

## Substantial Uncertainty Regarding Continued Haz Waste Operations in State; Comprehensive Legislative Overhaul Expected in 2018

The Department of Toxic Substances Control (DTSC) regulates the handling, management, and remediation of hazardous substances, materials, and waste in California. Over the last several years, DTSC has struggled with significant public relations issues, including decreased stakeholder confidence and public trust, arising out of: the mishandling of the hazardous waste facility permitting and enforcement, resulting in contamination; neglected cost-recovery efforts for cleanups across the state, leading to an accumulation of 1,661 projects totaling almost \$194 million in uncollected cleanup costs dating back 26 years; a growing backlog of applications to renew hazardous waste permits; delayed site remediation; failed public participation and transparency activities; and personnel issues.

DTSC, the administration, and the Legislature have taken several actions to restore public confidence in and boost employee morale at DTSC. These efforts have included budget augmentations and numerous statutory changes to help DTSC better achieve its mandates. Unfortunately, some of these actions have imposed additional unnecessary costly and burdensome requirements on permitted hazardous waste facilities operating in good faith. The result has been a steady decline in the number of hazardous waste operating facilities in California. Although DTSC has undertaken a number of reform efforts, continued calls for greater transparency, accountability, and long-term stability remain.

In 2017, the hazardous waste industry was hit from all sides—legislative, regulatory and costs—creating substantial uncertainty regarding future costs and obligations for continuing operation in California. At least one facility has shut down as a result of actions in 2017, with others, including the U.S. military, seriously weighing the viability of continued operations.

This article provides some background regarding hazardous waste management in California, summarizes the developments in 2017, and identifies the important discussions and developments expected in 2018. At its core, California will need to make an important policy decision in 2018: Does California intend to treat in California the hazardous waste generated by Californians, or is California's policy to exclusively export the hazardous waste generated by Californians to other states and countries? The answer to this important policy question will inform other critical decisions and discussions in 2018.

### California Hazardous Waste Permitting

The federal Resource Conservation and Recovery Act (RCRA) of 1976 is the primary law governing the disposal and treatment of hazardous waste. RCRA is a comprehensive “cradle to grave” regulation that imposes stringent recordkeeping and reporting requirements on generators, transporters and operators of treatment, storage and disposal facilities handling hazardous waste. Federal law allows the U.S. Environmental Protection Agency (EPA) to delegate this program to states to manage and administer. State programs must be at least as stringent as federal law. They can be stricter, and California's program is stricter.

DTSC has administered the federal RCRA program in California since 1982. In 1982, the California Legislature declared that “it is in the best interest of the health and safety of the people of the State of California for the state to obtain and maintain authorization to administer a state hazardous waste program in lieu of the federal program... pursuant to the Resource Conservation and Recovery Act of 1976.” Indeed, Congress designed RCRA so that it could be administered by the states because states are closer to, and more familiar with, the regulated community. For these reasons, states are in a better position to administer the RCRA hazardous waste program and respond to local needs.

Most California hazardous waste regulations are very similar to federal RCRA regulations. In many circumstances, however, the California regulations are more stringent or broader in scope than federal regulations. For example, in California, certain wastes beyond RCRA's scope are nonetheless considered hazardous and therefore subject to California's hazardous waste regulations. These wastes are called “non-RCRA” or “California-only” hazardous wastes. By way of example, approximately 85% of the waste deposited at one of the largest hazardous waste facilities in California is treated as California-only waste. If the waste leaves the state, however, it is treated as nonhazardous. For this reason, treating and disposing of hazardous waste in California is more protective of the environment because California's protocols are more rigorous compared to federal RCRA regulations and those of other states.

### Status of Hazardous Waste Facilities in California

The hazardous waste facilities in California are a vital component to the state's economy, and perform essential functions

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relating to military defense, the environment, and public health. These facilities provide an array of professional hazardous waste management services to thousands of generators and work to ensure that vast quantities of industrial and remediation waste generated in California can be managed in the state in a manner that is safe and fully protective of human health and the environment. A total of 1.82 billion pounds of California hazardous waste was disposed of at these facilities in 2012. Of this total, 62% was treated to the point where it no longer met toxic standards, and 38% was placed in landfills.

Challenges to the continued operation of these facilities include additional burdens with regard to redundant and unnecessary regulatory requirements, which increase the cost of waste management services to the point where out-of-state waste management options become more economical to hazardous waste generators. The higher costs and burdensome requirements make it more difficult for California hazardous waste facilities to compete for disposal volumes against out-of-state facilities, which are not subject to the same rigorous standards.

The number of permitted hazardous waste facilities in California has been on a steady decline. Information indicates there were about 137 permitted facilities in or around 2006, 123 permitted facilities in or around 2011, 117 permitted facilities in 2013, and, as of December 2017, only 109 permitted facilities remaining.

As more facilities close, California will be left unable to manage its own hazardous waste. This will lead to further exports of hazardous waste to states with less protective environmental standards, and will increase the likelihood of improper and illegal disposal of hazardous waste (for example, used motor oil) in trash cans, storm drains, landfills, and waterways, which may disproportionately affect disadvantaged communities.

## DTSC Reform Efforts and Performance Evaluation

### *DTSC's 'Fixing the Foundation' Initiative*

In early 2012, DTSC launched the “Fixing the Foundation” initiative to address issues that threatened the agency’s ability to achieve its RCRA mission and to ensure accountability to the public. As part of the initiative, in early 2013, DTSC contracted with an independent consulting firm to conduct a comprehensive report of DTSC’s existing permitting program. The consultant was tasked with developing a standardized process for issuing hazardous waste permits. The purpose of the report was to address concerns raised by certain stakeholders about the cost and length of time the department was taking to issue permit decisions. There also was a perception that DTSC may not adequately address community concerns when evaluating RCRA hazardous waste permits.

The final report, *Department of Toxic Substances Control Permitting Process Review and Analysis*, was issued on October 2, 2013. The report’s findings included the following:

- **Process Is Too Slow.** Permitting decisions are not made on a timely basis, and lengthy and preventable delays occur due to a lack of standard process and a failure to include all

processing requirements in a predictable, standard order that is identified and shared with permitting staff;

- **Causes of Delay.** Permitting delays are due to agency staff reductions and poor management practices;

- **Application Process Not Well Understood.** Although many aspects of the work process required for a permit renewal are well-defined and well-known, most of the difficult or complex steps are not well understood by the regulated community; and

- **Lack of Objective Criteria.** There are no clear, objective criteria for denying or revoking a permit based on valid standards of performance and actual threats to public health or the environment.

The report made 17 recommendations to address the above findings. DTSC has responded with a list of tasks and timelines for implementation. All the tasks can be and currently are being implemented on the regulatory level; changes to the law are not necessarily required to address the deficiencies the report identified.

### *Permitting Enhancement Work Plan*

In response to the report, DTSC released a Permitting Enhancement Work Plan (PEWP) in 2014. According to DTSC, the PEWP is a “comprehensive roadmap to guide efforts to improve [DTSC’s] ability to issue protective, timely and enforceable permits using more transparent standards and consistent procedures.” DTSC notes that the PEWP “provides a critical link to help DTSC move forward and modernize its permitting process.”

The PEWP is the second part of a three-part plan that DTSC has identified to address certain deficiencies in its administrative and technical practices. The PEWP incorporates the report’s goals, and also includes the basis for selecting each goal, an outline of strategies and desired outcomes, and specific deliverables needed to achieve each goal.

The 10 goals, which were scheduled to be achieved within a two-year timeframe but which nonetheless continue to be developed, are as follows:

- 1) **Shorter Process.** Define processes that will reduce permit processing times whenever feasible while maintaining quality and protectiveness;
- 2) **Metrics.** Establish clear permitting performance metrics;
- 3) **Standardized Review.** Standardize the technical review process materials and vocabulary used to review, approve or deny applications or permit modifications;
- 4) **Coordination.** Coordinate intradepartmental support during the permitting process;
- 5) **Public Protection.** Update permitting standards to increase protections for human health and the environment;
- 6) **Enforcement.** Enhance enforcement;
- 7) **Public Participation.** Inform public of progress in processing permits;
- 8) **Environmental Justice.** Identify and address environmental justice concerns early in permitting actions;
- 9) **Adequate Staffing.** Develop and maintain staff capacity;
- 10) **Data Management.** Address data management needs.

In 2014, the Department of Finance requested and the Legislature approved \$699,000 and five three-year, limited-term positions to implement the PEWP. Once the PEWP is fully implemented, DTSC has stated that it will identify areas, if necessary, for additional regulatory or legislative changes.

#### **Public Engagement Work Plan**

In January 2017, DTSC released the statewide assessment report related to its public engagement efforts. The report completed by University of California, Davis researchers recommended that DTSC: 1) establish a more direct and visible connection between public input and decisions made to increase transparency and accountability; 2) engage in earlier, more systematic and sustained interaction with impacted communities; 3) build greater capacity for effective public engagement for both DTSC and stakeholders; and 4) increase access to data and information relevant to decision making. DTSC is currently working on its evaluations of the recommendations and their potential implementation.

#### **Independent Review Panel**

In 2015, SB 83 (Chapter 24, Statutes of 2015), the Public Resources Budget Trailer Bill, established the Independent Review Panel (IRP) to review and make recommendations regarding improvements to DTSC's permitting, enforcement, public outreach, and fiscal management. The IRP consists of a three-member panel.

The IRP is required to report to the Governor and the Legislature every 90 days on DTSC's progress in reducing permitting and enforcement backlogs, improving public outreach, and enhancing fiscal management. In addition, the IRP must submit recommendations at the time the Governor submits the annual budget to the Legislature. The IRP has held public meetings since November 2015, and has submitted 10 reports to the Legislature and the Governor. The final hearing was conducted in December 2017, and the final report is expected in January 2018.

Each report contains several recommendations, some requiring legislative authorization if implemented. The IRP's recommendations, some of which are discussed below, have served as the basis for legislative action in 2016 and 2017.

### **Legislative Responses to Independent Review Panel Recommendations**

#### **Assembly Continues to Push Piecemeal Attempts at Reform**

Over the last couple of years, various Democratic Assembly members have introduced piecemeal legislation seeking to reform certain aspects of DTSC's hazardous waste program. In the last months of the 2016 legislative session, two Democratic Assembly members from Los Angeles, Miguel Santiago and Jimmy Gomez, introduced the following bills:

- **AB 1102 (Santiago; D-Los Angeles):** Would have imposed substantially increased costs on hazardous waste permit applicants by imposing new inspection requirements on DTSC, notwithstanding the fact that DTSC is currently reforming its enforcement program on the regulatory level, including the issue of on-site inspections. The regulated community viewed this approach as premature and unnecessarily burdensome.

- **AB 1400 (Santiago; D-Los Angeles):** Would have required 1) the permit applicant to install fence-line monitoring at its facility as a condition of approval (even though DTSC already has the discretion to require fence-line monitoring and has done so for several facilities), and 2) permit applicants to fund technical assistance grants to maximize public participation. Industry viewed this second requirement as in clear violation of Proposition 26 because the costs imposed on the applicant would not have been "incident to issuing licenses and permits."

- **AB 1205 (Gomez; D-Los Angeles):** Would have imposed requirements deemed vague and duplicative by the regulated community by requiring DTSC to hold a public meeting within 90 days of receiving a renewal application for a permit and requiring DTSC to review the financial assurances of permitted facilities at least once every five years.

None of these bills passed muster in the Senate Environmental Quality Committee. The committee analysis characterized the legislation as follows:

*"It is not clear that a suite of bills that make small 'steps in the right direction' at the 11th hour of the Legislature's policy deadlines at the end of a two-year session is the right direction at this point. This lacks the opportunity to do the thoughtful consideration necessary to review how these reforms impact all stakeholders and may actually hinder significant reform necessary to improve DTSC."*

*"It is clear however, that all review to date has pointed to systemic issues at DTSC. At the heart of the criticisms around DTSC's failings is a lack of accountability. These bills, while they may tighten the statute, do not help solve the root problem of greater transparency and accountability."*

Despite the Senate Environmental Quality Committee's analysis, these bills resurfaced again in 2017, along with other piecemeal legislative attempts. The majority of the legislative proposals did not proceed to the Governor's desk. Two of the bills that did move to the Governor were vetoed with the following message:

*"There is no question that comprehensive reform of the Department's operations is needed and the Administration is committed to working with the Legislature on that task. When it comes to protecting the public health of our communities, government cannot afford to make promises it cannot keep."*

*"Adding new responsibilities to the Department must be undertaken holistically while considering the resources and funding available. Doing anything less robs the community of a real solution and sets government up for failure."*

*"Addressing the structural problems at the Department, both fiscal and administrative, will not be an easy task, but one that is achievable if the Administration and the Legislature work together. I look forward to the partnership."*

A brief summary of the 2017 bills and associated outcomes follows:

- **AB 245 (Quirk; D-Hayward):** Before amendments, would have imposed unnecessary new costs on hazardous waste permit operators by requiring a public hearing be held within 90 days of the submittal of a hazardous waste permit renewal

application, notwithstanding the multiple existing opportunities for public review; and created uncertainty regarding the application of ambiguous language relating to the adequacy of financial assurances to be reviewed every five years. The bill was amended to remove those provisions, leaving only an increase in the amount of administrative and civil penalties. The Legislature passed and the Governor signed the bill as amended.

- **AB 246 (Santiago; D-Los Angeles):** Would have required the DTSC, in consultation with air pollution control and air quality management districts, to assess hazardous waste facilities, determine if fence-line or other monitoring is necessary or available, and provide a report on the assessment to the Legislature by September 1, 2018. The bill was gutted and amended to cover an unrelated subject.

- **AB 248 (Reyes; D-Grand Terrace):** Before amendments, would have undermined the iterative permit application process by requiring premature submittal of permit renewal application paperwork and would have created uncertainty by failing to identify the consequences to the regulated community in the event the DTSC failed to take action on the permit renewal application within a specified timeframe, even if the permit applicant acted diligently and in good faith throughout the permit application process. The bill was amended to set deadlines for submittal of permit renewal applications. It passed the Legislature, but was vetoed by the Governor.

- **AB 1179 (Kalra; D-San Jose):** Would have prematurely and unnecessarily imposed new costs on hazardous waste permit operators and would likely have resulted in further delays in permit processing by arbitrarily setting inspection frequencies for certain facilities and directing the DTSC to adopt regulations setting inspection frequencies for all facilities, notwithstanding the fact that DTSC is currently reforming its enforcement program at the regulatory level. It passed the Legislature, but was vetoed by the Governor.

If the past is any indication, hazardous waste stakeholders will likely encounter several new piecemeal legislative attempts at reform in 2018. These piecemeal legislative attempts at reform are problematic because they disregard and fail to address the cumulative impact and effect of the bills combined with existing obligations and costs, which will make the hazardous waste permitting process unworkable and excessively expensive. They also disregard DTSC's ongoing reform efforts (including its efforts under the "Fixing the Foundation" initiative).

### ***SB 774 Pushes New Bureaucratic Layer that Will Further Delay Permitting and Increase Costs***

In 2017, Senator Connie Leyva (D-Chino) introduced SB 774 in response to an IRP recommendation to create the California Toxic Substances Board (CTSB) to further accountability and transparency within the department. While the preamble of the bill characterizes the CTSB as an "oversight board," the authority, powers, and duties given to the board indicate otherwise. The California Chamber of Commerce and a broad industry coalition raised significant concerns with the CTSB proposal, including that it would add yet another bureaucratic

layer, thus delaying rather than expediting the permit application process. Other concerns raised by the coalition include:

- The CTSB would be authorized to bypass public participation and input when it adopts future fee schedules as "emergency" regulations, when such regulations will have significant impacts on permittees' ability to continue to provide vital services to California communities.

- The CTSB would create significant uncertainty because it would have the power to disregard the administrative record and would be allowed to impose conditions on hazardous waste permits or require various actions relating to site cleanup following a single hearing. SB 774 further states that the Director "shall comply" with such directives by the CTSB.

- The CTSB can divert resources to tasks within its purview (that is, hazardous waste management and remediation of contaminated sites) to the detriment of other important programs because it is tasked with setting an "annual agenda for the department's priorities and work plans for the current year" and may direct the Director to use staff as the CTSB sees fit.

A myriad of other concerns include the meaning of "serious violation," the transition time and impact on existing and pending permit renewal applications, the authority of subcommittees, and inclusion of members on the CTSB with no experience in specific areas within the board's purview.

On the eve of the final committee hearing, SB 774 was amended to further include a provision requiring DTSC to adopt a new fee schedule by January 1, 2019, "at a rate sufficient to reimburse the department's costs to implement" its statutory requirements. This requirement would practically result in significant new and additional costs being imposed on permittees as evidenced by the existing combined structural deficit of approximately \$3 million in the Hazardous Waste Control Account and the Toxic Substances Control Account—the two primary sources of funding for DTSC. Accordingly, the CalChamber labeled the bill a job killer. SB 774 is a two-year bill and is on the Assembly floor.

Comprehensive reform will be a hot topic in 2018. Although the CalChamber agrees with the Governor's veto message that holistic reform and solutions to DTSC's fiscal and administrative problems must be considered in partnership, the CalChamber believes it is imperative that permittees and stakeholders be included in that partnership. Accordingly, the CalChamber is committed to working with the Administration and Legislature in reform efforts in 2018.

### **Skyrocketing Costs**

Historically, facilities seeking to obtain a hazardous waste permit had two options. They could either pay DTSC a flat statutory fee or enter into a reimbursement agreement where DTSC would be paid by the hour for the staff time spent on processing the application. In an effort to recoup the costs associated with processing RCRA permit applications, DTSC proposed budget trailer language in 2016 to eliminate the flat fee option for applicants and to instead require a reimbursement agreement in all circumstances.

That budget trailer language, labeled a job killer by the CalChamber, was later inserted into SB 839 (Committee on Budget and Fiscal Review), the natural resources budget bill, which the Legislature passed and the Governor subsequently signed. From CalChamber's perspective, DTSC's proposal is akin to handing DTSC a "blank check" to process permit applications. The view is that this will discourage these facilities from further modernizing and improving their infrastructure by giving DTSC the authority to simply charge whatever it deems fit for processing a permit application, notwithstanding the DTSC's own self-acknowledged deficiencies within its current permitting program.

In addition, there is uncertainty whether DTSC can charge applicants for the agency costs to handle fee disputes—a serious disincentive to questioning the agency's oversight fees. The regulated community is concerned that DTSC's proposal will lead to intractable disputes, add further delays to the permitting process, and impose extraordinary, unjustified, and unpredictable costs on the permit applicant.

The CalChamber and several other organizations proposed a reasonable and good faith viable alternative, which would have ensured that DTSC could recoup a significant amount of its costs directly from the permit application process while also maintaining the transparency, certainty and predictability that hazardous waste permit applicants need. This alternative included: 1) retaining but increasing by 100% the current flat fees; 2) allowing DTSC to enter into a capped reimbursement agreement not to exceed the amount of the new flat fee in instances where a "significant modification" of the permit is required, such as where the application filed is substantially incomplete, or where the application is required to be rewritten in its entirety; and 3) allowing DTSC to impose a secondary flat fee above the initial flat fee in instances where DTSC determines that the applicant has submitted the application in bad faith.

Although several members of the Assembly submitted a letter to Speaker Anthony Rendon (D-Lakewood), encouraging him to replace DTSC's proposal with the industry proposal, the industry's proposal was ultimately rejected in favor of DTSC's proposal to eliminate the flat fee option.

In 2017, a number of facilities received their first permit renewal application invoices under the "fee for service" regime, with some signaling a tenfold to thirty-fivefold increase over prior permit renewal application costs. The sticker shock associated with the permit fee increases has resulted in at least one facility closing its doors (and others considering the same), and the U.S. military signaling it may close facilities as well. As predicted, the "fee for service" regime has essentially been considered a "blank check."

Concerns regarding DTSC's fee for service billing include, among other things: 1) the amount charged per hour for staff time greatly exceeds the hourly rate paid by facilities for services by significantly more experienced private consultants; 2) the lack of detail or descriptions relating to the services performed or anticipated to be performed and a justification for the hours

allocated; and 3) the lack of accountability and transparency in the billing practices.

The CalChamber and its coalition had previously proposed several measures to improve the billing process, including:

- Establish deadlines by which DTSC must respond to billing disputes;
- Establish deadlines by which meet-and-confers must occur;
- Establish consequences if DTSC fails to comply with preparing cost estimates or fails to issue invoices on a timely basis;
- Provide DTSC project managers with the organizational structure and budget management tools necessary for efficient project management;
- Establish procedures to substantially reduce DTSC's indirect cost rate, which from January to June 2015 was at 169%;
- Establish guidelines to ensure that parties are not billed for the cost associated with resolving fee disputes;
- Require DTSC to provide daily staff time logs as a matter of course with all invoices;
- Require DTSC to change its practices to ensure that interest is not charged for any unpaid amounts subject to a dispute; and
- Require DTSC to provide its staff with a concentrated training program in billing practices and procedures.

If, in addition to the increased costs under the "fee for service" regime, DTSC's structural deficit is passed along to permittees and the additional costs and obligations proposed by the SB 673 regulations are imposed (discussed below), California will need to brace itself for further facility closures. The CalChamber and its coalition will continue to push for billing reform, whether through regulation or legislation, in 2018.

### 'Tidal Wave' of New Regulations Proposed

In 2015, the Legislature passed and the Governor signed SB 673 (Lara; D-Bell Gardens). SB 673 was enacted in response to public and legislative concerns regarding DTSC's shortcomings in implementing the hazardous waste facility permitting program in California and to prevent the recurrence of administrative failures. The Legislature required DTSC to adopt regulations establishing or updating criteria used in determining whether to issue a new or modified hazardous waste facilities permit, or to renew a permit, which may include criteria for denying or suspending a permit. SB 673 directs DTSC to consider (but not necessarily adopt) all of the following by January 1, 2018:

- Number and types of past violations that will result in a denial.
- The vulnerability of, and existing health risks to, nearby populations. Vulnerability and existing health risks shall be assessed using available tools, local and regional health risk assessments, the region's federal Clean Air Act attainment status, and other indicators of community vulnerability, cumulative impact, and potential risks to health and well-being.
- Minimum setback distances from sensitive receptors, such as schools, child care facilities, residences, hospitals, elder care facilities, and other sensitive locations.

- Evidence of financial responsibility and qualifications of ownership.
- Provision of financial assurances pursuant to Section 25200.1.
- Training of personnel in the safety culture and plans, emergency plans, and maintenance of operations.
- Completion of a health risk assessment.

SB 673 further requires DTSC to develop and implement by July 1, 2018, programmatic reforms designed to improve the protectiveness, timeliness, legal defensibility, and enforceability of the department's permitting program, including strengthening environmental justice safeguards, enhancing enforcement of public health protections, and increasing public participation and outreach activities. In accomplishing these reforms, DTSC is required to do all of the following:

- Establish transparent standards and procedures for permitting decisions, including those that are applicable to permit revocation and denial.
- Establish terms and conditions on permits to better protect public health and the environment, including in imminent and substantial endangerment situations.
- Employ consistent procedures for reviewing permit applications, integrating public input into those procedures, and making timely permit decisions.
- Enhance public involvement using procedures that provide for early identification and integration of public concerns into permitting decisions, including concerns of communities identified pursuant to Section 39711.

In early 2016, DTSC representatives gave a presentation to the CalChamber and other organizations in the business community to review DTSC's plans to propose a Violation Scoring Procedure (VSP) regulation in response to SB 673. According to DTSC, the purpose of the VSP is to create clear and objective criteria for denying or revoking permits that are based on valid standards of performance and risk. The VSP process would empower DTSC to 1) identify, within an unknown period of time, Class I violations and Class II violations when those violations are chronic or committed by a recalcitrant violator, 2) assign each violation a score based on the extent of the deviation and potential for harm, characterized in terms of "minor," "moderate," or "major," and 3) total up the scores against an unknown numerical threshold to determine whether to deny or revoke a permit.

The CalChamber submitted comments to DTSC on its preliminary VSP proposal, asking that DTSC not pursue the proposal. CalChamber urged the agency to instead prepare guidelines or regulations to properly implement AB 1075 (Alejo; D-Salinas). AB 1075 establishes standards for what constitutes a "violation" or "noncompliance" that shows a "repeating or recurring pattern," and further specifies the enforcement or permit revocation action to be taken by DTSC if such repeat or recurring violations occur. Importantly, CalChamber believes that DTSC does not have the statutory authority to move forward with its VSP proposal after the passage of AB 1075, because AB 1075 established the only types

of violations or instances of noncompliance that can serve as grounds for denying or revoking a permit.

In addition to the serious questions about DTSC's lack of statutory authority to promulgate the VSP proposal, the VSP concept is extremely problematic for several reasons. First and foremost, the numerical scores upon which the VSP intends to rely cannot possibly serve as clear and objective criteria for making permit denial and revocation decisions; the scores are inherently subjective in nature, even though the VSP attempts to give the appearance of empiricism. To wit, the result of the VSP process would be a numerical value, but such value, using the process DTSC envisions, would be based on nothing more than a cascading series of subjective decisions. The process of evaluating the nature of past violations—especially when viewing how such violations should affect a facility's ability to continue operating—is an extraordinarily complicated, technical and data-driven inquiry that should not and indeed cannot be distilled to a numerical value.

In September 2017, DTSC released a notice of formal rulemaking, including proposed regulations establishing the VSP framework. The formal rulemaking also proposed regulations: 1) limiting the types of allowable financial assurance methods for permitting; 2) adding training requirements; 3) requiring completion of a Community Involvement Profile (CIP) during permit renewal; and 4) requiring completion of a Health Risk Assessment (HRA) during permit renewal. Despite repeated requests for an extension of the 45-day comment period, given the significance of the regulatory package and the absence of public workshops on substantial portions of the package, DTSC declined.

The CalChamber and its coalition submitted a robust 24-page comment letter expressing significant concern with the scope, cost, and application of the proposed regulations. Among other things, the comment letter states:

- DTSC is not required to mandate the criteria in SB 673; rather, it is required to consider the criteria in adopting the regulations;
- The proposed regulations will result in additional facility closures;
- The proposed rulemaking lacks evidentiary support in its entirety;
- The proposed rulemaking should not apply to existing or current "in progress" permit actions, and it should not apply retroactively;
- DTSC's conclusion that the proposed rulemaking will have minimal economic impact is erroneous, deficient, and unsupported;
- DTSC's conclusion that the proposed rulemaking has no environmental impacts necessitating a California Environmental Quality Act analysis is erroneous and ignores reality inasmuch as it fails to analyze the economic impacts related to exporting hazardous waste and anticipated illegal dumping of hazardous waste in the absence of available hazardous waste facilities;
- The VSP proposal is unlawful, unnecessary, and very problematic—including practical and due process concerns;
- The CIP requirement is overbroad, unduly burdensome,

costly and unnecessary—RCRA facilities already assess the community surrounding the facility as part of public participation activities when a draft permit is posted for public comment and non-RCRA facilities are, in DTSC’s words, “inherently less dangerous and complex than RCRA facilities” and “tend to generate far less public interest and public involvement than RCRA facilities”;

- The additional training requirements appear to apply more broadly than DTSC anticipated or intended;
- The record contains no evidence supporting the proposed amendments to the financial assurances obligations, and such proposed amendments are unnecessary;
- The HRA requirements are unduly burdensome and costly—DTSC presently requires an HRA on a case-by-case basis when it deems such information necessary given the type of facility and there is no evidence to support imposing this obligation and cost on noncomplex and noncontroversial permit renewal applications; and
- DTSC’s proposal to deny a permit for a facility based on the requirements of other federal, state, or local environmental regulations or permits is a significant expansion of its authority and inappropriate.

In addition to the SB 673 proposed rulemaking, DTSC proposed regulations regarding the federal post-closure rule and on toxicity criteria for human health risk assessments. The CalChamber and its coalition submitted comment letters on these regulatory packages as well.

The costs and obligations proposed by DTSC’s proposed rulemakings will have a substantial impact on facilities’ bottom lines, and will likely lead to more facilities closing.

### CalChamber Position

The CalChamber supports treating, storing and disposing of hazardous waste in California with protocols that protect the environment and public safety. Understanding the importance of keeping hazardous waste in California, hazardous waste permits should be issued in a timely manner and subject to clear and predictable procedures. The application procedures also must be flexible because this is an iterative process. Indeed, the iterative nature of the hazardous waste permit process is critical; it allows DTSC to adapt and respond to issues raised by stakeholders and the public during the administrative process, and ultimately ensures that final permits are both protective and defensible.

The CalChamber believes that virtually all the systemic issues within DTSC stem from a small minority of the operating permitted facilities and sites throughout the State of California. Indeed, efforts to reform DTSC, both by way of legislation and through the IRP’s recommendations, are driven by approximately 10–15 controversial facilities, but nonetheless unjustifiably would implicate all facilities/sites.

These facilities/sites may be controversial for several reasons, including the complexity of the underlying permit and environmental review, the size or location of the facility or site, and the degree of public involvement. The controversy merits specialized expertise and attention above and beyond that which is provided for the remaining, more routine and uncontroversial facilities and sites. A complex process should not be created for the vast majority of RCRA hazardous waste facilities where permit issuance should be much more routine.

Accordingly, legislative solutions should be focused on 1) giving DTSC the discretion and the resources to identify the 10–15 facilities and sites for which specialized expertise and attention are needed; 2) establishing a crisis management team devoted to the 10–15 facilities and sites identified by DTSC as requiring specialized expertise and attention (expanding on the IRP’s recommendation in its fourth report of October 2016 in which it suggests creating a “crisis management team within the Public Participation Program”); and 3) committing General Fund expenditures in matters of extraordinary public interest (as determined by DTSC) to adequately respond to public comments and to devote the requisite resources and expertise to complicated permitting processes or cleanups. A portion of these General Fund expenditures can be used for enhanced public participation and to ensure that local community groups have the resources necessary for full and informed public participations (for example, translation services for communities where English is not a first language).

In conclusion, the hazardous waste laws within the Health and Safety Code are complex and arcane. When new legislative concepts are proposed in any statutory framework, but particularly one as complicated as the hazardous waste laws, they typically are done by accretion. Legislation seldom eliminates provisions of law or harmonizes “new” and “old” provisions. California’s hazardous waste laws are in desperate need of modernization. The CalChamber believes that to the extent the Legislature is inclined to pursue DTSC reform legislation, it should proceed with caution to ensure that any new concepts are not duplicative and, where appropriate, the Legislature should eliminate unnecessary, outdated or unduly burdensome provisions.

*Article written by Louinda V. Lacey while serving as CalChamber policy advocate. She now is appellate attorney at the California Court of Appeal, Third Appellate District.*



Staff Contact

**Jennifer Barrera**

Senior Vice President, Policy

[jennifer.barrera@calchamber.com](mailto:jennifer.barrera@calchamber.com)

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