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5-DAY PUBLIC NOTICE AND COMMENT PERIOD

EMERGENCY READOPTION

Conditional Exemption for Undeployed Airbags

Department of Toxic Substances Control Reference Number: R-2023-21E

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control ("DTSC") proposes to readopt, for 90 additional days, emergency regulations in title 22, California Code of Regulations, division 4.5, sections 66260.10 and 66261.4. All further section references are to title 22, California Code of Regulations, division 4.5 unless otherwise indicated.

The emergency regulation became effective on March 15, 2024, and will expire on September 12, 2024, unless readopted. Pursuant to California Code of Regulations, title 1, subparagraph (c) of section 52, DTSC hereby incorporates by reference the rulemaking record of OAL Regulatory Action Number 2024-0305-02E.

Summary of OAL Regulatory Action Number 2024-0305-02E

DTSC adopted U.S. Environmental Protection Agency's (U.S. EPA) Interim Final Rule: Safe Management of Recalled Airbags (Interim Final Rule) through emergency rulemaking in response to the urgent public health hazard posed by: (1) the quantity of recalled Takata airbag inflators still left in vehicles in California; (2) the unstable nature of chemicals and other materials found in these airbags deteriorating over time under California's hot and humid climate; and (3) the stockpiling of recalled airbag waste at handlers' facilities. DTSC's emergency regulation mirrors U.S. EPA's Interim Final Rule by exempting the airbag waste from hazardous waste accumulation and transportation requirements if the airbag waste handler meets certain conditions. This is known as a conditional exemption.

The current emergency regulation provides flexibility for entities responsible for removing defective airbags (generators) from vehicles and managing airbag waste. This is achieved by moving the point of hazardous waste generation of airbag waste from the airbag waste handler to the designated facility. The exemption relaxes the hazardous waste requirements for the generation and accumulation of airbag waste at the airbag waste handler location and during transport, as long as the conditions of the exemption are met. Airbag waste becomes subject to hazardous waste requirements once it is received at a designated facility for proper management.

The emergency regulation applies to all airbag waste; not just the recalled Takata airbag inflators. Under this regulation, airbag waste does not require a hazardous waste manifest or a registered hauler when being transported offsite, which reduces the airbag waste handler's cost of transporting the waste to a designated facility.

The regulation:

- Defines "Airbag waste," "Airbag waste collection facility," and "Airbag waste handler"

- To be conditionally exempt from hazardous waste requirements, requires airbag waste handlers to:
 - Accumulate no more than 250 airbag modules and airbag inflators (combined) at one time,
 - Accumulate their airbag waste for no longer than 180 days,
 - Package their airbag waste in a container designated to address the risk posed by the airbag waste,
 - Label their airbag waste “Airbag Waste-Do Not Reuse,”
 - Send their airbag waste directly to either:
 - An airbag collection facility in the United States under the control of a vehicle manufacturer or their authorized representative, or under the control of an authorized party administering a remedy program in response to a recall under the National Highway Traffic Safety Administration (NHTSA), or
 - A designated facility as defined in California Code of Regulations, title 22, chapter 10, section 66260.10,
 - Ensure their airbag waste shipments comply with all applicable U.S. Department of Transportation (U.S. DOT) regulations in title 49, Code of Federal Regulations (CFR), part 171 through 180, for airbag waste during transit, and
 - Maintain records for no less than three years of all offsite shipments of airbag waste and all confirmations of receipt from the receiving facility at the airbag waste handler facility for no less than three years.
- Subjects airbag waste to all applicable hazardous waste regulations once it arrives at an airbag waste collection facility or designated facility.
- Prohibits reuse in vehicles of defective airbag modules or defective airbag inflators subject to a recall under the NHTSA.

Proposed Readoption

The regulatory text in this proposed readoption is unchanged from the initial emergency adoption. This proposed readoption of the regulation will ensure, for an additional 90 days, the continuing safe and effective management of undeployed airbags under the conditional exemption for airbag waste handlers while DTSC concurrently works on the permanent adoption of this regulation into California Code of Regulations through a regular rulemaking. DTSC recently held a public webinar in an outreach effort to acquire public opinions of the existing regulations and to provide updates on DTSC’s progress towards finalizing of the rule through a regular rulemaking. DTSC is currently preparing a regular rulemaking package scheduled to be submitted to OAL before the expiration of the emergency readoption period.

COMMENT PERIOD

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), DTSC provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action. After submission of the proposed emergency to OAL, OAL must allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

DTSC intends to submit this proposed emergency action to OAL on August 21, 2024. The submitted action will appear on the list of “Emergency Regulations Under Review” on OAL’s website at: https://oal.ca.gov/emergency_regulations/Emergency_Regulations_Under_Review/.

Comments must be submitted in writing directly to OAL:

OAL Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814
Fax Number: (916) 323-6826
staff@oal.ca.gov

A copy of the comment must also be submitted in writing to the Office of Legislation and Regulatory Review at:

Office of Legislation and Regulatory Review
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
Fax Number: (916) 324-1808
Phone Number: (916) 322-4563
regs@dtsc.ca.gov

TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

FINDING OF EMERGENCY

DTSC identified an immediate risk of serious injury or death to the public posed by the delayed removal and extended accumulation of defective Takata airbags constituting an emergency. These developments, along with several recent findings and occurrences, led DTSC to conclude that the regulatory system, coupled with the growing volume of removed, accumulated airbags and the large volume of airbags remaining to be removed, has created an unforeseen emergency necessitating immediate action to avoid serious and imminent harm to the public peace, health, safety, and general welfare. DTSC acted by seeking the emergency adoption of the Interim Final Rule in order to avoid serious and imminent harm to the public peace, health, safety and general welfare.

As part of the evaluation of the Interim Final Rule, DTSC contacted the NHTSA in June 2023 to access the status and statistics of the recalled Takata airbags. At that time, the NHTSA informed DTSC that 7.6 million recalled airbags remain in vehicles throughout the United States, of which 800,000 can be found in Californian’s vehicles. Additionally, the NHTSA has identified California as a high-risk or “Zone A” state, meaning California’s hot and humid environment increases the risk of a violent explosion of recalled inflators, as chemicals in the airbags become more unstable over time due to prolonged exposure to elevated temperatures and humidity. Undeployed airbags are deteriorating and pose a risk of potential explosion with each passing day, which increases the risk of harm to personnel at auto facilities that stockpile these dangerous airbags. Since 2009, there have been 27 fatalities and over 400 injuries in the United States alleged to have been caused by recalled Takata airbag inflators, with U.S. EPA informing DTSC of the most recent fatality on December 6, 2023. Of the 27 fatalities, three fatalities occurred in California. U.S. EPA further related that the defective propellant becomes less stable over time, emphasizing the continued urgency of the emergency posed by the defective airbag inflators. DTSC concluded that recalled undeployed airbags pose an immediate risk of serious injury or death to the public based on the following facts:

- Nationwide deaths and serious injuries caused by recalled airbags;

- Instability of chemicals used in recalled airbags;
- California's hot and humid climate accelerating the degradation of the chemicals in airbags;
- Quantity of recalled airbags still remaining in vehicles in California; and
- Accumulated stockpiles of recalled airbags at handlers' facilities.

The NHTSA mandated a recall of Takata airbag inflators in 2015. The U.S. DOT and the NHTSA issued a Preservation Order which initially required Takata to finance the recall, so that Takata would bear the cost of transporting and storing the recalled airbags that had been removed from the vehicles. However, Takata's 2018 bankruptcy and the U.S. DOT's resultant amendment to the Preservation Order resulted in the sudden application of hazardous waste management requirements as well as unforeseen costs and significant financial burdens on entities responsible for removing and replacing defective airbags. In response, the U.S. EPA issued the Interim Final Rule on November 30, 2018, with the intent of providing safe and environmentally sound disposal by exempting the collection of any hazardous waste airbag inflator or airbag module (airbag waste) from hazardous waste requirements so long as certain conditions were met.

Failure to take swift action to prevent imminent harm to public safety due to the large quantity of remaining recalled airbags in California would result in continued risks of serious injury or death to Californians. That failure likewise would leave entities that are responsible for the removal and replacement of these defective airbags in a situation where they bore the unexpected burden of hazardous waste management standards that are not typically applied to recalls, resulting in a significant financial burden which poses a significant threat of delaying or otherwise undermining the effort to remove these recalled airbags from California vehicles. DTSC is statutorily mandated to regulate the management of hazardous waste to protect against risks to public health and the environment. Adoption of the emergency rulemaking was the only option to provide an expeditious and streamlined pathway for entities which remove recalled airbags to transport them to destination facilities for proper management. This addressed and mitigated the risks of serious injury or death posed by recalled airbags that have been removed and encouraged the removal of recalled airbags, which otherwise would continue to pose a substantial risk of serious injury or death while those recalled airbags remain installed in vehicles. Furthermore, U.S. EPA has encouraged states to adopt the Interim Final Rule to address risks posed by defective airbags to public health and the environment.

UPDATE TO THE FINDING OF EMERGENCY

The emergency circumstances described above that led to the adoption of the emergency regulations are unchanged. In addition to the Takata airbag recall, NHTSA recently issued an initial decision supporting a national recall for more defective airbag inflators, which will likely increase the amount of airbag waste that must be properly managed.¹

¹ Initial Decision That Certain Frontal Driver and Passenger Air Bag Inflators Manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC Contain a Safety Defect; Extension of Written Submission Deadline, A Notice by the National Highway Traffic Safety Administration, 88 FR 62140, October 24, 2023.

PROGRESS TOWARDS PERMANENT REGULATIONS

DTSC has made substantial progress in finalizing the regular rulemaking package for notice and has proceeded with diligence toward making the regulations permanent in accordance with section 11346.1(e) of the Government Code. DTSC held a public outreach webinar to acquire public opinions on the existing regulations and to provide updates on DTSC's progress towards finalizing the rule using the regular rulemaking process. DTSC is currently preparing the Initial Statement of Reasons and the Economic and Fiscal Impact Analysis as a part of the regular rulemaking package. DTSC anticipates publishing the Notice of Proposed Action to make these emergency regulations permanent in the Fall of 2024.

DOCUMENTS RELIED UPON

Re-adoption of this proposal relied upon the following documents:

- National Highway Traffic Safety Administration, "Coordinated Remedy Order," November 3, 2015, Docket No. NHTSA-2015-0055. • National Highway Traffic Safety Administration, Amendment to the February 25, 2015
- "Preservation Order and Testing Order Control Plan," April 12, 2018, EA15-001 (formerly PE14-016).
- The Independent Monitor of Takata and the Coordinator Remedy Program, "The State of the Takata Airbag Recalls," November 15, 2017.
- U.S. Environmental Protection Agency, "Safe Management of Recalled Airbags," November 30, 2018 (83 Fed. Reg. 61552).
- U.S. Environmental Protection Agency, Memorandum, "Regulatory Status of Automotive Airbag Inflators and Fully Assembled Airbag Modules," July 19, 2018.
- U.S. Environmental Protection Agency, Office of Inspector General, "Incomplete Oversight of State Hazardous Waste Rule Authorization Creates Regulatory Gaps and Human Health and Environmental Risks," July 31, 2018.
- U.S. Environmental Protection Agency, "Resource Conservation and Recovery Act (RCRA) State Authorization Performance Measures," September 26, 2019.
- California StATS Data, March 31, 2020. • National Highway Traffic Safety Administration, "Takata Recall Spotlight," <https://www.nhtsa.gov/equipment/takata-recall-spotlight> (accessed on March 16, 2023).
- Communications with National Highway Traffic Safety Administration, June 27, 2023.
- Initial Decision That Certain Frontal Driver and Passenger Air Bag Inflators Manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC Contain a Safety Defect; and Scheduling of a Public Meeting, National Highway Traffic Safety Administration; Federal Register Vol. 88 No. 173, September 8, 2023.

AVAILABILITY OF TEXT OF PROPOSED REGULATIONS AND OTHER RULEMAKING DOCUMENTS

Copies of the Notice of Proposed Action, including the Finding of Emergency and the express terms of the proposed regulations (also known as the proposed regulatory text), are posted to DTSC's Internet website at <https://dtsc.ca.gov/dtsc-emergency-regulations/>.

ALL OTHER QUESTIONS/COMMENTS/INQUIRIES/UPDATES

Please direct all written comments, procedural inquiries, and requests for documents by mail, e-mail, or fax to the Office of Legislation and Regulatory Review, as specified above. To be included in this regulation package's mailing list and to receive updates of this rulemaking, please visit <https://dtsc.ca.gov/dtsc-e-lists/> and subscribe to the applicable e-list or e-mail: regs@dtsc.ca.gov.

PROPOSED REGULATORY TEXT

Note: Proposed additions are indicated in underlining to show where the new text is being added. Proposed text for deletion (repeal) is shown in ~~striketrough~~. The symbol "***" means that intervening text not proposed for amendment is not shown.

Amend Title 22, division 4.5, chapter 10, article 2, section 66260.10 to read:

§ 66260.10. Definitions.

When used in this division, the following terms have the meanings given below:

For the purposes of chapters 14 and 15, "air stripping operation" is a desorption operation employed to transfer one or more volatile components from a liquid mixture into a gas (air) either with or without the application of heat to the liquid.

"Airbag waste" means any hazardous waste airbag modules or hazardous waste airbag inflators.

"Airbag waste collection facility" means any facility that receives airbag waste from airbag waste handlers in compliance with section 66261.4(j) of this division and accumulates the waste for more than ten days.

"Airbag waste handler" means any person, by site, who generates airbag waste, as defined in section 66260.10 of this division, that is subject to regulation under this division.

"Ancillary equipment" means any device including, but not limited to, such devices as piping, fittings, flanges, valves and pumps, that is used to distribute, meter or control the flow of hazardous waste from its point of generation to a storage or treatment tank(s), between hazardous waste storage and treatment tanks to a point of disposal on-site, or to a point of shipment for disposal offsite.

Note: Authority cited: Sections 25141, 25150, 25158.1, 25158.4, 25159, 25159.5, 25187.7, 25200.10, 25204, 25214.9, 25214.10.2, 25218.3(d), 25200.21, 25245, 25259, 25316, 25355.5, 25356.9, 25358.9, 58004 and 58012, Health and Safety Code; Governor's Reorganizational Plan #1 of 1991; and Sections 42475.1 and 42475.2, Public Resources Code. Reference: Sections 25110.02, 25110.1, 25110.5, 25111, 25112, 25112.5, 25113, 25114, 25115, 25117, 25117.1, 25117.3, 25117.8, 25117.9, 25117.11, 25118, 25119, 25120, 25121, 25121.5, 25122.7, 25123, 25123.3, 25123.5, 25123.6,

25141, 25150, 25158.2, 25159, 25159.5, 25187.7, 25200.1, 25201.6, 25204, 25214.9, 25218.1(f), 25218.3, 25200.21, 25229, 25245, 25259, 25316, 25354(b), 25355.5, 25355.6, 25356.9, 25358.1, 25358.9, 25359.8, 25361, 25501, 25529 and 58012, Health and Safety Code; Section 42493(a), Public Resources Code; and 40 Code of Federal Regulations; Sections 260.10, 261.1, 262.21, 264.551, 264.1031, 268.2, 270.2 and 273.6.

Amend Title 22, division 4.5, Chapter 11, article 1, section 66261.4 to read:

§ 66261.4. Exclusions

(a) Materials which are not wastes. The following materials are not wastes for the purpose of this chapter:

(j) Airbag waste.

(1) Airbag waste at the airbag waste handler or during transport to an airbag waste collection facility or designated facility is not subject to regulation under chapters 12 through 16, 18, and 20 through 22 of this division, and is not subject to the notification requirements of Health and Safety Code section 25153.6 provided that:

(A) The airbag waste is accumulated in a quantity of no more than 250 airbag modules or airbag inflators, for no longer than 180 days;

(B) The airbag waste is packaged in a container designed to address the risk posed by the airbag waste and labeled "Airbag Waste-Do Not Reuse";

(C) The airbag waste is sent directly to either:

(1) An airbag waste collection facility in the United States under the control of a vehicle manufacturer or their authorized representative, or under the control of an authorized party administering a remedy program in response to a recall under the National Highway Traffic Safety Administration, or

(2) A designated facility as defined in section 66260.10 of this division;

(D) The transport of the airbag waste complies with all applicable U.S. Department of Transportation regulations in 49 CFR parts 171 through 180 during transit;

(E) The airbag waste handler maintains at the handler facility for no less than three years records of all offsite shipments of airbag waste and all confirmations of receipt from the receiving facility. For each shipment, these records shall, at a minimum, contain the name of the transporter and date of the shipment; name and address of receiving facility; and the type and quantity of airbag waste (i.e., airbag modules or airbag inflators) in the shipment. Confirmations of receipt shall include the name and address of the receiving facility; the type and quantity of the airbag waste (i.e., airbag modules

and airbag inflators) received; and the date which it was received. Shipping records and confirmations of receipt shall be made available for inspection and may be satisfied by routine business records (e.g., electronic or paper financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(2) Once airbag waste arrives at an airbag waste collection facility or designated facility, it becomes subject to all applicable hazardous waste regulations in chapters 12 through 16, 18, and 20 through 22 of this division, and the facility receiving the airbag waste is considered the hazardous waste generator for the purposes of the hazardous waste regulations and shall comply with the requirements of chapter 12 of this division.

(3) Reuse in vehicles of defective airbag modules or defective airbag inflators subject to a recall under the National Highway Traffic Safety Administration is prohibited.

Note: Authority cited: Sections 25140, 25141, 25141.5, 25143.2.5, 25150, 25159, 25159.5, 25214.9, 58004, and 58012, Health and Safety Code. Reference: Sections 25117, 25212, 25124, 25140, 25141, 25141.5, 25143, 25143.1, 25143.2, 25143.2.5, 25143.4(a), 25143.11, 25159, 25159.5, and 25214.9, Health and Safety Code; and 40 Code of Federal Regulations; Section 261.4.