



**CENTER ON RACE, POVERTY & THE ENVIRONMENT**

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October 8, 2021

*Sent via electronic mail to: [permits\\_HWM@dtsc.ca.gov](mailto:permits_HWM@dtsc.ca.gov)*

Department of Toxic Substances Control  
1001 I Street  
Sacramento, CA 95814

Dear Mrs. Rodriguez:

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 and its ability to avoid harm to communities near hazardous waste facilities. 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) update its permitting process to avoid adding new pollution and to reduce existing pollution in over-burdened 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 Must Avoid Agency Discretion and Undue Operator Influence in its Selection of Facility Tier Pathways**

The regulatory framework describes an open-ended process by which DTSC may use supplemental data to help determine a facility's tier pathway. On the one hand, official and traditional data sources may not capture a full picture of a community's vulnerability. Allowing supplemental information on vulnerabilities and risks that are not adequately captured by official or traditional data sources will lead to a more accurate assessment of the cumulative risk a facility may pose on a community. However, an open-ended approach which allows any stakeholder to submit supplemental information may unintentionally lead to an unequal playing field whereby corporate entities with a financial stake in the selected tier would be able to identify, generate, collect, or compile data that would best serve their interests in downplaying or minimizing a community's vulnerability. Impacted communities that have the best sense of local conditions and vulnerability will have barriers to overcome to submit supplemental information and otherwise meaningfully participate in the tier pathway selection process, including language barriers, lack of financial resources, and bias against community sources of knowledge. Given these factors, DTSC should design a process that allows impacted residents to provide supplemental information if traditional data sources underestimate or fail to fully capture community burdens and vulnerabilities. Supplemental data, therefore, would be used only to move a facility from a lower tier pathway (e.g., 2 or 3) to a higher tier pathway (e.g., 1 or 2) where warranted.

To avoid unchecked agency discretion in establishing a facility's tier, DTSC should also establish a standardized process by which it will assess community vulnerability. Ideally this process will calculate a facility's tier pathway using a uniform and finite set of data sources (aside from the limited use of supplemental data described above) and a uniform methodology to weight the different data sources. Given the widespread lack of trust in the agency, DTSC must avoid all actual and perceived bias in its selection of a facility's tier pathway. DTSC's selection of tier pathways must be transparent, predictable, and replicable. Additionally, as one of the first agencies in California to incorporate cumulative impacts into permitting decisions, DTSC's approach may be used as model for other agencies. As such, its approach should not be overly burdensome or complicated.

Finally, CRPE supports DTSC's proposed use of CalEnviroScreen as an appropriate initial screening tool and its proposed methodology of using CES scores of census tracts touching areas of analysis in its screening process. CRPE urges DTSC to especially consider and capture impacts of communities closest to a facility and account for large census tracts which may obscure vulnerabilities in small rural communities.

## **II. DTSC Should Determine Facility Pathway Tiers Early in Process.**

DTSC's regulatory framework proposes that facility tier pathway selection would occur during individual facility permit processes for each facility rather than establishing tier pathways for all existing facilities at the same time. CRPE recommends that DTSC determine, publish, and regularly update facility tier pathways at the outset and use individual permit processes to determine whether supplemental data warrants shifting a facility to a higher pathway tier. DTSC must ensure that its consideration of community vulnerability and cumulative impacts does not create further delays in its

already backlogged permitting program. The advanced determination of pathways should help avoid lengthy processes during individual permitting decisions.

DTSC should model its selection of facility tiers on its Violation Scoring Procedure in which it scored all facilities at the same time and outside any individual permit process. This approach would also ensure uniformity in scoring procedures, avoid real or perceived bias for any particular facility, avoid additional permitting backlogs, and avoid protracted disagreements with facility operators who have increased incentive to challenge tier pathway selection as part of individual permit processes.

DTSC should then consider any community generated supplemental data to address any under reporting of vulnerability during an individual permit process and allow DTSC to consider whether this information would warrant bumping a facility to a higher tier. 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.

### **III. Facility Activities to Reduce Impacts Should Be Required at Pathway Tiers 1 through 3.**

DTSC's regulatory framework is vague about what types of actions, monitoring, and public engagement would be required for each tiered pathway. In principle, facilities in Pathway 1 would be required to implement more actions to reduce impacts than facilities in Pathway 2, and Pathway 3 facilities would only be required to implement enhanced public outreach and engagement processes. While CRPE does not oppose establishing different tiered pathways, all facilities that are located in over-burdened communities should take action to reduce their impacts to those communities.

To be clear, neither enhanced public processes nor increased monitoring reduce pollution or other impacts to communities. Enhanced public processes and monitoring are methods of obtaining more complete information about the impacts of a facility but by themselves do not decrease a project's impacts and do not provide relief to impacted communities. It makes little sense to obtain more information about a facility's impacts through public processes or monitoring without any means to take action in response that information. One approach to ensure that enhanced public process and mitigation is meaningfully linked to reducing a project's impacts is to require additional mitigation if monitoring and enhanced public processes identify unmitigated facility impacts. CRPE also recommends that all facilities on Pathways 1 through 3 be required to adopt facility actions to reduce impacts. Facilities in those most over-burdened communities should be required to take significant actions to reduce their impacts or no longer operate in those communities.

### **IV. DTSC Must Ensure that Mitigation Is Meaningful, Not Driven By Cost to or Convenience for the Operator.**

DTSC's framework describes a process by which facility operators would evaluate and prioritize potential facility actions and determine whether they are feasible, cost-effective and reliable. This indicates that the operator will be given wide latitude to select which measures the facility will implement. This will lead to the adoption of measures that are easiest and cheapest for the operator to implement rather than measures that will meaningfully reduce local vulnerabilities or respond to community concerns. DTSC must require the selection of measures that actually reduce burdens and

meaningfully respond to community concerns. To do this, DTSC must integrate a process to provide for community input on potential measures and require the adoption of measures that are responsive to community concerns.

Further, DTSC should not focus on increased costs to facilities but rather require actions that most effectively reduces a facility's impacts. Residents in overburdened and vulnerable communities have already borne high costs in terms of impacts to their health, wellbeing, property values, and employment and educational opportunities due to exposure to pollution and residing near locally undesirable land uses. Externalities associated with hazardous waste facilities and other pollution sources have long been shifted to local residents without recourse or recompense. The cost of operating in an overburdened community should be significantly higher than in other areas to account for the higher risks to residents in those communities and in recognition that the pollution levels are such that no additional sources or increases in pollution can be sustained. If the additional costs associated with measures to significantly reduce impacts mean a facility cannot afford to operate, then that facility should close or relocate to a less burdened area.

#### **V. DTSC's Suggested Improvements to Facility Activities and Operations Will Not Significantly Reduce Impacts or Respond to Community Needs.**

DTSC offers a short list of potential facility activities and operations to reduce impacts. Many of the suggestions are far removed from concerns commonly raised by nearby communities. While determining what is meaningful to communities is a very site-specific exercise, CRPE offers its perspective that many of the recommendations are not aligned with common concerns, nor do they protect residents from harmful impacts.

Many of the suggestions will do little to address community health or reduce pollution. Measures focused on nuisance, noise, light, accident prevention and financial assurances, while potentially important, are not focused on reducing a community's existing pollution burden. Other suggestions are too vague to assess including the addition of air pollution controls (uncertain what types are currently available for hazardous waste facilities), pollution prevention (uncertain what this refers to in the hazardous waste context), and innovative or alternative technologies (uncertain about what such technologies are available and what their impacts may be on communities). There should be additional measures that will significantly reduce pollution burdens beyond the relatively insignificant recommendations DTSC has put on the table.

Additional measures should include restrictions on types of waste accepted as well as daily/weekly/annual limitations on amounts of waste that can be accepted. DTSC should also consider whether to include biomonitoring as a possible monitoring activity if desired by an impacted community. Additionally, DTSC should consider requiring monitoring not only at a facility fenceline but also monitoring at sensitive receptor sites to better understand the cumulative burdens facing communities.

#### **VI. Minimum Setback Distance Should Correspond to Distance Where Adverse Health Effects Are Experienced.**

DTSC's framework establishes a setback distance of .25 to .5 miles depending on the type of facility and CES score in the area. This distance is significantly smaller than the distances where adverse

health effects associated with proximity to hazardous waste sites have been found. The Framework explains that “several studies have found evidence of adverse health effects associated with residences more than 0.25 miles and up to 6 miles from facilities and hazardous waste sites.” (Pg. 27.) Setback distances should be established at distances that will avoid adverse health effects. Distances of .25 to .5 miles are simply too small to avoid harm, especially for hazardous waste landfills and other large facilities.

## **VII. DTSC’s Regulations Must Include Criteria for Permit Denial for Both New and Renewal Permits Based on Community Vulnerability and Health Risks.**

Historically, DTSC has lacked objective and standardized criteria for when to deny rather than approve hazardous waste permits. This leaves individual permit decisions up to the discretion of DTSC staff. To avoid unchecked agency and staff discretion, advocates have pushed for more standardization in permit decisions, particularly around permit denial. The current regulatory framework does not provide clarity on what point DTSC should deny a permit based on community vulnerability and continues to allow unchecked discretion to make that determination without any guidance or standards to apply.

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 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.

While CRPE appreciates DTSC’s recognition that community vulnerability and health risks to nearby populations can give rise to permit denial, DTSC should adopt standards to guide agency staff on when it is appropriate to deny permit based on “the vulnerability of, and health risks to, nearby

populations.” Without clear standards, individual decisions will remain up to staff discretion. This leads to a lack of uniformity, opens the door for undue industry influence.

Further, DTSC implies that permit denials must be based on “several factors” of which “vulnerability of, and health risks to, nearby populations” can be one. DTSC should clarify that community vulnerability or health risks alone are sufficient to justify a permit denial.

### **VIII. Regulations Should Incorporate Process for Good Neighbor Agreements and Community Benefit Agreements**

CRPE supports pathways for communities to work with the Department and Operators collaboratively on community agreements. In the first version of DTSC’s regulatory framework for SB 673, DTSC included a process for the voluntary development of community agreements as part of the regulatory scheme. In the second version of the framework, any engagement or action agreed to as part of a community benefits agreement or good neighbor agreement would be “outside the scope of this proposed framework.” This move away from collaborative community agreements is unfortunate and misses important opportunities for mutual benefit. DTSC should consider re-evaluating its earlier approach to incentivizing community agreements.

The current regulatory framework misses an important opportunity for communities and facilities to come to mutually beneficial agreements. GNAs and CBAs are flexible, responsive to community concerns, and generally improve communications and relationships between residents and nearby facilities. Community agreements can bypass limitations that encumber DTSC’s ability to require a facility action. GNA and CBAs allow parties much more flexibility and creativity to respond to community needs. DTSC should provide pathways and incentives for stakeholders to enter into cooperative agreements where possible.

### **IX. The VSP Should Be Tied to Areas of Analysis and Not Rely on Inspection Averaging.**

CRPE agrees that the VSP should account for community vulnerability to capture the increased risk violations pose at facilities located in particularly vulnerable and over-burdened communities. However, the VSP vulnerability categories should mirror the Area of Analysis DTSC has developed for the permitting tier pathways. DTSC is proposing that Pathway 1 should capture facilities screened to be in the top 10 percent of most vulnerable communities using CalEnviroScreen; Pathway 2 for the top 25 percent, and Pathway 3 for the top 40 percent. Yet it has developed a completely different scale of vulnerability for the VSP, only applying it to facilities near communities in the top 25% of CalEnviroScreen’s most burdened census tracts. Further, for permitting decisions, DTSC is proposing to define areas of analysis ranging from .5 miles to 6 miles depending on the type of facility. However, the VSP enhancement only applies to facilities between .25 and 1 mile from sensitive receptors. By limiting the enhancement to such close proximities, DTSC discounts impacts in rural areas where distances between facilities and communities are farther apart but where facilities still impose a risk to nearby communities. VSP should use the proposed Area of analysis permitting criteria to determine which facility violations should receive the vulnerability enhancement.

Further, CRPE urges DTSC to remedy the existing use of averaging to calculate a facility’s VSP score. Averaging the total number violation score by the total number of inspections obscures the

compliance history of problematic facilities which are subject to more inspections. Averaging scores by the number of inspections dilutes and disguises the overall compliance history of a facility. Instead DTSC should calculate the cumulative scores for facilities during the past 10 years. Once a facility surpasses the “acceptable” range of violations, the facility would then be included on the conditionally acceptable list. If the facility continued to receive violations, it would eventually be classified as unacceptable. Alternatively, DTSC should consider whether assessing violations during a set number of past inspections rather than a set number of years would result in a fairer outcome. This approach would weight recent violations higher at facilities that are inspected more frequently, but would reduce the dilution effect of the current averaging scheme.

## **X. 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