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Department of Toxic Substances Control

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Gavin Newsom
Governor

TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

Amending Section 66272.62

Determining the Initial Penalty for Each Violation

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to amend California Code of Regulations, Title 22, Division 4.5, Chapter 22, Article 3, section 66272.62.

PUBLIC HEARING

DTSC will hold two public hearings on the proposed regulation at the following times and locations:

DATE:	March 29, 2019	DATE:	March 29, 2019
TIME:	9:00AM – 12:00PM	TIME:	9:00AM – 12:00PM
LOCATION:	DTSC Regional Office 9211 Oakdale Avenue Chatsworth, California 91311	LOCATION:	DTSC Regional Office 8800 Cal Center Drive Sacramento, California 95826

At the times and locations listed above, any person(s) may present statements or arguments, orally or in writing, relevant to this proposal described in the Informative Digest. The public hearings will convene at 9:00AM PDT and will remain open until 12:00PM PDT, or until no attendees present testimony, whichever occurs first.

Representatives of DTSC will preside at the hearing. DTSC requests persons who wish to speak to please register before the hearing. Pre-hearing registration is conducted at the location of the hearing from 8:40AM PDT until the hearing commences. Registered persons will be heard in the order of their registration. Anyone else wishing to speak at the hearing will have an opportunity after all registered persons have been heard.

All visitors are required to sign in prior to attending any hearing at the Visitor Center located just inside of the building's public entrance. Please allow adequate time to sign in and receive a visitor badge before the public hearing begins.

NOTICE PERTAINING TO ACCESSIBILITY & REASONABLE ACCOMMODATION

All documents related to this regulation can be made available in alternate format (*i.e.* Braille, large print, etc.) or in another language, as requested, in accordance with State and Federal law. Further, to ensure the public has equal access to all available services and information, DTSC will provide disability-related reasonable accommodations and/or translator/interpreter needs, upon request. For assistance, please contact **Tara Barnes at (916) 327-4500** or Tara.Barnes@dtsc.ca.gov as soon as possible, but no later than 10 business days prior to the scheduled hearing. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

WRITTEN COMMENT PERIOD

Any interested person(s) or their authorized representative(s) may submit written comments relevant to the proposed regulatory action to DTSC in either electronic or hard-copy formats.

Written comments may be submitted electronically through the DTSC regulations email address at regs@dtsc.ca.gov or please direct hard-copy written comments to:

Jackie Buttle
Office of Legislation and Regulatory Review
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
Fax Number: (916) 324-1808

The written comment period will close at 5:00PM PDT on March 25, 2019. Only comments received at the DTSC office by that date and time will be considered.

AUTHORITY & REFERENCE

Authority

This regulation is being adopted under the following authorities:

- Health and Safety Code sections 25150 and 58012

Reference

This regulation implements, interprets, or makes specific the following statutes:

- Health and Safety Code sections 25187, 25188, 25189, and 25189.2.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Policy Statement Overview

Existing law and regulations permit DTSC or an authorized agency, known as a unified program agency, to implement and enforce the California Hazardous Waste Control Law (HWCL; Health & Saf. Code § 25100 et seq.) These laws and regulations allow DTSC and the unified program agencies to perform inspections of hazardous waste facilities and hazardous waste generators. Inspections may result in administrative or civil penalties for certain violations of any permit, rule, regulation, standard, or requirement issued or adopted pursuant to the HWCL.

Prior to the enactment of Assembly Bill No. 245 (AB 245; Chapter 499, Statutes of 2017), a person who failed to comply with a schedule for compliance or who violated hazardous waste laws was liable for a civil or administrative penalty not to exceed \$25,000 for each separate violation or, for continuing violations, for each day that the violation continues. DTSC's regulations for assessment of administrative penalties, utilized by DTSC and authorized agencies, state that any "penalty assessed . . . shall not exceed the maximum penalty specified in statute." (Cal. Code Regs., tit. 22, §§ 66272.61, 66272.63, subd. (d), 66272.67, subd. (e), 66272.69 [The final penalty shall not exceed the statutory maximum.])

Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2 to increase administrative and civil penalties from a maximum of \$25,000 per violation per day of violation to a maximum of \$70,000 per violation per day of violation. Since the existing penalty regulations apply only to administrative penalties, the statutory changes to the civil penalties are self-implementing upon the effective date of the statutory changes.

The statutory changes to the administrative penalties enacted by AB 245 resulted in a conflict between the statutory language and the regulations governing the administrative penalties, which still provided a maximum administrative initial penalty of \$25,000 per violation per day of violation. Therefore, DTSC determined that this conflict posed an emergency situation necessitating immediate action to amend the penalty regulations to avoid serious harm to public peace, health, safety, and general welfare. DTSC's proposed emergency regulation increasing the maximum administrative initial penalty to \$70,000 per violation per day of violation was approved by OAL and became effective on July 5, 2018. On December 31, 2018, OAL approved the re-adoption of this emergency regulation with an effective date of January 3, 2019 and an expiration date of April 3, 2019.

This rulemaking proposal would address the statutory changes made by AB 245 and finalize the emergency regulation re-adopted on January 3, 2018. The proposed amendment to the penalty regulation would increase the administrative initial penalty to a maximum of \$70,000 per violation per day of violation to be consistent with the statutory changes. The amendment to the regulation is intended to provide consistency, and promote fairness and transparency, to the regulated community and the regulatory agencies.

Proposed regulation

The proposed regulation would increase the maximum administrative initial penalty for hazardous waste violations in California from \$25,000 to \$70,000 per violation per day of violation.

Benefits of the Proposed Action

Amendment of the regulation would provide an added deterrent to the regulated community and encourage compliance with the HWCL. As a result, it would better protect California's people and environment from harmful effects of toxic substances by enforcing hazardous waste laws, reducing hazardous waste generation, improving worker safety, and encouraging the manufacture of chemically safer products.

Summary of Existing Statutes and Regulations

Effective January 1, 2018, Health and Safety Code sections 25188, 25189, and 25189.2 were amended, to provide for the assessment of administrative and civil penalties up to a maximum of \$70,000 per violation per day of violation.

The existing regulation, California Code of Regulations, title 22, section 66272.62, uses a matrix that evaluates potential for harm and extent of deviation to calculate penalty amounts. On July 5, 2018, the Office of Administrative Law approved an Emergency Rulemaking package submitted by DTSC to increase the maximum penalty from \$25,000 per violation per day of violation, to \$70,000 per violation per day of violation. On December 31, 2018, OAL approved the re-adoption of this emergency regulation with an effective date of January 3, 2019 and an expiration date of April 3, 2019.

Emergency Regulations are effective for 180 days and can be extended twice for 90 days each time. DTSC must complete a Certificate of Compliance pursuant to Government Code section 11346.1, subdivision (e) on or before April 2, 2019. If no emergency regulation extension is filed and a Certificate of Compliance is not completed, the emergency regulations will expire causing the regulation to revert to a maximum administrative initial penalty of \$25,000 per violation per day of violation.

Relation to Existing Federal Regulations

Penalties under federal law can be found in Code of Federal Regulations, Title 40, Chapter I, Subchapter A, Part 19, Section 19.4. The amendment of this regulation would not conflict with, or modify, any federal law. Rather, it would harmonize and make the proposed regulation consistent with federal law and regulations.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations

The authority to assess penalties under State regulations can be found in California Code of Regulations, title 22, section 66272.60 et seq. The amendment of this regulation would ensure consistency between federal law and regulations and State law and regulations. The amendment of this regulation would not conflict with State law or other State regulations. After conducting a review for any regulations that would relate to or affect this area, DTSC has concluded that these are the only regulations that concern determining the initial penalty for each violation. Therefore, the proposed regulation is neither inconsistent or incompatible with existing State regulation.

Incorporated By Reference

The regulation does not incorporate any references.

DISCLOSURE REGARDING THE PROPOSED ACTION

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DTSC determined that the proposed changes to this regulation would 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.

COST OR SAVINGS TO STATE OR LOCAL AGENCIES, OR SCHOOL DISTRICTS SUBJECT TO REIMBURSEMENT

Health and Safety Code section 25187, subdivision (j)(1) and (2) provide that all administrative penalties collected from an action brought by DTSC shall be placed in

separate DTSC subaccounts for expenditure by DTSC upon appropriation by the Legislature. As previously indicated in the Economic Impact Statement and based on assumptions from prior years, DTSC anticipates the increased penalty amount may result in a 2.8 factor increase in the amount of total penalties DTSC collects. The projected annual increase in settled administrative actions is calculated as approximately \$1,643,518.08 and \$336,085.14 annually for the State and unified program agencies (local governments), respectively.

However, due to the increased penalty amount, DTSC anticipates that there may be an increase in litigation costs for businesses contesting the increased penalty which would offset an increase in collected penalties. An increase in litigation may result in additional costs to DTSC defending any increased litigation due to the increased penalty.

Health and Safety Code section 25187, subdivision (k) provides that all administrative penalties collected from an action brought by a unified program agency, or its participating agencies such as a local health officer or local public officer, shall be deposited into a special account that shall be expended to fund enforcement activities of the unified program agency. As previously indicated in the Economic Impact Statement and based on assumptions from prior years, DTSC anticipates the increased penalty amount may result in a 2.8 factor increase in the total penalties a unified program agency collects. The projected annual increase in penalties based on the regulation amendment is \$336,085.14.

However, due to the increased penalty amount, DTSC anticipates that there may be an increase in litigation costs for businesses contesting the increased penalty which would offset an increase in collected penalties. An increase in litigation may result in additional costs to local agencies to defend any increased litigation due to the increased penalty.

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE

DTSC has determined that there would be no fiscal impact to federal funding to the state exists.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS

DTSC is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

EFFECT ON SMALL BUSINESSES

Government Code section 11346.3 defines a small business as any business that employs fewer than 100 employees. According to the 2016 labor market information by the California Employment Development Department (the most current full year of data available), 98.3 percent of all businesses in California employ less than 100 employees. DTSC does not have information that indicates whether these data apply to businesses impacted by the proposed regulation. Therefore, DTSC estimates that 98.3 percent of the businesses impacted by the proposed regulation are small businesses.

EFFECT ON HOUSING COSTS

DTSC has determined the proposed changes to regulation would not have an effect on housing costs.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

In accordance with Government Code section 11346.3, subdivision (b), DTSC completed an economic impact assessment. DTSC determined the proposed regulatory action has no significant statewide adverse economic impact directly affecting business. In theory, the proposed action does not impose new or revised duties or burden on businesses that handle hazardous waste. Based on prior years of penalty collection, DTSC estimates that the economic impact of this regulation on businesses would be less than \$2 million annually. The \$2 million is a benefit to the State.

DTSC has determined the proposed regulation would not create jobs and new businesses, nor would it eliminate jobs and existing businesses. The proposed regulation would not create an expansion of jobs and businesses currently doing business within the State.

As stated in the Form 399, the regulation amendment provides an added deterrent to the regulated community and encourages compliance with the HWCL. As a result, the regulation protects California's people and environment from harmful effects of toxic substances by enforcing hazardous waste control laws, reducing hazardous waste generation and encouraging the manufacture of chemically safer products.

Calculations for state government (DTSC):

Average DTSC settled penalties (annual year 2013-2017) = \$913,065.60

(5 year average settled penalties) X (% penalty increase) = Total projected penalty settlements annually for State of California after penalty increase – (Initial five year average) = Projected increase in penalties received by the state annually

$\$913,065.60 \times 2.8 = \$2,556,583.68 - \$913,065.60 = \$1,643,518.08$

Calculations for local government (Certified Unified Program Agencies (CUPA)):

Average CUPA settled penalties (annual year 2013-2017) = \$186,713.96

(Five year average settled penalties) X (% penalty increase) = Total projected penalty settlements annually for local governments after penalty increase – (Initial five year average) = Projected increase in penalties received by local governments annually

$\$186,713.96 \times 2.8 = \$522,799.10 - 186,713.96 = \$336,085.14$

Summary:

Average administrative penalties settled annually 2013-2017:

State of California: \$913,065.60

Local governments: \$186,713.96

Total = \$1,099,779.56

Projected administrative penalties settled annually after amending 66272.62:
State of California: \$2,556,583.68
Local governments: \$522,799.10
Total: \$3,079,382.78

Projected increase in settled administrative penalties annually:
State of California: \$1,643,519.08
Local governments: \$336,085.14
Total = \$1,979,603.22

DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT

As stated above, DTSC determined the proposed regulatory action has no significant statewide adverse economic impact directly affecting business. Based on prior years of penalty collection, DTSC estimates that the economic impact of this regulation on businesses would be less than \$2 million annually. Any economic impact of this regulation would be considered a benefit to the State.

CONSIDERATION OF ALTERNATIVES

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

OTHER APPLICABLE REQUIREMENTS PRESCRIBED BY STATUTE
CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

The Department of Toxic Substances Control has completed a Notice of Exemption (NOE) because the proposed regulation would not result in a change in land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. The proposed regulation is covered by the general rule that the California Environmental Quality Act applies only to projects which have the potential for causing a significant effect on the environment. DTSC finds with certainty that there is no possibility that the proposed regulation would have a significant effect on the environment.

CONTACTS

Inquiries regarding technical aspects of the proposed regulation or CEQA documents may be directed to Shawn Cox at (916) 322-7527 or Shawn.Cox@dtsc.ca.gov; or Maria Salomon at (916) 322-5919 or Maria.Salomon@dtsc.ca.gov. If unavailable, contact Jackie Buttle at (916) 324-8286 or regs@dtsc.ca.gov. However, such oral inquiries are not part of the rulemaking record.

The public comment period for this rulemaking file, as described above, will commence on February 8, 2019 and close on March 25, 2019 at 5:00PM PDT. During this time, DTSC will accept statements, arguments, or contentions and/or supporting documents regarding this rulemaking that must be submitted in writing prior to the public hearing, or may be presented orally or in writing at the public hearing. Comments must be received

by March 25, 2019 at 5:00PM PDT in order for them to be considered before DTSC adopts, amends, or repeals this regulation.

AVAILABILITY OF TEXT OF PROPOSED REGULATIONS and INITIAL STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons, the text of the proposed regulation, all the information upon which its proposal is based, and the express terms of the proposed regulation are posted to DTSC's Internet site at: <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/index.cfm> or may be obtained from Jackie Buttle of DTSC's Office of Legislation, as specified below.

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

Once the regulation has been adopted, DTSC prepares a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed public comments, and includes other materials required by Government Code section 11346.9. Copies of the Final Statement of Reasons may be obtained from Jackie Buttle at the address listed below. A copy of the Final Statement of Reasons along with the date the rulemaking is filed with the Secretary of State and the effective date of the regulation will also be posted on DTSC's Internet site at: <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/index.cfm>

To be included in this regulation package's mailing list and to receive updates of this rulemaking, please visit <http://www.dtsc.ca.gov/ContactDTSC/ELists.cfm> and subscribe to the applicable eList, or to directly subscribe, e-mail: regs@dtsc.ca.gov.

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

Jackie Buttle	E-mail address:	regs@dtsc.ca.gov
Office of Legislation & Regulatory Review	Fax number:	(916) 324-1808
DTSC Headquarters Building	Phone number:	(916) 324-8286
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Sacramento, California 95812-0806		

If Jackie Buttle is unavailable, please call Shawn Cox at (916) 322-7527 or Shawn.Cox@dtsc.ca.gov.