

Final Statement of Reasons Including Summary of Comments and Agency Responses

PUBLIC HEARING TO CONSIDER AMENDING PROPOSED REGULATIONS FOR PHASE I ENVIRONMENTAL SITE ASSESSMENTS (SCHOOLS) (R-02-01)

Public Hearing Date: November 4, 2002

I. UPDATE OF INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons released as part of the 45-day hearing process concerning the Phase I Environmental Site Assessments (Schools) regulations is incorporated by reference.

II. ALTERNATIVES DETERMINATION

DTSC has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by DTSC.

III. LOCAL MANDATE DETERMINATION

The Department of Toxic Substances Control (DTSC) has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the State pursuant to Part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

IV. COMMENTS SUBMITTED BY THE OFFICE OF SMALL BUSINESS ADVOCATE AND THE TRADE AND COMMERCE AGENCY

No comments were submitted by the Office of Small Business Advocate or the Trade and Commerce Agency.

V. SUMMARY OF COMMENTS AND AGENCY RESPONSES

Written and oral comments were received during the 45-day comment period beginning September 3, 2002. Oral testimony was provided by two (2) parties. Additionally, written comments were received from one (1) other source. (A copy of the comments is attached.) Following is DTSC's response to the summaries of the testimony and written comments:

A. Response to Comments from Mr. Paul Sweeney of the Board of Geologists and Geophysicists

Summarized Comment A.1:

Assembly Bill 2644 that was signed by Governor Gray Davis on September 13, 2000 and chaptered with the Secretary of State on September 14, 2000. This bill includes in the definition of an environmental assessor a registered professional engineer, a registered geologist, and a registered certified engineering geologist. The subject regulations should clearly state that these individuals are qualified to perform as “environmental assessors” in the preparation of Phase I Environmental Site Assessments for schools as defined in California Education Code Section 17213.2(a) that is referenced in “Section 69104. Preparation of a Phase I” in the subject draft regulations.

Response A.1:

Section 17213.1(a) of the Education Code requires that the Phase I Environmental Site Assessment (Phase I) of a proposed school site shall be supervised and signed by an Environmental Assessor. Section 17210(b) provides that an environmental assessor means an Environmental Assessor II, a Professional Engineer (PE), a Registered Geologist (RG), a Certified Engineering Geologist (CEG), or a Licensed Hazardous Substance Contractor, registered or certified in California. In addition, Section 17210(b) provides that any person who conducts a Phase I of a proposed school site shall have at least two years' experience in the preparation of Phase Is.

The term “environmental assessor” is not used in the regulations and consequently is not defined in the regulations. Since the Education Code has clearly provided the certification and registration requirements and is referenced in the regulations, it is not necessary to reiterate or duplicate the same information in the regulations.

DTSC has not made changes to the regulations based on this comment.

B. Response to Comments from Mr. Mike Perez of the San Bernardino Unified School District

Narrative Comment B.1:

We want to commend DTSC and/or CASH for coming up with these regulations. This is great because we had a project in DTSC for eighteen months because of lead and PCBs, so this will be helping us to get that project moving forward again.

Response B.1:

Comments are noted. DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.2:

Clear regulatory thresholds for lead and PCBs should be provided in the regulations. Under Section 69107, it has the term “case by case,” which allows it to not quite end the projects. It could continue and continue. Any risk evaluation should be reviewed and resolved by DTSC within 90 days or 60 days.

Response B.2:

Under the proposed regulations, sampling data shall be evaluated, using DTSC-approved human health screening methods (e.g., DTSC Leadsread, Version 7 (may be updated as needed), and the protocols outlined in the Preliminary Endangerment Assessment Guidance Manual), and compared with the concentrations that have been determined by DTSC on a case-by-case to be protective of human health and the environment.

DTSC’s current “Interim Guidance for Evaluating Lead-Based Paint and Asbestos-Containing Materials at Proposed School Sites, dated July 23, 2001” provides an initial screening value of 255 parts per million (PPM) for lead from lead-based paint. The residential Preliminary Remedial Goal (PRG) established by the U.S. Environmental Protection Agency Region 9 for PCBs currently is 0.22 PPM. Until specific California Screening Levels are established, these initial screening values will continue to be considered by DTSC as screening indicators for sites with impacts from lead-based paint or electrical transformers only.

If the highest detected concentrations do not exceed these initial screening values, the school district may want to include the sampling results in the Phase I (or Phase I addendum) with a recommendation of “No Action.” Sampling results will be subject to DTSC review with respect to data adequacy, levels of contamination found, and the risks that contaminants may pose. Upon receipt of the Phase I (or Phase I Addendum) with data, DTSC will review it for completeness and make a final Phase I determination.

Section 17213.1 (a) (2) of the Education Code requires that DTSC complete its review of the Phase I or additional information within 30 days of its receipt. DTSC has committed to and consistently met this legal mandate. DTSC will complete its review of the Phase I Addendum within 30 days of its receipt as well, unless additional information is needed. If DTSC requests additional information in order to complete the Phase I determination, the 30 day review period will begin again as soon as the information is submitted by the school district for DTSC review.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.3:

We need to develop a model which the schools and consultants can use to get through this process. Presently, DTSC staff has been working to develop some models. We'd like to see that a little faster. Also, the process didn't discuss health risk assessment for lead or PCBs. We were hoping that it would be provided to discuss cumulative impacts of these materials on the site.

Response B.3:

DTSC has developed a sample report format (table of contents) and instructions for preparing a Phase I Addendum. These instructions provide detailed explanations for completing a Phase I Addendum. These materials are available on DTSC's web page at www.dtsc.ca.gov. For a Phase I completed with lead and/or PCBs sampling data, the Phase I data may be organized pursuant to the Phase I Addendum table of contents format, included as an appendix to the Phase I, and referenced in the appropriate section of the Phase I.

For discussion on health risk assessment for lead or PCBs, please see Response B.2 above.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.4:

The regulations should allow school districts to move forward without a final release. We need your letters to acquire the site/to buy the property so we can then start doing testing and cleaning even before we start building the school. There needs be an avenue, which allows us to move the project forward. We know when we will be complete, again that goes with this process of identifying the levels of the plan that says "when you've done these steps, you will be completed."

Response B.4:

The Education Code specifies certain environmental review requirements for proposed school sites. The proposed regulations apply only to the preparation of Phase Is pursuant to section 17213.1 of the Education Code.

During the preparation of a Phase I, the school district may choose to complete the Phase I without collecting sampling data. In this case, where

needed, the Phase I will recommend that a post-site-acquisition investigation of impacts from lead-based paint or electrical transformers be conducted at a later date and submitted as a Phase I Addendum for DTSC review. If DTSC concurs with the conclusion of the Phase I, DTSC will issue a Phase I determination letter of "Phase I Addendum Required" to both the State Department of Education and the school district. In this case, the school district may be able to proceed with Site and Plan Approvals from the Department of Education, while submitting a letter of intent to complete DTSC's required sampling for lead-based paint or PCBs at a later date. Such sampling may be postponed until after site acquisition and demolition of existing structures, but must be completed prior to school construction.

In an alternative scenario, where lead-based paint and/or electrical transformers are identified as the only potential sources of contamination at a proposed school site, the school district may collect sampling data for lead in soil from lead-based paint and/or PCBs in soil from electrical transformers. The school district may then submit the results to DTSC as a Phase I. Based on review of the Phase I, DTSC will issue a Phase I determination letter of either "No Action" or "Further Action Required" to both the State Department of Education and the school district. "Further action" may include a Preliminary Endangerment Assessment and possible removal action.

For more information on state funding requirements, please contact the State Department of Education.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.5:

We were hoping that in this process it's considered not to disrupt homeowners, renters, and tenants. We've gone back to these houses several times, drilling holes in front of churches, drilling holes in properties' front yards, back yards, and then we go back again and do some more testing doing the same thing, and we're not even the owner of the property yet. We're just grateful that the property owners allow us to do this. With that plan, we can go in and do that test and get out and not bother them again.

Response B.5:

In general, sampling or testing is not required as part of the Phase I. No disruption is anticipated in such cases.

Under the proposed regulations, school districts may conduct limited sampling activities to address potential impacts from lead-based paint or

transformer PCBs in soil. School districts will have two choices regarding sampling schedules.

The school district may elect to complete the Phase I without collecting sampling data and conduct a post-site-acquisition investigation. In this case, no disruption is anticipated.

Alternatively, the school district may collect sampling data for lead and/or PCBs before the district acquires the property. To minimize any disruption of property owners or occupants in this case, it is recommended that DTSC's concurrence of the sampling work plan be sought prior to conducting the proposed sampling activities. Although the proposed regulations have provided a straightforward sampling and analysis protocol, DTSC may be consulted to determine the number and location of samples necessary to adequately characterize the potential impacts.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.6:

The process should also be clear as not to hold up CEQA. Presently, there have been some changes to allow the process to detach the DTSC process, but CEQA can move forward and be adopted, and for those properties we need to condemn, we'll condemn them in court and then let DTSC, before we start construction, then we provide evidence the site is now clean.

Response B.6:

The proposed regulations apply only to the preparation of a Phase I pursuant to section 17213.1 of the Education Code. As a condition of receiving state funding, an environmental review (a Phase I or Preliminary Endangerment Assessment) should be conducted prior to acquiring or constructing a school site. Compliance with the requirements of CEQA for a proposed school project is a different process which is required to meet other legal mandates. The school district can choose to conduct them concurrently or separately. Recent legislation in Assembly Bill 972 (Calderon), effective October 14, 2001, changed Education Code section 17213.1(a) to allow school districts two options for publicizing the PEA with or without the school district's CEQA document.

However, it is recommended that a proper environmental review (e.g., a Phase I or PEA) be conducted to support the CEQA review and decision for a proposed school site. Completion of a proper environmental review can serve to meet both legal mandates. Any CEQA document prepared without a proper environmental review may not be considered adequate.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.7:

We need clear information to get the site released. We need layouts and thresholds clearly defined. We want to allow acknowledgment of future actions before construction, as we will do the following remediation plans, we will clean the lead, we will clean PCBs, and that is recognized.

Response B.7:

See Response B.4 for two types of DTSC Phase I determination letters for sites with potential impacts from lead-based paint and/or electrical transformers only.

See Responses B.2 and B.3 for model documents and threshold levels.

If DTSC determines that “Further Action” is needed for a prospective school site, school districts may elect not to pursue the acquisition or construction project, or may proceed with a supplemental site investigation and, if necessary, a response action to reduce or remove contaminants. Such removal actions for school sites are generally conducted under DTSC oversight in accordance with the California Health and Safety Code, section 25356.1. In most cases, DTSC approval of completion of response action is necessary prior to school construction.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.8:

The regulations talk about projects that are presently in the pipeline that are under review by DTSC. We want to make sure that the staff who are the field people understand that this regulation will help those projects in the pipeline.

Response B.8:

The proposed Phase I regulations will apply to the preparation of a Phase I for any proposed school site pursuant to section 17213.1 of the Education Code. The regulations make it possible, as an option, to perform limited sampling at an earlier stage of the process. In order to allow school districts to benefit from the regulations (to expedite environmental review process and to reduce costs), DTSC first adopted emergency regulations. DTSC has also made efforts to ensure that the school districts are aware of this option.

DTSC released Fact Sheet #5, titled “Proposed Regulations on Preparation of Phase I Environmental Site Assessments,” concurrently with the public notice

of the proposed regulations in early September 2002. It is suggested in Fact Sheet #5 that for sites with a previous Phase I determination requiring completion of a focused PEA due to potential impacts from lead-based paint and/or transformer PCBs, the school district may choose to submit a Phase I Addendum instead of a PEA. Fact Sheet #5 was mailed to all school districts in California and posted in DTSC school web page: www.dtsc.ca.gov. Subsequently, DTSC mailed an advisory letter to each school district with such a site that a Phase I Addendum may be submitted instead of a PEA.

Additionally, DTSC has provided in-service training for DTSC field staff so that all project managers and their supervisors are aware of these regulations, and understand how the regulations are to be implemented.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment B.9:

The certification and registration required for district consultants who are preparing the Phase I and the Phase I Addendum should be clearly identified, whether it's an REA II, a PE or RE (registered engineer). We never know who we're supposed to hire, but if you tell us, we'll do it.

Response B.9:

See Response A.1 above. DTSC has not made changes to the regulations based on this comment.

C. Response to Jeriann Alexander, Registered Professional Engineer in Civil Engineering

Narrative Comment C.1:

DTSC is stopping shy of endorsing the ASTM guidelines for conducting Phase II studies, which is in essence what the Phase I Addendum will become when limited sampling and analysis is added. I see no merit in creating anything other than a rule which endorses the guidelines ASTM had the foresight to establish many years ago for sites which are not labeled as "Hazardous Waste Sites."

Response C.1:

The environmental review process for proposed school sites is specified by the Education Code. Currently, the Education Code requires a Phase I be conducted by the school district in accordance with the American Society for Testing and Materials (ASTM) Standard Practice for Environmental Site Assessments prior to acquisition or construction of a proposed school site.

The new regulations are proposed to expand beyond ASTM Phase I requirements, identify general sampling protocols and allow inclusion of limited sampling results for lead in soil from lead-based paint and PCBs in soil from electrical transformers.

The Education Code further requires that if a PEA of a proposed school site is required, the school district should conduct the PEA in accordance with DTSC's "Preliminary Endangerment Assessment: Guidance Manual," to address issues that are unique to school sites.

The school PEA incorporates the information required for completion of Phase II investigations. In addition, the school PEA will include public participation activities and screening risk evaluations. Overall, school PEA requirements are more comprehensive than requirements for the Phase II requirements.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment C.2:

The DTSC Phase I Addendum may help some school districts, yet it will leave others to face the daunting task of conducting a PEA because the wording has limited the baseline additional testing to only PCBs and lead. For instance in eastern Contra Costa County and other areas of the state where rural farming communities abounded, lead and PCBs are not the chemicals of concern, agricultural chemicals are. Limited testing for suspected chemicals has shown that these chemicals have a propensity to stay bound in the shallow soil zone; however, remnant concentrations are so low as to not represent a risk to public health nor the environment nor construction workers. I am all for rulemaking which acknowledges that a change is necessary, such as allowing school districts to use ASTM Phase I. My concern is that the Phase I Addendum is not as a good idea because it attempts to streamline a process which should not be streamlined as risks to children, the school district and ultimately the public are at stake.

Response C.2:

Lead in soil from lead-based paint and PCBs from former transformer fluids are two of the most common types of contamination found at former residential or commercial properties. Because neither of these contaminants moves in soil or gives off gaseous vapors, they are likely to cause limited surface soil contamination that can be addressed by soil removal. The potential presence of these two contaminants has often been the only reason a PEA was required at many proposed or expanding school sites.

Based upon past experience and DTSC's scientific evaluation, numerous PEAs for proposed school sites have identified levels of lead or PCBs (caused by lead-based paint or electrical transformers) that do not pose elevated health risks. Therefore, these contaminants are addressed differently than other contaminants caused by industrial or agricultural operations. A PEA is generally required for these industrial or agricultural sites in accordance with the Preliminary Endangerment Assessment Guidance Manual.

When a PEA is required for an agricultural site, DTSC has also recognized the unique conditions of agricultural soils. In June 2000, DTSC issued "Interim Guidance for Sampling Agricultural Soils" to provide a uniform approach for evaluating former agricultural properties where pesticides have been applied. The guidance represents an on-going effort to streamline the characterization of agricultural sites. Since its issuance, more than 75 agricultural sites have been evaluated across California. The most commonly detected pesticides have been DDT, DDE, DDD, toxaphene, dieldrin, and aldrin. DTSC's June 2000 guidance was revised and re-issued in August 2002.

DTSC has not made changes to the regulations based on this comment.

Narrative Comment C.3:

I would recommend that:

1. DTSC should look to endorse the use of ASTM Phase I and Phase II guidelines;
2. School districts should be allowed to conduct a Phase II either concurrently or after completing the Phase I which includes baseline testing for all suspected chemicals of concern;
3. School districts should be able to present the results of the Phase I and Phase II, and if necessary a Site Risk Management Plan which specifically addresses risks posed to construction workers and children, in person to the DTSC so that questions can be asked and answered on the spot; and
4. DTSC should be required to provide a written determination of the data studies within 60 days of receipt of the written reports.

Response C.3:

As discussed previously, the Education Code specifies certain environmental review processes for proposed school sites, including Phase I, PEA and others. The proposed regulations apply only to the preparation of Phase Is

pursuant to section 17213.1 of the Education Code. Section 69104 of the proposed regulations requires that Phase Is be conducted in accordance with ASTM Phase I guideline. If further investigations are necessary, a PEA should be conducted as specified in the Education Code.

As discussed in Response B.2, the Education Code requires that DTSC complete its review of the Phase I or additional information within 30 days of its receipt. DTSC will complete its review of the Phase I Addendum within 30 days of its receipt as well.

DTSC has not made changes to the regulations based on this comment.

VI. NONSUBSTANTIAL CHANGES TO THE REGULATION TEXT

- a. Subsection (a) (5) of Section 69103. (References) of the regulation text incorporates a document by reference by citation of a web site. This web site address has changed since the 45-Day Notice was prepared and disseminated. Following is the corrected language: (5) “Guidance on Environmental Data Verification and Data Validation,” EPAQA/G-8; Peer Review Draft, June 2001, available from United States Environmental Protection Agency, Quality Staff (2811 R), 1200 Pennsylvania Avenue, NW, Washington, DC 20460; (202) 564-6830; website <http://www.epa.gov/r10earth/offices/oea/epaqag8.pdf>
- b. As presented in the 45-Day Notice, the regulation text has portions of the text that were without underscoring in error. All of the text should have been underscored to indicate that this is new text to be added to Chapter 51.5.

These typographical corrections do not change the substance of the regulations or the effectiveness of the 45-day notice process.