



Western States Petroleum Association



April 15, 2019

Ms. Meredith Williams, Acting Director
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95812

Subject: Comments on “SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts.”

Dear Director Williams:

The undersigned organizations appreciate the opportunity to comment on the Department of Toxic Substances Control’s (DTSC) “SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts,” dated October 2018.

DTSC’s Draft Concept Paper (DCP) highlights the fundamental challenge in evaluating cumulative impacts and community vulnerability in the context of hazardous waste facility permitting: while there may be broad-based concerns regarding the potential cumulative public health and environmental impacts of multiple sources of pollution on vulnerable communities in California, the available research cited by DTSC does not support a direct causal linkage between exposure to hazardous waste and the health impacts reported in community studies.

1. General Comments on Draft Concept Paper Overview and Track 2 Elements

Justification for Track 2 Rulemaking - DTSC's SB 673 Hazardous Waste Facility Permitting Criteria Regulations, effective January 1, 2019, already address the statutory directive to consider "the vulnerability of, and existing health risks to, nearby populations" (H&SC §25200.21(b)) in the context of facility permitting decisions. The new regulations require facilities to submit a health risk assessment (HRA) with the permit application. The HRA will use site-specific information to determine whether and to what extent the facility's on-site and off-site operations pose a risk to people in the surrounding community. The new regulations also require additional data gathering "to identify vulnerable populations around or adjacent to hazardous waste facilities to address potential environmental justice issues and increase public participation opportunities."¹ DTSC's proposed Track 2 process opens the door to additional restrictions on facility operations based on cumulative impacts that may be driven by unrelated sources or socio-economic stressors that are independent of facility operations but contribute to overall community vulnerability. These factors are beyond the control of the facility and beyond the scope of DTSC's statutory directive.

Applicability - We support statements in the DCP indicating DTSC's intent to limit the applicability of a future Track 2 SB 673 rulemaking to operating hazardous waste facilities. This statement of intent is consistent with the statutory requirements at Health and Safety Code (H&SC) §25200.21 and .23, which prescribe several factors DTSC must *consider* in permitting hazardous waste treatment, storage and disposal facilities (TSDF). However, as we will discuss in the following comments, the practical effect of the ideas presented in the DCP would be to extend the reach of DTSC's hazardous waste permitting program beyond permitted hazardous waste facilities.

Facility Classification Scheme - The need for supplemental permit conditions or regulatory actions must be based on actual impacts resulting from the operation of permitted hazardous waste facilities, not a broader suite of "community vulnerabilities" over which the facility may have no control.

A facility should not be placed into a tiered structure that serves as a trigger for new requirements without first establishing that it is causing or significantly contributing to actual public health or environmental impacts in a disadvantaged community. In making this determination, DTSC's analysis can include the screening criteria it identifies in the DCP – facility size, characteristics, and hazardous waste activities (or planned activities

¹ Department of Toxic Substances Control Fact Sheet, Hazardous Waste Facility Permitting Criteria Regulations, December 2018: <https://www.dtsc.ca.gov/HazardousWaste/upload/SB-673-Regulations-Overview-Fact-Sheet-12-13-2018.pdf>.

in the case of new facilities) – but it should also include available information that adequately informs baseline conditions and the magnitude of any impact(s) from facility operation, such as a facility-wide environmental assessment or a facility-specific HRA.

Subject to further discussion and application of appropriate, science-based methodologies, we agree that community vulnerability assessments could help inform strategies for community outreach and engagement during the permit renewal process. An assessment of community vulnerability could also be used as a weighting factor in the analysis, but it should not be a primary driver in a classification scheme that results in the imposition of new regulatory requirements.

Use of Data Visualization Tools - The DCP emphasizes use of “higher-resolution” health data in visualization tools to present population effects and trends in health outcomes, *and* to correlate those effects and trends with location-specific factors. We agree that data visualization tools can be a useful means of communicating information on health trends in a given community. However, none of the visualization tools identified in the DCP (e.g., CalEnviroScreen 3.0, the UC Berkeley Environmental Justice Screening Method (EJSM) and the California Healthy Places Index), either alone or in combination, can establish a causal connection between hazardous waste operations and health outcomes in a given community. DTSC should not imply or otherwise encourage interpretations that cannot be supported by data visualization tools.

BDO Consultation - The DCP indicates that DTSC should consult with other Cal-EPA Boards, Departments and the Office of Environmental Health Hazard Assessment (OEHHA) to assess the availability of data and tools on a statewide basis as part of the review undertaken for any permit application. Conducting this scale of review for every individual permit would further complicate an already burdensome process and extend the timeframe necessary to process a permit application. It would also reduce regulatory certainty by actively seeking new information that might change the criteria on which individual permitting decisions are made.

Impact of DCP on Hazardous Waste Management in California - Proceeding down the path envisioned in the DCP will discourage renewal of hazardous waste facility permits and could lead to additional hazardous waste facility closures in California. This outcome would be counterproductive. It would further limit the volume of hazardous waste treated near the point of generation. Diverting a larger volume of hazardous waste to more distant facilities would create additional public safety risks and generate additional greenhouse gas (GHG), criteria pollutant and toxic air contaminant (TAC) emissions along transportation corridors from increased heavy-duty truck and rail traffic. Increased TAC emissions will also increase public health risks in these areas, including risks to vulnerable communities. Implementation of the measures envisioned in the DCP would also likely result in diverting a larger volume of non-RCRA hazardous waste to other states, where it can be managed as ordinary solid waste in lieu of DTSC’s

more stringent public health and environmental protection standards for California-only hazardous waste.

Major Regulations - A future Track 2 rulemaking based on the draft DCP would require a full California Environmental Quality Act (CEQA) analysis of impacts and alternatives to address potentially significant environmental consequences, including constraints on facility improvements and potential facility closures. In addition, the closure of a single TSDF and costs of post-closure management could elevate a proposed Track 2 regulation to the category of a “major regulation” which would subject the proposal to Government Code requirements for Standardized Regulatory Impact Assessment.²

2. Use of CalEnviroScreen (CES Version 3.0) and Other Qualitative Screening Tools to Support Additional Regulatory Actions

The DCP would group each permitted facility into one of three “action pathway” tiers based on 1) an initial facility assessment *and* 2) “the highest CES 3.0 ranking for the census tracts within a half-mile of the facility.”³ The rankings produced by the “Update to the California Communities Environmental Health Screening Tool” (CES 3.0) is a composite of several indicators of community vulnerability - exposures, environmental effects (all media), sensitive populations and socio-economic factors (e.g., education level, poverty, unemployment, etc.) – expressed as a percentile for a given census tract. The purpose of this design is to allow for qualitative comparisons of relative vulnerability/impact among individual communities on a statewide basis.

The DCP proposes to establish thresholds (CES 3.0 percentile-based cut points) to determine placement of facilities in each tier. The tiers would establish additional regulatory requirements for affected facilities; the higher the tier, the greater the requirements on the facility. For example, a facility placed in Tier 3 would be subject to an enhanced “community engagement” program, while a Tier 1 facility would be subject to community engagement, monitoring and mitigation measures through the permitting process.

CES was not designed to be a trigger mechanism for facility-specific permit conditions or regulatory requirements. The California Environmental Protection Agency (Cal-EPA) and Office of Environmental Health Hazard Assessment (OEHHA), which developed the CES tool, have been careful to acknowledge its limitations. As the agencies explained in their report on the original release of CES Version 1.0:

“CalEnviroScreen assesses environmental factors and effects on a regional or community-wide basis and cannot be used in lieu of

² Government Code §11346.2 et. seq.

³ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, page 5.

performing an analysis of the potentially significant impacts of any specific project.... [T]he tool's output should not be used as a focused risk assessment of a given community or site. It cannot predict or quantify specific health risks or effects associated with cumulative exposures identified for a given community or individual."⁴

Moreover, the agencies specifically cautioned that the CES tool is inappropriate for use in the CEQA process, which is the primary mechanism used by California public agencies to identify measures to mitigate a project's environmental impacts, including contributions to cumulative impacts. Like DTSC's definition of "cumulative impacts" - "the combined environmental and health effects of all sources of pollution in a community, including threats to air, water, and land" - the CES definition includes existing conditions that are considered part of the environmental baseline, not impacts of the project under CEQA:

"The statutory definition of 'cumulative impacts' contained in the CEQA is substantially different than the working definition of 'cumulative impacts' used to guide the development of CalEnviroScreen. Also, this tool considers some social, health, and economic factors that may not be relevant when doing an analysis under CEQA."⁵

The agencies' January 2017 report updating CES (version 3.0) reiterated those concerns:

"To ensure proper use and understanding we explained that the tool is not a substitute for a cumulative impacts analysis under the California Environmental Quality Act (CEQA). Nor is the intent to restrict the authority of government agencies in permit and land-use decisions. Furthermore, CalEnviroScreen may not be the appropriate tool to guide all public policy decisions. Other tools – or individual data layers – might be more useful for different purposes, such as for identifying communities facing socioeconomic disadvantage or health disadvantage."⁶

The DCP also acknowledges on page 1 that the methodology is designed to "produce a relative, rather than absolute, measure of pollution's impacts and vulnerabilities in California communities." The CES 3.0 model is designed for simplicity and ease of implementation at the census tract scale. The scoring system involves an averaging scheme across all indicators to allow for comparison of one census tract relative to

⁴ California Communities Environmental Health Screening Tool, Version 1 (CalEnviroScreen Version 1.0) (April 2013), pages iii-iv.

⁵ Id.

⁶ Update to the California Communities Environmental Health Screening Tool - CalEnviroScreen Version 3.0 (January 2017) page iii.

another. The report acknowledges various limitations and uncertainties which complicate interpretation of results. For example, the discussion of the Drinking Water Contaminants indicator states: “Certain assumptions, data gaps and limitations within the indicator score methodology may affect the calculation of scores.”⁷

The census tract analysis and scoring system also does not identify the contributions of individual sources to the composite score. For example, the “Hazardous Waste Generators and Facilities” indicator is the “sum of weighted permitted hazardous waste facilities and hazardous waste generators within each census tract.”⁸ The weighting scale is qualitative. For permitted facilities it considers the type and permit status of the facility. For large quantity generators (producing more than 1,000 kg of waste per month), it considers waste volumes and proximity to populated census blocks. Smaller quantity generators are excluded from the scoring method, regardless of facility emissions profile, proximity to community receptors or other factors that may indicate potential for significant public health or environmental impacts. More importantly, none of the factors included in the composite score are actual measures of impacts from particular sources. In addition, as noted above, the agencies that developed CES have stated it should not be used in the CEQA process for developing facility mitigation measures. In sum, CES 3.0 scores do not qualify as substantial evidence that can support mitigation and regulatory decisions.

These limitations are reflected in the established use of CES as one of multiple lines of information to inform administration of government grant programs (e.g., California’s Greenhouse Gas Reduction Fund), prioritization of inspections, investigations and enforcement actions and local land use and transportation planning. For example, the California Air Resources Board (ARB) and local air districts use CES 3.0 under the Community Air Protection Program (AB 617⁹) to help identify *candidate* communities for *possible* further evaluation and regulatory action. Actual selection of communities for air quality monitoring or emissions reduction programs requires more comprehensive analysis.

In addition, the DCP does not clarify how CES 3.0 would be used “in conjunction with other peer-reviewed scientific tools and scientific data” to assess cumulative impacts and community vulnerability near permitted hazardous waste facilities. Use of multiple screening tools, especially in the absence of guidance on scope of application, how to reconcile differences in weighting schemes, data integration and other issues could bias the results of the assessment. Approaches that lead to artificial weighting or double-counting of certain factors would be counter-productive because they would result in

⁷ I.d., page 37.

⁸ I.d., page 82.

⁹ C. Garcia, 2017.

misallocation of resources, diminishing program benefits in the most impacted communities.

CES is fundamentally a high-level screening tool that can be used to identify and prioritize communities that might benefit from further actions to address disproportionate public health and environmental impacts. However, it lacks the necessary scientific rigor, source-specificity and validation to support regulatory actions.

Recommendation: CES should not be used to establish thresholds that impose new permit conditions, requirements for community-wide health impact assessments or mitigation measures on individual facilities.

3. Need for Supplemental Analysis and Use of Appropriate Analytical Methods to Support Focused Regulatory Actions

The Introduction section states that the draft regulatory concepts “recognize ongoing actions by the California Air Resources Board and local air pollution control and air quality management districts to implement Assembly Bill 617.”¹⁰ Among the most important elements of AB 617 are features designed to focus monitoring and emissions reduction programs on sources that “cause or significantly contribute to a material impact on a sensitive receptor location or disadvantaged community.”¹¹

Appendix C of ARB’s Community Air Protection Blueprint requires evaluation of relative source contributions to cumulative air pollution exposure burden and health risk using best available methodologies identified in ARB’s “On-Line Resource Center.” The evaluation process and the five methods cited in ARB’s Resource Center are media-specific – they are limited to emissions of criteria pollutants and toxic air contaminants. DTSC’s DCP does not identify a comparable process or best available methods for any environmental media. The DCP only makes a vague one-sentence reference to consideration of “information on the facility’s contribution to cumulative impacts and community vulnerability around the facility” (emphasis added).¹² The short list of example metrics on page 7 is only partially responsive to this need – it also includes metrics of community-scale impacts that would not provide additional information on facility-specific contributions to those impacts.

The AB 617 requirements cited above help to ensure that de minimis or low-risk sources are not subject to additional requirements simply because they happen to be operating in or near a “disadvantaged community” (i.e., one with a high CES score).

¹⁰ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, page 2.

¹¹ Health and Safety Code §44391.2(b)(3).

¹² SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, page 6.

Recommendation: DTSC should employ an approach similar to the one described in ARB’s AB 617 Blueprint to evaluate the significance of individual source contributions to relevant environmental impacts where that work is not already in progress or completed by another responsible agency.

4. SB 673 Requires DTSC to Consider “Cumulative Impacts” and “Community Vulnerability” in Establishing Permit Conditions for Operating Hazardous Waste Facilities

Health and Safety Code §25200.21 requires DTSC to adopt regulations “establishing or updating criteria used for the issuance of a new or modified permit or renewal of a permit, (emphasis added). This code section requires DTSC to consider several criteria, including “the vulnerability of, and existing health risks to, nearby populations.”¹³ Subsection (b) prescribes an approach to assessment of vulnerability and existing health risks which relies on “available tools” including local and regional health risk assessments and indicators of “cumulative impact.”

Health and Safety Code §25200.23 requires DTSC to “develop and implement programmatic reforms designed to improve the protectiveness, timeliness, legal defensibility, and enforceability of the department’s permitting program.” Subdivisions (a) through (d) address procedures for permit decisions, terms and conditions on permits to better protect public health and the environment, procedures for reviewing permit applications and procedures to identify and integrate public concerns into permitting decisions (emphasis added). Thus, the scope of SB 673 is clearly limited to hazardous waste facility permitting. The statute does not authorize DTSC to develop plans or measures that reach beyond these facilities to address indicators of community vulnerability, health risks or cumulative public health or environmental impacts unrelated to the operation of DTSC-permitted hazardous waste facilities.

DTSC also references several studies that don’t actually measure exposure but claim to link permitted facilities to negative community health outcomes. At the same time, DTSC states that many operating hazardous waste facilities are located in socio-economically disadvantaged communities which often show a correlation with negative health outcomes. However, the reasons for these outcomes may be unrelated, or only minimally related, to facility operations. In some communities, the public health or environmental impacts indicated by available screening tools may be driven by natural sources rather than anthropogenic contributions (e.g., PM from windblown dust or naturally occurring metals in the groundwater), by diffuse area sources such as transportation corridors, or by a combination of socioeconomic factors (e.g., high

¹³ Health and Safety Code §25200.21(b).

poverty rates, lack of education, limited access to healthcare, etc.) in the absence of an environmental driver. DTSC does not have the necessary resources, expertise or authority to investigate all of the factors that may contribute to these indicators, much less to develop strategies to mitigate actual impacts that are not directly attributable to the operation of permitted hazardous waste facilities.

Recommendation: To the extent a screening-level analysis indicates other sources may be contributing to a cumulative environmental or public health impact in a given community, and those sources are not regulated by DTSC pursuant to a hazardous waste operating permit, DTSC should refer the results of the screening analysis to the appropriate regulatory authorities for further evaluation and possible action.

5. Initial Recommendation of Facility Action Pathways (Element 1)

Several of the criteria suggested in the DCP to assess the potential impact of a facility on the community may be misleading or ineffective. For example, the number and type of environmental permits required for the same type of facility may vary widely depending on the permitting programs administered by local regulatory agencies. Similarly, “number of truck trips generated” is an overly broad criterion. To the extent it is used as an indicator of potential impact in the assessment process, it should be tied directly to truck traffic attributable to the operation of the permitted facility.

As discussed above in comment 4, any prioritization scheme that would have the effect of imposing additional regulatory obligations on permitted facilities should be focused on the contribution of the facility to the cumulative environmental impacts in the community relative to other contributing sources or indicators of community vulnerability, and the materiality of the facility contribution. For example, a permitted facility identified as a de minimis contributor to local environmental and public health impacts should not be identified as a Tier 1 or high priority facility simply because it is located in a community where one or more census tracts show high CES 3.0 scores.

In addition, lowering the scores and expanding the buffer zone distances that qualify facilities for each tier (as DTSC is currently contemplating) would diminish DTSC’s ability to differentiate between high priority facilities and lower priority facilities for purposes of allocating resources to community outreach and education, monitoring, and further analysis to determine the need for measures to mitigate facility-specific impacts. At a minimum, the current draft DCP would require extensive community engagement around every operating hazardous waste facility regardless of the threat it poses to the community (if any). The additional adjustments DTSC is contemplating could greatly expand this obligation. This approach would not be sustainable for DTSC or for permitted facilities.

Recommendation: Any prioritization scheme that would have the effect of imposing additional regulatory obligations on permitted facilities should be focused on the contribution of the facility to the cumulative environmental impacts in the community relative to other contributing sources or indicators of community vulnerability, and the materiality of the facility contribution.

6. Public Review and Draft List of Facility Action Pathways (Element 2)

This section envisions public review and comment on DTSC’s preliminary recommendations for facility action pathways. As described in Element 1, this initial assessment would be based on an evaluation of facility-specific *screening* factors – which are not determinative of community exposure or risk from facility operations – and the composite CES 3.0 score for the subject census tract. As discussed above, these screening level assessments are likely to mislead the public about the extent of a facility’s contribution to cumulative impacts in the community. This approach would create expectations for further regulatory actions that DTSC may not be able to justify based on a more rigorous analysis of the nexus between facility operations and health or environmental impacts in the community. The longer the preliminary action pathway stands for a given facility, the more difficult it would be for DTSC to explain to the public why it is deviating from its earlier course, even where a supplemental analysis does not support imposition of additional requirements on the facility.

The DCP should provide greater clarity regarding what circumstances would necessitate “supplemental data” and what purpose that data would serve. To the extent the data are outputs of other tools like the EJSM or the Healthy Places Index – which assess similar parameters but were developed by different authors and may use different data sets and weighting schemes – they do not necessarily strengthen any conclusion about the contribution of a facility to the cumulative impacts in a community.

In addition, it is unclear how information in a petition from a community or local government official would be integrated into a process establishing an action pathway for a facility, how it would be validated or how it would be weighed relative to information from a peer-reviewed community screening tool or public health dataset or facility-specific information gathered during the permit application review process.

Recommendation: Any regulatory proposal should include language specifying criteria for use of various types of information in a facility prioritization process.

7. Supplemental Information for Permit Application Review (Element 3)

The quality and accuracy of information used in facility and community assessments is critical to properly inform the need for additional permit conditions or regulatory requirements. Data quality assurance and quality control (QA/QC) is especially important in areas where sources are already highly regulated to avoid jurisdictional confusion and imposition of well-intended but ineffective or superseded requirements. DTSC states on page 7 of the DCP that: “The public could also provide more localized supplemental information for the Department to consider before making a final determination on the facility action pathway.” This language is disconnected from statements in the prior paragraph indicating that DTSC would use “the best data sets and most up-to-date information and comprehensive information about environmental conditions and community vulnerability.” Moreover, DTSC does not identify any criteria for evaluating the quality and accuracy of information it may receive from third parties. These omissions raise the concern that regulatory decisions could be predicated, at least in part, on incomplete, inaccurate or biased information.

Appendix E of ARB’s AB 617 Community Air Protection Blueprint provides a useful model for QA/QC requirements in the context of community emissions monitoring programs. DTSC should develop a similar approach to establishing minimum QA/QC requirements for all information used to support facility and community assessments, facility classification and possible regulatory actions.

In addition, it is unclear how or why supplemental data relevant to the permit application process would be different than the data used for facility classification in Elements 1 and 2. If those elements are implemented as part of the state-wide process envisioned in the DCP, supplemental data generated during permit application review could necessitate reclassification of the facility multiple times during the permit renewal process. This construct is inefficient and would undermine the ability of DTSC, the facility operator and the public to determine what regulatory requirements apply to the facility.

Recommendation: DTSC should establish minimum QA/QC requirements for all information used to support facility and community assessments, facility classification and possible regulatory actions.

8. Alternative Pathway for Expediting Permitting Process (Element 3)

The DCP suggests that DTSC may consider expedited processing of a permit application if the facility operator enters into an agreement with community representatives, DTSC and local agencies specifying requirements for mitigation, monitoring, and community outreach.¹⁴ DTSC likens this instrument to a “good neighbor agreement.” Other than the

¹⁴ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, pages 7-8.

one example offered in this section - “bypass the requirement for the submittal of additional facility specific data on cumulative impacts and community vulnerability at the permit application stage” - the DCP is largely silent on the potential scope and terms of these agreements.

DTSC has a responsibility to hazardous waste permittees, the generators they serve and to the public to process permit applications in a timely manner. DTSC’s inability to manage this core statutory responsibility has contributed to a decline in permit renewals in California, deteriorating relationships between remaining facilities and the communities in which they operate, and a growing skepticism about the efficacy of the state’s hazardous waste management program. The additional actions contemplated in the DCP will make this difficult situation worse.

The provisions of the Hazardous Waste Control Law (HWCL) governing permitting of hazardous waste TSDFs recognize the importance of expediting all facility permitting decisions. Health and Safety Code §25199 (a)(2) states:

“The approval of hazardous waste facilities is not currently a coordinated process. The failure to coordinate the issuance of multiple permits, licenses, land use approvals, and other types of authorizations causes lengthy and costly delays. The end result of the process cannot be predicted, with any degree of certainty, by either the proponent of a project to site and construct a facility or by the concerned public.” (emphasis added)

Subsection (c) states the intent of the Legislature to “establish the means to expedite the approval of needed hazardous waste facilities.”¹⁵

Numerous attempts to reform the hazardous waste facility permitting process, including SB 673, stem from frustration with protracted delays in DTSC review of permit renewal applications. DTSC’s Independent Review Panel, convened by the Legislature in 2015, and DTSC’s own administrative reform initiatives document dozens of facilities operating under “interim status” - subject to conditions in an expired permit - for extended periods of time. Some facilities have been allowed to operate under interim status for nearly 20 years.

¹⁵ H&SC §25199 (c): “It is the intent of the Legislature, in enacting this article, to establish the means to expedite the approval of needed hazardous waste facilities; to ensure that new hazardous waste facilities are not sited unless the facility operator provides financial assurance that the operator can respond adequately to damage claims arising out of the operation of the facility; to ensure that the facilities comply with applicable laws and regulations; to clarify the procedures to be followed in approving a facility; to establish specific means to give the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities; and to establish a process for appealing local decisions on applications for land use approval for hazardous waste facilities.”

Permitted TSDFs are responsible for complying with the conditions prescribed in their permits. Those who make every reasonable effort to achieve and maintain compliance with permit conditions are, by definition, “good neighbors.” Responsible operators should not have to expose themselves to unreasonable demands, including but not limited to mitigation of community-scale impacts that are unrelated to their operations, just to obtain assurances that DTSC will process their permits in a timely manner.

Recommendation: The permit review process should be as expeditious as possible for every facility, regardless of whether the operator chooses to enter into a “good neighbor agreement” with community representatives.

9. Mitigation Measures and Clearinghouse (Element 5)

Several of the example mitigation measures listed on pages 11 and 12 would address impacts from other sources in the community that may be entirely unrelated to the permitted facility (e.g., lead abatement in homes, unspecified “community investments”, “additional community monitoring of air, water and environmental pollution concentrations”, community “healthy homes” assessments, etc.). DTSC should not use the permit approval process as leverage to compel the permittee to finance mitigation of impacts unrelated to the operation of the permitted facility. Moreover, as a practical matter, some permittees will not have the resources to underwrite such measures or receive the level of community cooperation necessary to implement them.

This concept is a text-book example of the kind of policies that are contributing to the exodus of permitted hazardous waste facilities from California. This trend is diminishing California’s capacity to manage its own hazardous waste and imposing new public health and environmental externalities both in California communities (in the form of more air pollution and hazardous materials release risk from increased shipments of waste to more distant facilities), and in communities in other states where California waste will be processed at facilities not subject to California’s stringent public health and environmental protection requirements. The latter problem would be especially pronounced for communities adjacent to municipal landfills that accept non-RCRA hazardous waste.

The need to impose additional mitigation requirements on operating hazardous waste facilities must be based on substantial evidence that the facility is causing or significantly contributing to a material impact in the community (see comment 3 above). This determination should be a function of the health risk the facility presents to the surrounding community, not a cursory assessment of potential hazards and a CES 3.0 score driven by community vulnerability factors. Imposing mitigation measures on a facility to address potential health hazards from facility operations would do nothing to address actual problems associated with poverty or lack of access to health care.

Similarly, any proposed monitoring measures must be tailored to the environmental impacts that available and substantial evidence indicates are likely to result from facility operations. A facility cannot be responsible for funding a community air quality monitoring program if the facility emissions profile indicates a de minimis contribution to air quality impacts in the community. Moreover, any mitigation measures must conform to legal requirements for nexus and rough proportionality between the impact and the required mitigation.¹⁶

Developing a “wish list” that includes measures to address community impacts unrelated to facility operations would undermine the credibility of Track 2 regulations and their effectiveness in reducing *actual* impacts from facility operations.

Recommendation: Mitigation measures should be informed by an assessment of what actions can reasonably address a facility’s contribution to cumulative public health or environmental impacts in a community.

10. Data and Tools Review (Element 6)

This element appears to define yet another process by which relevant agencies would “review” existing data and tools to ensure that the most up-to-date and advanced information and techniques are used in placing a facility on a particular action pathway. It is not clear how this overarching process would be coordinated with the review that would occur during the permit application process in Element 3. While reliable data and analysis are essential to a credible regulatory process, there must be a reasonable schedule established for revisions to the data and tools used in the regulatory process to ensure they are consistently and fairly applied to all permitted facilities over time.

Recommendation: DTSC should establish a reasonable schedule for updating information and tools used to support permit decisions.

11. Supplemental Assessment and Mitigation Would Reach Beyond Operating Hazardous Waste Facilities

Element 2 suggests supplemental factors and information to refine DTSC’s initial assessment of cumulative impacts and vulnerability in the communities surrounding each permitted hazardous waste facility. Among the example factors is “A map of facilities of interest that are significant sources of criteria pollutants or toxic air contaminants and are located in close proximity to the hazardous waste facility.”¹⁷ To

¹⁶ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹⁷ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, page 6.

the extent air pollution is a primary driver of cumulative impacts in the community, DTSC's approach should recognize ARB and local air district primacy. These agencies are already tasked with identifying and mitigating cumulative air pollution exposure burdens pursuant to AB 617.

The supplemental factor concepts in Element 2, coupled with the community engagement concepts in Element 4 and the mitigation concepts in Element 5 would invite demands for additional regulatory actions at other "facilities of interest" even if all the potential public health and environmental impacts from those facilities are already regulated by other agencies such that they are not material contributors to cumulative impacts in the community.

Recommendation: DTSC should not engage in duplicative investigations or regulatory actions, especially where other responsible agencies have taken or are taking steps to assess cumulative impacts and mitigate source contributions.

12. Summary of Recommendations

Based on the foregoing comments, we offer the following recommendations to align the Track 2 policy framework with the applicable statutory requirements and to help preserve a functional hazardous waste management program in California.

- a. Any Track 2 regulations should be strictly limited to DTSC-permitted, operating hazardous waste facilities. Further consideration of strategies and mitigation measures that seek to address potential contributions to community vulnerability and cumulative impacts from unrelated sources or factors is beyond the scope of DTSC's statutory authority and is not appropriate.
- b. Where hazardous waste treatment, storage or disposal is incidental to the operation of a facility (e.g., a manufacturing facility), DTSC should limit the focus of its Track 2 regulations only to the permitted hazardous waste units located within the facility footprint. In these cases, DTSC should not deny a permit, or impose additional conditions on a permit, based on potential impacts from other facility operations especially where those operations are already mitigated by another government agency's regulatory requirements that address potential public health and environmental impacts.
- c. Proposed Track 2 requirements must reflect appropriate uses of available community screening tools. Neither CalEnviroScreen 3.0, nor any functionally similar methodology, should be used as a trigger for new permit conditions or other regulatory requirements.

- d. Where a screening-level analysis indicates other sources or factors may be contributing to cumulative environmental or public health impacts or vulnerability in a given community, and those sources are not regulated by DTSC pursuant to a hazardous waste operating permit, DTSC should refer the results of the screening analysis to the appropriate regulatory authorities for further evaluation and possible action.
- e. The tiering concept should be employed as a prioritization mechanism to determine which permitted hazardous waste facilities need further investigation to establish appropriate permit conditions and to complete the permit review process. For example, a facility with potentially significant offsite impacts located in a highly impacted community should receive more scrutiny than one with low potential for offsite impacts located in a minimally impacted community. This approach would also assist DTSC in managing the resources and timeframes necessary to complete permit reviews.
- f. Permitted facilities should not bear the burden of communicating information to the community about cumulative impacts in the community or community vulnerability. Facilities should only be responsible for communicating information about impacts that are directly attributable to their own operations.
- g. Similarly, a permitted hazardous waste facility should not be required to bear the entire burden of implementing a community monitoring system where other facilities or sources (e.g., mobile sources) may be contributing to the cumulative impacts in the community.
- h. DTSC should develop minimum QA/QC requirements for all information that could be used to support facility and community assessments, facility classification and possible additional permit conditions or other regulatory actions.

We appreciate your consideration of our comments and recommendations on DTSC's Draft SB 673 Phase 2 Concept Paper.

Sincerely,



Lance Hastings, President

California Manufacturers and Technology Association

cc: Mr. Rizgar Ghazi, Acting Deputy Director – DTSC
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