

TITLE 22

EMERGENCY REGULATIONS

ADDITION OF PORTABLE DVD PLAYERS TO APPENDIX X

Department Reference Number: R-2006-05
Office of Administrative Law Emergency Number: 06-1221-03E

FINDING OF EMERGENCY

Health and Safety Code section 25214.10.2 grants authority to the Department of Toxic Substances Control (DTSC) to adopt emergency regulations for implementation of Health and Safety Code section 25214.10.1. According to section 25214.10.2, "adoption of these regulations is ... necessary for the immediate preservation of the public peace, health and safety, and general welfare."

AUTHORITY AND REFERENCE

Health and Safety Code section 25140. This section grants DTSC authority to prepare, adopt, and revise a listing of wastes which are determined to be hazardous.

Health and Safety Code section 25141. This section grants DTSC authority to adopt regulation criteria and guidelines for the identification of hazardous wastes.

Health and Safety Code section 25214.10. This section grants DTSC authority to prohibit the sale or offering for sale in California of an electronic device containing certain concentrations of heavy metals if its sale or offering for sale would be prohibited in the European Union (EU). The proposed regulatory action implements, interprets, and makes specific Health and Safety Code section 25214.10, subdivisions (b), (c), (d), (e), and (f).

Health and Safety Code section 25214.10.1. Health and Safety Code section 25214.10.1, subdivision (b) grants DTSC the authority to adopt regulations that identify electronic devices that DTSC determines are presumed to be hazardous wastes when discarded. The proposed regulatory action would implement, interpret, and make specific Health and Safety Code section 25214.10.1, subdivisions (c) through (e).

Health and Safety Code section 25214.10.2. This section grants DTSC authority to adopt emergency regulations for implementation of article 6 of chapter 6.5 of division 20 of the Health and Safety Code (commencing with section 25214.9).

Health and Safety Code section 58012 (Added by Gov. Reorg. Plan No. 1, §146, eff. July 17, 1991.) This section grants DTSC authority to adopt regulations to execute its duties. (Note: this section enacted by GRP 1, see http://www.dtsc.ca.gov/LawsRegsPolicies/upload/OEARA_REG_GRP1.pdf)

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Public Resources Code section 42475. This section grants DTSC the authority to adopt regulations that are necessary for implementation of Public Resources Code, division 30, part 3, chapter 8.5.

Public Resources Code section 42475.2. This section grants DTSC authority to adopt emergency regulations for implementation of Public Resources Code, division 30, part 3, chapter 8.5.

The proposed regulatory action would implement, interpret, and makes specific Public Resources Code section 42463, subdivision (f)(1). This section establishes the definition of a covered electronic device that is subject to the Electronic Waste Recycling Act of 2003, as amended.

Public Resources Code section 42465.2. The proposed regulatory action implements, interprets, and makes specific Public Resources Code section 42465.2, subdivision (b).

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

Existing Law

Existing State law requires DTSC to adopt regulations that identify electronic devices that DTSC determines are presumed to be, when discarded, hazardous wastes pursuant to State law. Under existing State law, each device that DTSC identifies must be managed as a “covered electronic device,” and, at the time it is discarded, as a “covered electronic waste”, unless its manufacturer has obtained DTSC’s concurrence that the device is not hazardous. Additionally, under existing law, DTSC must adopt regulations, effective January 1, 2007, that prohibit each device that DTSC identifies in its regulations from being sold or offered for sale in California if the electronic device would be prohibited from being sold or offered for sale in the EU on or after its date of manufacture, to the extent that Directive 2002/95/EC, adopted by the European Parliament and the Council of the EU on January 27, 2003, prohibits that sale due to the presence of certain heavy metals. DTSC submitted these regulations (DTSC Reference Number: R-2006-06) to the Office of Administrative Law on December 21, 2006. These regulations add section 66260.202 to the California Code of Regulations, title 22, chapter 10.

Existing State law requires each manufacturer of a covered electronic device to notify retailers regarding the “covered electronic device” classification for the device. Existing State law requires a consumer to pay a recycling fee upon the purchase of a new or refurbished covered electronic device from a retailer. This fee is used to fund the covered electronic waste recycling program established by the State Legislature through the Electronic Waste Recycling Act of 2003, as amended [(Stats. 2003, ch. 526 (SB 20) and Stats. 2004, chap. 863 (SB 50)]. This program applies to covered electronic wastes that will be recycled in order to recover valuable materials. As an alternative to managing covered electronic wastes as hazardous waste, existing State

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law authorizes collectors and recyclers of covered electronic wastes to manage all wastes that will be recycled through the program as State “universal wastes.”

DTSC has already identified, and listed in the California Code of Regulations, title 22, division 4.5, chapter 11, appendix X, subsection (c) (i.e., the Appendix X List), several electronic devices that DTSC presumes to be hazardous wastes when discarded. Existing law expressly exempts an electronic device added to the Appendix X List after July 1, 2004, from management as a covered electronic device or covered electronic waste until July 1 of the year subsequent to the year in which the device is added to the Appendix X List. Existing law does not expressly provide a similar exemption from the sales prohibition or expressly require DTSC to do so in the regulations that DTSC is required to adopt, effective January 1, 2007.

The proposed regulatory change would extend the Appendix X List to include portable DVD players with liquid crystal displays (LCDs) larger than four inches in size when measured diagonally. The proposed regulatory change would also specify that such DVD players, as well as other devices that DTSC adds to the Appendix X List in the future, would not become subject to the sales prohibition for covered electronic devices until July 1 of the year following the year in which they are added to the Appendix X List.

Pursuant to section 3006 (42 U.S.C. 6926) of the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 et seq.), DTSC is authorized by the United States Environmental Protection Agency (U.S. EPA) to administer and enforce its hazardous waste program within the State in lieu of the federal program administered and enforced by the U.S. EPA. U.S. EPA regulations authorize DTSC's program to be more stringent and broader in scope than the U.S. EPA's program. (40 C.F.R. § 271.1 (i)(1) and (2)).

DTSC perceives that private consumers (i.e., households) account for at least 95% of all purchases of portable DVD players. The proposed regulatory change would subject such DVD players, when discarded, to management as hazardous waste or universal waste under existing State law. Under the federal regulations implementing RCRA, solid wastes generated by households (including waste electronic devices) are excluded from the RCRA definition of hazardous waste (see 40 C.F.R. § 261.4(b)(1)), and facilities that manage household hazardous wastes are exempt from RCRA hazardous waste management requirements, provided that they do not mix household waste with regulated hazardous waste (see 67 Fed. Reg. 40508, 40511-40512 (June 12, 2002)). Therefore, waste electronic devices, including portable DVD players that contain LCDs, which are collected from households for recycling, are currently not regulated as hazardous waste or universal waste under federal law. In this regard, DTSC's regulation of discarded DVD players under the proposed regulation would be broader in scope than U.S. EPA's.

With regard to electronic devices that are collected from non-household sources, federal law does not require the U.S. EPA to adopt regulations that identify electronic devices that U.S. EPA presumes to be hazardous waste when discarded. Nor does federal law

require U.S. EPA to adopt regulations prohibiting the sale of electronic devices based on their heavy metal content. Therefore, DTSC's regulation of discarded portable DVD players under the proposed regulation would be broader in scope than the U.S. EPA's.

Federal law does not provide for a consumer-funded recycling program for electronic devices that are collected from non-household sources and that individually exhibit a RCRA hazardous characteristic. Although the U.S. EPA allows authorized states to regulate discarded electronic devices as universal waste under certain circumstances, the U.S. EPA does not allow such devices to be managed as a universal waste under RCRA. Instead, under the U.S. EPA's regulations, such devices, with the exception of cathode ray tubes (CRTs), are subject to applicable hazardous waste management requirements under RCRA¹.

Policy Statement Overview

Under the State's existing criteria many electronic devices are hazardous wastes when they are discarded. These devices are known to contain lead and/or other regulated toxic substances, and have the potential to release those toxic substances to the environment when placed in municipal landfills. Electronic wastes recovered for recycling may also pose a threat to public health, worker safety, and the environment, if not properly managed.

The Electronic Waste Recycling Act of 2003 [(Stats. 2003, ch. 526 (SB 20))] established a program for regulating certain electronic wastes. The State Legislature's goal in adopting the Electronic Waste Recycling Act was to eliminate electronic waste stockpiles, and to ensure the environmentally sound management of discarded electronic devices in the future [Pub. Resources Code § 42461, subd. (b) and (h)]. One of the primary mechanisms for achieving the Legislature's goal is a consumer-funded recycling program that was established by the Electronic Waste Recycling Act, as amended in 2004 [Stats. 2004, ch. 863 (SB 50)].

The consumer-funded recycling program applies to all electronic devices that DTSC has identified in its regulations as devices that "are presumed to be, when discarded, a hazardous waste" pursuant to State law. Several such devices have already been identified by DTSC in the Appendix X List. The proposed regulation would add "portable DVD players with LCDs greater than four inches measured diagonally" to the Appendix X List. This listing would require collection of the mandatory consumer-funded recycling-fee when such DVD players are sold, as established by the Electronic Waste Recycling Act, as amended, and will thereby provide an incentive for the proper management of these devices at the time they are discarded.

¹ The U.S. EPA has determined that many used CRTs exhibit a characteristic of RCRA hazardous wastes. To promote the recycling of such CRTs that are subject to RCRA hazardous waste regulations, the U.S. EPA has adopted regulations, effective January 1, 2007, that establish a conditional exclusion from the definition of a solid waste and, therefore, from RCRA hazardous waste regulations, for intact CRTs that are collected for recycling, including recycling to recover valuable materials (see 71 Fed. Reg., 42928-4249 (July 28, 2006)). The U.S. EPA has not adopted similar regulations for any electronic devices other than CRTs.

In addition, all devices identified on the Appendix X List are subject to a sales prohibition pursuant to Health and Safety Code, section 25214.10, as implemented in California Code of Regulations, title 22, section 66260.202. The proposed regulation would provide a reasonable period of time (i.e., until July 1 of the year following the year the devices are added to the Appendix X List) for manufacturers of devices that are added to the List to reduce the heavy metal content of the devices, as necessary, to conform to the limitations of the prohibition.

Proposed Regulations

The proposed regulations would add portable DVD players with LCDs that are greater than four inches in size when measured diagonally to the Appendix X List. To meet the statutory requirement to identify which electronic devices meet the criteria for covered electronic devices, DTSC evaluated portable DVD players with LCD screens greater than four inches. Analysis of portable DVD players by DTSC's Environmental Chemistry Laboratory (ECL) indicates that these devices contain levels of copper, lead, nickel and/or antimony which exceed state hazardous waste threshold concentrations. The lab's findings are available on DTSC's Web site at:

http://www.dtsc.ca.gov/HazardousWaste/EWaste/upload/EWaste_DVD_ExecSum.pdf in a report entitled "Summary of Analytical Test Results for Portable DVD Players". A copy of this report is also included in the emergency rulemaking file. The report details how portable DVD players of different brands and models were analyzed, and how the results compared to California's hazardous waste thresholds. Thus, these devices are proposed to be added to the Appendix X List and will be subject to management as covered electronic devices effective July 1, 2007.

The proposed regulation would also make electronic devices added to the Appendix X List subject to the sales prohibition of regulation section 66260.202 on July 1 of the year following the year the devices are added to the List. This period of time is necessary to provide manufacturers of devices that are added to the Appendix X List with a reasonable period of time to reduce the heavy metal content of the devices, as necessary, to conform to the limitations of the prohibition. Health and Safety Code section 25214.10.2 grants DTSC the authority to adopt the proposed regulations as emergency regulations. As explained below, DTSC's exercise of this authority to grant manufacturers time to reduce heavy metal content is consistent with Health and Safety Code section 25214.10.2.

The plain language of Health and Safety Code section 25214.10, subdivision (c) requires that the regulations that DTSC adopts to implement the prohibition prescribed in subdivision (b) of Health and Safety Code section 25214.10 take effect no sooner than January 1, 2007. This language clearly reflects the State Legislature's intent to prevent DTSC from imposing the subdivision (b) prohibition prior to January 1, 2007. But this language does not clearly require that the DTSC regulations establish January 1, 2007 as the date that the subdivision (b) prohibition shall become effective for each

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electronic device that is added to the Appendix X List.² It only requires that the regulations that establish the prohibition take effect no sooner than January 1, 2007.

The plain language of subdivision (b) shows that the State Legislature intended subdivision (b) to prescribe the scope of the prohibition. Subdivision (b) contains no language that addresses the date on which the regulations could or could not impose the prohibition.

Additionally, Health and Safety Code section 25214.10 does not expressly deny to DTSC the authority to determine in its regulations dates subsequent to January 1, 2007, for the prohibition to take effect. Subdivisions (d) through (f) of Health and Safety Code section 25214.10 show that the State Legislature considered the specific limitations that it wished to impose on DTSC's exercise of the broad regulatory authority that it had granted to DTSC to implement section 25214.10. Had the State Legislature intended to restrict DTSC's authority to establish effective dates for the prohibition subsequent to January 1, 2007, it probably would have done so directly and clearly in a provision similar to subdivisions (d) through (f), rather than inferentially through subdivisions (b) and (c).

To interpret Health and Safety Code section 25214.10, subdivision (c) to require DTSC to adopt regulations that make the prohibition effective on January 1, 2007, for all electronic devices added to the Appendix X List ignores the fact that the State Legislature delegated to DTSC a continuing obligation to add electronic devices to the List that extends beyond January 1, 2007. (See Health and Safety Code section 25214.10.1, subdivision (b).) Recognizing this fact begs the question: When does the sales prohibition go into effect for devices that DTSC adds to the List after January 1, 2007? The above interpretation doesn't clearly address this question.

Interpreting Health and Safety Code section 25214.10.1, subdivision (c) to establish January 1, 2007 as the date that the Health and Safety Code section subdivision (b) prohibition shall become effective would make January 1, 2007, the effective date of the prohibition for each electronic device that is added to the Appendix X List prior to January 1, 2007. For devices added to the List after January 1, 2007, the actual date that the devices were added to the List would, in effect, become the effective date of the prohibition. This approach would result in significantly different time periods for manufacturers of such electronic devices to reduce the heavy metal content of the devices, as necessary, to conform to the limitations of the prohibition. These time periods would range from about 30 months for devices added to the Appendix X List on or before July 1, 2004, to less than a month for the DVD players covered by DTSC's proposed regulations, to no time at all for devices that DTSC adds to the List on or after January 1, 2007. This disparate approach would be void of any legislative or regulatory

² Nor did the Legislative Counsel interpret this language to require that the DTSC regulations establish January 1, 2007 as the date that the subdivision (b) prohibition shall become effective for each electronic device that is added to the Appendix X List. See Legislative Counsel's Digest of Senate Bill 20 (Stats. 2003, c.526 (Reg. Sess.)).

consideration of the actual time that manufacturers may reasonably need to reduce the heavy metal content of the devices, as necessary, to conform to the limitations of the prohibition after their devices are added to the List.

On the other hand, interpreting Health and Safety Code section 25214.10, subdivision (c) to deny DTSC the discretion to impose the sales prohibition before January 1, 2007, but to allow DTSC the regulatory discretion to determine a reasonable period of time after January 1, 2007, for manufacturers of electronic devices that DTSC adds to the Appendix X List to reduce the heavy metal content of the devices, as necessary, to conform to the limitations of the prohibition provides an implementation approach that addresses manufacturers' legitimate business needs in an informed manner. This approach is also consistent with the approach that the State Legislature took in determining when the requirements of chapter 8.5 (commencing with section 42460) of part 3 of division 30 of the Public Resources Code should be applied to electronic devices as they are added to the Appendix X List. (See Health and Safety Code section 25214.10.1, subdivision (d)(2).) The State Legislature's taking this approach in implementing chapter 8.5 clearly reflects its understanding of the need to allow manufacturers a reasonable time period, after their electronic devices are added to the Appendix X List, to adjust their business practices to the new legal requirements imposed on them when their electronic devices are added to the Appendix X List. For the chapter 8.5 requirements imposed on manufacturers, the State Legislature decided to establish this reasonable time period in statute. The State Legislature did not make a similar decision for the Health and Safety Code section 25214.10 sales prohibition. The absence of such a decision by the State Legislature reasonably infers its intent to have DTSC use its broad regulatory authority to determine reasonable time periods, on or after January 1, 2007, for the implementation of the section 25214.10 sales prohibition.

STATEMENT OF FACTS SUPPORTING FINDING OF EMERGENCY

Statement of Facts Supporting Finding of Emergency

DTSC has found this rulemaking an emergency as a matter of law pursuant to Health and Safety Code section 25214.10.2, which states "adoption of these regulations is necessary for the immediate preservation of the public peace, health and safety, and general welfare."

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

DTSC has found this rulemaking project to be exempt under CEQA. A draft of the Notice of Exemption (NOE) is available for review with the rulemaking file, and the NOE will be filed with the State Clearinghouse when the regulations are adopted.

FISCAL IMPACT ESTIMATES

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates.

Estimate of Potential Cost or Savings to Local Agencies Subject to

Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other non-discretionary costs or savings to local agencies. Local agencies, as with all other businesses and persons, will be required to pay a small fee at the purchase of any covered electronic device. However, local agencies do not typically purchase portable DVD players.

Cost or Savings to Any State Agency: DTSC has made a preliminary determination that the proposed regulations will have no significant impact on State revenue or costs. State agencies, as with all other businesses and persons, will be required to pay a small fee at the purchase of any covered electronic device. However, State agencies do not typically purchase portable DVD players.

Cost or Savings in Federal Funding to the State: DTSC has made a preliminary determination that the proposed regulations will have no impact on Federal revenue or costs.