

# **ADDENDUM TO THE FILE**

January 24, 2025

## **Generation and Handling Fee Requirements**

**Department of Toxic Substances Control reference number: R-2024-11E**

**Office of Administrative Law Notice Reference Number: 2024-0117-02E**

On January 17, 2025, the Department of Toxic Substances Control (DTSC) submitted to the Office of Administrative Law (OAL) an emergency regulation package that would address four of the primary issues that DTSC determined led to a revenue shortfall in the Generation and Handling (G&H) Fee: nonpayment and underpayment of fees, broad and inconsistent application of G&H Fee exemptions with limited oversight, limitations of data sources used to project fee revenue for rate setting, and lack of penalties to influence feepayer behavior.

DTSC has prepared this Addendum to the File to summarize the changes DTSC made to clarify the regulatory text and to further explain DTSC's rationale for the regulation.

### **Modifications to the Regulatory Text**

#### **1. Section 66260.10. Definitions.**

- a. Three asterisks were added above the definition for "Continuous seal" to denote the prior text is not proposed for amendment. This change is nonsubstantive.
- b. The definition of "Load checking program", for purposes of chapter 19, was clarified in response to public comments to mean an operation or operating procedure that is both used to remove hazardous waste that has been discovered and separated from solid waste and is a requirement of a law, regulation, permit, or other grant of authorization. This change aligns the definition with the statutory load checking program fee exemption.

#### **2. Section 66260.41. Reporting Requirements.**

- a. Subsection (d) was modified to state that the information reported by a handler is subject to review by DTSC at its sole discretion. This change clarifies the role of DTSC in reviewing the information reported by a handler and does not change handlers' responsibility to report and document waste correctly.

#### **3. Section 66269.12. Exemption Requirements.**

- a. Subsection (d) was modified to conform to the revised definition of a "Load checking program" in section 66260.10. This change is nonsubstantive.
- b. The authority note was modified to add Health and Safety Code section 25205.5.1. This change is nonsubstantive.

#### **4. Section 66269.20. Applicability.**

- a. Subsection (a) was modified to remove the numbering of the subsection to conform the change made by the deletion of subsection (b). This change is nonsubstantive.
- b. Subsection (b) was deleted because it is duplicative of section 66269.21(a).
- c. The reference note was modified to list the statutes in numerical order. This change is nonsubstantive.

#### **5. Section 66269.21. Generation and Handling Fee Exemption Review.**

a. This section was modified so that the use of “section” and “subsection” is consistent with their use in other parts of the chapter. The reference note was modified to add Health and Safety Code sections 25205.5 and 25205.16. These changes are nonsubstantive.

b. Subsection (a) was modified to remove a comma. This change is nonsubstantive.

c. Subsection (c) was modified to specify that the extension period of 15 calendar days would be granted so long as the extension request was received by DTSC in writing before the end of the initial 30 calendar day period.

6. Section 66269.22. Recordkeeping Requirements for Generators Claiming an Exemption from the Generation and Handling Fee.

a. This section was modified to make the language consistent with other parts of the chapter. The authority note was modified to add Health and Safety Code section 25205.5.1. The citations in subsections (i) and (k) were corrected to cross-reference the specific exemption statute. The citation in paragraph (i)(2) was modified for consistency with other citations in the chapter. These changes are nonsubstantive.

b. Paragraph (b)(1) was modified to state that a generator is required to provide facts about the source and generation of the waste “relevant to the claim”. The initially proposed requirement for a generator to provide “all facts” could be interpreted in more than one way. This change clarifies for DTSC and a generator that the required documentation is intended to support the generator’s exemption claim by providing relevant details about the waste and is not intended to be unreasonably burdensome for the generator.

c. Paragraph (e)(2) was modified to conform with the changes made to the definition of “load checking program” in section 66260.10. This change is nonsubstantive.

d. Paragraph (m)(3) was modified to change “in route” to “en route” to correct the spelling. The statute that describes this deduction, Health and Safety Code section 25205.5(a)(4), uses the incorrect spelling, “in route.” This change is nonsubstantive and is intended to be consistent with the meaning of the statute.

7. Section 66269.30. Applicability.

a. Subsection (b) was deleted and replaced with the language from section 66269.31(a) because the two subsections were duplicative. This change is nonsubstantive.

b. The authority note was modified to add Health and Safety Code section 25180 and the reference note was modified to add Health and Safety Code section 25187 (d) and (e). These changes are nonsubstantive.

8. Section 66269.31. Administrative Process.

a. This section was deleted to avoid duplication of existing statutes that apply to the applicable administrative hearing procedures. This change is nonsubstantive.

b. Subsection (a) was moved to section 66269.30(b) because the two subsections were duplicative. This change is nonsubstantive.

9. Section 66269.33. Determining the Initial Penalty for Each Exemption Review Violation.

a. This section was modified for readability and specificity. This change is nonsubstantive.

10. Section 66269.34. Adjustment Factors.

a. The table in subsection (c) was revised to add “The extent to which the” in front of “Violation occurred despite good faith efforts to comply with regulation(s).”

b. Subsection (e) was modified to clarify the required financial information that violators need to submit for DTSC to review the violator's ability to pay. The section was further reworded to clarify the options available upon the Department's determination that the violator is unable to pay the penalty. When conducting an analysis of a violator's ability to pay, DTSC utilizes the United States Environmental Protection Agency (USEPA) economic model "IndiPay" or ABEL, if the violator is a corporation. The use of these models rely on the violator's Federal and State income tax returns for the last three years, in addition to financial and bank statements for the past one to three years.

11. Section. 66269.41. Facility Fee Rates for Fiscal Year 2024-25.

a. The title of this section was corrected to match the existing regulation title. This change is nonsubstantive.

12. Section 66269.42. Generation & Handling Fee Rate for Fiscal Year 2024-25.

a. The title of this section was corrected to match the existing regulation title. This change is nonsubstantive.

13. Section 66269.44. Facility Fee Rate Limits.

a. The citation in subsection (a) was corrected to cross-reference the correct fee rate statute. This change is nonsubstantive.

14. Article 4. Fee Rates.

a. Additionally, the regulatory text was modified to reflect renumbering of several sections in Chapter 19, rather than repealing and adding the sections in their entirety. These changes are nonsubstantive.

## **Supplemental Rationale**

1. Section 66269.12. Exemption Requirements.

a. Subsection (e) describes the waste that qualifies for the "Pass Through Waste Deduction." DTSC received public comments regarding the applicability of the deduction to certain types of treated waste. This regulation does not change the definition of treatment nor the department's regulation of treated waste.

2. Section 66269.21. Generation and Handling Fee Exemption Review.

a. This section describes the timeframes for the exemption review process. These timeframes are necessary for DTSC to be able to verify claimed exemptions so that it can verify the amount of hazardous waste that would be subject to the G&H Fee and timely complete revenue forecasting.

b. The timeframes specified in subsection (b) of three years and eight years align with CDTFE's statute of limitations to review returns or issue a notice of determination for fees pursuant to Revenue and Taxation Code section 43202.

c. The timeframes specified in subsections (c) and (d) would enable DTSC to conduct exemption review quickly enough to align with the Board of Environmental Safety (BES) rate setting process. DTSC selected 30 calendar days as the time period in order to provide enough time for generators to provide information to the Department for review, while also allowing enough time for DTSC to validate the data necessary for BES's rate setting process. DTSC selected the 15 calendar days for the extension period to accommodate generators who expressed concern at DTSC's October 2024 pre-rulemaking workshop that the initial 30 calendar days was insufficient.

3. Section 66269.22. Recordkeeping Requirements for Generators Claiming an Exemption from the Generation and Handling Fee.

a. This section describes timeframes for recordkeeping to substantiate the exemption claimed if selected for review. These timeframes are necessary for DTSC to verify claimed exemptions, which is necessary to accurately assess the amount of hazardous waste that is subject to the G&H Fee. The timeframes specified in subsection (a) align with CDTFA's recordkeeping requirements pursuant to Title 18, Division 2, Chapter 9.9 of the California Code of Regulations. DTSC has three-year recordkeeping requirements for generators of hazardous waste in section 66262.40, to implement and enforce other sections of the Hazardous Waste Control Law (Health and Safety Code, section 25100, et seq.). Section 66269.22 aligns with DTSC's three-year recordkeeping requirements in section 66262.40.

4. Section 66269.32. Determining the Initial Penalty for Each Reporting System Violation.

a. DTSC received several public comments regarding the penalty structure and methodology for determining penalty amounts in Article 3. To determine the penalty matrix listed in subsection (c), DTSC relied on available information about reporting practices in the electronic Verification Questionnaire (eVQ) in prior years. This approach was necessary to establish a matrix that could apply fairly to all handlers based on the potential for the noncompliance to negatively impact the administration and collection of the G&H Fee.

b. Tonnage Tiers: DTSC evaluated the number of handlers required to report into the eVQ system on an annual basis, regardless of the amount of hazardous waste they generated. The hazardous waste information is necessary for DTSC to assess the amount of hazardous waste that would be subject to the G&H Fee. All handlers of less than 5 tons are not subject to the G&H fee but are required to report into eVQ, thus the less than 5 tons tier was not further delineated even though it comprises the largest group of eVQ reporters. The remaining tiers were determined based on an evaluation of the number of eVQ reporters required to pay the G&H fee and the extent to which non-reporting or inaccurate reporting could pose adverse effects to the rate setting process. DTSC divided the number of reporters generating 5-499 tons into three comparably sized tiers. The largest generators, 500-1,000+ tons generated, were divided into two tiers based on the potential adverse effects of non-reporting or inaccurate reporting. Because BES annually sets the rate based on the tonnage generated in the prior calendar year compared to the resources necessary to support DTSC's operations, the largest generators have the greatest impact on the rate setting process.

c. Delinquency Tiers: DTSC evaluated when handlers reported into eVQ compared to when it was due. DTSC also considered the timeline in BES's rate setting process. The delinquency tiers were divided equally in 15-day increments between the close of the reporting period (March 31) and the start of the BES public rate setting process (May).

d. Penalty Amounts: In DTSC's October 2024 pre-rulemaking workshop, DTSC proposed significantly higher penalty amounts to compel handlers to report timely and accurately. However, workshop attendees informed DTSC that the proposed penalties would be burdensome and could cause a business to close rather than comply. In response to those concerns, DTSC revised the penalty amounts to encourage compliance without being unreasonably burdensome.

5. Section 66269.34. Adjustment Factors.

a. DTSC received public comments regarding the penalty assessment calculation and factors that DTSC will consider. The adjustment factors are necessary to ensure that DTSC has discretion to ensure that penalties are imposed fairly and have the intended effect. The

penalty that will be imposed in each case depends on the specific circumstances and will be based on DTSC's consideration of all the evidence, including the facts presented by the violator.

b. Subsection (c) states DTSC will downwardly adjust a penalty if the violation was completely beyond the violator's control or if it occurred despite the violator's good faith effort to comply. This provision allows for DTSC to consider whether the violator's circumstances prevented compliance when they would have otherwise complied.

c. Subsection (e) states the actions violators must take to trigger a review of their ability to pay the assessed penalties. If the violator has provided DTSC with the financial information necessary to assess the violator's ability to pay, DTSC may determine a violator is unable to pay a final penalty due to extreme financial hardship and allow payment over a period of time or reduce the penalty.

#### 6. Section 66260.41. Reporting Requirements.

a. DTSC received public comments expressing confusion with the use of the terms "manifested" and "unmanifested" in section 66260.41. However, the Department determined it is unnecessary to define these terms because the use of these terms in 66260.41 is clearly stated in that section. This regulation specifies which unmanifested wastes must be reported for each calendar year. Specifically, the department requires treated wood waste pursuant to Health and Safety Code section 25230.1(d) and waste granted a variance pursuant to Health and Safety Code section 25143 to be reported to the department as these waste streams are subject to fees. Also, the regulation requires the reporting of any waste for which an exemption or deduction is being claimed. Lastly, handlers are responsible for tracking and documenting the amount of waste and the year in which it was generated.

### **Documents Incorporated by Reference**

1. "Individual Ability to Pay Plus (INDIPAY+) Guide," May 2021, available from U.S. Environmental Protection Agency, <https://www.epa.gov/sites/default/files/2021-05/documents/indipayguide.pdf>
2. "Overview of Ability to Pay Guidance and Models," May 1995, available from U.S. Environmental Protection Agency, <https://www.epa.gov/sites/default/files/documents/ovrview-atp-rpt.pdf>