

TITLE 22
EMERGENCY REGULATIONS
Hazardous Wastes of Concern
DEPARTMENT REFERENCE NUMBER: R- 03- 02

FINDING OF EMERGENCY

These emergency regulations are mandated by section 25169.8 of the Health and Safety Code.

AUTHORITY AND REFERENCE

These regulations are being proposed under the authority of the California Health and Safety Code section 25169.8, which requires the Department of Toxic Substances Control (DTSC) to adopt emergency regulations implementing the legislative mandates of Statutes of 2002, chapter 607 [Sen. Bill No. 489 (2001-2002 Reg. Sess.) Romero], referenced below as SB 489, on or before July 1, 2003.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW

Existing Law

In the wake of the terrorist attacks of September 11, 2001, DTSC adopted the emergency Manifest Discrepancy Regulations on April 4, 2002, requiring hazardous waste Treatment, Storage, and Disposal Facilities (TSDFs) to submit 24 hour verbal notification to DTSC after discovery of a priority manifest discrepancy, followed by written notification within five days after receipt of the waste shipment. Those regulations defined a priority discrepancy as a variation in container count for containerized waste, a variation of one percent or more in weight for bulk waste, or any variation in the type of waste. The affected wastes were considered by DTSC as holding the greatest potential for use as weapons of terror, and met the United States Department of Transportation (U.S. DOT) definition of explosives or poisons. These emergency regulations supercede and replace the emergency Manifest Discrepancy Regulations which otherwise would expire on July 30, 2003.

SB 489 became effective January 1, 2003, and expanded the scope of DTSC's existing regulations, as described below.

Existing law governing the management of hazardous waste requires all persons transporting hazardous wastes to obtain valid registration from DTSC. A person holding registration is a registered hazardous waste transporter. All persons that generate hazardous wastes and offer it for transportation are required to complete and sign a hazardous waste manifest, which must accompany the shipment to its destination. A hazardous waste facility is a facility authorized by DTSC to engage in treatment, storage, and disposal of hazardous wastes. Hazardous waste facilities that discover manifest discrepancies upon arrival of the waste shipment at the facility are

required to note the discrepancy on the manifest and submit a report to DTSC within 15 days, if the discrepancy is not resolved.

SB 489 required DTSC to designate a new category of hazardous wastes, "Hazardous Wastes of Concern" (HWC), targeting wastes which hold the potential to be "intentionally and effectively used to harm the public in a terrorist or other criminal act" (Health and Saf. Code section 25169.6(a)). SB 489 requires DTSC to establish reportable quantities for HWC that would trigger immediate reporting requirements, if discovered to be missing. The immediate notification requirements previously applicable to TSDFs under the emergency Manifest Discrepancy Regulations are expanded by SB 489 to include transporters and losses discovered during storage of the waste at the facility. Under the new provisions, transporters who discover that a reportable quantity of HWC is missing during transportation, or discover a reportable difference in type, are required to provide "immediate notification" to DTSC, as specified in these regulations. TSDFs are required to carry out similar notification procedures if a reportable quantity of a HWC is missing upon receipt of the waste at the facility or during storage.

By action of the Statutes of 2002, chapter 605 [Sen. Bill No. 470 (2001-2002 Reg. Sess.) Sher], applicants for hazardous waste facility permits or permit modifications are required to submit a specified disclosure statement and fingerprints, unless otherwise exempted from disclosure statement requirements (section 25112.5 of the Health and Saf. Code). SB 489 (section 25169.7(b) of the Health and Saf. Code) now requires facilities and applicants for hazardous waste transporter registration or facility permits that would handle HWC, to submit disclosure statements to DTSC, including fingerprints and related identification information. Facilities handling HWC are required to submit these documents by January 1, 2004, while transporters are required to submit these documents with their annual registration renewal starting on January 1, 2004. Transporter renewal dates are distributed throughout the year, so some documents would not be submitted until December 2004. Facilities and transporters are exempted from these requirements if they are publicly traded companies listed with the Security and Exchange Commission, meeting specified conditions.

SB 489 directs DTSC by July 1, 2003 to implement its specified provisions by adopting emergency regulations and then seek a waiver if any of its provisions are preempted under the Hazardous Materials Transportation Authorization Act of 1994 (Health and Saf. Code 25169.8 (c) and (d)). Section 25169.8 of the Health and Safety Code requires DTSC to adopt regulations with the concurrence of the Department of the California Highway Patrol (CHP). CHP will review the regulations and provide DTSC with a memorandum demonstrating concurrence, prior to their adoption. The full text of the bill and related documents may be accessed on the web at www.leginfo.ca.gov.

Policy Statement Overview

The objective of these regulations is to tighten tracking of hazardous wastes that might be misused as a weapon of mass destruction, comply with the requirements specified by SB 489 in a way that is least burdensome for the regulated community, and protect public health, safety, and the environment. Upon adoption of these regulations, SB 489 requires owners of companies handling HWC to submit background check information, allowing for the disclosure of any past enforcement convictions or criminal activity that could signal a future threat to the public.

Proposed Regulations

As required by SB 489, these emergency regulations designate criteria for identifying HWC and provide immediate notification procedures applicable to transporters and TSDFs that handle the designated wastes. A HWC is defined as a hazardous waste that is identified on the manifest with one of the following hazard divisions within the U.S. DOT description, or otherwise known as: an explosive, hazard division 1.1 through 1.3; a poison, hazard division 6.1, packing group I or II; or a poisonous gas, hazard division 2.3. The designated wastes are materials listed by U.S. DOT in the Hazardous Materials Table, codified in section 172.101 of Title 49 Code of Federal Regulations (49 CFR). This table was developed by U.S. DOT to list materials which are hazardous materials for the purpose of transportation. For each listed material, the table provides information such as risk-based hazard class, proper shipping name, and reference requirements in 49 CFR pertaining to proper labeling and handling.

The proposed regulations establish reportable quantities and reportable differences that trigger notification requirements for missing HWC. Reportable quantities are variations of one container for containerized waste, or variations greater than three percent in weight or volume for bulk waste. Reportable differences are variations that can be observed in the type of waste, such as one type of waste substituted for another.

These regulations do not add specific language to implement SB 489's provisions related to disclosure statements and fingerprinting requirements. DTSC determined that disclosure statement and fingerprinting provisions are clearly described in statute and do not necessitate regulations for implementation.

STATEMENT OF FACTS SUPPORTING FINDING OF EMERGENCY

These regulations are deemed necessary by statute, for the immediate preservation of the public peace, health and safety, and general welfare. Section 25169.8, subsection (b) of the Health and Safety Code reads:

“The regulations adopted by the department pursuant to this section shall be adopted as emergency regulations...the adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, and general welfare.”

Subsection (e) also provides that emergency regulations adopted pursuant to this section will be filed with, but not repealed by, the Office of Administrative Law, and will remain in effect until revised by DTSC.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

DTSC has found this rulemaking project to be exempt from CEQA under the California Code of Regulations, title 14, section 15061(b)(3), because it does not result in a significant impact on the environment. The changes resulting from this rulemaking result in improved environmental protection and do not have the potential to cause other adverse environmental effects. A draft of the Notice of Exemption is available for review with the rulemaking file and will be filed with the State Clearinghouse when the regulations are adopted.

FISCAL IMPACT ESTIMATES

Mandates on Local Agencies and School Districts

DTSC has determined that adoption of these regulations creates no new mandates on local agencies or school districts.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement

DTSC has determined that the emergency regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500 of the Government Code. DTSC may refer some missing waste reports to the local Certified Unified Program Agencies (CUPAs) for further review and follow-up. Referring local enforcement cases to the CUPAs is standard DTSC

procedure. While it is unlikely that CUPAs may incur additional costs to investigate missing waste reports, these local costs are not reimbursable mandates because CUPAs are funded by locally assessed fees, which could be increased if necessary to cover the costs of investigating missing waste reports.

Cost or Savings to Any State Agency

Fiscal and Economic Impact: These regulations do not have a direct fiscal impact on DTSC. DTSC does not expect a significant increase in reporting due to the broadening of the reporting requirement to HWC losses discovered during transit and storage. However, the establishment of the HWC criteria in these regulations enables other SB 489 mandates to become effective. SB 489 requires transporters and TSDFs that handle HWC to submit disclosure statements and owner's fingerprints for criminal background checks. DTSC estimates it will require approximately 500 to 1000 hours to process the disclosure statements at a cost of between \$20,000 and \$40,000. DTSC plans to absorb the fiscal impact by using existing staff resources. However, in the unlikely event the adoption of the regulations significantly increases the number of reports of missing wastes, disclosure statements, and criminal background checks received, there may be a much greater fiscal impact on DTSC, as more staff time will be needed to process and follow up on missing HWC reports and review disclosure statements and criminal background checks.

The regulations are not expected to have a fiscal impact on any other state agency beyond the impact of the authorizing legislation. SB 489 exempts government agencies from submitting disclosure statements or fingerprints.

Cost or Savings in Federal Funding to the State

DTSC has made a preliminary determination that the proposed regulations will have no impact on federal revenue or costs.