



CENTER ON RACE, POVERTY & THE ENVIRONMENT

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Sent via electronic mail to: Bonnie.Holmes-Gen@dtsc.ca.gov

Bonnie Holmes-Gen, Senior Environmental Scientist
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95814

Dear Mrs. Holmes-Gen:

On behalf of the Center on Race, Poverty & the Environment (“CRPE”), I write to share comments on the Department of Toxic Substances Control’s (“Department” or “DTSC”) draft regulatory framework concepts for Senate Bill 673 implementation. The Department has permitted hazardous waste facilities for decades in areas of the state that are most overburdened by pollution and social vulnerability factors. Yet, it has failed to account for or consider these vulnerabilities or cumulative impacts in its permitting process. This has led to most hazardous waste facilities in the state to be located in areas with residents most vulnerable to their impacts and least equipped to manage those impacts.

DTSC’s implementation of SB 673 is an opportunity to ensure that these practices are not continued in the future and to provide some redress for the historic harm of DTSC’s permitting decisions on vulnerable communities. DTSC should assess the long-term success of its permitting program on its ability to eliminate racial and economic disparities in its permitting of hazardous waste facilities; its ability to avoid all harm to communities near hazardous waste facilities, and its ability to avoid, to the extent possible, exporting California generated hazardous waste to other vulnerable locations nationally and internationally. To achieve this, DTSC must take a multi-prong approach that: 1) re-invests in pollution prevention and innovative technology improvements to reduce the amount of hazardous waste generated in California; 2) plans for the long-term hazardous waste capacity needs in California by developing and implementing a statewide hazardous waste management plan, which may include identifying locations for new hazardous waste facilities in less burdened areas of the state; and 3) updates its permitting process to avoid adding new pollution and to reduce existing pollution in overburdened and vulnerable areas of the state.

CRPE offers these comments on the SB 673 regulatory concepts by assessing their alignment with these broader goals. CRPE also offers technical comments on the specific regulatory concepts provided by DTSC.

I. DTSC’s Implementation of SB 673 Must Include Criteria for Permit Denial for Both New and Renewal Permits Based on Community Vulnerability and Existing Health Risks.

Aside from a brief mention of a potential buffer zone or setback distance between new hazardous waste facilities and sensitive receptors, DTSC’s pre-regulatory concepts do not discuss whether community vulnerability and existing health risks will ever rise to a level that would necessitate a permit denial. SB 673 explicitly instructs DTSC to consider the adoption of “criteria for the denial or suspension of a permit,” including “the vulnerability of, and existing health risks to, nearby populations.” Cal. Health & Safety Code § 25200.21.

DTSC should acknowledge that, beyond a certain point, community vulnerability and existing health risks are so substantial that any additional polluting sources or environmental risk should be avoided. This is true not only for new proposals where operator investment is still relatively low, but also for permit renewals where conditions have changed so significantly that the continued operation of a hazardous waste facility is simply unsafe for neighboring uses, including adjacent schools, playgrounds, hospitals, eldercare facilities and other highly sensitive receptors. DTSC is in a unique position as a regulatory and permitting authority with the obligation to review and renew hazardous waste facility permits every ten years. DTSC should use this renewal process to assess the continued compatibility of a hazardous waste facility in areas that are highly vulnerable to its impacts.

DTSC’s permitting criteria for denial should be transparent and concrete. The Department released a report several years ago to provide recommendations for program improvements including standardized processes, clear decision-making criteria and corresponding performance standards. The report noted many areas of deficiency in the permitting process, including having no clear and objective criteria for making denial/revocation decisions that are based on valid standards of performance and threats. The study recommended that DTSC develop policies to determine what factors to use to support a decision to continue with permitting versus those to use to support a denial or revocation action.

SB 673 provides DTSC with the opportunity and clear authority to do just that. By failing to include concrete criteria for a permit denial in its SB 673 regulatory concepts, DTSC is continuing its path of subjective decision-making where neither operators, nor impacted communities, have a transparent and shared understanding of the basis for permitting decisions. This failure aligns with a common concern that the department is willing to overlook local public health risks so as to maintain and increase hazardous waste disposal capacity.

The primacy of DTSC’s goal to maintain current hazardous waste capacity in the state has the unintended consequence of creating sacrifice zones in the State where existing facilities are located. DTSC’s unwillingness to deny permits for existing facilities ensures that areas near these existing hazardous waste facilities will continue to bear the burden of the State’s hazardous waste disposal in perpetuity. DTSC increases this burden by allowing facilities to operate on expired permits for extended periods of time (i.e. Phibrotech) or by allowing facilities that are at capacity to expand and/or build new capacity (i.e. Kettleman Hills Facility). Residents near existing sites have not only experienced the historical burdens associated with living near toxic disposal sites and the transportation of hazardous waste, but are also being called upon to bear this burden into the foreseeable future. Maintaining these

sacrifice zones is especially problematic because of the State’s historical legacy of targeting low income communities and communities of color for the siting of undesirable land uses such as hazardous waste facilities.

DTSC should avoid perpetuating sacrifice zones while also ensuring sufficient on-going disposal capacity by immediately developing and adopting a statewide waste management plan. According to Section 25170 of the California Health & Safety Code, “The department, in performing its duties under this chapter, shall . . . [p]rovide statewide planning for hazardous waste facility site identification and assessment. . .” Health & Safety Code § 25170. The legislature specifically required DTSC to prepare and adopt a state hazardous waste management plan to serve as a comprehensive planning document for the state. The state hazardous waste management plan required DTSC to identify “areas or regions of the state where new or expanded capacity to manage hazardous waste are needed and the types of facilities that should be sited and constructed.” Health & Safety Code § 25135.9. The plan requires “a statement of goals, objectives, and policies currently in effect, or in the process of development, for the siting of hazardous waste facilities.” *Id.*

The California legislature expressed its intent that the hazardous waste management plans prepared by or with assistance from DTSC “serve as the primary planning document for hazardous waste management at the local level; that the plans be integrated with other local land use planning activities to ensure that suitable locations are available for needed hazardous waste facilities; that land uses adjacent to, or near, hazardous waste facilities, or proposed sites for these facilities, are compatible with their operation.” Health & Safety Code § 25135.

The legislature required DTSC to approve the first plan by 1991, with revisions at least every three years thereafter. Health & Safety Code § 25135(b). However, DTSC has yet to complete any of the required statewide planning documents. DTSC’s failure to complete the required planning documents, coupled with its failure to adopt concrete criteria for permit denial, has contributed to the prevalence of hazardous waste facilities in overburdened and vulnerable areas. DTSC should acknowledge its role in the disproportionate impacts of hazardous waste disposal in vulnerable and over-burdened areas of the state. More importantly, DTSC should use its authority provided by SB 673 to ensure these impacts are avoided in the future, including where necessary, denying permits where the risks to nearby residents are too significant.

II. Recommendations on Initial Recommendations for Facility Pathways.

CRPE supports the use of a tiered approach for the facility action pathways as well as the initial categorization of facilities into tiers using set criteria. DTSC should consider adding compliance history and/or facilities’ VSP scores to the initial factors in determining action pathways. A history of noncompliance with permit conditions or a high VSP score is an indication that a facility presents a greater health risk due to inadequate safeguards, poor management, or insufficient care and oversight at a facility.

The framework recommends the use of CalEnviroScreen (CES) 3.0 to assess action pathways. CRPE supports the use of CES but recommends that DTSC avoid reference to any particular version of CES to allow DTSC to use future and more up-to-date renditions of CES as they are developed and published.

The framework proposes classifying facilities as Tier 1 for facilities within one half mile of a census tract ranked in the 90th percentile or higher on CalEnviroScreen, Tier 2 for facilities within one half mile of a census tract ranked in the 65th percentile or higher, and Tier 3 for facilities within one half mile of a census tract ranked below the 65th percentile. DTSC should properly scale these tiers to ensure that Tier 1 encompasses the state’s definition of disadvantaged communities, which is census tracts ranked in the 75th percentile or higher on CalEnviroScreen. The other tiers should be adjusted to reflect this modification, by using percentiles 50-75th for Tier 2, and 50th and below for Tier 3. While this tiering may result in a high number of facilities being categorized in Tier 1, this is yet additional evidence of the historical practice of permitting facilities in the most over-burdened and vulnerable areas of the state.

Further, DTSC should allow some flexibility in the distance between the facility and census tract it uses to determine which tier to place a facility. In rural areas, census tracts are much larger than higher density urban census tracts. In rural areas, population centers are also much farther apart. This difference in census tract characteristics may mean that in rural areas, the community closest to a hazardous waste facility is not within a census tract one half mile from a facility. DTSC should analyze the CES score of the census tracts within a certain distance of a facility *and* the census tract containing the nearest population center to the facility. For example, Kettleman City is 3.5 miles from the Chemical Waste Management’s Kettleman Hills facility, yet is the community most directly impacted by the facility’s operations and transport of hazardous waste. DTSC should assess the adequacy of its methodology by testing whether rural communities closest to hazardous waste facilities are captured within census tracts within one half mile of the facility.

Finally, the draft concept explains that “for new facilities, the Department would consider potential impacts of planned operations of the facility.” It is unclear what is meant by this statement. However, the statement provides an indication that DTSC plans to treat new facilities under more stringent criteria than existing facilities. Treating proposed new facilities differently or under more stringent standards than existing facilities will have the unintended consequence of perpetuating historic inequities in where hazardous waste facilities are located. DTSC should design its permitting criteria to provide pathways to reduce burdens on vulnerable communities by permitting new facilities in less burdened areas of the state.

III. Recommendations on the Public Review and Draft List of Facility Action Pathways.

CRPE generally supports opportunities for communities who have the best sense of local conditions to supplement “official” documents and data sets. DTSC should retain flexibility to use supplemental information provided during a public process rather than limit itself to “a limited set of supplemental factors.”

CRPE also supports the advance publication and regular updating of its list of facility action pathways. DTSC must ensure that its consideration of community vulnerability and cumulative impacts does not create further delays in its already backlogged permitting program. The advance determination of pathways should help avoid lengthy processes during individual permitting decisions.

IV. Recommendations on the Permit Application Review.

CRPE urges DTSC to balance the need to reduce the permitting backlog and make timely permitting decision with the need to provide impacted residents and members of the public with sufficient opportunity to provide facility specific feedback on the selected pathway during the permitting process. CRPE supports DTSC's proposal to allow additional community feedback during the permitting process in recognition that impacted residents will be more engaged in a local permitting process than in the process to determine Draft Facility Action Pathways. DTSC should also ensure that it has the most up-to-date information for a facility which may not be captured in the Draft List of Facility Action Pathways. However, DTSC should concurrently with this effort to update its permitting criteria, also develop a plan to reduce the backlog of expired permits and ensure timely permit decisions. This should include mandating earlier submittal of permit applications, and enforcement of existing mandates to initiate permit denial proceedings if an applicant repeatedly fails to provide requested information to DTSC.

V. Recommendations on Supplemental Facility Information Required for Permit Application.

CRPE supports pathways for communities to work with the Department and Operators collaboratively on community agreements. However, DTSC should consider adopting policies that allow and encourage operators and communities to enter into a community agreement at any time during the permitting process. The current concept incentives early adoption of a community agreement but may inadvertently stymie or disincentivize such a collaborative approach later in the permitting process.

DTSC should provide additional clarity on who would be authorized to represent the "community" and how they would be selected. DTSC should ensure that any community agreement meets best management practices and environmental justice principles, including ensuring that community interests are well-represented, the process is transparent, inclusive and accessible, that benefits to communities are concrete and meaningful and responsive to community needs, and that there are clear enforcement mechanisms to ensure accountability to the agreement.

DTSC should also consider how this process would interact with the Tanner Act which allows a local assessment committee to "advise the appointing legislative body . . . of the terms and conditions under which the proposed hazardous waste facility may be acceptable to the community." Health and Safety Code § 25199.7. The Tanner Act is explicitly designed to make the siting of hazardous waste facilities easier and has been widely condemned by residents and advocates as a means to "buy off" a community rather than allow any meaningful discussion on whether a facility should be approved at all. Community agreements may be preferable to the Tanner Act process because it would be entirely voluntary to participate. However, care must be taken to ensure broad community participation and sign-off on any agreement with a facility.

VI. Recommendations on Community Engagement and Outreach.

The Community Engagement Plan described in the framework includes steps for a facility to inform the community about its operations, and even steps the facility would take to solicit community

input. CRPE recommends that Community Engagement Plans go a step further and discuss how the facility will incorporate community feedback that it receives during its engagement and outreach plans to ensure two-way dialogue and responsiveness to community concerns. Residents near hazardous waste facilities have expressed frustration at the number of meetings they are asked to attend. One-way meetings designed to simply inform the community without an opportunity for the facility to hear and respond to community concerns are some of the lowest priority meetings for residents to attend. DTSC has a role to play to ensure that the facility is responsive to community feedback and concerns. Community engagement plans may provide a good opportunity for DTSC to require that facilities are listening to communities, and making changes in response to community concerns, in addition to providing them with information.

The framework also describes how DTSC could require Tier 1 facilities to establish and support the meetings of a community advisory group. CPRE has advocated in the past for opportunities for communities near hazardous waste facilities to establish CAGs. DTSC should consider providing this option for communities near any facility rather than limiting it to Tier 1 facilities. DTSC should also clarify that it is not the facility that establishes these groups but that there is a level of autonomy for the CAG to organize itself. A facility should be expected to participate in and collaborate with the CAG as requested by the group.

DTSC's existing CAG program suffers from inadequate outreach so that many eligible communities have no knowledge of the program. DTSC should inform eligible groups about the program and the process for initiating a CAG. DTSC should also establish clear conflict of interest and transparency policies for all CAG participants.

VII. Recommendations on Mitigation and Monitoring

DTSC proposes to develop a clearinghouse of approved community mitigation projects to reduce cumulative environmental and health impacts on the community or to enhance community resiliency. This appears to be similar to DTSC's supplemental environmental project (SEP) program. DTSC should clarify if it seeks to expand its existing SEP program or create a separate program for permitted facilities. DTSC should also clarify how it proposes to select projects, including who has input and decision-making authority for project selection. DTSC should also adopt best management practices and environmental justice principles for SEP project selection. Any SEP must provide direct benefits to communities impacted by a facility and incorporate an accessible and open public process.

DTSC should clarify its proposed process for Tier 2 facilities which may implement either mitigation or monitoring projects. How does DTSC propose to determine whether mitigation or monitoring is required? Who has input and decision-making authority as to whether a facility will be required to mitigate cumulative impacts or merely monitor them?

DTSC must provide more information on its proposed mitigation and monitoring concept in order to generate thoughtful feedback. CRPE is especially interested in the amount and type of mitigation that would be required; how communities may be involved in the selection process; the facility's involvement in project selection; and the scope of projects that may be considered.

VIII. Conclusion

Thank you for the opportunity to provide comment on the draft regulatory concepts. We look forward to continuing to engage with DTSC through this process to help protect vulnerable communities from public health risks and cumulative impacts from hazardous waste facilities. Please inform CRPE of additional opportunities to comment or otherwise engage with the Department as DTSC moves forward with its implementation of SB 673.

Sincerely,

Ingrid Brostrom,
Assistant Director