as CEQA, and has determined that the CIP requirement serves a different and additional purpose beyond those that underlie other environmental statutes. More specifically, the purpose of the CIP is to begin the process early in DTSC's permitting process of identifying vulnerable communities that may be impacted by the facility. The fact that some of the CIP information includes the same or similar information required in other environmental statutes, such as CEQA, should reduce the facilities' workload to provide information for the CIP. DTSC did not make any changes to the regulations in response to these comments.

B. AVAILABILITY AND COST OF INFORMATION

Comment Summary:

The comment states that DTSC indicated in the ISOR that census information may assist in compiling the CIP, but census data would not provide all the required information. The comment poses a question regarding DTSC's analysis of the availability and cost of information to compile a CIP.

Comment: 1-86

Response:

DTSC appreciates the comment. DTSC has revised the proposed regulations to make the information needed to complete the CIP more specific. For example, in revised section 66270.14(b)(23), formerly section 66270.14(b)(24), DTSC added specificity regarding when the facility is in a census tract that has a population of less than 2000 people. In such cases, the CIP must include other census tracts located within one mile of the facility.

In response to the availability and cost of the information to compile a CIP, section 66270.14(b)(23) has been revised to make the information sources that DTSC identified in the ISOR more applicable. Additionally, the information sources in the ISOR and FSOR are publicly available at no cost to the facility.

Permit applicants may also want to arrange for pre-application meetings with DTSC which may provide additional clarification regarding the type and amount of information needed to meet this requirement. If the permit applicant believes the information required by the CIP is not "reasonably available," allowances may be made for the submission of the such information on a case-by-case basis in accordance with existing section 66270.14(a).

C. SURROUNDING COMMUNITY

Comments Summary:

These comments assert that DTSC's definition of "surrounding community" and "border" are overly broad, ambiguous and confusing and should be better defined or deleted.

Comments: 1-90 and 10-61

Response:

Based on this comment, DTSC has clarified and made more specific the area that is included in a "surrounding community" in relationship to the facility in section 66270.14(b)(23), formerly section 66270.14(b)(4). With the clarification of "surrounding community," the term "border" is not needed and was deleted.

D. CIP FOR PERMIT MODIFICATIONS

Comment Summary:

The comment notes that the proposed regulations require that a CIP and HRA must be submitted with permit applications and requests clarification whether the CIP and HRA would be required for permit modification applications.

Comment: 8-1

Response:

A CIP is required only if a Part B portion of the permit application is submitted. In response to these comments regarding whether an HRA is required for permit modification applications, DTSC has added section 66270.14(e)(22)(June 2018) to exclude the HRA requirements for post-closure permits and class 1, and 2 permit modification requests. For class 3 permit modification requests, DTSC may exclude the HRA requirement if DTSC deems it unnecessary.

E. DUPLICATION OF INFORMATION

Comment Summary:

This comment states that the CIP provision in section 66270.14(b)(23) duplicates already existing information requirements of the Tanner Act and CEQA and proposes this section be deleted.

Comment: 10-60

Response:

DTSC appreciates the concern raised regarding duplicative information. However, while this section may require some of the same information collected for CEQA or the Tanner Act, the information collected is not used for the same purpose. The purpose of this section is to address how hazardous waste facilities affect vulnerable communities. The fact that some of the CIP information is the same or similar information required in other environmental statutes, such as CEQA, should reduce the facilities' workload to provide information for the CIP. DTSC did not make any changes to the regulations in response to these comments.

Section 66270.14(b)(24)(A) (September 2017)

F. LAND USE

Comment Summary:

The comment asserts that DTSC requires a description of "surrounding land uses" and "zoning designations," but does not identify or discuss "as of what date" such descriptions should be made.

Comment: 1-91

Response:

DTSC has revised the proposed regulations in section 66270.14(b)(23)(A)4 (JUNE 2018), formerly section 66270.14(b)(24)(A)3(SEPTEMBER 2017), to reference and mirror existing section 66270.14(b)(18)(D) regarding the descriptions of surrounding land uses, which include residential, commercial, agricultural and recreational. The zoning designations would represent these land uses. The date of these descriptions would represent the current land use and zoning information as of the date the Part B application is submitted.

G. LAND USE INFORMATION

Comment Summary:

This comment asserts that the requirement in the proposed regulations to include information regarding the hazardous waste facility's surrounding land use is lacking specificity and leaves this provision open to subjective interpretation and subject to dispute. This situation would increase the time and cost associated with processing permit applications.

Comment: 1-87

Response:

DTSC has clarified the language in section 66270.14(b)(23)(A)(4)(JUNE 2018), formerly section 66270.14(b)(24)(A)(3)(SEPTEMBER 2017) , to provide specificity regarding land use zoning information. In requiring information about the facility's surrounding land uses and zoning information, DTSC has reduced the "one-mile radius" requirement to "2000 feet" of the facility's boundaries. Revising the regulations to specify "2000 feet of the facility's boundary" makes it clear as to where to begin measuring 2,000 feet (at the facility's boundaries). The reference to the existing "subsection 66270.14(a)(18)(D)" in section 66270.14(a)(23)(A)(4) clarifies that the surrounding land uses, and zoning information pertain to residential, commercial, agricultural, and recreational uses.

Section 66270.14(b)(24)(C) (September 2017)

H. COMMUNITY CONCERNS

Comments Summary:

These comments express concerns about meeting the requirement to submit "additional local public health issues identified within the community" and "known community concerns regarding public health or the environment," especially considering the broad and sweeping examples provided in the ISOR such as, diabetes, obesity, heart disease, cancer, and communicable illnesses.

One comment asserts that it is unreasonable to expect a facility owner/operator to identify "known health or environmental concerns" of the community relevant to the facility and asks numerous questions regarding how to obtain this information.

Comments: 1-92, 1-93 and 10-59

Response:

DTSC appreciates the concerns raised in these comments. There are publicly available tools and resources, such as CalEnviroScreen, the Environmental Justice Screening Method, and the Environmental Justice Screening and Mapping tool that may be searched for environmental indicators that may impact community health. The facility may also hear about community concerns directly from the members of the community. DTSC did not make any changes to the regulations in response to these comments.

Section 66270.14(b)(24)(D) (September 2017)

I. PUBLIC ACTIVITIES

Comment Summary:

The comment asks a question regarding the meaning of "known public activities."

Comment: 1-94

Response:

In response to these comments, DTSC has revised the proposed regulations to delete the reference to community meetings or hearings. The facility may not be aware of community meetings regarding the hazardous waste facility. Additionally, community meetings may be informal and may not be recorded or made publicly available. However, the facility should be aware of public meetings or hearings where the facility is being discussed, whether at the local level or state level, and the meetings and hearings are more likely to be recorded and publicly available.

Section 66270.14(b)(24)(F) (September 2017)

J. TRIBAL LANDS

Comments Summary:

These comments assert that it is the responsibility of the permittee to identify the locations of tribal lands within community boundaries, including federally and non-federally recognized tribes. These comments also indicate that the permittee does not have the authority to identify such lands with any certainty – especially with non-federally recognized tribes, which is a hotly-debated and sensitive issue, and which is subject to the purview of other state and federal agencies. The comments further state the requirement to identify lands owned by "an individual Indian" is burdensome and would require the permittee to make legal inferences from documents, such as records of title companies or county recorder's offices, spanning over many years.

Comments: 1-85 and 3-36

Response:

DTSC appreciates the concern raised in these comments. In response to this and other comments regarding the CIP, DTSC has clarified in the revised section 66270.14(b)(23), formerly section 66270.14(b)(24), that only information that is "reasonably available" must be included in the CIP. In making this revision, DTSC provided examples of "reasonably available" information sources in the ISOR and FSOR. For instance, the ISOR identified and provided citations where tribal information may be gathered using publicly available resources (See ISOR, pp. 45-46 and FSOR.).

Section 66270.14(b)(24)(G) (September 2017)

K. OFFSITE SOURCES

Comments Summary:

These comments state that the requirement that the CIP identify "offsite sources of potential exposures to hazardous waste, hazardous materials, or contamination sites within the community" is overly broad, costly, and would increase the time to process permit applications. Additionally, while DTSC identifies a few methods in the ISOR that may be used to obtain information, the comment asserts that "such sources would not provide all of the information to satisfy this overbroad requirement."

These comments maintain that the requirement to identify and provide the locations of offsite handlers of hazardous materials or hazardous waste is time-consuming and burdensome. The comments note, for example, that the permittee may need to research the Yellow Pages to identify hazardous materials and hazardous waste handlers, and could number in the hundreds or thousands in urban areas. This information should be collected by DTSC staff and it is not clear why DTSC needs information about "potential offsite sources."

Comments: 1-88 and 3-36

Response:

DTSC appreciates the concerns raised by these comments. DTSC requires information about potential offsite sources in the CIP to assess the potential cumulative impact to the surrounding community, as stated in the ISOR and FSOR.

DTSC does not agree that this requirement is overly broad. The proposed regulations are specific regarding which offsite sources of hazardous materials, hazardous waste, or sites to include in the CIP.

Additionally, DTSC has provided sources of publicly available information in the ISOR and FSOR for each of the offsite sources that may be accessed to meet the requirements in this subsection. Since the sources are publicly available, there should not be a cost for the data except for the time to compile the information. A pre-application meeting with DTSC may also provide additional clarity regarding the appropriate level of information needed to meet this requirement and to alleviate the concerns regarding the time to process the permit application.

In response to the comment that DTSC should be collecting this information instead of the facility, DTSC has determined that the required information about potential offsite sources must be included in the CIP to assess the potential cumulative impact to the surrounding community, and that it is the responsibility of the permit applicant to gather all information necessary to prepare the CIP. DTSC did not make any changes to the regulations in response to these comments.

L. TRANSPORTATION CORRIDOR

Comment Summary:

The comment states that the broad definition of "transportation corridors" would lead to disputes regarding interpretation of that term. The comment also poses a question regarding how the CIP requirements would be implemented and whether the CIP applies to permit applications being processed at the time these regulations become effective.

Comment: 1-89

Response:

In response to these comments, DTSC has revised the proposed regulations section 66270.14(b)(24)(G)6 (September 2017) to clarify the term "transportation corridors." Revised section 66270.14(b)(23)(G)6 (June 2018) has been changed to add language to describe transportation corridors in relation to the facility as "freeways, major state vehicle routes, seaports, airports and railyards." By expressly stating which transportation corridors to include, there should not be disputes regarding the "transportation corridor" term. Additionally, the CIP requirements would not apply to permit applications currently being processed. The CIP requirements would apply to permit applications submitted on or after the date these regulations become effective.

M. CIP COST

Comment Summary:

This comment states that the cost of preparing the CIP is likely to be substantial (may exceed $50,000) and is not fully captured in the Economic Impact Analysis. This comment also asserts that the duty to complete a CIP should be assigned to DTSC's Community Relations staff, who have most likely compiled much of the information specified in the profile, including the surrounding community's "issues" and "interest" based on prior interactions with the community.

Comment: 3-37

Response:

DTSC appreciates the concern regarding costs to comply with the CIP. However, the comment does not provide an explanation or basis for the estimate of $50,000. Without an explanation of the commenter's cost estimate, DTSC cannot fully respond to the concern raised by this comment. DTSC notes that the information needed to complete this requirement is publicly available online (refer to the ISOR and FSOR for website information) or available locally. The preparation of the CIP is the permit applicant's obligation.

To address the concern regarding costs, the applicant could arrange for a pre-application meetings with DTSC to clarify the information required to meet the CIP requirements; could use the examples of information sources provided in the ISOR and FSOR; and could demonstrate to DTSC that this information cannot be provided to the extent required in regulations and requesting DTSC to make allowances for the submission of the such information in accordance to the existing section 66270.14(a). DTSC did not make any changes to the regulations in response to these comments.

N. ALTERNATIVES TO CIP

Comment Summary:

This comment asserts that DTSC should not rely on the project applicant to provide the community involvement profile, if that profile is used to assess whether enhanced public participation is needed. The commenter states that DTSC should instead use the CalEnviroScreen tool to assess community vulnerability and the top 25 percent of the impacted census tracts near the proposed site should receive enhanced public participation and outreach. The comment suggests that other communities should be assessed for enhanced public participation using DTSC guidelines.

Comment: 4-19

Response:

DTSC believes that it is the permit applicant's responsibility to provide the CIP as an initial step to identify how hazardous waste facilities may affect the surrounding communities. This information would be used, in addition to other available information, as a basis to assess community vulnerability, cumulative impact, and potential risks to health and well-being to meet the requirements of SB 673. At the same time, this information may be used to facilitate DTSC's determination whether enhanced public involvement is needed. DTSC agrees that the CalEnviroScreen tool may be used in addition to the information provided in the CIP to determine whether enhanced public participation is needed. DTSC did not make any changes to the regulations in response to these comments.

XIV. HEALTH RISK ASSESSMENT (HRA)

Sections 66270.14(e)

A. HRA TIERS

Comment Summary:

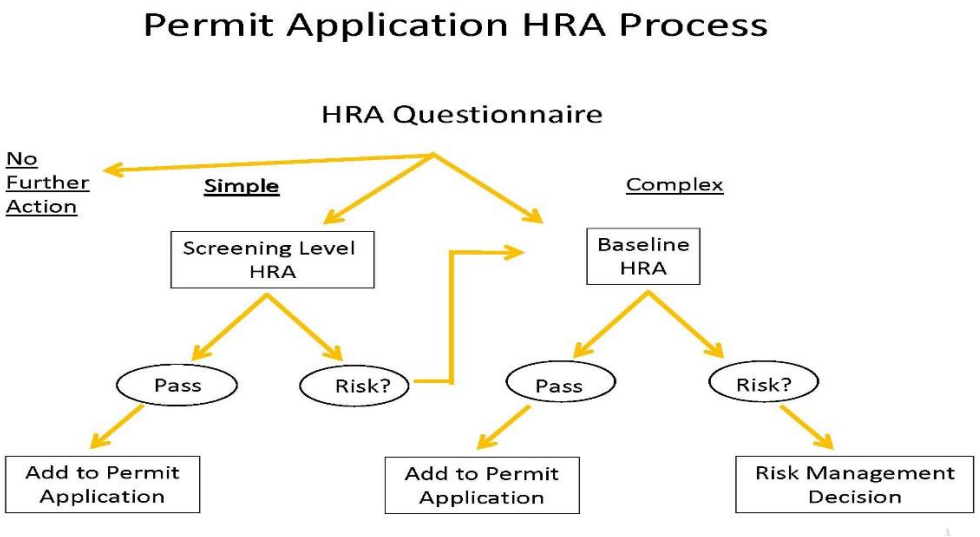
The comment asserts that there is a lack of clarity regarding the details of the HRA tiers. More specifically, the claim is made that it is not clear what the differences are among them. All three require

a toxicity assessment and exposure assessment of some sort. Because DTSC has discretion to reject each tier report and require supplemental information, it could substantially delay a facility from getting a permit as the rejection and resubmittal of new information for the next tier adds months at a time. The comment recommends DTSC include a table of what the requirements are for each tier, the timeline for each tier, and the overall applicability for each tier relative to the regulation.

Comment: 2-29

Response:

The HRA provision is structured so that all facilities submit an HRA Questionnaire with a Part B Permit Application (§ 66270.14(e)(4).) DTSC would review the submittal and determine if a Screening Level HRA or a Baseline HRA is required (§§ 66270.14(e)(8)(B)1 and 2.) DTSC may also determine that neither is required (§ 66270.14(e)(8)(B)3.) If a facility is a Class 1 landfill, a large treatment facility with an air permit, an incinerator, a boiler, or an industrial furnace, then both the HRA Questionnaire and the HRA baseline work plan are required to be submitted with the Part B permit application (§ 66270.14(e)(3).) A facility that submits a Screening Level HRA may have to complete a Baseline HRA if DTSC determines a Baseline HRA is appropriate (§ 66270.14(e)(14)(B)2).)



The comment also asks for the overall applicability and a timeline for each tier. The overall applicability for each tier is found in section 66270.14(e)(8)(B). The timeline varies based on whether the facility is a complex facility (§ 66270.14(e)(3)(A)), based on the evaluation of the HRA Questionnaire (§ 66270.14(e)(9)), or based on the Screening Level HRA determination (§ 66270.14(e)(15)(A). It would also vary based on whether there is a need for supplemental information in accordance with sections 66270.14(e)(8)(A), 66270.14(e)(14)(A), or 66270.14(e)(17)(A) and if DTSC determines that an alternative due date is appropriate. The timeline could vary as follows:

- Only an HRA Questionnaire is required and no Screening Level HRA or Baseline HRA: The timeline can range from three to five months;

- An HRA Questionnaire and a Screening Level HRA: The timeline can range from approximately 17 months to approximately 23 months if an alternative due date is provided for submittal of the Screening Level HRA;
- An HRA Questionnaire and Baseline HRA, if submitted concurrently at the time of the permit application: The timeline can range from approximately 12 months to approximately 18 months if an alternative due date is provided for submittal of the Baseline HRA;
- An HRA Questionnaire and Baseline HRA: The timeline can range from approximately 17 months to approximately 23 months if an alternative due date is provided for submittal of the Baseline HRA; and
- An HRA Questionnaire, a Screening Level HRA, and Baseline HRA: The timeline can range from approximately 26 months to approximately 41 months if alternative due dates are provided for a Screening Level HRA or Baseline HRA.

Due to the specific criteria and the reiterative nature of the process, the HRA submittal requirements and timelines are best described in a narrative instead of a table. DTSC did not make any changes to the regulations in response to these comments.

B. HRA COSTS

Comment Summary:

The comment states that enabling legislation does not require an HRA and mandate its inclusion in permit applications. The comment asserts that DTSC does not identify any gaps in information or concerns related to the current case-by-case process, but merely states the regulations are needed to characterize the risk posed by the facility and to ensure that hazardous waste facility permits are protective of human health and the environment. The comment claims this purported benefit does not appear to substantiate the significant costs and burdens imposed on applicants by way of the new HRA requirements.

Comment: 1-96

Response:

The authorizing statute (Health & Saf. Code §25200.21) requires DTSC to assess seven criteria for inclusion in the implementing regulations. Specifically, DTSC is mandated to *consider for inclusion* completion of an HRA. Although DTSC is not mandated to include an HRA, DTSC has determined that the tiered HRA process in the proposed regulations is necessary and appropriate to ensure that all facilities are evaluated in a systematic and impartial manner to assess the potential existing health risks due to facility operations and site conditions. The HRA in turn would help inform the permit decisions.

The HRA provision would also support DTSC's efforts pursuant to SB 673 to assess vulnerable populations, existing health risks, and indicators of cumulative impacts for updating criteria used for the issuance of a new or modified permit or renewal of a permit (Health & Saf. Code § 25200.21(b).) The development of viable procedures for evaluating cumulative impacts of multiple environmental factors is vital for improving the health of the surrounding communities.

See ISOR and FSOR for additional information explaining the necessity of the HRA provision. DTSC did not make any changes to the regulations in response to these comments.

C. DUPLICATIVE INFORMATION

Comment Summary:

The comment indicates that DTSC fails to discuss or analyze the duplicative information required for meeting the HRA requirements that are included in other permitting applications and associated environmental documents and questions whether such an analysis has been performed.

Comment: 1-99

Response:

DTSC has revised the regulation text to state that information that is duplicated in other elements of the Part A or Part B application may be included by citing the references to the information.

D. DEFINITION OF "POTENTIAL"

Comment Summary:

The comment states that the new HRA language uses the term "potential" throughout (e.g., chemicals of potential concern, reasonably foreseeable potential releases, potential pathways, potential magnitude, potential health impact, potential sources, potential sources of chemicals of potential concern, potential receptors, potential sources of emissions, and potential mechanisms), however, none of these terms is defined. The comment states that there are numerous DTSC publications and references that use these terms, some with differing definitions, but none are cited as a reference for an owner or operator to use to develop the HRA, and therefore the proposed rulemaking lacks the clarity required under the Administrative Procedure Act. The comment asserts that phrases that use the term "potential" should be deleted from the text, unless it is accompanied by clear and precise definitions.

Comment: 1-101

Response:

Although not all these terms are defined in the regulations, these are standard terms that are commonly used by toxicologists and practitioners in the field of conducting risk assessments. The ISOR and the FSOR provide further explanations of these terms and examples for non-practitioners. Thus, these regulations do meet the clarity standard set out in the Administrative Procedure Act. The following responses further address each of these terms:

- chemicals of potential concern – This term is defined in the regulations.
- reasonably foreseeable potential releases – Paragraph (1) of subsection 66270.14(e) defines the overall scope of the HRA. Section 66270.14(e)(1)(B) requires the HRA to include more than just known releases. The term "reasonably foreseeable" is another commonly used risk assessment term that is based on a "reasonable person" standard, meaning what a reasonable person would be able to predict or expect in a given set of circumstances. The term "release" is defined in section 66260.10. The regulations further clarify that potential releases for risk

characterization should include both normal operations of the facility and upset conditions at the facility, including releases associated with transportation to or from the facility.

- potential pathways – Paragraph (1) of subsection 66270.14(e) defines the overall scope of the HRA. Section 66270.14(e)(1)(C) requires the HRA to include the potential pathways which is a necessary step in an HRA. "potential pathways" is another term commonly used by toxicologists and practitioners in the field of conducting risk assessments. The regulatory text further clarifies this term for purposes of the HRA Questionnaire in section 66270.14(e)(6)(C), for the HRA Screening Level in section 66270.14(e)(10)(A)1, and for the Baseline HRA in section 66270.14(e)(16)(A).
- potential magnitude – DTSC revised the regulatory text to remove this term in response to this comment.
- potential health impact – Paragraph (1) of subsection 66270.14(e) defines the overall scope of the HRA. Section 66270.14(e)(1)(D) requires the HRA to include the potential health impacts. The regulatory text further clarifies the specific requirements to address health impacts in section 66270.14(e)(6) for the HRA Questionnaire, in section 66270.14(e)(10)(A)1 for the HRA Screening Level, and in sections 66270.14(e)(16)(A)1 through 5 for the Baseline HRA.
- potential sources – The regulations use this term only once in reference to potential sources of groundwater contamination. This term is commonly used by environmental professionals to characterize groundwater contamination. For example, due to the possibility of commingled groundwater plumes, it may not be possible to specify a definitive source of an identified chemical in a contaminated plume.
- potential sources of chemicals of potential concern - The regulations specify in section 66270.14(e)(5)(B) that the potential sources are required to be include in the HRA Questionnaire. Potential sources are listed in this section of the regulations as air emissions, wastewater discharges, contaminated media, spills, and foreseeable accidents.
- potential receptors – A potential receptor is a term that is commonly used by toxicologists and practitioners in the field of conducting risk assessments. The ISOR and FSOR provide additional explanation and examples for the non-practitioners. For example, the characterization of receptors is usually limited to residential adult, residential child, industrial adult (workers), or recreational adult.
- potential sources of emissions – A potential source of emission is a term that is commonly used by toxicologists and practitioners in the field of conducting risk assessments.
- potential mechanisms – This term is not used in the regulations.

DTSC incorporated existing language found in title 22, California Code of Regulations, section 66270.14(j), which was adopted in 1991. This section requires exposure data for land-based hazardous waste units. The terms found in this provision include the following:

- potential for the public to be exposed;
- reasonably foreseeable potential releases;
- potential pathways of human exposure; and
- potential health impacts.

DTSC did not make any changes to the regulations in response to these comments.

E. DEFINITION OF "REASONABLY FORESEEABLE"

Comment Summary:

The comment asserts that the proposed regulations are subjective and lack clear and achievable compliance metrics. The comment notes the proposed regulations require that risks from reasonably foreseeable releases be included in the HRA, but do not define "reasonably foreseeable".

Comment: 5-4

Response:

"Reasonably foreseeable" is a legal standard. It is a well-accepted and often-used standard in various legal and regulatory arenas. The foreseeability test basically asks whether a reasonable person would be able to predict or expect the ultimately harmful result of certain actions. In other words, could a facility reasonably foresee potential releases of hazardous waste or COPCs at the facility from normal operations, upset conditions, or traffic to and from the facility? Again, this term is used in existing language found in title 22, California Code of Regulations, section 66270.10(j)(1)(A). DTSC did not make any changes to the regulations in response to these comments.

F. TYPOGRAPHICAL ERROR

Comment Summary:

The proposed regulations insert a new subsection 66270.14(e); however, there is no corresponding strikeout showing that the existing subsection 66270.14(e) has been replaced.

Comment: 10-6

Response:

DTSC appreciates this comment and has revised the regulatory text to indicate that the existing section 667270.14(e) has been renumbered as section 667270.14(f).

G. EXEMPTION FOR A PREVIOUSLY COMPLETED HRA

Comment Summary:

The comment suggests that there should be an exemption for facility owners or operators that have undergone the lengthy process of obtaining DTSC-approved HRA approaches and procedures. The commenter believes these facilities should not be forced to completely reenter the HRA process, and states that DTSC cannot ignore the owners or operators who are already actively providing these HRAs and should include language allowing those owner or operators the ability to continue using DTSC-approved approaches for conducting these assessments.

Comment: 10-62

Response:

DTSC considered this suggestion and has determined that facilities with previously completed HRAs should not be exempt from these regulations. The HRA characterizes the risk posed by the facility to

surrounding populations. Many changes may occur during the ten-year duration of the permit, such as population size, demographics, proximity of sensitive receptors, increased number of residential units, new land use designations, increased transportation congestion, new facility operations, or new or changing waste streams. DTSC did not make any changes to the regulations in response to these comments.

H. EXEMPTIONS FOR POSTCLOSURE FACILITIES

Comment Summary:

The comment suggests that HRA requirements should not apply to facilities in post-closure care and that this should be clarified by changing the language in section 66270.14(c).

The comment states that language presented in the ISOR does not appear in the regulation, leading to inconsistent interpretation, regulatory ambiguity, and confusion, and that the language between the regulation and ISOR should either be consistent or have differences clarified.

Comment: 11-9

Response:

DTSC has revised the HRA requirements and added section 66270.14(e)(22) to exempt post-closure facilities, Class 1 permit modifications, and Class 2 permit modifications from the HRA requirements. DTSC has made conforming changes in the FSOR.

As to the commenters' second point, it is not clear what regulatory language the commenter is suggesting that DTSC revise. The regulations specify a process and scope for the HRA process. Section 66270.14(e)(4) specifies that the HRA questionnaire must include all the information in sections 66270.14(e)(5), 66270.14(e)(6), and 66270.14(e)(7) which can be reasonably ascertained by the applicant. The ISOR and FSOR provide justification, and additional explanations of the need for this type of initial screening to avoid the expense of a more comprehensive HRA if one is not needed. DTSC did not make any changes to the regulations in response to this comment.

I. HRA COST

Comment Summary:

The comment states that DTSC may not be adequately staffed, trained, or budgeted to support the HRA process as proposed, which, as currently written, requires resources to both manage and implement the program.

Comment: 11-10

Response:

DTSC has an extremely well-qualified staff of toxicologists and other experts that have extensive HRA experience related to DTSC's hazardous waste facility permitting process. These staff would take the lead on implementing this HRA provision as permit applications are submitted. DTSC did not make any changes to the regulations in response to these comments.

J. HRA MULTIPLE REVIEW CYCLES

Comment Summary:

The comment states the HRA process currently proposed in section 66270.14(e)(2) is inefficient, particularly for complex facilities. The comment requests that, for complex facilities, DTSC adopt U.S. EPA's Environmental Indicators process, which would eliminate many of the disruptions and review cycles between industry and DTSC as currently proposed. The comment asserts that the most complex facilities would likely require the most complex assessment, the baseline assessment, making the preliminary process irrelevant and unnecessary.

Comment: 11-11

Response:

DTSC agrees that complex facilities may need to complete a Baseline HRA. However, DTSC disagrees that the preliminary process is irrelevant and unnecessary. The preliminary HRA Questionnaire is a data collection effort intended to determine the level of assessment that is necessary. For a complex facility, the Baseline HRA work plan would be submitted concurrently with the HRA Questionnaire. The work plan would ensure that expectations are clear for the preparation of the Baseline HRA, which would ultimately reduce preparation time and costs. See ISOR and FSOR for further justification on the need for a work plan.

U.S. EPA has developed different environmental indicators for different purposes. For example, see U.S. EPA'S Environmental Indicators (EI) process for superfund sites. (https://semspub.epa.gov/work/11/176152.pdf). Another example is U.S. EPA Environmental Indicators for EJScreen (https://www.epa.gov/ejscreen/overview-environmental-indicators-ejscreen.) DTSC reviewed these indicators and does not find that they serve the same purpose as an HRA. So, it would be inappropriate to use environmental indicators instead of an HRA. DTSC did not make any changes to the regulations in response to the comment.

K. APPLICABILITY

Comments Summary:

The comment seeks clarification whether the regulation applies to applicants for a new permit only or to applicants for permit renewals as well as new permits.

Comments: 10-64 and 10-65

Response:

The HRA provision applies to any hazardous waste facility permit application, whether it is for a new permit or a permit renewal. However, DTSC revised the HRA regulation to exempt applications for a post-closure facility permit, or a Class 1 or Class 2 permit modification request. DTSC did not make any changes to the regulations in response to these comments.

L. TIERED PROCESS

Comment Summary:

The comment says that requiring a Baseline HRA work plan with the HRA questionnaire bypasses the step of a Screening HRA. The process should consider a facility's circumstances, prior reports, and other risk-related investigations. The comment goes on to question how DTSC envisions coordinating HRAs that are otherwise required under CEQA and based on existing regional air district thresholds.

Comment: 10-65

Response:

The comment is correct that once an HRA Questionnaire is reviewed, DTSC may determine that a Baseline HRA is required and decide to bypass the Screening Level HRA. DTSC structured the HRA requirement to have the flexibility needed to eliminate the Screening Level HRA, if DTSC has determined it was not necessary.

The facility circumstance is reviewed as part of the facility description, and any prior risk assessments could be included as part of the inventory of releases, emissions, or discharges. As for coordination with CEQA requirements, DTSC would not require a separate HRA to comply with CEQA. The regional air district thresholds for air quality are used in CEQA, but may not be applicable to the HRA process. The California Air Resources Board may also require a separate HRA to comply with provisions of the Air Toxics "Hot Spots" Information and Assessment Act (AB 2588, 1987, Connelly.) That statute requires stationary sources to report the types and quantities of certain substances routinely released into the air. The goals of the Air Toxics "Hot Spots" Act are to collect emission data, to identify facilities having localized impacts, to ascertain health risks, to notify nearby residents of significant risks, and to reduce those significant risks to acceptable levels. Therefore, any HRA required by a local air district would not be sufficient on its own to serve the purpose of an HRA under the proposed regulation. DTSC did not make any changes to the regulations in response to these comments.

Section 66270.14(e)(1)

M. TRANSPORTATION RELATED ACTIVITIES

Comments Summary:

The comment states that requiring a facility's HRA to identify releases associated with transportation to or from the facility is an excessive burden on the facility's assessment of potential risk from its operations, in part, because facilities typically have little or no control over the transporters delivering wastes to their facilities. Evaluating upset releases during transportation could involve unlimited hypothetical scenarios. HRA "transportation" pathways should be amended to clarify that the scope is limited to on-facility loading and unloading.

The commenter is opposed to HRA transportation requirements that duplicate those at the federal level and do not clearly account for facility safeguards. The need for HRA's to consider transportation "to or from the facility" is duplicative to requirements in:

- Title 40 of the Code of Federal Regulations (40 CFR), Part 263;
- California Air Resources Board regulations; and
- CEQA, which already includes an analysis of all reasonably foreseeable direct and indirect impacts that could result from transportation to/from facilities prior to project approval.

Comments: 10-63 and 11-13

Response:

DTSC has included transportation to and from the facility as part of the scope of the HRA for several reasons. As explained in the ISOR (p. 50) and FSOR, emissions from a high volume of transportation vehicles may have air quality consequences to surrounding communities. Secondly, the amount of truck traffic and traffic safety with respect to trucks hauling hazardous waste to a facility pose a concern for public safety, especially with respect to schools located on designated transportation routes.

DTSC respectfully disagrees that facilities have little control or no control over the transporters delivering wastes to their facilities. Facilities need to arrange for deliveries, verify the waste profiles, and may even require transporters to comply with designated transportation routes when a hazardous waste is an inhalation hazard, an explosive, or hazardous waste mixed with low level radioactive components.

DTSC respectfully disagrees with the assertion that this provision is duplicative of 40 CFR Part 263, which regulates hazardous waste transporters. In California, the transporter requirements are found in title 22, California Code of Regulations, section 66263. The California Air Resources Board principally regulates stationary sources and emission standards for vehicles, but does not require an assessment of air emissions for hazardous waste facilities. HRAs are used as supporting documentation for an initial study needed to comply with the requirement of CEQA. DTSC did not make any changes to the regulations in response to these comments.

N. PERMITTED CAPACITY & UPSET CONDITIONS

Comment Summary:

The comment asserts that the ISOR (p. 50) interprets section 66270.14(e)(1)(B) to require that the HRA evaluate operations under "maximum permitted capacity" for all "foreseeable upset conditions and their potential impacts." It is not clear how the upset condition can incorporate the various safeguards, which can both prevent or mitigate upset conditions. To require HRA's to consider upset scenarios without safeguards would require extensive engineering and modeling for a variety of HRA pathways for unlikely upset scenarios. Permitting should remain focused on longer-term, chronic conditions as opposed to hypothetical upsets with one-time acute exposures.

Comment: 11-14

Response:

Paragraph (1) of subsection 66270.14(e) defines the overall scope of the HRA. Section 66270.14(e)(1)(B) requires the HRA to include potential releases due to normal facility operations. The regulatory text further clarifies that maximum capacity is required to assess potential releases in sections 66270.14(e)(5)(A)4 and 66270.14(e)(5)(A)7 for the HRA Questionnaire, in section 66270.14(e)(10)(A)1 for the HRA Screening Level, and in section 66270.14(e)(16)(A)1 for the Baseline HRA. DTSC explains in the FSOR why maximum permitted capacity must be used for the assessment of operations as clarified in the proposed regulations.

Section 66270.14(e)(5)(B)5 (JULY 2018), former section 66270.14(e)(5)(A) (SEPTEMBER), does not require that the assessment of releases due to any foreseeable accidents or upset conditions use maximum capacity. There is no conflicting statement in either the ISOR or the FSOR that foreseeable upset conditions and their potential impacts must be evaluated using maximum permitted capacity.

An owner or operator may incorporate safeguards that prevent or mitigate upset conditions. However, if a facility has a history of facility upsets, then these need to be addressed in an HRA. It is not DTSC's intent to require extensive engineering and modeling for a variety of HRA pathways for unlikely upset scenarios. DTSC did not make any changes to the regulations in response to these comments.

Section 66270.14(e)(5)

O. VEHICULAR TRAFFIC

Comment Summary:

The comment states that the proposed text is vague. Further, the comment seeks clarification whether the traffic to be considered under section 66270.14(e)(5) is only that traffic relating to the hazardous waste operations on-site at the facility. The proposed text in 66270.14(e)(5)(I) should be revised to state, "Description of on-site vehicular traffic…"

Comment: 10-66

Response:

The existing permit application regulations (§ 66270.14(b)(10)) require information on traffic pattern, estimated volume, traffic control, and adequacy of access roadway. The federal Department of Transportation requires designated transportation routes for hazardous materials (hazardous waste is a hazardous material) transported by motor vehicle in types and quantities that require placarding, pursuant to Table 1 or 2 of section 172.504 of title 49 of the Code of Federal Regulations. DTSC believes that it is appropriate to consider both onsite and offsite transportation-related impacts in an HRA due to the operation of a facility. DTSC did not make any changes to section 66270.14(e)(5)(I) (SEPTEMBER 2017) in response to these comments.

Section 66270.14(e)(6)

P. UPSET CONDITIONS AND THE RISK MANAGEMENT PLAN REGULATIONS

Comment Summary:

The comment asserts that the widely varied chemical compositions, particularly at complex or specialty facilities, make completing a quantitative HRA nearly impossible – with an incredibly broad spectrum of exposure scenarios. The comment also states that the sensitivity and confidentiality of this type of modelling report should be adequately protected from potential saboteurs and terrorists. The comment asserts that the requirement to do an HRA on catastrophic spills, fires, and explosions is duplicative of both the federal Risk Management Plan (RMP) regulations and the California Accidental Release Prevention Program.

Comment: 11-15

Response:

In California, the Risk Management Plan Program is the California Accidental Release Prevention Program (CalARP). CalARP consists of the Federal Risk Management Plan Program with additional state requirements, including an additional list of regulated substances and thresholds. The requirements for this program are set out in title 19, California Code of Regulations, sections 2735.1 through 2785.1.

The intent of the CalARP is to provide basic information that may be used by first responders to prevent or mitigate damage to the public health and safety and to the environment from a release or threatened release of a hazardous material, to satisfy federal and state Community Right-To-Know laws, and to require process safety evaluations in order to prevent accidental releases from facilities. . Facilities that handle, manufacture, use, or store any of the toxic or flammable substances listed in the regulations above the specified threshold quantities in a process, are required to develop and implement a risk management program. If the facility is required to complete a CalARP report, a copy of the report may be submitted as part of the HRA requirement and a facility may claim such information confidential in accordance with title 22, California Code of Regulations, section 66260.2. DTSC did not make any changes to section 66270.14(e)(6)(A)5 (SEPTEMBER 2017) of the regulations in response to these comments.

Q. UPSET CONDITIONS

Comment Summary:

The comment asserts that floods and earthquakes may require every facility in California to submit a baseline HRA, and without a more specific explanation, definition or boundary, it is impossible to limit the number of catastrophic scenarios.

Comment: 11-16

Response:

Not every facility would be required to submit a Baseline HRA due to the risk of floods or earthquakes. Existing permit application regulations require a map of the 100-year floodplain (§ 66270.14(b)(18)((B)) and information needed to evaluate seismic activity covering a 3,000-foot radius of the facility (§ 66270.14(b)(11)). Based on this permit application information, DTSC would evaluate whether the risk of upset scenarios is credible if the facility is in a floodplain or within 3,000 feet of a fault. DTSC did not make any changes to the regulations in response to these comments.

R. UPSET SCENARIOS BASED ON EXPERIENCE

Comment Summary:

The commenter is concerned with how continual improvement is considered with respect to past incidents. Specifically, the comment states that the “information from past incidents” used to predict future pathways in an HRA needs to address several issues such as: 1) how chemical processes change over time, 2) continual improvement of safeguard(s), and 3) application of lessons learned. The comment asserts that as these improvements are implemented, the validity of the facility’s historical record to predict a future incident is compromised.

The commenter appreciates that under section 66270.14(e)(4)(A), applicants need only provide information that can be reasonably ascertained, but states this seems to contradict the HRA expectations that may require new research, creation, or compilation of data not yet in existence.

Comment: 11-17

Response:

The ISOR and FSOR point out that past incidents can help predict future upset scenarios. The comment makes a good point that continual improvements of safeguards is meant to avoid future mishaps. However, not all facilities have implemented continual improvement processes that reduce the risk of upset or can mitigate future accidents due to human error. Conversely, if a facility has operated for twenty to thirty years without an accident, it could be fair to state that the risk of an upset scenario is low.

Section 66270.14(e)(4)(A) requires only that the applicant provide information that can be reasonably ascertained. This provision is meant to clarify that DTSC would not require the facility to conduct new research, studies, or surveys if the data does not already exist for purposes of the HRA Questionnaire. The ISOR and FSOR discuss known sources of data to ascertain risk of upset scenarios. If the information does not readily exist, no additional effort is required to obtain the data for purposes of the HRA Questionnaire.

However, the regulations do not limit information that can be reasonably ascertained for the completion of a Screening Level HRA (sections 66270.14(e)(10) through (15)) or a Baseline HRA (sections 66270.14(e)(16) through (21).) DTSC did not make any changes to the regulations in response to these comments.

S. UPSET CONDITIONS AND CEQA

Comment Summary:

The comment states that section 66270.14(e)(6)(A)5 (September 2017) unnecessarily duplicates CEQA requirements, noting that CEQA already includes an assessment of any foreseeable accidents or upset conditions prior to project approval. The comment states this requirement should be deleted as redundant and asserts the requirement to assess accidents or upset conditions would be more appropriately included in a Disaster Preparedness Plan or Facility Response Plan. The comment goes on to state that if the requirement remains in the regulation, the obligation should be limited to historical records or reasonably foreseeable events.

Comment: 10-68

Response:

The provision found in section 66270.14(e)(6)(A)5 applies to “reasonably foreseeable” events. The comment is correct that owners or operators are required to complete a contingency plan and may prepare disaster preparedness plans as well.

DTSC respectfully disagrees that this provision is duplicative of CEQA, assuming the commenter is referring to the hazards and hazardous materials factors listed in the initial study checklist. The HRA is a

human HRA, while the analysis required for the initial study under CEQA focuses on environmental impacts. Some of the input for each of these assessments may be the same, but the resulting impacts that are analyzed are different. DTSC did not make any changes to the regulations in response to these comments.

T. REPORTABLE SPILLS

Comment Summary:

The comment suggests that since the purpose of the HRA is to evaluate the risks to human health and the environment posed by a facility, the HRA should be based upon only those spills that exceed reportable quantities under 40 CFR part 302.4, and that to require more would unfairly prejudice those facilities that record spills that are below reportable quantity thresholds.

Comment: 10-67

Response:

The requirement to list all known spills applies to both (1) any permit conditions for authorized hazardous waste activities that require this type of reporting; and (2) hazardous materials reporting requirements under state or federal laws. DTSC did not make any changes to section 66270.14(e)(6)(A)4 in response to these comments.

U. COPCS LIST

Comment Summary:

The comment urges that section 66270.14(e)(6)(B)2 include an exclusion for facilities that already have a DTSC-approved COPC list. The comment states that DTSC must consider previously approved evaluations and studies as a basis for forming the COPC list, and that not doing so would be unjust for owner or operators that have already undergone the extensive process to obtain DTSC approval of applicable COPCs for the facility.

Comment: 10-69

Response:

DTSC disagrees that facilities with a DTSC-approved COPC list should be excluded. The facility may have a COPC list approved for corrective action, for groundwater monitoring, or for post-closure permits. The COPC list for this HRA needs to cover not only existing contamination at a facility but also sources of COPC from the facility's ongoing operations. Any existing DTSC-approved COPC list should be included, but it may not be sufficient to cover all known or potential sources for a facility HRA. For example, if an approved COPC list is used for groundwater monitoring, the COPC list may be limited to chemicals found in groundwater only and would not include air emissions. DTSC did not make any changes to section 66270.14(e)(6)(B)2 in response to these comments.

V. TOXICITY ASSESSMENTS

Comment Summary:

The comment states that section 66270.14(e)(6)(C) needs to be revised to add language allowing the toxicity assessment to be incorporated by reference from U.S. EPA's Integrated Risk Information System (IRIS), OEHHA, or other appropriate sources. The peer-reviewed work of toxicity assessment has already been done and could be summarized for all COPCs on a single table. Describing the toxicity assessment of each COPC would add hundreds of pages to the report without adding value. Such a process is obviously duplicative, unreasonable, and burdensome.

Comment: 10-70

Response:

DTSC does not intend for a facility to develop toxicity assessments for each COPC. DTSC agrees that the peer-reviewed work of toxicity assessment has already been done and could be summarized for all COPCs on a single table. It is common practice in an HRA to include only a summary table of existing toxicity data for COPCs. DTSC did not make any changes to the regulations in response to these comments.

W. VULNERABLE POPULATIONS

Comment Summary:

The comment states that the proposed regulations require assessing health impacts from the facility on vulnerable populations, but DTSC notes in the ISOR and FSOR that the criteria for identifying vulnerable populations and cumulative impacts for permit decisions have not been finalized. The comment further states that while DTSC presents several examples of sources that may be used as a proxy for finalized criteria, a specific set of defined requirements that constitute a compliant state is not provided.

Comment: 5-5

Response:

Sensitive receptors, receptors likely to be affected or most susceptible to COPCs, and vulnerable populations, are similar, but different, concepts. Sensitive receptors include, but are not limited to, hospitals, schools, child care facilities, hospitals, elderly housing, elderly care facilities, and convalescent facilities. "Sensitive receptors" is a term used in section 66270.14(b)(23). Section 66270.14(e)(6)(B)3, requires the identification of receptors likely to be affected or most susceptible to a specific COPC, and this is an element of characterizing the toxicity of COPCs. Vulnerable populations are populations that, due to exposures to toxic chemicals or socioeconomic factors, are unable to resist and recover from pollution burdens.

Section 66270.14(e)(6)(B)3 (JUNE 2018), former section 66270.14(e)(6)(C)3 (SEPTEMBER 2017), requires that the HRA Questionnaire document categories of receptors that are likely to be affected or are most susceptible to COPCs, if applicable. There are categories of receptors that are categorized by biological factors, such as age, life stage, gender, race, or ethnicity that may be more susceptible to a specific toxicity characteristic. For example, persons of reproductive age are more susceptible to reproductive toxicants; children and infants are more susceptible to developmental toxicants, mutagens, and

endocrine disruptors; and pregnant women are more susceptible to persistent, bioaccumulative and toxic substances.

SB 673 authorizes DTSC to consider community vulnerability, cumulative impact, and potential risks to health and well-being in drafting these regulations governing DTSC's permit decisions. Although the CIP and HRA requirements in the proposed regulations would support DTS's efforts to assess vulnerable populations, DTSC is developing a separate rulemaking to address cumulative impacts and vulnerable communities. The comment is correct in that the criteria for identifying vulnerable populations and cumulative impacts for permit decisions have not been finalized. However, the regulations do not use the term "vulnerable populations" in the HRA. DTSC did not make any changes to section 66270.14(e)(6)(C)3 (SEPTEMBER 2017) in response to these comments.

Section 66270.14(e)(6)(D)3

X. POTENTIAL RECEPTORS

Comments Summary:

The comments state that the proposed text is vague and needs to define "potential receptors" as actual receptors, including the closest existing sensitive receptor (e.g., school, residence, senior care facility), which are typically used in HRAs. The comments further state that vague language invites theoretical receptor scenarios that are not necessarily reasonably foreseeable and may be incompatible with uses allowed under local general plan or zoning designations.

Comments: 10-71 and 10-74

Response:

The regulatory language specifies "the identification of, and rationale for, potential receptors." The term "potential receptor" is commonly used by toxicologists and practitioners in the field of conducting risk assessments. In the HRA Questionnaire, it is appropriate to be conservative and include all potential receptors for purposes of screening risk. The term "potential" is not used in either the Screening Level HRA (section 66270.14(e)(10)(A)1) or the Baseline HRA (section 66270.14(e)(16)(A)3.)

Facilities are not required to develop a list of all actual receptors; facilities need only identify groups of potential receptors based on surrounding land use, such as residences, recreational areas (e.g., public swimming pools, public parks, sports fields), commercial areas, and industrial areas.

This term "potential receptors" allows for the standardization of assumptions used in the HRA about duration of exposure, age, gender, breathing rates, etc. These standardized exposure assumptions are designed to provide a uniform basis for risk assessments and do not constitute an actual personal risk.

Conversely, if the HRA were made specific to include actual receptors, the HRA would be evaluated on a unique source-receptor relationship. The exposure data would have to include exposure point concentrations for each actual receptor based on specific locations. This is not the case; the HRA is a probabilistic prediction that often incorporates worst-case assumptions that do not reflect real-world human behavior.

"Receptors" is, therefore, qualified in section 66270.14(e)(6)(C)3 as "potential receptors" because not every individual in the receptor category may actually be exposed to a specific COPC, and as such, the term receptor is modified as "potential." DTSC did not make any changes to sections 66270.14(e)(6)(D)3, 66270.14(e)(8)(B)1.c, or 66270.14(e)(8)(B)2.c (SEPTEMBER 2017) in response to these comments.

Y. POTENTIAL PATHWAYS

Comment Summary:

The comment states that including all potential exposure pathways, even if they are incomplete and could not reasonably become complete, could cause confusion to regulators or the public, and the proposed text should be revised to clarify that only "… potentially complete or complete exposure pathways..." should be included in the report.

Comment: 10-72

Response:

DTSC has revised section 66270.14(e)(6)(D)4 as suggested by the comment.

Section 66270.14(e)(8)

Z. HRA QUESTIONNAIRE CRITERIA

Comment Summary:

The comment asks whether DTSC would use the same unidentified screening protocol when it evaluates the sufficiency of the HRA Questionnaire in the future.

Comment: 1-97

Response:

DTSC would review the sufficiency of the HRA Questionnaire based on the completeness of the information provided in the submittal. DTSC did not make any changes to the regulation in response to this comment.

AA. SUPPLEMENTAL INFORMATION

Comments Summary:

The comment states that given the complex nature of these analyses, 30 days may not be an adequate amount of time to provide supplemental information. The comment recommends the regulations be revised to provide up to 60 days to provide supplemental information.

Comments: 2-28 and PH-5-5

Response:

DTSC reconsidered all the time frames for providing supplemental information and has extended the time frame from 30 days to 60 days for the Baseline HRA submittal. However, DTSC did not extend the time specified in the regulations for the HRA Questionnaire, Screening Level work plan, Screening Level

HRA, or the Baseline HRA work plan. DTSC still considers these response time frames adequate for these submittals which are less complicated than the Baseline HRA. DTSC did not make changes to sections 66270.14(e)(8), 66270.14(e)(11), 66270.14(e)(13), 66270.14(e)(17), or 66270.14(e)(19) 9SEPTEMBER 2017) in response to the comments.

BB. OFFSITE CONSEQUENCE

Comments Summary:

The comments state that sections 66270.14(e)(8)(B)1.b. and 2.b. use the term "offsite consequences," which is undefined and indecipherably vague. The comments go on to say the language fails to explain how an "offsite consequence" is to be evaluated without first conducting the Screening HRA, and state DTSC should revise this section to more clearly explain the definition of "off-site consequences."

Comments: 10-73 and 10-76

Response:

The term "offsite" is defined (§ 66260.10) as any site which is not onsite. "Onsite" is further defined to mean the same or geographically contiguous property. Although the term "offsite consequences" is not defined, it is meant to have its common English meaning. The term "offsite consequence" refers to any consequences that may occur outside of the facility boundaries. DTSC did not make any changes to sections 66270.14(e)(8)(B)1.b or 66270.14(e)(8)(B)2.b of the regulations in response to these comments.

CC. COMPLETE EXPOSURE PATHWAYS

Comment Summary:

The comment states that as written, section 66270.14(e)(8)(B)3 suggests that DTSC would only require "no further action" if the factors in subsections (a) through (d) are all met. The commenter asserts it is unreasonable for DTSC to require that all subparts be met if by meeting subpart (c) the owner or operator can demonstrate there is no complete pathway between the COPCs and potential receptors, and DTSC should revise the text to read "If subpart (c) is met OR if all of (a), (b), and (d) are met."

Comment: 10-75

Response:

DTSC disagrees that the criteria for no further action should be met by only meeting subpart (c). This suggestion would allow a facility with onsite contamination, hazardous waste releases, or emissions of pollutants to not have to complete a Screening Level HRA or Baseline HRA based on data that may contain uncertainties. Instead, DTSC has determined to use a conservative approach. What is known about site conditions can change and all data regarding documented sources of contamination must be evaluated. Uncertainties about data may exist due to data gaps or unverified assumptions. Therefore, it is necessary for DTSC to make a determination of no further action based on very conservative criteria.

The HRA Questionnaire would provide an opportunity for an owner or operator to demonstrate how site-specific conditions do not pose a risk. Therefore, DTSC did not make any changes to section 66270.14(e)(8)(B)3 of the regulations in response to these comments.

DD. OFFSITE CONSEQUENCE

Comment Summary:

The comment asserts that section 66270.14(e)(8)(B)3.b is not consistent with the language used in other subparts of section 66270.14(e)(8)(B) to include only those pollutants and COPCs with "offsite consequences." The comment states the proposed regulations should be revised to be consistent with language used in the proposed text for section 66270.14(e)(8)(B)1.b and section 66270.14(e)(8)(B)2.b.

Comment: 10-76

Response:

DTSC intended to specify that no further action would be restricted to facilities with hazardous waste operations that do not result in any release, emission, or discharge. By not using the term "offsite consequence," the restriction applies to all releases, emissions, or discharges. For example, a used oil transfer station may not have releases to the environment, wastewater discharges, storm-water discharges, or emissions from any hazardous waste management units. DTSC did not make any changes to the regulations in response to these comments.

EE. CRITERIA FOR SCREENING HRA OR BASELINE HRA

Comment Summary:

The comment asserts that the criteria under which a Screening Risk Assessment or Baseline Risk Assessment would not be required are inadequately defined. The comment concludes the direct result is that a Screening Risk Assessment or Baseline Risk Assessment would likely be required for every permit action, without any consideration for how straightforward the permit renewal or the facility's compliance history is.

Comment: 5-6

Response:

The criteria under which a Screening Risk Assessment or Baseline Risk Assessment would not be required are not based on the simplicity of the permit renewal or the compliance history of the facility. The HRA tiers are based on the identification of known and potential sources of COPCs. The HRA assesses risk due to the complexity of the facility operations and site conditions. DTSC did not make any changes to sections 66270.14(e)(8)(B)2 or 66270.14(e)(8)(B)3 of the regulations in response to these comments.

Section 66270.14(e)(10)

FF. REGULATORY SCREENING LEVELS

Comment Summary:

The comment asserts that section 66270.14(e)(10)(A)2 should be revised to allow use of procedures and data sources that have been approved by DTSC, California Air Resources Board, or the appropriate

regional air district for risk assessments, and that inclusion of other peer-reviewed sources may fill data gaps in the sources currently provided in this subpart.

Comment: 10-77

Response:

Under section 66270.14(e)(6)(C)2, the HRA Questionnaire requires that any regulatory screening levels developed by state or federal agencies be included, if available. This section of the HRA Questionnaire allows for a broader list of screening criteria developed by other state agencies and is intended to help expedite the identification and evaluation of potential environmental concerns at contaminated hazardous waste facilities.

For purposes of the Screening Level HRA, the criteria are more protective and were developed to be consistent with DTSC's proposed Toxicity Criteria for Human Health Risk Assessment (R-2016-08). The proposed regulation uses the toxicity criteria specified by OEHHA, the U.S. EPA or the Agency for Toxic Substances and Disease Registry. Screening levels, include, but are not limited to, the following:

- U.S. EPA's Regional Screening Levels,
- U.S. EPA Provisional Peer Reviewed Toxicity Values (PPRTVs), and
- Agency for Toxic Substances and Disease Registry Minimal Risk Levels.

As stated in the ISOR and FSOR for the proposed regulation, DTSC is promulgating this proposed rule to adopt the "Office of Environmental Health Hazard Assessment (OEHHA) toxicity criteria and require their use because they afford greater protection of human health, safety and the environment than the nationwide minimum standard provided by analogous federal toxicity criteria for the same contaminants." DTSC did not make any changes to section 66270.14(e)(10)(A)2 in response to these comments.

Section 66270.14(e)(14)

GG. REJECTION OF A SCREENING LEVEL HRA

Comment Summary:

The comment asserts that section 66270.14(e)(14)(B)2 does not clarify if DTSC would allow for discussion between DTSC and the owner or operator of any perceived gaps in the Screening Level HRA. DTSC needs to allow the owner or operator an opportunity to rectify any concerns prior to final rejection of the Screening Level HRA. Such an opportunity could mitigate the need to reject the Screening Level HRA. DTSC needs to revise the regulation to allow for that review and discussion prior to rejecting the Screening Level HRA.

Comment: 10-78

Response:

The regulations provide for a work plan to be submitted for the Screening Level HRA. If neither the OEHHA nor the federal screening levels specify a level for a COPC, DTSC may approve alternate

screening levels if there are any gaps. DTSC did not make any changes to section 66270.14(e)(14)(B)2 in response to these comments.

Section 66270.14(e)(17)

HH. BASELINE DATA REQUESTS

Comment Summary:

The comment asserts that section 66270.14(e)(17)(A)1 needs an additional provision that would read "or within an amount of time specified by DTSC." The comment states that some data requests, such as information requiring sampling or testing, may not be available within 30 days, and thus, an owner or operator may not be able to meet the stated time frame in the proposed regulations, and that DTSC should revise the subpart to allow DTSC to specify a time frame that is considerate of the type of information DTSC is requesting from the owner or operator.

Comment: 10-79

Response:

This provision specifies the time frame for the work plan for the Baseline HRA. If additional data is needed for completion of the Baseline HRA, the work plan would address any needed time for acquiring additional sampling or monitoring data. Section 66270.14(e)(19) already provides DTSC the discretion to specify an alternative due date for the HRA submittal, and DTSC has revised section 66270.14(e)(20) to allow the same discretion for an alternative due date for supplemental information for a Baseline HRA. DTSC did not make any changes to section 66270.14(e)(17)(A)1 for the HRA Baseline work plan in response to these comments.

Section 66270.14(e)(18)

II. REJECTION OF A BASELINE HRA

Comment Summary:

The comment asserts that section 66270.14(e)(18) does not clarify if DTSC would allow for discussion between DTSC and the owner or operator of any perceived gaps in the Baseline HRA Work Plan. The comment states DTSC needs to allow the owner or operator an opportunity to rectify any concerns prior to final rejection of the Baseline HRA Work Plan; such an opportunity could mitigate the need to reject the work plan, and to revise the regulation to allow for that review and discussion prior to rejecting the Baseline HRA Work Plan.

Comment: 10-80

Response:

The facility has 90 days to prepare a Baseline HRA, and has 30 days to respond to a supplemental request for information. The facility can at any time during these four months ask DTSC to clarify any issue. However, if DTSC does reject the Baseline HRA, DTSC may use a notice of deficiency (Health & Saf. Code § 25200.18) to address this Baseline HRA deficiency and provide the facility an opportunity to

respond to the notice of deficiency. DTSC did not make any changes to section 66270.14(e)(18) in response to these comments.

Section 66270.14(e)(20)

JJ. BASELINE DATA REQUESTS

Comment Summary:

The comment contends that section 66270.14(e)(20)(A)1 needs to add a provision reading "or within an amount of time specified by DTSC." The comment states that some data requests, such as information requiring sampling or testing, may not be available within 30 days, and thus, an owner or operator may not be able to meet the stated time frame in the proposed regulations, and that DTSC should revise the subpart to allow DTSC to specify a time frame that considers the type of information DTSC is requesting from the owner or operator.

Comment: 10-81

Response:

DTSC has revised the time frame from 30 days to 60 days in section 66270.14(e)(20)(A)1. More importantly, DTSC has revised the provision to provide DTSC the discretion to extend the 180 days needed to complete the Baseline HRA to an alternative due date. This provision allows for additional time that the facility may need to provide supplemental information.

XV. APPENDIX 1 - CHAPTER 20

A. TRAINING PLAN VERSUS PROGRAM

Comment Summary:

The comment asserts that DTSC's proposed revision from "training plan" to "training program" in section 66270.42, Appendix I is not merely editorial, but would be inconsistent with U.S. EPA's RCRA regulations.

Comment: 10-87

Response:

DTSC appreciates this comment and has restored the term "training plan" to be consistent with federal regulations.

XVI. VIOLATIONS SCORING PROCEDURE (VSP)

A. AB 1075 AND THE PROPOSED REGULATIONS

Comments Summary:

The comments express a concern that Health and Safety Code section 25186.05 (AB 1075) may conflict with the proposed regulations based on the following interpretations:

- DTSC does not have the statutory authority to implement the VSP.
- AB 1075 implies that "repeating and recurring pattern," means three violations/convictions within a five-year period.
- The statutory language in subdivision (d)(3) of Health and Safety Code section 21586.05 limits and quantifies the only types of violations or instances of noncompliance that may be used to deny, revoke or suspend a permit. DTSC may not legally occupy a space in the regulatory arena that, since the passage of AB 1075, is now occupied solely and exclusively by this statute.
- There is enough specificity in the law for DTSC to use clear and objective criteria for making denial, revocation and suspension decisions.
- DTSC also has the statutory authority to elaborate in greater detail, through regulation, how the provisions of AB 1075 would operate in practice.

Comments: 1-34, 1-35, and 1-36

Response:

DTSC respectfully disagrees and finds that DTSC does have the statutory authority to implement the VSP. DTSC has omnibus authority under Health and Safety Code section 25150 to adopt and revise standards and regulations for the management of hazardous waste. More importantly, Health and Safety Code section 25200.21 (SB 673) expressly authorizes DTSC to adopt regulations establishing or updating criteria used for the issuance of a new or modified permit or renewal of a permit, or for the denial or suspension of a permit. The VSP provisions address the criteria specified in section 25200.21(a) regarding a facility's past violations. DTSC agrees that statutory provisions other than those set out in SB 673 and codified in Health and Safety Code section 25200.21 (for example, Health & Saf. Code §§ 25186, 25186.05, 25186.2, 25186.2.5, and 25189.3) provide additional criteria for making permit denial, revocation and suspension decisions.

Health and Safety Code section 25186.05 (AB 1075) mandates that DTSC consider three or more violations within a five-year period as compelling cause to deny, suspend, or revoke a permit, registration, or certificate. The owner or operator must be found liable or convicted with respect to a single facility within a five-year period under section 25186.05.

DTSC respectfully disagrees that Health and Safety Code section 25186.05 limits DTSC's authority to deny, suspend or revoke a permit based on only the types of violations or noncompliance specified in section 25186.05. The definitions of "violation" and "noncompliance" in section 25186.05 apply only to section 25186.05, and not to other provisions in the Hazardous Waste Control Act. Section 25186.05 provides additional authority to DTSC and it does not conflict with the proposed regulations. DTSC cited section 25200.21, not section 25186.05, as the Authority and Reference for these regulations. DTSC finds that the proposed regulations and AB 1075 are two complementary approaches to address noncompliant owners or operators. DTSC did not make any changes to the regulations in response to these comments.

B. VSP AND TIME NEEDED TO RESOLVE AN SOV

Comment Summary:

The comment states that an SOV is not final agency action; it cannot be appealed either administratively or judicially, and may languish for years before being resolved. The comment notes that issuance of an SOV is merely the first step in a potential enforcement action, followed by: (i) the issuance of a formal Inspection Report; (ii) the respondent's written response to the Inspection Report; (iii) a meet-and-confer process, if requested by the respondent; and finally (iv) settlement discussion leading to issuance of an Administrative Order on Consent or a Stipulated Order in cases that are referred to the Office of the Attorney General. The comment asserts that settlement discussions can continue for years in complex cases. As such, the commenter believes it is inappropriate to subject any alleged violation to any "scoring" process unless and until it has been admitted by the owner or operator, proven to have occurred, or the subject of a waiver of defenses.

Comment: 3-13

Response:

DTSC appreciates the comment regarding the steps and time needed to conclude an enforcement action. DTSC disagrees with the comment that it is inappropriate to subject any alleged violation to any "scoring" process. SB 673 specifically authorizes DTSC to consider the number and types of past violations that would result in a denial of a permit. DTSC acknowledges that not all enforcement actions end in a settlement that includes “admissions language” by which the owner or operator admits the violation(s); and that most violations alleged in past enforcement actions were not proven or fully adjudicated in a court proceeding. Using the commenter’s criteria would essentially eliminate the use of any past violations when making a permit decision, which would be in direct contradiction to SB 673.

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator’s existing due process right to challenge DTSC’s permit decisions or enforcement actions.

C. ROLE OF SOVS IN VSP

Comments Summary:

The comments state that an SOV is merely a summary of alleged violations that have yet to be proven by DTSC. DTSC bears the burden of proving a *prima facie* case in all enforcement proceedings, and the SOV, by itself, has no legal significance beyond its function of putting the facility on notice of DTSC’s findings and allegations.

The comments recommend that DTSC clarify that a Class I violation identified in an SOV or any other violation that is not appealable shall not be considered when scoring a facility under the VSP program; further, that the only Class I violations that should be considered are those for which the owner or operator has the formal right to appeal the violation, either administratively or judicially.

The comments assert that DTSC should not include in the VSP score any Class I violation that has been timely appealed, and the appeal has not been finally resolved, saying it would be unfair and a serious violation of a permittee's due process rights for DTSC to include such a violation in the facility's VSP score before the permit holder has had a chance to complete its challenge of the violation before DTSC and the courts.

Finally, the comments state that any alleged violation that is the subject of an ongoing legal challenge must be excluded from the VSP; to that end, the comments recommend that sections 66271.50(c) and 66271.54(a) be revised to exclude several types of violations from the VSP scoring. These violations include the following: (1) all violations that are not appealable, (2) all violations for which the appeals period has not run, (3) all violations that have been appealed and the appeal has not been finally resolved, including all judicial appeals, and (4) all violations that have been cancelled, retracted, withdrawn or successfully challenged in an administrative or judicial proceeding.

Comments: 1-62, 3-12, 3-14, 3-15, 10-13, 10-14, and 10-25

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

DTSC, however, will not revise sections 66271.50(c) or 66271.54(a) as recommended by the comment, because doing so would essentially eliminate the use of any past violations when making a permit decision, which would be in direct contradiction to SB 673.

D. VIOLATIONS WITHIN THE PERMITTED UNIT

Comment Summary:

The comment observes that military installations are like "small cities'' with much work done by tenants and contractors, and for this reason, AB 1075 of 2016 was amended to only include violations within the permitted unit of federal facilities. The commenter does not see this provision in the draft regulations and requests that it be added. The commenter asserts that these and other instances point to the lack of clear compliance thresholds that would result in uncertainty regarding a compliance status under the proposed regulations impacting the extent of the requirements and length of renewal.

Comment: 5-7

Response:

DTSC reviewed the Class I violations issued to federal facilities and found that all the Class I violations were related to transfer, treatment, storage, and disposal of hazardous waste in permitted units and unauthorized areas. DTSC has determined that it is not necessary to limit violations to units or areas

permitted or otherwise authorized for hazardous waste management activities. DTSC finds that the proposed regulations and AB 1075 are two complementary approaches to address noncompliant owners or operators. DTSC did not make any additional changes to section 66271.50(c) in response to these comments.

E. PROGRAMMATIC CONCERNS WITH VSP

Comments Summary:

The comments contend that the VSP regulations have numerous serious flaws and should not be adopted unless and until those flaws are corrected. The comments assert VSP regulations' flaws include the following: (1) a fundamental lack of due process protections; (2) a failure to explain how DTSC would retroactively score prior violations; (3) they undermine or violate prior settlement agreements; (4) they place a large burden on DTSC's staff to score facilities; and (5) they would virtually assure that permittees must challenge every Class I and Class II violation and every VSP score assigned.

The comments also assert that Health and Safety Code section 25200.21 did not mandate that DTSC adopt the VSP or any other tool for evaluating a facility's compliance history. They state that DTSC is not compelled to promulgate the VSP regulations, and that SB 673 merely allows, but does not mandate, that DTSC adopt the VSP regulations. The comments claim that while SB 673 states that DTSC "shall adopt regulations" for the issuing or renewing of permits, it also states that the regulations "may include criteria for the denial or suspension of a permit." They further state that by using the phrase "may include," the Legislature clearly did not mandate that DTSC "shall" adopt such criteria, and that the statute also contemplates that, if DTSC were to propose such criteria, it should focus on the number and types of past violations that would result in denial of a permit.

Comments: 3-19 and 10-8

Response:

Health and Safety Code section 25200.21 (SB 673) expressly authorizes DTSC to adopt regulations establishing or updating criteria used for the issuance of a new or modified permit or renewal of a permit, or for the denial or suspension of a permit. The VSP provisions address the criteria specified in section 25200.21(a) regarding a facility's past violations.

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

F. VSP MATRIX

Comments Summary:

The comments claim that the regulatory proposal is devoted to a novel VSP that seeks to pigeonhole permitted facilities as "acceptable, conditionally acceptable, and unacceptable." The commenters state these classifications are the function of staff's ranking of Class I violations issued over the prior ten years, using the same potential for harm/extent of deviation matrix used in the assessment of administrative penalties, except that numeric scores are assigned, added and adjusted to yield a final facility VSP score. The commenters are concerned that use of the formulaic procedure and the subjective nature of the ranking process would result in outcomes that are very unfair and that would have severe consequences for the facility.

Comments: 3-7, 3-8, and 10-8

Response:

The proposed regulations establish a clear and rational process for DTSC to score violations and assign a compliance tier. The process allows DTSC to use a framework through which point values are assigned to each inspection score according to the seriousness of the Class I violations and repeat violations, and then averaged over all inspections to account for the number of inspections performed. As explained in the ISOR (p. 89), FSOR, and in the response to comment 10-8 above, DTSC's intent is to build on existing enforcement protocols and experience of the last 30 years. Using a similar approach for VSP scoring as is used for the assessment of monetary penalties would allow DTSC to conduct the VSP scoring in a fair and consistent manner. DTSC anticipates that the scoring would also be done by the same DTSC staff with extensive enforcement experience and who would be dedicated to do this work to ensure the uniformity of the scoring process. As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP.

G. IMPACT OF VSP ON SETTLEMENTS

Comments Summary:

The comments express concern that facilities would not agree to settle a Class I or Class II violation ever again because they believe it goes on the record without any due process. The comments assert the proposed VSP regulations would force permit holders to challenge every Class I and Class II violation, stating that facility operators would face serious and potentially devastating losses if DTSC denies a permit renewal or imposes conditions that cripple a facility's ability to continue operating.

The commenters further assert DTSC would cause huge increased demands on its enforcement resources, on the Attorney General's office, on DTSC's administrative appeals department, and on the courts at all levels. They state these regulations would cause a huge increase in litigation costs that would be borne by both DTSC and the permit holders forced to prosecute these appeals aggressively. It would become impossible to settle violations if any settlement requires the facility operator to agree to a Class I violation.

Comments: 10-8, 10-10, 10-11, 10-12, and PH-4-8

Response:

DTSC acknowledges the viewpoint that in response to the VSP regulations, permittees would feel compelled to challenge every Class I violation and potentially Class II violations. SB 673 and the

proposed regulations are intended to have a deterrent effect on hazardous waste facilities and to encourage the regulated community to comply with applicable laws and regulations. The main work of the VSP would be implemented as part of DTSC's enforcement program. Any increase in DTSC's reimbursable permit application processing costs due to the proposed regulations would primarily be for DTSC's review of documents required to be submitted with a hazardous waste facility permit application. As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP.

H. VSP IMPLEMENTATION COSTS

Comment Summary:

The comment asserts that the VSP would require an extraordinary commitment of administrative resources and result in the establishment of a huge new bureaucracy within DTSC, the full cost of which would inevitably be borne by the regulated community in the form of higher permit fees and other fees.

Comment: 3-11

Response:

The main work of the VSP would be implemented as part of DTSC's enforcement program. Any increase in DTSC's reimbursable permit application processing costs due to the proposed regulations would primarily be for DTSC's review of documents required to be submitted with a hazardous waste facility permit application. In addition, DTSC notes that about half of the facilities have been able to operate in the last ten years without a single violation, regardless of the size or complexity of the facility.

I. EVIDENCE TO SUPPORT THE VSP REGULATIONS

Comment Summary:

The comment asserts that there is simply no documentation in the record to substantiate that this procedure is supported by evidence. The comment states there is an implication that the regulations are supported by DTSC's experience with addressing administrative penalty calculations; however, there is no documentation in the record about how DTSC has implemented those regulations. The commenter notes that DTSC does not make its penalty assessments available to facilities during an enforcement proceeding.

The comment goes on to note that, as stated in the ISOR, DTSC already has various grounds upon which to revoke or suspend a permit, including if a facility has been found to have three or more incidents of Class I violations within a five-year period (Health & Saf. Code § 25186.05) or if it poses an imminent and substantial danger or creates a significant risk of harm (Health & Saf. Code §§ 25186.05 and 25186.2). (ISOR pp. 87-88.) The commenter concludes that the VSP appears to be unnecessary.

Comment: 1-38

Response:

DTSC respectfully disagrees with the comment. The Administrative Procedure Act expressly recognizes "facts, studies, and expert opinion" as items that constitute "evidence" for purposes of Government

Code section 11349(a), which specifies the "necessity" standard for the adoption of regulations. That provision reads in its entirety, "'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, considering the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion." (Gov't. Code § 11349(a).) As noted in the ISOR (pp. 7-9) and FSOR, DTSC relied on many reports, studies and other documents as the evidence for the need for the VSP. The proposed regulations also reflect the collective experience, knowledge, and input of DTSC staff, other CalEPA employees, academics, members of the regulated community, and the public.

Health and Safety Code section 25200.21(a) directed DTSC to evaluate the past violations and compliance history of facilities to inform DTSC's permitting decisions. DTSC's objective in the development of the VSP provision in the regulations is to create a transparent and accountable approach, using objective criteria, to evaluate a facility's compliance history. The VSP serves these objectives. The Administrative Procedure Act requires a regulatory agency to meet the requirements found in chapter 1 of division 1 of title 1 of the California Code of Regulations. The necessity statement for the VSP is provided in the ISOR, on pages 83 through 115, and FSOR.

The comment is correct in that DTSC does not always make the basis for how the penalty was assessed available to a facility, because often the information is attorney-client privileged. In contrast, under the proposed regulations, the Facility VSP Scores would be posted on DTSC's webpage, but each individual inspection violation score associated with the Facility VSP Score would be shared only with the facility.

Although there are other statutes authorizing DTSC to deny, suspend, or revoke a permit on various grounds, these statutes do not always provide clear and uniform criteria to DTSC to make such permit decision. The VSP is intended to establish such criteria so that DTSC could make permit decisions in a consistent and transparent manner. As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC finds that the proposed regulations and AB 1075 are two complementary approaches to address noncompliant owners or operators.

J. INSPECTIONS AND VSP

Comments Summary:

The comments assert that given DTSC's own internal critical review and findings as described in the Report on Improving Enforcement Performance (Report) dated June 2017, it is especially troubling that DTSC would now turn to the inspection reports prepared during those very same years as the basis for establishing a facility's VSP score for past violations. They state that reliance by DTSC on reports from those flawed inspections is inherently unfair and at odds with the purpose of the program evaluation; i.e., to improve DTSC's hazardous waste enforcement program.

The comments note that DTSC conducted a two-year comprehensive review of its hazardous waste management enforcement program that resulted in the preparation of a formal DTSC Report, entitled "Improving Enforcement Performance" and that the report articulated eight core policies that are central themes to an effective enforcement program and that needed to be incorporated into DTSC's program.

Comments: 3-16 and 3-17

Response:

The comment cites this Report which provides guiding principles to improve DTSC's Enforcement and Emergency Response Division. The Report also provides specific recommendations to improve consistency and rigor of the enforcement program. This involves developing and updating regulations, policies, and guidelines to ensure that its enforcement program consistently delivers the best compliance possible within the constraints of available resources. Examples in the report included developing the VSP regulations, and implementing a Lean 6 Sigma project to improve the efficiency and effectiveness of the penalty calculation process.

DTSC is committed to continuing with efforts to improve its enforcement program. DTSC anticipates that the VSP regulations would enhance the regulated community's compliance and help ensure protection of public health and safety and the environment. DTSC disagrees t with the comment that the Report concludes that inspections are flawed and reliance on those inspections is unfair. This is a misrepresentation of the Report's findings. As discussed above in response to other comments regarding the VSP.

K. ENFORCEMENT RIGOR

Comment Summary:

The comment expresses the opinion that DTSC does not consider many violations to be serious. As an example, the commenter states that DTSC discovered that there were 73 unreported spills in a facility's log, but these spills did not result in 73 serious violations. The commenter questions DTSC's ability to score facilities correctly.

Comment: PH-9-3

Response:

DTSC assumes that this comment is about a particular hazardous waste landfill. Not all spills result in a release of hazardous waste into the environment if the facility follows its emergency plan or contingency plan to take immediate actions to contain and clean up the spills. The characterization of violations considers a number of factors, including the degree of harm and the extent of deviation from the underlying requirement.

The proposed regulations are intended to provide transparent, consistent, and accountable approach, using objective criteria to guide DTSC's evaluation of a facility's compliance history. In a consistent manner. As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP.

L. OBJECTIVITY OF VSP CRITERIA

Comment Summary:

The comment asserts that the VSP would not create an objective method for evaluating permittees because inspections involve subjective assessments and decisions. The comment expresses concern with

inconsistent inspection procedures and requirements among DTSC inspectors, and that the VSP now proposes to use inspection reports from the past ten years to calculate VSP scores that could and would dictate permittees' futures. The comment concludes the VSP is based on the subjective scoring procedures implemented by these inspectors with varying experience, and asserts that for the VSP to be an objective standard, it must include a metric to provide a level of confidence regarding regulatory consistency.

Comment: 1-40

Response:

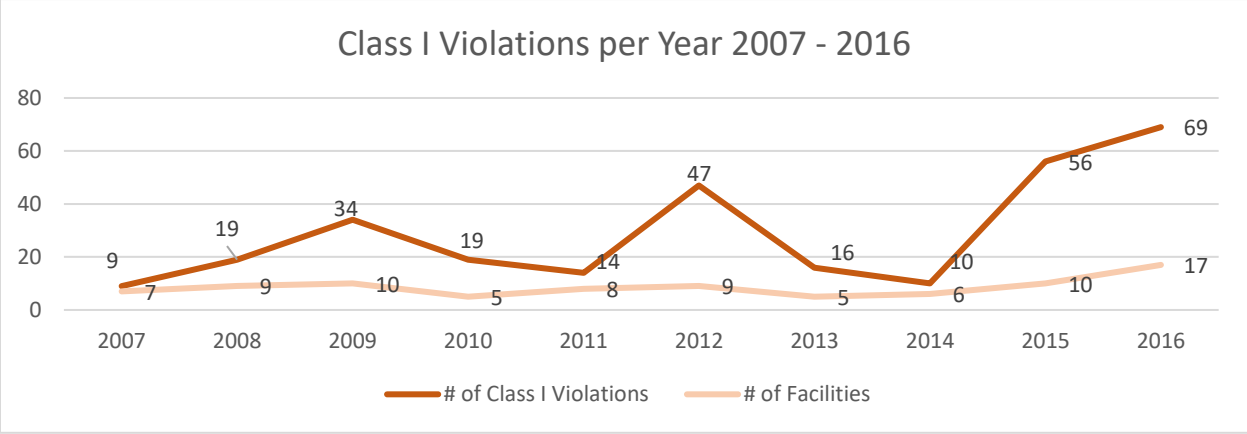
The comment implies that all inspections are subjective assessments and, therefore, are assumed to be unfair or biased. DTSC respectfully disagrees.

DTSC's enforcement program has implemented regulations for penalty assessments that establish valid objective criteria to assess the potential harm and extent of deviation from hazardous waste requirements. DTSC and U.S. EPA have also developed guidance documents and training for inspectors to improve consistency, reliability, and fairness in conducting inspections and assessing penalties. Many common violations have been found and documented, and penalties assessed, by experienced and knowledgeable DTSC staff over the last two decades. The VSP has been developed using the process and matrix in the penalty regulations (Cal. Code Regs., tit. 22, § 66272.62) such that the VSP would be implemented consistently with the implementation of the penalty regulations.

DTSC is committed to pursuing initiatives that would continue to improve its enforcement efforts. The Enforcement Program Performance FY 2015-16 report provides specific recommendations to improve consistency and rigor of the enforcement program, and the efficiency and effectiveness of the penalty calculation process. DTSC's objective to improve performance is expected to increase inspectors' proficiency and knowledge resulting in more accurate, frequent and timely inspections.

DTSC is anticipating additional improvement from the implementation of the VSP. Posting the Facility VSP Scores would allow the public an opportunity to compare all the facilities using the same metric. Improvements would also result from facilities being able to dispute an inspection violation score and challenge its compliance tier assignment. Figure 2 shows the number of Class I violations issued by DTSC inspectors every year for over the 10-year period from 2007 to 2016. This figure illustrates how many facilities committed Class I violations each year and the corresponding number of violations found at all facilities.

FIGURE 2. Number of Facilities and the Number of Violations Committed Each Year



DTSC also notes that Hazardous waste statutes and regulations often provide a level of discretion to regulators for addressing specific circumstances surrounding the violations. This discretion allows inspectors the flexibility to enforce hazardous waste laws across a diverse universe of regulated facilities.

M. CLARITY IN VSP

Comment Summary:

The comment supports the concept of a VSP that accounts for differences in a violation's potential for harm and the extent of deviation from applicable standards, while also accounting for multiple violations over time. The comment states the proposed VSP can theoretically provide clarity and consistency to DTSC's use of its existing authority to deny, revoke or suspend permits under either the "public health" prong or the "pattern of violations" prong of section 25186. The comment then claims that the proposed VSP regulations are not sufficiently protective. The commenter believes the VSP, as currently drafted, would not remedy the significant confusion and inconsistency in considering past violations as part of the permitting process.

Comment: 4-9

Response:

DTSC appreciates the positive comments in support of the rulemaking. In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment.

N. VSP IMPACT ON LARGE FACILITIES

Comment Summary:

The comment claims that the VSP scoring unfairly prejudices large complex treatment, storage and disposal (TSD) facilities that are subject to thousands of regulatory requirements and numerous inspections. The comment states that large TSD facilities receive intense regulatory scrutiny and are subject to huge numbers of regulatory requirements. The comment expresses concern that with so many requirements and so much scrutiny, the likelihood DTSC would detect a violation is greater than at smaller facilities that receive relatively little scrutiny. The comment asks DTSC to withdraw all the proposed article 3 regulations.

Comment: 10-9

Response:

DTSC accounted for the frequency of inspections by averaging all the inspection violation scores over the number of inspections. For example, a facility that is inspected every year might have eleven inspections over a 10-year period. The Facility VSP Score is calculated by adding all the individual inspection violation scores and dividing the total by eleven. The averaging was included to normalize the VSP metric for all facilities.

To obtain authorization to operate a hazardous waste facility, the facility is required to submit to DTSC a permit application that details how the facility would be operated in compliance with all applicable hazardous waste requirements. A hazardous waste facility permit is often the principal enforcement tool for DTSC to monitor the facility operations and ensure compliance. When a permit is issued, it is DTSC's and the facility's mutual understanding that the owner or operator is able and ready to operate the facility and conduct all authorized hazardous waste management activities in compliance with the permit conditions and applicable hazardous waste law and regulations. DTSC notes that about half of the facilities have been able to operate in the last ten years without a single violation, regardless of the size or complexity of the facility. DTSC did not make any changes to the regulations in response to this comment.

O. VSP POLICY CONCEPT

Comment Summary:

The comment claims that the concept of distilling violations down to numerical values, totaling up those numerical values against what the commenter believes to be an arbitrary numerical threshold, and determining the fate of hazardous waste facilities based on those calculations is poor public policy and would demonstrate a fundamental lack of appreciation for the highly technical and data-driven evaluations required to determine the severity (or lack thereof) of permit violations.

The comment further claims that, while there is an inherent subjectivity in evaluating permit violations, the VSP attempts to give the appearance of empiricism by establishing bright-line numerical values and thresholds. The comment claims the inspection scoring process would paralyze the permitting process through endless appeals based on subjective claims, which would be impossible for a governmental arbiter to resolve in an objective manner.

Comment: 1-37

Response:

The VSP synthesizes the existing enforcement program elements, including the penalty regulations, into a unified conceptual framework to standardize the assessment of all facilities' compliance history. The comment fails to mention that the VSP threshold triggers additional review under section 66271.55 and does not automatically result in denial, suspension, or revocation. Instead, under section 66271.57, DTSC shall initiate the process to deny, suspend, or revoke a permit.

Under the VSP's dispute process, the facility would have an opportunity to review the inspection documents, including DTSC's evidence, and examine any issues or claims that the facility may consider problematic or subjective.

The Facility VSP Scores and the corresponding compliance tier would be published once a year. DTSC would initially have additional work associated with disputes of inspection violation scores. Going forward, the inspection violation scoring process would be integrated as part of inspection work. As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. EFFICIENCY OF VSP

Comment Summary:

The comment urges DTSC to remove the VSP provisions in their entirety from the proposed regulations. The commenter is uncertain how DTSC can justify such a resource-intensive program when it estimates that only about 5 percent of current hazardous waste facility operations would be affected. If DTSC's estimates are accurate, the commenter is confident there is a more efficient way to identify and address these problem facilities. The comment states that at a minimum, DTSC should be required to explain in detail how it came up with these estimates.

Comment: 3-18

Response:

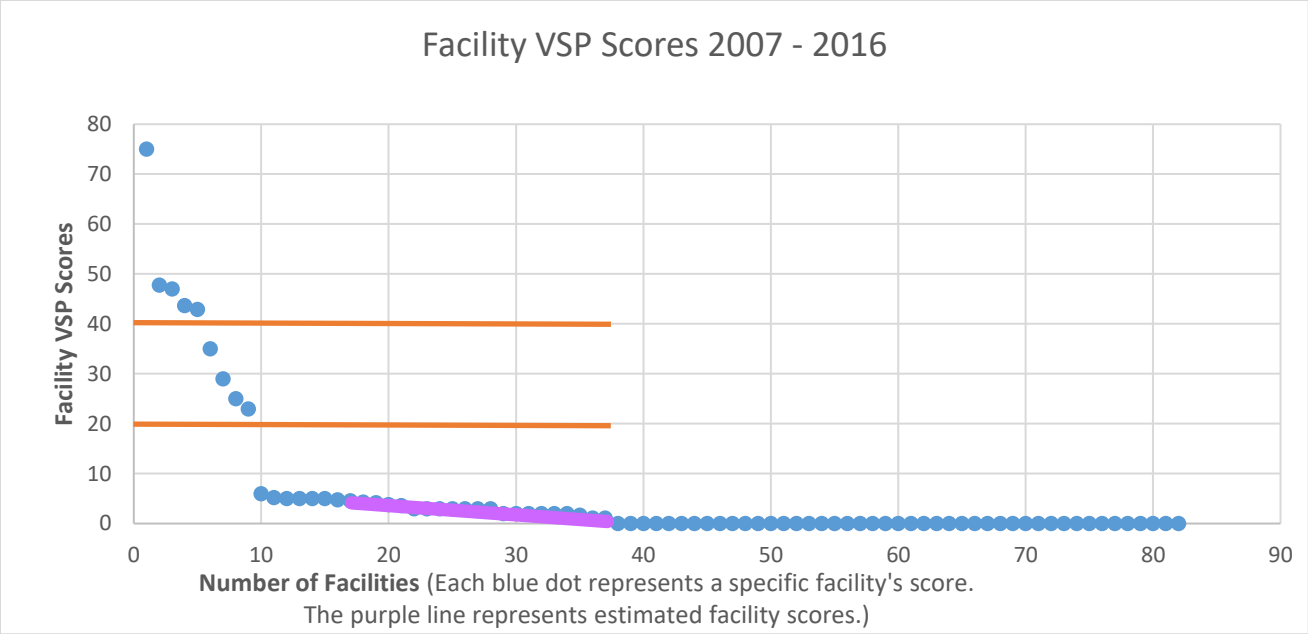
DTSC estimated the percent of facilities that would face additional requirements as a result of the VSP by using the Envirostor database to download all the violations that have occurred from 2007 through 2016. (See Figure 3 below.) The database covers more than just facilities with valid hazardous waste facility permits. So, DTSC extracted all the violations for the 113[5] facilities identified in September of 2017 as the operating facilities. DTSC then scored twenty facilities. This included a mix of facilities with many Class I violations and a sampling of other facilities. On the other end of the spectrum are the 45 facilities without a single Class I violation, which translates to a Facility VSP Score of "zero." The rest of the facilities fall somewhere in between four and zero Class I violations over the ten-year period. In Figure 3 below, we interpolated their scores by using a line.

The comment is correct that most of the work associated with the VSP might focus on a small subset of the facilities. What is also true is that these same facilities represent a disproportionate workload for DTSC enforcement activities, and present the greatest threat of releases that could affect public health or the environment. VSP creates additional incentive for all facilities to maintain a good compliance

[5] As of September 2017. The number of facilities is 109 as of June 2018 and is 82 if post-closure facilities are excluded. This number is subject to change.

record, enhance transparency and consistency in DTSC's enforcement program and foster public confidence in DTSC's permitting program.

FIGURE 3. Estimated and Calculated Facility VSP Score



P. AIR EMISSIONS AND VSP SCORING

Comment Summary:

The comment approves of the VSP regulations, and suggests that air emissions be included as part of the scoring for major violations.

Comment: PH-12-1

Response:

DTSC appreciates the comment. DTSC requires facilities to minimize air emissions resulting from hazardous waste management in containers, tanks, and other units in accordance with articles 27, 28, and 28.5 of chapters 14 and 15 of title 22, California Code of Regulations. Any violations of these regulations are subject to the VSP. In addition, violations of the Clean Air Act and the implementing rules of the California Air Resources Board and local air district are included in DTSC's review of a facility's compliance history under section 66271.55 when DTSC makes permit decisions. DTSC did not make any changes to the regulations in response to the comment.

Q. VSP AND CLOSURES AND POST-CLOSURES

Comment Summary:

The comment supports the language that excludes closure and post-closure facilities from the VSP provisions.

Comment: 11-26

Response:

DTSC appreciates the commenter's support for not including closure permits and post-closure permits in the VSP provisions. DTSC did not make any changes to the regulations in response to the comment.

R. VSP AND OLDER CLASS I VIOLATIONS

Comment Summary:

The comment urges DTSC to discount older Class I violations in calculating a facility's VSP score. The comment notes that under the proposed VSP scoring procedures, a 10-year old Class I violation carries the same weight as a violation occurring immediately before a permit renewal application is submitted. The comment states that ten years is a long time and a facility's programs and compliance status may have changed significantly over this period, and in many cases, the ownership of the facility may have changed. The comment concludes it would be unfair for DTSC to make permit renewal decisions based on such outdated and stale compliance information.

Comment: 10-21

Response:

DTSC disagrees that older violations are somehow less valid or significant than current violations. DTSC has considered the time frame for the VSP and determined that keeping it at ten years more closely mirrors the 10-year term for a hazardous waste facility permit. Keeping the time frame consistent allows the Facility VSP Score to uniformly reflect compliance history and any enforcement issues during the same time frame. DTSC has revised the regulations to increase the consistency of the time frames by calculating the Facility VSP Scores through December 31 of the prior calendar year. DTSC did not make any changes to the regulations in response to these comments.

S. VIOLATIONS CONSIDERED UNDER VSP

Comment Summary:

The comment asserts that DTSC cannot and should not consider violations occurring before the VSP regulations are final, and that the VSP program would also be fundamentally unfair and flawed if DTSC implements the scoring methodology for future violations only. The comment states that if DTSC finds a Class I violation at a facility during the first inspection after the regulations are final, the VSP score would be artificially high because it cannot be averaged over multiple prior inspections. Based on this reasoning, the comment concludes the entire design of the VSP program is fundamentally flawed and should be withdrawn.

Comment: 10-19

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP, including making the dispute process applicable to both violations that occurred before the effective date of the regulations and violations that occur after the effective date of the regulations.

T. VSP AND SELF-REPORTED VIOLATIONS

Comment Summary:

The comment urges that the VSP scoring should exclude self-reported violations, noting that CalEPA has adopted a policy to encourage facilities to self-report environmental violations. The comment asserts the proposed VSP program would undermine this policy for all hazardous waste facilities, stating that if any self-reported violation could result in a Class I violation that jeopardizes a facility's continued existence, owners and operators would have no incentive to voluntarily disclose any violation. The comment goes on to state that the mathematics of the VSP scoring would cause a self-reported violation to have an even greater impact on the facility's VSP score because the facility would have one more violation (i.e., the numerator), but no increase in the number of compliance inspections (i.e., the denominator).

Comments: 10-15

Response:

DTSC considered the impact of self-reported violations in the VSP. The Facility VSP Score would treat these self-reported violations as inspections and thus the inspection score for these self-reported violations would be averaged as any other inspection violation score. DTSC determined that this treatment would not jeopardize the facility's permit status. DTSC did not make any changes to the regulations in response to the comment.

U. NUMBER OF VIOLATIONS

Comment Summary:

The comment claims that although the VSP does not include Class II violations or minor violations that are the subject of a Notice to Comply, the vast majority of violations issued by DTSC during inspections are written up as Class I violations, even though they may represent minor infractions with little or no potential to cause harm. The comment asserts that during an inspection, facility personnel have no meaningful opportunity to question the inspector's classification of a violation and are expected to sign a Summary of Violations even if they strongly dispute the inspector's findings and conclusions.

The comment also claims that, given the vast number of regulatory requirements that apply to hazardous waste management facilities, the chances of "passing" an inspection without receiving a single citation is very small. The comment concludes that, over the 10-year horizon of the VSP, the number of Class I violations that would have to be evaluated and ranked could easily exceed 100 per facility (this total could be reached with only two inspections per year, and five violations per inspection), stating that with 113 permitted facilities in the state, DTSC is obligating itself to rank literally thousands of past Class I violations.

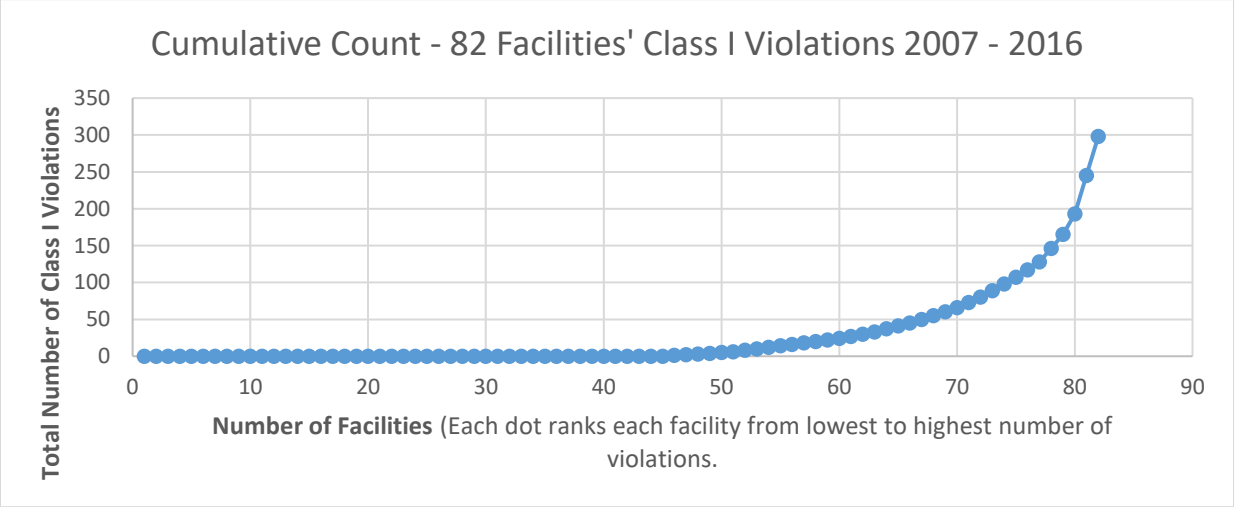
Comment: 3-9

Response:

The proposed regulations do not change how minor, Class II, or Class I violations are documented in a Summary of Violation or the existing procedure for presenting the inspector's findings to an owner or operator. DTSC did not make any changes to the regulations in response to these comments.

As far as the number of Class I violations, DTSC has analyzed the data for the number of Class I violations during the ten-year period between January 1, 2007 and December 31, 2016. There are less than 300 Class I violations committed by all 82[6] facilities over the ten-year period as shown in Figure 4. This number is significantly below what the comment has speculated to be the total for this period.

FIGURE 4. Total Number of Class I Violations for 82 Facilities During 2007-2016.



Section 66271.50

V. CHRONIC AND RECALCITRANT CLASS II VIOLATIONS

Comment Summary:

The comment states the VSP includes consideration of certain Class II violations that become Class I violations when "[t]he violation is a Class II violation which is a chronic violation or committed by a recalcitrant violator." (ISOR at p. 86.) The comment expresses concern that the VSP does not contain any guidance regarding how these concepts would be applied in the VSP, or how the terms "chronic" and "recalcitrant" would be defined. The comment asserts that for the VSP to be applied consistently, it must provide enough specificity to ensure that the determinations would be made objectively.

The comment goes on to question whether chronic administrative or recordkeeping violations may qualify as a Class I violation for purposes of the VSP, and states such application would be inappropriate,

[6] 82 facilities are subject to VSP as of June 2018. This number is subject to change.

problematic, and unjustified because such violations do not pose direct threats to public health, safety, or the environment.

Comment: 1-46

Response:

The comment is referring to the definition of a Class I violation found in section 66260.10. The definition states that a Class I violation includes a *"Class II violation which is a chronic violation or committed by a recalcitrant violator."* Repeat Class II violations are considered an indicator of a facility's unwillingness or inability to comply with requirements or correct violations. The VSP does not alter the existing definition of a Class II violation or how a Class II violation is treated under the State or federal enforcement program or policy. In addition, neither of the terms "chronic" and "recalcitrant" are used in the proposed regulations.

Even violations of paperwork requirements could be a Class I violation. For example, it is critical to have a contingency plan at a facility in the event of an emergency because the purpose of having this plan are to: (1) prevent fatalities and injuries, (2) reduce damage to facility operations and equipment; (3) minimize and control hazardous waste releases into the environment; and (4) protect human health, safety, and the environment and the community.

Another example, is about maintaining a financial assurance mechanism documentation for closure, post-closure, and corrective action. Without such documentation, there is no assurance that there would be sufficient funding to address releases of hazardous waste at the facility and that the taxpayers would not be burdened with any cleanup of contaminated facilities. DTSC did not make any changes to the regulations in response to these comments.

W. NOVEL PERMIT CONDITIONS

Comment Summary:

The comment asserts that past violations should not include violations of permit conditions under the VSP calculation because facility operators often agree to novel permit conditions that are subject to interpretation. The comment states that including permit condition violations in the VSP calculation would further exacerbate its already subjective calculation. While violations to permit conditions should be enforced, they should be subject to qualitatively different treatment.

Comment: 1-60

Response:

DTSC respectfully disagrees that permit conditions should be excluded or treated differently under the VSP. Health and Safety Code section 25187 (a)(1) authorizes DTSC to take enforcement action to address any violation of the Hazardous Waste Control Law or any permit, rule, regulations, standards, or requirements issued or adopted under thereunder. A hazardous waste facility permit includes general conditions applicable to all hazardous waste facilities and facility-specific and unit-specific conditions applicable to that facility. The owner or operator has the right under the existing regulations to appeal any permit conditions that it deems unclear, unfair, or impractical. DTSC did not make any changes to section 66271.50(d) the regulations in response to these comments.

X. VSP SHOULD ACCOUNT FOR ALL VIOLATIONS

Comment Summary:

The comment asserts that the language of Health and Safety Code section 25186 indicates that the Legislature intended to authorize DTSC to revoke, suspend, or deny a permit based on a single Class I violation (excluding a Class I violation based on inadequate financial assurances) or based on a pattern of multiple violations, including minor violations that do not pose a threat to public health or safety or the environment. The comment states that DTSC's proposal to exclude non-Class I violations in the VSP undermines the Legislature's intent to include chronic violators of all types within DTSC's permit denial and revocation authority, and that DTSC offers no rationale for not including Class II and minor violations in the matrices.

Comment: 4-10

Response:

The Legislature is fully aware of DTSC's existing, broad authority under Health and Safety Code section 25186, and other statutes and regulations. The Legislature, nonetheless passed SB 673, which authorizes DTSC to adopt regulations regarding its permitting program to bring more transparency and certainty to the permitting process and outcomes. This is especially true regarding the number and types of violations that would result in a denial. SB 673 sets out criteria for consideration by DTSC in adopting regulations that are in addition to, and more specific than, the factors that may lead to denial, suspension, or revocation of a permit pursuant to Health and Safety Code sections 25186. These regulations do not depend on Health and Safety Code section 25186 as authority and do not in any way contravene or conflict with that statute.

We disagree with the comment that DTSC has not offered rationale for no including Class II and minor violations in the VSP. As stated in the ISOR and FSOR, expanding the violations to include all violations was an alternative considered by DTSC. However, that alternative would have compromised the process and matrix used for assessing penalties. If the VSP regulations were to include all violations, it is not possible to attribute an inspection violation score to minor violations that occurred in the past. Minor violations are not assessed administrative penalties under the penalty regulations and thus, are not evaluated for extent of deviation or potential harm.

The VSP synthesizes existing enforcement program elements, including the penalty regulations, into a unified conceptual framework to standardize the assessment of all facilities' compliance history. For example, the matrix found in section 66271.51 has been developed using the process and matrix in the penalty regulations. DTSC determines the potential harm and extent of deviation for all Class I violations and assess a penalty for the violation in accordance with the penalty regulations. Class II violations may also be assessed administrative penalties. Minor violations are exempt from these penalties. The result is that DTSC has documented the potential harm and extent of deviation for all prior Class I violations, some Class II violations, and none of the minor violations.

However, if there is a Class II violation and the same violation is repeated, the second time the Class II occurs, it is reclassified as a Class I. For example, three Class II violations for the same or closely-related

regulatory requirement would be considered a Class II (first time), a Class I (second time), and a repeat Class I (third time,) for the purpose of an upward adjustment under section 66271.52.

Most importantly, the proposed section 66271.55 would require DTSC to conduct a complete review of a facility's compliance history, including Class II and minor violations, when making a permit decision. In summary, while DTSC considers all violations when making a permit decision, DTSC did not make any changes to the VSP scoring to include all violations and is limiting its applicability to the most serious and significant violations of hazardous waste requirements.

TABLE 2. Number of Violations and Number of Facilities Committing Violations

NUMBER OF VIOLATIONS AND NUMBER OF FACILITIES COMMITING VIOLATIONS				
YEAR	**VIOLATIONS CLASS I only**	**UNIQUE NUMBER OF FACILITIES**	**VIOLATIONS ALL - Class I Class II, and Minor**	**UNIQUE NUMBER OF FACILITIES**
2016	69	17	158	38
2015	56	10	141	27
2014	10	6	68	24
2013	16	5	101	22
2012	47	9	95	31
2011	14	8	85	28
2010	19	5	86	30
2009	34	10	101	38
2008	19	9	102	40
2007	9	7	76	34

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Y. VSP AND RETROACTIVITY

Comments Summary:

The comments assert that DTSC's use of previous inspection reports likely violates permittees' due process rights, and that DTSC already acknowledges that an owner or operator has a due process right to challenge an inspection score for inspections occurring after the proposed regulations are promulgated.

The comments explain this is because permittees may have taken different actions and challenges to prior inspections had they known how the VSP would be applied. They further state that this is particularly true because there is no appeal process for past violations regarding the VSP score calculation. The comments conclude that DTSC should only consider violations in a compliance assessment that are alleged after the regulations become effective.

The comments also assert that DTSC has not administered its enforcement program consistently over the years. They claim this means that certain facilities that have garnered DTSC's attention in the past would be prejudiced in the future. The comments further state that certain facilities may have elected not to contest certain violations in the past simply because of the time and resources it takes to challenge an enforcement action.

Comments: 1-43 and 10-17

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment.

Z. POTENTIAL HARM

Comment Summary:

The comment notes that DTSC defines a violation posing major potential harm when "the characteristics and/or amount of the substance involved present a major threat to public health and safety or the environment and the circumstances of the violation indicate a high potential for harm." The comment expresses concern that the proposed regulation limits the violations which may be classified as posing a major potential harm to those involving the management of hazardous waste, the absence of financial assurance or the absence of a contingency plan, stating it is unnecessary and arbitrary, and that DTSC provides no rationale for the limits. The comment states DTSC should consider any violation that presents a major threat to public health or the environment as posing major potential harm.

Comment: 4-13

Response:

The VSP has been developed using the process and matrix in the penalty regulations (Cal. Code Regs., tit. 22, § 66272.62) such that the VSP would be implemented consistently with the implementation of the penalty regulations. The classification of major, moderate, and minimal allows DTSC to assess potential harm based on the seriousness of each violation. DTSC uses the criteria for "major" for any violation involving a substance that presents a major threat to public health and safety or the environment and the circumstances of the violation indicate a high potential for harm. It is important that the VSP be consistent with the penalty regulations because the VSP scoring would be based on the same criteria as

used in the penalty regulations and would depend on how the enforcement records document each inspection and violation for the past ten years and in the future. DTSC did not make any changes to section 66271.51(b)(3) in response to this comment.

DTSC's enforcement program has consistently implemented regulations for penalty assessments that establish valid objective criteria to assess the potential harm and extent of deviation from hazardous waste requirements. DTSC and U.S. EPA have also developed guidance documents and training for inspectors to improve consistency, reliability, and fairness in conducting inspections and assessing penalties. Many common violations have been found and documented, and penalties assessed, by experienced and knowledgeable DTSC staff over the last two decades. Therefore, DTSC disagrees with the comment that the VSP limits the violations to only certain types of violations involving the management of hazardous waste as limiting its permitting or enforcement authority. DTSC did not make any changes to section 66271.51(b)(3).

AA. FINANCIAL ASSURANCE VIOLATIONS MAJOR/MINOR

Comment Summary:

The comment notes the proposed rulemaking states a Financial Assurance violation that is based on a documentation error or omission may not be classified as a "major" violation; however, the comment states it is unclear why such violations would not merely be classified as "minor."

Comment: 1-48

Response:

A financial assurance violation can be either a record-keeping violation or a substantive hazardous waste management violation depending on the nature of the violation. This provision is needed to clarify how a requirement that might appear to be record-keeping in nature, may be a substantive hazardous waste management requirement with a major potential for harm. For example, if an insurance policy for financial assurance for closure lapses, it could result in a major potential for harm if there is contamination at the facility and there are no funds to clean it up. Conversely, a failure to have a copy of the current insurance policy available for inspection could be a record-keeping violation assuming the policy is in effect even though it is not available for DTSC's inspection. DTSC did not make any changes to section 66271.51(b)(3) in response to these comments.

BB. VSP MATRIX AND THE ISOR

Comment Summary:

The comment notes that Section 66271.53 states the "each Class I violation would be scored, then summed to arrive at a VSP score." The commenter asks for discussion in the ISOR defining how the initial scoring would be calculated.

Comment: 8-3

Response:

The matrix is included in section 66271.51(d) of the regulations. DTSC will include this matrix in the FSOR in response to this comment.

CC. GRAVITY OF VIOLATIONS CONSIDERED

Comment Summary:

The comment asserts that DTSC should only include the Class I violations where the Potential Harm is "Major" and the Extent of Deviation is "Major". Commenter agrees that DTSC must consider whether it should renew or rescind permits for facilities that present major threats to public health and safety or to the environment and for those facilities that completely ignore their permitting and regulatory requirements for the safe and environmentally sound management of hazardous wastes.

The commenter states that it does not agree that DTSC should rescind or deny renewal of permits for (a) violations that did not present a major threat to public health and safety or the environment, or (b) facilities that did not completely ignore the requirement that was violated. The comment recommends revising section 66271.51(d) such that the only Class I violations that are included in a facility's scoring are those that fall into the Major/Major category.

Comment: 10-20

Response:

DTSC has already determined that Class II and minor violations would not be included in the inspection violation scores. DTSC has consistently documented Class I violations and related penalty assessments in its records, including the assigned values for potential harm and extent of deviation. As the matrix demonstrates, the proportional scores already account for the gravity of each violation. For example, a Class I violation with minimal potential harm and minimal extent of deviation would be scored as "2." A Class I violation with major potential harm and major extent of deviation would be scored as "25." DTSC did not make any changes to section 66271.51(d) in response to the comment.

DD. CHARACTERIZATING CLASS I VIOLATIONS

Comment Summary:

The comment asserts that the exclusion of Class II and minor violations from the VSP renders the "Degree of Harm" and "Extent of Deviation" characterizations superfluous. The comment states that all Class I violations represent significant deviations of the law and pose a significant threat to human health and the environment or result in unauthorized disposal or release of hazardous waste. The comment further claims that if DTSC characterizes a violation as Class I, then in most cases it must also give the violation the highest score in the VSP, which the commenter believes would render the entire concept of the VSP scoring matrix as duplicative of existing violation characterization.

Comment: 4-11

Response:

DTSC disagrees that the exclusion of Class II and minor violations from the VSP renders "Degree of Harm" and "Extent of Deviation" as superfluous. While the primary violation categories of Class I, Class II

and minor violations represent clear distinctions in the gravity of a violation, there are also gradations within each of those categories. DTSC considers the nature and extent of Class I violations when determining penalties, and records of these determinations inform review of a facility's compliance history.

DTSC intends the VSP scoring matrix to reflect and build on the existing facility inspection records for Class I violations. This matrix was developed to ensure the assessments are done in a fair and consistent manner and that the assigned values are appropriate for the seriousness of the violations. By design, the VSP scoring matrix addresses Class I violations only. DTSC disagrees that the VSP is duplicative of any existing regulatory requirements. DTSC did not make any changes to section 66271.51(d) in response to this comment.

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EE. DEFINITION OF REPEAT VIOLATIONS

Comment Summary:

The comment states that the regulations must clarify that a "repeat violation" cannot consist of multiple violations of the same requirement identified in the same compliance inspection. The comment asserts a violation should not be considered a "repeat violation" unless the owner or operator has had a reasonable opportunity to correct the violation yet nonetheless violates the same requirements again. The comment recommends the following definition,

> *"Repeat violation" means a violation identified in a compliance inspection*
>
> > *(a) of the same statutory or regulatory requirement or the same term or condition or provision of a permit, order, settlement document, decree or other document establishing requirements upon operations at the facility,*
> > *(b) that occurs after the prior violation has been formally issued by DTSC, and*
> > *(c) the period for appealing the prior violation has expired or the prior violation has been affirmed after all appeals.*

Comment: 10-22

Response:

The existing definition for "repeat violation" states that it means two or more violations in separate compliance inspections. Contrary to the comment, the commenter's suggested language has eliminated the clarification that a repeat violation must occur in separate inspections. The comment also suggests an owner or operator should be allowed an opportunity to correct the violation and yet the commenter's suggested language does not address it. Furthermore, the comment does not take into consideration that the existing statutes and regulations allow DTSC to assess a penalty for a violation for each day the violation continues. DTSC did not make any changes in response to this comment. DTSC did revise the definition of "repeat violation" in section 66271.50 (a)(3) in response to these comments.

FF. DEFINITION OF SIMILAR VIOLATIONS

Comment Summary:

The comment objects to the use of “similar” violations for adjusting VSP scores as vague and unenforceable. The comment states the proposed regulations allow DTSC to adjust a facility’s score for “repeat violations” based on its determining that a violation is “similar” and asserts that such a vague standard is arbitrary and capricious and would likely be unenforceable.

Comment: 10-23

Response:

DTSC appreciates the comment. DTSC has deleted the phrase, “for the same or similar requirement,” from section 66271.52 and has revised the definition of “repeat violation” in section 66271.50(a)(3) to clarify this issue.

GG. NEED FOR CLARITY ON REPEAT VIOLATIONS

Comments Summary:

The comments assert that for purposes of evaluating compliance in the permitting context, there is no need for upward adjustments to scores. Additionally, the regulations contain procedures for evaluating whether a facility is unable or unwilling to comply with regulatory requirements, and any repeat violations can be considered at that point.

The comments state it is unclear how the upward adjustment to the inspection score would be applied, asking if it would be applied to each violation in the same inspection report - for example, if a facility has five violations of the same type in one report, would each of those violations be increased by 100 percent?

In proposed section 66271.52, the comments state the term "similar requirement" lacks the clarity required by the Administrative Procedure Act (Gov't. Code, § 11349.1) and gives DTSC broad license to group violations together so that they can double, triple or even quadruple a facility's inspection violation score. The comments go on to state that this catch-all provision of the title 22 regulations is frequently contained in SOVs, even though it may be based on the same facts that form the basis for other violations. The comments conclude that upward adjustment of the score can occur even if the "repeat" violations, taken together, posed no real likelihood of harm to human health or the environment.

Comments: 1-49 and 3-10

Response:

DTSC included an upward adjustment for repeat violations to address situations in which the facility has had clear notice of the violation and an opportunity to correct it. A case can be made that an adjustment for repeat violation is appropriate for those facilities that have previously been notified of the violations and have failed to prevent repeat violations.

The definition of the term “repeat violation” specifies that a repeat violation is one that occurs in separate compliance inspections; so, it would not be applied to each violation in the same inspection

report. For additional clarity, DTSC has revised the definition of "repeat violation," and has revised section 66271.52 to remove the term "similar requirement."

HH. PROCESS FOR UPWARD ADJUSTMENTS

Comment Summary:

The comment asks how DTSC proposes to avoid double-application of the upward adjustment for repeat violations as applied to "chronic" or "recalcitrant" Class II violations classified as Class I violations?

Comment: 1-59

Response:

The intent of section 66271.52 is to disincentive repeat violations by imposing an upward adjustment. A Class II violation which is a chronic violation or committed by a recalcitrant violator can be considered a Class I violation (Health & Saf. Code § 25110.8.5. and Cal. Code Regs., tit. 22, § 66260.10). DTSC would adjust each Class I violation score in accordance with the table found in section 66271.52(c) if all the following criteria are met:

- the violation is a Class I violation (§ 66271.50(c));
- the Class I violation meets the definition of repeat violation (§ 66272.50(a)(3)); and
- the Class I violation has occurred at the same facility within the prior three years or the last three inspections (§ 66271.52(b)).

The upward adjustment under this provision applies only to Class I violations that are repeated. For example, three violations that meet the definition of Class II violations for the same or closely-related regulatory requirement within three years, for purposes of VSP, are considered as follows:

- a Class II violation: If this Class II violation is for the first time under existing regulations;
- a Class I violation: If this Class II violation occurs for the second time under existing regulations; and
- a repeat Class I violation: If this Class II violation occurs the third time under section 66271.52.

The upward adjustment only occurs after the second Class I violation. DTSC disagrees that reclassifying Class II violations as Class I violations is a potential double application of the upward adjustment. This upward adjustment provides a deterrent for those facilities that have prior or other violations.

Moreover, Class II violations committed by recalcitrant violators do not necessarily involve repeat violations under section 66271.52. A recalcitrant violator is a person who refuses to comply with the regulatory requirements or a person who has engaged in a pattern of neglect or disregard for statutory or regulatory requirements. This upward adjustment for scoring each Class I violation is similar to the upward adjustment for calculating administrative penalties under section 66272.68. Again, DTSC disagrees that there would be double application of the upward adjustment. DTSC did not make any changes to section 66271.52 in response to these comments.

Section 66271.53

II. SETTLEMENTS OF PAST VIOLATIONS

Comments Summary:

The comments state that past violations, Consent Orders or other settlement documents include non-admissions language, which is designed to protect the owner or operator against future misuse of unproven allegations. The comment asserts the VSP violates this most basic element of the settlement process by including past SOVs that were resolved through settlement in the scoring procedure because for inspections that were finalized before the effective date of the regulations, there is no opportunity for dispute resolution or appeal of the inspection violation scores (§ 6627 l .53(i)). The comments conclude that given the potentially severe consequences of a high VSP score, including mandatory third-party audits and potential loss of the right to operate, the process designed by DTSC runs afoul of basic procedural due process rights.

Comments: 1-39 and 3-15

Response:

DTSC acknowledges that some settlement documents included "non-admissions language" by which the owner or operator did not admit the violation(s); and that some violations alleged in enforcement actions were not proven or fully adjudicated in a court proceeding. In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment.

It is important to note that permit decisions are not based solely on the VSP score; rather they consider, among other things, the facility's compliance history in totality. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

JJ. SETTLEMENT ADJUSTMENTS AND OWNERSHIP CHANGE

Comment Summary:

The comment asks how DTSC would address inspection reports that previously included improper and incorrect violation findings that were adjusted in the settlement process relating to the administrative penalty, but were not addressed or documented in the actual inspection reports, stating it would be fundamentally unfair to include such inspection findings in the VSP score calculation.

The comment goes on to assert the unfairness is compounded by the lack of available appeal relating to the VSP score itself, stating the only appeals allowed under the proposed rulemaking are with respect to inspection reports issued after the effective date, or when DTSC makes an adverse decision on a permit. The comment further states the VSP score would be made public and would certainly affect the

permittee's reputation and public perception, and expresses concern that DTSC does not consider ownership or operation changes in determining the VSP score.

Comment: 1-42

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

KK. VSP AND PRIOR VIOLATIONS

Comments Summary:

The comments assert that it is fundamentally unfair for DTSC to retroactively determine the classification of past violations. The comments state DTSC settles most enforcement actions and many of those settlements do not specify the classification of the violation or include admissions to the violations or their classification. The comments further state that even if the respondent admits the violation, DTSC settlements typically nowhere state the classification of the violation. The comments then assert the classification of any specific violation depends on DTSC's assessment of many subjective or qualitative factors under Health and Safety Code section 25110.8.5, including whether the violation represents a significant threat to human health or safety or the environment, the relative hazardousness of the waste, proximity of the population at risk, whether it could result in a failure to accomplish certain operational or preventive activities.

The comments claim if DTSC is to consider past violations in the VSP, DTSC would retroactively have to classify thousands of past violations going back ten years, but the comments suggest that would be speculative and fundamentally unfair to the party that resolved its liability years ago. The comments conclude the VSP should not consider any violations occurring prior to the date when the regulations become effective.

Comments: 10-18 and 10-26

Response:

DTSC disagrees with the characterization that it would be speculative to have to evaluate past violations. As stated in the Response to Comments 1-38, 3-19, and 10-8, the inspection reports have documented potential harm and extent of deviation for Class I violations, so the inspection violation scores would not be speculative. Further, the comments greatly overestimate the number of Class I violations to be evaluated. DTSC analyzed the data for the number of Class I violations during the ten-year period between January 1, 2007 and December 31, 2016. The total number of Class I violations committed by the 82 permitted facilities is below 300. See Figure 1 (Class I Violations 2007-2016.)

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment.

LL. VSP PRELIMINARY INSPECTION SCORE DISPUTE PROCESS

Comment Summary:

The comment states that the preliminary inspection violation dispute procedures are duplicative, burdensome, and unreasonable. The comment notes the proposed regulations set forth a process for challenging a preliminary inspection violation score, but claims the regulations fail to address how this process relates to, or integrates with, the process for appealing the violation itself. The commenter is concerned that if DTSC issues both a preliminary inspection violation score and the violation itself, the permittee must challenge both decisions.

The comment concludes that DTSC's proposed VSP would require permittees to institute two appeals of every violation – one of the preliminary inspection score and one for the underlying violation, and as a result finds the design of the entire VSP is ill-conceived, unworkable, and unfair.

Comment: 10-24

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

MM. DISPUTE TIMEFRAME

Comment Summary:

The comment notes that Section 66271.53 provides only thirty days for a facility to provide its dispute document in response to a preliminary inspection violation score. The comment asserts this is insufficient time, and the facility should receive at least ninety days to prepare a response to a document that features so prominently in the permitting process. Additionally, the commenter believes the 45-day response period is problematic, and states there is no evidence in the record indicating DTSC could meet this timeframe.

Comment: 1-51

Response:

DTSC has reconsidered the time frames for the dispute document provision. The language in section 66271.53(c) has been revised to extend the time frame from 30 days to 60 days for filing a dispute document. DTSC has added a new provision for the owner or operator to request an extension for the dispute document. Furthermore, DTSC has extended the time frame from 45 days to 90 days to resolve the dispute.

NN. CHALLENGING A FACILITY VSP SCORE

Comment Summary:

The comment states that it is a concern that the proposed regulations do not provide a mechanism to challenge the portion of a facility's score from inspections made before the regulations go into effect. Facilities should have the opportunity to challenge scores put forth prior to the Regulation going into effect. To address this concern, the comment recommends DTSC revise the language under 66271.54(d) to allow facilities to challenge, within 90 days of DTSC posting the first VSP score for the facility, the score for past, pre-regulation inspections.

Comment: 2-30

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

OO. PROCEDURE FOR ADMINISTRATIVE APPEAL

Comment Summary:

The comment states that Section 66271.53(g) specifies that there is no further review of a compliance assessment after DTSC considers a Dispute Document. The comment asserts there is no administrative appeal, and the lack of an ability to appeal a distinct assessment that would play a critical role in the permitting process is a denial of due process.

The comment also asserts there is a conflict of interest, that the same DTSC staff that prepared the compliance assessment would consider the Dispute Document prepared by the facility. The comment claims this guarantees that the Dispute Document does not receive an independent and unbiased assessment.

Additionally, the comment states that it frequently takes several years to resolve enforcement actions with DTSC. The comment claims when these matters are finally resolved, it is not uncommon for DTSC to withdraw or revise violations, and as a result DTSC would potentially count a violation against a facility

in the permitting context that it ultimately withdraws in an enforcement action. The comment states this is fundamentally unfair, and if a violation is actively disputed by a facility, it should not be counted towards any compliance assessment during permitting.

Comment: 1-61

Response:

DTSC has reconsidered these elements of the inspection violation score provision. First, the dispute document provision is the administrative appeal of the inspection violation score. Once the decision is made, no further administrative appeal is provided for an inspection violation score. However, the regulations have been revised to allow for a challenge to the compliance tier assignment which is a second administrative appeal provided in the proposed regulations before DTSC makes a permit decision. The owner or operator still has the right under the existing regulations to appeal DTSC's permit decision and seek judicial review.

DTSC recognizes the concern about conflict of interest and is committed to fair and objective implementation of the VSP. DTSC would not have the same staff involved in calculating the inspection violation scores or the Facility VSP Score, or assigning the compliance tier serve as the Director's designee to resolve any dispute or challenge brought by the facility. DTSC is required to comply with State law governing the issues of conflict of interest or incompatible activities.

Furthermore, section 66271.54 specifies that a Class I violation that has been cancelled, retracted, withdrawn, or successfully challenges in an administrative or judicial proceeding would not be included in the Facility VSP Score. DTSC did not make any changes to the regulations in response to these comments.

PP. APPEAL OF PAST VSP SCORES

Comments Summary:

The comment states that section 66271.53 provides no mechanism to challenge the portion of a facility's score from inspections before the regulations goes into effect, and requests a provision be added to provide 90 days within DTSC posting the first VSP score under section 66271.54(d) to challenge the score for past, and pre-regulation inspections.

Comments: 11-28 and PH-5-6

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP, including making the dispute process applicable to both violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations. DTSC has also revised the regulations to provide additional time for the dispute process.

Section 66271.54

QQ. QUALIFIED AND CONSISTENT REVIEW OF VIOLATIONS

Comment Summary:

The comment notes that Section 66271.51 states DTSC shall determine an initial score for each Class I violation in a manner that is similar to how enforcement staff evaluate violations pursuant to DTSC's regulations regarding the assessment of administrative penalties. The comment asserts there is no evidence in the record to indicate that permitting staff can perform this task because they are not trained to perform enforcement tasks. The comment states it is possible that permitting staff would assess a violation differently than enforcement staff previously considered a potential violation and as a result the regulations create the possibility of conflicting regulatory determinations rather than consistency.

The comment goes on to argue if DTSC were to rely upon the prior analysis performed by enforcement staff, that too would be problematic. The comment states that DTSC does not make these assessments available to facilities that are in enforcement proceedings, and claims that if they were made available, facilities could contest specific characterizations of alleged violations and change the penalty assessment. The comment concludes that, if permitting staff are going to rely on the same framework for assessing violations as enforcement staff, then facilities must be given the same information in both contexts so that they can adequately defend themselves in both cases.

Comment: 1-41

Response:

DTSC intends to have fully-trained DTSC staff with enforcement experience and knowledge to calculate the inspection violation scores and Facility VSP Score. The reason the provision in section 66271.51 was developed to mirror the existing penalty regulations is to ensure consistency and transparency in calculating the violation scores and the Facility VSP Score, and assessing a penalty. This is especially true for past inspections, as explained in the ISOR and FSOR. The VSP would be integrated into DTSC's enforcement work.

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP, including making the dispute process applicable to both violations that occurred before the effective date of the regulations and violations that occur after the effective date of the regulations.

RR. AVERAGING AND VSP

Comments Summary:

The comments urge that DTSC should measure the cumulative, not average violation score in its VSP. The comments assert this scoring procedure is antithetical to the language of Health and Safety Code section 25186, which authorizes DTSC to revoke, suspend, or deny a permit based on a repeating or recurring pattern of violations. The comments state this should be measured by assessing the cumulative total number of violations over ten years because averaging would serve to obscure and minimize the total number and severity of violations and renders the compliance tiers and the VSP completely irrelevant.

The comments claim that, to get a score of 40, the facility would have to have two serious Class I violations for every single inspection over a ten-year period, and further claim that DTSC has never found a facility that has been that non-compliant, so no facility would ever reach a VSP threshold that would result in any DTSC action.

Comments: 4-14, 4-15, and PH-11-2

Response:

DTSC has determined that averaging is the best way to account for differing inspection intervals, which can vary based on facility type between multiple inspections per year to one inspection every three-to-four years. Having a cumulative score skews the data for facilities that are required to be inspected more frequently.

The commenter asserts that the only way to reach the threshold of 40 is to have two Class I violations every single inspection. However, DTSC could find multiple Class I violations in a single inspection. Historically, the number of Class I violations has ranged from zero to a maximum of fourteen. DTSC has concluded that about 6 percent of the facilities may be above the threshold specified in the regulations.

SS. VSP AVERAGING AND HEALTH AND SAFETY CODE SECTION 25186.05

Comment Summary:

The comment claims that the VSP averaging procedure contradicts Health and Safety Code section 25186.05, which requires DTSC to consider three serious violations within a five-year period as a compelling cause to deny, revoke or suspend a permit.

Comment: 4-15

Response:

As stated in the ISOR and FSOR, DTSC already has various grounds upon which to revoke or suspend a permit, including when a facility has had three or more incidents of Class I violations for which a person or entity has been found liable or has been convicted with respect to a single facility within a five-year period. DTSC does not consider that the averaging of the Facility VSP Score would conflict with the implementation of Health and Safety Code section 25186.05. DTSC finds that there is an advantage to having these two complementary approaches to address noncompliant owners or operators.

TT. DOUBLE JEOPARDY

Comments Summary:

The comments assert that retroactively using past Class I violations for permitting decisions would violate DTSC's settlement agreements. If DTSC were to now use these prior "full settlements" to deny a permit renewal, DTSC would – in effect – be imposing additional punishment on the facility owner or operator for violations that the parties already fully settled. The comments state such additional penalty or punishment would violate the spirit, purpose, and express language of these settlement agreements.

Comments: 1-39 and 10-16

Response:

DTSC acknowledges that some settlement documents included "non-admissions language" by which the owner or operator denied the violation(s); and that most violations alleged in enforcement actions were not proven or fully adjudicated in a court proceeding. In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

UU. DTSC LACKS RESOURCES

Comment Summary:

The comment states there are doubts that DTSC has the resources to investigate and determine the VSP score for every permitted facility in California. The comment asserts that to calculate a facility's VSP score, DTSC must review all violations – including all Class I and Class II violations – for every facility for ten years, as well as every compliance inspection for the past ten years, and would then have to determine the matrix scoring for every violation under section 66271.51 – an inherently subjective exercise.

Comment: 10-27

Response:

The majority of VSP review would be implemented as part of DTSC's enforcement program. Sections 66271.52 through 66271.54 provide the VSP scoring procedure for inspection violation scores. In the ISOR (pp. 88-93) and FSOR, DTSC explained how previous violations would be scored. In summary, DTSC is utilizing the existing inspection and enforcement process and documentation, so the VSP scoring matrix is based on the same metrics used to calculate penalties. DTSC has implemented existing penalty regulations to calculate penalties, consistent with federal RCRA Civil Penalty Policy, for at least 30 years. There would be an increase in work to score each inspection Class I violation. and an increase work related to the dispute process. However, DTSC will incorporate the additional work into existing enforcement program and procedures whenever Class I violations occur. Due to the existence of historical enforcement data and the fact that about half of the facilities have been able to operate in the last ten years without a single violation, DTSC believes that it can absorb the additional work related to the VSP. DTSC did not make any changes to sections 66271.54(c) and (d) in response to these comments.

VV. APPEAL OF YEARLY SCORE

Comment Summary:

The comment urges that the regulations give facilities the opportunity to appeal their VSP scores that DTSC determines and posts annually. The comment asserts that given the serious implications of a facility's VSP score, due process and fairness demand that an owner or operator must have the opportunity to challenge every VSP scoring calculated by DTSC, and that without any procedures for such challenge, the proposed VSP is wholly deficient and must be withdrawn.

Comment: 10-28

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These include (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

WW. VSP TIMING

Comment Summary:

The comment asserts that the proposed VSP regulations fail to state at what point in the permit review process the VSP score would be considered. The comment notes the proposed regulations state that DTSC would consider the VSP score "when making a decision to approve, deny, revoke, suspend, or modify a permit" and that permit review can be lengthy. The comment provides for example, if a facility holder applies for a permit renewal in 2018, yet DTSC completes its review and makes its decision in 2021, what 10-year period would DTSC use to determine the compliance tier for the facility: 2008-2018, 2011-2021, or some other period? The comment claims the regulation could incentivize DTSC to issue violations to increase a facility's score after an application is submitted for improper reasons, such as political pressure or community opposition to a facility's permit renewal.

Comment: 10-29

Response:

The proposed regulation specifies that DTSC shall annually calculate a Facility VCP Score for each of the hazardous waste facilities and assign a compliance tier for each. The Facility VSP Scores would be posted on DTSC's website every year. For clarification, DTSC has revised the regulations to define the period for including violations in the prior calendar year. In the commenter's example, if the regulations become effective January 1, 2019 and the permit application is submitted in 2018, the facility would be given its first provisional inspection scores, a Facility VSP Score, and the assigned compliance tier in 2019. If the compliance tier is unacceptable, then DTSC may initiate a suspension or a revocation of the authorization before completing the technical review of the permit application. DTSC would recalculate the Facility VSP Scores again in 2020 and every year thereafter. The facility would be subject to the initiation of permit denial, revocation, or suspension in any year the facility's compliance tier is unacceptable.

Whether or not, DTSC has a permit application pending its review or not, all facilities would be subject to the provision of section 66271.57 if the facility is assigned an unacceptable compliance tier. The 10-year period would always include the preceding ten years ending on December 31 or the prior year for each of the Facility VSP Scores.

DTSC strongly disagrees that it would be motivated for improper reasons to issue violations to increase a facility's score after an application is submitted. There is no basis for this assertion. The comment is contradictory to DTSC's enforcement policy objectives, which are to promote compliance, treat all facilities equally and consistently, return violators to compliance in a timely manner, and ensure the consequences of non-compliance serve as a deterrence against future violations.

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP, including making the dispute process applicable to both violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations.

XX. INSPECTION GAPS

Comment Summary:

The comment asks how DTSC would address potential significant gaps or lapses in inspections at facilities, to ensure that facilities are not adversely impacted by the number of inspections taken. The comment notes DTSC acknowledged in the ISOR, "it is necessary to have this provision be based on an average score so that one or more outlier VSP scores do not result in assigning a compliance tier that would trigger additional hazardous waste management requirements." The comment expresses concern that a facility that only had a few inspections would face increased the likelihood of an outlier having such unintended consequences.

Comment: 1-45

Response:

DTSC inspects some facilities more frequently than others. The inspection intervals vary based on the type of facility. Facilities that pose a lower risk are inspected less frequently, unless violations are found. If DTSC finds violations at a facility, DTSC may put this facility on a more frequent inspection schedule. This enforcement practice is meant to promote compliance.

The commenter's question assumes that a facility would have a high Facility VSP Score due to fewer number of inspections. This situation is unlikely because DTSC would address this situation with more frequent inspections to bring this facility back into compliance. Averaging the facility inspection violation scores reduces the likelihood of having a single inspection or fewer inspections raising the Facility VSP Score. DTSC did not make any changes to the regulations in response to this comment.

YY. SETTLEMENT ADJUSTMENTS AND OWNERSHIP CHANGE

Comment Summary:

The comment asks how DTSC would address inspection reports that previously included improper and incorrect violation findings that were adjusted in the settlement process relating to the administrative

penalty, but were not addressed or documented in the actual inspection reports, stating it would be fundamentally unfair to include such inspection findings in the VSP score calculation.

The comment goes on to assert the unfairness is compounded by the lack of available appeal relating to the VSP score itself, stating the only appeals allowed under the proposed rulemaking are with respect to inspection reports issued after the effective date, or when DTSC makes an adverse decision on a permit. The comment further states the VSP score would be made public and would certainly affect the permittee's reputation and public perception, and expresses concern that DTSC does not consider ownership or operation changes in determining the VSP score.

Comment: 1-42

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57. These includes (1) a process to score violations found during compliance inspections; (2) a dispute process for an owner or operator to dispute the inspection violation scores for violations occurred before the effective date of the regulations and violations that occur after the effective date of the regulations; (3) a process to calculate the Facility Violations Scoring Procedure Score; (4) a process to assign the final compliance tier; and (5) a process to challenge the final compliance tier assignment. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

ZZ. BASIS FOR TIERS

Comment Summary:

The comment notes that Section 66271.54(b) outlines the numerical values that establish which tier a facility is placed in as part of the compliance assessment. The comment asserts there is no evidence to indicate the basis for establishing the tiers, asking why a facility that scores a 19 is acceptable but a facility that scores a 21 is conditionally acceptable.

The comment goes on to assert the VSP is supposed to inform, but not control, DTSC's consideration of a facility's permit renewal or modification application, stating that Section 66271.54(d) does nothing to advance this purpose and there is no reason why DTSC should post each facility's VSP annually.

Comment: 1-63

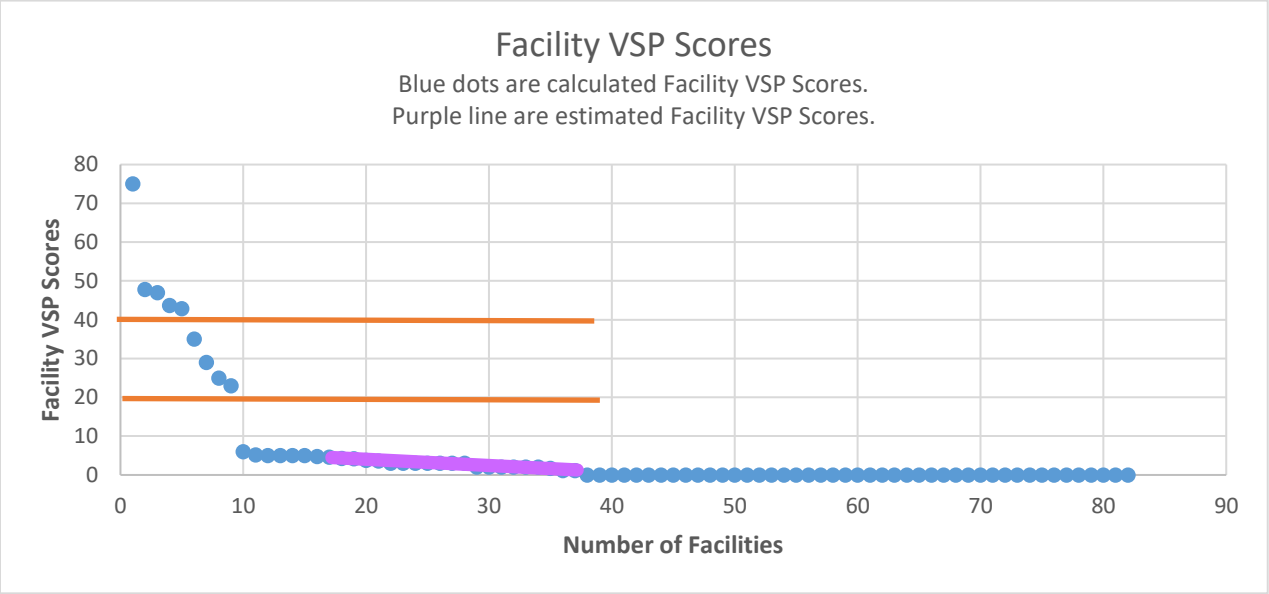
Response:

DTSC determined the threshold number based on the statistical distribution of the Facility VSP Scores. The threshold numbers for the scores were calculated using the estimated mean and standard deviation for the calculated Facility VSP Score data and surrogate data. The first threshold number of 40 represents the mean plus three standard deviations. The second threshold of 20 is the mean plus two standard deviations. See Figure 5 for a graphic display of the Facility VSP Scores that were calculated and estimated and the response to comment 3-18.

DTSC respectfully disagrees that the Facility VSP Scores control the consideration of a permit application. The VSP synthesizes existing enforcement program elements, including the penalty

regulations, into a unified conceptual framework to standardize the assessment of all facilities' compliance history. For example, the matrix found in section 66271.51 has been developed using the process and matrix in the penalty regulations. This proposed rulemaking has been developed to address the legislature's concerns with DTSC's permitting program by providing a transparent assessment that is done in a consistent manner with assigned values appropriate for the seriousness of the violation. DTSC did not make any changes to the regulations in response to these comments.

FIGURE 5. Estimated and Calculated Facility VSP Score and Threshold Numbers.



AAA. TIER NOMENCLATURE

Comment Summary:

The comment states the proposed nomenclature of "acceptable," "conditionally unacceptable," and "unacceptable" is inappropriate. The comment further states the proposed regulations clarify that the determination of whether a facility falls into one of these categories is not the final analysis regarding permitting, yet the nomenclature suggests otherwise. The comment expresses concern the terminology has the potential to inflame the public and would make it difficult, if not impossible, for DTSC to approve a permit for a facility that is not "acceptable." The comment urges DTSC to develop different nomenclature than that specified in section 66271.54 to reflect the degree to which it would provide additional scrutiny to a facility's compliance history. As an example, "low," "medium," and "high" would be more appropriate.

Comment: 1-52

Response:

The nomenclature used for the tiers reflects a facility's compliance history. This naming convention is intended to inform both the facility and public about the nature of that compliance history. The compliance tier also triggers audits and DTSC's initiation of a process to deny, suspend, or revoke a permit. DTSC did not make any changes to the regulations in response to these comments.

BBB. RECALCULATION OF THE FACILITY VSP SCORE

Comment Summary:

The comment asks how often the VSP score would be updated, noting that DTSC proposes to base the score on violations in the preceding 10-year period. The comment states that if the VSP score is not updated every year, the score would include violations spanning more than the preceding 10-year period – counter to what is stated in the proposed rulemaking.

Comment: 1-47

Response:

The comment is correct in that DTSC will calculate the Facility VSP Score every year for every facility based on the previous ten-year period that end on December 31 of the previous calendar year. DTSC did not make any changes to the regulations to clarify this.

CCC. BASIS FOR ASSUMPTIONS

Comment Summary:

The comment asks how DTSC concluded that "almost 95 percent" of facilities would fall in the "acceptable" tier? The comment asks what evidence and analysis DTSC relied on for this conclusion, and how DTSC concluded that "about 2 to 3 percent of the facilities" would be "conditionally acceptable" and "about 2 to 3 percent of the facilities" would be "unacceptable"?

Comment: 1-50

Response:

For the initial release of the proposed language, the number of facilities that were included in DTSC's analysis was 113. DTSC scored about 10 percent of the facilities against the proposed VSP, using existing enforcement program data. Since then, the number of facilities has dropped, and the post-closure facilities were excluded from DTSC's analysis, thus, leaving 82[7] facilities. Furthermore, DTSC evaluated an additional 10 percent of the remaining facilities, so the percentage numbers have changed. The updated analysis has shown that three facilities (3 percent to 4 percent) would be in the conditionally acceptable compliance tier and five facilities (5 percent to 6 percent) in the unacceptable compliance tier. The new percentage of facilities in the acceptable tier subject to the VSP provision is now 90 percent. DTSC did not make any changes to the regulations in response to these comments.

DDD. IMPACT OF DELAYED CHALLENGES TO VIOLATIONS

[7] As of June 2018, there were 82 facilities subject to VSP. This number was used to calculate the Facility VSP Scores and for the Economic and Fiscal Impact Statement.

Comment Summary:

The comment asks if a facility unsuccessfully challenges an inspection finding and the challenge took 2 years, when does the 10-year period start for the violation for VSP scoring, at the time of inspection, or when the challenge was finalized?

Comment: 8-5

Response:

For inspections that take place after the effective date of the proposed regulations, the inspection violation score would be provided with the inspection report. If the violation or violations are challenged, a dispute document may be submitted by the owner or operator to contest the inspection violation score. In the interim, a Facility VSP Score is calculated, sent to the facility, and posted on DTSC's webpage. If the dispute is resolved in favor of the facility, DTSC would revise and reissue the Facility VSP Score. If the facility is unsuccessful in the dispute, the inspection violation scores and the Facility VSP Score would remain unchanged. If the process stretches over two years, it may be possible to impact two separate annual Facility VSP Scores. For example, the dispute may affect the 2020 Facility VSP Score (based on violations occurring between 1/1/2010 – 12/31/2019) and the 2021 Facility VSP Score (based on violations occurring between 1/1/2011 – 12/31/2020). DTSC did not make any changes to the regulations in response to these comments.

EEE. FACILITY VSP SCORE AND PERMIT DURATION

Comment Summary:

The comment states that DTSC is tasked with assessing permit renewals every ten years, during which it considers past violations as a factor that may trigger a permit suspension or denial. The comment notes, however, the permit renewal process often takes considerably longer, due in large part to delays and deficiencies in DTSC receiving adequate applications from owners or operators. To incentivize more timely submission of information and renewal of applications, the comment states that DTSC should adopt language requiring DTSC to determine an initial score for violations that occurred during the preceding ten years or since the issuance of the last permit, whichever is longer.

Comment: 4-12

Response:

DTSC has considered the time frame for the VSP and determined that keeping it at ten years more closely mirrors the 10-year term for a hazardous waste facility permit. Keeping the time frame consistent allows the Facility VSP Score to uniformly reflect compliance history and any enforcement issues during the same time frame. DTSC has revised the regulations to increase the consistency of the time frames by calculating the Facility VSP Scores through December 31 of the prior calendar year. DTSC did not make any changes to the regulations in response to these comments.

Section 66271.55

FFF. VSP AND COMPLIANCE IMPROVEMENTS

Comment Summary:

The comment asserts that the VSP fails to take into consideration a facility's more recent efforts to make improvements or take other corrective actions that would prevent recurrence of similar violations in the future.

Comment: 3-11

Response:

The intent of the VSP provision is to identify those facilities that have more significant violations that rise above the threshold set by the regulations for "conditionally acceptable" or "unacceptable." If a facility's efforts to make improvements correct the pattern of noncompliance going forward, this would be reflected in future Facility VSP Scores. Section 66270.55 provides for DTSC to complete a more extensive review of a facility's compliance history, including a facility's record of returning to compliance and cooperation with DTSC. DTSC has also revised section 66271.57 to allow facilities assigned to the unacceptable tier an opportunity to challenge the compliance tier assignment and demonstrate that the facility is able to operate in compliance with its permit and any other applicable environmental laws and regulations.

GGG. PERMIT MODIFICATIONS

Comment Summary:

The comment asserts that the proposed VSP goes beyond statutory expectations by applying the VSP to decisions relating to modification of permits, as well as denial (including revocation or suspension). The comment states this could have far-reaching adverse consequences for a facility, even impeding modifications that are designed to make capital improvements to a facility or improve its operations. The comment concludes further work and stakeholder input is required before any regulations of this type are adopted.

Comment: 3-19

Response:

Permit decisions include permit issuance, denials, suspensions, revocations, and permit modifications. A request for a permit modification could involve substantial changes to a facility's operations that may significantly impact the environmental or public health in the surrounding community. Therefore, DTSC's decision on such a permit modification request could be as significant as a decision on a permit denial, suspension, or revocation. DTSC did not make any changes to the regulations to exclude permit modifications from sections 66271.55 and 66271.57.

Section 66271.56

HHH. AUDIT AND SECURITY

Comment Summary:

The comment states that the requirement for a state-approved audit process conducted by private firms could conflict with military security needs. Currently, the proposed regulations do not appear to allow for a self-reporting feature, and the commenter recommends inclusion, as this is an important compliance component.

Comment: 5-2

Response:

DTSC has revised section 66271.56 to allow federal facilities a self-disclosure audit report and the use of an internal auditor in lieu of a third-party auditor in response to these comments.

III. AUDITS

Comment Summary:

The commenter is strongly opposed to the requirement that all facilities in the "conditionally acceptable" compliance tier must conduct "independent third-party compliance audits" to maintain their authorization to operate. The commenter suspects that many facilities may be placed in this compliance tier and would be subject to the auditing requirement. Facilities that are ranked as "unacceptable" could also face this requirement, as one of a few means of remaining in operation.

Comment: 3-20

Response:

Over the years, the federal and state environmental agencies have encouraged facilities to initiate environmental audit programs that support and document compliance with environmental regulations, as well as to identify and correct environmental hazards. The objective of an audit is to improve the facility's compliance by initiating and maintaining sound environmental practices proactively.

DTSC believes that it is appropriate for those facilities that have operated in the past ten years with higher than average number of Class I violations to conduct audits and improve their compliance. DTSC did not make any changes to the regulations in response to these comments.

JJJ. AUDIT COSTS

Comment Summary:

The commenter objects to any regulatory obligation that would duplicate an existing audit process using an auditor acceptable to DTSC. The comment states these audits would need to be conducted whether the facility already conducts independent third-party audits pursuant to a corporate environmental management system and would double or triple the amount of money spent on compliance audits.

Additionally, the comment notes that these costs are in addition to the new "fee for service" regime that also replaced statutorily set and annually indexed activity permit fees. The comment further states that these "fees for service" include DTSC's estimated direct and indirect costs within the Hazardous Waste Management Program, including the cost of staff-conducted inspection and enforcement activities.

Comment: 3-22

Response:

DTSC projects that over 90 percent of the permitted facilities would not be impacted by this provision. The requirement for an audit is triggered when a facility is assigned a conditionally acceptable compliance tier based on its Facility VSP Score. DTSC does not anticipate that any facility that currently conducts regular audits pursuant to corporate environmental management systems would be subject to this requirement or would have to duplicate the audits. This is because the intended outcome of such self-audits is to prevent violations, and keep the facility in full compliance with all hazardous waste requirements.

The VSP would be implemented as part of its enforcement program. Any increase in DTSC's reimbursable permit application processing costs due to the proposed regulations would primarily be for DTSC's review of documents required to be submitted with a hazardous waste facility permit application. DTSC did not make any changes to the regulations in response to these comments.

KKK. AUDITOR QUALIFICATIONS

Comments Summary:

The comments express concern with the very general education and experience requirements identified in the proposed regulations, stating they are too general and too subjective, and therefore completely impractical, as effective pre-qualifying criteria necessary to ensure unassailable performance standards and qualifications for the auditors. The comments state that a college degree and five years of auditing experience does not guarantee that an individual has the necessary education and experience to conduct an audit of a hazardous waste management facility.

The comments note that DTSC emphasized in the ISOR, "The education and experience requirements being proposed for compliance auditors are similar to the requirements that existed for the former DTSC Registered Environmental Assessors (REA)". The comments go on to state the REA Program was repealed because, among other things, it noted that "Performance standards and qualifications, established in statute, are too general and subjective…" "Registrants in the California REA Program self-certify their qualifications and there is no way to confirm they actually have the necessary education and experience."

Comments: 3-25 and 3-26

Response:

The elimination of the REA Program was primarily because the program was largely duplicative of, and inconsistent with, federal environmental professional standards. Those standards had been adopted for environmental professionals conducting environmental assessments under other statutory programs.

DTSC has added provisions to ensure the credibility and reliability of auditors beyond that which was provided by the REA program.

Unlike the REA program, the audit provision requires that the owner or operator submit the names and qualifications of at least three auditors to DTSC for approval. DTSC's review of the auditor's relevant work experience, education, training, and any licenses is essential is essential to serve the purpose of the proposed regulations. DTSC did not make any changes to the regulations in response to these comments.

LLL. AUDITOR APPROVAL

Comment Summary:

The proposed regulations would give DTSC the authority to rely on subjective criteria to reject any of the auditors chosen by the owner or operator and, instead, impose DTSC's own handpicked auditor. The process poses a real risk that DTSC would develop a list of preferred compliance auditors consisting of persons of questionable qualification who have a conflict of interest and would be inclined to please DTSC to procure additional audit work. This process negates any semblance of "independence "or "impartiality" on the part of the auditor or the audit.

Comment: 3-27

Response:

The requirement for DTSC's approval of the proposed auditor allows DTSC to review the auditor's relevant work experience and education needed to ensure competence. DTSC has no intention of selecting auditors who lack the required education, experience, or skills. Moreover, DTSC has no intention of selecting auditors if they have a conflict of interest in performing one or more audits. To ensure approval by DTSC, the owner or operator should list at least three or more auditors, in order of the owner's or operator's preference, with the required qualifications and relevant experience. DTSC did not make any changes to the regulations in response to these comments.

MMM. AUDITS TO CALCULATE VSP SCORES

Comments Summary:

The comments note that DTSC states that it may rely on the independent third-party auditor reports "for purposes of enforcement and calculations of inspection violation scores or Facility VSP scores." (ISOR at p. 106.) The comments state the ISOR and the proposed regulations are devoid of any discussion as to how DTSC would use such reports to calculate inspection violation scores or VSP scores. Because the inspection and VSP scores are proposed to be based on DTSC inspections, the comments say it is unclear why or how DTSC intends to use the audits for this purpose, for example if the auditor disagrees with DTSC's characterization of a violation, would DTSC consider or be required to adjust the VSP score?

Comments: 1-53, 1-54, and 1-55

Response:

DTSC has considered this comment and has deleted this provision. DTSC conducts regular, routine compliance inspections of hazardous waste facilities. This includes reviewing submitted data and reports, periodic physical observation, and testing/ evaluation of facilities. DTSC enforcement staff are trained on hazardous waste laws and regulations and use federal and state guidance documents on conducting inspections and implementing the appropriate enforcement response actions.

NNN. AUDITS AND PERMIT REVIEW TIMES

Comment Summary:

The comment asserts that third-party audits would further delay the permitting process, noting Section 66271.56 sets out an audit schedule that provides up to 270 days for an initial audit report and not less than 180 more days for a second audit report. The comment claims DTSC would then use this information in the permitting process, and this guarantees that the permitting process for a facility subject to an audit requirement would take more than a year to complete, probably by a considerable amount.

Comment: 1-57

Response:

DTSC does not anticipate that the time frame specified in the regulations for the audit process would further delay the permitting process. DTSC has established a goal of making 90 percent of the permit decisions in two years, starting with the application submittal and ending with the permit decision. In addition, most of the permit applications would not be impacted by an owner or operator having to meet the audit requirements. DTSC has not revised the deadlines specified in the provision for audits or made other changes to the regulations in response to these comments.

OOO. AUDITS AND NEW VIOLATIONS

Comment Summary:

The comment states that pursuant to section 66271.56(a)(2), a facility shall prepare a compliance implementation plan to address the findings of the third-party auditor that is subject to the review and approval of DTSC. The comment asserts that because the compliance implementation plan shall be an enforceable commitment, DTSC should be prohibited from issuing new violations for the conditions addressed in the plan.

Comment: 1-58

Response:

DTSC respectfully disagrees that it should waive its authority to issue notices of violations to facilities. DTSC did not make any changes to the audit provision to limit DTSC's enforcement authority. DTSC did not make any changes to the regulation in response to these comments.

PPP. COMMUNITY BENEFIT AGREEMENT

Comments Summary:

The comments state that Section 66271.56(b)(4) authorizes DTSC to require facilities to enter into community benefit agreements or projects to reduce impacts or alleviate adverse conditions caused by the facility's noncompliance with hazardous waste management requirements. The comments assert this is a significant expansion of DTSC's authority without any corresponding guardrails to guarantee that this authority is not abused.

- Clear criteria for such agreements or projects must be established, subject to public review and comment.
- The commenter objects and urges the elimination of sections 66271.56(b)(3).

Comments: 1-69 and 2-31

Response:

Health and Safety Code section 25200 (a) authorizes DTSC to impose any conditions on a hazardous waste facility that are consistent with the intent of the Hazardous Waste Control Law. Section 66271.56(b)(4) provides DTSC the discretion to impose additional conditions on hazardous waste facilities that receive a conditionally acceptable compliance tier assignment. This provision is necessary to require facilities with troublesome compliance histories to make changes to their operations in a manner that is responsive to the problems noted at the facility.

DTSC respectfully disagrees that the regulations need to include additional criteria, or that this provision should be eliminated entirely for facilities that receive a conditionally acceptable compliance tier. DTSC did not make any changes to the regulations in response to these comments.

QQQ. CONTESTING AUDITS

Comments Summary:

The comment states there must be a process for contesting an audit finding because a third-party auditor is likely to make mistakes and alleged violations may be withdrawn. The regulations need to include a procedure for correcting these errors.

Comments: 1-56 and 3-24

Response:

DTSC has revised the regulations to remove the provision which would have required DTSC to rely on audit reports for the purposes of calculating an inspection violation score or a Facility VSP Score. Consequently, the purpose of an audit is to provide the owner or operator an appropriate means and mechanism to correct and prevent violations. The audit is intended to enhance compliance with applicable hazardous waste law and regulations. DTSC did not make any changes to the regulations in response to these comments.

RRR. AUDIT AND INSPECTIONS ARE DUPLICATIVE

Comment Summary:

The comment states the responsibilities of the DTSC-approved auditors mirror the responsibilities of current enforcement staff and immediately raise a question around the necessity for this entirely new program. The comment goes on to state that DTSC itself is already tasked with carrying out those precise responsibilities, as confirmed in the updated Official Policy for Conducting Inspections,[8] noting that each of the minimum elements for audit reports in sections 66271.56(a)(1)(B)(2)-(7) required by the proposed regulations is specified in the policy as a necessary element of any DTSC pre-inspection or inspection activity. The comment concludes that the result is that facilities that are subject to the mandatory compliance audit requirement would effectively pay twice for the same service - in addition to the independent third-party audits that facilities may already have conducted.

Comment: 3-23

Response:

DTSC respectfully disagrees with the commenter that the audit provision is duplicative of DTSC enforcement inspections for facilities. First, only the facilities that have a conditionally acceptable compliance tier are required to perform an audit. DTSC is not creating an entirely new program for all facilities, because this provision only applies to facilities that have higher than average number of Class I violations over a 10-year period. Secondly, DTSC's Official Policy on Conduction Inspections is a guidance document that sets forth the policy for conducting DTSC inspections and preparing inspection reports. Lastly, facilities are not required to pay for DTSC inspections. Therefore, facilities that are required to comply with audit requirement are not paying twice for the same service. DTSC did not make any changes to the regulations in response to these comments.

SSS. ROLE OF THIRD-PARTY AUDITORS

Comment Summary:

The comment expresses concern that the process outlined in the regulations would effectively lead to the outsourcing of DTSC's inspection program to third-party auditors, and that the grounds for disqualification are very vague and subjective leaving DTSC with broad discretion.

The comment goes on to state that no regulatory-qualifying criteria are specified for compliance auditors subject to selection by DTSC, leaving open the possibility that DTSC could select retired enforcement staff or other individuals with prior professional relationships or business dealings with DTSC or the Administration on legislative, budget or administrative matters. Further, the comment states that the owner or operator must accept DTSC's choice of auditor -- there is no recourse for the owner or operator to reject DTSC's alternate selection or to appeal its decision.

Comment: 3-24

Response:

DTSC appreciates the concern about DTSC's inspection program. However, DTSC's enforcement program is responsible for more than conducting routine and targeted compliance inspections of operating and non-operating facilities. DTSC also conducts criminal investigations and responds to complaints from the

[8] DTSC-OP-0005, dated June 29, 2017

public. DTSC's enforcement program would continue in its current form and perform its current statutory and regulatory duties.

The proposed regulations in section 66271.56(a)(1)(A)1. a. specify the minimum qualifications for an auditor. These minimum qualifications apply to auditors whether an owner or operator selects them or DTSC selects them. DTSC understands the concern about conflict of interest and will implement the VSP implemented objectively. DTSC would not have the same staff involved in calculating the inspection violation scores or the Facility VSP Score, or assigning the compliance tier serve as the Director's designee to resolve any dispute or challenge brought by the facility. DTSC is required to comply with State law governing the issues of conflict of interest or incompatible activities.

DTSC is sensitive to concerns that DTSC or any owner or operator might be able to influence or control the outcome of an audit. In the development of the regulations, DTSC focused on how to limit the influence on the preparation of the audit report by the owner or operator that is paying the bills and how to keep the process moving forward. DTSC determined that having final approval of the auditor was sufficient to address the first issue. DTSC also considered that the process might be further delayed if multiple attempts to select an auditor were allowed in the regulations. The compromise is for DTSC to select another auditor if DTSC rejects all three auditors proposed by the owner or operator. This process has been used successfully by DTSC to approve the selection of consultants to prepare Environmental Impact Reports.

DTSC respectfully disagrees with the comments. DTSC did not make any changes to the regulations in response to these comments.

Section 66271.57

TTT. STANDARDS FOR DENIAL/REVOCATION

Comment Summary:

The comment asserts it is unlikely that a facility would meet VSP threshold for denial because the threshold is too high. The comment objects that DTSC would have discretion to grant a permit to such a facility.

Comment: PH-11-3

Response:

DTSC appreciates the comment. DTSC has revised section 66271.57 to require that DTSC shall initiate a process to deny, suspend, or revoke a permit for a facility that has a final "unacceptable" compliance tier assignment.

UUU. FACILITY IMPROVEMENTS

Comments Summary:

The comments note that Section 66271.57(b)(2) allows DTSC to require the facility to "implement facility improvements" and raise concern that this broad authority would be provided to DTSC without any set

criteria dictating when such authority may be utilized, stating it does not ensure consistency with the recommendations of third-party audits. The comment states that there should be regulatory language indicating what criteria would be the basis for such improvements.

The comments further state the language provides no mechanism or requirement for working with the facility operator to determine the best course of action that considers efficiency, costs and timing.

The commenters are concerned that DTSC could require expensive and/or infeasible improvements that may not fix the problem, or that may not be related to the causes of the violations. The commenters believe dialogue and collaboration with the facility operator, who understands all operating aspects of the facility, is warranted and could ultimately help deliver a better, more mutually beneficial outcome to address the problem.

Comments: 2-32, 11-27 and PH-5-7

Response:

DTSC appreciates the comment and has revised the proposed regulations to include criteria that tie the improvements to the causes related to the facility's violations. DTSC did not revise the regulation to require collaboration between DTSC and the facility to address how to "implement facility improvements." However, the facility is encouraged to meet with DTSC if it has any questions or concerns about the requirements in the proposed regulations. DTSC did not make any changes to the regulations in response to these comments.

VVV. PERMIT DENIAL CRITERA CAN'T INCLUDE OTHER LAWS

Comment Summary:

The commenter notes that Section 66271.57(a)(4) states DTSC can deny a permit for a facility based on the requirements of "other federal, state or local environmental regulations or permits." The commenter asserts this is a significant expansion of DTSC's purported authority, and wholly inappropriate. The comment states that DTSC is authorized to enforce the Hazardous Waste Control Law, not other laws that fall within and under the jurisdictions of other agencies, and that DTSC lacks the experience, expertise, and the authority to evaluate a facility's compliance with laws it does not enforce. The comment concludes that, in the absence of statutory authority, any attempt to use other environmental laws or regulations as a basis for denying a hazardous waste facility permit would be *ultra vires*.

Comment: 1-109

Response:

DTSC appreciates the comment. Pursuant to Health and Safety Code section 25186, DTSC has the authority to deny, suspend, or revoke a permit for violations of, or noncompliance with, several State and federal environmental statutes or regulations. DTSC has deleted the reference to other environmental regulations or permits from the proposed regulations since Health and Safety Code section 25186 already provides broad authority to DTSC in making its permit decision.

WWW.VSP AND HAZARDOUS WASTE PROTECTIONS

Comments Summary:

The comments say that DTSC's proposed regulations state that DTSC "may" deny, suspend, or revoke a permit for a facility that has an "unacceptable" VSP score, but only if DTSC also finds certain conditions. The comments state this represents a drastic weakening of protections to the public against non-compliant owners or operators. They state that under existing law, DTSC may deny, suspend, or revoke a permit based on a single violation that may pose a threat to public health, safety, or the environment. They also assert that under DTSC's proposed regulations, the facility must exceed a threshold for Class I violations and DTSC must additionally find that the facility presents an imminent endangerment, or be unwilling or unable to operate in compliance with its permit or other similar conditions, and that this limits DTSC's discretion to use its existing authority to deny, suspend, or revoke a permit.

Comments: 4-16 and PH-11-1

Response:

DTSC appreciates the comment. DTSC has revised section 66271.57 to state that DTSC shall initiate a process to deny, suspend, or revoke a permit for a facility that has a final "unacceptable" compliance tier assignment.

XXX. IMMINENT AND SUBSTANTIAL ENDANGERMENT

Comment Summary:

The comment states there are vague criteria regarding endangerment: section 66271.57(a)(1) states DTSC may deny a permit for a facility that presents an imminent and substantial endangerment, while Section 66271.57(a)(2)(C) provides that DTSC may deny a permit for a facility that "is likely to result in significant adverse health impacts to workers or the public." The comment states that DTSC should clarify how these criteria differ from each other. If they do not differ, then one is superfluous if they do differ, then the difference is not evident.

Comment: 1-67

Response:

DTSC appreciates this comment regarding the condition of imminent and substantial endangerment as a ground for permit denial, suspension, revocation. There are existing provisions in Health and Safety Code that already address imminent and substantial endangerment in the context of DTSC's permit decisions.

YYY. FACILITY IS UNWILLING

Comment Summary:

The comment states that a facility disputing a violation should not be deemed "unwilling" to come into compliance. The comment notes that Section 66271.57(a)(2) authorizes DTSC to deny a permit for a facility that is "unwilling" to come into compliance with the law. The comment asserts that if the facility disputes the existence of the violation, then it should not be deemed "unwilling" for the purposes of denying a permit. The comment goes on to say, on any number of occasions DTSC alleges violations only

to withdraw them later because they were not supported by evidence or reflected a misunderstanding of relevant law or facts. Accordingly, a facility that is disputing a violation in good faith should not be deemed "unwilling" to come into compliance.

Comment: 1-65

Response:

Section 66271.57(a)(2) was originally drafted to require DTSC to establish criteria for a more in-depth review of the facility's compliance history. This provision would enable confirmation of an operator's or owner's unwillingness or inability to operate in compliance.

However, this provision has been rewritten and now provides an owner or operator an opportunity to challenge the unacceptable compliance tier assignment. The owner or operator must demonstrate that he or she is willing or able to operate the facility in compliance with hazardous waste management requirements. The owner's or operator's challenge would also be subject to DTSC review and a public meeting to allow the public an opportunity to submit comments.

ZZZ. FACILITY IS UNABLE TO OPERATE IN COMPLIANCE

Comment Summary:

Under section 66271.57(a)(2)(A), DTSC may deny a permit if a facility is "unable" to operate the facility in compliance with law and, under section 66271.57(a)(2)(B), DTSC may deny a permit if the facility as constructed cannot operate the facility in compliance with law. These sections should not be applied when DTSC has changed its assessment or interpretation of the law, rendering facilities or equipment that were previously considered compliant to be considered instead non-compliant.

Comment: 1-66

Response:

This provision has been rewritten and now provides an owner or operator an opportunity to challenge the unacceptable compliance tier assignment. The owner or operator must demonstrate that the facility it is able to operate the facility in compliance with the permit conditions and all applicable law, regulations, and requirements.

AAAA. INADEQUATE FINANCIAL ASSURANCE

Comment Summary:

The comment states that DTSC may deny a permit under existing law. Therefore, the comment continues, section 66271.57(a)(2)(D), which makes such authority explicit, is unnecessary.

Comment: 1-81

Response:

DTSC appreciates the concern raised in this comment. The purpose of the proposed regulations is to implement existing law and regulations to facilitate DTSC's permit decisions and to ensure that DTSC's permit decisions are made in a consistent and transparent manner. The proposed regulations are also

necessary to implement SB 673. DTSC did not make any changes to the regulations in response to these comments.

BBBB. PATTERN OF NONCOMPLIANCE

Comment Summary:

The comment objects to what the commenter terms vague application of "pattern of noncompliance" criteria: section 66271.57(a)(3) states DTSC may deny a permit for a facility if an audit demonstrates an ongoing pattern of noncompliance. The comment asks how this is different from the prior criteria authorizing DTSC to deny a permit for a facility that is unwilling or unable to comply with the law. The comment concludes that this section should not apply to a violation DTSC alleges but the facility contests.

Comment: 1-68

Response:

Section 66271.57(a) was originally drafted to require DTSC to do a more in-depth review of the facility's compliance history. Specifically, it required DTSC to include the audit findings if the auditor had included any ongoing patterns of noncompliance or a failure to implement actions to correct deficiencies. This provision has been revised to provide an owner or operator an opportunity to challenge the unacceptable compliance tier assignment. The owner or operator must demonstrate that he or she is able to operate the facility in compliance with all applicable requirements and that audit reports demonstrate an ongoing pattern of compliance. The owner's or operator's challenge would be subject to DTSC's review and a public meeting to allow the public an opportunity to submit comments.

CCCC. RESTRICTED PERMIT TO UNACCEPTABLE

Comments Summary:

The comment notes that Section 66271.57(d)(1) – (3) states DTSC "may also impose other responses on a facility owner or operator." The comment expresses concern that those responses can include imposing a shorter operating period on a facility than specified in the permit; restricting or prohibiting hazardous waste management practices; and imposing additional conditions on hazardous waste management activities beyond those specified in the permit.

The comment states there are no criteria articulated for how DTSC would exercise this extraordinary authority, asking: (1) when and why should DTSC be able to limit the operating period of a permit? (2) under what conditions should DTSC be able to prohibit a facility from engaging in a permitted hazardous waste management activity? and (3) what does it mean to impose additional conditions beyond those specified in the permit? The comment claims that DTSC could impose requirements that are not required by law and even conditions/requirements that would otherwise fall outside DTSC's jurisdiction, and states that DTSC cannot have vague and unfettered discretion to rewrite permits.

Comments: 1-64 and 2-31

Response:

DTSC respectfully disagrees with the comments. Health and Safety Code section 25200 (a) authorizes DTSC to impose any conditions on a hazardous waste facility that are consistent with the intent of the Hazardous Waste Control Law. Section 66271.57 provides DTSC the discretion to impose additional conditions on hazardous waste facilities that receive an unacceptable compliance tier assignment. This provision is necessary to require facilities with significant compliance histories to make changes to their operations in a manner that is responsive to the serious problems noted at the facility.

DTSC respectfully disagrees that there is a need for additional criteria as to how DTSC would exercise this authority. DTSC has existing discretion and existing authority to include permit conditions[9,10] needed to assure protection of human health and the environment. This provision makes clear that that discretion would be exercised when facilities have poor compliance histories.

Because the criteria apply to a facility with an unacceptable compliance tier, it may be appropriate to limit the operating period of a permit when violations continue to occur. This would provide DTSC more frequent reviews of the facility's operations and ensure the facility can be operated in compliance with existing hazardous waste laws and regulations. DTSC may also determine that a facility cannot implement a permitted hazardous waste management activity in accordance with hazardous waste regulations or permit conditions. This may result in DTSC potentially addressing the causes of noncompliance by responsive actions, such as limiting type or quantity of permitted waste streams, limiting storage or treatment capacity, or altering the times of operation for a specific hazardous waste management unit. However, DTSC could not impose requirements that are not required by law or conditions and requirements that would otherwise fall outside DTSC's jurisdiction. DTSC did not make any changes to the regulations in section 66271.57(d)(1) through (3) in response to these comments.

Section 66271.58

DDDD. VSP AND PERMIT APPEAL

Comment Summary:

The comment supports allowing DTSC to overturn a decision to deny, suspend, or revoke a permit to prevent a manifest injustice. If DTSC retains the VSP regulations, the comment supports including procedures for overturning a decision to revoke or deny a permit.

Comment: 10-30

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

[9] Title 22, California Code of Regulations, section 66270.32 allows for the setting of permit conditions required on a case-by-case basis, in permits.

[10] Health and Safety Code sections 25150 and 25159. These statutes mirror the federal Omnibus Provision authorized by Congress under section 3005(c)(3) of the United States Code.

EEEE. PERMIT APPEAL PROCESS UNNECCESSARY

Comments Summary:

The comments assert that DTSC should not implement a separate appeal process accessible only to owner or operators. They note that DTSC already has an appeal process that applies to any permit decision. The commenters say that though the current appeals process is deeply flawed, it is applied the same for either a permit applicant or permit opponent. The comments state DTSC should not set up a parallel appeal process that is accessible only to one side and with a less stringent burden of proof than the current appeals process that can only benefit permit applicants.

Comments: 4-17 and PH-11-4

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

FFFF. PROPER NOTICE OF DENIAL, SUSPENSION OR REVOCATION

Comment Summary:

The comment states the regulations should include language that requires DTSC to state formally and clearly that it intends to deny, suspend, or revoke a permit and that the owner or operator has a right to appeal the proposed decision. The comment notes that as proposed, subsection (c) requires the facility owner or operator to file an appeal within 30 days "of being informed by DTSC in writing that it is proposing" to deny, suspend, or revoke a permit. The comment asserts this language is too vague and could allow DTSC to contend that a mere e-mail suggesting that a permit might be suspended triggers the right to appeal. The comment claims DTSC must provide the owner or operator with a formal and unequivocal written determination that it intends to deny, suspend, or revoke the permit, and DTSC must specifically notify the owner or operator that the determination triggers the right to appeal and what its appeal rights are.

Comment: 10-31

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

GGGG. BURDEN OF APPEAL PROCESS

Comment Summary:

The comment states that in this VSP appeals process, DTSC bears the burden of establishing that its proposed decision is not clearly erroneous by demonstrating that the VSP Score was not in compliance

with this article or a manifest injustice would result from DTSC taking the proposed action. The comment claims the language does not make sense, and states It is not DTSC's role to demonstrate that its decision was in error. The comment further states that DTSC's decision would be overturned upon a showing that the facility has implemented substantial improvements; that the VSP does not provide an accurate characterization of the facility's compliance record; or there are overriding benefits resulting from the continued operation of the facility. Finally, the comment says these standards are extremely deferential to hazardous waste owner or operators and exclude impacted residents and advocates completely from the process.

Comment: 4-18

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

HHHH. APPEAL COSTS

Comment Summary:

The comment asserts that DTSC fails to consider the costs associated with the administrative appeal process; a permittee wishing to appeal an inspection score would have to pay for its own legal representation and would also be responsible to pay for its prosecutor. The commenter asserts this process perpetuates the unfairness discussed above.

Comment: 1-44

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

IIII. APPEALS FOR RECONSIDERATION

Comment Summary:

The comment states the procedures outlined for appeals for reconsideration in section 66271.58 are ambiguous and fraught with double-negatives. The comment notes that Section 66271.58(b) states DTSC has the burden of establishing that a decision is not clearly erroneous and section 66271.58(b)(1) states that this can be shown by demonstrating that a VSP score was calculated in a manner that is not in compliance with the regulations. The comment speculates that DTSC would want to show that the VSP was scored in compliance with the regulations to demonstrate that its decision was not clearly erroneous. The comment seeks clarification of DTSC's flexibility pursuant to section 66271.58(b)(2), under which DTSC can meet its burden by demonstrating that a permitting decision was not clearly erroneous if a manifest injustice would result from the DTSC action. We are unable to decipher what this means."

Comment: 1-105

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

JJJJ. MANIFEST INJUSTICE

Comments Summary:

The comment states that the intent of section 66271.58(b)(2) appears to be that a decision to deny a permit should be overturned if the decision would otherwise result in a manifest injustice. It further states a "manifest injustice" would occur if the facility has "implemented substantial improvements that would substantively and effectively prevent future noncompliance," "if the Facility's VSP Score does not provide an accurate characterization of the facility's compliance record," or "there are substantial and overriding benefits to the people of the State of California resulting from the continued operation of the facility."

The comment questions the necessity of each of these factors.

Comments: 1-106, 1-107, and 1-108

Response:

As discussed above in response to other comments regarding the VSP, DTSC has made substantial changes to the VSP. DTSC deleted section 66271.58. The VSP processes would not affect, and would ensure, an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

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