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CHAIRS

Chief Consultant
Gabrielle Meindl

Consultant
Genevieve M. Wong
Eric Walters

Committee Assistant
Mimi Holtkamp

1021 O Street, Room 3230
(916) 651-4108

JOINT OVERSIGHT HEARING ON THE DEPARTMENT OF TOXIC SUBSTANCES
CONTROL –
BOARD OF ENVIRONMENTAL SAFETY

To: Members of the Senate Committee on Environmental Quality and
Members of the Assembly Committee on Environmental Safety & Toxic
Materials

From: Chairs, Senator Ben Allen and Assemblymember Bill Quirk

Subject: Joint Oversight Hearing: First Progress Report on Department of Toxic
Substances Control's (DTSC) Reform: Enhancing Transparency and
Engaging Communities

Date: August 3, 2022

Introduction: In 2021, after years of legislative hearings and policy changes, the Legislature enacted SB 158 (Committee on Budget and Fiscal Review, Chapter 73, Statutes of 2021) which mandated several policy reforms to the California Department of Toxic Substances Control (DTSC), stabilized funding, and created the Board of Environmental Safety (Board). Through testimony from the newly created Board, the Director of DTSC, and stakeholders, this hearing will provide updates on these reforms, in order to evaluate the progress that has been made to improve DTSC, with special emphasis on DTSC's engagement with communities affected by hazardous waste and hazardous materials.

DTSC's authority and major programs:

California Hazardous Waste Control Law (HWCL): The HWCL is the state's program that implements and enforces federal hazardous waste law in California and directs DTSC to oversee and implement the state's HWCL. Any person who stores, treats, or disposes of hazardous waste must obtain a permit from DTSC. The HWCL covers the entire management of hazardous waste, from the point that hazardous waste is generated to management, transportation, and ultimately disposal of waste into a state or federally-authorized facility.

DTSC's Hazardous Waste Management Permitting Program: DTSC is responsible for administering the Hazardous Waste Facility Permitting Program established under the HWCL and the federal Resource Conservation and Recovery Act (RCRA) to regulate facilities that treat, store, or dispose of hazardous waste. In California, hazardous waste is classified as either being subject to the federal RCRA, or to state laws and regulations. The core activities of the permitting program include review of RCRA and non-RCRA hazardous waste permit applications to ensure safe design and operation; review of operating permits, post-closure permits, emergency permits, permit modifications, and closure plans; oversight of approved closure plans; and providing opportunities for public involvement on issues related to permitted facilities.

DTSC's hazardous waste management enforcement program: DTSC's inspection and enforcement responsibilities include its delegated authority under the federal RCRA, California's HWCL, and state laws pertaining to toxic substances in packaging and consumer products, and the disposal of universal wastes such as electronic waste. Core activities of DTSC's hazardous waste management program include routine compliance inspections and targeted compliance inspections. Routine compliance inspections involve review of submitted data and reports as well as physical observation, testing, and evaluation of regulated facilities. Targeted compliance inspections involve review of specific units or processes in response to focused concerns or to inform permitting decisions, as well as analysis of current and historical compliance to inform those decisions.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): CERCLA, or Superfund, provides a federal "Superfund" to clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, the United States Environmental Protection Agency (US EPA) was given authority to seek out those parties responsible for any release and assure their cooperation in the cleanup. In addition, the US EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act.

Carpenter-Presley-Tanner Hazardous Substances Account Act (HSAA): State law, the HSAA, provides DTSC with general administrative responsibility for overseeing the state's responses to spills or releases of hazardous substances, and for hazardous waste disposal sites that pose a threat to public health or the environment. Additionally, DTSC ensures that the state meets the federal requirements that California pays 10 percent of cleanup costs for federal Superfund sites and 100 percent of the operation and maintenance costs after cleanup is complete. The HSAA provides DTSC with the authority, procedures, and standards to investigate, remove, and remediate contamination at sites; issue and enforce a removal or remedial action order to any responsible party; and impose administrative or civil penalties for noncompliance with an order. Federal and state laws also authorize DTSC to recover costs and expenses incurred by carrying out these activities.

Green Chemistry in California: In 2008, the California Legislature enacted two landmark pieces of legislation to begin implementation of a green chemistry program: AB 1879 (Feuer and Huffman, Chapter 559, Statutes of 2008) and SB 509 (Simitian, Chapter 560, Statutes of 2008). These bills lay the statutory foundation for the state's Green Chemistry Program and are designed to establish a comprehensive approach to chemicals policy. Specifically, AB 1879 (Feuer, Chapter 559, Statutes of 2008) mandates that a regulatory process be established for identifying and prioritizing chemicals of concern in consumer products and to create methods for analyzing alternatives to existing hazardous chemicals. SB 509 establishes the Toxics Information Clearinghouse, with the goal of increasing public knowledge about the toxicity and hazards of thousands of chemicals used in California every day.

The Safer Consumer Products regulatory process: To implement the Green Chemistry statutes, DTSC created what it called a "four-step continuous, science-based, iterative" regulatory process through its "Safer Consumer Products" (SCP) regulations. The SCP regulations were adopted October 2013, and follow the process below:

- 1) Candidate Chemicals – The regulations establish a list of "candidate chemicals" based on the work already done by other authoritative organizations, and specify a process for DTSC to identify additional chemicals as candidate chemicals.
- 2) Priority Products – The regulations require DTSC to evaluate and prioritize product/candidate chemical combinations to develop a list of "priority products" for which alternatives analyses must be conducted.
- 3) Alternatives Analysis – The regulations require responsible entities (manufacturers, importers, assemblers, and retailers) to notify DTSC when their product is listed as a priority product. DTSC will post this information on its website. Manufacturers (or other responsible entities) of a priority product must perform an alternatives analysis for the product and the chemicals of concern in the product to determine how to best limit exposures or reduce the level of adverse public health and environmental impacts posed by the chemicals of concern.
- 4) Regulatory Responses – The regulations require DTSC to identify and implement regulatory responses designed to protect public health and/or the environment and maximize the use of acceptable and feasible alternatives of least concern. DTSC may require regulatory responses for a priority product, if the manufacturer decides to retain the product, or for an alternative product selected to replace the priority product.

In the almost 15 years since the passage of the original Green Chemistry legislation, DTSC has only adopted five priority products, with two additional priority products currently undergoing the regulatory process.

Recent criticism of DTSC: Over the past decade or so, DTSC has received complaints from the public about its permitting program and held public meetings to identify and understand these concerns. Prior to reform, community groups living

near hazardous waste facilities had expressed concern that DTSC was not properly enforcing state and federal laws, and was allowing facilities to operate with an expired permit or with numerous violations of state laws and regulations. Additionally, the regulated community had expressed concerns about the costs associated with processing a permit and the length of time it was taking DTSC to process a permit, which could take years beyond the expiration date of a permit.

Legislative oversight: Over the last seven years, the Legislature has conducted numerous hearings on DTSC's internal controls, its business practices, and its basic statutory obligations. In those hearings, the budget and policy committees have evaluated the following four main areas: (1) reviewing and monitoring the department's strategic plan and reorganization; (2) auditing cost recovery at the department; (3) reviewing staffing needs to improve permit backlogs and business operations; and, (4) improving the department's enforcement activities.

Numerous clarifying and strengthening statutory changes have been made to help DTSC better achieve its mandates. Limited-term budget augmentations have also been made to give DTSC resources to reduce backlogs and address outstanding programmatic failings. However, up until the adoption of reforms in 2021, many of the underlying concerns about transparency, accountability, and long-term stability of DTSC programs remained, as well as a fiscal deficit.

DTSC Independent Review Panel (IRP): In 2015, the Legislature passed and the Governor signed SB 83 (Budget Committee, Chapter 24, Statutes of 2015), which established within DTSC, until January 1, 2018, a three-member IRP to review and make recommendations regarding improvements to DTSC's permitting, enforcement, public outreach, and fiscal management. Over the course of its term, the IRP conducted 24 public meetings and released 11 progress and annual reports. On January 8, 2018 the IRP released its final report and recommendations, which concluded: "The Department has implemented, or is working on, most of the IRP's recommendations and has achieved, or partially achieved, many of the IRP's suggested performance metrics. However, there is more work to be done. In the absence of the IRP, the Governor and the Legislature should consider a DTSC governing board or other structural change to enhance transparency and accountability and regularly monitor the status of the IRP-suggested recommendations and performance metrics, as well as DTSC's ongoing initiatives and decision-making."

DTSC's fiscal situation: DTSC's funding comes primarily from the Hazardous Waste Control Account (HWCA) and the Toxic Substances Account Act (TSCA). The HWCA is a repository for revenues from cost recovery activities and fees paid by various hazardous waste generators, transporters, and facilities. The HWCA funds DTSC's regulatory work overseeing hazardous waste management activities in the state. The TSCA is a repository for revenues from cost recovery, penalties, interest, and the Environmental Fee (established as a 2/3 vote tax). TSCA funds DTSC's work dealing with cleaning up contaminated properties, including federal Superfund sites and state orphan sites, as well as funding the Safer Consumer Products Program.

Prior to budget actions taken last year, both the HWCA and TSCA had been operating with a structural deficit, with expenditures from these accounts exceeding revenues on an annual basis for many years. The Budget Act of 2019-2020 provided the HWCA with \$27.5 million from the General Fund to backfill the shortfall and maintain existing operations. The Governor's budget for 2020-2021 provided a \$12 million backfill for the TSCA and a backfill of approximately \$19 million for the HWCA, as those accounts were projected to be insolvent in the budget year.

Legislative actions: In 2013, the Legislature began introducing legislation to help address concerns raised by community groups and the regulated community. The bulk of the legislation was proposed in 2017 and 2018. In 2013, SB 812 (De León) was introduced to improve the processing of hazardous waste facility permits and the public's involvement in the permitting process; this bill was vetoed by Governor Brown. In 2017, SB 774 (Leyva) was introduced to create a California Toxic Substances Board within DTSC to provide oversight of California's hazardous waste management plan. Due to ongoing discussions with the Administration and the potential for a veto, SB 774 was amended on the Assembly Floor into a different bill. Also in 2017, a package of Assembly bills, including AB 1179 (Kalra) and AB 248 (Reyes), were introduced to improve the permitting process for hazardous waste facility permits, as well as the enforcement of hazardous waste laws and regulations. Ultimately, both bills were vetoed by Governor Brown (the veto message included a reference to DTSC's fiscal deficit as a reason it could not take on any new requirements). In 2020, Assemblymember Cristina Garcia introduced AB 995, which included elements of some of the previous legislative efforts, as well as provisions to update the hazardous waste management plan and improve the permitting process, the public's engagement in the permitting process, and financial assurance requirements for hazardous waste facilities. AB 995 was vetoed by the Governor, citing concerns that the bill contained provisions on governance reform without making fiscal changes that would be needed to help DTSC achieve its mandates. However many elements of AB 995 were ultimately incorporated into SB 158, which passed in 2021 (described further below).

Governor Newsom's response to DTSC's fiscal situation: As part of the 2020-2021 budget, the Newsom Administration proposed a reform package intended to resolve DTSC's governance and fiscal problems. The Administration proposed to remedy the agency's fiscal instability by providing DTSC the ongoing authority to set and revise fees. The Administration included trailer bill language with its proposal to raise fees in the HWCA and TSCA; this language was proposed as a 2/3 vote measure. To address transparency and governance issues, the Administration proposed, also with trailer bill language, to create the Board of Environmental Safety. Ultimately the budget committee deferred action on the administration's proposal to the legislative policy process under AB 995. AB 995 contained many similar elements to the budget proposal but in lieu of the fee authority requested by the administration, the bill proposed the establishment of a fee task force which would have established a public process for determining the funding needs and revenue sources for DTSC operations.

Governor Newsom proposes new DTSC reform package as part of 2021-2022 budget: In response to the veto of AB 995, the Governor announced a new, revised DTSC reform package for 2021-2022 that contained three major components: establishing a Board of Environmental Safety, fee reform, and programmatic reform. Along with this proposal, the Administration also released a detailed workload analysis for DTSC describing the different program areas and what could be accomplished if provided with additional resources. This workload analysis provided the information the Legislature was seeking with the fee task force proposed in AB 995. Additionally, the Governor's proposal included a number of policy changes that were based upon the work of AB 995.

The Governor proposed creating a five-member Board, with members appointed by the Governor. The Board would set fees and fee rates, decide permit appeals for hazardous waste facilities, provide opportunities for public comment on DTSC's permit and remediation decisions, review and approve the DTSC Director's annual priorities and performance metrics, provide long-term goals for DTSC's programs, and provide an annual performance review of the DTSC Director. Along with the Board, the proposal would establish an Ombudsperson to receive and evaluate complaints and suggestions regarding any action, program, or policy of DTSC.

Additionally, the proposal was designed to produce sufficient revenue to eliminate the need to provide General Fund backfill; close DTSC's baseline funding gap; pay the costs associated with the Board, support staff, and Ombudsperson; provide for an additional \$59 million in revenue to support anticipated near-term staffing needs, likely beginning in 2022; and begin to establish a prudent reserve.

As part of the proposal, programmatic changes were included to establish a hazardous waste management plan (Plan) to be presented to the Board. The Plan would include recommendations to establish hazardous waste reduction goals, update DTSC's pollution prevention program, and reduce the risk of exposure to communities threatened by releases of hazardous waste. Moreover, the Governor's proposal included changes to strengthen financial assurance requirements for permitted hazardous waste facilities and establishes accountability requirements for DTSC's permitting of renewal applications for hazardous waste facilities. Ultimately, the Governor's proposal was negotiated with the Legislature and the DTSC reform package was placed within SB 158.

Final DTSC reform (SB 158): In 2021, as a result of months of negotiation, the Administration and Legislature agreed to a compromise on DTSC Reform by enacting SB 158. SB 158 included the creation of the 5-member Board of Environmental Safety that sets policy and prioritizes transparency and accountability for DTSC. Each member of the Board must meet at least one qualification from a specified list and the Board is required to meet at least 6 times a year.

SB 158 also enacted fee reform, by eliminating and modifying some fees. This included repealing the Generator Fee and instead establishing the new Generation and Handling Fee. The bill also created a new (hazardous waste) facility fee and modified and raised the Environmental Fee. All fees were set at a rate that would eliminate

DTSC's operating deficit, provide revenue for anticipated needs in the near-term, fund the Board and the development of a hazardous waste management plan, and provide DTSC with a prudent reserve.

Additionally, SB 158 included a number of programmatic reforms such as the development of a hazardous waste management plan to be completed by March 1, 2025 and updated every 3 years; strengthened financial assurance requirements for both hazardous waste facilities and contaminated cleanup sites; and, made changes to the permitting requirements for hazardous waste facilities to improve the efficiency and transparency of the processing of the permits. Lastly, SB 158 included \$500 million for the cleanup of contaminated sites, including priority for sites where there are high environmental burdens and sensitive receptors.

Board of Environmental Safety: Senate Bill 158 created the Board to improve DTSC's transparency, accountability, and fiscal stability. The Board is comprised of 4 part-time members and one full-time member. Three of the Board members are appointed by the Governor, including the full-time Board Chair, and subject to confirmation by the Senate. The Senate and Assembly each appoint one additional member.

The Board's duties and authorities include developing a multi-year schedule to develop long-term goals for DTSC's programs; reviewing and approving the Director's priorities and adopting performance metrics; adjusting fee rates based upon changes made in the annual Budget Act; hearing and deciding hazardous waste facility permit appeals; providing opportunities for public hearings on permitted and remediation sites; conducting an analysis of DTSC's fee structure; conducting an analysis of DTSC's programs and their relationship with related programs in other agencies; and, forming advisory subcommittees on any topic, including fees and environmental justice. SB 158 also established an Office of the Ombudsperson within the Board and requires the DTSC Director and the Board Chair to appear annually before Legislative policy committees.

The members of the Board are:

Board Chair Appointee Jeanne Rizzo (appointed by Governor Newsom). Chair Rizzo has a background in cumulative impact assessment and management. From 2001 to 2018, Rizzo guided Breast Cancer Prevention Partners through adoption of its mission to prevent breast cancer by eliminating exposure to toxic chemicals and radiation linked to the disease. Under her leadership, the organization showed its commitment to strong science, smart public policy, consumer education and business accountability. Jeanne has also championed initiatives to reduce exposure to toxic chemicals. She is co-founder of the Cancer Free Economy Network, co-chair of the National Institutes of Health's Interagency Breast Cancer and Environmental Research Coordinating Committee, current member of the Seventh Generation Social Mission Board, and past council chair of the California Breast Cancer Research Program.

Board Appointee Sushma Dhulipala Bhatia (appointed by Governor Newsom). Bhatia has a background in environmental science, particularly in engineering and toxicology. She launched award winning environmental initiatives for the City of San Francisco and

received recognition from Mayors Gavin Newsom and Edwin Lee. Currently, Bhatia is head of Strategy and Operations, Payments and Partnerships at Google, where she shaped Google's Financial Services Partnership Solutions Program. Prior to this role, she was a business strategist with Accenture. Her formal background includes a bachelor's degree in Chemical Engineering from IIT-Mumbai, an M.S. from the University of Southern California, and an MBA from the University of California, Berkeley's Haas School of Business. She is a certified Executive Coach from the Berkeley Executive Coaching Institute.

Board Appointee Alexis Strauss Hacker (appointed by Governor Newsom). Having served for 40 years at the US EPA, including as acting regional administrator of EPA Region IX, Hacker is experienced in the wide spectrum of issues and stakeholders involved with regulatory permitting. In addition to her position on the Board of Environmental Safety, she also serves as a governor-appointed member of the San Francisco Bay Regional Water Quality Control Board. She has been recognized with several leadership and management awards in her federal career. She earned a master's degree in urban planning and a bachelor's degree in geography from the University of California, Los Angeles.

Board Member Lizette Ruiz (appointed by Assembly Speaker Rendon). Ruiz is an accomplished environmental scientist. She is currently employed as Staff Scientist with EBI Consulting, an environmental consulting firm. Prior to her current role, she served as the SELA Regional Coordinator with TreePeople, Staff Scientist with Partner Engineering and Science Inc., and Senior Environmental Specialist with Anderson Environmental Consulting. Lizette holds a B.S. in Environmental Science and Policy from California State University, Long Beach, as well as certificates in Hazardous Waste Operations and Emergency Response and in Asbestos Building Inspector initial training courses.

Board Member Georgette Gómez (appointed by Senate President Pro Tempore Atkins). Gómez served on the San Diego City Council from 2016-2020. Before holding political office, she was the Associate Director of the Environmental Health Coalition, which advocates to protect public health and the environment from toxic pollution. Gómez received a bachelor's degree in environmental and natural resource geography from San Diego State University. She worked as a community organizer and victims' advocate. She was also a chairwoman of the San Diego Metropolitan Transit System.

Legislative history of key policy proposals regarding DTSC:

Related Legislation:

- 1) SB 158 (Budget, Chapter 73, Statutes of 2021). Establishes a 5-member Board of Environmental Safety; revises, recasts and increases hazardous waste fees; and makes changes to DTSC financial assurance requirements for hazardous waste facilities and cleanup sites; and makes improvements to the permitting of hazardous waste facilities.
- 2) AB 1 (C. Garcia, 2021). Would have created the Board of Environmental Safety within the California Environmental Protection Agency (CalEPA) to provide policy direction to and oversight of DTSC. Would have raised and recast existing fees within the Hazardous Waste Control Account (HWCA) to fill a projected

deficit of approximately \$18 million. This bill language was no longer pursued due to the compromise legislation in SB 158 and subsequently amended into a different bill.

- 3) AB 732 (Quirk, 2021). Would have increased the rates of the Environmental Fee in an amount sufficient to close the structural deficit within TSCA and provide base funding to support the Site Mitigation Program and Safe Consumer Products Program. This bill language was no longer pursued due to the compromise legislation in SB 158 and subsequently amended into a different bill.
- 4) AB 1024 (Santiago, Chapter 474, Statutes of 2021). Requires DTSC to post on its internet website easily accessible information for each contaminated site cleanup project, as specified. Additionally, requires that moneys recovered by the State from responsible parties relating to the Exide Technology (Exide) cleanup site be used to repay the General Fund, the Lead Acid Battery Cleanup Fund, and any other fund sources for costs incurred during the cleanup of contaminated sites near Exide.
- 5) AB 995 (C. Garcia, 2020). Would have created the Board of Environmental Safety within CalEPA to provide policy direction to and oversight of DTSC. Raises and recasts existing fees within the HWCA to fill a projected deficit of approximately \$18 million. This bill was vetoed by the Governor.
- 6) AB 2094 (Kalra, 2018). Would have required DTSC to, on or before January 1, 2021, adopt regulations establishing inspection frequencies for permitted hazardous waste treatment, storage, and disposal facilities; hazardous waste generators; and transporters. This bill was held in the Senate Appropriations Committee.
- 7) AB 2345 (Reyes, 2018). As it was heard before the ESTM Committee, would have made statutory changes to improve the process for the permitting of hazardous waste facilities. This bill was later amended to require the California Energy Commission to require each large electrical corporation to establish a tariff or tariffs that provide for bill credits for electricity generated by eligible renewable generating facilities and exported to the electrical grid. This bill was held in the Senate Rules Committee.
- 8) AB 2606 (Fong, 2018). Would have required DTSC to process a hazardous waste facility renewal permit in an expedited manner if DTSC determines certain conditions apply. This bill was held in the Senate Appropriations Committee.
- 9) AB 248 (Reyes, 2017). Would have made statutory changes to improve the permitting process for hazardous waste facilities. This bill was vetoed by the Governor.
- 10) AB 1179 (Kalra, 2017). Would have required DTSC to, on or before January 1, 2020, adopt regulations establishing inspection frequencies for permitted hazardous waste treatment, storage, and disposal facilities and for hazardous waste generators and transporters. This bill was vetoed by the Governor.

- 11) SB 774 (Leyva, 2017). As it was heard before the ESTM Committee, would have created the California Toxic Substances Board within DTSC to provide oversight of California's hazardous waste management and the remediation of contaminated sites. This bill was later amended to require the California State University Trustees to oversee a competitive process to award funds to the Wildland and Wildland Urban Interface Wildfire Research Grant Program and appropriate \$5 million from the General Fund to the Trustees in order to oversee the program. This bill was vetoed by the Governor.
- 12) AB 118 (Santiago, Chapter 10, Statutes of 2016). Appropriated \$176.6 million to DTSC to use for activities related to the cleanup and investigation of properties contaminated with lead in the communities surrounding Exide.
- 13) SB 812 (De León, 2014). Would have modified the permitting process and public participation requirements for hazardous waste facilities. Would have established a Bureau of Internal Affairs to oversee DTSC and investigate departmental misconduct and a DTSC Citizen Oversight Committee to receive and review allegations of misconduct. This bill was vetoed by the Governor.
- 14) AB 1329 (V. Manuel Pérez, Chapter 598, Statutes of 2013). Requires DTSC to prioritize enforcement activities in environmental justice communities as identified by the California Environmental Protection Agency.