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**DRAFT INITIAL STATEMENT OF REASONS**  
**Environmental Tax**  
**Department of Toxic Substances Control Reference Number: R-2006-03**  
**Office of Administrative Law Notice File Number: Z-**

## **EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS**

The proposed regulations do not duplicate or conflict with federal regulations. No federal agency administers fees or taxes related to organizations that use, generate, store, or conduct activities in California related to hazardous materials as defined in Health and Safety Code section 25501. The definition of hazardous materials incorporates and is consistent with several federal laws listing hazardous materials and wastes.

## **STUDIES RELIED ON**

For the purpose of developing the list that is required by this regulation, DTSC reviewed the various industry code categories to determine whether the businesses identified by those codes had requested identification numbers required for persons who handle hazardous wastes. No independent studies were directly relied upon.

## **ALTERNATIVES CONSIDERED**

Chosen alternative: DTSC's selected the alternative that fulfills the requirement of a ruling from the California Supreme Court, which is to adopt a regulation to implement and interpret Health and Safety Code section 25205.6. In its April 24, 2006, ruling in *Morning Star Company v. State Board of Equalization*, 38 Cal. 4<sup>th</sup> 324 (*Morning Star*), the Court ruled that DTSC was in violation of the Administrative Procedure Act, Government Code section 11340 et seq. (APA). To correct the violation, DTSC must promulgate a regulation for the proper implementation of Health and Safety Code section 25205.6. This section requires DTSC to annually prepare a list, by Standard Industrial Classification (SIC) Codes or North American Industry Classification System (NAICS) Codes, of all industry types that use, generate, store, or conduct activities related to hazardous materials, and submit this list to the Board of Equalization (BOE). The Court stated that DTSC's existing practice of providing all the SIC codes to BOE was a reasonable basis for assessing the environmental tax (*Id.* at p. 328), but found it did not meet the test of "the sole 'legally tenable' interpretation" of the law. (*Id.* at p. 339.) Thus, DTSC's interpretation of Health and Safety Code section 25205.6 must comply with the customary APA requirements of advance notice, public comment, and review by an independent office that measures it against the law passed by the Legislature.

Other alternatives:

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Do nothing. This alternative is not viable because doing so would place DTSC in violation of the decision of the California Supreme Court in *Morning Star*.

Promulgate a regulation that construes Health and Safety Code section 25205.6 in some way that narrows the list of industries that are subject to the environmental tax. DTSC rejected this alternative because, for reasons explained in the Detailed Statement of Reasons, it is not the best construction of Health and Safety Code 25205.6. (*Morning Star, supra*, 324 Cal. 4<sup>th</sup> at p. 341.)

## **DETAILED STATEMENT OF REASONS**

### **Add Chapter 19, Section 69269.1**

DTSC is proposing to add the following sections:

The preamble to the regulation explains that every business in California with fifty or more employees uses, generates, stores, or conducts activities related to hazardous materials, as those terms are used in Health and Safety Code section 25205.6 and in this regulation. The preamble thus makes it immediately clear what the impact will be of implementing the pertinent statutory and regulatory definitions and procedures in a manner than offers the best construction of section 25205.6, and complies with the direction of the California Supreme Court.

Subsection (a) defines certain terms that are used either in this regulation or in Health and Safety Code section 25205.6 that are not defined elsewhere in this title or in statutes that directly govern the environmental tax. These terms could cause uncertainty if they do not have settled legal definitions.

Subsection (a) (1) defines “employee”. Clarification of the term is important because of issues related to specific types of employees, with a need to resolve questions about the employment status of persons such as leased employees and contract workers. The definition here incorporates the standards of the California Employment Development Department (EDD) for deciding who must report as the employer for purposes of unemployment insurance data. This definition of “employee” is preferred because EDD’s definitions are very comprehensive and rely heavily on the accepted, common law definition of “employee”; i.e., a person whose labor is under the direction and control of another, taking into account how that definition has been expanded, refined, and explained by numerous courts over the years. Moreover, the definition of employee included here provides for a workable definition by which the State Board of Equalization (BOE) can administer the environmental tax, by providing an objective standard applicable across tax-paying entities. BOE utilizes data provided by EDD in its administration of the environmental tax.

Exceptions to the EDD standards for defining an employee are added for two reasons. First, allowing exceptions based on statute takes into account that Health and Safety Code section 25305.6 limits the meaning of “employee” to a person who works at least

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500 hours per calendar year. Also, this regulation provides that, if two or more businesses have a unity of ownership, the person is deemed to be the employee of the enterprise for which he or she most directly provides services. This is a departure from EDD's practice. DTSC believes that the rule stated in this regulation is closer to the common law meaning of "employee", and therefore is more effective in implementing the intent of Health and Safety Code section 25205.6.

Subsection (a) (2) defines "environmental tax" in order prevent the term "environmental tax" from being mistakenly applied to other charges that are assessed for DTSC's support, such as the hazardous waste generator or disposal fees.

Subsection (a) (3) defines "hazardous material" in a way that is consistent with Health and Safety Code sections 25205.6(a) and 25501, and fulfills the mandate of the Supreme Court. Section 25205.6(a) defines "hazardous material" by reference to section 25501. Section 25501, in turn, defines a hazardous material to mean a product, substance, or waste that poses a "significant hazard", which it then goes on to define broadly as any material included on one of several lists. However, the Court found that the statutory definition is insufficient without further interpretation by DTSC, observing that "the term 'significant' [is] sufficiently ambiguous to allow for at least some agency discretion in interpreting it." (*Morning Star, supra*, 38 Cal. 4<sup>th</sup> at p. 338.) In this subsection, DTSC resolves the ambiguity cited by the Court, by finding that merely being included on one of the lists of hazardous materials cited by the Legislature demonstrates that the material constitutes a significant risk.

The language of section 25205.6 and 25501 shows that the Legislature intended that, in determining "significant risk", one needs only to determine whether the substance has been previously deemed sufficiently dangerous to be included on one of the lists cited by the statute. It is noted that each of these lists has already undergone public scrutiny through the legislative or regulatory process. The alternative interpretation is that one should determine risk by looking in part to the amount of the substance or to the manner in which it is used. DTSC rejects these alternative interpretations as being, at best, tenable readings of the statutes, but not the preferred readings, for the following reasons.

Had the legislature intended to make the quantity or type of usage a necessary criterion in all cases for "significant risk", it could have stated this in Health and Safety Code sections 25205.6 or in 25501. Section 25205.6 says nothing about the amount or the type of usage; indeed, its plain language infers that any usage is sufficient. As to section 25501, it lists "quantity" as only one possible source of significant risk. It states that a material can be deemed hazardous because of its "quantity, concentration, or physical or chemical characteristics." Had the Legislature intended that quantity and must in all cases be taken into account, it would have used the conjunctive word "and", rather than "or." Section 25501 states that any material that is included on the enumerated lists is a hazardous substance or hazardous waste, with no additional requirement other than that it must be on one of the lists.

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Also, subsection (a) (3) clarifies that “hazardous material” includes products and equipment that have hazardous materials as components, ingredients, or fuels. DTSC concludes that this interpretation is also consistent with the intent of section 25205.6, which uses very broad language in saying that the usage need only be “related to” hazardous materials.

Finally, the definition of “hazardous material” that has been used in this subsection is in keeping with an interpretation of section 25205.6 that the Supreme Court found to be reasonable in the *Morning Star* case. This definition will probably result in all SIC codes being provided to BOE, except as otherwise exempted by law. The Supreme Court in *Morning Star* found that the “view that all California corporations ‘use, generate, store, or conduct activities in this state related to hazardous materials’” is “reasonable”, but “constitutes a ‘regulation’ under the APA.” (*Morning Star, supra*, 38 Cal. 4<sup>th</sup> at p. 328.)

Subsection (a) (4) is added to explain what it means to “use” hazardous materials and to “conduct activities related to” hazardous materials. As with subsection (a) (3), the intent of this paragraph is to be consistent with Health and Safety Code section 25205.6, subdivision (a), and to fulfill the mandate of the Supreme Court to provide regulatory support for DTSC’s interpretation of the statute. By finding that any use or handling is sufficient, rather than only certain types of use, and that any amount or degree is sufficient, DTSC adheres to the plain language of section 25205.6. Also, DTSC adopts a construction that fulfills the manifest purpose of the environmental tax, for the following reasons.

While an individual company may use, generate, store, or conduct activities related to only small amounts of hazardous materials, the cumulative amount used by all companies is significant. Thus, it is reasonable for the Legislature to require that a comparatively small tax or fee should be assessed in recognition of each organization’s contribution to the overall problem of dealing with hazardous materials. There are already much larger taxes or fees in place for entities that generate five or more tons of hazardous waste (the generator fee), dispose of hazardous waste to land (the disposal fee), and operate hazardous waste facilities (the facility fee). Thus, there are other charges for organizations that handle hazardous materials in large quantities. The environmental tax is an alternative for organizations that handle hazardous materials in more limited quantities, and thus pay a considerably smaller amount. As with any tax, however, there is no requirement that the amount must be precisely proportionate to the individual taxpayer’s contribution to the government’s burden.

The definition used in this paragraph is in keeping with the construction of the statute that the California Supreme Court deemed reasonable. The Court added, however, that this construction must be promulgated by regulation. (*Morning Star, supra*, 38 Cal. 4<sup>th</sup> at p. 328.)

Subsection (b) is added to clarify Health and Safety Code sections 25205.6 and 25501. This provision includes lists of materials that pose a significant present or potential hazard to human health or safety, or to the environment. It neither expands nor reduces

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the sources of hazardous materials encompassed within section 25205.6's expansive definition of "hazardous material." However, the statutes that currently govern this definition are disjointed and confusing, in large part due to excessive cross-referencing. Section 25205.6 references section 25501. Section 25501, subdivision (o), in turn, can be understood only by referring to subdivisions (p) and (q). Subdivision (q) references Health and Safety Code sections 25115, 25117, and 25316, all of which reference other scattered laws, federal and state. Health and Safety Code section 25501.1 contains an easily-overlooked exception to section 25501. It is not surprising that the Supreme Court complained about "the thicket of cross-references that lends meaning to the term 'hazardous materials.'" (*Morning Star, supra*, 324 Cal. 4<sup>th</sup> at p. 338.) DTSC believes that the numerous cross-references make the relevant statutes very confusing, and that it would resolve one of the Court's concerns to clarify the definition by condensing all the cross-references into one regulatory subsection.

Subsection (c) is added to implement and make specific Health and Safety Code section 25205.6. This statute says that DTSC will provide the Board with a schedule of codes, consisting of organizations that handle hazardous materials, as identified on one or more of the enumerated lists. The statute gives no direction, however, on how DTSC is to make the determination as to what codes will be included on the list. In part, that direction is provided by the definitions contained in subsection (a) of this regulation. Subsection (c) provides further direction by specifying that an industry type may qualify for placement on the list solely through the use of ordinary products, such as computers, televisions, copiers, and motor vehicles, that are in common usage by most businesses and even in homes, yet contain hazardous substances and could be dangerous if not handled or disposed of properly.

DTSC believes this normal usage was an important factor in the determination by a legislative committee that "virtually all corporations, in some way, contribute to the generation of hazardous materials and hazardous waste." (Sen. Co. on Appropriations, Rep. on Assem. Bill No. 3540 (1993-1994 Reg. Sess.) Aug. 15, 1994, p. 1.) Similarly, another legislative committee described the environmental tax as "the broadbased fee levied on all corporations." (Sen. Committee on Environmental Quality, Analysis of Sen. Bill No. 660 (1997-1998 Reg. Sess.) Sept. 15, 1007, p. 3.) Thus, DTSC has been guided not only by the plain language of the applicable statute, but by relevant legislative history as well.

The regulation adds that DTSC, to obtain additional support for its findings, can look to existing data bases that identify types of industries that use hazardous materials, although it is not required to do so. On the other hand, it is possible that an industry type can use hazardous materials without appearing on a particular data base DTSC uses. Therefore, the subsection clarifies that the data bases are "in addition to other relevant indicators."

Subsection (c) also resolves a statutory ambiguity about the use of codes. Using either SIC Codes or NAICS codes, businesses can be listed by two digits, or with greater precision by three digits, or with greater still by four digits. The Court construed this to

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mean that DTSC has discretion in the use of codes. It observed: “The Department now has greater flexibility in this regard, with the Department being permitted to use two-, three-, or four-digit SIC codes in compiling its schedules..., and in any case, classifications based on ‘major groups’ are possible, though less precise.” *Morning Star, supra*, 38 Cal. 4<sup>th</sup> at p. 339.) To implement the classification by codes in a way that is consistent with the Court’s construction, subsection (c) specifies that codes will be listed by two digits. Breaking down the codes by additional digits would be administratively cumbersome and, in nearly all cases, unnecessary because of the widespread use of hazardous materials among all code groups and sub-groups. In at least one case, however, it is necessary to use four digits, to exclude residential care facilities as required by Health and Safety Code section 25205.6, subdivision (g). Furthermore, there is at least a possibility that in the future empirical data will indicate that other exceptions are appropriate. To accommodate the possibility of exceptions, subsection (c) allows for three or four digit categories if necessary.

Subsection (d) is added to explain and implement the requirement of section 25205.6 that the list must be submitted annually. The annual submission requirement infers the legislature thought there was at least a possibility the list could change. Given the ubiquity of hazardous materials in the business environment, it is unlikely that new data would lead to a determination to remove an industry code from the list. Nonetheless, this subsection allows for the possibility that this could happen, by requiring DTSC to review the list to make sure that every year it continues to satisfy the requirements of subsection (c).

Finally, subsection (d) expands upon the preamble by giving more detail about the list. While every industry type satisfies the criteria of subdivision (c), Private Households are omitted because they are not the type of organization anticipated by Health and Safety Code section 25205.6. Also, Residential Care Facilities are omitted due to an express statutory exemption.

In concluding that all codes pertain to industry types that generate, store, use, or conduct activities related to hazardous materials (except as otherwise noted), the department, in accordance with subdivision (c), took into account the normal usage of consumer and business products. These products include but are not limited to: (1) interior lamps that contain mercury; (2) exterior lamps in parking spaces that are lit by high pressure sodium, high intensity discharge, and mercury vapor lamps; (3) modern electronic devices that use batteries that contain corrosive electrolytes and toxic metals such as zinc, nickel, cadmium, and lead, including cell phones, laptop computers, and personal data assistants; (4) other electronic devices, such as televisions and personal computers, that test as hazardous due in part to the lead-based solders used to assemble their circuit boards; (5) motor vehicles, which use flammable and toxic fuels, generate used oil, and contain hazardous mercury switches and explosively reactive air bags; and (6) numerous other common hazardous materials, such as pesticides, disinfectants for toilets and bathrooms, paints, and some toner cartridges.

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All these hazardous materials, and more, are used by virtually every business in the state, and all these materials appear on one or more of the lists of hazardous materials contained in subsection (b). It is very unlikely that even a small business could operate with using at least some of them. It is virtually impossible for any business that is large enough to have 50 employees to exist without using some of the hazardous materials described herein.

In addition, the department has taken into account the SIC Codes identified in a data base maintained by the department, showing by SIC Code the industry types that have requested identification numbers that are required when hazardous waste is manifested. Over a two-year period, every SIC Code was represented on the data base, with the exception of Code 88.

Therefore, it has been determined that every industry type, in the normal course of doing business, generates, stores, uses, or conducts activities that involve one or more hazardous materials, especially if it functions at a level requiring 50 or more employees.