

Memorandum 2020-62

**Recodification of Toxic Substance Statutes
(Comments on Tentative Recommendation)**

In this study, the Commission¹ is undertaking a nonsubstantive reorganization of Chapters 6.5 (commencing with Section 25100) and 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.² The Commission decided to proceed with the recodification of Chapter 6.8 first, then move to the recodification of Chapter 6.5.³

In January 2020, the Commission approved tentative recommendations for the recodification of Chapter 6.8 and the associated conforming revisions.⁴ The comment deadline for those tentative recommendations was July 24, 2020.

The Commission received comments on the recodification from Department of Toxic Substances Control (“DTSC”) staff and an attorney in private practice, Peter Weiner. No comments were received on the conforming revisions tentative recommendation.

After some brief background, this memorandum discusses the treatment of the Commission’s Notes in the main tentative recommendation and the stakeholder comments generally. After that general discussion, this memorandum begins describing the issues raised in the Commission’s Notes or stakeholder comments that require individual consideration. This memorandum discusses the individual issues in order of proposed section number, up through proposed Section 68420. The remaining issues will be addressed in a future memorandum.

Unless otherwise indicated, any statutory citations are to the Health and Safety Code. Citations to “proposed” sections refer to the proposed sections contained in the Commission’s tentative recommendation for the recodification of Chapter 6.8.

1. 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. See 2020 Cal. Stat. res. ch. 46 (ACR 173 (Gallagher)).

3. Minutes (Feb. 2019), p. 3.

4. Minutes (Jan. 2020), p. 3.

BACKGROUND

As it works to finalize its recommendation, the Commission may find helpful a brief summary of the study's objectives and the conservative drafting approach that was used to prepare the tentative recommendations.

Study Objectives

The Legislature's assignment to the Commission specifically identifies key goals of the Commission's work on this topic:

- (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.⁵

The Legislature also specifically directed that the Commission's work be nonsubstantive, avoiding any change to the legal outcomes or requirements.⁶ However, the Legislature also directed the Commission to include a list of substantive issues for possible future study in its report.⁷

Drafting Nonsubstantive Recodification

The Commission has undertaken a number of nonsubstantive recodification projects. In the course of its work, the Commission has learned that these projects should focus primarily on organizational changes.

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" 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."

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

5. See 2020 Cal. Stat. res. ch. 46.

6. *Id.*

7. *Id.*

developed over the years to ensure that a recodification effects no substantive change.⁸

The “other techniques” that the Commission uses in this type of study include, for instance, a now-standard suite of rules of construction that expressly affirm that the proposed law is a nonsubstantive continuation of existing law, rather than a new enactment.⁹

Those techniques also include a conservative drafting posture, described below, that limits the changes to the existing statutory language.

Conservative Drafting Posture

Over the course of the last few nonsubstantive recodification projects, the Commission has developed a set of principles to guide decisions on when the language of existing law should be changed.

Under these principles, a proposed change would only be included in the Commission’s recommendation if it meets 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.¹⁰

In an earlier study, the Commission decided that these principles should probably be used in all nonsubstantive recodification projects.¹¹ The Commission also decided specifically that these principles would be used in this study.¹²

Under that conservative approach, the Commission will likely be deferential when faced with concerns from commenters. Changes that prompt significant concern will likely be removed, reverting to the language of existing law. Despite such a reversal, an issue can always be added to the list of possible topics for future study. This would enable the Commission to revisit the matter, without the time pressures of the overall study and the possibility that a controversial change could jeopardize the larger proposal.

The staff will refer back to these conservative drafting principles throughout the remainder of this memorandum, as a reason to reverse a proposed change.

8. Memorandum 2018-52, p. 4 (internal citations omitted).

9. See proposed Sections 68010-68025.

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

11. Minutes (Sept. 2016), p. 7.

12. See Minutes (Oct. 2018), p. 4; Memorandum 2018-52, p. 5.

PROPOSED CONSENT TREATMENT

Previously, the Commission directed the staff to use proposed consent treatment for issues to streamline consideration of purely technical and uncontroversial matters.¹³ The staff will use proposed consent treatment, as appropriate, to facilitate the Commission's consideration of comments that can be resolved with minor adjustments to the proposed legislation.

Each proposed consent item will be identified in its heading as "PROPOSED CONSENT." If any Commissioner would like to discuss a consent item, the Commissioner may request discussion at the meeting. In the absence of such a request, the issue will be deemed unanimously approved without discussion.

STATUS OF TENTATIVE RECOMMENDATION AND STAKEHOLDER COMMENT

When preparing the tentative recommendation, the Commission included over 200 individual "Notes" in its proposal. The Notes serve two purposes. They provide information to help stakeholders understand the proposal and they solicit stakeholder comment on specific issues.

Stakeholder Comment

The Commission received informal comment on the tentative recommendation from Attorney Peter Weiner and DTSC staff. The DTSC staff comments were provided by a few different individuals.

The comment was provided both by phone and in a series of emails.¹⁴ Given the different formats and sources of the comment, it would not be particularly easy or helpful to reproduce all of the commentary as an attachment to this memorandum.

Instead, the memorandum simply describes, paraphrases, and, in some cases, briefly quotes the relevant comment. In preparing this memorandum, the staff sought to highlight the key concerns of the commenters, but welcomes any clarifications, refinements, or additional comments.

13. Minutes (July 2019), p. 2.

When presenting proposed consent matters, the memorandum describes the issue using the same level of detail as if the issue would be up for discussion at the Commission's meeting, but the item will not be presented by staff at the meeting.

14. Written materials received are on file with the Commission.

Comment Generally

DTSC staff expressed general support for the organizational changes reflected in the proposal. DTSC staff also responded to a number of the specific issues raised in the Notes or raised other individual issues. Where DTSC staff sought a change or raised a concern, those items will be discussed individually.

DTSC staff made generally supportive comments in response to a number of the Commission's Notes.¹⁵ These comments will not be discussed individually, as they do not raise concerns or seek changes to the proposed treatment in the tentative recommendation. The staff appreciates these comments, as the comments provide additional confidence that the proposed treatment in the tentative recommendation is appropriate.

Mr. Weiner raised concerns about the recodification of a provision that was the subject of a 9th Circuit decision. Mr. Weiner's concerns will be discussed in a future memorandum.

Many of the Commission's Notes did not receive comment. The next section of this memorandum categorizes the Commission's Notes and offers a proposed treatment for the issues raised in the Notes, even in the absence of comment.

TREATMENT OF NOTES IN TENTATIVE RECOMMENDATION

In general, the Notes in the tentative recommendation fall into four general categories:

- (1) **Informational Notes.** Informational Notes provide an explanation of a proposed change to existing law. They are intended to facilitate stakeholder review of the proposal. Typically, these Notes do not seek comment.
- (2) **Notes on possible problem or improvement.** Notes on a possible problem or improvement seek comment on whether a provision needs to be revised or studied further.
- (3) **Notes on apparent error.** Notes on apparent error seek comment on how to update or revise an apparent error in existing law.
- (4) **Notes on possible obsolescence.** Notes on possible obsolescence seek comment on whether a provision can be discontinued as obsolete.

The treatment of each category is discussed in turn below.

15. DTSC staff was generally supportive of the restatements offered in the tentative recommendation for the following proposed sections: 68075, 68450 (Note #1), 68600 (Notes #1, 3), 68605, 68615, 68660 (Note #1), 68765 (Notes # 1, 2), and 69060 (Note #1).

Informational Notes

Description

Informational Notes describe and explain a proposed change to existing law in detail. These informational Notes could be further subdivided into three groups, based the degree of confidence that the staff has in the proposed changes:

- Where the technical correctness of the proposed change seems plain, the Note is strictly explanatory. No request for comment is made.¹⁶
- Where the correctness of the proposed change is nearly certain, the Note takes a presumptive posture, stating that “absent comment, the proposed provision will be presumed correct.”¹⁷
- In a few cases, where the correctness of a proposed change is less certain, the Note simply welcomes comment.¹⁸

Proposed Treatment

The staff anticipated that most of the informational Notes would not prompt comment. That is because the staff had some measure of confidence that the proposed changes were correct.

Where the Commission received comment expressing concern about a proposed change, the comments will be discussed individually.

In the absence of comment raising concern about a proposed change, the staff recommends that the provision be left as presented in the tentative recommendation (i.e., including the proposed change).

Notes on Possible Problem or Improvement

Description

The Commission encountered a number of provisions where it appeared that there might be a problem with existing law, but the Commission did not have enough information to (1) determine whether the perceived problem was causing actual problems in practice, and (2) how the law should be revised to address such problems.

This category of Notes includes situations where:

16. See, e.g., Notes to proposed Sections 68035 (Note #1), 68140, 68295, 68420 (Notes # 2, 4), 68660 (Note #2), 68790, 69225 (Note #2), 70230 (Note #2), and 70970.

17. See, e.g., Notes to proposed Sections 68240, 68420 (Note #3), 68590 (Note #2), 68605, 68675, 68855 (Notes #3-5), 68925, 69030 (Notes #1, 2), 69100 (Note #1), 69330 (Note #1), 70070 (Note #1), and 70925 (Notes #1, 2).

18. See, e.g., Notes to proposed Sections 68085 (Note #1), 68105, 68200, 68210 (Note #2), 68230 (Note #3), 68285 (Note #1), 68510 (1st 2 paragraphs), 68535, 68560 (Note #1), 70305, and 70870.

- An existing provision has a possible deficiency,¹⁹ but it is unclear whether the deficiency is causing practical problems.²⁰
- An existing provision seems difficult to understand, but that may not be causing problems in practice.²¹
- An existing provision could not be fully evaluated for errors or obsolescence without additional information.²²
- An existing provision seems to be a candidate for relocation elsewhere in the code.²³
- An existing provision should perhaps be added to the list of topics for future substantive work.²⁴

In each of these cases, the recodification includes a Note flagging the issue and requesting information needed to determine whether and how the provision should be revised.

Proposed Treatment

Where the Commission received comment responding to a question raised in a Note, those responses will be discussed individually.

In the absence of such comment, the staff recommends that the relevant provisions be left as presented in the tentative recommendation (i.e., no change should be made to existing law to address the possible problem). These Notes involve cases where the staff lacks sufficient information to know whether a perceived problem actually exists or, if it does, how to address it. Without stakeholder input on these questions, the Commission could only make an educated guess about whether or how to address them. Making changes in these circumstances poses too high a risk of inadvertent substantive change.

However, the Commission may want to consider adding these items to the list of issues for possible future study. The staff has prepared a list of the issues on which we did not receive comment. It is attached to this memorandum. **The**

19. E.g., the deficiency could be an erroneous cross-reference, an inexplicable inconsistency, or an error in terminology.

20. See, e.g., Notes to proposed Sections 68260, 68285 (Note #3), 68440 (Note #2), 68930 (Note #4), 69230 (Note #2), 69670 (Note #2), 69680 (Note #2), 69875, 70085, 70230 (Notes # 1, 3), 70235 (Note #2), and 70710 (Note #2).

21. See, e.g., Notes to proposed Sections 68035 (Note #2), 68290, 68420 (Note #5), 68440 (Note #1), 68870 (Note #2), 68930 (Note #2), 68935 (Note #3), 69160, 69880, 70310, and 70730.

22. See, e.g., Note to proposed Article 13 of Chapter 8 and Notes to proposed Sections 68230 (Note #2), 68510 (3rd paragraph), 68600 (Note #2), 69100 (Note #3), and 70100.

23. See Note to proposed Article 9 of Chapter 3 and Note to proposed Section 69055 (Note #2).

24. See Notes to proposed Sections 68575 (Note #2) and 69055 (Note #1); see also Notes to proposed Sections 70230 (Notes #1, 3) and 70280 (these Notes discuss broken cross-references, but also raise questions about the need for additional substantive revision)

Commission can consider whether some or all of the items on the attached list should be added to the list of issues for possible future study.

Notes on Apparent Error

Description

A number of existing provisions contain clearly defective cross-references (i.e., the referenced provision is either plainly incorrect or does not exist). Where possible, these cross-references were corrected and flagged in an informational Note (as described previously). In some cases, however, the appropriate update or change to address the cross-reference was not entirely clear.

For some broken cross-references, the cross-reference can simply be deleted. Where deletion was proposed, a Note requests comment on whether that result is appropriate.²⁵

In other cases, the broken cross-reference cannot simply be excised from the provision. For these provisions, a Note seeks comment on how to update the provision to address the error.²⁶

Proposed Treatment

Where the Commission received no comment on a proposed correction, the staff recommends that the language proposed in the tentative recommendation be retained in the proposed law. Where comment raising concern about the proposed correction is received, that comment will be discussed individually.

Where no proposed correction was made, the broken cross-reference will need to be addressed regardless of whether comment was received. The Commission will need to determine how to fix each broken cross-reference in its recommendation. Each of these items will be discussed individually and different options for resolution will be presented.

Notes on Possible Obsolescence

Description

In preparing the recodification, the Commission identified a number of provisions that appear to be obsolete, in whole or in part. For example, some

25. See, e.g., Note to proposed Sections 68345.

26. See, e.g., Notes to proposed Sections 68555 and 70070 (Note #2); see also Notes to proposed Sections 70230 (Notes #1, 3) and 70280 (addressing both the immediate issue of a broken cross-reference, but also raising questions about the need for future substantive work).

provisions establish a due date for a one-time report or create an obligation that must be fulfilled by a specific date.

While any provision with a lapsed date may be obsolete, there are reasons why such provisions could have continuing relevance. For example, if a specified deadline was not met, it may be helpful to keep the law on the books for some period of time to avoid impliedly relieving the responsible party of the responsibility altogether. A lapsed provision may also have continuing historical relevance that is best served by keeping the provision in the law. Those situations are more likely to exist for a recently lapsed date than for one that lapsed long ago.

Rather than trying to assess how long a particular provision would remain relevant after the its date had passed, the tentative recommendation took a cautious approach. The tentative recommendation proposes continuing these possibly obsolete provisions, but requests comment on whether the provision should be deleted as obsolete.²⁷

Proposed Treatment

No comment was received supporting the removal of any of those provisions from the law.

In general, the staff recommends a conservative approach to provisions with lapsed dates. It would be better to leave an obsolete provision in the law (for now) than to delete a provision that turns out to serve a useful purpose.

The Commission now needs to decide how to handle the apparently obsolete provisions. It could:

- (1) Remove some or all of them from the proposed law. This would require case-by-case analysis, without any extrinsic input on how to assess them.
- (2) Leave them in the proposed law. This would not be ideal, as the Commission has been charged with removing obsolete material. But it would seem to be the prudent course, given the difficulty of assessing obsolescence case by case.

If the Commission decides to retain any or all of the apparently obsolete provisions, **the staff recommends that the Commission add those provisions to the list of possible future study topics.** This could allow the Commission to return

27. See, e.g., Notes to proposed Sections 68285 (Note #2), 68505, 68885 (Note #2), 69105 (Note #1), 69330 (Note #2), 69680 (Note #2), 69730, 70490, and 70625.

to the matter with a freer hand (because substantive changes could be made and any controversial choices would not endanger the recodification as a whole).

ISSUES AFFECTING MULTIPLE PROVISIONS

In working through the Notes in the tentative recommendation, the staff encountered several issues that affect multiple provisions of the proposed legislation. Those issues are aggregated and discussed in groups below.

PROPOSED CONSENT: Erroneous Use of “Hazardous Waste”

Chapter 6.8 deals primarily with “hazardous substances.”²⁸ Two provisions appear to erroneously refer to “hazardous waste,” as opposed to “hazardous substance.”²⁹

From context it seems clear that the provisions should refer instead to “hazardous substance.” Excerpts of the relevant provisions from the proposed law are set out below (with key terms in bold):

68560. (a) The department shall conduct a technology transfer program that shall include the development, collection, evaluation, coordination, and dissemination of information relating to the utilization of alternative or innovative **hazardous waste** treatment technologies demonstrated pursuant to this article.

(b) The information in subdivision (a) shall include all of the following:

(1) An evaluation of each treatment demonstration project’s efficacy relating to performance and cost in achieving permanent and significant reduction in risks from **hazardous substance** releases.

...

68720. After making a determination, based upon a preliminary site assessment that there has been a release of a **hazardous substance** on, under, or into the land on a site, the department or a county health officer shall order the property owner to secure the site if all of the following conditions apply to that site:

...

(b) The site poses a public health risk if human contact is made with the **hazardous waste** or the surrounding contaminated area.

...

28. The definition of “hazardous substance” is broad and includes any “hazardous waste” as defined in Chapter 6.5. See proposed Section 68075(a)(7).

29. See proposed Sections 68560 and 68720.

For these provisions, DTSC staff agree that “hazardous waste” should be replaced with “hazardous substance” in those provisions. **The staff recommends that those changes be made.**

PROPOSED CONSENT: Use of “Liable Party”

In existing law, “responsible party” and “liable person” are both defined terms.³⁰ They are interchangeable, with both having the same defined meaning.³¹

Two provisions of existing law use the term “liable party.”³² That is not defined for the purposes of Chapter 6.8.

It is unclear whether the use of “liable party” was a drafting error or was intentional (presumably with the intention that it be read with its common meaning).

Notes asked about this issue.

DTSC staff commented that it appears that “party” was simply used interchangeably with “person” and that “liable party” is meant to have the same meaning as “responsible party” and “liable person.”

Out of an excess of caution, the staff recommends that the language be left unchanged and that the issue be added to the list of possible topics for further study.

On a related point, the Commission itself proposed using the term “liable party” in the proposed law. This was not a drafting error. The Commission intended that the words be given their common meaning.

Nonetheless, to avoid any possibility of confusion, the staff now recommends that the heading be reworded to break up the potentially confusing term, thus:

Article 7. State Recovery from Liable Party Liable for the Loss

PROPOSED CONSENT: Addition of Section Defining “State Board”

The term “state board” is defined twice in existing Chapter 6.8. Each definition has its own limited application.³³ In both instances, the term means the State Water Resources Control Board.

Two provisions of Chapter 6.8 use the term “state board” without definition, because they are not located within the parts of the chapter that are governed by

30. See proposed Sections 68145.

31. Proposed Section 68145 provides that “responsible party” or “liable person” means “those persons described in Section 107(a) of the federal act.”

32. See proposed Sections 69670 and 70920.

33. See proposed Sections 69190 and 70270.

the two definitions.³⁴ In both instances, the context strongly suggests that the term is used to refer to the State Water Resources Control Board.

The tentative recommendation asks whether a single definition of “state board,” applicable to the entire proposed law, could be added as a replacement for the two existing limited application definitions.

DTSC did not answer that general question, but did make some related comments. They noted that some headings use the term “state board” without falling within the application of the existing definitions. They see that as problematic. That concern would be addressed by adding a general definition of the term that is applicable to the entirety of the proposed law.

The staff recommends adding the following provision to the proposed law:

68168. “State board” means the State Water Resources Control Board.

In addition, the existing limited-application definitions for “state board” should be removed as redundant.

ISSUES AFFECTING SINGLE PROVISIONS

The issues discussed in this section of the memorandum each relate to one provision of the proposed law.

These issues are presented in numerical order using the section numbering from the proposed law.

Proposed Section 68020. Judicial Decisions Interpreting Former Law

Proposed Section 68020 is one of the Commission’s standard rules of construction used in nonsubstantive recodification projects:

68020. (a) A judicial decision interpreting a previously existing provision is relevant in interpreting any provision of this part that restates and continues that previously existing provision.

(b) However, in enacting the Hazardous Substance Account Recodification Act, the Legislature has not evaluated the correctness of any judicial decision interpreting a provision affected by the act.

(c) The Hazardous Substance Account Recodification Act is not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision affected by the act.

34. See proposed Sections 68910(b) and 70775.

DTSC staff found the provision overly complex and suggested that it be simplified to read: “restatement of an existing provision is not intended to have any effect on a judicial interpretation of the restated provision.”

The staff is not sure that the proposed language fully captures the meaning of proposed Section 68020. For example, subdivisions (b) and (c) of that provision describe the legislative intent with respect to prior judicial decisions. DTSC staff’s proposed language does not address that issue.

Moreover, the Commission’s rules of construction are mostly uniform across its various recodification projects. The staff believes that this uniformity is valuable for judicial interpretation.

The staff recommends against making the proposed change.

PROPOSED CONSENT: Proposed Section 68035. Applicable Definitions

Proposed Section 68035(b) provides, in part, “[u]nless the context requires otherwise and except as provided in this article, the definitions contained in Section 101 of the federal act (42 U.S.C. Sec. 9601) apply to the terms used in this part.” A Note sought comment on whether this provision provided sufficient clarity as to when the federal definitions apply.

DTSC staff commented that a comparison between state and federal definitions should be studied before any changes are made.

The staff recommends that this provision be left as presented in the tentative recommendation.

This issue is on the attached list of possible additions to the list of issues for future study. The Commission can consider whether to include this issue on the list of issues in its recommendation.³⁵

PROPOSED CONSENT: Proposed Section 68085. “Person”

Proposed Section 68085 restates the definition of “person” in existing Section 25319. Section 25319 provides, in relevant part:

“Person” means an individual, trust, firm, joint stock company, business concern, *corporation, including, but not limited to, a government corporation*, partnership, limited liability company, and association.

Proposed Section 68085 would move the italicized item to the end of the sentence to improve readability.

35. See Exhibit, p. 2 (first item under “Difficult to Understand” heading).

DTSC expressed concern about making the proposed change. Consistent with the conservative drafting posture in this study, **the staff recommends reverting to the existing language that is quoted above.**

Proposed Section 68105. “Release”

Proposed Section 68105 restates the definition of “release” found in existing Sections 25320 (defining “release”) and 25321 (listing exclusions from “release”).

While DTSC staff was generally supportive of the changes, they noted that one of the listed exclusions from “release” is structurally not parallel with the other exceptions. That exclusion differs in that it contains an initial clause related to its scope of application (“[f]or the purposes of Section 104 of the federal act or any other response action...”). None of the other exclusions have express language specifying their scope of application.

In this case, the lack of structural parallelism is not necessarily a problem. It reflects an actual difference in the law.

However, in light of DTSC’s concern, the Commission could consider restating proposed Section 68105(b)(4) as follows (changes shown in strikeout and underscore):

~~(4) For the purposes of Section 104 of the federal act (42 U.S.C. Sec. 9604) or any other response action, any~~ Any release of source, byproduct, or special nuclear material, as those terms are defined in the federal Atomic Energy Act of 1954 (42 U.S.C. Sec. 2011 et seq.), from any processing site designated under Section 7912(a)(1) or 7942(a) of Title 42 of the United States Code, which sections are a part of the federal Uranium Mill Tailings Radiation Control Act of 1978. This paragraph applies for the purposes of Section 104 of the federal act (42 U.S.C. Sec. 9604) or any other response action.

By moving the application language, such a change would minimize the lack of parallelism that DTSC noted, at least with respect to the first sentence.

Consistent with the guiding principles for restatements, the staff would generally recommend that the Commission retain the language in the tentative recommendation (as it is closer to existing law). However, the staff does not otherwise have concerns about this possible revision.

Does the Commission want to incorporate the revision presented above into its recommendation?

PROPOSED CONSENT: Proposed Section 68185. Construction as to Liability

Proposed Section 68185(b) restates Section 25366(b) to eliminate a redundant term, with that change shown in strikeout below:

Nothing in this chapter shall be construed as authorizing recovery for response costs or damages resulting from any release authorized or permitted pursuant to state law ~~or a federally permitted release.~~

The reference to “federally permitted release” appears to be unnecessary because that term is expressly included in the definition of “release authorized or permitted pursuant to state law.”³⁶ In other words, the second term is wholly contained within the first.

DTSC staff raised concerns that a reader may not realize a “release authorized or permitted pursuant to state law” is a defined term and includes a “federally permitted release.” To address this concern, the staff recommends that the proposed Section 68185 be revised as follows:

(b) Nothing in this part shall be construed as authorizing recovery for response costs or damages resulting from any release authorized or permitted pursuant to state law, including a federally permitted release.

This should avoid any misunderstanding, while better reflecting the relationship between the two terms.

Unless the Commission directs otherwise, proposed Section 68185(b) will be revised as shown above.

PROPOSED CONSENT: Proposed Section 68200. Items to be Scheduled in Budget Act

Proposed Section 68200 restates existing Section 25342 to make its meaning clearer. Section 25342 reads as follows:

The Director of Finance shall schedule in the annual Budget Act the projects proposed in any fiscal year, that will incur direct costs for removal and remedial actions at hazardous substance release sites.

Proposed Section 68200 would restate the provision as follows:

36. See proposed Section 68110 (“The term [release authorized or permitted pursuant to state law] includes a federally permitted release, as defined by Section 68070, and releases that are in accordance with any court order or consent decree.”).

In each annual Budget Act, the Director of Finance shall schedule those projects proposed for the upcoming fiscal year that will incur direct costs for removal and remedial actions at hazardous substance release sites.

In response, DTSC staff expressed uncertainty about whether the proposed restatement is consistent with current practice. In light of that concern, the staff recommends that proposed Section 68200 revert to the language of existing law. **Unless the Commission directs otherwise, that change will be made.**

Proposed Section 68210. Protection of Positions Funded by Federal Grant or Responsible Party

Proposed Section 68210 would continue existing Section 25353.5. There are two issues regarding that provision. They are discussed below.

PROPOSED CONSENT: Proposed Definition

Proposed Section 68210 includes a new definition, “externally-funded position.” It was added for drafting convenience and to improve readability. It uses a short term, “externally funded position,” to replace lengthy blocks of text that are repeated in the existing provision:

For the purposes of this section, “externally-funded position” includes both of the following:

- (1) A direct or indirect position that provides oversight and related support of remediation and hazardous substance management at a military base, including a closed military base, that is funded through an agreement with a party responsible for paying the department’s costs.
- (2) A direct or indirect position that is funded by a federal grant that does not require a state match funded from the General Fund.³⁷

DTSC staff was generally supportive of adding the definition, but suggested two adjustments.

First, DTSC staff recommends that the new definition be placed at the beginning (rather than the end) of the section it governs.

Second, DTSC staff recommends revising the definition to make it more clear that an externally-funded position does not have to meet both of the stated conditions. That could be addressed by revising the introductory text to read as follows:

37. See proposed Section 68210(g).

For the purposes of this section, an “externally-funded position” means either of the following:

Unless the Commission directs otherwise, the contents of proposed Section 68210 will be reordered and revised as discussed above.

Need for Substantive Work: Possible Mismatch Between Protected Positions and Staff Needs

Existing Section 25353.5 generally precludes the elimination of “externally funded positions.” DTSC staff explained that the provision was originally enacted to ensure that the department kept positions needed to oversee military base closure activities, at a time when such closures were more common. In particular, DTSC staff noted:

These contaminated properties were intended to be fast-tracked for transfer from federal ownership to state, local and private ownership for redevelopment to minimize economic impact to the communities. This need for oversight came at a time of cost cutting measures resulting in specific legislation to protect these positions.

Given that the legislation was based on circumstances that existed in the past, when base closings were much more common, DTSC staff suggests that it is not clear if the current number of “externally funded positions” exceeds the current need.

That issue seems more substantive and political than the kinds of issues that the Commission is expected to address in a clean-up project of this type. **For this reason, the staff recommends against adding this issue to its list of topics for future study.**

PROPOSED CONSENT: Proposed Section 68240. Reserve Account for Emergencies

Proposed Section 68240 continues the part of existing Section 25354 that relates to appropriations for the reserve account for emergencies. Proposed Section 68875 recodifies the part of Section 25354 governing expenditures from that account.

Proposed Section 68875 contains a reference back to proposed Section 68240. The reference was needed to identify the “reserve account” referenced in the text.

DTSC staff suggest that proposed Section 68240 should be revised to include a reference to proposed Section 68875. That would make it easier for readers to understand the relationship between the two provisions. Each would refer to the other.

The reference requested by DTSC staff could be added as follows (new language is shown in underscore):

68240. (a) There is hereby continuously appropriated from the state account to the department the sum of one million dollars (\$1,000,000) for each fiscal year as a reserve account for emergencies, notwithstanding Section 13340 of the Government Code. Funds in the reserve account are governed by Section 68875.

The proposed language, shown above, appears uncontroversial and could make the provision more user-friendly.

Unless the Commission directs otherwise, that change will be made.

NEXT STEPS

Does the Commission approve of the proposed treatment for the proposed consent matters discussed in this memorandum?

The remaining issues relating to the tentative recommendation will be discussed in a future memorandum.

Respectfully submitted,

Kristin Burford
Staff Counsel

POSSIBLE ADDITIONS TO THE LIST OF SUBSTANTIVE ISSUES FOR FUTURE STUDY

Italic text is used to identify items that are addressed in the memorandum and may be resolved individually or addressed as a class. Depending on the Commission's decisions with respect to the individual items presented in the memorandum, the italicized items on this list may be removed or adjusted.

Possible Deficiency

- Should the reference to “Section 114(c) of the federal act” in proposed Section 68260 be adjusted?
- Should the limited-application definition of “responsible party” in proposed Section 68285 be adjusted, in light of the definition of “responsible party” in proposed Section 68145 (which applies to the entire part)?
- Should proposed Section 68440 be restated to clarify the scope of the authority to require a person to furnish relevant information?
- *Should the reference to “hazardous waste” in proposed Section 68560 instead refer to “hazardous substance”?*
- Should proposed Section 68655 be adjusted to address the following issues:
 - To specify that the references are to the relevant acts “as amended”?
 - To adjust the cross-reference to the federal Hazardous Materials Transportation Act?
 - To clarify the treatment of exclusions from the defined terms “hazardous substance” and “hazardous waste”?
- *Should the reference to “hazardous waste” in proposed Section 68720 instead refer to “hazardous substance”?*
- Should proposed Section 68850 be amended to clarify the meaning of the “sites identified in Article 5 (commencing with Section 68760) of Chapter 4”?
- Should proposed Section 68855 be adjusted for consistency in identifying who (the director or the department) is authorized to make expenditures?
- Should proposed Section 68870 be adjusted for consistency with the operation of the defenses in Sections 101(35) and 107(b) of the federal act in practice?

- Should the scope of the exemption in proposed Section 68930 for emergency actions be expanded to include actions taken pursuant to proposed Section 68870?
- Should proposed Section 69020 be adjusted for consistency in identifying who (the director or the department) is authorized to issue orders?
- Should a cross-reference to proposed Section 68870 (related to imminent and substantial endangerment) be added to proposed Section 69060(c)?
- Should proposed Section 69100 be adjusted to specify what should occur when a person can provide identities and addresses for only some of the relevant property owners?
- Should the cross-reference to “Section 25343 as it read on December 31, 1997” in proposed Section 69105 be revised for ease of use?
- Should proposed Section 69230(d) be repealed as redundant, given the rule in proposed Section 69225(a)?
- Should proposed Section 69235 be restated to improve consistency and clarity?
- *Should the term “liable party [or parties]” in proposed Sections 69670 and 70920 refer instead to the defined term, “responsible party” or “liable person”?*
- Should the limited-application definition of “site” in proposed Section 69875 be adjusted, in light of the definition of “site” in proposed Section 68155 (which applies to the entire part)?
- Should the referenced provisions in proposed Section 70085 be adjusted?
- Should the definition of “hazardous material” in proposed Section 70235 be adjusted to exclude non-hazardous wastes?
- Should the definition of “hazardous material” in proposed Section 70710 be adjusted to address one or more of the following issues:
Clarify whether the term includes a substance in proposed Section 68075(b).
Exclude non-hazardous waste from the definition.
- Should proposed Section 70900 be adjusted to clarify which funds are available for the payment of claims?

Difficult to Understand

- Should the provision that provides for the application of definitions from the federal act (proposed Section 68035) be restated for clarity?

- Should the definition of “person” (proposed Section 68085) be restated for clarity?
- Should the provision that provides for the application of the State General Obligation Bond Act to the Hazardous Substance Bond Act of 1984 (proposed Section 68290) be restated for clarity?
- Should proposed Section 68305(b)(2) (regarding conditions for expenditure of funds from bond proceeds) be restated for clarity?
- Should proposed Section 68420(d) (regarding expenditures for public participation activities) be restated for clarity?
- Should proposed Section 68450 (regarding the authority to enter, inspect, and sample property) be restated for clarity?
- Should the scope of “business financial data and information” in proposed Section 68930 be clarified?
- Should the scope of “planned response action” in proposed Section 68935 be clarified?
- Should proposed Section 69160 (regarding prerequisites for local government-initiated response actions) be restated for clarity?
- Should proposed Section 69355 (regarding law enforcement notification regarding hazardous substances at illegal drug labs) be restated for clarity?
- Should proposed Section 69880 (regarding releases from liability for the former Kaiser Steel Corporation steel mill site) be restated for clarity?
- Should proposed Section 70310 (deeming references to “hazardous substances” to be references to “hazardous materials”) be restated for clarity?
- Should proposed Article 11 (commencing with Section 70570) of Chapter 10 (regarding the administering agency for a site) be restated for clarity?
- Should proposed Section 70730 (regarding persons ineligible to apply for loans) be restated for clarity?

Additional Information Needed

- Is the provision discussing the successor fund to the Stringfellow Insurance Proceeds Account (proposed Section 68230(f)) current?
- Should proposed Section 68510, which provides for the accreditation of laboratories, be revised to permit TNI accreditation pursuant to Section 100825(c)(14)-(20)?
- Should the different terminology (“short list,” “prequalified list”) in proposed Section 68600 be revised for consistency?

- Does proposed Article 13 (commencing with Section 69935) of Chapter 8 regarding lien authority require adjustment to address situations in which the regional board incurred the costs or damages that constitute the lien?
- Should proposed Section 70100(a) (regarding the operative date of the law on orphan share reimbursement) be discontinued as obsolete?
- Should proposed Section 70950 be adjusted to apply to any claim “under this chapter [Chapter 12 (commencing with Section 70900)]” as opposed to “under this part [Part 2 (commencing with Section 68000)]”?

Candidate for Relocation

- Should the contents of proposed Article 9 (commencing with Section 68575) of Chapter 3, which relate to the required contents of a biennial report, be recodified with Section 25178?
- Should the provisions regarding land use restrictions in proposed Section 69055(b) be recodified elsewhere?
- Depending on the intended scope of the rule in proposed Section 69100(b) (regarding accommodating property owner participation in site remediation), should this provision be relocated elsewhere?

Candidate for Future Substantive Work

- Should proposed Section 68575 be revised to reconcile the reporting requirements and rules in Section 25178 and Government Code Section 10231.5?
- Should a provision be added to directly authorize the department to issue the orders and enter the agreements described in proposed Section 69055?
- Should proposed Section 70230 (defining “eligible property”) be adjusted, in light of changes to the provisions it cross-references, to achieve its intended legislative purpose?
- Should the definition of “urban area” in proposed Section 70280 be adjusted in light of the repeal of the referenced provision defining urbanized area?