

SECOND PUBLIC COMMENT PERIOD JUNE 29, 2018 – JULY 23, 2018
RESPONSE TO COMMENTS

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I. OVERVIEW AND ORGANIZATION

This document summarizes and responds to public comments submitted to the Department of Toxic Substances Control (DTSC) on the Proposed Rulemaking entitled *Hazardous Waste Facility Permitting Criteria*, which was released to the public on June 29, 2018 during the second public notice of the proposed regulations.

- The proposal was released to the public on September 22, 2017 for comment for forty-five (45) days that ended on November 6, 2017.
- A public hearing was held on November 6, 2017.
- A revised proposal was released to the public on June 29, 2018 for a 17-day public comment period that ended on July 16, 2018. DTSC then extended the public comment period for an additional seven days. Thus, the public comment period for the June 29, 2018 version of the proposed regulations ended on July 23, 2018.
- DTSC released another version of the proposed regulations for a 15-day public comment period that ran from July 27, 2018 to August 13, 2018.

This response to comment document addresses the comments received during the public comment period that ended on July 23, 2018. There were nine letters commenting on the proposal released on June 29, 2018 are provided in Table 1 - List of Commenters. This document lists the comment letters by their affiliations in alphabetical order, and the number assigned to their correspondence.

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

- 45-Day Public Comment Period September 22, 2017 – November 6, 2017 Response to Comments (or the “September 2017 Response to Comments”) document; and
- Third Public Comment Period July 27, 2018 – August 13, 2018 Response to Comments (or the “July 2018 Response to Comments”) document.

In this document, where a response references a section of the proposed regulations that was originally public noticed in September 2017, but may have been changed or renumbered, the change is indicated with the parenthetical “(September 2017).” If a proposed change was made in June 2018, a parenthetical indicates this change as “(June 2018).” All referenced section numbers are found in Division 4.5 of Title 22 of the California Code of Regulations, unless otherwise specified.

For the second public comment period, each comment letter was issued a number starting with “2.” DTSC subsequently numbered each of the comments contained in the letter and collated similar comments together. The designation “2-1-1” means the “June 29, 2018 to July 23, 2018” comment period comment, letter number 1, comment number 1 and so forth.

For orderly presentation, the comments have been categorized by the topics or sections that they address. The comments that are general in nature have been addressed under General Comments.

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

Table 1. List of Commenters		
#	Name of Entity	Number of comments
1	California Council for Environmental & Economic Balance	17
2	Clean Harbors	38
3	California Manufacturers & Technology Assn	25
4	Department of Defense	23
5	Greenaction for Health and Environmental Justice	8
6	Morgan Lewis - RCRA Corrective Action Project	1
7	Surplus Lines Association	1
8	Waste Management	32
9	Western States Petroleum Association	21

II. SUPPORT OF PROPOSED REGULATION

Comments Summary:

The comments express support for one or more changes made to the proposed regulations released for public notice in September 2017.

Comments: 2-1-4, 2-1-10, 2-1-15, 2-1-17, 2-2-1, 2-2-2, 2-2-3, 2-2-4, 2-2-5, 2-3-3, 2-4-3, and 2-9-18

Response:

DTSC appreciates the comments in support of these changes, and is making no further changes to the proposed regulations in response to these comments. The specific provisions mentioned were the following:

- Sections 66265.16(g) (June 2018) – the revised text for the personnel training requirements that provides an exemption for generators from the new training requirements.
- Section 66264.101 – the revised text replacing the trigger for establishing financial assurance for corrective action from the “earliest time” that DTSC may make a reasonable determination of costs to 90 days after DTSC’s approval of a corrective measures implementation workplan.
- Sections 66264.143(f)(11) and 66265.143(e)(10) (September 2017) - the elimination of the requirement to establish a trust fund in conjunction with a financial test and guarantee for closure.
- Section 66270.14(b)(23) (June 2018) – the revised text clarifying which census tract or tracts must be included in the Community Involvement Profile.
- Section 66270.14(b)(23) (September 2017) – the elimination of the requirement to include internal facility standard operating procedures in a Part B permit application.
- Section 66270.14(e)(22) (June 2018) – the revised text excluding post-closure permit applications and requests for Class 1 and Class 2 permit modifications from the health risk assessment (HRA) requirement. The revised text also adds a provision that allows DTSC to waive the requirement for Class 3 modifications if deemed unnecessary.
- Section 66271.53(i) (September 2017) – the elimination of the text that would have disallowed a dispute of the portion of a facility’s score calculated from inspections made prior to the effective date of the proposed regulations. Revisions to this section provide clear and important process steps for a facility to dispute their scores and make it clear that scores are provisional until the dispute process has closed, the dispute timeframe has passed, or a final decision on a dispute has been rendered.
- Section 66271.54(a)(1) (June 2018) – the revised text that allows federal facilities to conduct self-reporting audits.
- Section 66271.56(c) (September 2017) – the elimination of the provision that would have allowed DTSC to rely on audit reports for purposes of enforcement and calculation of inspection violation scores and Facility Violation Scoring Procedure Scores (Facility VSP Scores).
- Section 66271.57(i)(3) (June 2018) – the revised language ensures written findings from DTSC outlining the basis for the tier designation and allowing for a permit modification process to the extent certain criteria are met.

III. GENERAL

A. GENERAL COMMENTS ON CHANGED PROVISIONS

Comment Summary:

The comment is the introductory language of a letter conveying overarching concern with numerous provisions in the second version of the proposed regulations released for public comment on June 29, 2017. Virtually all the issues articulated in this comment are conveyed in more detail later in the comment letter. The detailed comments are separately numbered and addressed in the pertinent topic areas.

Comment: 2-8-1

Response:

To the extent that this comment addresses matters that were changed from the initial version of the proposed regulations to the second version proposed, those comments are summarized and responded to in the pertinent topic areas (e.g., Financial Assurance, Training, HRA, etc.). Otherwise, DTSC made no specific changes to the regulations in response to these comments.

B. GENERAL COMMENTS ON UNCHANGED PROVISIONS

Comments Summary:

These comments are broad, general comments on a variety of topics. The comments convey criticism of DTSC's approach to drafting these regulations. The comments express concern with the burdensomeness of the proposed regulations, lack of protection of civil rights, and inconsistency with other provisions of law.

Comments: 2-2-6, 2-2-7, 2-4-4, 2-4-22, 2-5-1, 2-5-8, and 2-8-119

Response:

These comments address provisions in the proposed regulations that did not change from the initial version released for public comment on September 22, 2017 to the second version of the proposed regulations. As such, these comments are outside the scope of topics subject to public comment for the version of the proposed regulations released on June 29, 2018. DTSC notes that virtually all of the comments were provided during the comment period for the initial version of the proposed regulations. As such, they are summarized and responded to in the responses to the comments received during the initial 45-day comment period, and are provided in the final rulemaking package submitted to the Office of Administrative Law. DTSC did not make any changes to the regulations in response to these comments.

C. COMPLIANCE WITH ADMINISTRATIVE PROCEDURE ACT (APA)

Comments Summary:

The comments claim that DTSC failed to comply with the Administrative Procedures Act (APA) in general or Government Code Section 11346.8(c). Comments include concerns that the three-week public comment period for the proposed revised regulations was inadequate. Other comments assert that there was a lack of meaningful engagement by DTSC regarding the revised proposed regulations. Comments also contend that the changes made to the initial version released on June 29, 2018 are not “sufficiently related” changes. As such, the commenters argue that DTSC is not authorized to propose these changes by way of a 15-day public comment period, referencing Government Code Section 11346.8(c). The commenters assert that DTSC was required to provide a 45-day public comment period for those proposed changes.

Comments: 2-1-2, 2-1-3, 2-3-2, 2-4-1, 2-8-89, 2-8-90, 2-8-91, and 2-9-2

Response:

To respond to this comment, pertinent excerpts from relevant statutory and regulatory provisions are provided below. Government Code Section 11346.8(c) provides in pertinent part:

“No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulations...”

California Code of Regulations, title 1, section 42 provides a definition of “sufficiently related” as follows:

“Changes to the original text of a regulation shall be deemed to be ‘sufficiently related,’ as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the proposed regulations could have resulted.”

One of the commenters emphasized that there were “many” additions and deletions to the proposed text, and that the revisions were “substantial.” DTSC agrees. But that is not the standard for determining whether a change is “substantially related,” as established in the above cited provisions. Rather, the test is whether a reasonable member of the directly affected public could have determined from the notice of the proposed regulations that these changes to the proposed regulations could have resulted from the original text that was initially noticed for public comments. DTSC notes that it did not expand (or reduce) the scope of the revised proposed regulations from the same five topic areas initially addressed. All the proposed changes from the initial to the revised version are well within the same initial set of concepts and topics. In fact, virtually all the changes made were prompted by or otherwise addressed in response to the initial set of public comments.

DTSC held open the public comment period longer than required to continue its established pattern of significant public engagement regarding these regulations. As discussed in greater detail in the initial Response to Public Comments, DTSC held numerous meetings, workshops, and hearings to ensure a high level of public engagement regarding these regulations. Much of this public engagement was well beyond that required by the APA. Finally, the fact that numerous commenters were able to collaborate and submit timely and thoughtful comments indicates that the public had sufficient time to respond to the second version of the proposed regulations. DTSC did not make any changes to the regulations in response to these comments.

D. AVAILABILITY OF RESPONSE TO COMMENTS ON INITIAL PROPOSAL

Comments Summary:

These comments point out that DTSC did not release the Responses to Comments on the initial version of the proposed regulations before DTSC released the revised proposed regulations. The comments state that the revised proposed regulations were not accompanied by an explanation of why certain comments led to changes while others did not. Some commenters gave examples of provisions that the commenters thought were still problematic in their original, unrevised form.

Comments: 2-1-1, 2-3-1, 2-4-1, 2-9-1, 2-8-88, and 2-8-89

Response:

Please see above responses regarding public engagement and compliance with the APA regarding the 15-day public comment period. In addition, DTSC notes that it is fully in compliance with the APA's provisions governing the duty to compile responses to comments. More specifically, Government Code Section 11346.9(a)(3) sets out the duties of state agencies in responding to comments. That provision reads in pertinent part as follows: *"Every agency subject to this chapter shall do the following: (a) Prepare and submit to the office [of Administrative Law] with the adopted regulation a final statement of reasons that shall include all of the following: (3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change."* As is evident from this passage and the fact that DTSC is in this Final Statement of Reasons compiling summaries and responses to all comments within the scope of these revised proposed regulations, DTSC is in full compliance with its duties under the APA.

It should be noted that DTSC considered each of the comments it received on the initial proposal. The number and nature of the revisions to the proposed regulatory text bears this out. In effect, the proposed revisions function as DTSC's response to comments. In other words, DTSC's revisions to proposed text reflect an agreement with a concern raised by the comments. The absence of change to the proposed regulations text reflects DTSC's disagreement with a comment or the suggested solution. The Final Statement of Reasons also provides further general responses based on the entire set of comments made on the rulemaking. DTSC did not make any changes to the regulations in response to these comments.

IV. CHEMICAL OF POTENTIAL CONCERN (COPC)

Section 66260.10

A. COPC: SCOPE OF CHEMICALS INCLUDED AS COPCS

Comments Summary:

The comments state that the revised definition of “chemical of potential concern” (COPC) is too broad when including “or chemical constituent” (e.g., ingredients). The specific comments are as follows:

- Human HRAs conducted elsewhere are not conducted on a “chemical ingredient” level for Resource Conservation and Recovery Act (RCRA) permitted waste streams.
- The definition would include naturally occurring, background constituents in the HRA, even if such chemicals are not a result of the permitted waste stream. New background data would have to be generated on constituents.
- Such an expansion of the scope of what constitutes a COPC would result in including substances beyond those identified in a facility’s hazardous waste permit and waste streams.

The comments recommend that DTSC should limit the scope of COPCs to the specified RCRA permitted waste streams. The comment suggests that the definition be revised as follows:

“Chemical of Potential Concern or COPC means a chemical ~~or chemical constituent~~ at or from the facility that is present in the facility’s permitted hazardous waste streams soil, water or air, at a concentration that may pose a risk and is potentially due to facility related activities or contamination. This definition is solely for purposes of the health risk assessment process pursuant to section 66270.14(e).”

Comments: 2-1-11, 2-1-13, 2-3-17, 2-9-3, 2-9-4, and 2-9-6

Response:

The existing definition in section 66260.10 for “COPC” already limits the HRA to hazardous waste facility related activities and existing contamination. “Facility” is defined in Section 66260.10 as “Hazardous waste facility,” “hazardous waste management facility,” “HW facility,” or “facility” to mean:

(a) all contiguous land and structures, other appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal or recycling of hazardous waste. A hazardous waste facility may consist of one or more treatment, transfer, storage, resource recovery, disposal or recycling operational units or combinations of these units.

The term “chemical constituent” was added to the definition to be consistent with other definitions in Section 66260.10, such as:

- *“Constituents of concern” means any waste constituents, reaction products and hazardous constituents that are reasonably expected to be in or derived from waste contained in a regulated unit*
- *“Hazardous Constituent” means: a constituent identified in Appendix VIII to chapter 11 of this division; or any other element, chemical compound, or mixture of compounds which is a*

component of a hazardous waste or leachate and which has a physical or chemical property that causes the waste or leachate to be identified as a hazardous waste.

- *“Hazardous waste constituent” means a constituent that caused the USEPA Administrator to list the hazardous waste in 40 CFR Part 261, Subpart D, or a constituent listed in Table 1 of 40 CFR section 261.24. (Section 66261.24, Table I)*

DTSC disagrees that HRAs conducted elsewhere are not conducted on a “chemical ingredient” level. The HRA needs to address the underlying constituents that cause a waste stream to be considered hazardous waste. Many waste streams are not just a single chemical. When hazardous waste streams are treated, the intent is to change the physical, chemical, or biological character or composition. When waste streams are released, they may undergo degradation. For all these reasons, the definition of COPC cannot be restricted to only a facility’s permitted hazardous waste streams.

For example, used oil waste streams are not all a single chemical or a single uniform composition. These waste streams consist of hundreds of fractionated petroleum hydrocarbons and volatile organic compounds, many of which are hazardous. When these waste streams are handled or released to the environment, only a small number of chemical constituents typically account for a large majority of the health risks associated with potential exposures to affected air, soil, soil gas, or groundwater. Furthermore, over time, the composition of a used oil release will change during long-term field exposure or weathering.

DTSC recognizes that many COPCs for a given release or emission are not expected to drive risk in an HRA, and therefore, to focus on non-risk-driving constituents may provide little or no value. However, all known potential constituents must be identified to effectively narrow the list of COPCs. There is a shared knowledge among environmental scientists of the most prevalent list of hazardous COPCs that are potentially present for the majority of hazardous waste streams, and DTSC does not expect the owners or operators to list thousands of COPCs. Environmental testing techniques typically analyze for groups of constituents, such as organic compounds, metals, polychlorinated biphenyls (PCBs), sulfates, halides, cyanides, particulates, among others, in soil, water, or air.

The provision for the HRA requirement includes both a conceptual site model and a work plan to assure that the HRA captures the potential COPCs and the mechanisms by which chemicals or constituents could migrate through the environment and cause potential impacts to receptors. Therefore, an HRA assessment requires an appropriate set of COPCs. DTSC has defined COPCs as both chemicals and chemical constituents to ensure an appropriate screening of hazards.

Similarly, contributions of naturally occurring, or background constituents, such as metals, need to be assessed in an HRA. Background concentrations of contaminants are those concentrations found in areas surrounding a site, but are unrelated to site releases. These background constituents come from two major sources: first, natural sources (i.e., geologically derived concentrations of chemicals in the environment not influenced by human activity), and second, ambient or anthropogenic sources (i.e., concentrations present due to human activities, such as automobile use or pesticide dispersion in farming areas).

While COPCs may be removed from further assessment through comparison with toxicological benchmarks, comparison with background levels generally cannot be used to remove COPCs owing to

the need to fully characterize site risk. For example, if the maximum metal concentration found onsite is less than the background concentration, the metal may be excluded as a COPC.

DTSC does not consider the revised definition an expansion of the scope of what constitutes a COPC. An HRA should include the underlying constituents beyond those identified in a hazardous waste facility permit. DTSC did not make any changes to the definition of COPC in section 66260.10 in response to these comments.

B. COPC: MINIMUM DATA QUALITY REQUIRED TO INCLUDE COPC

Comment Summary:

The comment states that the U.S. EPA Risk Assessment Guidance for Superfund defines in RAGS Volume I, Part A, Exhibit 5-1 that COPC is a chemical that is "***potentially site-related and whose data are of sufficient quality for use in the quantitative risk assessment.***" The underscored bold phrase is omitted from DTSC's proposed rule language but is essential to successful implementation of a RCRA quantitative risk assessment.

Comment: 2-9-4

Response:

The comment is correct that the data should be of sufficient quality for use in a quantitative risk assessment. However, in the proposed regulations, the COPCs would be used in the HRA provision for purposes of a questionnaire, a Screening Level HRA, and a Baseline HRA. DTSC did not make any changes to the definition in response to these comments because it restricts the use of COPC data for the HRA tiers, unnecessarily limiting review and analysis of community risks.

V. TRAINING

[Section 66264.16\(f\) and 66265.16\(f\)](#)

A. TRAINING: DUE DATE FOR CERTIFICATION

Comments Summary:

These comments repeat those previously provided during the 45-day comment period, that the due date for reporting that training occurred for the previous year is March 1, when many other state and federal reports are due. While these comments note that the effective date is March 1, 2021, these comments state that the reporting requirement is unnecessary, of little value, duplicative, and that the training records are available on site during annual facility inspections. The comments indicate that the requirement should be deleted, or the proposed regulations revised such that the training certifications are placed in the employee's file.

One comment has an opposing view and states that the training certification reporting requirement to DTSC should be effective immediately, citing that safety should not be delayed.

Comments: 2-1-7, 2-3-6, 2-5-2, and 2-8-118

Response:

DTSC acknowledges these comments and the concerns expressed, and provided responses to these comments in the September 2017 Response to Comments document. As previously stated, DTSC has proposed these changes to training requirements based on DTSC review of common compliance violations related to training or lack of training for hazardous waste facility personnel. The proposed regulations are not duplicative of compliance inspections but are intended to require treatment, storage, and disposal facilities (TSDFs) to ensure compliance with training requirements, which would be verified during compliance inspections. DTSC believes this requirement is of value to ensure appropriate training of facility staff, to ensure training when staff changes within the facility, and to also reduce potential training violations during inspections.

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

In response to the comment that the annual reporting requirement to certify facility personnel training should be effective immediately, DTSC notes that the personnel training provision is effective July 1, 2019. It is only the annual training certificate that would become effective on March 1, 2021. The TSDF needs adequate lead time to make necessary changes to prepare, conduct, and record facility personnel training so the training certification could be provided to DTSC for the prior year. These regulations would become effective in 2019, which would allow the TSDFs to make system changes and train facility personnel. In 2020, the facility would have a full year of training records for the first annual training certification due March 1, 2021. DTSC did not make any changes to the regulations in response to these comments.

B. TRAINING: APPLICABILITY TO ENTIRE FACILITY**Comments Summary:**

These comments express concern that the revisions to the training requirements are not clear enough and that facilities with a permitted unit on site would be subject to all the training requirements as a fully permitted TSDF. These comments request additional clarification of the applicability in Sections 66264.16(f) and 66265.16(f) to reflect, at a minimum, that these sections apply only to personnel operating the permitted unit rather than to all facility personnel.

Comments: 2-1-5, 2-3-4, 2-3-5, 2-9-19 and 2-9-20

Response:

DTSC appreciates the concern raised in these comments. However, public safety requires that training requirements apply to all permitted hazardous waste facilities regardless of the number of hazardous waste units or the primary business of the owner or operator. All of section 66264.16 applies to facility personnel. Section 66264.16(a)(4)(A) makes it a requirement that all facility personnel must have a general awareness training that provides a description of the hazardous waste facility operations and corresponding security and safety considerations. Section 66264.16(a)(4)(B) requires function-specific

training for personnel that are involved with hazardous waste management activities. As suggested by the comment, only the job titles for positions related to hazardous waste management are required to be provided with the function-specific certification. DTSC did not make any changes to section 66264.16(f) or 66265.16(f) in response to these comments.

C. TRAINING: EMPLOYEE NAMES IN ANNUAL CERTIFICATION

Comments Summary:

These comments request deletion of sections 66264.16(f)(2) and 66265.16(f)(2), which requires that the annual training certification include the job title and name of employee for each position related to hazardous waste management. These comments state that this provision is unnecessary because this information is available during annual inspections. The comments also indicate that public disclosure of employee names and positions may be a security and safety concern.

Comments: 2-1-6, 2-3-5 and 2-9-21

Response:

DTSC acknowledges the concerns raised in these comments. However, these comments are out of the scope of this comment period as DTSC has not revised these provisions. Please refer to the September 2017 Response to Comments document where DTSC summarized and responded to this comment. DTSC did not make any changes to the regulations in response to these comments.

VI. FINANCIAL ASSURANCE (FA)

A. FINANCIAL ASSURANCE: PRIOR COMMENTS NOT INCOPORATED

Summary of Comment:

The comment is critical of DTSC for making some, but not all, of the changes recommended by the commenter during the initial 45-day public comment period. The comment does not address the revised, proposed regulatory text in the June 2018 version of the proposed regulations. Rather, the comment notes a lack of change to the unchanged text in the following areas: adding a credit rating requirement to the financial test financial assurance mechanism; doubling the net worth requirement from \$10 million to \$20 million; precluding use of the same assets to satisfy more than one government agency financial assurance requirement; requiring 90% of assets to be held in the United States or have assets in the United States equal to at least six times the financial test; and requiring submittal of financial statements to DTSC, as opposed to merely submitting a letter from a certified public accountant.

Comment: 2-2-30

Response:

DTSC acknowledges the portion of the comment supportive of changes DTSC made from the initial proposed regulatory text to the revised text. Regarding the remaining points identified in the above summary, these comments are outside the scope of this public comment period because they address

unchanged text, as noted above. For this reason, DTSC did not make any changes in response to these comments.

For further information, the commenter is directed to DTSC's September 2017 Response to Comments document on the initial version of the regulatory text.

VII. CORRECTIVE ACTION

Section 66264.101

A. CORRECTIVE ACTION: DTSC ACCESS TO FINANCIAL ASSURANCE FUNDS

Comments Summary:

These comments criticize the revised proposed regulatory text that addresses financial assurance requirements for owners or operators of facilities conducting corrective action. ("Corrective action" encompasses the various remediation activities that facility owners or operators are required to perform to investigate and clean up historic contamination at the facility.) One of the principal criticisms in these comments is that DTSC has revised the proposed regulations to require the owner or operator to establish a financial assurance mechanism that allows DTSC to access funds for corrective action in specified situations. The commenters assert that the effect of this provision is to preclude the use of the financial test mechanism and the corporate guarantee. This, the commenters claim, conflicts with other provisions that require DTSC to allow the use of all the financial assurance mechanisms allowed under RCRA.

Comments: 2-1-8, 2-2-32, 2-3-7, 2-3-8, 2-6-1, 2-8-111, 2-9-14, and 2-9-15

Response:

DTSC agrees that there is an inadvertent effect of the revised proposed language for section 66264.101(b) that precludes the use of the financial test and corporate guarantee mechanisms. Therefore, DTSC again revised the language for public comment during another 15-day public comment period that ran from July 27, 2018 through August 13, 2018. The most recent version of the proposed text reads in pertinent part as follows: *"If the owner or operator proposes to use the financial test or corporate guarantee as the financial assurance mechanism for corrective action, the owner or operator shall also establish a process that allows the Department access to the funds to undertake corrective measures implementation tasks if the department determines that the owner or operator is unable or unwilling to undertake the required tasks. Any financial assurance mechanism or process proposed by the owner or operator shall be subject to the Department's approval."*

DTSC's most recent proposed language preserves the ability of owners or operators to use the financial test and corporate guarantee financial assurance mechanisms. DTSC revised the language to require the owner or operator to set up a process outside of the selected financial assurance mechanism for those relying on the financial test or corporate guarantee. This language would allow DTSC access to corrective action funds when necessary to undertake corrective action work not being undertaken by the owner or operator. This revision allows the owner or operator more flexibility to propose a process that would work for it. DTSC anticipates that owners or operators relying on the financial test or corporate

guarantee mechanism would work with DTSC to agree on a process that sufficiently protects DTSC from financial burden in the event DTSC has to undertake corrective action work that is the responsibility of the owner or operator.

B. CORRECTIVE ACTION: APPLICABILITY OF FINANCIAL ASSURANCE REQUIREMENTS TO TSDF

Comments Summary:

These comments assert that the corrective action financial assurance provision lacks clarity as to whom it applies. The commenters question whether the provision applies to any entity that has a permitted hazardous waste treatment unit or solely to entities identified by the comments as Treatment, Storage, or Disposal Facilities. These comments also assert that there is a lack of clarity regarding whether the provision applies to sitewide corrective action and to post-closure units.

Comments: 2-1-8, 2-2-32, 2-3-7, 2-3-8, 2-6-1, 2-8-111, and 2-9-14

Response:

Health and Safety Code section 25117.1 defines a “hazardous waste facility” to mean *“all contiguous land and structures, other than appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste. A hazardous waste facility may consist of one or more treatment, transfer, storage, resource recovery, disposal, or recycling hazardous waste management units, or combination of these units.”* The term “hazardous waste facility” includes any facility with a permitted hazardous waste management unit, regardless of whether the entity operating the facility, or the unit is primarily in the hazardous waste management business. The proposed regulations would not affect this statutory definition or the long-standing interpretation of this definition.

For example, at various refineries in California, their principal business is to refine crude oil or petroleum to transform and refine these materials into more useful products such as gasoline, diesel fuel, asphalt base, heating oil, kerosene, liquefied petroleum gas, jet fuel and fuel oils. Many refineries also operate one or more hazardous waste management units permitted by DTSC for the storage and/or treatment of hazardous waste. By definition, such refineries that have permitted units are TSDFs, regardless of the size of the TSDF unit.

Furthermore, for the purposes of corrective action, Health and Safety Code section 25200.10 defines a “facility” to mean the entire site that is under the control of the owner or operator seeking a hazardous waste facilities permit. Therefore, DTSC has the authority to require corrective action for all releases of hazardous waste or constituents from a solid waste management unit or a hazardous waste management unit at a facility engaged in hazardous waste management, regardless of the time at which waste was released at the facility.

An owner or operator is required to take corrective action beyond the facility boundary where necessary to protect human health and safety or the environment. And when corrective action cannot be completed prior to issuance of the permit, the permit shall contain compliance schedules for corrective action and assurances of financial responsibility for completing the corrective action.

Existing law and regulations establish the applicability for corrective action for a facility. DTSC did not make any additional changes to section 66264.101(b) in response to these comments.

C. CORRECTIVE ACTION: DEPARTMENT APPROVAL OF FINANCIAL ASSURANCE MECHANISM

Comments Summary:

These comments object to the fact that the proposed regulations provide that the “financial assurance mechanism is subject to the Department’s approval.” The concerns include the following: in the absence of clear criteria, DTSC would act arbitrarily and capriciously in deciding whether to approve or disapprove of a selected financial assurance mechanism; this provision would deprive owners or operators of needed flexibility in selecting an appropriate financial mechanism; DTSC would end up controlling which mechanism is used; DTSC lacks authority to approve of the choice of financial assurance mechanism selected by the owner or operator, although DTSC may review the selected mechanism to ensure that it meets all requirements.

Comments: 2-2-33, 2-3-8, 2-6-1, 2-8-111, and 2-9-16

Response:

There is no basis for assuming or alleging that DTSC would act arbitrarily or capriciously in approving or denying the selection of a financial assurance mechanism by an owner or operator. DTSC has every intention of carrying out its responsibilities under the proposed regulations consistent with its performance of other duties and in an unbiased manner consistent with the governing law and regulations. There is not an absence of criteria for approval or disapproval of the selection of a financial assurance mechanism. Rather, the criteria are the requirements in the governing regulations. That is evident from the context of this new provision and DTSC’s longstanding practice. DTSC’s approval authority does nothing to diminish the owner or operator’s ability to select a financial assurance mechanism in the first instance. DTSC is merely formalizing the fact that any selected financial assurance mechanism must conform to the relevant statutes and regulations. DTSC is in the best position to confirm that the financial assurance mechanism has met this requirement. DTSC has ample authority to draft regulations to review and approve the selection of a financial assurance mechanism. That authority includes, but is not limited to, the authorizing legislation (SB 673, adding Health and Safety Code section 25200.21) and Health and Safety Code section 25150. DTSC did not make any changes to the regulations in response to these comments.

D. CORRECTIVE ACTION: AGREEMENTS AND ORDERS WITH REGIONAL WATER BOARDS

Comment Summary:

The comment asserts that new language inserted in the revised proposed text in Section 6264.101(c) is inappropriate and should be deleted. The language that is the subject of the comment is “Corrective action must be specified in the permit, order, or agreement for corrective action issued or entered into by the Department...” (emphasis in original). The comment claims that this new language changes the meaning of the sentence and omits reference to orders or agreements issued or entered into by regional water boards.

Comment: 2-9-17

Response:

DTSC respectfully disagrees with the comment. The new language does not change the meaning of the sentence. Rather, it expands the scope of the items that are covered by the statutory mandate to include corrective action provisions, where it is appropriate to do. Currently, regulations require corrective action language in specified documents extends to permits and orders only, and neglects to include agreements entered into between DTSC and owners or operators. The proposed language addresses this gap, and better reflects the fact that DTSC often enters into agreements regarding corrective action, as opposed to issuing permits or unilateral orders. DTSC has no authority to compel regional water boards, or any other agencies, to include corrective action language in documents issued by these agencies. However, owners or operators are encouraged to work with DTSC to ensure that permits, orders, or agreements issued by DTSC address any existing corrective action work being overseen by other agencies, including, but not limited to, regional water boards. DTSC did not make any changes to the regulations in response to these comments.

VIII. FINANCIAL ASSURANCE FOR CLOSURE**Sections 66264.143(f) & 66264.145(f)****A. FINANCIAL ASSURANCE FOR CLOSURE: FINANCIAL TEST FOR CLOSURE AND POST-CLOSURE****Comment Summary:**

The comment states that DTSC has provided no reason for precluding an owner or operator from pledging assets to satisfy the financial means test mechanism for purposes of DTSC's requirements when those same assets are pledged to satisfy financial assurance requirements of another governmental agency.

Comment: 2-8-110

Response:

This comment is outside the scope of the topics subject to comment for the revised proposed regulations because DTSC made no change to these provisions as part of the second public comment period. For further information on this topic, the commenter is directed to a discussion of this topic in the Initial Statement of Reasons and the September 2017 Response to Comments document. DTSC did not make any changes to the regulations in response to these comments.

B. FINANCIAL ASSURANCE FOR CLOSURE: USE OF THE TERM "ADMITTED CARRIER" AND RELATED REQUIREMENTS**Comments Summary:**

The comments address DTSC's use of the term "admitted carrier" in the following provisions: Sections 66264.143(e), 66264.145(e), 66264.147(a), 66264.147(b), 66264.147(f), 66264.151, 66265.143(d), 66265.145(d), 66265.147(a) and 66265.147(b). To understand these comments, it should be noted that the use and effect of the term are identical in these eight provisions. Each provision requires an owner or operator to meet the particular financial assurance requirement by establishing that the insurance

relied upon was provided by an “admitted carrier.” An “admitted carrier” is defined in proposed section 66260.10 as follows: *“Admitted carrier” means an insurance company entitled to transact business of insurance in this state, having complied with the laws imposing conditions precedent to transactions of such business.*” In a closely related provision, DTSC discusses “excess or surplus lines [insurance] brokers.” These two inextricably linked topics were both raised by these comments. (While the term “excess or surplus lines brokers” is not the subject of proposed definitions in these regulations, it is a term of art well understood in the relevant community and should be used as such in these proposed regulations.)

Some of the comments begin by describing what an “admitted carrier” is—describing such an entity as an insurance company that has submitted its rates to the California Department of Insurance (DOI) for approval. Once those rates are approved by DOI, the comment continues, the carriers are required to use those rates with all customers equally. DOI also reviews the “admitted carrier’s” investments and reserves as part of the partial backing of policies provided by “admitted carriers” by the California Insurance Guarantee Association (CIGA). Some comments note that DTSC’s proposed definition of the term is not identical to the definition of this term in the California Insurance Code. The comments assert that this means the provision is duplicative and fails the necessity standard and/or conflicts with the Insurance Code.

Other comments assert that use of the term “admitted carrier” is ambiguous, and state that DTSC is confused about the difference between admitted and non-admitted carriers. The comments imply that DTSC has mistakenly equated “admitted carrier” status with a mark of stability, rather than the more appropriate administrative status the term represents. Another comment indicates the commenter had insufficient time to research this newly proposed revision, and further said that the provision raised significant legal issues, including conformity to the California Insurance Code and the U.S. Constitution. Another commenter questions DTSC’s authority to preclude a type of insurance that is authorized under RCRA. The commenter continues by saying that captive insurance has been relied on by it for over 40 years without incident. In addition, the commenter asserts that the limitation of authorized financial assurance providers to “admitted carriers” runs afoul of California Health and Safety Code section 25245.

Another comment asserts that the use of the term “admitted carrier” fails the necessity, clarity, nonduplication, and authority provisions of the APA. The commenter goes on to assert that the provision appears to preclude it from using captive insurance. And the commenter continues by providing the definition of “admitted carrier” in the California Insurance Code, and by questioning the lack of a definition for the term “transacted.” This commenter also specifically challenged DTSC’s authority to preclude the use of a specific type of insurance (i.e. captive insurance) if the DOI allows the captive to transact the business of insurance in California. Finally, in this regard, the commenter states that DTSC has not provided any substantial evidence for the necessity of these “admitted carrier” provisions, which would preclude it from relying on captive insurance.

Some commenters stated that the new language regarding “admitted carrier” and excess and surplus lines would inadvertently result in no excess or surplus lines carrier being able to provide financial assurance for facility owners or operators in California. These commenters continue by observing that limiting excess and surplus lines coverage to entities licensed in California would preclude the use of this

type of insurance for meeting DTSC's financial assurance requirements. An additional comment states that DTSC appears not to be aware of the difference between "admitted carriers" and excess and surplus lines brokers, or of amendments to the California Insurance Code made in 2011 regarding excess and surplus lines brokers, especially regarding creation of a List of Approved Surplus Line Insurers (LASLI).

Comments: 2-1-9, 2-3-9, 2-3-10, 2-3-14, 2-3-15, 2-3-16, 2-7-1, 2-8-103, 2-8-104, 2-8-105, 2-8-106, 2-8-107, 2-8-108, and 2-8-109

Response:

DTSC notes that it has made significant revisions to the provisions that are the subject of the comment, both in response to the above comments and based on DTSC's own reconsideration of the potential impacts created by the provisions. On July 27, 2018, DTSC released another set of revisions to the proposed regulations for a 15-day public comment period. That extended comment period ended on August 13, 2018. One of the two topics of the July public comment period was the "admitted carrier" provision, including the related excess and surplus lines broker provision. Again, as stated at the beginning of this Response to Comments document, the pertinent terminology appears in numerous places in the financial assurance provisions. But in each case, the terminology and effect are identical. Therefore, the most recent revised text and the implications of its use are discussed only once.

The July 2018 version of the revised, proposed text reads as follows:

"At a minimum, the insurer shall be: (A) an admitted carrier, licensed to transact the business of insurance in California; or (B) a nonadmitted carrier eligible to provide insurance as an excess or surplus lines insurer in California. Any excess or surplus insurance shall be placed by and through an excess or surplus lines broker currently licensed by the California Department of Insurance; and shall be underwritten by a surplus lines insurer that is on the California Department of Insurance's List of Approved Surplus Lines Insurers [LASLI] as being eligible to cover risks in California."

DTSC believes that this latest revised language addresses the criticism in the above comments. In general, DTSC agrees with the commenters' definition and description of an "admitted carrier." The definition of "admitted carrier" in the proposed regulations is identical to the definition of that term used by CalRecycle in its financial assurance regulations in California Code of Regulations, title 27, section 22200(b). This term is necessary to allow for a common understanding and usage of the term in the context of insurance coverage for the solid waste facilities regulated by CalRecycle and the hazardous waste facilities regulated by DTSC.

DTSC respectfully disagrees that it lacks authority to adopt any financial assurance provisions beyond those set out in the California Insurance Code and disagrees with the related assertion that if DTSC were to adopt regulations for hazardous waste entities, they must be identical to those in the California Insurance Code.

DTSC has independent authority under Health and Safety Code sections 25150, 25200.21, and 25245, among others, to draft regulations setting out requirements for facilities that treat, store, or dispose of hazardous waste. DTSC has long done so in numerous areas that partially overlap with other

government entities, including DOI. This partial overlap does not raise a necessity or non-duplication issue. The fact that DOI has provisions regarding licensing of insurance entities does not mean that it is not necessary for DTSC to adopt specific regulation to govern financial assurance for corrective action. There is nothing elsewhere in the Hazardous Waste Control Act or DTSC's implementing regulations that covers the "admitted carrier" and excess and surplus lines broker issues as they are addressed here. Rather, the definition of "admitted carrier" in the proposed regulations is identical to the definition of that term used by CalRecycle in its financial assurance regulations in California Code of Regulations, title 27, section 22200(b). This term is necessary to allow for a common understanding and usage of the term in the context of insurance coverage for the solid waste facilities regulated by CalRecycle and the hazardous waste facilities regulated by DTSC. In addition, nothing in these regulations in any way interferes with DOI's mission or jurisdiction. DTSC is not regulating insurance carriers. Rather, DTSC is building on the existing requirements imposed by the Legislature and DOI to specify substantive requirements for financial assurance mechanisms used by hazardous waste facilities that are acceptable to DTSC for implementation of DTSC's hazardous waste management program. Nor does RCRA preclude DTSC from being more stringent than RCRA in specifying financial assurance requirements. In fact, RCRA expressly contemplates and authorizes RCRA-authorized states to be broader in scope and/or more stringent in requirements for entities regulated under the state programs.

As for the assertion that DTSC is confused by the definition or concept of what an "admitted carrier" is, that concern is fully addressed by the revised, proposed language. DTSC respectfully disagrees that it misunderstood or misused the term "admitted carrier in the previous version of the language." In any event, the concern is effectively rendered moot by the revised proposed language.

The same is true for the concern that the commenter lacked sufficient time to review the proposal. As noted above, further revised language was the subject of a 15-day public comment period initiated by DTSC. To the extent the comments regarding "captive insurance" are within the scope of this public comment period and are not otherwise addressed in this response, they are further discussed below under that heading immediately following this Response. But DTSC notes that the revised, proposed text effectively renders this concern moot as well.

DTSC respectfully disagrees that its proposed regulations conflict with Health and Safety Code section 25245(a). That provision confers authority on DTSC to "adopt, and revise when appropriate, standards and regulations..." It further specifies that if financial assurance is being provided for a facility subject to RCRA, the financial assurance "shall be a trust fund, surety bond, letter of credit, insurance, or any other mechanism authorized under [RCRA] and the regulations adopted pursuant to [RCRA]." DTSC's proposed regulations do not exceed or conflict with the authority conferred upon it in this provision. Moreover, section 25245(b) provides as follows: "in adopting regulations pursuant to subdivision (a), to carry out the purposes of this chapter [6.5], the department may specify policy or other contractual terms, conditions, or defenses which are necessary or are unacceptable in establishing evidence of financial responsibility." This is precisely what DTSC has done in the proposed regulations—specified in regulation further conditions for satisfying financial assurance obligations by owners or operators.

The most recent proposed language also resolves the concerns that the prior language confusing "admitted carrier" with excess and surplus lines brokers concepts would have precluded any excess or

surplus lines broker from providing financial assurance in California to meet DTSC's requirements in this area.

C. FINANCIAL ASSURANCE FOR CLOSURE: COMPLIANCE WITH APA

Comment Summary:

The comment repeats earlier comments regarding purported failings of the financial assurance regulations to satisfy various criteria used by the Office of Administrative Law in its review of regulations. The comment sets out adverse consequences that would result if DTSC were to adopt the financial assurance regulations as proposed. None of content of the comment addresses changes made to the proposed regulations circulated by DTSC for comment in June 2018.

Comment: 2-2-31

Response:

These comments are outside the scope of this public comment period because they do not address text changed in the proposed regulations for comment in June 29, 2018. For further information regarding DTSC's compliance with the APA and intent in drafting these regulations, the commenter is directed to the Initial Statement of Reasons and the September 2017 Response to Comments document. DTSC did not make any changes to the regulations in response to these comments.

D. FINANCIAL ASSURANCE FOR CLOSURE: CAPTIVE INSURANCE

Comments Summary:

The comments state that DTSC has failed to meet the necessity standard for eliminating the use of captive insurance. They claim DTSC has had only positive experiences with captive insurance, and has no basis for eliminating it. The elimination of captive insurance results from limiting financial assurance providers to "admitted carriers" in California. Captive insurance is a beneficial and proven method of meeting financial assurance obligations, and DTSC should retain it for meeting DTSC's financial assurance requirements. The comments also state that DTSC either misunderstands captive insurance or it has intentionally sought to preclude its use despite earlier comments supportive of it. The comment points out the distinction between an "admitted carrier" and an excess or surplus lines broker. More specifically, an excess or surplus lines broker is one that, by definition, is not an "admitted carrier." The comments list an array of statistics and facts regarding captive insurance and the entities that rely on it to meet their financial assurance obligations.

Comments: 2-8-102, 2-8-108.5, 2-3-11, 2-3-12, and 2-3-13

Response:

Please see Response above regarding use of the term "admitted carrier." That response covers virtually all the comments made separately here. In addition, DTSC need not show catastrophic failure(s) of a given financial assurance mechanism before determining that it is no longer an appropriate mechanism.

DTSC has determined based on research and experience that the unfettered use of captive insurance is problematic. As discussed at length in the Response to Comments on the initial proposal and in the Initial Statement of Reasons, DTSC has deep concerns about the very essence of captive insurance—the lack of risk separation and risk shifting between the insurer and the insured. However, the provisions that are the subject of these comments have been revised, as discussed extensively above under the Response to “admitted carrier” comments. DTSC understands the nature of captive insurance. DTSC revised the proposed regulations based on public comment and its own reconsideration of these issues. DTSC understands that there may be some benefit to those who rely on captive insurance, but continues to believe, given its inherent risks, that reasonable safeguards are appropriate. DTSC has endeavored to strike this balance in its most recent version of the proposed regulations. DTSC understands the distinction between an “admitted carrier” and an excess or surplus lines broker. That distinction is reflected in the latest version of the proposed regulations. DTSC made extensive changes to the regulations based on these comments. Please see July 2018 version of the proposed regulations for the revised text, which is also set out above in the Response to Comments regarding “admitted carrier.”

IX. COMMUNITY INVOLVEMENT PROFILE (CIP)

[Section 66270.14\(b\)\(24\)\(September 2017\)](#)

A. CIP: EFFORT TO PREPARE, APPLICANT RESPONSIBILITY TO PREPARE, AND EXCLUSION OF LOW-INCOME COMMUNITIES OF COLOR

Comments Summary:

In general, these comments assert that the change from “readily available” to “reasonably available” for the CIP does not address the concern regarding extensive research, the use of consultants or other qualified experts to conduct extensive research including, interviews with community members, nor the time and cost to prepare a CIP. One comment states that “reasonably available” imposes a greater information-gathering burden on facilities. Another comment states that the requirement for the CIP presumes sufficient data is readily available and that there is no documentation that this is correct. Some comments indicate that the value of a CIP is not evident as decision criteria for permit decisions and instead, would add unnecessary time and cost to compile and provide information, adding years to the permit process.

Another comment states the opposing concern – that the change from “readily available information” to “reasonably available information” gives the owner/operator of a hazardous waste facility too much discretion to limit the information in a CIP and that the CIP needs to be as comprehensive as possible. This comment states this change from “readily” to “reasonably” should be deleted. This comment also indicates that the CIP improperly and specifically excludes the low-income communities of color that live next to California’s three hazardous waste landfills and limits relevant information that would be required in the CIP.

Some comments indicate that DTSC should complete the CIP because it has the knowledge regarding the community.

Comments: 2-2-34, 2-2-35, 2-3-18, 2-4-20, 2-5-3, 2-8-112, and 2-9-9

Response:

DTSC appreciates the concerns raised in these comments. DTSC believes that the information sources named in the Initial Statement of Reasons (ISOR) dated September 2017 are more accurately described as “reasonably available”, yet also allows for updates and new updated information from these “reasonably available” sources. By using the information sources as described in the ISOR, hiring consultants or other experts may not be necessary. The ISOR clearly identifies and documents sources where information may be obtained to fulfill the CIP requirement. Regarding the comments that time and cost are concerns to the permittee, the fact that some CIP information is the same or similar information as required by other environmental laws, such as CEQA, should reduce the facilities’ time and cost to provide information for the CIP.

Permit applicants may also want to pursue permit pre-application meetings with DTSC, which may provide additional clarification regarding the amount of information needed to meet this requirement. The ISOR provides information sources to meet the CIP requirements. However, if the permit applicant believes the information required by the CIP is not “reasonably available,” allowances may be made for the submission of such information on a case-by-case basis, in accordance with the existing section 66270.14(a).

In response to comments that a CIP does not provide value as decision criteria for permit decisions and would add unnecessary time and cost to prepare and provide information, DTSC notes that much of the information required in the CIP is similar to information required by CEQA. The time and cost should be absorbable. While the CIP may not be referenced specifically in statute as a decision criterion, the CIP is a first step to ensure that potential community concerns are brought to light early in the permit application review process and that community concerns are considered during the permit review and permit decision process. Early identification of vulnerable communities and health concerns in the permitting process would provide the facility the opportunity to address and mitigate potential concerns early in the permitting process rather than at the end of the process.

Regarding the concern that the owner or operator of a hazardous waste facility is given too much discretion with the proposed revision from “readily available” to “reasonably available,” DTSC believes that the concern is unfounded. Both terms were meant to refer to information sources named in the ISOR to fulfill the CIP requirements. As such, there is no additional discretion allowed the facility regarding the amount of information and data required to meet the CIP requirements.

DTSC does not agree with the comment that the CIP excludes low-income communities of color that live next to hazardous waste landfills. While the term “surrounding community” for purposes of the CIP has been clarified, the required information has not changed from the previously proposed language. Sections 66270.14(b)(23)(B)1 through 8 (June 2018), previously Sections 66270.14(b)(24)(B)1 through 8 (September 2017), include demographic information needed to identify low-income communities of color. For example, household income, languages spoken in the home, race and ethnicity data must be included in the CIP for the surrounding community demographics.

DTSC has not proposed any regulatory changes that alter the responsibility of completing the CIP. Therefore, the comment that DTSC, rather than the permit applicant, should complete the CIP is out of the scope of the proposed regulatory changes in this second comment period. (See the September 2017

Response to Comments document.). DTSC did not make any changes to the regulations in response to these comments.

A. CIP: SURROUNDING COMMUNITY

Comment Summary:

This comment expresses concern regarding the proposed revised language: “The surrounding community for the purposes of the Profile must include the United States census tracts in which the facility is located. If the facility is located in a census tract that has a population of less than 2000 people, any other census tracts located within one (1) mile of the facility must also be included in the surrounding community profile.”

The concern is that application of the proposed language would exclude impacted communities from inclusion in the CIP, mainly low-income minority communities. In particular, this comment is concerned with the three hazardous waste landfill facilities in California; they are located in Kettleman Hills, Westmorland, and Buttonwillow. The commenter is concerned that the census tract for the Kettleman City community would not be included in the CIP for the landfill located in Kettleman Hills, in the regulatory language as proposed. The comment states that census tracts bordering the census tract where a hazardous waste facility is located must be included in a CIP. The comment states that if DTSC does not correct this section to address the concern, the situation may constitute a civil rights violation.

Comment: 2-5-4

Response:

DTSC appreciates the concern raised in this comment. The CIP is an initial step to collect information on communities surrounding hazardous waste facilities. DTSC is in the process of developing regulations to consider vulnerable communities and cumulative impacts in permit decisions (see ISOR, page 37-38) that would utilize information obtained through the CIP. As DTSC develops the separate regulations, the criteria for “surrounding community” could be revised to include other census tracts or otherwise account for impacted communities not captured in the initial CIP. The revised language provides a positive first step to identify the surrounding community through census information, including the use of census tracts, demographics, and community issues.

Regarding the concern of a potential civil rights violation, DTSC cannot respond without specific information to support the commenter’s assertion that there may be a civil rights violation. DTSC did not make any changes to the regulations in response to these comments.

B. CIP: COMMUNITY CONCERNS

Comments Summary:

This comment states that Form 399, Health & Safety Code §25200.21 requires that DTSC “shall consider the vulnerability of, and existing health risks to, nearby populations... using available tools, local and regional HRA, the region’s federal CAA attainment status, and other indicators of community vulnerability.” While HRAs can be scientific- and data-based, the requirement to consider “community concerns” may not be scientific and may be unrelated to the facility permit. This is problematic.

DTSC should clarify the terms used in the proposed regulations to ensure comparability of subsequent HRA information.

Comments: 2-3-19 and 2-9-10

Response:

DTSC appreciates these comments to clarify terms used in the proposed regulations. The proposed regulations keep the two concepts, “community concerns” and HRA, separate. Community concerns are identified in the CIP as an initial step to provide information about the surrounding community and how hazardous waste facilities may potentially affect vulnerable communities. The HRA conducted is specific to the hazardous waste facility.

As explained in the ISOR, many of the terms used in the CIP for socioeconomic characteristics are based on the United States Census Bureau’s website glossary¹. This resource provides common definitions for demographic and socioeconomic data used by CalEnviroScreen, CalEnviroStor, and the Demographic Research Unit (DRU) of the California Department of Finance. The terminology used in the CIP for offsite sources, such as hazardous waste sites, hazardous waste generators, and site cleanups, matches terminology used in CalEnviroScreen.

One question asked how “vulnerability” would be interpreted and how that would affect the permit decision. DTSC is developing a regulatory proposal to address community vulnerability and cumulative impacts in permit decisions. Additional refinement to the criteria for “surrounding community” will be considered in that proposal.

A human HRA is a systematic framework within which scientific information relating to the nature and magnitude of threats to human health from the facility is organized and evaluated. The comment is correct that the HRA must be based on scientifically-defensible evaluations of data that are relevant to assessing human health impacts. The terms used in the HRA mirror the terminology used in environmental HRAs by governmental agencies, such as the U.S. EPA, DTSC, California Air Resources Board (CARB), and Office of Environmental Health Hazard Assessment (OEHHA). Because the CIP and the HRA are separate concepts, there is no need to unify the terminology used in these two provisions. DTSC did not make any changes to the regulations in response to these comments.

X. HEALTH RISK ASSESSMENT (HRA)

Section 66270.14(e)

A. HRA: USE OF CALENVIROSCREEN INFORMATION

Comment Summary:

The comment suggests that the HRA should include all information available in CalEnviroScreen for all census tracts within 10 miles of the facility. The HRA should also include other relevant and available information regarding cumulative impacts.

¹ <https://www.census.gov/glossary/>

Comment: 2-5-5**Response:**

The comment brings up a valid point. DTSC divided the rulemaking for SB 673 (§ 25200.21) into two tracks. DTSC will be considering additional permitting criteria related to community vulnerability and cumulative impacts to nearby populations in a subsequent rulemaking. The statute requires that this assessment use available tools, such as CalEnviroScreen, which will be part of the next regulatory proposal. DTSC did not make any changes to the regulations in response to these comments.

B. HRA: POTENTIAL PERMITTING DELAYS**Comment Summary:**

The comment expresses concern that the proposal would extend the time required to review a permit. Federal facilities have extensive Federal Acquisition Regulations which dictate procurement requirements and timelines that may not fit into the regulation's schedule. The HRA alone may represent almost five years of work, or half the length of the actual permit. While this extensive HRA analysis may be appropriate for new applications, it may not be appropriate for permit renewals and that should be reflected in the final regulation.

Comment: 2-4-2**Response:**

DTSC disagrees that the HRA would require five years. The HRA provisions are tiered and designed to address health risks based on the complexity of the facility operations. Even in the case when a Baseline HRA is required, five years is excessive for completing an HRA. HRA submittals would only be applicable when permit applications are submitted and do not apply to applications received prior to the effective date of the proposed regulations. The expiration date of existing permits sets a predictable schedule for the planning needed to comply with Federal Acquisition Regulations.

Furthermore, the comment addresses provisions in the proposed regulations that did not change from the initial version released for public comment on September 22, 2017. As such, this comment is outside the scope of topics subject to public comment for the version of the proposed regulations released on June 29, 2018. DTSC did not make any changes to the regulations in response to these comments.

C. HRA: LACK OF CLARITY REGARDING HOW HRA WILL INFORM THE PERMIT DECKSKL**Comment Summary:**

Requiring the regulated public to complete HRA Questionnaires, Checklists, Work Plans, Screenings, and Baseline HRA submittals (potentially to be revised annually) does not “diagnose” anything in the RCRA permit world, nor does it transparently explain the criteria to be used to support permit approval decisions. DTSC should demonstrate how each input and piece of data being required by the regulation would be used to either approve or deny a permit, rather than requiring an unwarranted and unnecessary detailed list of environmental and socioeconomic demographic data without showing how these inform a regulatory permit writer’s approval.

Comment: 2-9-13

Response:

SB 673 authorizes DTSC to consider for inclusion as criteria the completion of a HRA (Health & Saf. Code §25200.21(g).) The objective of an HRA is to assess the risk posed by the facility and its operations. DTSC's permit decision is based on many regulatory requirements and policy factors, including the findings in an HRA. DTSC did not make any changes to the HRA provision in response to these comments.

D. HRA: REVISION TO CORRECT SCOPE OF COPCS**Comment Summary:**

The comment asserts that while revised text struck problematic language related to HRAs needing to identify releases of the newly defined COPCs "in its entirety" in Section 66270.14(e)(1)(A) and (B), language was subsequently added that essentially requires the same thing by requiring description "in detail all of"

Comment: 2-1-12 and 2-9-6

Response:

The comment is correct that the revision was made to change the grammar to clarify the meaning. This edit did not change the meaning of the provision. DTSC did not make any further changes to section 66270.14(e)(1) (September 2017) in response to these comments.

E. HRA: REASONABLY FORESEEABLE RELEASES**Comment Summary:**

The comment states that the proposed regulation requires that risks from reasonably foreseeable releases be included in the HRA, but does not define "reasonably foreseeable". Additionally, the proposed regulation requires assessing health impacts from the facility on vulnerable populations, but DTSC notes that the criteria for identifying vulnerable populations and cumulative impacts for permit decisions will be finalized in a separate rulemaking.

Comment: 2-4-5

Response:

As explained in the September 2017 Response to Comments document, "reasonably foreseeable" is a legal standard. It is a well-accepted and often-used standard in various legal and regulatory arenas. The foreseeability test basically asks whether a reasonable person would be able to predict or expect the ultimately harmful result of his or her actions. In other words, could a facility reasonably foresee potential releases of hazardous waste or COPCs at the facility from normal operations, upset conditions, or traffic to and from the facility.

This term is also found in existing language in section 66270.10(j)(1)(A) under general application requirements. This subsection specifically applies to surface impoundments and landfills and requires exposure information on "*reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit.*"

The proposed regulations do not include the term “vulnerable populations” in the HRA provisions. The comment is correct that DTSC is working on a separate rulemaking that would address vulnerable populations. DTSC did not make any changes to sections 66260.10 or 66270.14(e)(1)(B) in response to these comments.

F. HRA: OCCUPATIONAL EXPOSURES

Comment Summary:

The comment asserts that the HRAs should be based only on environmental exposures, not occupational ones. The air contaminants resulting from ongoing hazardous waste operations are occupational exposures for the owners or operators who are subject to OSHA HAZWOPER standard. Air contaminants released outside of the facility that reach non-workers, would represent environmental exposures. OSHA’s occupational screening levels are typically less stringent than environmental screening levels.

Comment: 2-4-9

Response:

The scope of the HRA is found in section 66270.14(e)(1)(D). The provision specifies that the “potential magnitude and potential health impact of the human exposure to persons both within and outside of the facility” must be identified in the HRA. DTSC did not revise this section and therefore, this comment is out of scope. DTSC did not make any changes to the regulations in response to these comments.

C. HRA: ALTERNATE BASIS FOR REQUIREING HRA AND COORDINATION OF HRAS

Comment Summary:

The comment states that the HRA process should consider a facility’s circumstances, prior reports, and other risk-related investigations instead of a Baseline HRA for the types of facilities listed in section 66270.14(e)(3)(A). A Baseline HRA Work Plan bypasses the step of a Screening HRA if it is required for permit renewals. The comment poses the following questions:

- Would a Baseline HRA Work Plan be required at every permit renewal?
- How does DTSC envision coordinating with HRA’s that are otherwise required under CEQA and based on existing regional air district thresholds?

Comment: 2-8-113

Response:

A Baseline HRA would be required every ten years for a permit renewal for the types of facilities listed in this provision, because changes in site conditions and potential sources of COPCs may occur over time.

DTSC’s current practice is to require an HRA to support an Environmental Impact Report (EIR). An EIR is required by law for the expansion of an existing facility that burns hazardous waste, the initial issuance of a hazardous waste permit to a landfill disposal facility, or the initial issuance of a hazardous waste permit for a large offsite treatment facility (Pub. Res. Code § 21151.1 and Cal Code Regs., Tit. 14 § 15081.5). The HRA supports the environmental analysis in the EIR.

CEQA also requires a Lead Agency to determine the significance of all environmental impacts (Pub. Res. Code § 21082.2; and Cal Code Regs., Tit. 14, § 15064). Since the local air pollution control district determines a threshold of significance for air impacts, DTSC would use those existing air district thresholds to determine significant air quality impacts.

An HRA performed as part of an EIR would be expected to be relevant to the Baseline HRA. For projects where an EIR is being performed concurrent with the permit application, DTSC would coordinate with the facility and the lead agency preparing the EIR to address any requirements needed for the HRA and the EIR.

The comment asks that the process consider facility-specific circumstances, prior reports and other risk-related investigations, rather than requiring an HRA based on the type of facility. In addition to the list of facility types identified in section 66270.14(e) 3(A), the regulations specify facility-specific circumstances that require a Baseline HRA in section 66270.14(e)(8)(B) :

- (a) evidence of facility-wide onsite contamination or contamination has migrated beyond the facility boundaries; or
- (b) normal management of hazardous waste results in the release, emission, or discharge of any pollutant or chemical of potential concern with offsite consequences; or
- (c) there is a potential complete pathway between the chemical of potential concern and potential receptors; or
- (d) foreseeable risk of upset scenarios may impact offsite receptors.

DTSC did not make any changes to section 66270.14(e)(3)(A) in response to these comments.

G. HRA: POTENTIAL FACILITY RELEASES, EMISSIONS, AND DISCHARGES

Comment Summary:

The comment states that the phrase “potential facility releases, emissions, and discharges,” is redundant in sections 66270.14(e)(4)(B) and (5) and suggests replacing this phrase with “permitted potential emissions” to clarify that these requirements cover permitted potential emissions from the facility. The terms “releases” and “discharges” are typically used in association with upset conditions or accidental releases.

Comment: 2-8-114

Response:

DTSC’s intent is to include all potential releases, emissions, and discharges, not limited to only permitted potential emissions. The definition of release is found in section 66260.10 and it means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” The term “emission” was added to section 66270.14(e)(5) to capture air emission data and the term “discharge” was added to capture releases into land or water. Although releases and discharges may also be associated with upset conditions or accidental releases, DTSC disagrees that the text should be replaced with the term “permitted potential emissions” which would

seem to imply including permitted potential air emissions only. DTSC did not make any changes to sections 66270.14(e)(4)(B) and (5) in response to these comments.

H. HRA: PAST SITE USE

Comment Summary:

The comment states that by adding “a summary of” to the requirement to list past uses of the site is an unwarranted regulatory expansion. A summary of past operations or previous hazardous waste streams no longer relevant to the site seems to leave the window open for retroactive regulation of chemicals and waste streams that were neither previously declared hazardous nor previously regulated under a RCRA permit.

DTSC should clearly explain in the proposed regulatory text the intent is to provide a “general summary” of the history of a facility, and not a line-by-line discussion of process changes over decades of operations that are irrelevant to a RCRA permit going forward.

Comment: 2-9-7

Response:

DTSC is unclear how revising the description of “past uses of the site” to a “summary of past uses of the site” is a regulatory expansion. The common understanding of the term “summary” does not imply a line-by-line discussion of process changes over decades of operation. For example, a former use could be described as a bulk fuel storage installation, a surface impoundment prior to RCRA, or agricultural farmland. DTSC did not make any changes to section 66270.14(e)(5)(A)1 in response to these comments.

I. HRA: VEHICULAR TRAFFIC

Comments Summary:

The comment states that the proposed text should clarify the type of vehicular traffic to be included, for instance “on-site vehicular traffic.” It is unclear if section 66270.14(e)(5)(A)7 includes truck traffic pertaining only to hazardous waste operation. Is the description limited to types and numbers of trucks per a given time period or should it include routes as well? If routes are desired, it is not clear what the boundaries are for this. The commenter recommends that this sentence be clarified and limited to just types and numbers of trucks associated with the hazardous waste operation on-site at the facility and not include truck routes off-site. Another comment objects to changing delivery trucks to diesel trucks because it creates a bias against the producers of diesel.

Comments: 2-4-14, 2-8-115, and 2-9-11

Response:

Section 66270.14(e)(1) specifies that the scope of the HRA must include releases of hazardous waste, including “releases associated with transportation to or from the facility.” Furthermore, the language in section 66270.14(e)(5)(A)7 was revised to change “delivery trucks” to “diesel trucks.” Both of these provisions make it clear that traffic is not restricted to vehicular traffic for onsite delivery purposes.

The description in the HRA should summarize the types and numbers of trucks at any given time and include off-site routes. The revised language did not alter this requirement to provide this onsite and offsite vehicular traffic information, only to limit delivery trucks to diesel trucks. DTSC revised the text from “delivery trucks” to “diesel trucks” due to the potential risk to human health. Diesel engines produce more nitrogen oxides and fine particulate matter than vehicles that operate on other fuels. Long-term exposure to nitrogen oxides can significantly increase the risk of respiratory problems and the fine particulate matter has been identified as a carcinogen that can also can have acute respiratory effects. DTSC felt that it was necessary to be more specific due to the increased health risks associated with diesel. DTSC did not make any changes to section 66270.14(e)(5)(A)7 in response to these comments.

J. HRA: VAPOR INTRUSION DATA

Comment Summary:

The comment notes that the language remaining after the term “vapor intrusion” was struck out could be interpreted to include all indoor air data, which primarily would consist of occupational measurements. If the intent is to evaluation vapor intrusion, the use of occupational data would be inconsistent with the HRA goal. The commenter recommends clarification that indoor air sampling is for evaluating the vapor intrusion pathway at sites where soil-gas data suggest a potential for vapor intrusion.

Comment: 2-4-15

Response:

Section 66270.14(e)(5)(B)3 was revised to be more specific regarding the data required in the identification of all known and potential sources of COPCs. The intent is to require air and soil-gas monitoring at sites with soil and groundwater contamination plumes that are a potential source of vapor intrusion. This language has been revised as follows: *“soil or groundwater contamination plume information at and under the facility, including potential sources, chemicals of potential concern, a summary of available groundwater monitoring, and a summary of available indoor air and soil-gas monitoring data for the most recent three (3) years.”*

Vapor intrusion is the process by which chemicals in soil or groundwater migrate to indoor air above a contaminated site. Although the suggested language does clarify the intent of the indoor air monitoring, it also limits the monitoring to sites where soil-gas data suggest a potential for vapor intrusion. DTSC believes that if air monitoring is being done to ensure worker safety due to contaminated soil or groundwater, such data would be appropriate to include in the HRA and there is no need to restrict the use of existing data. DTSC did not make any changes to section 66270.14(e)(5)(B)3 in response to these comments.

K. HRA: KNOWN SPILLS DOCUMENTED

Comment Summary:

Section 66270.14(e)(5)(B)4 states, “list of all known spills documented....” This statement is vague and overbroad. It should be limited to reportable spills within the hazardous waste permitted units.

Comment: 2-4-16

Response:

The entire revised section cited states, *“4. List of all known spills documented in accordance with any previous authorization of hazardous waste activities or subject to hazardous materials reporting requirements under state or federal laws and the names of the corresponding reporting agency, if applicable.”*

This section makes it clear that what needs to be provided is a list of spills that are either reportable under the Hazardous Waste Control Law or other statutes. The comment suggests limiting reportable spills to spills that occur within hazardous waste permitted units would overly restrict what information is included in the HRA. For example, if hazardous waste is managed in tanks or containers that are required to have secondary containment, and if a spill occurs in these units, the spills are not reportable because they are contained and not released to the environment.

The revision made to this section does not alter the basic description of what spills need to be disclosed. DTSC did not make any changes to section 66270.14(e)(5)(B)4 in response to these comments.

L. HRA: TRANSFORMATION AND DEGRADATION PRODUCTS

Comments Summary:

The comments assert that potentially thousands of hypothetical “transformation products, degradation products and emissions” could now be required to have measurements, fate and transport data, toxicity data, modeling, and quantitative results. This unnecessarily broad definition leads to false concerns and inaccurate perceptions by the surrounding communities, in addition to cost increases for facilities

Comments: 2-9-5 and 2-9-6

Response:

This comment refers to section 66270.14(e)(6)(A)(2)(June 2018) which was renumbered but was not revised. Transformation generally refers to the changes from one chemical into another through physical, chemical, or biological processes. Hazardous waste treatment is designed to change the physical, chemical, or biological character or composition of hazardous waste or any material contained therein. To assess risk due to hazardous waste facility operations, the HRA needs to include an assessment of the transformation of permitted waste streams. For example, the guidance for hazardous waste combustion facilities suggests that COPC for a risk assessment should include reformation products that are formed immediately after combustion, due to interaction of specific constituents in the combustion gasses.

Degradation is a form of transformation. If a hazardous waste is released, there can be changes that occur when waste is comingled with soil, water, or air. For example, the biological degradation of highly chlorinated solvents occurs most efficiently under strictly anaerobic conditions. Perchloroethylene (PCE) can be degraded to trichloroethylene (TCE), dichloroethylene (DCE), and vinyl chloride (VC), and ethene. PCE and each of the degradation products has a distinct toxicity profile. Conversely, transformation and degradation processes are typically not applicable to chemicals that are relatively persistent and immobile in a specific media.

The definition of COPC does not expand this provision. DTSC did not make any changes to section 66270.14(e)(6)(A)(2)(June 2018) or the definition of COPCs in section 66260.10 in response to these comments.

M. HRA: REGULATORY EXPANSION

Comments Summary:

The comment asserts that DTSC's revised definition of COPC expands the list of COPC in the HRA Questionnaire making it impossible to get through the Screening Level HRA work plan. Specifically, there would be no "media-specific screening levels" for most transformation and degradation products. Thus, the requirement for inclusion of a comprehensive listing of such levels in the HRA Questionnaire is futile as many of the COPCs do not have screening levels listed by OEHHA or U.S. EPA.

Comments: 2-9-5 and 2-9-6

Response:

DTSC disagrees that the definition of COPC expands the listing and makes the HRA Questionnaire futile. The introduction of the provision states that identification of COPC must include COPC's transformation and degradation products, if applicable. This limits transformation and degradation products that meet the definition of COPC to those which are present at a concentration that may pose a risk (§ 66260.10.) DTSC did not make any changes to the definition of COPC or revising section 66270.14(e)(6)(A)2 in response to these comments.

N. HRA: IDENTIFICATION OF SOURCES OF COPCS

Comment Summary:

The comment reasserts that requiring assessment of fire, floods, and earthquakes is an unreasonable expectation, as previously commented on during the 45-day public comment period. Instead, DTSC amends the requirement to include "a summary of any remediation... performed that addresses any of the emissions or releases." The combination of this new language with the term "foreseeable accidents or upset conditions" is, by definition, incongruous.

Comment: 2-9-8

Response:

This section requires that remediation or corrective action be performed to address accidents and upset conditions. It is not intended to include cleanups of foreseeable accidents. DTSC did not make any changes to section 66270.14(e)(5)(B)6 in response to these comments.

O. HRA: SCREENING VERSUS BASELINE

Comments Summary:

The comments state that the criteria DTSC presents under which a Screening Risk Assessment or Baseline Risk Assessment would not be required, are inadequately defined and that DTSC would treat Screening Level HRA's as a prelude to the baseline. The direct result is that a Screening Risk Assessment or Baseline Risk Assessment would likely be required for every permit action, without any consideration

of the facility's size, complexity, or compliance history. The Screening Level HRA should satisfy most permit renewals, especially those which have not substantially changed operations and operate in communities without significant receptors. This would lead to further delays and costs.

Comments: 2-4-6 and 2-4-13

Response:

DTSC agrees that the Screening Level HRA should satisfy most permit renewals in accordance with the criteria specified in section 66270.14(e)(8)(B), but not all. DTSC disagrees that DTSC would be using the Screening Level HRA as a prelude to a Baseline. For example, in section 66270.14(e)(3), the proposed regulations list complex facilities that are subject to the Baseline HRA at the time the permit applications are submitted. Thus, no Screening Level HRA is required. The HRA provisions are not structured to require a Questionnaire HRA, then a Screening Level HRA, and finally a Baseline HRA in all cases. Instead, the provisions are tiered so that the appropriate effort is required to complete the HRA based on site-specific conditions.

None of the HRA provisions were revised to change the basic premise of tiering the HRA, so these comments are out of scope. DTSC did not make any changes to the regulations in response to these comments.

P. HRA: BASIS SHOULD BE HAZARDOUS WASTE UNITS NOT SITE-WIDE

Comment Summary:

The comment states that the proposed regulations should define "facility" to be the permitted hazardous waste facility or permitted hazardous waste units. Otherwise, at military installations, "facility" could be mistakenly interpreted as the entire installation. The proposed regulations use terms like "facility wide" and "facility boundaries." Thus, it is important to know the footprint of the "facility." When it comes to calculating the HRAs, they do not want to have to include the entire military installation.

Comment: 2-4-11

Response:

The term "facility" is defined in Section 66260.10 to mean "*all contiguous land and structures, other appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal or recycling of hazardous waste.*" The scope is narrowed by the definition of chemicals of potential concern which are limited to facility-related activities or contamination. In other words, the facility is the entire site, but the scope of the HRA is specified in section 66270.14(e)(1) to address releases of hazardous waste resulting in contaminated media, and potential releases of hazardous waste from normal operations or upset conditions.

The terms "facility-wide" and "facility boundary" are used in the criteria for determining whether a Baseline HRA is required. The contamination would have to be facility-wide and the contaminations has migrated beyond the facility boundaries. The provisions for the scope of the HRA were not revised and thus these comments are out of scope. DTSC did not make any changes to sections 66260.10, 66270.14(e)(1) or 66270.14(e)(8)(B)2 in response to these comments.

Q. HRA: TIME ALLOWED TO SUBMIT HRA**Comment Summary:**

The comment states that the 90-day period to submit HRA work plans for either a Screening Level HRA or a Baseline HRA is insufficient time. This work would likely be contracted to environmental consulting firms and more time would be needed.

Comment: 2-4-17

Response:

The HRA provision requires that the most complex facilities submit a Baseline HRA work plan concurrently with the permit application in accordance with section 66270.14(e)(3). All other facilities must instead submit the HRA Questionnaire with their applications. The provision specifies a list of facilities required to complete a Baseline HRA and this serves as notice to prepare a Baseline HRA work plan.

As for other facilities, the criteria for determining if a Baseline HRA work plan, a Screening Level work plan, or no further action is required can be found in section 66270.14(e)(8)(B). At the time the facility prepares the questionnaire, these criteria should help the owner or operator self-assess conditions at the facility and determine if it would have to prepare a Screening Level or Baseline HRA. DTSC is confident that 90 days for the preparation of a work plan is adequate. DTSC did not make any changes to sections 66270.14(e)(9) in response to these comments.

R. HRA: WORK PLAN DETAILS**Comment Summary:**

The comment notes that to calculate a reasonable maximum exposure (RME) one would need to have an exposure point concentration (EPC). The proposed regulations fail to identify how EPCs would be identified for the HRAs. Perhaps it is acceptable that this level of detail is reserved for the work plan. Other items that can be disputed in a work plan include the selection of exposure factors and toxicity criteria, where to sample, how to sample, test methods, and level of acceptable risk. Resolving such conflicts takes time and the deadlines proposed could be missed.

Comment: 2-4-10

Response:

DTSC agrees that most of the site-specific details would be addressed in the work plans. However, due dates for work plans and HRA submittals are specified in Sections 270.14(e)(3), 66270.14(e)(9), and 66270.14(e)(15) and DTSC did not change them.

In addition to the due dates, DTSC has included in the HRA process an additional step to address supplemental information for the Screening Level HRA work plan and the Baseline HRA work plan. This extra step serves to address the areas of potential conflict that the comment enumerates. Since DTSC did not revise any of these provisions, this comment is out of scope.

S. HRA: INCLUDING TOXICITY ASSESSMENT INFORMATION**Comment Summary:**

The comment states that the proposed text needs to be revised to add language allowing the toxicity assessment to be incorporated by reference. The peer-reviewed work of toxicity assessment has already been done and could be summarized for all COPCs on a single table. Describing the toxicity assessment of each COPC would add hundreds of pages to the report without adding value. Such a process is obviously duplicative, unreasonable, and burdensome. Additionally, toxicity values are updated as new data becomes available, which could result in outdated values in the work plan.

Comment: 2-8-116

Response:

DTSC agrees that the peer-reviewed work of toxicity assessment has already been done and could be summarized for all COPCs on a single table. The provision requires a summary which can be a table of values and does not disallow incorporating by reference peer-reviewed toxicity assessments. DTSC did not make any changes to section 66270.14(e)(10) in response to these comments.

T. HRA: USE OF PRIOR APPROVED RISK ASSESSMENTS

Comment: 2-8-117

Comment Summary:

The comment states that the proposed regulation should be revised to allow use of approaches to risk assessment that have been approved by DTSC, CARB, or the appropriate air district for risk assessments, including procedures and data sources. Inclusion of other peer-reviewed sources may fill data gaps from the sources currently provided in this subpart.

Response:

Section 66270.14(e)(10)(A)1.d requires that the owner or operator provide the approach to risk assessment for cancer and non-cancer health impacts. There is nothing that limits approaches to those previously approved by DTSC, CARB, or air pollution control districts. Using approaches previously approved by DTSC for similar HRAs could increase the likelihood that the approach for the Screening-Level HRA work plan would be approved.

Section 66270.14(e)(10)(A)2 is a separate provision requiring that the screening levels must be developed by OEHHA or the U.S. EPA. This second provision was not revised in the June 2018 version and therefore, the comment is out of scope. DTSC did not make any changes to sections 66270.14(e)(10)(A)1.d or & 66270.14(e)(10)(A)2 in response to these comments.

U. HRA: WORKER EXPOSURES**Comment Summary:**

This comment conveys concern that the Baseline HRA would assess exposure to onsite workers who are subject to the HAZWOPER standard. The comment states that the phrase, "conditions and operations at the facility," seems to imply that exposure to hazardous waste operators would be evaluated using this

methodology. Exposure of hazardous waste operators that are covered by HAZWOPER standard should be evaluated using recognized occupation standards. The HRA should evaluate “environmental” exposures, not “occupational” ones. Recommend revision or clarification of this section to avoid misinterpretation.

Comment: 2-4-18

Response:

The scope of the HRA is found in section 66270.14(e)(1)(D). The provision specifies that the “potential magnitude and potential health impact of the human exposure to persons both within and outside of the facility” must be identified in the HRA. Since DTSC did not revise this section, this comment is out of scope.

V. HRA: ANNUAL UPDATE

Comments Summary:

The comments state that the revised text in Section 66270.14(e)(21)(A) adds a new provision that DTSC may require annual updates of the Baseline HRA. There is no mention as to what DTSC would base its “requirement” upon in the proposed language. Such an approach fails the transparency test, placing an arbitrary “requirement” on facilities.

One comment suggests that DTSC should consider revising the frequency of updates to something related to a significant change in procedure or to a significant increase in environmental monitoring results.

Comments: 2-1-14, 2-1-14, 2-3-20, 2-4-19, 2-9-12, and 2-4-19

Response:

The annual updates are not meant for a new HRA to be completed, but instead, are intended to update the information that was initially included in the Baseline HRA. These updates ensure continued safety of the public and may include new monitoring information that alters estimated health risks or hazards over time. This would be implemented by updating the input parameters with new data into the existing approved HRA formulas and rerunning the calculations. These updates may also include new exposure point concentrations due to ongoing monitoring reports for specific media. DTSC did not make any changes in response to these comments.

XI. VIOLATIONS SCORING PROCEDURE (VSP)

A. VSP: ASSEMBLY BILL NO. 1075 (AB 1075) PREEMPTION

Comment Summary:

The comment asserts that the proposed regulation is preempted by AB 1075 which added Health and Safety Code section 25186.05 (Stats. 2015, c. 460, § 2, eff. Jan. 1, 2016). While the law has yet to be put into effect, it legally occupies the space this proposed VSP would seek to fill. The proposed VSP should therefore be stricken in deference to the prior law.

Comment: 2-3-24**Response:**

Nowhere is it written in Health and Safety Code section 25186.05 that this statute preempts or is intended to preempt another statute. Instead, section 25186.05(c)(3) specifically states that AB 1075 does not limit or modify DTSC's authority to deny, suspend, or revoke any permit or any other law. DTSC did not make any changes to the regulations in response to these comments.

B. VSP: FUNDAMENTAL FLAWS**Comment Summary:**

The comment states that the Facility VSP is fundamentally flawed and should be deleted from the Proposed Regulations. The commenter remains adamantly opposed to the Facility VSP for the reasons set forth in its November 6, 2017 comment letter.

This procedure goes far beyond what is needed to implement SB 673 and creates an extremely bureaucratic, formulaic approach that is likely to result in the unwarranted assignment of many existing facilities to the "conditionally acceptable" or even "unacceptable" category.

This classification would subject affected facilities to costly additional conditions, mandatory "independent third-party audits" and, possibly, to denial or suspension of their permits.

Comment: 2-2-8**Response:**

DTSC believes that the proposed regulations are reasonable and would provide consistent application of inspection violation scores of Class I violations. DTSC has developed the VSP to incorporate existing enforcement program elements, including the penalty regulations, into a unified conceptual framework to standardize the assessment of all facilities' compliance history. The proposed regulations achieve this objectives by providing a formula through which point values are assigned to each inspection according the seriousness of the Class I violations and repeat violations, and then averaged over all inspections to account for the number of inspections performed.

DTSC's intent is to build on existing enforcement protocol and experience of the last 20 years. By using a similar approach as used for the assessment of penalties, the VSP scoring utilizes a fair and consistent process.

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

The comment is correct in that the most significant noncompliant facilities would be subject to additional requirements commensurate with the seriousness of their ongoing violations. This approach is meant to incentivize better compliance.

B. VSP: DUE PROCESS

Comment Summary:

The comment asserts that the post-hearing revisions fail to fix the fundamental and fatal due process flaws with the VSP. In prior comments, the commenter identified several fundamental flaws with the entire VSP scoring process, many of which raised fundamental due process issues. All those comments remain relevant. It appears that DTSC believes that the dispute resolution process can fix any due process problems. These procedures do not fix most of the fundamental and constitutional fatal flaws in the proposed regulations. The commenter expresses concern that due process concerns are still created by many of the steps included in the proposed methodology for developing VSP scores. One comment asks several questions about specific implementation procedures for disputing inspection violation scores and what the approach would be to determine how disputes are resolved. The comment raises various questions regarding settled violations, evidence or lack of evidence, and due process.

Comment: 2-8-93

Response:

This comment reintroduces comments submitted during the previous comment period. Responses to these comments can be found in the September 2017 Response to Comments document under comments 10-13, 10-14, 10-16, 10-17, 10-18, 10-25, and 10-26.

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57 to establish a process to score violations found during compliance inspections; a dispute process for an owner or operator to dispute the inspection violation scores for violations that occurred before the effective date of the proposed regulations and violations that occur after the effective date of the proposed regulations; a process to calculate the Facility VSP Score; a process to assign the final compliance tier; and a process to challenge the final compliance tier assignment. The VSP processes would not affect an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions. DTSC did not make additional changes to the regulations in response to these comments.

C. VSP: ALTERNATIVE APPROACH

Comments Summary:

The comments recommend that rather than implementing VSP, DTSC should determine in qualitative terms, the types and frequency of violations that could warrant denial of a permit. DTSC should clarify that the types of violations that are serious enough to warrant loss of the right to operate are necessarily limited to those violations that are knowing and intentional, or that reveal gross negligence or a wanton disregard for human health and safety or the environment, and that result in serious actual harm or an imminent and substantial endangerment thereof.

Comments: 2-1-16, 2-2-9, and 2-3-22

Response:

The legislature authorizes DTSC to consider past violations and compliance history as criteria to make permit denial, suspension, and revocation decisions. DTSC has chosen to include only Class I violations that have been assessed for potential harm and extent of deviation as the types of past violations that could result in a permit denial, suspension, or revocation. DTSC chose to average the number of inspections with Class I violations to normalize the data and account for different inspection intervals or frequencies.

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

D. VSP: DISCOURAGES SETTLEMENTS**Comments Summary:**

The comment states that the VSP would create strong incentives to challenge all but the most minor and obvious violations. DTSC should reconsider the Facility VSP in its entirety. Retroactive application of the scoring procedure to past violations is extremely unfair and violates an owner/operator's rights to due process of law.

A high VSP score poses a serious risk and permittees must guard against any risk of DTSC denying a permit renewal or imposing conditions that cripple a facility's ability to continue operating. Operators may have no choice but to appeal – and keep appealing as far as possible through the courts – every Class I and Class II violation. By creating a system that compels facility operators to appeal every violation, DTSC would cause huge increased demands on its enforcement resources, on the Attorney General's office, on DTSC's administrative appeals department, and on the courts at all levels.

Comments: 2-2-25 and 2-8-95

Response:

Comments regarding how the VSP would discourage settlements were submitted in the previous comment period and DTSC did not revise the language in response to these comments. Please see responses to comments 10-8, 10-10, 10-11, 10-12, 10-27, and PH-4-8 in the September 2017 Response to Comments document. These comments are out of scope and DTSC did not make any additional changes to the VSP provision in response to these comments.

E. VSP: COSTLY BURDEN**Comments Summary:**

An extraordinary number of hours of staff time would be needed to review historical enforcement records and rank the old violations according to the new scheme. The staff costs for conducting these reviews that would undoubtedly be recouped through the fee for service program, resulting in even higher costs that must be borne by regulated facilities. Permit activity fees being charged by DTSC under the reimbursable permit application processing costs (formerly known as fee for service) are already exorbitant, causing some facilities to withdraw from the market.

Comments: 2-2-15 and 2-2-16

Response:

The economic and fiscal impact statement was revised for the June 2018 version of the proposed regulations. The VSP is not part of the permit application review process and therefore, it is not subject to permit application processing cost reimbursement.

F. VSP: UNFAIR**Comment Summary:**

The scoring process is inherently unfair in that it would be conducted behind closed doors, without any opportunity for input by the affected facility.

Comment: 2-2-20

Response:

DTSC disagrees that the VSP is inherently unfair or closed to public input. The VSP provisions require DTSC to provide written notice to the owner or operator by September 30 of each year regarding the Facility VSP Score, the compliance tier, and the provisional or final inspection scores used in the calculations. The owner or operator has until December 31 of each year, to review and potentially dispute the provisional inspection violation scores or to challenge the unacceptable compliance tier assignment.

For transparency, the public would have online access to the Facility VSP Scores and to EnviroStor data. Information on DTSC's EnviroStor includes enforcement reports for all permitted hazardous waste facilities and other entities that are inspected by DTSC. EnviroStor information also includes enforcement timelines and enforcement report listings with dates, violations, and other enforcement data. All Class I violations are listed and individual reports for each inspection are posted. DTSC did not make any changes to the regulations in response to these comments.

G. VSP: TWO CLASS I VIOLATIONS COULD RESULT IN DENIAL**Comments Summary:**

Based on the issuance of alleged Class I violations or several non-major violations, a facility could be assigned to the unacceptable compliance tier, and the Department would be obligated to initiate permit

denial proceedings. One of the comments presents a hypothetical scenario for the Facility VSP Score and concludes that as few as two Class 1 violations in the last 10 years could result in permit denial.

Alleged violations that are being contested would still be included in the scoring procedure under the proposed regulations as proposed. See § 66271.54(a)(1). This provision violates one of the most basic tenets of our justice system: the presumption of innocence. In the Department's view of the world, a facility is guilty until proven innocent.

Comments: 2-2-13 and 2-3-21

Response:

The example in the comments does not take averaging into account. A correct statement would be that two Class I violations for every inspection that occurred over a ten-year period would result in DTSC initiating a process for permit denial, suspension, or revocation.

Comments regarding alleged violations were submitted in the previous comment period. Please see responses to comments 1-62, 3-12, 3-13, 3-14, 3-15, 10-13, 10-14, and 10-15 in the September 2017 Response to Comments document. DTSC revised the VSP provisions and added additional administrative remedies to alleviate these issues that were raised during the previous comment period. DTSC did not make any additional changes to the language in response to these comments.

H. VSP: ENFORCEMENT IMPROVEMENT

Comment Summary:

The comment asserts that DTSC frequently ignores or minimizes serious and major violations and ultimately issues little or no fines in many instances. Until DTSC begins enforcing permit conditions, accurately categorizing them, and properly enforcing violations, this section would have little to no positive impact.

Comment: 2-5-6

Response:

DTSC has developed the VSP to incorporate existing enforcement program elements, including penalty regulations into a unified conceptual framework to standardize the assessment of all facilities' compliance history. DTSC believes the proposed VSP regulations are reasonable and would provide consistent calculations of inspection violation scores of Class 1 violations. Incorporating the assessment of compliance history into a facility permit process is intended to strengthen the permit process and provide more transparent information to the public about a facility's compliance history. While DTSC acknowledges the comment, the comment does not address any specific provision of VSP and is focused on DTSC's enforcement program. The proposed regulations do not address how inspections are conducted. DTSC did not make any additional changes to the regulations in response to these comments.

I. VSP: CHALLENGES TO PAST VIOLATIONS**Comment Summary:**

The comment asserts that many scores for past violations would likely be challenged as erroneous, arbitrary and capricious or in violation of law, resulting in excessive recourse to dispute resolution processes and judicial review.

Comment: 2-2-23

Response:

The comment does not suggest that any specific provision in the VSP be revised to address this concern. DTSC agrees that there may be additional work that may result from the dispute process and potential judicial review. However, the dispute provision is necessary to provide due process to facilities. DTSC did not make any additional changes to the regulations in response to these comments.

J. VSP: POSITIVE CONSIDERATION FOR PAST PERFORMANCE**Comments Summary:**

The comments state that VSP is a backward-looking exercise, which fails to take into consideration a facility's more recent efforts to make improvements or take other corrective actions that would prevent recurrence of similar violations in the future. The proposed regulations should clearly give positive consideration for past performance and recognize compliant inspection histories with little to no issues with a lighter assessment burden during permit renewal. Past performance should be considered as well as the volumes of inspection records already available to DTSC before mandating additional studies.

Comments: 2-2-19 and 2-4-23

Response:

The intent of the VSP provision is to identify those facilities that have more significant violations that rise above the threshold set by the proposed regulations for "conditionally acceptable" or "unacceptable." If a facility's efforts to make improvements correct the pattern of noncompliance going forward, this would be reflected in future Facility VSP Scores. Section 66270.55 allows DTSC to complete a more extensive review of a facility's compliance history, including a facility's record of returning to compliance.

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

Furthermore, this same comment (comment 3-11) was provided in the previous comment period and DTSC provided the same response in the September 2017 Response to Comments document. DTSC did not make any additional changes to the regulations in response to these comments.

K. VSP: SUBJECTIVE

Comments Summary:

The comments express concern that the VSP remains a subjective framework that goes beyond what is necessary to implement the provisions of SB 673. The process of ranking violations that go back 10 years is highly subjective. Information needed to accurately assess these violations may no longer be available, staff who were involved in the inspections may have long since left the Department, and memories would have faded even for those inspectors who are still with the Department.

The comment expresses concern that the ranking process would result in outcomes that are very unfair and that would have severe consequences for hazardous waste facilities, far beyond the penalties or negative press associated with the original citations. The Department already routinely considers a facility's compliance history during permit proceedings and could have addressed the Legislature's concern simply by enumerating more specifically how it conducts this review. There is no justification for developing a new, resource-intensive, and highly subjective procedure for this purpose.

Comments: 2-1-16, 2-2-14, 2-2-17, 2-2-21, and 2-4-21

Response:

DTSC's intent is to build on existing enforcement protocol and experience of the last 20 years. By using a similar approach as is used for the assessment of penalties, the VSP calculations utilizes a fair and consistent process. DTSC believes the proposed regulations are reasonable, fair and will provide consistent calculation of inspection violation scores of Class I violations.

These comments are similar to comments 1-37, 1-40, and 10-9 submitted during the September 2017 public notice comment period. Please see the September 2017 Response to Comments document for the corresponding responses. DTSC did not make any changes to the regulations in response to these previous comments dated November 6, 2017 and therefore, these comments are out of the scope.

L. VSP: LEGISLATURE DID NOT INTEND DENIAL OR REVOCATION

Comment Summary:

The comment states that the Legislature did not intend facilities to face denial or revocation of their permits based on violations that fall below the level of gravity of knowing and intentional violations, or that reveal gross negligence or a wanton disregard for human health and safety or the environment, and that result in serious actual harm or an imminent and substantial endangerment thereof. By broadly including all Class I violations in the scoring procedure – the clear majority of which could never fairly support denial or revocation of a permit even if they occur on a repeat basis – the proposed regulations are inconsistent with the SB 673 and other existing laws and are likely to have unintended consequences that were neither contemplated nor desired by the Legislature. In addition to being unnecessary, the proposed regulations fail to meet the statutory rulemaking standard of consistency.

Comment: 2-2-10**Response:**

As stated in the September 2017 Response to Comments document, the Legislature placed the additional requirement on DTSC to consider facility compliance history in permit decisions pursuant to SB 673 without changing DTSC's existing authority under Health and Safety Code section 25186 and other statutes and regulations to deny, revoke or suspend a permit. The Legislature also specifies that DTSC must consider the number and types of past violations that would result in a denial. DTSC disagrees the VSP could never fairly support denial or revocation of a permit even if the Class I violations occur on a repeat basis. DTSC disagrees that the VSP provision is inconsistent with SB 673. As stated before, the Legislature authorizes DTSC to use the number and types of past violations in making permit decisions. DTSC chose to average the number of Class I violations over the number of inspections to normalize the data and account for different inspection intervals or frequencies. For the types of past violations that would result in permit denial, DTSC has chosen to include only Class I violations which are assessed for potential harm and extent of deviation. DTSC assumes that the claim that the proposed regulations are inconsistent with SB 673 is the basis for the criticism that the proposed regulations fail to meet the consistency standard for rulemaking. For all the preceding reasons, DTSC disagrees and did not make any changes to the regulations in response to these comments.

Sections 66271.50 through 66271.57**M. VSP: APPLICABILITY OF CLASS II VIOLATIONS****Comments Summary:**

The comments states that the revised section 66271.50(d)(1) (June 2018) now gives DTSC the discretion to reclassify a Class II violation as a Class I violation retroactively, based on a highly subjective re-evaluation of the facts. The comment goes on to assert that this is an absurd, unfair, and unlawful change.

One comment poses many questions regarding how DTSC would retroactively reclassify prior violations and how DTSC could change a violation that was settled. The reclassification of a Class II violation to a Class I would present grave due process problems because the permittee would not have ever had notice of the potential reclassification when it decided to settle, rather than appeal the violation.

This provision does not meet the rulemaking standard of clarity and violates due process. Facilities with acceptable compliance histories may be at high risk of being placed in the conditionally acceptable or unacceptable compliance tier.

Comments: 2-2-11, 2-2-18, 2-3-23, and 2-8-94

Response:

DTSC has revised the regulation to include the citations to the existing definitions for Class I and Class II violations found in section 66260.10. These definitions in section 66260.10 match the definitions that exist in Health and Safety Code sections 25110.8.5 and 25117.6. The revision is added for clarity and does not have any additional or different regulatory effect. The comments incorrectly state that this

provision gives DTSC new authority to retroactively reclassify a Class II violation as a Class I violation. DTSC did not make any changes to section 66271.50(d)(1) in response to these comments.

N. VSP: USE OF REPEAT VIOLATIONS

Comment Summary:

The comment states that the definition of “repeat violation” that includes “closely related violations” is woefully vague, ambiguous, and lacks the clarity required by Government Code section 1349.1. While the commenter agrees with the elimination of “similar violations,” DTSC has substituted a standard that is just as vague, ambiguous, and unfair. The standard for determining what is a “closely-related” would invariably result in inconsistent and unfair application of the same purported standard to different permittees. DTSC must delete the reference to “closely-related” violations.

Comment: 2-8-98

Response:

The Class I violation score is adjusted upward for repeat violations in three years or three consecutive inspections. Repeat violations indicate that the violator has engaged in a pattern of neglect or disregard with respect to applicable regulatory requirements. The upward adjustment is meant to provide a disincentive for an owner or operator that has been cited in the past for the same or a closely-related violation (generally, a citation issued under the same standard for the same violated condition).

DTSC believes that the definition of “repeat violation” in section 66271.50 (a)(3) provides additional clarity for the purpose of the VSP for Class I violations. DTSC disagrees that the definition provides DTSC unnecessary discretion or that the definition is inconsistent with Government Code Section 11349.1. DTSC did not make any changes to the definition in section 66271.50(a)(3) in response to these comments.

O. VSP: APPLICABILITY TO MILITARY FACILITIES

Comment Summary:

The comment notes that military installations are like “small cities” with much work done by tenants and contractors. For this reason, AB 1075 of 2016 was revised to only include violations within the permitted unit of federal facilities. The commenter requests restricting the violations that occur within a permitted unit be added to VSP.

Comment: 2-4-7

Response:

DTSC reviewed all the Class I violations issued to federal facilities and found that all the Class I violations are specific to permitted transfer, treatment, storage, and disposal of hazardous waste. DTSC has determined that it is not necessary to limit violations to those occur within the permitted units.

This provision was revised to clarify the definition of Class I violations and to include some editorial changes without regulatory effect. Please refer to the September 2017 Response to Comments

document where DTSC summarized and responded to this comment. DTSC did not make any additional changes to section 66271.50(c) in response to these comments.

P. VSP: DUE PROCESS

Comment Summary:

The comment states that DTSC has failed to correct the due process violations that would arise if DTSC uses past violations and settled violations for scoring facilities that could result in permit denial, suspension, or revocation. It is challenging to know whether some of DTSC's changes were intended to address the due process issues and if so, they failed.

Comment: 2-8-100

Response:

DTSC disagrees that there are due process violations because of this proposed regulation. The comment addresses provisions in the proposed regulations that did not change from the initial version released for public comment on September 22, 2017 to the second version of the proposed regulations. As such, this comment is outside the scope of topics subject to public comment for the version of the proposed regulations released on June 29, 2018. DTSC did not make any changes to section 66271.51(a) in response to these comments.

DTSC notes that there were comments in the previous public comment period regarding due process in general about settled violations, and specifically, about the dispute process found in section 66271.53. Please see the September 2017 Response to Comments document for additional responses regarding due process.

Q. VSP: USE OF SUMMARY OF VIOLATIONS

Comment Summary:

This comment states that one of the most important comments previously made was the concern that DTSC would be scoring facilities based on violations alleged in a "Summary of Violations" (SOV), even though an SOV is merely a document that notifies the facility of the violation identified and the corrective actions DTSC believes are necessary for the facility to return to compliance. The SOV does not impose a penalty and does not set forth any procedures for appealing the SOV. The comment states that the post-hearing revisions fail to fix due process flaws by allowing adjustments to scores if the facility received an SOV over the past three inspections. Since the SOV is not an appealable document, those violations cannot be appealed by the permit holder. The owner or operator has no formal means for challenging DTSC's determination that there is a violation or how DTSC scored the violation in its "harm/deviation" matrix. Because the SOV is not appealable, then the SOV should not be used for purposes of assigning VSP score to the facility. If DTSC were to do so, such a decision would be a clear violation of the owner's or operator's constitutional due process rights.

While the initial draft did not even mention the term "Summary of Violations," there is no mention of SOVs in the procedures for setting the initial score, the provisional score, or the final score. This presumably means that violations listed in an SOV are considered for scoring purposes only for adjustments for repeat violations. This leaves ambiguous how and when DTSC determines when a

“violation” can be used for scoring. If DTSC intends to score facilities based on violations that have not ripened to a point when they can be appealed or if the violation has been appealed and not resolved, Imposing sanctions on a facility would create violations of due process rights.

The comment goes on to ask various questions regarding when a violation would be used to determine the initial score for each Class I violation and the effect of appeals or settlements of violations.

Comment: 2-8-97

Response:

DTSC agrees that SOVs would only be used to identify repeat violations if the SOVs have not been cancelled, retracted, withdrawn, or successfully challenged. DTSC would not use notices to comply or SOVs for scoring a Class I violation.

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

DTSC did not make any changes to section 66271.52 in response to these comments regarding SOVs. DTSC notes that there were similar comments in the previous public comment period regarding appeals and settled violations. Please see the September 2017 Response to Comments document for additional responses.

R. VSP: ALLEGED VIOLATIONS

Comments Summary:

The comment states that most of the violations that would be evaluated under the VSP were settled without any adjudication or admission of fact or law. These prior violations were settled without any expectation that they would be resurrected for the purpose contemplated by the VSP. It is inappropriate to subject any alleged violation to any “scoring” process unless it has been admitted by the owner or operator, proven by the Department by substantial evidence, or the subject of a waiver of defenses. The VSP is likely unconstitutional in that it would deprive companies of their right to due process of law.

The dispute process provided in the post-hearing changes is extremely limited and inherently biased, as it would be conducted by Department staff rather than by a neutral mediator and would not remedy this constitutional fatal flaw.

Comments: 2-2-12, 2-2-21, 2-2-22, 2-2-24

Response:

Previously, the dispute process was available only for prospective violations only. This provision has been revised to apply to all violations, after or before the effective date of the proposed regulations.

Please see responses to comments 1-62, 3-12, 3-13, 3-14, 3-15, 10-13, 10-14, and 10-15 in the September 2017 Response to Comments document. DTSC revised the VSP provisions and added additional administrative remedies to alleviate these issues that were raised during the previous comment period. DTSC did not make any additional changes to section 66271.53 in response to these comments.

G. VSP: ADMINISTRATIVE REMEDIES

Comment Summary:

The comment states that DTSC has no authority to determine whether the failure to contest a provisional inspection score constitutes a “failure to exhaust administrative remedies.” Section 66271.53(d)(3) purports to determine whether DTSC can assert in court the defense of “failure to exhaust.” Whether this defense applies or not is a judicial determination and not one that DTSC has any authority to enshrine in regulation.

Comment: 2-8-96

Response:

Section 66271.53(d)(3) is provided to facilitate an owner’s or operator’s exercise of its due process right to seek judicial review and to ensure that the owner or operator does not need to use resources in seeking and exhausting unnecessary administrative remedies. Exhausting the administrative remedies provided in statutes or regulations is a prerequisite to seeking judicial review. DTSC did not make any additional change to section 66271.53(d) in response to these comments.

S. VSP: INSPECTION VIOLATION SCORE DISPUTES

Comment Summary:

The comment states that the dispute procedures in sections 66271.54 and 66271.57 are duplicative, burdensome, and unreasonable. Despite the addition of more procedures for disputing VSP scores and permit decisions based on those scores, the proposed regulations have failed to address how they relate to or integrate with the process for appealing the violation itself.

It still appears that DTSC’s proposed VSP procedures would require permittees to institute two appeals of every violation – one of the preliminary inspection score and one for the underlying violation. Such a process is obviously duplicative, unreasonable, and burdensome. Again, this fundamental flaw highlights that the design of the entire VSP process is ill-conceived, unworkable, and unfair.

Comment: 2-8-99

Response:

In response to various comments received by DTSC regarding the VSP, DTSC has made substantial changes to sections 66271.50 through 66271.57 to establish a process to score violations found during compliance inspections; a dispute process for an owner or operator to dispute the inspection violation scores for violations that occurred before the effective date of the proposed regulations and violations that occur after the effective date of the proposed regulations; a process to calculate the Facility

Violations Scoring Procedure Score; a process to assign the final compliance tier; and a process to challenge the final compliance tier assignment. The VSP processes would not affect an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions.

DTSC considers the dispute process and the compliance tier assignment challenge process necessary to address any potential due process concerns. Neither is a requirement, but both are made available if the owner or operator wishes to avail itself of these opportunities to contest the VSP process. DTSC did not make any changes to sections 66271.54 or 66271.57 in response to these comments.

T. VSP: TIMING OF VSP PROVISIONS

Comment Summary:

The comment states that the permit review process may take many years to complete. DTSC needs to explain at what point the Facility VSP Score would be considered.

Comment: 2-8-101

Response:

DTSC has revised the proposed regulations to define the period for including violations as the previous ten-year period ending on December 31 of the prior calendar year. There would be yearly Facility VSP Scores calculated based on a rolling ten-year period. For example, there would be a 2019 Facility VSP Score, 2020 Facility VSP Score, and a 2021 Facility VSP Score, etc. For each of those years, there are additional requirements imposed each time the owner or operator is assigned a conditionally acceptable or an unacceptable compliance tier.

Assuming the proposed regulations become effective January 1, 2019 and the permit application is submitted in 2018, then in 2019, the facility would be given its first provisional inspection scores, a Facility VSP Score, and the compliance tier assignment. DTSC would recalculate the Facility VSP Scores again in 2020 and every year thereafter. The facility would be subject to the process for permit denial, revocation, or suspension each year the facility is assigned an unacceptable compliance tier.

This same comment was provided in the prior public comment period and is considered out of scope. DTSC did not make any changes to the regulations in response to these comments.

U. VSP: GRANTING PERMITS

Comment Summary:

The comment states that section 66271.55(g) creates a loophole that allows facilities that are in the unacceptable compliance tier with serious violations to continue operating. Allowing a facility that has been deemed by DTSC to belong in the "unacceptable compliance tier" to continue operating disregards human and environmental health and safety. This loophole that rewards chronic serious violations must be removed from the criteria.

Comment: 2-5-7

Response:

Section 661271.57(g) requires DTSC to make written findings based on substantial evidence that granting the permit or permit modification would not pose a threat to public health or safety or the environment; the owner or operator have made enforceable improvements to its facility operations; and the continued facility operations would benefit the people of California. Furthermore, section 66271.57(h) would impose stringent additional conditions to the granting of a permit or permit modification in these circumstances. DTSC did not make any changes to the regulations in response to these comments.

V. VSP: AUDIT PROVISION

Comment Summary:

The commenter is strongly opposed to mandatory “third-party compliance audits,” as required by the proposed regulations to maintain the right to operate. Given the likelihood that many facilities would be assigned to this compliance tier and thus subject to the audit requirement, the proposed regulations are of significant concern. Facilities that are ranked as “unacceptable” could also face this requirement as one of a few means of remaining in operation.

Comment: 2-2-26

Response:

There were minimal revisions made to the audit provision and they did not substantially change the requirements for third-party audits. A similar comment was submitted during the prior public comment periods. Please see the response to comment 3-20 in the September 2017 Response to Comments document. This comment is out of scope and DTSC did not make any changes to the regulations in response to these comments.

X. VSP: FEDERAL FACILITY PROVISIONS REGARDING THIRD-PARTY AUDITS

Comments Summary:

These comments express dissatisfaction that the only substantive post-hearing change that was made allows federal facilities to use their own internal audit staffs to perform required audits. This is contrary to the Federal Facilities Compliance Act, which provides that all federal facilities must comply with federal and state environmental regulations in the same manner as non-federal facilities and should not be treated as a protected class, especially from a compliance perspective. Federal facilities should not be treated favorable over those in the private sector.

Comments: 2-2-27 and 2-2-28

Response:

The Federal Facility Compliance Act amended section 6001 of RCRA (42 U.S.C. § 6961) to waive federal sovereign immunity regarding States’ hazardous waste management requirements. However, certain federal facilities, including those with military, intelligence, nuclear-related, and law enforcement functions, may have special security or access requirements necessitated by the facility’s mission. It may be necessary to obtain the appropriate clearances for access to classified national security information, facilities, or restricted data at federal facilities. It is necessary to provide the flexibility to use internal

auditors at federal facilities due to national security issues. DTSC did not make any changes to section 66271.56(a)(1) in response to these comments.

Y. VSP: DTSC DISAPPROVAL OF AUDITOR

Comment Summary:

The comment expresses continued concern regarding DTSC's right to disapprove any auditor recommended by the facility, even where the auditor is independent of the company, professional, and highly experienced.

Comment: 2-2-29

Response:

The above comment addresses provisions in the proposed regulations that did not change from the initial version released for public comment on September 22, 2017 to the second version of the proposed regulations. As such, this comment is outside the scope of topics subject to public comment for the version of the proposed regulations released on June 29, 2018. DTSC notes that this comment was submitted as comment 3-20 regarding the initial version of the proposed regulations. Therefore, please refer to the September 2017 Response to Comments document where DTSC summarized and responded to this comment. DTSC did not make any changes to the regulations in response to these comments.

XII. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

A. CEQA: ENVIRONMENTAL IMPACT REPORT (EIR) NEEDED FOR RULEMAKING

Comments Summary:

The comments expressed general concerns with the proposed regulations regarding CEQA compliance. The comments state that DTSC's revisions to the proposed regulations require a CEQA analysis, which DTSC has not performed. DTSC's conclusion that the proposed regulations are exempt under the "general rule" in CEQA Guidelines section 15061(b)(3) is not correct. The comments suggest that DTSC continues to violate CEQA by not preparing an environmental impact report (EIR) prior to adopting the proposed regulations.

Comments: 2-2-37, 2-8-1 and 2-8-92 Response:

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

XIII. ECONOMIC ANALYSIS

A. ECONOMIC ANALYSIS: MISLEADING ECONOMIC AND FISCAL IMPACT STATEMENT (EFIS)

Comments Summary:

The comment asserts that the EFIS declares the following: No, the regulation would not affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here. On the contrary, the proposed Regulation would have direct, unique fiscal burdens on facilities required to comply with California's proposed Regulation that facilities in other states would not incur. The Department's claim that the Regulation does not affect California businesses' ability to compete with other states is inaccurate and false.

Comments: 2-3-25 and 2-9-13

Response:

A similar comment was submitted during the prior public comment period. Please see the response to comment 1-10 in the September 2017 Response to Comments document. This comment is out of the scope of the proposed regulations released on June 29, 2018 for public comment. DTSC did not make any changes to the EFIS in response to these comments.

B. ECONOMIC ANALYSIS: UNDERESTIMATED COST OF REGULATION

Comment Summary:

The comment suggests the costs are significantly underestimated, and that total actual annual costs, particularly for a facility in the "conditionally unacceptable" or "unacceptable" compliance tier, would substantially exceed these amounts. The proposed regulations would further disincentivize businesses from owning and operating hazardous waste management facilities in California.

The comment also contends that DTSC wrongly concludes that the proposed regulations would "not affect increases or decreases of investments in the State."

Comment: 2-2-36

Response:

The EFIS requires that DTSC assess the cost of compliance for a typical hazardous waste facility. As explained in the September 2017 Response to Comments document, DTSC has revised the EFIS to include additional information regarding the costs to the facility and to DTSC. DTSC did not make any additional changes to the EFIS in response to these comments.

C. ECONOMIC ANALYSIS: FACILITY CLOSURES

Comment Summary:

The comment expresses concern that the requirements imposed by the proposed regulations, would continue to raise the cost to facilities to the point where out-of-state waste management options become more economical to hazardous waste generators. Permitted facilities that are unable to operate

profitably could be forced to close, leaving the state without adequate means of managing its own hazardous wastes.

Comment: 2-2-38

Response:

DTSC disagrees that the proposed regulations threaten a facility's ability to remain in business. The facilities with the greatest economic burdens associated with these regulations are those facilities that pose potential public health impacts either because they have onsite or offsite contamination that result in having to complete a Baseline HRA, or they have compliance issues which result in audit requirements, additional mitigation measures, or DTSC's initiation of permit denial, revocation, or suspension. Otherwise, the facilities would not have these additional economic burdens. DTSC did not make any additional changes to the EFIS in response to these comments.

D. ECONOMIC ANALYSIS: LABOR COSTS FOR THE COMMUNITY INVOLVEMENT PROFILE

Comment Summary:

How much labor did the DTSC include in its budgetary estimate for compiling and presenting census and other socioeconomic data for DTSC review?

Comment: 2-9-10

Response:

DTSC considered and estimated an owner's or operator's cost of completing the CIP and DTSC's cost of reviewing the CIP, and DTSC revised the EFIS accordingly. The revised EFIS now includes the cost estimate for the facility to prepare the CIP and estimate of DTSC's reimbursable costs in reviewing the CIP. See Attachment 2 of the revised EFIS for a spreadsheet that details each of the two estimates for DTSC's review time of the CIP. DTSC did not make any additional changes to the EFIS in response to these comments.

E. ECONOMIC ANALYSIS: COST OF ANNUAL HRA UPDATES

Comments Summary:

In the revised text in Section 66270.14(e)(21)(A), DTSC has inserted a new requirement that "If the Baseline HRA is accepted, the Department may require annual updates of the Baseline HRA."

- The economic analysis of this proposed Regulation did not include any estimates of what annual updates to a risk assessment would require for the Department nor the regulated community.

More specifically, the revised EFIS Section B fails to include any annual costs of this regulation beyond a minimal \$3100-\$3800 annual cost. Requiring updates to a Baseline HRA on an annual basis, however, would actually be more along the lines of \$57,500-\$143,900 per year for each facility that has to complete one (using the figures in Attachment 1 page 7 Summary Table). The Department should be aware of the costs of California risk assessments based on its federal partnerships and reimbursable permit application processing cost/cost sharing paradigms and should not underestimate either the (1) regulated community's cost of this annual requirement, or (2) the public cost of having appropriately

qualified DTSC personnel (or their contractors) review annual submittals. These annual costs to update a Baseline HRA are not included in the Form 399 page 7.

Further, there is a major accounting error for the line item for “HRA-Screening & Baseline Average” envisioned for 8 facilities. The “typical” cost of \$57,500 cannot possibly include the HRA Screening Work Plan, HRA Screening, Baseline Work Plan, and Baseline HRA and any annual updates. These costs are all underestimated in the rolled-up costs with actual costs to be incurred well over \$10 million.

Comments: 2-1-14, 2-9-12, and 2-3-20

Response:

The assumptions used to calculate the HRA costs assume that one to two facilities a year would be subject to the Baseline HRA due to the complexity of the authorized hazardous waste facility. The first group of facilities subject to the HRA requirement would be those that apply for hazardous waste facility permits in 2019. DTSC did not add the cost of the annual update because the annual update for a Baseline would likely apply to the more complex facilities. These larger operations would probably take more than two years for DTSC to process an application. Assuming it would take three years, then the timing of an annual update, if required, would not be until after 2023 or later. The current cost estimate for a Baseline HRA is adequate because only a small percentage of facilities would be subject to the Baseline HRA and an even smaller subset would potentially be subject to the annual updates that would not be required for another four to five years from the effective date of the proposed regulations. DTSC did not make any changes to the EFIS in response to these comments.

F. ECONOMIC ANALYSIS: INCLUDE HRA IN EFIS

Comments Summary:

The comments express concern that the HRA requirements need additional economic consideration and that the EFIS is not complete without considering the costs of performing the HRAs. If costs for regulatory review is to be transferred to the permittee, then these costs need to be addressed as well.

Comments: 2-4-8 and 2-4-12

Response:

DTSC considered the costs for preparing the HRA and DTSC’s review of the HRA both for owners or operators and for DTSC. Attachment 2 of the EFIS dated June 2018 includes a spreadsheet with detailed cost estimates for the HRA Questionnaire, the Screening Level HRA, and the Baseline HRA. This revised EFIS now also includes DTSC’s reimbursable permit application processing costs for review of all the HRA-related documents. DTSC did not make any additional changes to the EFIS in response to these comments.

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As noted in the Overview and Organization, all comments received in response to this second public notice of the proposed regulations were assigned a number “2” followed by a unique number assigned to each commenter, with a final number representing each sequential comment in the document. Each unique comment number is listed below, followed by the page number that provides the response to that comment.

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