

California Department of Toxic Substances Control Gains New Hazardous Waste Regulatory Powers

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Governor Brown and Legislature give California's ***Department of Toxic Substances Control*** more power to regulate hazardous substances.

On Friday, October 2, 2015, ***California Governor*** Edmund G. (Jerry) ***Brown*** Jr. signed into law a number of legislative bills giving the California Department of Toxic Substances Control (DTSC) greater power in regulating hazardous substances. The new legislation, authored by the state Assembly's Committee on Environmental Safety and Toxic Materials, increases the interest rate on unpaid penalties charged by DTSC, authorizes DTSC to write-off or write-down recovery accounts that meet specific criteria, requires DTSC to pursue recovery costs within three years after completion of response operation and maintenance actions, authorizes DTSC to require hazardous waste managers to ensure their ability to pay for potential cleanups that could arise, and requires DTSC to suspend or revoke the hazardous waste permits of facilities that have serious or repeat hazardous waste violations.

The New Legislation in Detail

Assembly Bill (AB) 273 clarifies the cost recovery processes for DTSC remedial actions regarding the release of hazardous substances, whereby DTSC has the express authority to take or oversee remedial action, and the California Attorney General continues to have the authority to recover costs incurred by the Department in doing so. The new law also increases the interest rate charged by DTSC to 7% per annum until June 30, 2021, and 10% per annum thereafter, with an exception for local governments, whose rate would remain at 7% per annum. The legislature enacted this change in hopes of aiding DTSC in more promptly recovering its remediation costs from responsible parties. AB 273 amends Sections 25187.2, 25360, and 25360.1 of the Health and Safety Code of California.

AB 274 tasks DTSC with prioritizing its cost-recovery efforts to enable more efficient collection of costs. The law grants DTSC the power to write-off or write-down "uncollectible accounts" because cost recovery of these accounts would not be cost effective. To qualify as an "uncollectible account," (1) the response action, corrective action, or oversight costs must have been incurred by DTSC between July 1, 1987 and December 21, 2013; (2) the costs must not total more than \$5,000; and (3)

DTSC must not incur any further response, corrective action, or oversight costs related to that site. This bill is a “one-time fix” that is meant to aid DTSC in reducing its current backlog of uncollected accounts. By allowing DTSC to eliminate accounts for which recovery efforts could result in a financial loss, the bill frees DTSC resources for recovery of larger and more financially significant cleanup accounts. AB 274 amends Section 25269.9 of the Health and Safety Code.

AB 275 revises the statute of limitations for DTSC to pursue recovery of costs incurred by the Department in conducting or overseeing response or corrective actions. As under previous law, DTSC may commence an action to recover costs within three years after the certified completion of all response or corrective actions. The new legislation extends this limitations period where further operation and maintenance is required as part of the remedial action. In those cases, the DTSC has until three years after the certified completion of operation and maintenance to commence a recovery action. The legislature enacted this measure to grant DTSC more flexibility in its recovery efforts in hopes of making these efforts more expeditious and more successful. AB 275 amends Sections 25360.4, 25363, and 25366.5 of the Health and Safety Code.

AB 276 grants DTSC new authority to request financial information from a potentially responsible party. The legislation applies only where DTSC has a reasonable basis to believe that there has been or may be a release or threatened release of a hazardous substance. Under those circumstances, the new law requires any person who currently manages or has previously managed hazardous waste to supply information to DTSC regarding their ability to pay for or perform cleanup activities. DTSC is also authorized to require a person who has or may have information relevant to the ability of a person to pay for cleanup to provide the information to the Department. DTSC has the power to issue orders directing compliance with these information requests where a person intentionally or negligently fails to provide the required information. DTSC may also disclose the information received to authorized representatives, contractors, or government agencies (such as the US Environmental Protection Agency [EPA]) in connection with DTSC’s hazardous waste control responsibilities. Any person providing information to DTSC under this law must identify all trade secret information included, and may incur penalties where such information is not properly identified and protected. These changes to California hazardous waste law bring it more in line with federal law on the subject, which has long granted EPA the power to request this type of information from potentially responsible parties. Previously, DTSC had to first sue potentially responsible parties to require them to provide financial information. With this new legislation, the California legislature hopes to expedite the cost-recovery process for DTSC by removing the need for litigation at this stage. AB 276 amends Sections 25185.6, 25190, 25358.1, 25358.2, and 25367 of the Health and Safety Code.

AB 1075 draws a bright line for hazardous waste permit denial and revocation. The legislation grants DTSC stronger regulatory powers by requiring the Department to consider three or more serious violations of a hazardous waste permit during a five-year period as “compelling cause” for denying, revoking, or suspending the permit. The law defines a “serious violation” as: (1) a fire, explosion, or uncontrolled chemical reaction; (2) a serious or acute injury or illness; (3) a violation of any order issued by DTSC to the permit holder or applicant; or (4) a federal or state felony conviction for violations of hazardous waste laws. Violations not falling within these categories would be considered minor violations that do not count toward the three-violation threshold. If DTSC determines that conditions present “an imminent and substantial endangerment to the public health or safety or the environment,” the law empowers the Department to temporarily suspend a permit prior to conducting a hearing. Further, if a person has been found liable for three or more hazardous waste violations within any consecutive 60 months, the new law imposes additional civil penalties of at least \$5,000 and up to \$50,000 per day for each violation. The aim of this law was to enable DTSC to prioritize violations through clear, bright-line rules to better address serious threats to human health and the

environment in contrast to less immediate issues that could be resolved with less urgency. AB 1075 amends Sections 25186 and 25186.2 of the Health and Safety Code, and adds Sections 25186.05 and 25189.4.

Conclusion

These five new hazardous waste laws share the common goal of providing DTSC with stronger regulatory powers to more efficiently pursue the management, cleanup, and recovery of costs associated with hazardous wastes. Managers of hazardous wastes should prepare to face requests for financial information where there may have been no hazardous waste violation, but DTSC may reasonably believe one is threatened. Where violations do occur, parties dealing with hazardous wastes should be prepared to face higher interest rates on penalties. And where remedial actions extend over long periods, including operations and maintenance costs, parties should prepare to face potential cost recovery actions that would've been outside of the earlier, shorter statute of limitations period.

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