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TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

Phase I Environmental Site Assessments (Proposed New and Expanding School Sites)

Department Reference Number: R-2004-01
Office of Administrative Law Notice File Number: Z-07-0227-10

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to amend the California Code of Regulations, chapter 51.5, article 1, emergency regulations that were approved by the Office of Administrative Law (OAL) on November 27, 2006 and designated as OAL Reference Number 06-1117-11E. The proposed regulations will finalize the emergency provisions and make other procedural and clarifying changes to regulation text in sections 69100, 69101, 69102, 69103, 69104, 69105, 69106, 69107, 69108 and adding section 69109.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

A written comment period has been established commencing on March 9, and closing on April 23, 2007. DTSC will hold a public hearing on the proposed regulations at 10:00 a.m. on April 23, 2007 in the Sierra Hearing Room, 2nd Floor, 1001 "I" Street, Sacramento, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on April 23, 2007 will be considered.

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

Due to enhanced security precautions at the California Environmental Protection Agency (Cal/EPA) Headquarters Building located at 1001 I Street, Sacramento, all visitors are required to sign in prior to attending any meeting. Sign-in and badge

issuance occur in the Visitor and Environmental Services Center. This Center is located just inside and to the left of the building's public entrance. Depending on their destination and the building security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification cards. Depending on the size and number of meetings scheduled on any given day, the security check-in could take from three to fifteen minutes. Please allow adequate time to sign in before being directed to your meeting.

If you have special accommodation or language needs, please contact Nicole Sotak, Chief, Environmental Analysis and Regulations Section, at (916) 327-4508 or by e-mail at regs@dtsc.ca.gov by April 5, 2007. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

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

AUTHORITY AND REFERENCE

These regulations are being proposed under the following authorities:

Health and Safety Code section 58012 (added by Gov. Reorg. Plan No. 1, §146, eff. July 17, 1991.) This section provides DTSC with the authority to adopt and enforce rules and regulations needed for the execution of its duties.

Education Code section 17210, subsection (g). This section authorizes DTSC to adopt final regulations that establish guidelines for Phase I Environmental Site Assessments for proposed school sites.

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

Education Code section 17210, subsection (g). This section specifies the requirements for conducting a Phase I Environmental Site Assessment in the absence of DTSC regulations and authorizes DTSC to adopt final regulations that establish different guidelines for Phase I Environmental Site Assessments for proposed school sites.

Education Code section 17213.1. This section specifies the role of DTSC in the Phase I environmental assessment process for proposed school sites.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

Education Code sections 17210, 17210.1, 17213.1, and 17213.2 specify the comprehensive environmental review process under DTSC oversight for proposed new or expanding schools. The environmental review process includes a Phase I Environmental Site Assessment (Phase I), Preliminary Endangerment Assessment (PEA), and if necessary, response action that is protective of children's health with an ample margin of safety.

The existing emergency regulations (Cal. Code Regs., tit. 22, div. 4.5, ch. 51.5, commencing with § 69100), posted at www.dtsc.ca.gov, establish guidelines for completion of a Phase I and Phase I Addendum. These proposed regulations finalize the emergency component of those regulations and present other procedural and clarifying changes to the Phase I and Phase I Addendum processes. These regulations streamline the environmental review process and help minimize site assessment costs for properties historically considered unlikely to have contamination, such as residential properties.

Policy Statement Overview

Broad Objectives: These regulations are necessary to continue supporting the efforts of the State of California to increase the number of school facilities while protecting children and staff from the potential effects of exposure to hazardous materials. These regulations will also provide consistency with updated federal standards to ensure that school assessments are conducted in accordance with national standards so federal and/or State liability protection may be available to school districts. Additionally, the changes will streamline and thereby improve the site assessment process for proposed new and expanding school sites by allowing submittal of test results for organochlorine pesticides (OCPs) in soil from termiticide application in a Phase I Addendum.

Specific Objectives: These regulations are necessary to finalize the provisions contained in the emergency regulations approved on November 27, 2006, to ensure continued DTSC compliance with the latest American Society for Testing and Materials (ASTM) national standard for Phase Is, to include provisions to allow submission of sampling and analytical results for OCPs in soil from termiticide application in a Phase I Addendum.

Proposed Regulations

DTSC proposes to amend existing regulations to: (1) avoid conflict with the ASTM national standard for Phase Is; (2) streamline the process and minimize costs associated with environmental review of properties historically considered unlikely to have other than OCP contamination; (3) ensure consistency with laws and policies of

DTSC; and (4) provide other needed clarifying provisions. Additional detail for each objective is provided below.

- (1) ASTM Standard E1527-05 is now the nationally recognized standard for conducting Phase Is and is the primary reference for conducting Phase Is for proposed new and expanding school sites. Reference to ASTM Standard E1527-00, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as cited in the regulations prior to DTSC's emergency rulemaking, has been superseded by the new standard approved on November 1, 2005, ASTM Standard E1527-05. The emergency regulations amended the regulation text to reflect this change. School districts rely on environmental assessors to conduct Phase Is, Phase I Addenda, and PEAs. It is critical that environmental assessments be conducted using the national standard, for environmental assessments conducted after November 27, 2006.
- (2) The regulations allow submittal of sampling and analytical results for OCPs in soil from termiticide application in a Phase I Addendum. The regulations streamline the process and minimize costs associated with environmental review for properties otherwise considered unlikely to have contamination, such as residential properties. These proposed regulations are needed to ensure that OCPs will be part of the Phase I and Phase I Addendum process.

If sampling and analytical results for OCPs in soil from termiticide application could not be submitted in a Phase I Addendum, school districts would be required to complete a Preliminary Endangerment Assessment (PEA) for all proposed school sites with structures that have wood components. This would result in significant increased costs for assessment of proposed school sites otherwise considered unlikely to have contamination, such as residential properties. These regulations present sampling protocols and analytical methods to be used to evaluate OCPs in soil from termiticide application. Sampling and analytical results will be evaluated in a human health screening evaluation approved by DTSC.

- 3) DTSC will reference the new ASTM Standard E1527-05, developed concurrently with all appropriate inquiries (AAI) provisions.

The State also passed legislation to provide liability protections under State law, Assembly Bill 389 (ch. 705, stats. 2004) also known as the California Land Reuse and Revitalization Act of 2004 (CLRRA). To be eligible for liability relief under CLRRA, bona fide purchasers, contiguous property owners, and innocent landowners, must comply with AAI and ASTM Standard E1527-05 may be used to satisfy this requirement.

The federal 2002 Brownfields Amendments to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) required

United States Environmental Protection Agency (USEPA) to develop regulations establishing standards and practices for conducting AAls. To satisfy this requirement, USEPA developed a Final Rule for “Standards and Practices for All Appropriate Inquiries” (40 C.F.R. § 312) that became effective on November 1, 2006. To be eligible for liability protections under the federal 2002 Brownfields Amendments, bona fide purchasers, contiguous property owners, and innocent landowners must comply with AAI and may use ASTM Standard E1527-05 to satisfy this requirement. The proposed regulations ensure compliance with AAI and with the ASTM.

- 4) In addition to critical changes above, DTSC is also proposing the following modifications to assist in providing clarity to these processes:
- Clarify the definitions for a Phase I and Phase I Addendum to help school districts understand the differences between the two documents. A new section is being added to the regulations for Phase I Addendum recommendations.
 - Add contaminants and sources that should be evaluated in addition to those identified in ASTM Standard E1527-05.
 - Clarify construction cutoff dates for evaluation of lead-based paint and electrical transformers.
 - Add sample collection procedures for post-demolition sampling for lead if the foundations or slabs are present and the site has not been graded.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

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

PEER REVIEW

There was a Residential Pesticide Study completed by DTSC in 2006 which supports the basis for the provision to allow results of sampling and analysis for OCPs in soil from termiticide application to be submitted in a Phase I Addendum. However, the basis for the determination to include OCPs as part of a Phase I and Phase I Addendum is a voluntary procedure and does not establish a “regulatory level, standard, or other requirement” as defined by Health and Safety Code section 57004 and does not require peer review. The Office of Health Hazard Assessment (OEHHA) did review the Residential Pesticide Study and OEHHA’s comments were incorporated in the Study. A copy of the Study is available in DTSC’s Regulations Unit.

BUSINESS REPORT

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

FISCAL IMPACT ESTIMATES:

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates. These regulations provide a voluntary option for school districts that choose to conduct a Phase I Environmental Site Assessment. Any mandates that are imposed on school districts already exist in statute and these regulations impose no new mandates.

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

Cost or Savings to Any State Agency: The requirements for completion of a Phase I Assessment in the regulations would have no fiscal impact on DTSC because the regulations merely clarify Phase I activities required by current law. The regulations could result in some additional costs for DTSC to review a Phase I Addendum. However, any costs for DTSC to review the Phase I Addendum would be reimbursed by the school district.

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

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

Cost Impacts on Representative Private Persons or Businesses: These regulations do not impose any costs over what is already required by statute. Specifically, any such costs would have been as a result of implementation of Senate Bill 162 (ch. 1002, stats. 1999) and Assembly Bill 387 (ch. 992, stats. 1999). Together these bills establish the authority for these regulations by requiring school districts, as a condition of receiving State funds, to enter into an agreement with DTSC to oversee response actions, as well as establishing the parameters for school districts conducting Phase I assessments, and provisions for reimbursing DTSC for oversight costs.

Significant Statewide Adverse Economic Impact on Businesses: DTSC has made an initial determination that the proposed regulations will not have a statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states.

Assessment Statement:

- (A) **Creation or elimination of jobs within California** – DTSC has made a preliminary determination that no jobs will be created or eliminated in California as a result of the proposed regulations.
- (B) **Creation of new businesses or the elimination of existing businesses within California** – DTSC has made a preliminary determination that no businesses will be created or eliminated in California as a result of the proposed regulations.
- (C) **Expansion of businesses currently doing business in California** – DTSC has made a preliminary determination that it is not likely that businesses in California will be expanded as a result of the proposed regulations.

Effect on Small Businesses: DTSC has determined that these regulations do not have an effect on small businesses because the regulations apply only to school districts seeking State funding for acquisition of property or construction projects.

CONSIDERATION OF ALTERNATIVES

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

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons, and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Ms. Nicole Sotak of DTSC's Regulations Section as specified below. If you are interested in receiving notice by electronic mail when any new and/or additional information is available concerning these regulations, please go to: <http://www.calepa.ca.gov/Listservs/dtsc/>

You can "subscribe" to these specific regulations by following the instructions on this website.

POST-HEARING CHANGES

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

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

CONTACT PERSONS

Inquiries regarding technical aspects of the proposed regulations or CEQA documents may be directed to Laurie Grouard of DTSC at (916) 323-3394 or, if unavailable, Kathleen Hartshorne of DTSC at (916) 323-3395. However, such oral inquiries are not part of the rulemaking record.

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

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

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