



FACT SHEET: Reinstatement of Chapter 6.8, The State Superfund (Senate Bill 47)

Introduction

On January 1, 1999, key provisions of Chapter 6.8 of Division 20 of the Health and Safety Code (also known as the "State Superfund") sunsetted. The State Superfund law was originally enacted in 1981, and the Department of Toxic Substances Control (DTSC) is the State agency responsible for ensuring that public health and the environment are protected from the harmful effects of releases and threatened releases of hazardous substances. Senate Bill (SB) 47 (Chapter 23, Stats. 1999) reenacted Chapter 6.8. The key objective of SB 47 was to repeal, reenact and revise the State Superfund law (all references in this fact sheet are to the Health and Safety Code unless otherwise stated). SB 47 is retroactive to January 1, 1999; it also made significant changes. This fact sheet provides a brief overview of the major provisions of SB 47.

● Orphan Share Trust Fund

At some sites, a portion of the liability for contamination is attributable to persons who no longer exist or are no longer financially solvent. This portion of the liability is considered the "orphan share," and is typically paid by the viable responsible parties. This bill establishes an Orphan Share Trust Fund (Fund) which would pay the orphan shares of site investigation and cleanup costs for sites listed under Chapter 6.8, as determined by the Fund Administrator. However, the Fund will not become operative until another statute is passed that creates the position of Trust Fund Administrator and either appropriates funds or establishes a revenue source for the Fund (or both).

▶ Use of Orphan Fund

The Fund would pay the orphan share of costs to investigate and cleanup a site. It also pays for DTSC's or a Regional Water Quality Control Board's (RWQCB's) reasonable costs of their assistance in determining orphan shares (there is a 5% cap on these costs). Funds in excess of \$5 million in any given year (after all orphan share claims have been paid) could be used to pay cleanup of 100% orphan sites if DTSC determines a need.

▶ Eligibility

Persons cannot apply for an orphan share determination until DTSC or RWQCB approves a final Remedial Action Plan (RAP). Applicants must also have entered into an order or enforceable agreement that covers all response actions and must be in compliance with the terms of the order or enforceable agreement. However, sites which have been cleaned up or those where a remedy has been selected prior to 1/1/99, sites on the National Priority List (NPL) or in DTSC's Expedited Remedial Action Program, are ineligible to request orphan share funding. Only "listed" sites (listed pursuant to section 25356) are eligible for orphan share funding.

▶ **Limitations on Claims**

Orphan shares for sites are generally on a “first in/first out” basis. The first payment is made after the final RAP is adopted, the second and last payment are made at the time cleanup construction is complete. Orphan share funding is not available for any long-term O&M costs. Orphan shares at individual sites cannot exceed 75% of the total costs of cleanup and individual claims cannot exceed 10% of the total amount available in the Fund that year. Allocations are expressed in multiples of 5%. Orphan share funding is available only to the extent that there are funds in the Trust Fund, and neither the Fund nor the State has any obligation to pay orphan shares which exceed the available funding.

▶ **Consideration of Other Factors for Orphan Share Determinations**

The Fund Administrator can also consider the apportionment of shares resulting from voluntary arbitration, mediation, or by a civil action. Determinations made by the Fund Administrator are final and are not subject to judicial review unless there is a showing of fraud on the part of a party who submitted information to the Administrator.

▶ **Windfall Profit Lien**

A “windfall profit lien” will be placed on properties cleaned up with the assistance of orphan share funding to the extent that the value of the property increased as a result of the cleanup. Recovered lien funds will revert to the Fund.

● **Financial Assurance for Long-Term Operation and Maintenance**

Responsible Parties (RPs) are required to provide financial assurance that they can fund the long-term Operation and Maintenance (O&M) activities planned for each specific site. DTSC or a RWQCB can make a determination to waive the financial assurance requirement for small businesses under specified conditions.

● **Streamline State Criteria for Remedy Selection**

Under the old provisions of the State Superfund, DTSC was required to discuss how the selected cleanup remedy adequately met six specific State requirements in each RAP. In addition, each cleanup was required to be consistent with the National Contingency Plan’s (NCP’s) nine federal criteria for selection of a remedy. If the RAP discussion of the nine federal criteria adequately addresses the six State criteria, the RAP no longer has to include an additional discussion of the six State criteria.

● **Number of Responsible Parties Named in Orders**

As a matter of practice, DTSC has issued its orders to as many RPs as can be identified, to the extent that the number remained reasonable and manageable. SB 47 requires DTSC to issue its orders to the largest manageable number of potentially responsible parties (PRPs). The identification of additional PRPs would be based on such factors as the evidence of each PRPs’ liability, the financial viability of each PRP, the relationship or contribution of each PRP to the release or threatened release of a hazardous substance at a site, and the resources available to DTSC to make these determinations.

● **Risk Assessments and Future Land Use**

SB 47 requires that response actions are to be based on the NCP (these are the regulations for the

federal superfund law) and the State Water Code requirements. Risk assessments are required to evaluate acute, carcinogenic, and non-carcinogenic risks; consider synergistic effects and sensitive subgroups; and consider contaminant exposure and all impacted media. Risk assessments are to be based on U.S. EPA guidance and the most current sound science. It also requires the risk assessment to include the development of reasonable maximum estimates of exposure for both current and reasonably foreseeable uses of the contaminated property.

● **Public Participation**

DTSC ensures that the interested public has ample opportunities to receive information and participate in DTSC's decision-making process for site investigations and cleanups. SB 47 adds additional public participation components (for listed sites, pursuant to section 25356) that will be detailed in a separate fact sheet:

- ▶ **Community Advisory Groups (CAGs)**
- ▶ **Community Service Offices (CSOs)**
- ▶ **Technical Assistance Grants (TAGs)**

● **Limited Liability Relief to Homeowners**

SB 47 provides that homeowners/homeowner associations are not considered to be RPs if they did not know about a hazardous substance release (except for groundwater contamination) on the property when they bought it. However, for homeowners/homeowner associations who purchase property with known groundwater contamination from an offsite source, in order to be eligible for the limited liability relief, they cannot cause or contribute to the contamination, must provide DTSC or its representatives access to the property, and must not interfere with the cleanup actions.

● **De Minimis Settlement and Third Party Liability Protection**

To better manage the cleanup and coordination with the responsible parties, it is beneficial to DTSC and to the responsible parties if settlements are reached with as many as possible of the minimally contributing (also known as de minimis) parties early in the process. SB 47 gives DTSC specific authority to negotiate de minimis settlements and provide protection to these parties from third party lawsuits.

● **Sunset Provision and Retroactivity**

SB 47 eliminates the former "sunset" provision in Chapter 6.8. SB 47 specifies that the sunset does not terminate, affect or modify any proceeding, order or agreement issued or entered into based on the State Superfund. The provisions of the reenacted State Superfund Chapter 6.8 are to apply retroactively.

● **Listing Process/Agency Coordination**

SB 47 modifies the listing process in Health & Safety Code (H&SC) section 25356 by adding a provision that DTSC and the RWQCBs are the agencies with sole jurisdiction at a listed site, and they shall, as appropriate, coordinate the involvement of other agencies and interested parties in the response action. All listed sites are subject to the Chapter 6.8 cleanup process, which would include those where the RWQCB is the lead agency.

- **Obsolete Sections**

SB 47 eliminates some obsolete sections and subsections of the State Superfund statute and corrects punctuation or typographical errors in citations and references to other statutes.

- **Other 1997/98 Legislative Changes That Impact Chapter 6.8**

- ▶ **AB 871 (Chapter 430, Stats. 1998) - Allows DTSC to Work on Petroleum-Contaminated Sites Under Voluntary Cleanup Agreement** - Enacts H&SC section 25355(c)(2) to allow DTSC to enter into voluntary cleanup agreements to oversee the cleanup of petroleum releases (other than releases from underground storage tanks).

-- **Deed Restriction Registry** - AB 871 also amended the requirement for DTSC to notify planning and building departments of each city, county, or regional council of governments of any DTSC land use restrictions imposed by adding certain remedial action land use controls (H&SC sections 25229 and 25398.7). Additionally, DTSC is required to maintain a list of all DTSC recorded land use restrictions, including deed restrictions. DTSC is required to make its list of recorded deed restrictions available to the public, upon request, and place the list on the DTSC Internet website.

-- **Polanco Act/Redevelopment Agencies** - Among other things, AB 871 extended the repeal date of the Polanco Act (commencing with section 33459.1) to January 1, 2004.

- ▶ **AB 681 (Chapter 255, Stats. 1998) - Requires Notice to Current Owners of Record** - Enacts H&SC section 25355.8 that prohibits DTSC from considering a cleanup, site closure proposal, entering into an agreement to oversee the preparation or review of a Preliminary Endangerment Assessment (PEA) for a property, or issue a letter of No Further Action (NFA), unless the person requesting DTSC to take action has taken steps to identify and notify the current owners of record.
- ▶ **SB 2240 (Chapter 882, Stats. 1998) - Increases dollar amount for oral contracts when immediate action is required** - Enacts H&SC section 25354.5, which among other things, raises the amount from \$5,000 to \$10,000 in which DTSC may enter into oral contracts when immediate corrective action is necessary to address an emergency.

To find out more about the reenactment of Chapter 6.8, The State Superfund (Senate Bill 47), contact:

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- ▶ Information is also available on DTSC's Internet address: <http://www.dtsc.ca.gov>