

Independent Review Panel

DEPARTMENT OF TOXIC SUBSTANCES CONTROL



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DTSC Independent Review Panel Third Report to the Governor and the Legislature Pursuant to Health and Safety Code Section 57014(f)

July 26, 2016

Introduction

The Department of Toxic Substances Control (DTSC) Independent Review Panel (IRP) submits this third report in compliance with section 57014(f) of the Health and Safety Code (HSC), which requires the Panel to report to the Governor and the Legislature 90 days after it was appointed and every 90 days thereafter on DTSC's progress in reducing permitting and enforcement backlogs, improving public outreach, and improving fiscal management. The Panel submitted its first report on January 28, 2016 and its second report on April 21, 2016.

The first report addressed five DTSC topics: budget, permitting, enforcement, public outreach, and fiscal management. After providing background information, the report made initial recommendations to the Governor and Legislature, recommendations to DTSC, and information requests to the DTSC for each topic. The second report presented initial recommendations for DTSC's site mitigation Brownfields and Environmental Restoration Program. Following the example of the first report, this second report included recommendations to the Governor and Legislature, recommendations to DTSC, and information requests of the DTSC. The second report also addressed DTSC's permitting efforts and presented Permitting Program recommendations to the Governor and Legislature, recommendations to DTSC, suggested performance metrics, and information requests.

Following the IRP Work Plan for the remainder of 2016 and all of 2017 until the Panel's sunset date as stipulated in HSC section 57014(i), the IRP devoted the majority of its May 12, June 8, and July 13 public meetings to DTSC enforcement. The IRP also asked DTSC to provide the Panel with various enforcement information and data. Using the information gathered and discussed, this third report is devoted to an in-depth discussion of enforcement, including recommendations for the Governor and Legislature, recommendations for DTSC, suggested performance metrics, and information requests.

Enforcement Program Summary

The DTSC inspection and enforcement program involves two divisions in the Hazardous Waste Management Program (HWMP): the Enforcement and Emergency Response Division (EERD) and the Office of Criminal Investigations (OCI). EERD conducts inspections and has regulatory authority to enforce hazardous waste laws through administrative and civil enforcement. It has 113 (?) authorized positions, primarily environmental scientists. OCI investigates criminal violations of hazardous waste laws. It has 33 (?) authorized positions, including 15 (?) sworn criminal investigators and 15 (?) environmental scientists. Staff members from other divisions assist in the department's inspection and enforcement activities in many capacities.

Inspection and enforcement play a crucial role in protecting public health and the environment from the harmful effects of toxic substances. Although the department's performance has exceeded national goals and averages for most of the past five years, there has been room for improvement.

In a 2014 DTSC report on progress in implementing its 2013 strategic plan for 2014-18, "Fixing the Foundation – Building a Path Forward," Acting Director Miriam Barcellona Ingenito wrote the following: "For several years, DTSC's efforts to carry out this mission were compromised by deficiencies in technical and administrative processes and procedures, from a misaligned personnel system to insufficient coordination between programs. These systematic issues resulted in a structural budget deficit; \$184.5 million in uncollected cleanup costs dating back 26 years; a growing backlog of applications to renew hazardous waste permits; and decreased stakeholder confidence and public trust in the Department." With respect to inspection and enforcement, a 2015 DTSC budget change proposal to improve enforcement performance identified key areas where improvements were needed. They included: (1) clearer and more consistent metrics for assessing facility compliance; (2) updated policies and procedures for responding to non-compliance; (3) improved responsiveness to communities impacted by hazardous waste facilities; and (4) more timely actions in sending inspection reports to hazardous waste facilities, issuing final administrative orders after inspection, settling administrative cases, and referring cases to the Attorney General's Office.

DTSC's inspection and enforcement responsibilities include its delegated authority under the federal Resource Conservation and Recovery Act (RCRA), California's Hazardous Waste Control Law, and state laws pertaining to toxics in packaging, toxic substances in consumer products, and disposal of universal wastes such as electronic waste. The HWMP also conducts emergency response removal actions, provides support to the department's Permitting Division, evaluates the hazardous waste portion of the implementation of the Unified Program by Certified Unified Program Agencies (CUPAs), and serves as the state-implemented CUPA (SCUPA) for Imperial County and Trinity County.

Core activities of the HWMP include: (1) routine compliance inspections, which involve review of submitted data and reports as well as physical observation, testing, and evaluation of regulated facilities; and (2) targeted compliance inspections, which 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. Core activities also include: (1) complaint response, which involves operation of the DTSC Hazardous Waste Alert Hotline, collaboration with CalEPA's Environmental Complaint System, triaging complaints, and referring appropriate complaints to other agencies; and (2) civil and criminal investigations, including facility-specific, sector-based, and geographically-focused investigations. Among the civil and criminal investigations are inspections of hazardous waste generators, transporters, used-oil recycling facilities and handlers, and electronic waste recyclers and handlers. Other core enforcement activities include collaboration with DTSC's Office of Permitting and Geologic Services Branch to evaluate and inspect groundwater monitoring systems at operating and closed land disposal facilities, supporting CalEPA's CUPA evaluations, and administering the SCUPA.

Inspections

According to a July 7, 2016 draft of the DTSC report to the IRP on Enforcement Program Performance: FY 2015-2016, the department has met or exceeded its federal inspection targets under the RCRA Grant as well as nearly all of its state inspection commitments and targets based on its available data. The following is a summary of the DTSC-provided inspection information by program area:

- *Permitted Facilities.* DTSC enforcement staff inspects RCRA and non-RCRA permitted facilities that treat, store, and dispose of hazardous waste. DTSC's RCRA grant includes required inspections for RCRA facilities, and DTSC establishes targets for non-RCRA facilities. In FY 2015-16, DTSC committed to inspect a total of 35 RCRA and non-RCRA facilities and conducted 55 inspections (157 percent of target), including 9 federal facilities it inspected on behalf of U.S. EPA Region IX.
- *Electronic Waste.* DTSC enforcement staff inspects e-waste referred to as Covered Electronic Waste (CEW) in Public Resources Code section 42479. Annual inspections are required of all CEW Recyclers. DTSC inspected 53 of the 54 CEW recyclers in FY 2015-16 (98 percent). The statute does not specify inspection of CEW collectors. However, a memorandum of understanding between DTSC and Cal Recycle establishes a goal for DTSC to inspect each CEW collector approximately once every five years. In FY 2015-16, DTSC set a target to inspect 75 CEW collectors and inspected 72 of the 441 collectors in the Cal Recycle CEW Information Database as of July 5, 2016 (96 percent).
- *Hazardous Waste Transporters.* DTSC enforces statutes and regulations governing the transportation of hazardous wastes pursuant to HSC section 25180. The statute does not specify a routine inspection requirement. Routine inspections typically involve a comprehensive review of the transporter company, including the company's compliance with manifest requirements. In FY 2015-16, under a focused initiative to improve hazardous waste transportation compliance in vulnerable communities, DTSC set a goal of inspecting 34 transporters and inspected 69 (203 percent).
- *Border Enforcement.* Pursuant to HSC section 25180, DTSC inspects shipments of hazardous wastes at ports of entry and in the California border area and reviews import-

export notifications. US Customs restricts hazardous waste transport from Mexico into California to two ports of entry (Otay Mesa and Calexico) and also restricts the days and times for border crossing. DTSC inspects all hazardous waste transporters that cross during the prescribed times. In FY 2015-16, DTSC inspected 2,909 northbound shipments across the border for hazardous waste, products returned to the U.S., universal waste, and nonregulated materials. During FY 2015-16, DTSC also participated in a special investigation of 125 southbound shipments of non-regulated materials.

Complaint Response

DTSC receives complaints from its complaint hotline and the CalEPA Environmental Complaint System. The latter includes complaints from the community-based reporting tool used by the IVAN (Identifying Violations Affecting Neighborhoods) network. After a preliminary investigation, if there is enough information to conduct an investigation, DTSC investigates the complaint or refers it to another entity. This may be another board, department or office within CalEPA. Or it may be another agency, such as U.S. EPA, or a local CUPA or air district. According to DTSC, the department received 531 complaints in FY 2015-16. Of them, 409 were referred to agencies outside of CalEPA and 51 complaints to entities within CalEPA. EERD retained 33 complaints, 26 of which were investigated by OCI. Six were still in screening review and one was awaiting assignment to an investigator as of July 5, 2016. Five complaints did not have sufficient information to investigate or were duplicative.

Investigations

OCI primarily investigates alleged criminal violations of the Hazardous Waste Control Law and pursues a wide range of both felony and misdemeanor cases. It coordinates multi-media environmental investigations with other CalEPA agencies and participates with regional, state, and federal task forces, including the Office of the Attorney General, Offices of U.S. Attorney, district attorneys, and circuit prosecutors. According to DTSC, OCI initiated 112 new investigations, referred 12 cases for prosecution, and settled 3 cases in FY 2015-16. It also closed 225 cases due to insufficient evidence, expired statute of limitation, etc. OCI began a new initiative to investigate metal recyclers and conducted 12 such investigations during that period.

Multi-Entity Investigations

DTSC cooperates with other government entities to enforce laws pertaining to toxic substances. Section 12812.2 of the Government Code provides for a deputy to the CalEPA Secretary to coordinate enforcement actions among the agency's entities and establish a cross-media unit to conduct enforcement investigations that involves the jurisdiction of more than one entity. HSC section 25179 requires DTSC to establish a Hazardous Waste Strike Force consisting of representatives of 13 state agencies. There are many local task forces that deal with toxic substances enforcement, and DTSC participates in them when appropriate. DTSC works with U.S. Customs and Border Protection as well as Mexican government officials on border issues. It works with the California Highway Patrol to ensure that hazardous waste transporters comply with laws regarding toxic substances.

CUPA Evaluations

HSC section 25404.4 requires CalEPA's Secretary to periodically review the ability of each CUPA to carry out the requirements of the chapter. The process is defined in Title 27 of the California Code of Regulations, article 8, section 15330.

CalEPA leads a team made up of senior staff from DTSC, the Office of Emergency Services, the State Water Resources Control Board, and the Office of State Fire Marshall to evaluate each CUPA triennially. In FY 2015-16, CalEPA identified 21 CUPAs for detailed evaluations. DTSC's EERD staff participated in all 21. Participation includes at least one field investigation, and DTSC performed 31 during the fiscal year.

SCUPA Administration

DTSC implementation of CUPA programs for Imperial and Trinity counties includes: hazardous waste generator and tiered permitting, hazardous materials release response plans and inventory programs, regulation of above-ground and underground storage tanks, and the California Accidental Release Prevention Program (CalARP).

According to DTSC, the SCUPA program for Imperial County exceeded all annual element inspection targets, except for underground storage tank inspections, which were 91 percent of target, during FY 2015-16. Triennial element inspections in Imperial County between July 1, 2013 and June 20, 2016 ranged from 92 to 98 percent of the targets, except for inspections of facilities subject to the CalARP, which only reached 73 percent of target. The SCUPA regulated 836 businesses in Imperial County. The SCUPA inspection program for Trinity County exceeded all annual element inspection targets during FY 2015-16. Triennial element inspections in Trinity County ranged from an 85 percent to a 100 percent completion rate between July 1, 2013 and June 30, 2016. The SCUPA regulated 139 businesses in Trinity County.

Toxics in Packaging

Pursuant to HSC sections 25214.11 through 25214.26, California limits cadmium, lead, mercury, and hexavalent chromium in product packaging. These restrictions include any packaging or packaging component sold in the state. The laws affect all manufacturers, distributors, and resellers, regardless where the packaging was made, distributed from, or sold. The statutes, however, do not provide for any routine inspection of packaging. Nevertheless, DTSC has authority to enforce the law. In FY 2015-16, DTSC undertook one comprehensive assessment of multiple food and beverage packaging. The findings will be released in FY 2016-17, according to the department.

Improving Enforcement Performance Workplan and Recent Program Improvements/Activities

"Fixing the Foundation – Building a Path Forward" outlined several objectives for improving enforcement. Among them were: (1) improving effectiveness, efficiency, and consistency in enforcing hazardous waste laws; (2) make enforcement program's information and processes more accessible; (3) establish clear guidelines for decision points to ensure that enforcement actions result in timely resolution with appropriate penalties and corrective actions; (4) apply criteria and processes to prioritize work; (5) implement a new system for hazardous waste tracking data; (6) improve training and program approaches for CUPAs in collaboration with CalEPA; (7) increase collaborative enforcement efforts with other agencies; (8) implement a

groundwater monitoring oversight program for land disposal facilities; and (9) assess historical metal shredder waste reclassification decisions.

DTSC received resources to develop and implement a two-year plan to improve its enforcement processes and outcomes in the FY 2015-16 budget. The Improving Enforcement Performance Workplan has the following goals: (1) clearly define the inspection and enforcement process and identify areas for streamlining the process as well as barriers; (2) establish clear metrics to evaluate performance; (3) create a formal review process for enforcement case management; (4) clearly communicate the inspection and enforcement processes to stakeholders and the community; and (5) incorporate community engagement in setting priorities. Although DTSC indicated in its project budget change proposal that it would finalize the plan by the end of June 2016, the department reported to the IRP that its subsequent decision to use the rigorous Lean Sigma Six methodology has resulted in postponement of this milestone. As indicated below, DTSC reported to the IRP that it expects to adopt the workplan by January 1, 2017.

Although the planning process is ongoing and will not conclude until June 30, 2017, DTSC recently reported that program improvements are underway in the following areas: environmental justice, communication, analysis and transparency, efficiency, consistency and rigor, sector-based enforcement, and data management.

- *Environmental Justice.* In cooperation with DTSC's newly established Office of Environmental Justice and Tribal Affairs, enforcement staff members are conducting a comprehensive evaluation of the Enforcement Program to identify gaps and develop strategies to more effectively address compliance challenges in disadvantaged communities. Meanwhile, DTSC is taking steps to improve its enforcement in disadvantaged communities. The department is using CalEnviroScreen to prioritize inspection and investigation in disadvantaged communities, such as enhanced inspections of hazardous waste transporters and metal recyclers. The department expanded the IVAN network to the Bayview Hunters Point neighborhood in San Francisco in 2015-16. It actively participates in the CalEPA Environmental Justice Compliance Working Group, which conducts multi-media enforcement initiatives in disadvantaged communities. It signed a Supplemental Environmental Project (SEP) policy on May 5, 2016 pertaining to environmentally beneficial projects that persons subject to an administrative or civil enforcement action can agree to undertake in settlement of the action.
- *Communication.* DTSC reports that it is taking steps to ensure that Enforcement Program staff communicate, coordinate, and collaborate consistently within the department and with co-regulators, regulated businesses, and the public. Liaisons have been established to improve internal communication. Externally, DTSC helped roll out CalEPA's online Environmental Complaint System and offered three California Compliance School classes for businesses in 2015-16.
- *Analysis and Transparency.* DTSC reports that it is developing analytics and metrics to better characterize work done by the department and make that information available to

the public. In FY 2015-16, Enforcement Program staff collaborated with the Office of Legal Counsel on a draft quantitative approach for measuring and comparing compliance to allow assessment of compliance across diverse industry sectors and facility types. This draft is undergoing final review and should be available for public discussion in September of 2016. In 2014, information was added to the website and to EnviroStor to provide access to inspection data and reports for permitted facilities, Summaries of Violation, and enforcement settlements. Further enhancements are currently under development to provide inspection and enforcement performance metrics online. When the compliance analytics methodology is final, DTSC indicates it will also provide compliance outcomes online. DTSC implemented a pilot project during FY 2015-16 to provide public comment on draft settlement agreements. Participation was voluntary on the part of the facilities, and DTSC was unable to secure participation. As a result, the department is evaluating options for requiring public comment on draft settlement agreements, including, for example, when a sector or facility has poor compliance history or low compliance index as compared to other sectors or facilities.

- *Efficiency and Effectiveness.* DTSC has begun to implement structured analyses of enforcement program elements using the Lean Six Sigma methods to increase efficiency and eliminate waste in its processes. An analysis of OCI case management and backlog of unresolved cases established a goal for the office to refer 95 percent of cases within 180 days. A not-yet-concluded analysis of administrative enforcement cases has a goal of completing 90 percent of EERD enforcement actions for administrative cases within 180 days when the calculated penalties are less than \$75,000.
- *Consistency and Rigor.* DTSC reports that it is developing and updating its enforcement regulations, policies, and guidelines. For example, the department is working on Violation Scoring Procedures (VSP) to inform permitting decisions by evaluating a hazardous waste facility's compliance history. The department expects to propose regulatory language on the VSP by January 1, 2017. In another example, DTSC required all penalty calculations to be reviewed by a multi-disciplinary Penalty Working Group during FY 2015-16. A Lean Six Sigma project is expected to further improve the penalty calculation process, and preliminary analysis suggests that regulatory changes may be needed to achieve some of the desired improvements.
- *Sector-Based Enforcement.* OCI conducted 12 metal recycler inspections in FY 2015-16 and plans to complete 30 in FY 2016-17. DTSC reached penalty settlements with mercury thermostat manufacturers for falling short of annual performance goals for diverting mercury thermostats from the solid waste stream. EERD plans to focus a portion of the scheduled transporter inspections in FY 2016-17 on transporters of asbestos waste as a result of identified compliance issues among removal contractors from FY 2015-16 manifest inspections.
- *Data Management.* According to DTSC, enforcement staff members worked with the Department's Office of Environmental Information Management on data management improvements in 2015-16.

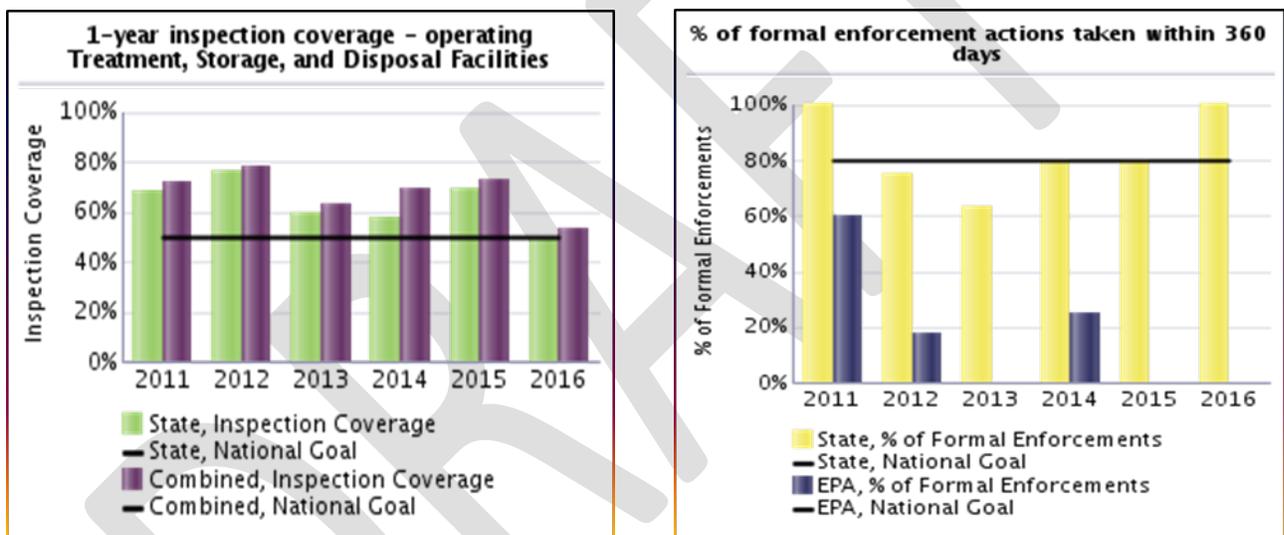
It is important to recognize that the development and implementation of enforcement improvement plans are progressing, but are still in their initial stages.

DTSC Performance Reports to U.S. EPA

The IRP notes that DTSC and the CUPAs report their hazardous waste inspection and enforcement activities to U.S. EPA, which in turn reports this information in its Enforcement and Compliance History Online (ECHO) system: <https://echo.epa.gov/>.

Users can view a California Hazardous Waste Dashboard that compares the state's performance with national goals and averages for inspections, violations found during inspections, significant non-compliance, enforcement actions, and penalties – over multiple years:

<https://echo.epa.gov/trends/comparative-maps-dashboards/state-hazardous-waste-dashboard?view=performance&state=CA#critical>. Below are two examples:



U.S. EPA cautions viewers that data alone cannot provide a complete picture of performance that many states have issues with data completeness and accuracy, and that there is important context around data that must be taken into account to provide an accurate picture. Nevertheless, it appears from the ECHO information that DTSC has met or exceeded national goals during most of the previous five years.

The IRP believes that a focus on national performance is both fundamental and crucial.

Update on Previously Submitted IRP Enforcement Recommendations

In its January 28, 2016 initial report to the Governor and Legislature, the IRP made three enforcement-related suggestions for DTSC. They were:

1. Adopt by May 1, 2016 an AB 1071-compliant SEP policy.

DTSC Director Barbara A. Lee signed the department's first SEP policy on May 5, 2016. Under it, up to 50 percent of fines and penalties from hazardous waste settlements could be directed toward projects that improve public health or the environment. The policy prioritizes the use of SEPs in communities where a violation occurred and in environmental justice communities. Federally recognized Native American tribes are also eligible to apply for this funding. The policy describes types of potential SEP projects and requires accountability for all funding.

2. Adopt by January 1, 2017 the Improving Enforcement Performance Workplan.

Director Lee reported to the IRP at its June 8, 2016 meeting that the department is on track to adopt this program improvement workplan by January 1, 2017.

3. Adopt guidance or publish draft regulations by January 1, 2017 on DTSC's VSP.

DTSC indicated in its recent Enforcement Program Performance report to the IRP that the department expects to proposed regulatory language by January of 2017.

In a recommendation to the DTSC in the IRP's April 21, 2016 report, the panel returned to the VSP issue. This new recommendation was as follows:

1. Create a guidance document on the relationship between the VSP, AB 1075, the California hazardous waste violation classification system, and the federal hazardous waste violation classification system by January 1, 2017.

In response to an IRP information request for a list of current hazardous waste facility permit holders that fall within the provisions of AB 1075's requirement that DTSC consider repeating violators or noncompliance in making permit decisions, the department reported on May 5, 2016 that it could find no hazardous waste facility with an operating permit that met all of the criteria established by the 2015 legislation. At the IRP's meeting on January 8, 2016, Director Lee stated her belief that the VSP is not expected to be inconsistent with AB 1075, would not implement the new law, and would be more nuanced as well as useful.

Recommendations to the Governor and Legislature to Improve Enforcement

1. Include hazardous waste facility inspection frequencies in statute. The frequency of inspections should be based on facility compliance history, quantity of waste, and proximity to sensitive habitats and populations at risk, including disadvantaged communities.

2. Support AB 1858 (Santiago), which requires the Department of Motor Vehicles to establish an Unlicensed Automobile Dismantling Task Force to investigate the occurrences of unlicensed vehicle dismantling.
3. Increase the maximum penalty for violations of HSC sections 25189 and 25189.2 from \$25,000 to \$27,500 so that California penalties are equal to federal penalties.

Recommendations to the DTSC to Improve Enforcement

1. Evaluate the number of positions and vacancy levels in OCI and EERD.
2. Evaluate the level of participation in state and local task forces that investigate environmental crimes.

Recommended Goals and Performance Metrics for Enforcement

1. Measure the number of inspection sent to hazardous waste facility operators within the statutory time periods, with a goal of 100 percent of the time each fiscal year.
2. Meet or exceed national average in the percentage of permitted hazardous waste treatment, storage, and disposal facilities inspected each fiscal year.
3. Measure and evaluate the violations found during comprehensive inspections of hazardous waste treatment, storage, and disposal facilities per fiscal year.
4. Measure and evaluate the percentage of hazardous waste treatment, storage, and disposal facilities with comprehensive inspections in which Statement of Noncompliance was determined per fiscal year.
5. Measure and evaluate the percentage of formal enforcement actions taken within 360 days of Statement of Noncompliance per fiscal year, with a goal of exceeding the national average.
6. Measure and evaluate the number of final formal enforcement actions and associated penalties per fiscal year.
7. Measure and evaluate the referral time for OCI cases with a goal of referring 95 percent of the cases within 180 days.
8. Complete 90 percent of EERD administrative enforcement actions within 180 days when the calculated penalties are less than \$75,000.

Data Requests to the DTSC on Enforcement Program

DTSC satisfied all IRP inspection and enforcement data requests during this reporting period. No additional information is requested.

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