

**Final Statement of Reasons
Including Summary of Comments and Agency Responses**

**PRIVATE SITE MANAGEMENT PERFORMANCE STANDARDS
Department Reference Number: R-96-01**

I. GENERAL

Local Mandate Determination:

The Department of Toxic Substances Control (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.

DTSC has determined that this regulatory action will not have a significant adverse economic impact on business.

Alternatives Considered:

DTSC has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective or less burdensome to affected private persons than the action taken by DTSC.

A public hearing was held on July 22, 2002, at the end of the 45-day comment period following publication of the notice of proposed regulations. One commenter presented comments at the public hearing and two written comments were submitted during the public comment period. Additionally, a 15-day notice was mailed out to provide interested persons an opportunity to comment concerning changes in the regulations based on statutory changes. No comments were received regarding the 15-day notice.

II. UPDATE OF INFORMATION CONTAINED IN THE INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons released as part of the 45-day notice and hearing process concerning the Private Site Management Performance Standards is incorporated by reference, with the updated information as indicated below:

The following paragraphs provide additional explanation and/or clarification of the necessity for the section of the regulations:

Section 69000. Purpose: This section is necessary to explain that the purpose of these proposed regulations is to establish minimum standards of performance for activities and conduct of private site managers and members of private site management teams.

Section 69000.5. Definitions: This section provides definitions that are applicable to the Private Site Management Program. This is a voluntary program that allows a new class of professionals to conduct site investigations and removal and remedial actions at low-threat sites. These definitions are necessary for the operation of this program and for assuring that private site managers and private site management team members meet the minimum performance requirements.

- (a) The term “Administrative Record” refers to all of the documents that were relied on or considered when a private site manager or members of the private site management team prepared a removal action workplan or a remedial action plan pursuant to Health and Safety Code section 25395.5. Additionally, Health and Safety Code section 25395.11 requires that private site managers and members of a private site management team comply with the provisions of chapter 6.8 or chapter 6.85 of the Health and Safety Code, which require the creation of an administrative record. The requirement to prepare an administrative record is in Health and Safety Code section 25357.5, which limits judicial review to the administrative record of any issues concerning the adequacy of any response action taken or ordered by DTSC. The administrative record is also used as a way for the public to review and participate in the selection of the response action by providing access to the documents and information that were considered or relied on in the decision-making process.
- (b) The term “Administrative Record List” means the list of documents that must be maintained by the private site manager to specify the contents of the administrative record. The administrative record list is the method for listing those documents that were considered in the remedy selection document and including the list with the removal action workplan or the remedial action plan.
- (c) The term “Application Package” refers to all documentation that is part of applying for this program. This definition is necessary so that applicants understand there is not a single application document.
- (d) The term “Article 8” refers to article 8, of chapter 6.8 of division 20 of the Health and Safety Code.
- (e) The term “CEQA” means the California Environmental Quality Act in the Public Resources Code sections 21000-21178, and the California Code of Regulations, title 14, sections 15000-15387.

- (f) The terms “chapter 6.5,” “chapter 6.66.,” “chapter 6.8,” and “chapter 6.85” mean chapters 6.5, 6.66, 6.8 and 6.85 respectively, of division 20 of the Health and Safety Code.
- (g) The term “Department” is defined so anyone reading the regulations understands it only refers to the Department of Toxic Substances Control.
- (h) The term “EIR” is defined so the acronym for the environmental impact report is understood by those reading the regulations.
- (i) The term “FS” means feasibility study.
- (j) The term “Independent” is defined to clarify the requirements of subsection (d) of section 25395.1 of the Health and Safety Code.
- (k) The term “Initial Study” is defined as it pertains to these regulations.
- (l) The term “Land Use Controls” is necessary to describe any easement, covenant, restriction, or servitude or combination, as appropriate, that prohibits certain land uses or restricts certain activities on a site, signed by DTSC and the landowner and recorded with the county where the land is located. All land use controls shall run with the land pursuant to Civil Code section 1471 and sections 25202.5, or 25222.1, or 25355.5 subsection (a)(1)(C), or section 25398.7 of the Health and Safety Code and shall continue in perpetuity unless modified or terminated in accordance with applicable law.
- (m) The term “Material Deviation” is defined so that DTSC can determine if a substantial or significant change may impact a remedy selected in a removal action workplan or remedial action plan, and if the change would require a public notice and comment period to allow the affected community to review and comment on the change. Even though a site is accepted into the Private Site Management Program, DTSC must be able to take or require that certain actions be taken to prevent a hazardous substance release from endangering public health, welfare, or the environment. In addition, the term “Material Deviation” is defined to clarify that Health and Safety Code section 25395.13 prohibits private site managers and members of a private site management team from making materially false or inaccurate statements in any application, record, report, certification, plan, design, or statement that the private site manager or the team member submits to DTSC.
- ~~(n) The term “OEHHA” is necessary to clarify that the Office of Environmental Health Hazard Assessment (OEHHA) is the State agency that has adopted regulations that establish the registration criteria for the Registered Environmental Assessor-Class II (REA II). DTSC is required by Health and Safety Code section 25395.12 to report any audit findings to OEHHA whenever a private site manager or private~~

~~site management team fails to meet the minimum performance standards.~~ This definition is being deleted due to a change in statute, Senate Bill 1011 (Stats. 2002, ch. 626). Effective January 1, 2003, DTSC will be the agency responsible for Registered Environmental Assessor Class IIs.

- (n) The term "O&M" refers to operation and maintenance work to be done following remediation action at a site.
- (o) The term "PEA" means preliminary environmental assessment.
- (p) The term "Private Site Management Program" is defined to help those reading the regulations to understand the scope of the program.
- (q) The term "Private Site Management Program Agreement" refers to the specific agreement that would be developed when a project proponent enters the Private Site Management Program.
- (r) The term "Private Site Management Team" is defined to clarify the requirements in subsection (b) of section 25395.1 of the Health and Safety Code.
- (s) The term "private site manager" means the individual who is overseeing a site cleanup and is a Registered Environmental Assessor - Class II. It has been determined that the Class II level Assessor has the needed experience to function without close oversight by DTSC.
- (t) The term "project proponent" is defined to clarify that someone other than the site owner or the person responsible for a hazardous substance release may be eligible to enter into a Private Site Management Program agreement as a project proponent.
- (u) The term "RAP" is an acronym for the remedial action plan required in accordance with all requirements of chapter 6.8 or chapter 6.85 for sites selected.
- (v) The term "RAW" is an acronym for the removal action workplan.
- (w) "Reasonable Costs" refers to costs incurred by DTSC in order to carry out work in accordance with chapters 6.5, 6.66, 6.8, and 6.85, division 20 of the Health and Safety Code.
- (x) The term "RI" is an acronym for remedial investigation.

Section 69001. Performance Standards: This section establishes the minimum requirements that private site managers must follow when conducting all activities pursuant to the Private Site Management Program. Private site managers are responsible for selecting private site management team members who possess the

necessary skills, work experience licenses, and appropriate insurance for performing site cleanup activities as specified in Health and Safety Code section 25395.4.

Private site managers and private site management team members are required to follow all applicable federal, State, and local laws and regulations in order to ensure those site cleanup actions are protective of public health and safety and the environment. Private site managers and private site management team members are required to identify and obtain relevant site information, reports, and data that are necessary for determining site conditions and the level of community concern regarding the cleanup actions. These provisions are necessary to ensure that response actions are performed adequately and are consistent with the law.

Subsections (c)(1) through (7) require the private site manager and private site management team members to prepare every opinion, determination, and decision related to the assessment of a hazardous substance release or potential release by describing the methods, data, and risk assessments that were used to support the findings, determinations, or decisions rendered in any reports, data, or documentation that is submitted to DTSC for review and approval. Subsection (c)(4) references an advisory list of State and federal technical guidance documents and manuals that the Department relies upon when preparing reports, plans, designs, or other documentation during the investigation and cleanup of a site. A description of the advisory list is in section 69008 of the regulations. Subsection (c)(5) refers to the private site manager or private site management team preparing site investigation or cleanup reports, plans, designs or other documentation using appropriate formatting similar to the Department-prepared documents to the extent feasible. This provision will allow the Department to quickly review submitted documentation within the timeframes provided by this Program. Private site managers and team members are required to disclose facts, data, and qualifications, that may support or lead to an opinion which is significantly different from the one expressed in the document. All documentation must bear the signature, and if appropriate, the stamp of the private site manager and the date the document was signed. These standards are essential because Health and Safety Code section 25395.8 requires DTSC to review and approve or reject all reports or other documentation or provide a written notice describing the deficiencies within a specified time frame. DTSC must be able to make a determination whether the proposed cleanup action is protective of public health and safety and the environment and understanding all site conditions and the private site manager's decision-making process is necessary to make this determination.

In addition, subsection (d) requires private site managers and private site management team members to immediately notify the project proponent when site conditions or an incident poses an imminent or substantial endangerment to the public health, welfare, or the environment. This notification requirement is necessary to ensure that DTSC may take appropriate action to address an imminent or substantial endangerment that may pose a threat to public health and safety and the environment. Subsection (e) is needed to inform the public and/or applicants that prohibitions are listed in Health and Safety Code section 25395.13.

Section 69002. Preliminary Endangerment Assessment Report: This section is necessary to establish a process for a private site manager to submit a preliminary endangerment assessment (PEA) report to DTSC along with a determination that no further action is required at the site, if appropriate. This regulation is necessary to implement the statutory requirement that the private site manager perform investigations using PEA procedures, which have been approved by DTSC and to incorporate by reference DTSC's PEA Guidance Manual. The PEA Guidance Manual was adopted and approved by DTSC in January 1994, and reprinted in 1999. This regulation also specifies that the private site manager will either agree to pay DTSC's costs for reviewing the PEA report and other documentation or provide a signed statement from the project proponent indicating that the project proponent agrees to pay DTSC's costs. This regulation is necessary to implement Health and Safety Code section 25395.14 that requires the project proponent to fully reimburse DTSC for all reasonable costs incurred by DTSC, including costs associated with the site investigation, cleanup actions, certification, and audit process at the site.

Section 69003. Private Site Management Program Application Package: This section would establish the process for submitting an Application Package to include the cleanup of a low-threat site in DTSC's Private Site Management Program. It includes the types of reports, documentation, and information that should be provided or attached to the application regarding professional qualifications of private site management team members, appropriate insurance information, and sufficient information on site conditions.

These regulations are necessary because DTSC must be provided sufficient information to determine if a site is eligible for participation in the Private Site Management Program and if the private site manager has selected qualified team members who possess the statutorily required experience or training to address the conditions at the site, as well as if they possess appropriate insurance.

DTSC must also be provided sufficient information to determine if the site conditions or the proposed cleanup actions may pose a significant environmental impact which would trigger the requirement to prepare an environmental impact report (EIR) under the provisions of the California Environmental Quality Act (CEQA). A site will not automatically be disqualified for participation in this program if an EIR is required. If DTSC determines that an EIR is required because the cleanup actions will result in a significant environmental impact or exposure to humans, DTSC will rescind its approval for a site to participate in the Private Site Management Program. All sites participating in the Private Site Management Program must comply with CEQA requirements as specified in Health and Safety Code section 25395.11. Subsection (g) indicates that certain types of sites that pose or may pose a greater risk to public health and the environment are not eligible to participate in this program.

Subsection 69003 (e) of the proposed regulations is not subject to the Permit Reform Act requirements regarding timeframes for the Department's review and response to

submittal of the Application Package because site investigations and response actions on sites that would be eligible under the Private Site Management Program (Program) may be undertaken by persons independent of the Program. Proponents may choose to conduct these activities under any one of a number of other site remediation programs, including programs of other State or local agencies, or without formal regulatory oversight. If a proponent chooses not to conduct activities under the Program, the proponent does not receive a Program certificate of completion and foregoes other advantages of the Program.

Section 69004. Insurance Requirements: This section would establish minimum insurance requirements for private site managers. DTSC consulted with the Department of General Services, Office of Risk and Insurance Management to determine what would constitute appropriate insurance as required by Health and Safety Code section 25395.10, subsection (b). This section requires that all private site management insurance policies contain a statement that insurance coverage will not be canceled without providing 120 days prior written notice to the project proponent and DTSC. This is required because if the private site manager or members of the private site management team fail to keep the required insurance coverage, DTSC, as well as the project proponent, must have a way to know that appropriate insurance is not being maintained. DTSC may terminate the private site manager's participation in the Private Site Management Program if this occurs. The types of coverage and monetary limits established by this section are very similar to the requirements that the Department of General Services, Office of Risk and Insurance Management requires from its contractors who provide similar services to those of a private site manager or who provides consulting services or who performs cleanup and remediation services involving hazardous substances or wastes. Section 69004, subsection (h) is provided as an additional protection for the project proponent if new site conditions are identified or if site conditions change that may require more expensive cleanup measures to be taken. Additionally, if the site requires operation and maintenance, project proponents are to provide the required financial assurance pursuant to section 25355.2 of the Health and Safety Code.

Subsection (i) allows the private site manager or team member to provide evidence to DTSC that demonstrates that a contractor/subcontractor is already carrying similar insurance coverage in compliance with the requirements of this section. If DTSC concurs, the private site manager or team member may be allowed to provide only the portion of the insurance that is not being maintained by the contractor/subcontractor.

Section 69005. Compliance with the California Environmental Quality Act (CEQA): This section is necessary to provide specific requirements to assure that all site cleanup actions comply with the California Environmental Quality Act (CEQA). This section is necessary to provide the various processes that DTSC will follow based on site specific conditions.

Subsection (a) is necessary to specify DTSC's role and responsibility to review documentation in the event that the DTSC is not the lead agency.

Subsection (b) is necessary to specify the types of documents that must be submitted to DTSC when the private site management team determines a removal action is required. This subsection provides information related to DTSC's review process.

Subsection (c) is necessary to establish DTSC's review process when DTSC is the lead agency. As the lead agency, DTSC must make a determination that the CEQA documentation is technically complete.

Subsection (d) is necessary to specify the role of the private site management team in submitting reports and documentation when the team determines the site requires a RAP.

Subsection (e) addresses the types of determinations DTSC can make as the lead agency and the basis for making a determination.

Subsection (f) is necessary to specify the process DTSC will follow if it determines that the CEQA documentation is insufficient.

Section 69006. Project Proponent: This section is necessary to establish minimum requirements for Project Proponents who choose to participate in DTSC's Private Site Management Program. These requirements include: providing private site managers with all site information, entering into an agreement with DTSC, notifying DTSC of any imminent or substantial endangerment conditions at the site, reimbursing DTSC for its costs, and cooperating with DTSC's audit efforts. It also emphasizes the requirement for remaining "Independent" as defined by section 69000.5, subsection (j). As a voluntary program, these minimum requirements ensure that the private site manager, members of the private site management team, the project proponent, and in turn DTSC, comply with the requirements of the Private Site Management Program and the Private Site Management Act. They are designed to ensure that DTSC and the private site manager have all necessary information about the site and that the site is appropriately remediated.

Section 69007. Private Site Management Program Agreement: To participate in the Private Site Management Program, all project proponents must enter into an agreement with DTSC that clearly identifies the procedures, requirements, costs and other associated components of the program as required by the Health and Safety Code. This section would require DTSC to confer with the project proponent and private site manager to facilitate the private site management process. This section would also establish the requirement for DTSC to provide an initial estimate of DTSC's costs and anticipated hours to be spent by DTSC. Due to the voluntary nature of this program, the project proponent may choose to either continue to participate in the Private Site Management Program after receipt of the estimate or withdraw from the Program. In addition, the regulations are necessary to ensure that the project proponent is adequately informed of the potential costs associated with the Private Site Management Program.

Subsection (c) is necessary to inform the project proponent that there is an option to request more than minimal DTSC oversight of the site investigation and cleanup actions.

Subsection (d) is necessary to clearly indicate that the Private Site Management Program is a voluntary program. It clarifies that participation in this Program can be terminated by providing written notice to DTSC.

Subsection (e) is necessary to clearly indicate that the Private Site Management Program is strictly voluntary and DTSC may also terminate the agreement by providing written notice as specified in the regulations.

Section 69008. Guidance Documents: This section is necessary to establish the procedures and conditions under which DTSC will provide an advisory list of technical guidance documents and manuals to private site managers. These guidance documents are advisory only.

Section 69009. Change in Site Conditions or Site Information: This section establishes the requirements for private site managers and private site management team members to notify DTSC regarding changes in site conditions or site information which is materially different from the facts, data or information used at the time a preliminary endangerment assessment report, removal action workplan, remedial action plan, remedial design, or certification request was prepared. Subsection (a) requires written notification to DTSC and the project proponent within seven days if physical conditions of the site change or if a change in physical conditions becomes known to the private site manager. This notification is necessary in cases where DTSC may need to require additional response actions to be performed at a private site management site. The seven day notification is based on a provision in DTSC's enforcement orders which specifies that the Responsible Party (RP) or the RP's project coordinator is required to furnish a written report to DTSC within seven days setting forth the events which occurred and the immediate measures taken in the response action. Every site approved for participation in the Private Site Management Program must meet some specific criteria, and if the conditions or site information change, it may change the criteria and therefore the appropriateness of the site to remain in the program. If at any time during the cleanup process any of the conditions or information regarding the site changes, DTSC must be able to determine whether or not the site still qualifies for participation in the Private Site Management Program. The notification requirements in this section are necessary to ensure that only low-risk sites remain in the program.

Section 69010. Material Deviation from Department Approved Report, Work Plan, or Remedial Design: This section would establish notification procedures to be followed if the project proponent, private site manager or private site management team member knows or has reason to believe that an action or decision will materially deviate from a DTSC approved preliminary endangerment assessment report, removal action workplan, remedial action plan, or remedial design. Subsection (a) requires written notification to DTSC and the project proponent within seven days if physical conditions

of the site change or if a change in physical conditions becomes known to the private site manager. This notification is necessary in cases where DTSC may need to require additional response actions to be performed at a private site management site. The seven day notification is based on a provision in DTSC's enforcement orders which specify that the RP or the RP's project coordinator is required to furnish a written report to DTSC within seven days setting forth the events which occurred and the immediate measures taken in the response action. With limited oversight from the State, it is imperative that all project proponents, private site managers, and members of a private site management team take cleanup actions in compliance with DTSC's approval as specified in Health and Safety Code section 25395.8, subsection (a). This would include the preliminary endangerment assessment report, removal action workplan, remedial action plan or remedial design. This notification requirement is necessary to ensure that all appropriate cleanup actions are taken to address any threats to public health and safety and the environment, and provide the public with an opportunity to review and comment on the proposed changes.

Section 69011. Department Review and Approval of Submittals by the Private Site Manager or Private Site Management Team: This section is necessary to establish procedures and time frames that DTSC will use when reviewing preliminary endangerment assessment reports, removal action workplans, and remedial action plans, as well as final remedial designs and certification requests. If DTSC rejects a report or other documentation, it must provide a written report describing the deficiencies and the corrective actions necessary to resolve the problems. Health and Safety Code section 25395.8 specifies that DTSC will conduct timely reviews of all documentation, reports, and designs submitted by the private site manager and members of the private site management team.

Subsection (a) establishes that when a PEA report is submitted and the private site manager is certifying that no further action is required, DTSC will have 60 days to review the PEA report. This 60 day timeframe remains in effect even if DTSC does not agree with the private site manager's findings as provided in subsection (a) (1). This subsection is necessary to establish that if DTSC fails to make a written notification to the private site manager that identifies the problems or deficiencies of the PEA report's finding within 60 days as specified in Health and Safety Code section 25395. 2, DTSC will be deemed to agree with the PEA report and the site will be considered as not requiring any further action.

Subsection (a)(2) is necessary to establish that if DTSC does not agree with the private site manager's PEA report certifying that no further action is required, DTSC has 60 days to issue a written notice identifying the reasons why DTSC does not agree with the PEA report. The basis for the 60 day timeframe is that it is reasonable and consistent with the Health and Safety Code section 25395.2.

Subsection (a)(3) further explains that DTSC will not make a determination of no further action if DTSC has determined that a hazardous substance release has caused or threatens to cause discharges to the waters of the State. This provision is necessary

because Health and Safety Code 25395.3 specifies that certain types of releases, such as discharges to groundwater would make a site ineligible for participation in the Private Site Management Program.

Subsection (b) is necessary to establish that if DTSC reviews a PEA report and agrees with the finding that there has been a significant hazardous substance release that has occurred or may likely have occurred at the site, DTSC has 60 days to review the PEA report. Subsection (b)(1) further specifies that if DTSC agrees with the PEA report's finding as described in (b), DTSC will notify the private site manager that an Application Package should be prepared.

Subsection (b)(2) is necessary to establish that if DTSC does not agree with the PEA report findings, DTSC has 60 days to issue a written notice describing the reasons why DTSC does not concur with the private site manager's determination. The basis for the 60-day timeframe is that it is reasonable and consistent with similar statutory timeframes.

Subsections (c) and (d) provide the specific requirements applicable to the development of removal action workplans (RAWs) and remedial action plans (RAPs). These requirements are based upon other statutory provisions as provided by chapter 6.8 and chapter 6.85. These requirements are necessary to ensure that the RAW and RAP are also consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (also known as "NCP") 1 Part 300, 40 Code of Federal Regulations. The NCP forms the regulatory framework for the Comprehensive Environmental Response and Liability Act (CERCLA) also commonly known as the federal Superfund. The NCP is available for review at DTSC or it may be directly accessed through the U.S. Environmental Protection Agency's webpage: www.epa.gov/r10earth/offices/oec/natcontp.pdf. CERCLA may also be reviewed at DTSC or directly accessed through the U.S. Environmental Protection Agency's webpage: www.epa.gov/superfund/action/law/cercla.htm.

Subsection (c) is necessary to establish that DTSC has 60 days to review a draft or final RAW and also make a determination that the draft CEQA information is technically complete. Health and Safety Code section 25323.1 establishes the requirements that a removal action must be performed in a manner that is protective of the public health and safety and the environment. The RAW must include a detailed engineering plan for conducting the removal action, a description of the onsite contamination, and the cleanup goals to be achieved by the removal action, and any alternative removal options that were considered and rejected, and the basis for the rejection. In addition to these requirements, a RAW must include components for making the affected community aware of the proposed removal action. These efforts include the preparation of a community profile report to determine the level of community interest, and may include additional efforts to keep the community informed of cleanup actions and to provide opportunities for public comment, which may include conducting a public meeting. As indicated in section 69005 of the proposed regulations, the public review of CEQA documents and the draft RAW shall be held concurrently to ensure an efficient

and speedy cleanup of the site. This is the same manner that DTSC uses for other types of site investigation and cleanup sites.

Subsection (c) (1) is necessary to provide the process that DTSC will follow if it determines that the draft RAW and draft CEQA information is not adequate. If DTSC rejects the draft RAW and draft CEQA information, DTSC must provide the reasons for rejecting the documents and describe what action or additional documentation is necessary to correct the identified problems.

Subsection (c) (2) is necessary to allow sufficient time for the private site manager or the private site management team to respond to DTSC's identified reasons for rejecting the draft RAW or CEQA information. It is also necessary to allow sufficient time for DTSC to review the private site manager's or private site team's revised submittal. Subsection (c) (3) is necessary to provide a concurrent 30 day public review of the draft RAW and draft CEQA information if DTSC considers the information to be technically complete. It clearly requires that these documents will be noticed in a newspaper of general circulation at the beginning of the 30 day public review period. This is the same process that DTSC uses on other site investigations and cleanup actions.

Subsection (c) (4) is necessary to clearly state that DTSC may approve or reject the final RAW. If DTSC approves the final RAW, the private site manager or team may implement the response or removal action set forth in the approved RAW. The implementation of the RAW may be conducted without DTSC oversight.

Subsection (d) is necessary to establish that DTSC has 60 days to review a draft RAP and determine if the draft CEQA information is technically complete. The 60 day timeframe is reasonable and consistent with similar statutory timeframes. Health and Safety Code section 25356.1 establishes the requirements for a RAP, which includes among other things, that all RAPs must include a statement of reasons setting forth the basis for the removal and remedial actions selected. The draft RAP must include an evaluation of each proposed alternative remedy and the reasons for rejecting any of the alternative removal and remedial actions. Health and Safety Code section 25356.1 also requires that one or more public meetings must be held to provide information about the site and the proposed remedy which would allow the public to address the issues which may concern the affected community. These requirements are necessary to ensure consistency with the National Contingency Plan. As indicated in section 69005 of the proposed regulations, the public review of CEQA documents and the draft RAP shall be held concurrently to ensure an efficient and speedy cleanup of the site. This is the same manner that DTSC uses on other site investigations and cleanup actions. The draft RAP may be prepared without DTSC oversight.

Subsection (d)(1) is necessary to clearly establish that DTSC may reject a draft RAP and draft CEQA information, and if DTSC rejects these documents, it must state the reasons for rejection and identify the actions needed to correct the problems.

Subsection (d)(2) is necessary to allow sufficient time for the private site manager or the private site management team to respond to DTSC's identified reasons for rejecting the draft RAP or CEQA information. It is also necessary to allow sufficient time for DTSC to review the private site manager's or private site team's revised submittal. DTSC believes that providing 60 days for DTSC to review any revised documents, reports, or workplans is reasonable and consistent with similar statutory timeframes.

Subsection (d)(3) is necessary to provide a concurrent 30 day review of the draft RAP and draft CEQA information if DTSC considers the information to be technically complete. The 30-day review period is consistent with the timeframe in section 21108 of the Public Resources Code. It clearly requires that these documents will be noticed in a newspaper of general circulation at the beginning of the 30 day public review period. Following the public comment period, DTSC will comply with subsection 25356.1(f), prepare a written notice that informs the community of the final selected remedy, prepare a written notice that informs the community of the final selected remedy, and file a Notice of Determination under section 21108 of the Public Resources Code. (See subsection (d) above for additional details involved with providing public access to the remedy selection process.) This is the same process that DTSC uses on other site investigations and cleanup actions.

Subsection (e) is necessary to establish that the private site manager is required to prepare and submit the final RAP for DTSC's approval in accordance with chapter 6.8 or chapter 6.85 for those sites participating in DTSC's Expedited Remedial Action Program. DTSC has the authority to approve or reject a final RAP. If DTSC approves the final RAP, the private site manager or team may implement the final approved RAP. The implementation of the RAP may be conducted without DTSC oversight.

Subsection (f) is necessary to establish that the private site manager or team are required to prepare a remedial design. Health and Safety Code section 25322.1 defines a remedial design, which is the detailed engineering plan to implement the remedial action alternative or initial remedial measure approved by DTSC. DTSC has 60 days to review the remedial design and either approve or reject the remedial design. DTSC is responsible for reviewing the remedial design to ensure it is consistent with the final approved RAP. The 60-day review period is consistent with similar statutory timeframes.

Subsection (f)(1) is necessary to establish that DTSC must state its reasons for rejecting the final remedial design and identify what is needed to correct the problems.

Subsection (f)(2) is necessary to establish that if DTSC rejects the final remedial design, the private site management team may submit revised documentation. It also provides sufficient time for DTSC to review the private site manager's or private site team's revised submittal. Providing 60 days for DTSC to review any revised documents, reports, or workplans is reasonable and consistent with similar statutory timeframes.

Subsection (f)(3) is necessary to establish that upon DTSC's approval of the final remedial design, the private site manager is required to prepare a fact sheet that describes the activities associated with implementing the final remedial design. Upon DTSC's approval, the private site manager may distribute the fact sheet to the public. Based on site specific concerns, the private site manager may also need to hold a public meeting.

Subsection (f)(4) is necessary to establish that the private site management team is responsible for implementing the approved remedial design, and may do so without DTSC oversight.

Subsection (g) is necessary to establish that the private site manager is required to submit a certificate of completion to DTSC after completing the response action. DTSC has 30 days to review the certificate of completion. This 30-day review period is consistent with similar statutory provisions. However, there is an exception to DTSC's approval or rejection of the certificate of completion within the 30 day timeframe, as specified in subsection (f)(7) below. DTSC is required to audit a minimum of 25 percent of sites selected for participation in this program under the audit provisions in section 69012. The purpose for postponing DTSC's 30 day review is to allow DTSC sufficient time to conduct an audit prior to approving or rejecting the certificate of completion if the site is selected for an audit. After the audit is completed, DTSC will complete its review of the certificate of completion within 30 days and either certify that the site has been satisfactorily remediated or specify the reasons for rejecting the request. DTSC believes that conducting an audit before approving the certificate of completion is more beneficial to the project proponent who may take action to redevelop or reuse the property without knowing if the audit finds deficiencies in the site investigation or cleanup actions. Senate Bill 1011 (Stats. 2002, ch. 626) also made changes to the audit provisions which allows DTSC to conduct an audit prior to approving a certificate of completion.

Subsection (g)(1) is necessary to establish that DTSC will require that, prior to issuing a certification pursuant to Health and Safety Code section 25395.8, DTSC shall determine if appropriate land use controls and restrictions have been recorded and run with the land. Land use controls are recorded documents that restrict the present and future uses of the site, including but not limited to, recorded easements, covenants, restrictions, or servitudes, or any combination thereof. Land use controls run with the land from the date of recordation, and bind all of the property owners, their heirs, successors, and assignees, and the agents, employees, and lessees, successors, and their assignees. Pursuant to Health and Safety Code section 25395.8 subsection (b)(4), DTSC shall determine if appropriate land use controls and restrictions are needed at the site to protect public health and safety and the environment, and if so, require that land use controls be properly recorded. DTSC recently received approval from the Office of Administrative Law for its Land Use Covenants Regulations (#R-99-17.) These regulations were filed with the Office of the Secretary of State on March 20, 2003 and will be effective on April 19, 2003. These regulations establish that DTSC will not certify

a site if the site is not cleaned up to unrestricted use unless land use covenants have been recorded. The regulations also include exceptions.

DTSC may also request that additional information or data be submitted with the certificate of completion request. DTSC may request additional information on a site specific basis due to the nature of site investigation and cleanup actions, and the different array of site specific conditions, level of community interest, contaminants of concern, etc. DTSC must be able to consider the site specific factors when determining whether the selected response action was satisfactorily completed. This is the same consideration that DTSC uses on other types of site investigations and cleanup actions.

Subsection (g)(2) establishes the requirement that if ongoing Operation and Maintenance (O&M) measures are required by the approved RAW or approved final RAP, the private site manager is responsible for preparing an O&M plan. In addition, the private site manager will be responsible demonstrating that financial assurance requirements for O&M have been met as specified by section 25355.2 of the Health and Safety Code.

Subsection (g)(3) is necessary to specify that DTSC will evaluate a certification request to determine if the approved response actions have been completed as provided by the approved RAW or approved final RAP. DTSC may also request that additional information or data be submitted with the certificate of completion request on a site specific basis. This provision is necessary due to the nature of site investigation and cleanup actions, and the different array of site specific conditions, level of community interest, contaminants of concern, etc. DTSC must be able to consider the site specific factors when determining whether the selected response action was satisfactorily completed. This is the same consideration that DTSC uses on other types of site investigations and cleanup actions.

Subsection (g)(4) is necessary to establish the factors DTSC will consider when preparing an approved certification request and what specific requirements such as recorded land use covenants. It also specifies who DTSC will notify when the certification has been approved.

Subsection (g)(5) is necessary to establish that if DTSC rejects a certification request, it must do so in writing and identify what actions are necessary to correct the problems.

Subsection (g)(6) is necessary to establish that the private site manager or team may submit a revised submittal and that DTSC will have an additional 30 days to review the revised submittal. DTSC believes that providing 30 days for DTSC to review any revised documents, reports, or workplans is an acceptable timeframe.

Subsection (g)(7) is necessary to establish that if a site is selected for an audit, DTSC will not approve a certification request until the audit is completed. This provision ensures that once a site has been certified by DTSC, it will not be subject to further reopening by DTSC except as specified. This provision is necessary to clarify the

circumstances under which DTSC can require further site investigation and remedial actions on a site specific basis in order to prevent any risk to human health and safety or to the environment.

Subsection (h) is necessary to clearly establish that DTSC may reopen a site certification if it makes one or more of the findings under subsections (h)(1) through (h)(6). These reopeners are similar to provisions in other cleanup programs administered by DTSC under the provisions of chapter 6.8 and chapter 6.85 of the Health and Safety Code.

Subsection (i) is necessary to clearly establish that DTSC may determine that a site no longer qualifies for a certificate of completion and may withdraw its approval for the response action at the site. If DTSC makes such a determination, it will provide a written notice to the private site manager and provide the reasons for DTSC's determination.

Section 69012. Department Audits: This section would require the project proponent, private site managers, and private site management team members to provide DTSC with complete access to information, records, technical data, reports, sampling data, photographs, maps, and files related to a cleanup action.

Subsection (a) is necessary to establish DTSC's authority to conduct an audit.

Subsection (b) is necessary to establish that the private site manager and team, as well as the project proponent are required to cooperate fully with DTSC's audit. By providing all of the required information, DTSC is able to verify that every participant involved in the site have completed all the necessary steps, and required documentation to meet the minimum performance standards. This includes an analysis of the scope, problem and necessary procedures to achieve a certified cleanup. DTSC is required by Health and Safety Code section 25395.12 to audit a minimum of 25% of the sites where a private site manager or members of a private site management team have conducted site investigations or cleanup actions with minimum DTSC oversight and where DTSC has issued a certificate of completion.

Subsection (c) establishes the requirement for private site managers to retain all data related to the site investigation and cleanup actions for a period of ten years after the conclusion of all site activities, including O&M.

Subsection (d) is necessary to establish the requirement that the project proponent may be required to maintain the documentation described subsection (b) including the Administrative Record for more than ten years. This provision allows DTSC to make arrangements to review and/or obtain these documents prior to their destruction.

Subsection (e) is necessary to establish that if DTSC's audit finds that the private site manager or team has failed to meet the minimum performance standards, DTSC may

take action regarding the registration status of the private site manager or team member.

Subsection (f) is necessary to establish that the project proponent is provided a reasonable notice that the site has been selected for an audit. DTSC believes that 21 working days provides adequate notice, because the notice occurs within the 30 day period that DTSC is required to review, approve, or reject a certification request with written notification of the reasons for rejecting the request.

Subsection (g) is necessary to establish that DTSC will complete the audit within 45 working days of notifying the project proponent that the site has been selected for audit. The audit findings will be provided to the project proponent in writing.

Subsection (h) is necessary to establish that if a site is selected for audit, DTSC's time to review the certification request will be extended to 45 working days from the date the audit notification is mailed to the project proponent, or until the audit has been completed, whichever comes first. As provided by section 69011, if the audit reveals facts or information that would require additional response actions, DTSC will reject the certification request in writing and identify the reasons for rejecting the request.

Section 69013. Withdrawal of Department Approval: This section would allow DTSC to rescind its approval of a Private Site Management Program application if a project proponent, a private site manager, or member of a private site management team fails to meet the requirements of chapter 6.8 or chapter 6.85 of the Health and Safety Code. This program is a voluntary program with a lower level of State oversight. These rescission rights are necessary to ensure that the private site managers and private site management team members conduct cleanups that protect the public health and the environment and that are consistent with the National Contingency Plan.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSES (45-DAY COMMENT PERIOD)

Comments were received in the form of two written letters during the 45-day comment period beginning June 7, 2002 and ending on July 22, 2002. A representative for the California Board for Geologists and Geophysicists presented the Board's testimony at the public hearing held on July 22, 2002, as well as submitting the comments in writing.

Following is DTSC's response to the testimony and written comments:

a. Response to Comments from the California Board for Geologists and Geophysicists

(A copy of the letter from the California Board for Geologists and Geophysicists is attached.)

Comment: "The subject regulations should ensure that these qualified individuals [referring to registered professional engineers, registered geologists,

and registered certified engineering geologists] are defined as qualified to perform as ‘environmental assessors’ in the Private Site Manager Program.”

Response: DTSC agrees with the comment in part and notes that the statute authorizing the Private Site Management Program defines “private site manager” as “an individual who is registered as a class II environmental assessor pursuant to [Health and Safety Code] Section 25570.3.” (Health & Saf. Code § 25395.1, subd. (a).) Health and Safety Code section 25570.3 required the Director of Environmental Health Hazard Assessment (OEHHA) to adopt regulations* for registration of environmental assessors. The regulations so adopted are at California Code of Regulations, title 14, sections 19030-19044. In keeping with the statutory mandate of Health and Safety Code section 25395.1, subdivision (a), the proposed private site management performance standard regulations define Private Site Managers as individuals who are California Registered Environmental Assessors – Class II (REA II) and who are conducting response actions under the regulations. (Proposed Cal. Code Regs., tit. 22, § 69000.5, subsection (t).) Because registered professional engineers, registered geologists, and registered certified engineering geologists may qualify to be registered as REA IIs (see Cal. Code Regs., tit. 14, § 19030, subsection (q), and § 19033), these individuals, if they are REA IIs, would also be eligible to qualify as Private Site Managers. Prior to January 1, 2003, the REA II regulations were implemented by OEHHA. Starting January 1, 2003, the REA II regulations are being implemented by DTSC.* While many registered professionals who possess the needed experience would be considered qualified as REA IIs under the REA II program criteria*; they must be formally registered as REA IIs in order to be eligible to also qualify as Private Site Managers. In addition, both the statute (Health & Saf. Code § 25395.1, subd. (b)) and the proposed regulations (Cal. Code Regs., tit. 22, § 69000.5, subs. (s)) authorize registered geologists, registered certified hydrogeologists, registered certified engineering geologists, registered geophysicists, and certain other persons with backgrounds in soil geology, hydrogeology or related fields to be part of a private site management team even if they are not registered as REA IIs.

***Effective January 1, 2003, DTSC is authorized to implement the REA II regulations. This is based on recently chaptered legislation (Senate Bill No. 1011, Stats. 2002, ch. 626) that transfers responsibility for the REA program to DTSC.**

The commenter identifies Assembly Bill No. 2644 (Stats. 2000, ch. 443) as providing the correct definition for an environmental assessor. Assembly Bill No. 2644 addresses contamination at school facilities that require a school district (if the school district wants to obtain state funding for construction of school buildings) to conduct a Phase I environmental assessment and/or a Preliminary Endangerment Assessment (PEA) if DTSC determines that a PEA is required. This bill also defines “Environmental Assessor” in Education Code section 17210, subdivision (b) to include “...a professional engineer registered in

this state, a geologist registered in this state, and a certified engineering geologist registered in this state...” However, this Education Code definition does not govern or change the statutory requirements in section 25395.1, subdivision (a) of the Health and Safety Code, which states: “Private site manager” means an individual who is registered as a class II environmental assessor pursuant to Section 25570.3.” In addition, section 25395.3, subdivision (a)(2) of the Health and Safety Code provides that school sites and properties adjacent to school sites are not appropriate for the Private Site Management Program. Therefore, DTSC believes that use of the Assembly Bill No. 2644 definition for environmental assessors is inappropriate for the Private Site Management Program.

DTSC has not made changes to the regulations based on the comment.

Comment: “The Board feels that the necessity of professional licensure, specifically when it comes to the practice of geology and geophysics is unclear in the draft regulations... The Board believes that a Registered Geologist is also qualified to be a Private Site Manager. In fact, about a third of the currently listed REA IIs are Registered Geologists. Therefore, we request that the regulation state that Registered Geologists, as well as REA IIs, be defined as Private Site Managers in Section 69000.5(t).”

Response: DTSC does not believe that the definition of Private Site Manager or the qualifications for private site management team members are unclear in the proposed regulations as indicated in the comment. As discussed in the previous response, the statute and the proposed regulations define private site managers as individuals who are registered as REA IIs pursuant to Health and Safety Code section 25570.3. The statute does not authorize persons who are not registered as REA IIs, even if they are qualified to be REA IIs, to be private site managers. In addition, section 25395.1, subdivision (b)(1) of the Health and Safety Code clearly states the types of registered and licensed professionals that can participate in the Private Site Management Program as “private site management team” members. A team member does not have to be an REA II, and therefore geologists who are not REA IIs may participate as private site management team members. Therefore, DTSC has not made changes to the regulations based on these comments.

b. Response to Comments from Foley and Lardner, submitted on behalf of the Centre City Development Corporation for the City of San Diego (A copy of the letter from Foley and Lardner is attached.)

Comment: “We encourage the Department to consider revisiting its proposed regulations to accomplish the public policy that inspired the legislation and attempt to achieve the valuable public policy goals it advertised.”

Response: DTSC believes the proposed regulations reflect the intent of the statute as approved by the Legislature when it passed Assembly Bill No. 1876 (Stats. 1995, ch. 820). The private site management program is designed to allow the private sector to select a private site manager, to have limited State involvement at a low-threat hazardous substance release site, and to obtain a State designation that no further action is required or a State certification that the site has been remediated in accordance with applicable statutes and regulations. This is a voluntary program that may result in cost savings for site cleanups depending on site-specific circumstances such as the complexity of necessary response actions and the technical expertise of the private site management team. DTSC has not made changes to the regulations as a result of this comment.

Comment: “The Department should have proposed regulations that emphasized (as the Cal-EPA Fact Sheet advertised) a process for private sector clean-ups that would “ease” the return of property to productive use with a ‘potentially less costly clean-up option’. . . . The regulations ‘make no discernable efforts to try and provide for easier or less costly clean-up solutions.’”

Response: The Private Site Management Program allows qualified private sector professionals that are REA IIs to serve as private site managers in the evaluation and/or cleanup of certain specified sites. It is DTSC’s belief that the Private Site Management Program does represent a less costly oversight option, because the project proponents can choose to have limited oversight by DTSC resulting in lower costs. The proposed regulations reflect the expedited process for response actions conducted under the program. See, e.g., section 69011 (spelling out timeframes for DTSC review and approval and specifically authorizing certain activities to be conducted without DTSC oversight). DTSC has not made changes to the regulations as a result of this comment.

Comment: “The requirement to prepare a Preliminary Endangerment Assessment report. . .is. . .an ineffective and unduly costly process for most brownfield sites. Appropriate assessments can be conducted using ASTM approved methodology (recently embraced by US EPA and Congress in its amendments to the Federal Superfund Law) and continued reliance on the traditional PEA approach could well result in defeating the underlying legislative policy.”

Response: The Preliminary Endangerment Assessment (PEA) report is required by section 25395.2 of the Health and Safety Code, which specifies use of preliminary endangerment assessment procedures approved by DTSC. The DTSC PEA Guidance Manual, which is incorporated by reference into the regulations, is a widely accepted and acknowledged guidance document for making this type of determination. This is the same process that DTSC follows in other site remediations to determine if there has been a hazardous substance release or a threatened release at the site. The statute requires that removal

action work plans and remedial action plans prepared for the Private Site Management Program be prepared in accordance with chapter 6.8 or chapter 6.85 of division 20 of the Health and Safety Code and other applicable regulations and guidance documents adopted or issued by DTSC. The PEA Guidance Manual is such a document. Furthermore, the amendments to the federal Superfund law that authorized use of ASTM methodology were added for the purpose of specifying the requirements for conducting “all appropriate inquiries” to establish a defense to cleanup liability and not for the purpose of specifying requirements for preliminary endangerment assessments. Therefore, DTSC has not made changes to the regulations as a result of this comment.

Comment: “The same comments can be applied to the proposed regulatory admonition that all documents be prepared in accordance with the National Contingency Plan requirements. . .”

Response: The Private Site Management Program is a voluntary program, and sites that qualify for participation in this program are subject to the same state and federal laws, regulations, and cleanup standards that other types of sites are subject to under the provisions of chapter 6.8 and chapter 6.85 of division 20 of the Health and Safety Code. (See Health & Saf. Code §§ 25395.5, subd. (a), 25395.6, subd. (a), and 25395.11.) One of the primary goals of implementing this program is based on obtaining a “state” certification that the site has been satisfactorily cleaned up. DTSC cannot provide such a certification if DTSC has reason to believe the site poses a risk to human health and safety or to the environment, if statutory requirements have not been met or if the public has not been allowed to participate in the decision-making process specified by the National Contingency Plan and the Health and Safety Code. DTSC has not made changes to the regulations as a result of this comment.

Comment: “Some of the ideas contained in the regulations, particularly those mandating response times by the department, are likely to have a salutary effect.”

Response: DTSC appreciates the comment. DTSC has not made changes to the regulations as a result of this comment.

Comment: “[T]he general tenor of the regulations is to limit the creativity and flexibility that a private site manager could bring to the process of DTSC approval for a clean-up plan and its successful implementation. Our shared goal ought to be a flexible mechanism by which DTSC reviews and approves such plans and then satisfies itself that they were properly implemented. The extensive requirements that NCP, PEA and other superfund-era processes brings to this is, quite frankly, counterproductive to that effort.”

Response: DTSC believes the proposed regulations provide flexibility in keeping with the statutory mandate, which allows for conducting certain response

actions with limited DTSC oversight. DTSC will review and approve removal action work plans, remedial action plans and other site cleanup documents and will undertake its other Private Site Management Program activities in keeping with the flexibility provided under the statute and regulations and also with its responsibility to protect public health, safety and the environment. See above responses to comments also. DTSC has not made changes to the proposed regulations based on these comments.

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSES (15-DAY COMMENT PERIOD)

Following the 45-day comment period, Senate Bill No. 1011 (Stats. 2002, ch. 626) was chaptered, effective January 1, 2003. Senate Bill No. 1011 transfers responsibility for the Registered Environmental Assessor Program from the Office of Environmental Health Hazard Assessment to DTSC. The enactment of this statute resulted in the need for some changes in the proposed regulation text. These changes were made and sent out to interested persons for comment. No comments were received as a result of the 15-day notice and comment period.

V. COMMENTS SUBMITTED BY THE OFFICE OF SMALL BUSINESS ADVOCATE AND THE TRADE AND COMMERCE AGENCY

No comments were submitted by the Office of Small Business Advocate or the Trade and Commerce Agency.