



June 24, 2019

Ms. Meredith Williams, Acting Director
Department of Toxic Substances
Control 10011 Street
Sacramento, CA 95812

Dear Director Williams:

The undersigned organizations appreciate the Department of Toxic Substances Control's ("DTSC") efforts in compiling and summarizing interested parties' comments on the Department's Draft Concept Paper ("DCP") "SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts," dated October 2018. It is our understanding that DTSC will continue to accept public comments beyond the informal April 30 deadline as it works to develop the next iteration of the DCP.

Bearing that in mind, and after reviewing DTSC's comment summary document, we have identified additional issues we believe should be considered by DTSC. It should be noted that while there are areas of disagreement among the stakeholder groups, DTSC's document does identify some common ground that could be a foundation for consensus changes and a constructive dialogue on more controversial issues. We also note that some of the comments attributed to business interests do not accurately reflect the intended message. This letter seeks to address each of these issue areas

One of the areas of apparent agreement that is especially time sensitive is the recommendation that DTSC develop case studies to evaluate the feasibility of the draft framework for Facility Action Pathway Designations. As was discussed during the February 22 business stakeholder meeting, we believe the case studies should test the draft framework under various permitting scenarios to determine if it produces intended outcomes, such as placing high risk facilities on action pathways that are likely to improve conditions in the subject community and screening out facilities that are de minimis contributors to cumulative exposures. If the draft framework does not perform as intended, the case studies can help identify where the process breaks down. They may also be useful in determining what supplemental information may be necessary to inform accurate facility prioritization and identification of effective mitigation measures. We recommend that DTSC initiate this process as soon as possible so the results can inform a future Track 2 proposal.

Areas of Agreement:

Element 1: Process for Facility Review - The DCP envisions an initial Facility Action Pathway for each hazardous waste facility with an operating permit based on review of cumulative impacts and community vulnerability.¹ We agree with community representatives that this initial classification would hang over the permitting process making any future deviation from the initial pathway unlikely.² This feature would be especially burdensome for facilities assigned to a Tier 1 Action Pathway based principally on measures of community vulnerability that are unrelated to facility operation. In these cases, the initial designation would promote a negative community perception of the facility and serve as a political barrier to future reclassification. Moreover, for facilities whose permit renewal applications are approved during the pendency of this Track 2 process, DTSCs initial designation would stand for nearly a decade before it could be reconsidered based on more reliable, facility-specific information introduced in the permit renewal process. In these cases, the initial classification is likely to influence community complaints, facility inspections and enforcement actions that may later prove to be unnecessary or unjustified.

Element 1: Stakeholder Engagement - An overarching theme attributed to community representatives is the need for more substantive community involvement in developing the Track 2 process. We support this sentiment. An important part of this process is engaging community representatives, along with business groups, local government representatives and appropriate subject matter experts in working sessions to validate DTSCs draft framework.

¹ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, Page 4.

² DTSC Matrix of Stakeholder Comments, Community Comments, Page 1.

As was discussed during the February 22 business stakeholder meeting, the DCP is vague on how DTSC would sequence analysis of facility and community-scale information and how those inputs would be weighed to inform where a facility is placed among the three Action Pathway Tiers. We believe information about community conditions should be considered in the context of a more in-depth review of potential impacts associated with facility operations, including 'evaluation of existing regulatory measures that serve to mitigate those impacts, so community stakeholders have a better understanding of the potential health risk a facility presents to nearby receptors and the community at large. All stakeholders would benefit from an effective regulatory framework that yields meaningful environmental improvements in impacted communities without imposing unnecessary burdens on regulated facilities.

Element 1: Action Pathway Designations - Community representatives recommend that additional facility-specific information should be included as part of the Pathway Designation.³ We agree and encourage DTSC to give greater weight to data establishing any potential impact of the facility on the community rather than factors beyond the control of the facility, such as emissions from other sources and socio-economic contributors to community vulnerability. Pathway Designations must include consideration of baseline facility conditions and mitigation measures already in place pursuant to health-based thresholds established under other regulatory programs. Community stakeholders deserve greater transparency than the current DCP would afford, including a clear understanding of the potential health risk the facility poses in the community and objective decision criteria.

Element 5: Example Mitigation Measures - The DCP suggests lead abatement in homes as an example of a potential mitigation measure for Tier 1 facilities.⁴ We agree with community representatives that this type of measure would not be appropriate unless a reasonable nexus can be established between the project - in this case the renewal of a facility permit - and the identified community impacts.⁵ As community representatives indicated, this interpretation is consistent with Cal-EPA Supplemental Environmental Project policy. It is also consistent with relevant case law.⁶ In order to establish a reasonable nexus, DTSC must first conduct an environmental analysis which establishes that facility operations pose a "significant impact" on the community requiring mitigation, as defined under California Environmental Quality Act law and implementing regulations. Furthermore, where DTSC determines the identified impacts are due to the operation of the facility, any mitigation measures it prescribes must be roughly proportional to the nature and severity of those impacts and consistent with other applicable regulatory requirements. Even if DTSC forgoes the CEQA process for this rulemaking, the United States Supreme Court has held that in no situation can the

³ DTSC Matrix of Stakeholder Comments, Community Comments, Page 3.

⁴ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, Page 11.

⁵ Id., Community Comments Page 7.

⁶ *Nolan v. California Coastal Commission* 483 U.S. 825 (1987) and *Dolan v. City of Tigard* 512 U.S. 374 (1994).

government conditionally approve land-use permits unless the conditions are connected to the land use and approximately proportional to the effects of the proposed land use.⁷

Element 6: Use of CES 3.0 - DTSC's comment summary attributes the following statement to a community stakeholder: "The relative and fluctuating nature of CES scores makes the actual value of reflected negative impacts disputable."⁸ We agree with this assessment and underscore the discussion in our April 15 comments regarding the methodological limitations identified by the CES authors which lead to the conclusion that CES scores should not be used as a basis for regulatory decision making.

Element 7: Coordination with Other Agencies - SB 673 does not expand DTSC's authority beyond hazardous waste facility permitting. Therefore, DTSC has limited ability to enforce effective mitigation measures in communities where cumulative impacts are driven by other sources. This statutory constraint necessitates collaboration with other agencies that have primary jurisdiction over the particular environmental media at issue in the community. We agree with community representatives that DTSC should "Identify areas of overlap and opportunity to coordinate with ARB and other agencies, as well as how DTSC will accomplish coordination."⁹

Element 8: DTSC Authority and Conflicts with Other Law - We agree with community stakeholders that as it is currently described, "the proposed process would strip full CEQA review and public involvement."¹⁰ While we appreciate the desire for an expedited Track 2 process, truncating environmental review and due process in favor of preordained outcomes such as permit denials would invite litigation of final agency actions and as noted above could result in unintended environmental and public health impacts in already vulnerable communities.

Issues Requiring Further Deliberation:

Element 1: Expansion of Action Pathway Tiers - Community stakeholders propose to expand the draft Action Pathway Tiers by lowering CalEnviroScreen ("CES") cut points.¹¹ Moving in this direction would be a mistake as it would diminish DTSC's ability to differentiate among facilities for purposes of resource allocation and development of more protective permit conditions where such action would result in meaningful environmental improvements in communities impacted by facility operations. As we discussed in our April 15 comments on the DCP, the developers of CES acknowledged its

⁷ Koontz, JR. v. St Johns River Water Management District, 570 US 595 (2013).

⁸ DTSC Matrix of Stakeholder Comments, Community Comments, Page 7.

⁹ Id., Community Comments, Page 8.

¹⁰ Id., Community Comments, Page 10.

¹¹ Id., Community Comments, Page 3.

limitations, especially in the context of evaluating the impacts of a specific project.¹² CES is intended to provide an overview of "the combined environmental and health effects of all sources of pollution in a community," not to evaluate the localized environmental impacts from a specific facility. Lowering the cut points for each Tier would exacerbate a problem that already exists in the DCP: characterizing a larger number of facilities as high priority based on limited information and holding them responsible for all of the environmental and socio-economic impacts identified in a given community.

Element 1: Cumulative Impact Assessments- DTSC should reject the notion of using health protective zones to address land use compatibility issues "pre-emptively." We read this statement to mean that some existing land uses should be revoked. Such action would ignore the fact that many permitted hazardous waste facilities are de minimis contributors to public health impacts and would only lead to more unnecessary, and ultimately harmful, permit denials. Closure of hazardous waste TSDFs in California inappropriately shifts the burden of managing California's hazardous waste onto other states. It is also counterproductive to California's environmental policy goals as it would force larger volumes of hazardous waste to be transported across greater distances resulting in additional greenhouse gas, criteria pollutant and toxic air contaminant emissions. To avoid these undesirable outcomes, it is necessary for DTSC to evaluate the contribution of the individual facilities to cumulative environmental impacts relative to other sources in the community.

Element 1: Permit Denial Pathway - The community recommendation for a separate permit denial pathway based on qualitative or subjective assessments of community vulnerability would position facilities for arbitrary permit denials.¹³ This is an extreme regulatory response that should only be considered where DTSC determines that facility operation poses significant health risks in the community that cannot be mitigated below established levels of significance. Such decisions should not be based solely on community perceptions or facility location relative to other land uses.

The science underpinning the DCP Action Pathway framework, particularly the use of CES 3.0 scores, is too generalized and fraught with uncertainties to be used as justification for permit denials. Health and Safety Code §25200.21 directs DTSC to consider "cumulative impacts" and "community vulnerability" when establishing or updating criteria for evaluating hazardous waste facility permit applications.¹⁴ While the statute requires DTSC to weigh these factors in the permit evaluation process, it does not establish them as the sole basis for denying a permit application. Moreover, such outcomes would be inappropriate and indefensible in instances where available

¹² California Communities Environmental Health Screening Tool, Version 1 (CalEnviroScreen Version 1.0) (April 2013), pages iii-iv.

¹³ DTSC Matrix of Stakeholder Comments, Community Comments, Page 4.

¹⁴ Health and Safety Code §25200.21(b); §25200.23

information shows that factors unrelated to the operation of the permitted facility are driving public health risks in the community.

Element 1: Area of Analysis/Setback Distance - It would be premature, inappropriate and likely ineffective for DTSC to implement minimum setback distances as mitigation measures without first conducting adequate site-specific environmental impact analyses and evaluating its findings relative to established regulatory thresholds defining what constitutes a "significant impact." ¹⁵ Absent such analysis, DTSC could not conclude that

1) a facility is causing or significantly contributing to impacts that warrant additional mitigation measures or 2) that minimum setbacks are the most effective means of mitigating the identified impacts. A rush to judgement on setbacks or other mitigation measures could have the unintended consequence of magnifying local and regional environmental impacts by forcing increased shipment of locally generated hazardous waste through impacted communities to another facility.

Element 5: Stakeholder Roles - Community stakeholders express a desire that DTSC and the community, and not the regulated facilities, should develop community engagement plans and mitigation measures. ¹⁶ This approach raises several concerns. First, where DTSC determines a facility is responsible for a significant environmental impact in a community, the hazardous waste facility operator is in the best position to advise DTSC on the feasibility of potential mitigation measures. The facility operator is the most knowledgeable party with regard to facility design, operating parameters, control technology and emissions profile. The facility operator is also in the best position to evaluate the efficacy of potential mitigation measures relative to the environmental endpoint(s) of concern attributed to the facility. If DTSC removes the facility operator from this process, it is more likely that any mitigation measures selected for the facility will fall short of achieving their intended purposes. Second, there is no clarity in the DCP as to how individuals or organizations would be selected to represent "the community" and what exactly their role would be concerning decisions that impose new regulatory obligations on permitted facilities. Presumably, the community role would be advisory as the statute does not authorize DTSC to delegate its regulatory authority, but in any event, DTSC must clarify these issues to avoid confusion and stakeholder conflicts that would be counter-productive to the Track 2 implementation process.

Additional Clarification Needs:

Element 1: Expired Permits vs. Interim Status - DTSC must address the commonly held misperception that many TSDFs are operating under "expired" permits. As the agency is

¹⁵ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, Page 10.

¹⁶ DTSC Matrix of Stakeholder Comments, Community Comments, Page 6.

well aware, a facility may continue to operate under a designation of "interim status" provided the operator has submitted an application for permit renewal within the prescribed timeframe and the facility continues to comply with the conditions specified in its most recently approved permit. It is clear from DTSC's comment summary that some community stakeholders believe facilities are operating without valid permits.¹⁷ This misperception is reinforced by identifying permit expiration dates in DTSC's EnviroStor data base without further explanation. It invites unwarranted criticism of the facility and accusations that DTSC's inaction is placing surrounding communities in harm's way.

Element 2: Suggested Supplemental Data - Any attempt to prioritize facilities for purposes of future regulatory actions necessitates explicit consideration of 1) the regulatory requirements that already apply to the facility, including conditions in the facility's most recently approved hazardous waste operating permit and environmental and public health protection requirements enforced by other regulatory agencies, and 2) the extent to which those measures already effectively mitigate the facility's contribution to any potential environmental impacts and health risks in the community. Failure to consider these existing requirements could result in misallocation of resources toward development of measures that either are duplicative of existing requirements or have been rejected by other agencies as infeasible or ineffective for their intended purpose.

Element 5: Good Neighbor Agreements - DTSC's summary of business stakeholder comments broadly states that businesses want to be "good neighbors."¹⁸ These statements should not be confused with the DCP notion of facilities entering into "good neighbor" agreements in exchange for expedited processing of a permit application.¹⁹ As we noted in our April 15 comments on the DCP, responsible operators should not be forced into poorly defined "good neighbor" agreements, exposing them to unreasonable demands for mitigation that may be unrelated to the impacts from their operations, in order to have DTSC act on their permit applications in a timely manner. Nor can DTSC administratively waive or condition its statutory obligations in this area. Fundamentally, being a "good neighbor" should be defined as compliance with regulatory requirements that reduce the impact of facility operations in the community. "Good neighbor" should not be defined as taking responsibility for impacts from unrelated sources or socioeconomic factors beyond the control of the facility.

Element 8: Larger Societal/Cultural Issues - DTSC attributed the following statement to business representatives: "Long term, there needs to be a general plan to transition these facilities away from overburdened communities."²⁰ This statement is certainly

¹⁷ Id., Community Comments, Page 3.

¹⁸ DTSC Matrix of Stakeholder Comments, Business Comments, Page 7.

¹⁹ SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts, pages 7-8.

²⁰ DTSC Matrix of Stakeholder Comments, Business Comments, Page 9.

relevant to any permit applications that may be considered in the future for new hazardous waste TSDFs. It is also potentially relevant to smaller scale or transitory facilities (e.g., consolidation and transfer facilities) that may have the ability to relocate and remain profitable. However, for many larger existing facilities, relocation within the state would be infeasible. A policy promoting such outcomes would ignore the positive societal benefits of preserving in-state hazardous waste management capacity and is likely to amplify the current trend toward closure of California facilities.

We appreciate your consideration of our additional comments on DTSC's summary of stakeholder input on its SB 673 Cumulative Impacts and Community Vulnerability Draft Regulatory Framework Concepts document.

Sincerely,



Lance Hastings, President
California Manufacturers & Technology Association

cc: Rizgar Ghazi - DTSC
Ana Mascarenas - DTSC
Nelline Kowbel- DTSC
Bonnie Holmes-Gen - DTSC