

Memorandum 2018-52

**Recodification of Toxic Substance Statutes
(Introduction of Study)**

This year, the Legislature added a new study to the Commission's Resolution of Authority: a nonsubstantive reorganization of certain provisions of the Health and Safety Code.¹ Specifically, the Legislature

authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions, to improve the organization and expression of the law. Such revisions may include, but are not limited to, grouping similar provisions together, reducing the length and complexity of sections, eliminating obsolete or redundant provisions, and correcting technical errors. The recommended revisions shall not make any substantive changes to the law. The commission's report shall also include a list of substantive issues that the commission identifies in the course of its work, for possible future study[.]²

After a brief discussion about the timing of this study, this memorandum provides general background on the new study. The memorandum also introduces the study's scope and methodology.

Except as otherwise indicated, all statutory references in this memorandum are to the Health and Safety Code.

1. See 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth & Chau)).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2018 Cal. Stat. res. ch. 158.

TIMING OF STUDY

Senate Concurrent Resolution 91 (Roth and Chau) has taken effect, having been approved by both houses of the Legislature and chaptered by the Secretary of State.³ Thus, the Commission now has authority to conduct this new study.⁴

Although the language of the resolution does not include a deadline for this new study, the staff understands this matter to be a legislative priority.⁵ Typically, legislative assignments are accorded high priority by the Commission.⁶ For this reason, the staff has initiated work on the new study, beginning with the preparation of this memorandum.

The Commission's annual consideration of work topics and priorities will occur at the December meeting. **In the meantime, does the Commission approve of proceeding with work on this topic?**

HISTORY OF ASSIGNMENT

In 2015, the Legislature enacted a bill establishing an Independent Review Panel ("IRP" or "Panel") within the Department of Toxic Substances Control ("DTSC" or "Department").⁷ The IRP was charged with reviewing and making recommendations "regarding improvements to the department's permitting, enforcement, public outreach, and fiscal management."⁸ The IRP was directed to prepare progress reports every 90 days, as well as annual reports providing recommendations to the Governor and the Legislature.⁹ The IRP was authorized only until January 1, 2018, and ceased to exist on that date.¹⁰

During the IRP's tenure, the Panel held several meetings a year, received public comment, and prepared a number of reports.¹¹ During that time, the IRP made two recommendations that certain law reform work be assigned to the Commission.¹² Specifically, the IRP recommended that the Legislature:

3. See 2018 Cal. Stat. res. ch. 158.

4. See Gov't Code § 9602.

5. See Second Supplement to Memorandum 2018-14, p. 1.

6. See, e.g., Memorandum 2017-55, pp. 36-37.

7. See 2015 Cal. Stat. ch. 24 (SB 83 (Committee on Budget and Fiscal Review)).

8. Section 57014(a), as enacted by 2015 Cal. Stat. ch. 24.

9. See Section 57014(f), (h), as enacted by 2015 Cal. Stat. ch. 24.

10. See Section 57014(i), as enacted by 2015 Cal. Stat. ch. 24; see also IRP, DTSC Independent Review Panel Recommendations to the Governor and the Legislature Pursuant to Health and Safety Code Section 57014(h), Executive Summary (Jan. 8, 2018) (hereafter, "IRP Final Report").

11. See generally materials available on IRP Website, <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Independent-Review-Panel.cfm>.

12. See IRP Final Report, *supra* note 10, at 30-31, 37.

- (1) Direct the California Law Revision Commission to review provisions pertaining to the response authority for releases of hazardous substances in Chapter 6.5 and Chapter 6.8 of Division 20 of the Health and Safety Code and related statutory law and provide necessary revisions to improve their organization, clarify their meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant changes to the effect of the law.
- (2) Direct the California Law Revision Commission to work with DTSC to review provisions pertaining to pollution prevention and toxic chemicals in consumer products in Chapter 6.5 of Division 20 of the Health and Safety Code and related statutory law and provide necessary revisions to improve their organization and eliminate unnecessary or obsolete provisions.

Differences between Commission's Assignment and IRP's Recommendation

The Commission's assignment from the Legislature has a different scope than the IRP's recommendations.

The Commission's assignment covers a broader range of statutes. The assignment covers the whole of Chapters 6.5 and 6.8, and is not limited to particular issues addressed within those chapters (i.e., response authority for releases of hazardous substances or pollution prevention and toxic chemicals in consumer products). Given the IRP's concern about these particular bodies of law, it seems sensible to accord those topics particular attention.

The Commission's assignment authorizes a narrower type of reform in that the authorized reform is a strictly *nonsubstantive* recodification. Thus, the Commission's current assignment will not address substantive issues or make substantive reforms. However, the Legislature also asked that the Commission prepare a list of possible substantive issues that the Commission discovers in the course of its study.

The staff notes that the IRP identified several concerns about specific statutory provisions in its Report.¹³ In some instances, addressing the concern would necessarily change the substantive effect of the law. To the extent that the IRP's concerns are substantive and beyond the scope of this study, the staff intends to include those items on the list of substantive issues for possible future study.

Is this approach acceptable to the Commission?

13. See IRP Final Report, *supra* note 10, at 30-31.

STUDY OBJECTIVES

In the Resolution of Authority, the Legislature identifies key goals of this reform. Specifically, the Commission's recommended legislation should:

- (1) Improve the organization and expression of the law.
- (2) Group similar provisions together.
- (3) Reduce the length and complexity of sections.
- (4) Eliminate obsolete and redundant provisions.
- (5) Correct technical errors.¹⁴

As indicated above, under the Commission's current assignment, the legislation must *not* make any substantive changes to the law. Instead, the Commission is directed to include in its report a list of substantive issues for possible future study. The Legislature could subsequently authorize the Commission to undertake additional work on these substantive issues.

Additional Guiding Principles for Recodification

In its recent recodification studies, the Commission has taken a modest approach to proposing changes to the laws at issue. This approach is "grounded in pragmatic concerns about the difficulty of achieving enactment"¹⁵ of a lengthy recodification bill. Given the length and breadth of material in a typical Commission recodification project, "the Legislature needs to receive a noncontroversial bill, so that it can focus its analytical resources on the primary purpose of the bill: to make the [statutory material] easier to use and understand."¹⁶

To avoid creating concerns over its proposed legislation, the Commission will need to (1) stick closely to the existing language of the affected provisions and (2) use the other techniques it has developed over the years to ensure that a recodification effects no substantive change.¹⁷

The Commission, in its recent recodification studies,¹⁸ developed and used a set of criteria to assess whether a proposed change should be included in the

14. See 2018 Cal. Stat. res. ch. 138 (SCR 91 (Roth & Chau)).

15. Memorandum 2009-53, pp. 45-46; see also First Supplement to Memorandum 2016-47, p. 6; Memorandum 2017-5, p. 5.

16. Memorandum 2009-53, pp. 45-46; see also First Supplement to Memorandum 2016-47, p. 6; Memorandum 2017-5, p. 5.

17. For a description of those techniques, see *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217, 231-37 (2009).

18. See Minutes (Sept. 2016), p. 6; Minutes (Feb. 2017), p. 3; see also generally First Supplement to Memorandum 2016-47.

recommendation. Specifically, a proposed change would only be considered for inclusion in the Commission’s recommendation if the change met all of the following criteria:

- (1) It is plainly beneficial.
- (2) It does not present a significant risk of unintended consequences (i.e., its effects seem straightforward and circumscribed).
- (3) It is not likely to be controversial.¹⁹

When the Commission adopted these criteria for use in the Fish and Game recodification study, the Commission indicated that the criteria “should probably be used in any future technical clean-up project.”²⁰

Does the Commission want to use these criteria for assessing proposed changes in this study?

STATUTORY PROVISIONS AT ISSUE

The Commission was asked to revise “Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions.”²¹

Substance of Expressly-Identified Statutory Provisions

Division 20 of the Health and Safety Code is entitled “Miscellaneous Health and Safety Provisions.” Chapter 6.5 is entitled “Hazardous Waste Control” and Chapter 6.8 is entitled “Hazardous Substance Account.” For reference, a list of the articles contained in these chapters is attached as an exhibit to this memorandum.

Generally, these provisions include rules governing, among other things:

- Identification and listing of wastes which are hazardous.²²
- Reduction of hazardous waste production and pollution prevention.²³
- Use, manufacture, or sale of specific substances or products that are hazardous or contain hazardous substances.²⁴

19. See, e.g., Minutes (Sept. 2016), p. 6; Minutes (Feb. 2017), p. 3.

20. Minutes (Sept. 2016), p. 6.

21. *Id.*

22. See, e.g., §§ 25140-25145.4.

23. See, e.g., §§ 25244.12-25244.23, 25251-25257.2.

24. See, e.g., §§ 25210-25210.1, 25210.10, 25214.2, 25215.8.3-25214.8.4.

- Treatment and disposal of hazardous waste (includes rules applicable to generators, transporters, and facilities that treat, store, or dispose of hazardous waste).²⁵
- Approval and permitting of hazardous waste facilities.²⁶
- Enforcement authority and penalty provisions related to violations of hazardous waste and hazardous substance rules.²⁷
- Rules for the disposition of hazardous waste from households and small generators.²⁸
- Financial provisions (e.g., fees, accounts, loans, and funds) related to hazardous substances and hazardous wastes.²⁹

“Related Provisions”

The Commission’s assignment also extends to nonsubstantive reforms of “related provisions.” At this early stage of the study, the staff is not entirely sure which types of provisions should be considered “related provisions” for the purposes of the Commission’s study.

At a minimum, “related provisions” would include any provisions that cross-refer to the provisions of Chapters 6.5 and 6.8. Those cross-references will need to be updated to reflect any numbering or organizational changes.

“Related provisions” would also seem to include any closely-related provisions currently codified elsewhere in the codes. Those provisions could be re-codified with the substance of Chapters 6.5 and 6.8.

The staff welcomes comments on any provisions that should be candidates for nonsubstantive reform as “related provisions.”

Implementing Regulations

As in the Commission’s study of Fish and Game law, the statutory provisions at issue in this study are backed by a large body of regulations.³⁰ DTSC’s regulations are found in Division 4.5 of Title 22 of the California Code of Regulations.

The Commission has no authority to make recommendations for the reform of administrative regulations. However, the Commission’s recodification of the associated statutes will require conforming changes to the regulations.

25. See, e.g., §§ 25179.1-25179.12, 25208-25208.17, 25209-25209.19, 25245-25249.

26. See, e.g., §§ 25199-25199.14, 25200-25205.

27. See, e.g., §§ 25180-25196, 25358.9, 25359.2, 25359.4, 25359.7, 25367.

28. See, e.g., §§ 25218-25218.14.

29. See, e.g., §§ 25205.1-25205.23, 25330.2-25337, 25342-25343, 25350-25359.7, 25358-25386.5, 25395.20-25395.32.

30. See Memorandum 2018-22, pp. 3-4.

Specifically, statutory cross-references in the regulations will need to be revised to reflect the new numbering of the statutes. The required statement of statutory authority for each regulation will also need to be updated.

The Commission's final recommendation will include a disposition table that should substantially simplify the task of updating the regulations. These tables will provide a relatively quick way to identify the appropriate updated citation.³¹

STUDY METHODOLOGY

Because this is the introductory memorandum for a new study, it is worthwhile to briefly describe the Commission's study process, for the benefit of stakeholders who are unfamiliar with that process.

The following summary is largely a restatement of material contained in a Commission memorandum introducing the Commission's study of the California Public Records Act.³²

General Description of Study Process

The Commission's study process is described in detail in its *Annual Report*.³³

For this study, the Commission's staff will conduct background research as needed.³⁴ The staff will share its background research with the Commission and interested persons in a series of memoranda to be presented and discussed at the Commission's bi-monthly public meetings. **Interested persons are invited to bring relevant materials and helpful resources on this topic to the staff's attention.**

Before each meeting, the staff will prepare and distribute one or more memoranda that serve as the basis for discussion at the meeting. At the meeting, informed by the staff memoranda and public comment, the Commission will make decisions about how to proceed (what issues to investigate, what reforms to propose, how those reforms should be drafted, and the like).

31. See, e.g., *Commercial and Industrial Common Interest Developments*, 42 Cal. L. Revision Comm'n Reports 1, 215-220 (2012).

32. See Memorandum 2017-5, pp. 11-13.

33. The Commission's 2016-2017 *Annual Report* is available in preprint format at <http://www.clrc.ca.gov/pub/Printed-Reports/Pub239-AR16.pdf>. See in particular pages 768-777. For further information on the Commission's study process, see http://www.clrc.ca.gov/Menu5_about/process.html; see also Barbara Gaal, *Evidence Legislation in California*, 36 Sw. Univ. L. Rev. 561, 563-69 (2008).

34. For certain studies, Commission hires a consultant (usually a law professor) to prepare a background study before the Commission begins considering a topic. Because this particular study will be purely technical and nonsubstantive in nature, the background research will be done by the staff, not by a consultant.

The Commission welcomes public input throughout the course of its study. If possible, comments on a specific issue should be provided prior to or contemporaneously with the Commission’s consideration of the issue.

For this study, the staff memoranda will be posted on the Commission’s website at < <http://www.clrc.ca.gov/E200.html>>. By following the instructions on that page, interested persons can subscribe to receive the memoranda for this study electronically as they are generated.

After the Commission becomes familiar with a topic and makes a series of preliminary decisions, preparation of a tentative recommendation begins. A tentative recommendation has three main components: (1) proposed legislation, (2) a Commission Comment to each section of the proposed legislation, and (3) a narrative explanation of the reform (the “preliminary part”).

After the Commission approves a draft of the tentative recommendation, the tentative recommendation is widely circulated to interested persons for a formal public comment period, which typically ranges from 30 days to several months (the length of the period corresponds to the length and complexity of the proposed reform). During the comment period, it is just as important for an interested person to express support for the proposal as it is to express disapproval.

The Commission then considers the comments at one or more public meetings and determines what, if any, recommendation it will make to the Legislature. The Commission will often substantially revise a proposal in response to comment it receives. After consideration of the comments, the Commission decides whether to approve a final recommendation.

After the Commission approves a final recommendation, the proposal must go through the same legislative process as any other legislative proposal to become law. The staff provides the final recommendation (including the proposed legislation, Commission Comments, and preliminary part) to the policy committees and the Governor. The Commission’s recommendation is properly regarded as legislative history, indicative of legislative intent.³⁵

The process of preparing a final recommendation, even on a narrow, simple, and straightforward topic, takes a minimum of a year, often several years. Then it generally takes at least another year before the proposal is enacted. Legislation generally becomes operative on January 1st of the year following its enactment.³⁶

35. See *2016-2017 Annual Report*, *supra* note 33, at 770-77 & cases cited therein

36. See Cal. Const. art. IV, § 8(c)(1); Gov’t Code § 9600(a).

Participation By Interested Persons

The Commission's longstanding practice is to welcome participation by *any* interested individual or organization in its study process. All Commission meetings are open to the public and members of the public are given opportunities to participate in the discussion. Written comments can be submitted at any time, by mail, email, or other method of delivery.

Comments relating to this study should be directed to Kristin Burford, as follows:

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California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
Email: <kburford@clrc.ca.gov>

Comments received shortly before a Commission meeting may not be analyzed and considered as thoroughly as comments received well in advance.

Comments are especially encouraged and solicited during the comment period on a tentative recommendation. Persons or organizations with limited resources may want to focus on providing comments at this stage of the Commission's study.

Efforts to Build the Mailing List for This Study

The staff will be creating a new mailing list for this study. The Commission has not done prior work on these issues and, thus, does not have a suitable existing mailing list for this topic. The staff is just beginning the process of building the mailing list for this study.

Suggestions about persons and organizations to include on the mailing list would be helpful. In a future memorandum, we will update the Commission on our progress and efforts to reach out to stakeholders.

Respectfully submitted,

Kristin Burford
Staff Counsel

LIST OF AFFECTED ARTICLES OF HEALTH & SAFETY CODE FOR RECODIFICATION STUDY

Division 20. Miscellaneous Health and Safety Provisions

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Chapter 6.5. Hazardous Waste Control

- Article 1. Findings and Declarations
- Article 2. Definitions
- Article 3. Hazardous Waste Resource and Research Coordination Program
- Article 3.5. Hazardous Waste Management Plans
- Article 4. Listings
- Article 4.5. State Regulation of Existing Hazardous Waste Facilities
- Article 5. Standards
- Article 5.5. Coordination with Federal Acts
- Article 5.6. The Toxic Injection Well Control Act of 1985
- Article 6. Transportation
- Article 6.5. Hazardous Waste Haulers
- Article 6.6. Hazardous Waste of Concern and Public Safety Act
- Article 7. Treatment, Recycling, and Disposal Technology
- Article 7.7. Hazardous Waste Treatment Reform Act of 1995
- Article 8. Enforcement
- Article 8.3. Hazardous Waste Enforcement Coordinator and Strike Force
- Article 8.5. Hazardous Waste Testing Laboratories
- Article 8.6. Development of Hazardous Waste Management Facilities on Indian Country
- Article 8.7. Procedures for the Approval of New Facilities
- Article 9. Permitting of Facilities
- Article 9.1. Facilities and Generator Fees
- Article 9.2. Cost Reimbursement
- Article 9.4. Banned, Unregistered, or Outdated Agricultural Wastes
- Article 9.5. Surface Impoundments
- Article 9.6. Land Treatment Units
- Article 9.7. Integrated On-Farm Drainage Management
- Article 10. Prohibited Chemicals
- Article 10.01. Management of Perchlorate
- Article 10.02. Lighting Toxics Reduction
- Article 10.1. Management of Hazardous Wastes Removed From Discarded Appliances
 - Article 10.1.1. Metal-Containing Jewelry
 - Article 10.1.2. Lead Plumbing Monitoring and Compliance Testing

- Article 10.2. Motor Vehicle Switches
 - Article 10.2.1. Mercury-Added Thermostats, Relays, Switches, and Measuring Devices
 - Article 10.2.2. Mercury Thermostat Collection Act of 2008
- Article 10.3. Electronic Waste
- Article 10.4. Toxics in Packaging Prevention Act
- Article 10.5. The Lead-Acid Battery Recycling Act of 2016
 - Article 10.5.1. Lead Wheel Weights
- Article 10.6. Management of Small Household Batteries
- Article 10.7. Recyclable Latex Paint and Oil-Based Paint
- Article 10.8. Household Hazardous Waste and Small Quantity Generator Waste
 - Article 10.9. Battery Management: Federal Regulation
- Article 11.1. Institutional Control
- Article 11.5. Hazardous Waste Disposal on Public Land
- Article 11.8. Hazardous Waste Reduction, Recycling, and Treatment
- Article 11.9. Pollution Prevention and Hazardous Waste Source Reduction and Management Review Act
- Article 12. Financial Responsibility and Closure and Maintenance of Facilities
 - Article 12.5. The Perchlorate Contamination Prevention Program
- Article 13. Management of Used Oil
 - Article 13.5. Motor Vehicle Brake Friction Materials
- Article 14. Green Chemistry
- Article 16. Lead and Arsenic Content in Glass Beads
- Article 17. Photovoltaic Modules

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Chapter 6.8. Hazardous Substance Account

- Article 1. Short Title and Legislative Intent
- Article 2. Definitions
- Article 3. Hazardous Substance Account
- Article 4. Fees
- Article 5. Uses of the State Account
 - Article 5.5. Cleanup of Santa Susana Field Laboratory
- Article 6. Recovery Actions
 - Article 6.3. Technology Demonstration Program
- Article 7. Compensation
 - Article 7.5. Hazardous Substance Cleanup Bond Act of 1984
- Article 7.8. Orphan Share Reimbursement Trust Fund
- Article 8.5. Cleanup Loans and Environmental Assistance to Neighborhoods
 - Article 8.6. Revolving Loans Fund
 - Article 8.7. California Financial Assurance and Insurance for Redevelopment Program