

AGENDA

JOINT OVERSIGHT HEARING: DEPARTMENT OF TOXIC SUBSTANCES CONTROL

ASSEMBLY BUDGET SUBCOMMITTEE NO. 3 ON RESOURCES AND TRANSPORTATION
AND

ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY AND TOXIC MATERIALS

AND

SENATE BUDGET SUBCOMMITTEE NO. 2 ON RESOURCES, ENVIRONMENTAL PROTECTION, ENERGY
AND TRANSPORTATION

AND

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

CHAIRS: RICHARD BLOOM, BILL QUIRK, BOB WIECKOWSKI, AND BEN ALLEN

WEDNESDAY, FEBRUARY 27, 2019

9:30 A.M. – STATE CAPITOL, ROOM 4203

I. Opening Remarks and Introductions.

II. Overview of DTSC's Budget and Operations.

- a. Jared Blumenfeld, Secretary, California Environmental Protection Agency
- b. Meredith Williams, Ph.D., Acting Director, Department of Toxic Substances Control
- c. Francesca Negri, Chief Deputy Director, Department of Toxic Substances Control
- d. Shawn Martin, Principal Fiscal & Policy Analyst, Legislative Analyst's Office

III. Public Comment.

BACKGROUND

The Department of Toxic Substances Control (DTSC) has three major program areas. DTSC's mission is to protect public health and the environment from toxic harm by restoring contaminated resources, enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products. DTSC has approximately 900 scientists, engineers, toxicologists, chemists, geologists, attorneys, criminal investigators, and administrative staff. DTSC employees are geographically located in Sacramento headquarters and nine offices throughout the state, and in two environmental chemistry laboratories located in Berkeley and Pasadena. DTSC operations fall under three major program areas:

1. **Site Mitigation and Brownfields Reuse Program.** This program implements the state's laws regarding site cleanup and the federal Superfund program. The program currently oversees approximately 1,170 hazardous substance release site investigations and cleanups, known as U.S. EPA National Priorities List (NPL) sites. The program also monitors long-term operations and maintenance activities at more than 470 sites where the cleanup process is complete. Additionally, the program is responsible for ensuring compliance with the terms of approximately 820 land-use restrictions in place on properties throughout the state. This program is responsible for the cleanup and restoration of contaminated sites throughout the state; including legacy landfills (e.g., Stringfellow Acid Pits and the BKK Landfill), the Santa Susana Field Lab, military bases, former industrial properties, and school sites.

This program identifies new sites through surveillance and enforcement efforts, emergency response activities, examination of other previously-identified potential sites, and public and private entities that voluntarily request that the Department take action to return local properties to productive use. These sites and projects include cleaning up federal and state Superfund properties, abandoned mines, other abandoned and underutilized properties known as "brownfields," and both active and closed military installations. Additionally, DTSC ensures that the state meets the federal requirements that California pay 10-percent of cleanup costs for federal Superfund sites and 100-percent of the operation and maintenance costs after cleanup is complete. Federal and state law also authorizes DTSC to recover costs and expenses it incurs in carrying out these activities.

The program oversees environmental assessments and the clean-up of proposed new or expanding school sites to prevent or reduce exposing students and staff to hazardous substances.

2. **Hazardous Waste Management Program.** This program regulates the generation, storage, transportation, treatment, and disposal of hazardous waste to minimize risks to public health and the environment. The program oversees permitting and compliance at 119 authorized facilities that manage hazardous waste, approximately 900 registered businesses that transport hazardous waste, approximately 300 facilities/generators that are subject to corrective actions, and approximately 100,000 entities that generate hazardous waste in California. Many hazardous waste generators and facilities are located near communities who look to DTSC to protect them from the threats posed by potential releases of harmful chemicals into their air, land, and water. Effective permitting and enforcement of these hazardous waste facilities is paramount to protecting human health and safety and the environment. Many of these permitted hazardous waste facilities are located in communities with vulnerable populations, and inadequate permits or lax enforcement could severely impact the quality of their life and health.

The program additionally monitors hazardous waste transfer, storage, treatment, and disposal facilities for illegal activity, including surveillance and monitoring of registered hazardous waste transporters; enforcement of hazardous waste requirement violations found through routine inspections; complaint intake, triage, and investigations; and other focused enforcement initiatives. The program also provides emergency response support for hazardous materials-related emergencies throughout California.

3. **Safer Consumers Products and Workplaces Program.** This program is responsible for reducing toxic chemicals in consumer products, creating new business opportunities in the emerging green chemistry industry, and helping consumers and businesses identify what chemicals are in the products they buy.

Through this program, DTSC identifies and prioritizes chemicals of concern in consumer products, evaluates alternatives, and specifies regulatory responses to reduce chemicals of concern in products.

DTSC has two primary funding sources. DTSC is funded by fees paid by persons that generate, transport, store, treat, or dispose of hazardous wastes; environmental fees levied on most corporations; federal funds; and General Fund dollars. DTSC's operating budget for 2018-19 is \$317,095,000.

DTSC's two largest funding sources are the Hazardous Waste Control Account (HWCA) and the Toxic Substances Control Account (TSCA). These funds comprise more than half of the Department's spending authority. They provide funding for the Hazardous Waste Management Program, the Cleanup Program and the Safer Consumer Products Program. They are also the

primary funding source for DTSC's support programs, including administration, information technology, legal and communications.

TSCA is the largest fund available to DTSC. This account provides response authority for hazardous substances releases, including spills and hazardous waste disposal sites posing a threat to the public and the environment. The Environmental Fee constitutes over 80 percent of revenue deposited into the account. The Environmental Fee is assessed on all businesses in California, based on the number of employees, under the premise that every business generates some hazardous waste in its normal operations whether it be batteries, fluorescent lightbulbs, or oil. The base Environmental fee is set in statute (HSC §25205.6) and is adjusted annually, up or down, based on changes to the Consumer Price Index.

HWCA is the second largest fund available to DTSC. This account supports DTSC's management of hazardous waste by generators, transporters, and storage, treatment, and disposal facilities in California. The HWCA supports these activities through the collection of a variety of fees, including the generator fee, facility fee, transporter fee and manifest user fee.

DTSC indicates that both HWCA and TSCA have large, growing structural deficits. Expenditures out of HWCA and TSCA currently exceeds revenues from fees, taxes, and cost recovery. The structural imbalance is largely a reflection that the baseline fees that feed into both funds, while adjusted annually based Consumer Price Index, have not been modified in over 20 years to account for new statutory mandates and the growth and changes in various programs. Additionally, changes in the Consumer Price Index do not fully reflect changes in the cost of operating the Department.

The structural deficit for TSCA is expected to worsen in the next couple of years as a number of Superfund/NPL sites are anticipated to enter the post-cleanup monitoring and maintenance phase. Under federal law, the state is responsible for all post-cleanup costs.

The structural deficit in TSCA will also grow with the identification of additional cleanup sites, especially when there is no responsible party available (i.e. orphan sites). Currently DTSC has identified approximately 10,000 sites, however, U.S. EPA estimates there are between 96,000 and 212,000 sites in the state.

DTSC estimates the demand for funding NPL and state orphan sites to be \$15 - \$20 million annually for the next few years from TSCA, though the account only has approximately \$10 million in revenues annually. Failure to address this revenue shortfall will prevent DTSC from carrying out its core mission, especially in regards to the remediation of orphan sites, many of which are impacting groundwater designated for irrigation or drinking, or migrating towards

priority groundwater reserves. Orphan sites also release toxic vapors into buildings where people live and work.

Programmatic Impacts of the structural deficit have already been seen. DTSC currently has slightly less authorized positions than it did in the early 1990s, despite significant new statutory mandates authorized since then, including the Schools Program, Toxics in Packaging Prevention Act, and the Safer Consumer Products Program.

For example, to fund the implementation of the statutorily-created Safer Consumer Products Program from TSCA, DTSC dismantled a pollution prevention program.

Regulatory activities funded by the HWCA have also fallen behind, growing a backlog on the issuance of permits and enforcement, as well as other HWCA programs.

Severe fiscal uncertainty on fund reserves. If left unaddressed, both accounts, TSCA and HWCA, will deplete its reserves resulting in negative fund balances in the near future. However, there is a large amount of uncertainty over when the reserves will be depleted.

On paper, between the 2017-18 and 2018-19 proposed budgets, there was an increase in the growth of the HWCA reserve due to unspecified prior year adjustments that increased the reserve by 160%. A large unspecified prior year adjustment was also made to TSCA. DTSC and the Department of Finance have indicated that there have been substantial accounting difficulties, including merging the department's budget accounting into the new Fi\$cal accounting system.

Given the large amount of adjustments that are being made to the HWCA and TSCA funds, it is uncertain when the reserves might be fully depleted. The large scale adjustments also mask changes in revenues and expenditures in the past couple of years that may be important considerations when addressing the structural deficit.

Numerous fiscal and programmatic criticisms levied at DTSC. In recent years the Department has faced criticism over fiscal mismanagement, inconsistent record keeping, insufficient administrative processes and lack of transparency. Specific incidents across California have exposed and continue to expose glaring failings in DTSC's implementation of its core programs, as well as its support programs. Such incidences include the mishandling of the hazardous waste facility permitting and enforcement of Exide and the Quemetco battery recycling facilities; delayed site remediation; failed public participation and transparency activities; and personnel issues have all led to decreased stakeholder confidence and public trust in DTSC's ability to meet its mandate to protect public health and the environment.

In August 2014, the State Auditor issued a report citing DTSC's neglected cost-recovery efforts. According to the audit, DTSC failed to collect an estimated \$194 million in cleanup costs from polluters since 1987, failed to send out nearly \$142 million in bills, and for the \$52 million in assessments the DTSC did mail, but never collected.

Furthermore, community groups that live near hazardous waste facilities are concerned that DTSC is not properly enforcing state and federal law and is allowing facilities that have numerous violations of state law and regulation, or have an expired permit, to continue to operate. Due to a growing backlog of applications to renew hazardous waste permits, many facilities are operating on "continued permits." These facilities operating on a continued permit are likely using outdated technologies, practices, and safeguards and are potentially releasing hazardous wastes into the environment.

Over the past five years the department has sought to reduce the permit backlog for hazardous waste facilities. In 2014 the Legislature appropriated additional limited-term staff to help reduce the permit backlog, noting there were 24 continued permits. Despite those limited-term positions, as of January 2019, there are now 29 continued operating permits – with 4 of those being expired for a decade or more.

Additionally, the regulated community is concerned about the length of time it takes DTSC to process a permit, with processing a permit extending years beyond the expiration date of their permit, which impacts the costs associated with processing a permit.

DTSC, the Administration, and the Legislature have all taken several actions aimed at restoring public confidence and to help DTSC better achieve its mandate. Over the last five years, the Legislature has conducted numerous hearings on DTSC's internal controls, its business practices, and its basic statutory obligations. In those hearings, the budget and policy committees have evaluated the following four main areas: (1) reviewing and monitoring the department's strategic plan and reorganization; (2) auditing cost recovery at the Department; (3) providing staffing to improve permit backlogs and business operations; and, (4) improving enforcement at the Department.

As a result of those hearings, statutory changes were made to clarify and strengthen the statute to help DTSC better achieve its mandates, and budget augmentations were made to give DTSC the resources to reduce backlogs and address outstanding programmatic failings. Efforts include increasing cost recovery from those responsible for hazardous waste contamination, reducing permitting backlogs, strengthening enforcement, and improving the financial sustainability of its operating funds.

However, many of the underlying concerns about transparency, accountability, and long-term stability of DTSC programs remain.

DTSC's Internal Improvement Initiative. In early 2012, DTSC launched its "Fixing the Foundation" initiative, which includes more than 30 different activities intended to improve its operations and restore public trust in the Department. Activities include increasing cost recovery from those responsible for hazardous waste contamination, reducing permitting backlogs, strengthening enforcement, and improving the financial sustainability of its operating funds. This effort includes multiple goals at every level of the organization, from staff engagement, to permitting backlogs and cost recovery.

In 2014, DTSC released its Permitting Enhancement Work Plan as a comprehensive roadmap to guide efforts to improve DTSC's ability to issue protective, timely and enforceable permits using more transparent standards and consistent procedures. In the 2014-15 Budget Act, DTSC requested and was granted 8 limited-term positions and \$1.2 million for reduction of backlogged permitting application review. As part of the 2015-16 Budget Act, DTSC requested, and received, an additional \$1.632 million and 16 limited-term positions for two years to address the permitting backlog. Though, as noted above, the permitting backlog is now longer than in 2015 and the limited-term positions have expired.

Several recent legislative efforts to improve DTSC's function have been vetoed, citing fiscal issues with DTSC. While Governor Brown recognized the need for improved programmatic performance by DTSC, he vetoed multiple efforts citing that none of those statutory changes should be done without also addressing the budget issues with the Department. Those vetoed bills included:

1. **AB 248 (Reyes, 2017) Hazardous waste: facilities: permits;** would have made statutory changes to improve the permitting process for hazardous waste facilities. The bill was vetoed the Governor. The veto message stated: "...Adding new responsibilities to the DTSC must be undertaken holistically while considering the resources and funding available. Doing anything less robs the community of a real solution and sets government up for failure. Addressing the structural problems at the DTSC, both fiscal and administrative, will not be an easy task, but one that is achievable if the Administration and the Legislature work together. I look forward to the partnership."
2. **AB 1179 (Kalra, 2017) Hazardous waste facilities: inspections;** would have required the DTSC to, on or before January 1, 2020, adopt regulations establishing inspection frequencies for permitted hazardous waste treatment, storage, and disposal facilities and for hazardous waste generators and transporters. The bill was vetoed the Governor. The veto message stated: "...There is no question that comprehensive reform of the DTSC's

operations is needed and the Administration is committed to working with the Legislature on that task. When it comes to protecting the public health of our communities, government cannot afford to make promises it cannot keep. Adding new responsibilities to the DTSC must be undertaken holistically while considering the resources and funding available. Doing anything less robs the community of a real solution and sets government up for failure. Addressing the structural problems at the DTSC, both fiscal and administrative, will not be an easy task, but one that is achievable if the Administration and the Legislature work together. I look forward to the partnership."

3. **AB 2474 (Quirk, 2018) Hazardous waste: identification: testing;** would have authorized the DTSC to evaluate the suitability of two acute aquatic toxicity test protocols, one testing for toxicity to fish embryos, and the other for toxicity to daphnids, for hazardous waste identification, and requires the DTSC to provide one or both of the tests as optional alternatives to the acute aquatic toxicity test currently in its regulations, which is performed on fish. The bill was vetoed the Governor. The veto message stated: "...This bill authorizes the DTSC to evaluate alternative methods from its standard bioassay procedure when determining if a product is hazardous waste. The DTSC currently has the authority to establish alternative methods of testing a product's toxicity to aquatic life. Despite this, it has not exercised this option because such tests are too expensive. The DTSC has a structural deficit and I am not inclined to sign legislation that creates additional cost pressures."
4. **SB 812 (De León, 2014) Hazardous waste;** would have modified DTSC's permitting process and public participation requirements for hazardous waste facilities. Establishes a Bureau of Internal Affairs to oversee DTSC and investigate departmental misconduct and a DTSC Citizen Oversight Committee to receive and review allegations of misconduct. The bill was vetoed the Governor. The veto message stated: "This bill attempts to fix the hazardous waste facility permitting process by establishing a community oversight committee, a three-year timeline for issuing permits, and an amended regulatory process for standardizing permit decisions. The author is seeking transparency and accountability in the Department's permitting process, and rightfully so. The delay and complexity that has plagued the Department's permit process over the last few decades has resulted in an inadequate and unresponsive regulatory program. Unfortunately, there are provisions in the bill that will unintentionally delay the Department's current plan to revise its program and complete its review of expired permits over the next two years. Instead of risking further delay and confusion, I would like to personally work with the author on modifications to the language, including providing the Department the necessary authority and adequate resources to fulfill our shared objectives of improving the performance of this critically important state program."

Recent Budget Actions.

1. **Fee for Service.** SB 839 (Committee on Budget and Fiscal Review, Chapter 340, Statutes of 2016) eliminated the option to pay a flat fee for a hazardous waste permit application in lieu of a fee for service. This change to a cost-reimbursement basis would require permit applicants to pay the full costs associated with permitting efforts. Prior to this change, applicants had the option of paying either a flat fee, or a reimbursement fee for the actual costs of reviewing permit applications. Given that the flat fee was very low and did not cover the cost of the permit, facilities chose to pay the flat fee, therefore DTSC had to dip into other funds to cover the permit review costs. This change is intended to lessen pressures on the HWCA.
2. **The Independent Review Panel.** With the aim of identifying and addressing the continued failings of DTSC to meet its public health and environmental protection mandates, SB 83 (Committee on Budget and Fiscal Review, Chapter 24, Statutes of 2015) established an Independent Review Panel (IRP) to review and make recommendations regarding improvements to DTSC's permitting, enforcement, public outreach, and fiscal management, with the goal of resolving the outstanding operational problems within DTSC and creating strong statutory mandates and accountability in the long term.

The three member IRP was charged with advising DTSC on issues related to its reporting obligations, making recommendations for improving DTSC's programs, and advising DTSC, along with the other California Environmental Protection Agency boards and departments, to *"institute quality government programs to achieve increased levels of environmental protection and the public's satisfaction through improving the quality, efficiency, and cost-effectiveness of the state programs."* Pursuant to SB 83, the IRP was authorized until January 1, 2018.

On January 1, 2018, the IRP completed its term and on January 8, 2018 released its final report and recommendations concluding:

DTSC made considerable progress since the IRP began meeting in November 2015. The Governor and DTSC Director Lee stabilized the Department's leadership team. DTSC worked systematically to evaluate its organizational culture and lay the groundwork for improvements. Budget augmentations have made a difference, especially in cost recovery, reducing permitting backlogs, environmental justice work, and the Exide residential cleanup. DTSC has been working on improvements to its public engagement efforts. It has made efficiency improvements. It has enhanced the EnviroStor public interface and made content improvements to its other website offerings. The Department

has implemented, or is working on, most of the IRP's recommendations and has achieved, or partially achieved, many of the IRP's suggested performance metrics.

However, there is more work to be done. DTSC can expect a wave of retirements in the coming years, with a consequent loss of institutional knowledge. The Department is only beginning to consider and implement its organizational culture plans, and several cannot be implemented without additional resources. Structural deficits in DTSC's two major accounts require immediate attention. Several programs need additional funding, especially for orphan site cleanups, the Exide residential cleanup, and the SCP Program. It is not yet certain whether DTSC's public participation and environmental justice work will lead to enduring improvements. The website and EnviroStor require further improvements and fastidious content updates. DTSC must find a better balance between work product quality and timeliness. DTSC's governing statutes should be reviewed to delete redundancy and give the Department more focus.

The IRP process challenged DTSC to explain publicly why it operated the way it does and to think about how it can better accomplish its mission in a climate of limited resources. In the absence of the IRP, the Governor and the Legislature should consider a DTSC governing board or other structural change to enhance transparency and accountability and regularly monitor the status of the IRP-suggested recommendations and performance metrics, as well as the Department's ongoing initiatives and decision-making.

STAFF COMMENTS

Despite a number of internal and external efforts to improve DTSC's ability to satisfactorily meet its core mission and statutory mandates, the Department continues to not meet public expectations, especially in regards to clean-up and permitting activities. Effective regulation of hazardous waste is essential for the protection of public health.

The Department's difficulties likely are a result of multiple factors, though undoubtedly a major factor is the shortage of funding from both HWCA and TSCA. The fees that feed into these funds have not been adjusted for over 20 years and do not reflect significant program expansions and new mandates.

Improving the function of the Department will be extremely difficult, if not impossible, without addressing the funding issues. Resolution of the funding issues will require transparency of the true revenues and expenditures of the past few years, as well as an identification of the true costs of performing all the statutory mandates which the Department is charged.

Bringing additional funding to the Department will necessitate providing assurances that the additional funding will actually lead to better performance, including improved consideration of public health in its decisions and timely permitting. As noted by the IRP's final recommendation, providing these assurances will require actions to enhance transparency and accountability, perhaps with a governing board or other structural change.

To inform consideration of structural and fiscal reforms of the Department, the Legislature might wish to consider asking the Department the following questions:

1. The Department had some complications with migrating over to the new fiscal management system and only was able to close the books for 15-16 and 16-17 this past summer. Have the issues associated with migrating to FISCAL been resolved?
2. The January budget show extremely large adjustments to the 2017-18 fund conditions – in some cases the adjustments are larger than the beginning balance of the account. How confident is DTSC in the status of their budget as reflected in the January budget? If there is uncertainty, what is the range of that uncertainty?
3. The fund condition statements in the January budget shows a reserve in the HWCA of \$23 million, which is over \$10 million higher than was estimated in lasts year's budget. Similarly, the January budget projected ending the current budget year with a reserve of \$12.2 million, which is \$3.5 million higher than the amount estimated last year. What has driven such large changes in projected reserves? Does DTSC anticipate additional significant adjustments?
4. It is certain that the HWCA and TSCA are both in structural deficit, even if there may be uncertainty as to when the accounts might run out of reserves. Given that even the most optimistic projections of the reserves will give the Department no longer than two, maybe three years, before these funds run out of money, what is the Department's plan to address the structural deficit? When does the Department anticipate presenting a plan to the Legislature?
5. There are seven main fees that fund the HWCA. What has been the long term trend in revenues from each of these funds and can the Department explain the drivers for these trends?
6. Several pieces of legislation that proposed to codify IRP recommendations were vetoed by Governor Brown specifically due to the Department's fiscal situation. Have budgetary

constraints hampered the implementation of IRP recommendations and other operational reforms? Has budgetary constraints impacted the Departments base activities?

7. Last year this Subcommittee was told, during May Revise, that there was concern that the HWCA was in danger of running out of reserves in the 17-18 year, which necessitated loans from the Lead-Acid Battery Cleanup Fund to the HWCA to support the Department's base operations. Yet the January 10, 2019 fund condition statements show a \$12 million reserve at the end of the current budget year. Why does the Department propose to continue to take loans from the Lead-Acid Battery Cleanup Fund for DTSC base activities given the stated reserve? Is this transfer still necessary given the higher reserve in HWCA? How have the loans from the Lead-Acid Battery Cleanup Fund impacted the Department's ability to remediate lead contamination in communities impacted by historic lead smelting?
8. What is the Department currently doing in addressing the permit backlog?
9. Can the Legislature expect to see permit decisions this year on some of these permits that have been expired for more than a decade?
10. Of the 29 continued permits, 14 of those are expired within the last two years. Noting the Department's goal of making 90 percent of all permit decisions within two years, when does the Department anticipate significantly reducing the backlog. Does the Department have sufficient staff to reduce this backlog? When can the Legislature expect to see this backlog actually reduced?
11. Given that the Department of Tax Fee Administration collects most of DTSC's fees, has there been any oversight by DTSC or Finance to ensure that fee payers are being billed correctly and are paying what they owe to the state?
12. Looking at the structural deficit in TSCA and seeing that in the near future there will be a significant amount of more federal obligations than the state currently has budgeted for in the site mitigation account, how is the Department planning on addressing the other programs funded by TSCA? Specifically, how will the Department fund state orphan site cleanup? Will the Department have to reduce staff in the Safer Consumer Products Program? What is the Department's plan for addressing this known shortfall in available revenue in TSCA?
13. Given the structural deficit in both HWCA and TSCA, what is the Department's plan for funding its programs if there are no additional resources appropriated?