

FINAL STATEMENT OF REASONS (November 7, 2007)

Environmental Fee (R-2006-03)

OFFICE OF ADMINISTRATIVE LAW REGULATORY ACTION NUMBER:

This Final Statement of Reasons dated November 7, 2007 supersedes the previous Final Statement of Reasons submitted to the Office of Administrative Law on September 25, 2007.

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9, subsection (d), the Department of Toxic Substances Control (DTSC) incorporates by reference the Initial Statement of Reasons prepared for this rulemaking.

The final regulatory text has the following non-substantive, post-hearing changes:

- 1) proposed section 69269.1 has been changed to 66269.1 in order to be consistent with the sequence of section numbers in title 22,
- 2) instances of "department" has been replaced by "Department", and
- 3) citations within subsection (b) have been corrected from "Code of California Regulations" to "California Code of Regulations."
- 4) Typographical error correction in subsection (a)(4) changed "mean" to "means"
- 5) Citation correction in subsection (b)(8) to include reference to Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (the federal act) and include reference to section 9602 of the United States Code (U.S.C). (See explanation below)
- 6) Capitalization of "standard industrial classification code" in subsection (c)

No other changes were made to the proposed regulations following the public hearing and 45-day comment period.

Explanation for Citation Correction in Subsection (b)(8)

In subsection (b)(8), DTSC is correcting the citation to section 102 of CERCLA. Proposed regulatory section 69269.1, subsection (b) (8) was intended to reference Health and Safety Code section 25316, subdivision (b), but through editing, the references to CERCLA (referred to as the federal act in section 25316 subdivision (b)) and section 9602 of the United States Code were omitted. The nonsubstantive change that DTSC is making corrects those errors. Please note that a correct citation appeared in the proposed text that was provided to the public on DTSC's website from 2006 through the entire rulemaking period. See www.dtsc.ca.gov.

Correcting the citation does not materially alter the requirements, rights responsibilities, conditions or prescriptions contained in the original text (Cal. Code Regs., tit. 1, § 40) because by statute any element, compound, mixture, solution or substances designated pursuant to section 9602 of 42 United States Code is a hazardous substance pursuant to Health and Safety Code section 25316, subdivision (b), which is a hazardous material pursuant to Health and Safety Code section 25501.

The purpose of the list of citations in subsection (b) (1) through (9) is to highlight relevant cross references necessary for defining “hazardous material.” Subsection (b) neither expands nor reduces the sources of hazardous materials encompassed within section 25205.6’s expansive definition of “hazardous material” (See, Initial Statement of Reasons, page 5).

Health and Safety Code section 25205.6, subdivision (b) states that “On or before November 1 of each year, ...the Department shall provide a schedule of codes,activities in this state related to hazardous materials, as defined in Section 25501, including, but not limited to, hazardous waste....”

Health and Safety Code section 25501, subdivision (o) states:

“... ‘Hazardous materials’ include, but are not limited to, *hazardous substances, hazardous waste*, and any material that...” (Emphasis added.)

Health and Safety Code section 25501, subdivision (q) states:

“‘Hazardous waste’ means hazardous waste, as defined by section 25115, 25117, and 25316.” (Emphasis added.)

Health and Safety Code section 25316 states:

“‘Hazardous substance’ means:

- (a)...
- (b) Any element, compound, mixture, solution, or substance designated pursuant to *Section 102 of the federal act (42 U.S.C. Sec. 9602)*.
- (c) ...”

(Emphasis added.)

LOCAL MANDATE DETERMINATION

DTSC has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the

State pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

ALTERNATIVES DETERMINATION

DTSC has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective as and less burdensome to affected private persons than the proposed regulation.

ADVERSE IMPACT ON SMALL BUSINESSES

DTSC has determined that this regulatory action will not have an adverse economic impact on business because this rulemaking does not increase or decrease the amount of the fee that would be collected from small business, or any business, compared to existing practice. Because there are no adverse impacts on small business, there are no alternatives to consider. No comments or proposed alternatives were submitted by the Office of Small Business Advocate.

ECONOMIC IMPACT ON BUSINESS DETERMINATION

DTSC has determined that the regulatory action will not have a significant adverse economic impact on business. DTSC is glad to provide the information below relative to the per-employee cost of the tax in general for companies based on their number of employees. The 2007 annual rates prescribed by existing law, when measured on a per employee basis, are:

Less than 50 employees:	no impact
50 – 74 employees:	\$3.54 to \$5.24 per year per employee
75 – 99 employees:	\$4.67 to \$6.16 per year per employee
100 – 249 employees:	\$3.70 to \$9.22 per year per employee
250 – 499 employees	\$3.96 to \$7.90 per year per employee
500 or more employees:	\$7.38 or less per year per employee

These figures illustrate that the environmental fee adds imperceptibly to a business's cost of maintaining employees, in most cases less than one hour's pay at minimum wage. Further, the cost is miniscule compared to total business expenses. Based on these figures, for a business with less than 50 employees, the impact of the environmental fee is zero. For businesses that have 50 or more employees, the impact is immeasurably small. Again, this is the impact of the

environmental fee as it is currently applied, which would not be affected by these regulations.

BUSINESS REPORT DETERMINATION

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

RESPONSE TO COMMENTS

Response to Comments of the Morning Star Company

1. Comment: The proposed regulation violates the Administrative Procedure Act (APA).

The comments of the Morning Star Company were prepared by Mr. Brian C. Leighton, who was counsel for the company in the case *Morning Star Company v. State Board of Equalization* (2006) 38 Cal. 4th 324 [42 Cal.Rptr.3d 47] (*Morning Star*). In that case, the plaintiff sought to eliminate the environmental fee by having it declared unconstitutional, or, failing that, to have the court declare that its application must be limited.

The Supreme Court found in the plaintiff's favor only on one narrow issue, in that it required that a regulation must be promulgated, though not for the reasons the plaintiff had primarily advanced. According to the court, the need for a regulation was grounded in the statute's ambiguity and consequent need for formal interpretation by a regulatory agency. The court gave no credence to the Morning Star Corporation's contention (echoed in its comments on the present rulemaking) that the applicable statutes could not, even by regulation, be interpreted as the Department of Toxic Substances (DTSC) had done. The commenter re-argues many of the same points that the court rejected in litigation.

The findings by the court demonstrate that DTSC is in full compliance with the APA in promulgating the proposed regulation. The following responses to specific comments further demonstrate this.

2. Comment: The regulation has a pre-determined outcome that ignores the holding of the Morning Star decision.

As stated in the Initial Statement of Reasons (ISOR), DTSC has carefully considered the possible interpretations of Health and Safety Code section 25205.6 (ISOR at 1-2 and 3-4.) Of the possible, allowable interpretations, DTSC has adopted the one that it has determined to most carefully conform to the intent of the Legislature, expressed in both its statutory language and in its legislative history. The Supreme Court, in its findings on this case, confirms and supports

the basis for DTSC's interpretation of the statute. Specifically, the Supreme Court observed: "...the agencies' arguments suggest a basis for the Department's conclusion that all corporations with 50 or more employees in this state 'use, generate, store, or conduct activities in this state related to hazardous materials' under section 25205.6..." (*Morning Star* at 340.) Therefore, this regulation does not ignore, but is consistent with, the findings of the court.

Had the court intended to prevent DTSC from finding that all companies with 50 or more employees handle hazardous materials, it could have said that such a conclusion was not legally tenable. However, after first taking care to note that DTSC's conclusion was "reasonable," the court added that it was not the *only* legally tenable interpretation. (*Morning Star* at 328.) This observation by the court yields two results: first, that DTSC's interpretation is legally tenable, and second, that, to be valid, it must be promulgated under the APA. The court's finding that APA compliance is required is the very reason why the current regulation package has been submitted.

The commenter claims that the Supreme Court prohibited a finding that all businesses [with 50 or more employees] are subjected to the environmental fee. However, the citations provided by the commenter do not support that statement. In fact, they do the opposite. Upon examination, the citations are uniformly supportive of the regulation package.

First, in citing *Morning Star* at page 337, the commenter quotes the court as observing that the statutes do not "strip the Department of any discretionary decision making authority... whereby...the Department must identify the types of corporations that 'uses, generates, stores, or conducts activities related to hazardous materials.'"

The language cited here by the commenter supports DTSC's (rather than the commenter's) interpretation of the court's findings. The court states that DTSC must identify corporations by type, in contrast to the commenter's stated belief that DTSC must make individualized determinations by taking a "detailed look at what each company does." Then, the court goes on to strongly emphasize the discretion that was vested in DTSC by the Legislature. DTSC endorses the Supreme Court's finding that the statute allows it discretion to determine who uses, generates, stores, or conducts activities related to hazardous materials. If DTSC did not accept the court's finding that it has this discretionary authority, it would not be promulgating this regulation package as required by the court.

It is noted that the commenter is seeking to limit the discretion granted to DTSC by the statute, and confirmed by the court, to construe the environmental fee statute and determine who handles hazardous materials. The essence of the court's decision, however, was that a regulation is required because there is more than one tenable way the statute can be construed. The commenter's

argument that his narrow reading of the statute is compulsory conflicts with the court's decision.

Second, the commenter states that DTSC ignores the Supreme Court's rejection of the argument that the relevant statutes do not compel a conclusion that all non-exempt corporations (with 50 or more employees) are required to pay the fee. The commenter's statement is incorrect, because, implicit in the court's direction to DTSC to promulgate a regulation, is agreement by the court that the statutes do not compel one particular conclusion. As the court explained, the statutes do not unambiguously compel DTSC to conclude that every business with 50 or more employees handles hazardous materials. Nor do they compel DTSC to conclude otherwise. Whichever conclusion is preferred, it must be promulgated, based on facts and reasonable statutory interpretation, as part of the discretionary decision-making authority that the Supreme Court upheld.

Next, the commenter cites language from a *Morning Star* footnote that explains only that DTSC's interpretation, to be allowable, must be promulgated by regulation. The commenter then argues, incorrectly, that the court's language is intended to preclude DTSC's construction entirely. Specifically, the commenter quotes the court's observation (*Morning Star* at 339, fn. 6) that:

“...a fair argument may be made that the cross-referenced schedule, criteria, or definition does not plainly compel the conclusion that all corporations with 50 or more employees in the (sic) state ‘use, generate, store, or conduct activities in this state related to hazardous materials’... *at least without interpretive deductions...*” (Emphasis added.)

As indicated by the aforesaid footnote language, the court did not find that section 25501 does not compel a conclusion that all corporations handle hazardous materials. Rather, the court acknowledges only that such an argument can plausibly be made, which is consistent with DTSC's position that APA compliance is necessary because there is more than one tenable interpretation. Then, this language goes further, and affirms that the implementing agency may, in fact, conclude that all corporations do handle hazardous materials, but that in doing so, it would be interpreting a statute. Hence, there is the need for a regulation.

In summary, there is nothing in the court's holding that could be read to preclude DTSC, using APA procedures, from finding that all businesses handle hazardous materials. This regulation package is, in fact, predicated on the conclusion, that DTSC is not compelled to make a finding that all businesses with 50 or more employees handle hazardous materials, but that it has discretion to make such a finding by regulation.

3. *Comment: The fact that the Supreme Court stated that the Department's decision may be "reasonable" was solely in the context of minimally defeating the Department's argument that it did not have to comply with the APA.*

This comment acknowledges that the Supreme Court found that DTSC's construction is "reasonable", but argues, in essence, that the Supreme Court did not really mean what it so plainly said. The commenter asserts that this statement was "solely in the context of minimally defeating the Department's argument that it did not have to comply with the APA." The commenter's explanation does not make sense, since there is no logic in the contention that a finding of reasonableness could have served in any way to defeat DTSC's argument, "minimally" or otherwise. The language referenced by the commenter (*Morning Star* at 328) states in full:

"The Department's interpretation of 'use, generate, store, or conduct activities in this state related to hazardous materials (§ 25205.6, subd. (a)) is reasonable, but not plainly ineluctable, meaning that DTSC cannot avail itself of the APA exception that applies if an agency's construction of a statute represents 'the only legally tenable interpretation of a provision of law.'"

The court's finding that DTSC's interpretation was reasonable, though not plainly ineluctable, is of great importance. It is well-established that the "validity of the... regulation depends upon its reasonableness." (*Pitts v. Perluss* (1962) 58 Cal. 2d 824, 834 [27 Cal.Rptr. 19].) The commenter asserts that DTSC has taken the finding of reasonableness out of context. There is nothing in the surrounding context, however, to indicate that the court did not mean exactly what it said. The remainder of the court's opinion mainly discusses how a promulgated regulation is necessary, because the statute could be construed either as DTSC has construed it, or in other legally tenable ways. At no point does the Supreme Court retreat from its initial finding about the reasonableness of DTSC's construction.

Notably, of the alternative interpretation that was advanced by the Morning Star Corporation (i.e., that each company is entitled to a determination based on the level of its activities), the Supreme Court found only that it was "not palpably unreasonable." (*Morning Star* at 338.) There is no basis on which to construe the court's findings to infer that DTSC is prohibited from adopting, through the APA process, what the court has termed a reasonable interpretation. Nor is there a basis on which to assert that DTSC is mandated to adopt an interpretation that was found by the court to be, at best, "not palpably unreasonable."

4. *Comment: The Department ignores section 25501, which defines hazardous material to mean a product, substance, or waste that poses a "significant hazard."*

The commenter states that Health and Safety Code section 25501 does not allow the regulation to define “hazardous material” to mean any substance included on one of the lists mentioned or cross-referenced in that section. There are two responses to that assertion. First, the Morning Star Corporation made that same argument before the Supreme Court, and there is nothing in the court’s findings to suggest that it accepted this argument. Second, DTSC based its interpretation on the language of section 25501. While it may not be the only “legally tenable” interpretation, DTSC, exercising the decision-making authority that was granted by the Legislature and affirmed by the Supreme Court, concludes that it is the best of the possibilities. The relevant statutory language is:

“‘Hazardous material’ means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. ‘Hazardous materials’ include, but are not limited to, hazardous substances, hazardous waste, and any material that a handler or the administering agency has a reasonable basis for believing that it would be injurious to the health and safety of persons or harmful to the environment if released into the workplace or the environment. Hazardous substances’ means any substance or chemical product for which one of the following applies:...” (Emphasis added.)

At this point, the statute goes on at length to identify several other statutes and regulations that define or make lists of the hazardous materials that subject a company to the environmental fee. This is the “confusing cross-thicket” of which the court justifiably complained. DTSC untangles some of this thicket, to the extent possible, by summarizing the sources in the proposed regulation at subsection (b).

Culling the essential words from section 25501, a hazardous material is one that poses a significant hazard to human health or safety or to the environment if it is released. But there remains an issue of what it means to be a significant hazard. The commenter appears to believe that the *manner* in which the substance is used must, in each *individual* instance, pose a major risk. However, the plain language of this statute indicates otherwise; i.e., that the Legislature did not intend for either level of usage or individual determinations to be taken into consideration in determining if a material is a hazardous material. The alternative construction is that a substance poses a significant risk if the substance itself can potentially be dangerous, and for that reason has been defined as hazardous by statute or regulation. By way of illustration, a single can of motor oil, placed in the household trash, will probably have little discernable impact on the environment. Yet, motor oil is vigorously regulated as a hazardous material, including small quantities, because motor oil, through the cumulative impact of those small quantities, poses a significant risk.

Section 25501 goes on to state that the term “hazardous materials include, but are not limited to, hazardous substances [and] hazardous waste...” Section 25501 defines hazardous waste to mean hazardous waste as defined in Health and Safety Code sections 25115, 25117 and 25316. Section 25117, in turn, by reference to section 25141 embodies the hazardous waste definitions and classification criteria set forth in DTSC’s regulations. Section 25501 also clarifies the term “hazardous substance.” A hazardous substance—i.e., a substance that poses a “significant risk”—is expressly defined as any substance that is named in one of the federal or state statutes or regulations the statute has cited. The level of usage is not a factor, unless the individual cross-referenced law makes it so. This plain wording is consistent with the proposed regulation.

It seems so apparent on the face of section 25501 that a company that handles one or more of these materials is subject to the environmental fee, that DTSC argued, during the *Morning Star* litigation, that no regulation was necessary. Nonetheless, DTSC is proceeding to implement the Supreme Court’s finding that the statute could be construed in other ways, and so APA compliance is required. That issue is no longer in dispute. DTSC rejects, however, any assertion that a construction according to its best reading of the statute’s language is somehow prohibited. As the Supreme Court noted, “the term ‘significant’ [is] sufficiently ambiguous to allow for at least some agency interpretation in interpreting it.” (*Morning Star* at 338.) With the promulgation of this regulation, especially proposed subsection (a) (3), DTSC complies with the Supreme Court’s mandate to interpret the term in a formal rulemaking. Clearly, the Supreme Court has found that DTSC is empowered, in its discretion, to construe the statute through regulation, and that the construction it has traditionally applied is reasonable and permissible.

The issue for purposes of APA compliance is whether the proposed regulation reflects a reasonable interpretation. Not only did the Supreme Court find it reasonable, but so did a unanimous 3-person court of appeal panel, a trial court judge, and, as discussed in the ISOR, at least two legislative committees. It is not credible to find as unreasonable an interpretation of the statute that has been found to be reasonable by all of these knowledgeable sources.

It is of further interest what the Supreme Court had to say about the legislative committee language that supports DTSC’s construction. The court observed: “While potentially useful in ascertaining legislative intent, these materials simply do not categorically rule out alternative interpretations of the pertinent law.” (*Morning Star* at 339.) Had the court accepted the *Morning Star* Corporation’s arguments, it would have been obliged to reject the legislative history, and most certainly would not have called it useful. Thus, while the legislative history is not sufficient to preclude the need for a promulgated regulation, it is a useful factor for DTSC to consider, and it has done so. Significantly, there is no legislative history available that supports the commenter’s construction. Rather, two

legislative committees went on the written record with a view that is diametrically opposed to the one that the commenter has asserted.

Still, the commenter claims that the Supreme Court found that the “legislature could not have concluded that simply referring to a list to see if a business used any of the substances was consistent with legislative intent.” If this is what the Supreme Court meant, it likely would have said so but, notably, it did not. Lacking any specific language to support his claim, the commenter instead cites general language from the court about how the Legislature would not have engaged in “Rube Goldberg-style rigmarole over more simple approaches.” That language, however, judging from the conclusions that precede and follow, serves only to support the need for a regulation by suggesting that the Legislature intentionally left some matters unsettled, such as what it means to handle a hazardous material and what types of companies do so, and that it wanted DTSC to exercise its “discretionary decision-making authority” (*Morning Star* at 337) to construe and refine the reach of the environmental fee.

While citing language in which the court said that the Legislature would not have engaged in “Rube Goldberg-style rigmarole,” the commenter proposes an interpretation that requires one to conclude that the Supreme Court would engage in that very form of “rigmarole.” In effect, the comment suggests that DTSC, in promulgating the regulation, should draw highly dubious inferences from the court's broad observations, while disregarding its clear findings, such as that DTSC's construction was "reasonable", that the committee language was "useful", and that the *Morning Star* Corporation's interpretation was no more than "not palpably unreasonable."

Ironically, it was DTSC that initially believed, during the course of the litigation, that the statutory language was sufficiently direct so as to limit its discretion. (As previously observed, a trial court judge and three appellate justices had exactly the same belief.) As it turned out, the Supreme Court vested DTSC with far more discretionary decision-making authority than it had been willing to presume for itself, and it now exercises that authority through the proposed regulation. The Supreme Court affirmed that DTSC has discretion to select from among possible interpretations, but insisted that it must do so through the APA process.

Next, the commenter asserts that what DTSC did was to “initially determine that it wishes to have every business pay the environmental fee (thus stuffing the coffers of the Department), and then backed into a gratuitous rationale to justify the Department’s ultimate wish list.” Initially, it is observed that what the comment describes as “stuffing the coffers of the Department” was described by the California Supreme Court as “of critical importance to the State of California.” (*Morning Star* at 342.) Moreover, DTSC’s construction is, in fact, for the reasons discussed above and in the ISOR, based on the best reading of Health and Safety Code sections 25205.6 and 25501.

5. *Comment: Universal wastes are not hazardous materials within the meaning of the environmental fee.*

The term “universal waste” is defined in section 66261.9 of the California Code of Regulations. Specifically, universal wastes are a subset of the universe of hazardous wastes, and are defined as those hazardous wastes listed in section 66261.9. This list currently includes 16 items (e.g., batteries, lamps, cathode ray tubes, aerosol cans, electronic devices, and various mercury-containing devices). The items on this list are hazardous waste, and therefore universal waste, if: (1) they exhibit one or more hazardous waste characteristics set forth in DTSC’s regulations; and (2) they have become a “waste” as defined in DTSC’s regulations. Since universal wastes by definition are hazardous wastes, they are also incorporated into the definition in section 25501 of hazardous materials. For the reasons detailed below, DTSC has reasonably determined that these items even while still in use, or in storage prior to or in lieu of usage, are hazardous materials. However, it should also be pointed out that, even without regard to whether these items are hazardous materials prior to becoming wastes, any business that uses these items will invariably discard them at some point. The business will at that point be managing a hazardous waste, and thus, without question, will be conducting an activity related to hazardous materials.

With respect to whether these items are hazardous materials, the commenter states, “The mere presence of lights, batteries, computers, etc. in a business is obviously not what the legislature intended for a requirement to pay the environmental fee, otherwise, ‘it could have simply said so, and said so simply.’” A similar comment was made at the public hearing and included references to “white out” and cell phones, interior lamps and lamps in parking lots. That comment asserted that if the legislature really intended for the fee to apply to businesses that use these items, the legislature would have amended the statute to say exactly that when the legislature amended the statute to include all businesses, except those exempt. The comment at the hearing also asserted that DTSC has not complied with the APA.

In response, it may be observed that, if either the Legislature or the Supreme Court had intended to prohibit such an interpretation, they could have said that simply as well. In fact, the Supreme Court affirmed the opposite, allowing for such an interpretation so long as it is promulgated by regulation. In a statement that sums up DTSC’s own position in this rulemaking, the court stated:

“The Department has determined, first, that the term ‘hazardous materials’ encompasses common items such as correction fluid, toner, certain types of pens and pencils, fluorescent lights, and materials used in computers and telephones; and second, that all corporations with 50 or more employees in this state ‘use, generate, store, or conduct activities...related to’ these materials. As both indicia of a regulation exist, *the Department*

should have complied with the APA, unless an exception applies.”
(Emphasis added.) (*Morning Star* at 334.)

Thus, the court did not disavow the finding that universal wastes are hazardous materials, but said rather that a finding of this nature is a regulation and therefore requires promulgation under the APA. The court went on to underscore DTSC’s discretionary authority to make such an interpretation, by pointing out:

“The Department, and not this court, is in the best position to determine whether and in what circumstances given materials satisfy these standards. To transfer to the courts what are properly agency responsibilities as to these and similar matters would frustrate the intent of the Legislature in enacting the APA.” (*Morning Star* at 341.)

Consistent with the court’s decision, the Legislature left it to the discretion of the Department, within boundaries set by section 25501, to determine whether such items should be subject to the environmental fee. In fact, products that are in common usage, including electronic devices and motor vehicles, do pose a significant threat to the environment if they are not handled properly.

Finally, the commenter asserts that before DTSC imposes the environmental fee, it must take a “detailed look at what each company does, not a look generally at what similar types of companies use”, thus demanding an individualized finding for each of the thousands of California companies. There are three responses to this. First, Health and Safety Code section 25205.6 does not require that, and neither did the Supreme Court. Second, what 25205.6 does require is that the determination be based on “types” of organizations, not individual organizations. And third, DTSC does not believe the Legislature intended to establish a tax program that would require the significant expenditure of taxpayer dollars that would be required for the thousands of individual judgments about whether usage is “significant” for the sake of a tax that may be as low as \$200. Nor does it believe the Legislature intended to burden businesses with intrusive reporting requirements. The associated reporting requirements alone could exceed a business’s cost of paying the fee.

With regard to the assertion at the public hearing that DTSC is not in compliance with the APA, our response is that this rulemaking package demonstrates that DTSC is in full compliance with the APA in promulgating the proposed regulation.

6. Comment: Scientific peer review is required.

The comment asserts that scientific peer review is required because of DTSC’s conclusion that various common products are hazardous materials. The comment states: “The assumptions were not presented to scientific peer review for accuracy.” That statement is incorrect. A rigorous peer review occurs whenever a substance is added to a regulatory list of substances that must by

law be treated as hazardous, or when regulatory criteria for classifying a substance as hazardous are adopted or modified. The regulatory lists that have been deemed as defining a “hazardous material” by Health and Safety Code section 25501 underwent peer review when originally adopted or modified, so there is no requirement or need to repeat that peer review process. In deciding whether a substance is hazardous, the relevant question, according to section 25501, is whether it is described within one of the federal or state statutes or regulations that make up the definition of “hazardous material”. This is a statutory compliance action, not a scientific determination, and does not require peer review.

Indeed, throughout the Hazardous Waste Control Law (Health & Saf. Code, § 25100 et seq.) and the Hazardous Substance Account Act (Health & Saf. Code, § 25300 et seq.), there are numerous statutory references to “hazardous wastes”, “hazardous substances”, or “hazardous materials.” The extensive network of regulations that identify hazardous materials exists precisely so that peer review needs to be done only when a substance is added to a regulation, and does not have to be repeated in order to enforce each individual statute. The commenter’s proposal would render the lists identified by section 25501 worthless by requiring a new determination of hazardous characteristics for every substance that forms a basis for a determination that an industry type uses hazardous materials. There is no suggestion in sections 25205.6 or 25501 that the Legislature intended such a cumbersome, costly, and unnecessary result. Such a result would require the diversion of a sizable amount of funds earmarked for the preservation of human health and the environment, to be used, instead, to duplicate scientific findings that are already well-established. It was to avoid such a wasteful result that the Legislature found that a substance is “hazardous” if it has already been deemed to be such by section 25501.

7. Comment: The regulation will have a fiscal impact.

The rulemaking will have no impact on state revenue or expenditures, refer to email concurrence from Department of Finance in tab I of this administrative record. Promulgating the regulation in its current form will mean that state revenues for the purpose of environmental safety will generally continue as they have been for the past several years, neither increasing nor decreasing as a result of the regulation. Expanding the application of the environmental fee would have meant an increase in state revenue; limiting the application would have meant a decrease. Keeping it the same, as the regulation does, means that it is revenue-neutral.

During oral testimony at the public hearing, the commenter clarified what he meant by his statement that the rulemaking will impact state revenue. He observed that, because of the recent amendment to Health and Safety Code section 25205.6, the assessments due in 2008 will, for the first time, encompass businesses that are not corporations. Since the prior amount collected from this

group was zero, the comment suggests that there is a fiscal impact in the form of the increased revenue that will be generated from the payments paid by non-corporate businesses. The fiscal impact caused by the expansion of the environmental fee, however, will not be the result of the proposed regulation. The impact is the direct result of the bill enacted by the Legislature (Stats. 2006, ch. 77 (Assem. Bill No.1803 (2005-2006 Reg. Sess.), effective July 18, 2006).

In view of the interest the commenter has expressed, DTSC is glad to provide the following general fiscal information relative to the environmental fee. The environmental fee provides approximate annual revenues of \$35 million. These funds are deposited into the Toxic Substances Control Account (TSCA) and used primarily for pollution protection and remediation of contaminated soil and groundwater. As DTSC is currently under a court order to promulgate a regulation, failure to promulgate this regulation could, in the worst case, ultimately lead to invalidation of the environmental fee by the court, potentially eliminating the entire revenue source. While the commenter has suggested that General Fund revenues could compensate for the difference, the General Fund is already heavily encumbered and subject to changing political pressures. It is highly unlikely that the Legislature would be willing to provide General Fund monies to replace the money that is now generated by the environmental fee to protect the health and safety of Californians and our environment.

It is reiterated that, as compared to existing law and established practice, the fiscal impact of the regulation is zero.

8. Comment: The regulation has an impact on small businesses.

The commenter disputes DTSC's finding that there is no impact on small businesses because he asserts, without support, that a business with 50 employees is still "small." The commenter asks where DTSC gets its definition of a "small business".

In the 45-day Public Notice (refer to tab A of the administrative record), DTSC made a preliminary, good faith determination that there is no impact on small business and stated that business organizations with fewer than 50 employees are not subject to the environmental fee. Health and Safety Code 25205.6, subdivision (c)(1) provides that the lowest increment for being subject to the environmental fee is 50 to 75 employees. DTSC recognizes that for purposes of the Administrative Procedures Act small business is defined by Government Code section 11342.610. Using this definition, DTSC has made a final determination that there is no impact on small business because this rulemaking does not increase or decrease the amount of the fee that would be collected from small business, or any business, compared to existing practice. See also response to preceding comment.

Nonetheless, DTSC is glad to provide the information below relative to the per-employee cost of the tax in general for companies based on their number of employees. The 2007 annual rates prescribed by existing law, when measured on a per employee basis, are:

Less than 50 employees: no impact

50 – 74 employees: \$3.54 to \$5.24 per year per employee

75 – 99 employees: \$4.67 to \$6.16 per year per employee

100 – 249 employees: \$3.70 to \$9.22 per year per employee

250 – 499 employees \$3.96 to \$7.90 per year per employee

500 or more employees: \$7.38 or less per year per employee

These figures illustrate that the environmental fee adds imperceptibly to a business's cost of maintaining employees, in most cases less than one hour's pay at minimum wage. Further, the cost is miniscule compared to total business expenses. Based on these figures, for a business with less than 50 employees, the impact of the environmental fee is zero. For businesses that are "small" as defined in Government Code section 11342.610, but have 50 or more employees, the impact is immeasurably small. Again, this is the impact of the environmental fee as it is currently applied, which would not be affected by these regulations.

It should also be noted that, by rejecting the commenter's suggestion that each company must receive an individualized determination, the regulation saves the companies the expense, in an unknown amount, of complying with burdensome reporting requirements.

9. Comment (at the public hearing): DTSC is treating the environmental fee as a tax rather than a fee.

At the public hearing, the Morning Star Corporation augmented its comments by alleging that DTSC is treating the environmental fee as a tax. This issue is addressed in the responses to the comments of the California League of Food Processors below. See response to Comment 17.

10. Comment: DTSC has not considered alternatives.

The comment alleges that DTSC has not considered whether there are alternatives that would be more effective in carrying out the purpose of the statute. The alternatives are discussed in detail on pages 3 and 4 of the ISOR.

Notwithstanding that discussion, the commenter insists that alternatives were not considered because the “proposed regulations are consistent with what it has been saying for the last 10 years.” Actually, the regulations are consistent with what has been done by the Board of Equalization for 19 years. The commenter’s premise appears to be that DTSC cannot be deemed to have considered alternatives unless it revises its construction of the environmental fee law, preferably to a construction that is to the commenter’s liking. Such a premise is without merit.

In summation, DTSC has selected the statutory interpretation that it has determined to best comport with the language of Health and Safety Code section 25205.6 and 25501. The Senate Committee on Environmental Quality had this interpretation in mind when it described the fee as “a broad-based fee levied on all California corporations.” (Analysis of Sen. Bill No. 660 (1997-1998 Reg. Sess.), Sept. 15, 2007, p. 3.) We now know from the Supreme Court’s findings that this interpretation is not compulsory, but it is allowable in DTSC’s discretion. DTSC, in full compliance with the APA and the Supreme Court’s decision, has selected that interpretation.

Response to Comments of The California League of Food Processors

DTSC thanks the League for its interest in the regulation, and offers the following responses.

11. Comment: DTSC contends that its proposal is the only tenable interpretation of the law.

DTSC has never made this contention in the context of the current rulemaking. In harmony with the Supreme Court’s decision, DTSC’s position is that the proposed regulation reflects one legally tenable interpretation, but not the only one. As explained in the responses to comments from the Morning Star Company, the interpretation selected by DTSC is the interpretation that DTSC has determined to best comport with the intent of the Legislature, as expressed in both the governing statutes and underlying legislative history.

12. Comment: There is no mention of a 50-employee threshold in the legislation.

Health and Safety Code section 25205.6, subdivision (c)(1), provides that the lowest increment for being subject to the environmental fee is 50 to 75 employees.

13. Comment: There is no apparent correlation with the number of employees working at a firm and whether or not they generate any significant amount of hazardous waste.

The Legislature required that the environmental fee must be based on the number of employees (Health & Saf. Code, §25205.6). This is one of the reasons why the assessment is not based on the amount of waste that is produced. It may be that the commenter would prefer that the environmental fee would resemble the generator fee (Health & Saf. Code, §25205.5) or the disposal fee (Health & Saf. Code, § 25174.1), both of which are expressly based on the volume of waste. Had the Legislature intended that result, it would have established increments of weight or volume, rather than increments of employee numbers. That change could come about only through the legislative process.

14. Comment: DTSC should diligently review the Standard Industrial Classification (SIC) Codes to ascertain what specific types of firms actually handle hazardous materials.

DTSC has done this, and determined that there is no type of firm that does not handle hazardous materials. The ISOR, at page 7, discusses DTSC's review of the SIC Code data.

15. Comment: Peer review is required.

This issue is discussed in the responses to the Morning Star Company comments above. See response to Comment 6.

16. Comment: The fee should distinguish between companies with large numbers of seasonal employees and companies that primarily have year-round employees.

DTSC does not have authority to make this distinction. The Legislature has set the threshold for being considered an employee at 500 hours per year. (Health & Saf. Code, § 25205.6, subd. (e).) Seasonal employees may be excluded, but only if they work less than 500 hours in the calendar year. Also, under the regulation's meaning of "employee," seasonal workers (and other workers) who are leased are the employees of the leasing firm that leases them out and lawfully reports them to the Employment Development Department.

17. Comment: The regulation confuses a fee with a tax.

The assessment in question is a tax. The regulation refers to it as a "fee", as does this document, only for consistency with the terminology of Health and Safety Code section 25205.6. The nomenclature in that section has little, if any, bearing on the matter. It is well-established that:

“The nomenclature is of minor importance, for the courts must look beyond the mere title of the bare legislative assertion of the tax’s designation and determine the real object, purpose, and result of the enactment.” (*Sacramento Municipal Utility District v. County of Sonoma* (1991) 235 Cal. App.3d 726, 727 [1 Cal.Rptr.2d 99] citing *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 105 [252 Cal.Rptr. 99].)

Legislative Counsel has determined numerous times that the environmental fee, its name notwithstanding, is a tax. Most recently, in relation to the expansion of the fee to non-corporate businesses, Legislative Counsel stated:

“This bill...would require the department to provide the board with a schedule of codes that consists of the types of organizations, as defined, that use, generate, store, or conduct activities in this state related to hazardous materials, as defined. The bill would impose the tax upon organizations that are not subject to the tax under existing law, thereby imposing a tax for purposes of Article XIII A of the California Constitution.” (Legis. Counsel’s Dig., Assem. Bill No. 1803 (2005-2006 Reg. Sess.) Stats. 2006 c. 77.)

Volumes may be written about the distinction between a tax and a fee, and a detailed summary of the numerous cases that have addressed this subject would be beyond the scope of this rulemaking. In general, however, an assessment is a tax if it may be imposed “upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not directly responsible for the condition to be remedied...” (*Leslie’s Pool Mart, Inc. v. Department of Food and Agriculture* (1990) 223 Cal. App.3d 1524, 1543 [273 Cal.Rptr. 373]) By this established test, the environmental fee must be considered a tax, for the following reason.

The environmental fee is deposited into the TSCA and used to fund the hazardous substances remediation program authorized by the Hazardous Substance Account Act (Health & Saf. Code, § 25300 et seq.) and DTSC’s pollution prevention program. All companies use hazardous materials to some degree. Very few, however, directly benefit from, or create a direct burden to, the TSCA, except in the broadest possible sense that all Californians benefit from cleaner soil and groundwater. Therefore, DTSC must concur with Legislative Counsel that Health and Safety Code section 25205.6 imposes a tax.

In any case, it is unclear why the commenter believes it is relevant whether the regulation treats the assessment as a fee or a tax. It may be that the commenter believes that, if the assessment is treated as a fee, the regulation would correlate its size to varying amounts of usage. DTSC is not authorized to do this. Even if one assumes that the regulation established some minimum threshold of usage to trigger the assessment, then, once that threshold had been reached, the assessment would still need to be the same regardless of the quantity of

hazardous materials. The Legislature simply did not leave room, by any rational interpretation, for the assessment to fluctuate up or down with the volume of toxic substances. When it wants to impose a fee based on volume, the Legislature does so plainly, as it did with the generator and disposal fees. It required instead, in the manner of a tax, that the environmental fee assessment must be based on the number of employees. There is no other lawful way that the assessment may be calculated.

18. Comment: "More appropriate" ways to raise the necessary funds should be explored.

The substantial revisions suggested by this comment would require legislative changes, and thus are outside the scope of this rulemaking.

In regard to the commenter's suggestion for a "polluter pays" system, an extensive program for that purpose is already in effect. There are other statutes that require persons who spill hazardous materials to pay for their cleanup or provide cost recovery to the agency that oversees the cleanup. (See, e.g., Health & Saf. Code §§ 25187, subd. (b), and 25360.) Section 25205.6, however, serves a different need. Unfortunately, for the indefinite future, there will be parcels of contaminated land for which the original polluter has disappeared, is unknown, or is insolvent, often called "orphan sites." For these parcels, the Legislature has decided that a broad-based tax would serve to protect California's environment. The Legislature has also decided that this broad-based tax should be used to fund DTSC's pollution prevention activities, because these activities, like restoration of abandoned contaminated land, provide a general societal benefit to all of California.

19. Comment: A comment at the public hearing was a recommendation that in the future DTSC should a) start over again; b) reinstate the regulatory process; c) review legislative intent again; d) peer review the scientific findings; e) analyze economic impacts, including those on small businesses, and f) hold further workshops with hopefully more than two (2) stakeholders in attendance.

Comment noted. This comment is not specifically directed at the current regulatory action and DTSC is not obligated to provide a response. (See Government Code §11346.9(a)(3).) Nonetheless, DTSC notes that it followed all requirements of the APA for the current regulatory action. Further, DTSC responded to several of these topics in the context of this current regulatory action. With regard to peer review, please see DTSC's Responses to Comments 6 and 15 above, incorporated herein by reference. With regard to economic impacts on small businesses, please see Response to Comment 8 above, incorporated herein by reference. With regard to legislative intent, please see Responses to Comments 10 and 11 above, incorporated herein by reference.