

Hazardous Waste Operations

Legislature Must Bring More Certainty to Hazardous Waste Operations

The extraordinary time and costs associated with the permitting process in California make in-state processing of hazardous waste economically uncompetitive with out-of-state hazardous waste processing facilities. Yet, permitted hazardous waste facilities in California are a vital component of the state's economy and perform essential functions related to military defense, recycling hazardous waste, remediating contaminated sites and protecting public health. More than 1.8 billion pounds of California hazardous waste is disposed of in California facilities each year. This article provides background about the current state of hazardous waste management in California and summarizes seminal recent legislative and regulatory developments that will have an impact on California's hazardous waste management for years to come.

BACKGROUND

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 record keeping and reporting requirements on generators, transporters and operators of treatment, storage and disposal facilities handling hazardous waste. The California Department of Toxic Substances Control (DTSC) regulates the handling, management and remediation of hazardous substances, materials and waste, and administers the federal RCRA program 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 hazardous waste facility permitting and enforcement, resulting in contamination and neglected cost-recovery efforts for cleanups across the state. These problems have led to an accumulation of 1,661 projects totaling almost \$194 million in uncollected cleanup costs dating back almost three decades.

DTSC, the former Brown administration and the Legislature took several actions over the last few years to try to restore public confidence in DTSC. These efforts included budget augmentations and numerous statutory changes aimed at helping DTSC fulfill its mission to protect California's people and environment from the harmful effects of toxic substances by restoring contaminated resources, enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products.

Some of these reforms have imposed additional unnecessary costs and burdensome requirements on permitted hazardous waste facilities operating in good faith and in full compliance with California law. The number of hazardous waste facilities in California is declining steadily each year, with just 80 permitted facilities operating today to manage the waste of 40 million Californians.

ELIMINATION OF FLAT FEE LEADS TO SUBSTANTIAL COST INCREASES TO PERMITTED FACILITIES

Historically, hazardous waste 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 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 California Chamber of Commerce, was later inserted into SB 839 (Committee on Budget and Fiscal Review), the natural

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resources budget bill, which the Legislature passed and Governor Edmund G. Brown Jr. subsequently signed. From the CalChamber's perspective, DTSC's proposal was akin to handing DTSC a "blank check" to process permit applications that would discourage these facilities from further modernizing and improving their infrastructure. In addition, there was uncertainty whether DTSC could charge applicants for the agency costs to handle fee disputes—a serious disincentive to questioning the agency's oversight fees.

As the regulated community predicted, the DTSC proposal led to intractable disputes, additional delays in the permitting process, and unpredictable costs that have driven many facilities to close. Today, there are only 81 permitted hazardous waste facilities left operating in California, including the seven facilities operated by the military, and 28 Post Closure Facilities (closed and going through final remediation), that provide for the treatment, storage or disposal of substances regulated as hazardous waste under federal and state law for all of California.

Compare that to 2006 when there were 137 permitted hazardous waste facilities operating in the state. At this closure rate, California is on a trajectory to have an inadequate number of permitted operating hazardous waste facilities to process the almost 2 billion pounds of hazardous waste produced each year. When there are inadequate permitted hazardous waste facilities in-state, California entities ship their hazardous waste to neighboring states or even other countries, like Mexico, where regulations are far less stringent and hazardous waste often is treated as garbage.

DTSC REGULATIONS IMPLEMENTING SB 673 WILL FURTHER COMPLICATE AND INCREASE COSTS FOR PERMITTED HAZARDOUS WASTE FACILITIES

In October 2015, Governor Brown signed into law SB 673 (Lara; D-Bell Gardens; Chapter 611, Statutes of 2015). SB 673 was enacted in response to public and legislative concerns about 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.

DTSC chose to implement SB 673 by dividing the regulations into two tracks. **Track 1** regulations were approved by the Office of Administrative Law on October 24, 2018 and went into effect January 1, 2019, while regulations for Track 2 are still in draft

concept. The regulations adopted and developed under both tracks are controversial for the regulated community.

- Under the **Track 1** regulations, DTSC created new permit criteria that assessed a facility's compliance history, data for a community profile, financial responsibility, training for facility personnel, and a health risk assessment for facility operations before granting a new permit or permit renewal.

Although the Violations Scoring Procedure (VSP) regulations were supposed to establish a systematic process for evaluating and characterizing a hazardous waste facility's compliance by assigning numerical scores, the VSP is unlikely to provide clear and objective criteria for making permit denial and revocation decisions. The VSP scores are inherently subjective despite DTSC's attempts to give the appearance of empiricism. Although the result of the VSP process would be a numerical value, the process itself is flawed because it is based on a cascading series of subjective DTSC 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 will have the unintended consequence of dissuading permittees from ever settling with the agency.

- Under **Track 2**, DTSC is developing regulations that create additional permit criteria to address cumulative impacts on vulnerable communities. Under these proposed regulations, DTSC proposes to establish minimum setback distances from locations such as schools, daycare centers and hospitals, as well as a process to place additional restrictions on facility operations based on cumulative impacts.

Although the CalChamber supports reducing cumulative public health and environmental impacts from multiple sources of pollution on vulnerable communities in California, the regulations attempt to mitigate impacts driven by unrelated sources or socio-economic stressors that are independent of facility operations but otherwise contribute to overall community vulnerability. Permitted hazardous waste facilities should be responsible for mitigating environmental and human health impacts related to their facility operations and within their control to mitigate.

The regulations already adopted under Track 1 and currently being pursued under Track 2 could discourage renewal of hazardous waste facility permits or lead to additional hazardous waste facility closures in California. As more California hazardous waste facilities close, a larger volume of California's non-RCRA hazardous waste will be exported to other states where it will be managed as ordinary solid waste, or worse, illegally dumped.

PERMIT STREAMLINING FOR 'GOOD ACTOR' HAZARDOUS WASTE FACILITIES FAILS

In 2018, the CalChamber led a coalition to support AB 2606 (Fong; R-Bakersfield), which would have addressed directly the unsustainable permit fees that are forcing California's permitted hazardous waste facilities to close by requiring DTSC to process permit renewal applications for "good actor" hazardous waste facilities in an expedited manner. AB 2606 received strong support from the U.S. military, which operates seven hazardous waste facilities in California, and bipartisan support in the Legislature. Unfortunately, AB 2606 was held in the Senate Appropriations Committee after DTSC stated it would need to hire 22 full-time employees, a statement the CalChamber disputed.

In 2019, Assembly Member Vince Fong introduced AB 655, a substantially similar version of AB 2606. Unfortunately, due to insufficient support, the author tabled the bill before it even reached its first committee hearing. It is unclear whether the author plans to try to move a similar proposal in 2021.

OVERHAULING DTSC THROUGH CREATION OF A BOARD

Over the years there have been numerous unsuccessful legislative attempts to overhaul DTSC into an organization that is more transparent and accountable in its decision making.

- In 2020, Governor Gavin Newsom announced revamping DTSC in his proposed 2020 budget by installing an oversight board to set fees and hear appeals of agency decisions. The five-member board was proposed to be funded with \$3 million from the General Fund and to have the authority to set fees that companies pay for managing hazardous waste and toxic substances.

- The Legislature had similar overhaul ideas, but with a more balanced approach. Assembly Member Cristina Garcia (D-Bell Gardens) and a dozen other lawmakers proposed a legislative overhaul to DTSC (AB 995) that would have created a five-person board to serve as the policy setting body for DTSC and to have the power to decide permit appeals and be the DTSC's public interface. AB 995 also would have made a number of

statutory changes to permitting deadlines and improved the department's financial assurances requirements.

Assembly Member Garcia also proposed to create a fee task force led by the Secretary of the California Environmental Protection Agency (Cal/EPA) and including representatives from environmental, environmental justice, and industry that would be charged with conducting a comprehensive evaluation of DTSC's fee structure to identify a funding structure that would provide sufficient resources for DTSC to carry out its statutory mandates. With AB 995, industry and environmental groups were aligned in their desire to eliminate inefficiencies at DTSC that resulted in delayed permitting decisions and contaminated sites sitting without funding or movement. AB 995 passed both the Senate and the Assembly. Unfortunately, the bill met its demise with the Governor's veto. His veto message stressed the need to pass his budget fund before reforms could be made. This very issue is expected to arise again in 2021–2022.

CALCHAMBER POSITION

The CalChamber supports treating, storing, and disposing of hazardous waste in California. The California protocols dealing with hazardous waste are more rigid than those of any other state, resulting in the processing of more hazardous waste into nontoxic form and sending less hazardous materials into landfills. To this end, the CalChamber endorses California's policy of managing its own hazardous waste and not exporting it to other states or nations where protocols are either nonexistent or far less stringent, resulting in less environmental protection.

The CalChamber supports policies that ensure DTSC issues hazardous waste permits in a timely and cost-effective manner and that permit applicants are subject to clear and predictable procedures. Conversely, the CalChamber opposes policies that exacerbate the closure of California hazardous waste facilities by creating unpredictable permitting criteria and unnecessarily increasing costs. Fee increases must be reasonable and tied to streamlined and effective activities at DTSC, and must include input from industry.



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