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45-DAY PUBLIC NOTICE AND COMMENT PERIOD

UPA Corrective Action Qualification Regulations

Department Reference Number: R-97-11

Office of Administrative Law Notice File Number: Z-05-1004-12

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to amend California Code of Regulations, title 22, section 67450.7 and adopt sections 68400.11 to 68400.16.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

DTSC will hold a public hearing on the proposed regulations at 10:00 a.m. on November 28, 2005 in the Coastal Hearing Room, 2nd Floor, 1001 "I" Street, Sacramento, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on November 28, 2005 will be considered.

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

Due to enhanced security precautions at the Cal/EPA Headquarters Building located at 1001 I Street, Sacramento, all visitors are required to sign in prior to attending any meeting. Sign-in and badge issuance occur in the Visitor and Environmental Services Center. This Center is located just inside and to the left of the building's public entrance. Depending on their destination and building security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification cards. Depending on the size and number of meetings scheduled on any given day, the security check-in could take from three to fifteen minutes. Please allow adequate time to sign in before being directed to your meeting.

If you have special accommodation or language needs, please contact Ms. Joan Ferber, Regulations Coordinator, Environmental Analysis and Regulations Section, at (916) 322-6409 or by e-mail at regs@dtsc.ca.gov by November 21, 2005. TTY/TDD users may dial 7-1-1 for the California Relay Service. Speech-to-Speech services are available by calling (800) 735-0373 or via TTY at (800) 735-0193.

AUTHORITY AND REFERENCE

These regulations are being proposed under the following authorities:

Health and Safety Code section 25150. This section grants DTSC authority to adopt standards dealing with the management of hazardous waste.

Health and Safety Code section 58012. This section grants DTSC authority to adopt regulations.

Health and Safety Code section 25404.1. This section grants DTSC authority to establish criteria and procedures for determining whether a unified program agency is qualified to implement the environmental assessment and corrective action portions of the unified program.

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

Health and Safety Code sections 25187 and 25187.1. These sections grant DTSC authority to implement and enforce corrective action.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

Current state law provides authority for DTSC to require or conduct corrective action at hazardous waste facilities. Current state law also requires DTSC to adopt regulations specifying qualifications criteria and a procedure for determining whether unified program agencies (UPAs) are qualified to implement environmental assessment and corrective action at unified program facilities. Currently, an UPA may oversee cleanup of a facility to a limited degree only when the remediation is necessary to address imminent and substantial endangerment in accordance with Health and Safety Code sections 25187 and 25404.1.

Other related existing laws include Health and Safety Code section 25200.3, which requires generators to comply with environmental assessment procedures and remediate any contamination resulting from the release of hazardous waste or constituents from a solid waste management unit or hazardous waste management unit at the generator's facility. Health and Safety Code section 25200.10 specifies that a facility's permit shall require corrective action for all releases of hazardous waste or constituents from a solid waste management unit or hazardous waste management unit at a facility engaged in hazardous waste management. Finally, Health and Safety Code section 25200.14 authorizes DTSC or a qualified unified program agency to require the owner or operator of a facility under the jurisdiction of the unified program agency, or a generator, to complete and file a phase I environmental assessment.

Policy Statement Overview

The broad objectives of the proposed regulations are to provide criteria and a process for a unified program agency to demonstrate that it is qualified to conduct or require corrective action consistent with activities required by DTSC and other UPAs throughout the state. The specific objectives are to establish a tiered system of qualifications, allowing UPAs to select the level of qualification best suited to the types of facilities and corrective action they intend to address, and to provide a general procedure for conducting corrective action consistent with the requirements DTSC uses to ensure consistency throughout the state.

Proposed Regulations

The proposed regulations would specify qualification criteria for determining whether an UPA is qualified to conduct environmental assessments and implement corrective action. The proposed regulations would provide a tiered approach. Tier 1 is intended for UPAs that intend to require only simple soil removals. Tier 2 is for the UPA that seeks to require any type of corrective action at any facility under its jurisdiction. In the proposed regulations the qualifications for Tier 2 require more specialized expertise in the areas of engineering, geology and toxicology, as well as more experience than in Tier 1. A unified program agency qualified in Tier 1 may conduct or require corrective action at less complex sites, defined in part as a site at which the selected corrective action alternative is removal and disposal of no more than 60 cubic yards of contaminated soil and the remaining contamination at the site does not pose a significant threat to human health. A unified program agency qualified for Tier 2 may require or undertake corrective action at any facility under its jurisdiction.

The proposed regulations would provide a process whereby an UPA seeking authority for corrective action shall submit specified documentation demonstrating the appropriate qualifications to DTSC. Within a specified timeframe, DTSC would evaluate the UPA

application and make a determination regarding the UPA's qualification. At any point in time DTSC may review its determination of an UPA's qualifications and withdraw its determination of qualification if the UPA is not in compliance with the proposed regulations.

The proposed regulations would also specify general provisions for conducting corrective action consistent with requirements DTSC establishes when requiring corrective action. These corrective action provisions are consistent with the corrective action requirements that DTSC specifies in a corrective action agreement or order. The difference in the process for conducting corrective action specified for Tiers 1 and 2 is a streamlined public involvement process for Tier 1 that allows full and meaningful public involvement to take place within the more limited timeframe of a corrective action alternative that specifies soil removal.

The proposed regulations do not affect DTSC's authority to require corrective action and do not change the number or type of sites that may require corrective action. In addition to the statutory authority for corrective action in Health and Safety Code sections 25187 and 25187.1, DTSC is also authorized to require and conduct corrective action pursuant to the federal Resource Conservation and Recovery Act (RCRA). DTSC bases its corrective action requirements on state and federal statutes, regulations and guidance. These requirements are specified for individual facilities, typically in an agreement or order. The proposed regulations are consistent with the requirements DTSC currently uses for corrective action and the qualifications for the UPAs are based on DTSC's own personnel qualifications. As a result, any corrective action conducted or required by UPAs determined to be qualified by DTSC in accordance with the proposed regulations is intended to be consistent with corrective action conducted or required by DTSC.

In addition, each specific corrective action project is subject to an individual environmental evaluation pursuant to the California Environmental Quality Act, as required by state law and specified in the proposed regulations.

California Environmental Quality Act (CEQA) Compliance

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

PEER REVIEW

Under the provisions of Health and Safety code sections 57004 and 25141.2, peer review is not required because the proposed regulations do not establish a regulatory level, standard, or other requirement subject to scientific peer review.

BUSINESS REPORT

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3(c). The proposed regulations may require reports of activities related to corrective action, such as a groundwater monitoring report at sites with groundwater contamination, however, these are not newly required reports. Since the specific corrective action procedures specified in the proposed regulations are consistent with the requirements currently used for corrective action by DTSC, such reports would be also required under the current processes for corrective action.

FISCAL IMPACT ESTIMATES:

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates. The regulations provide an opportunity for local UPAs to demonstrate their qualifications to require and implement corrective action at facilities within their jurisdiction, but no mandate is proposed requiring local agencies to assume corrective action authority.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies. The regulations allow local unified program agencies to demonstrate qualifications if they choose to assume authority to require or conduct corrective action, but no mandate is proposed to require local agencies to assume this authority. Any UPA that elects to assume corrective action authority must demonstrate, as part of its qualification, the ability to recover the costs of enforcing environmental assessment and corrective action within its jurisdiction.

Cost or Savings to Any State Agency: DTSC has made a preliminary determination that the proposed regulations are not likely to result in savings and may result in minimal costs and minor losses in revenue to the state.

For any UPA that seeks authority for environmental assessment and corrective action, DTSC will be required to evaluate the UPA qualifications and make a determination regarding the adequacy of those qualifications. This will result in an increase in workload for DTSC, however, the effect of such an increase depends primarily on how many applications are submitted simultaneously. DTSC plans to work with the UPAs to develop training and a model application to ensure the application process operates as smoothly as possible. It is difficult to predict how many UPAs will seek authority for environmental assessment and corrective action, but feedback from workshops and meetings held regarding the proposed regulation concepts indicate less than a dozen UPAs initially may seek to demonstrate full Tier 2 qualifications. DTSC expects more UPAs will seek to demonstrate Tier 1 qualifications initially, perhaps as many as one-third or one-half of the 87 UPAs currently in existence.

Those UPAs that are determined to be qualified to undertake environmental assessment and corrective action will then assume those responsibilities for unified program facilities from DTSC, which currently oversees environmental assessment and corrective action for these UPA facilities in addition to environmental assessment and corrective action at facilities under DTSC's jurisdiction. Because DTSC seeks reimbursement from the facilities for the majority of tasks associated with environmental assessment and corrective action, and because most of the facilities that are likely to be transferred to a qualified UPA are lower priority and currently awaiting action within DTSC's backlog, the net costs or savings to DTSC from the transferred facilities and associated reimbursements are likely to be negligible.

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

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

Cost Impacts on Representative Private Persons or Businesses:

These regulations do not directly impact private persons or businesses and thus DTSC sees no fiscal impact on businesses.

The proposed regulation establishes qualifications for unified program agencies that are the same as DTSC's own personnel qualifications. In addition the proposed regulation specifies general provisions for corrective action consistent with those DTSC imposes

on its own corrective action agreements or orders. The proposed regulations do not identify any new sites that may need to undergo corrective action or impose more or less stringent cleanup goals than those currently in use. Any costs arising from corrective action activities performed or required by unified program agencies are expected to be consistent with those costs that would have been incurred in the absence of the proposed regulations when corrective action activities would be performed or required by DTSC. Hence, any potential cost changes associated with the UPA oversight instead of the state conducting corrective action arising from the proposed regulations are expected to be negligible.

In the absence of the proposed regulations, DTSC would perform or require corrective action at the UPA facilities. Because corrective action associated with UPA facilities tends to be smaller and less complex than other facilities under DTSC's jurisdiction, they typically pose less hazard to human health and the environment and are often ranked lower in priority when compared with DTSC's other corrective action responsibilities. Under the proposed regulations, a qualified UPA, which would have fewer corrective action sites than DTSC, might be able to accomplish corrective action more quickly than DTSC, which might result in a cost savings to the facility.

Significant Statewide Adverse Economic Impact on Businesses:

DTSC has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states.

Assessment Statement:

- (A) **Creation or elimination of jobs within California** – DTSC has made a preliminary determination that no jobs will be created or eliminated in California as a result of the proposed regulations.
- (B) **Creation of new businesses or the elimination of existing businesses within California** – DTSC has made a preliminary determination that no businesses will be created or eliminated in California as a result of the proposed regulations.
- (C) **Expansion of businesses currently doing business in California** – DTSC has made a preliminary determination that no businesses in California will be expanded as a result of the proposed regulations.

Effect on Small Businesses:

DTSC has determined that provisions of this rulemaking may have an effect on small businesses. Although the proposed regulations do not change the approach currently used for addressing corrective action, the agency requiring or implementing environmental assessment or corrective action may change. Depending upon the workload of the qualified UPA, the implementation of environmental assessment or corrective action may occur more quickly under the proposed regulations.

CONSIDERATION OF ALTERNATIVES

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

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Ms. Joan Ferber of DTSC's Environmental Analysis and Regulations Section as specified below. The information upon which DTSC relied is also available at the address listed below.

POST-HEARING CHANGES

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

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

date the rulemaking is filed with the Secretary of State and the effective date of the regulations.

CONTACT PERSONS

Inquiries regarding technical aspects of the proposed regulations may be directed to Ms. Nancy Ostrom of DTSC at (916) 324-3385 or, if unavailable, to Mr. Karl Palmer of DTSC at (915) 445-2625. However, such oral inquiries are not part of the rulemaking record.

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

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

Ms. Joan Ferber, Regulations Coordinator
Environmental Analysis and Regulations Section
Department of Toxic Substances Control

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Sacramento, CA 95812-0806

E-mail Address: regs@dtsc.ca.gov

Fax Number: (916) 323-3215

Ms. Ferber's phone number is (916) 322-6409. If Ms. Ferber is unavailable, please call Ms. Nicole Sotak at (916) 327-4508 or Mr. James McRitchie at (916) 327-8642.