

Memorandum 2021-19

**Recodification of Toxic Substance Statutes:
Chapter 6.5 – First Portion of Part 1**

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

While the Commission was awaiting comment on its tentative recommendations related to Chapter 6.8, the Commission considered an initial memorandum discussing Chapter 6.5 and approving drafting practices and a tentative outline for the recodification of Chapter 6.5.⁴

This memorandum presents an initial draft of Chapters 1-5 of Part 1 of proposed Division 44 (where the substance of Chapter 6.5 would be recodified).

Commissioners and other interested persons should review the attached draft and raise any concerns identified. **Comments on any aspect of the draft, including issues that the Commission should consider adding to the list of substantive items for possible future study, would be welcome.**

Unless otherwise indicated, all of the statutory citations are to sections in the Health and Safety Code and all citations to “proposed” sections are to the proposed sections found in the attached draft legislation.

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. Memorandum 2020-13; Minutes (May 2020), p. 4.

UPDATE REGARDING ALTERNATIVE ORGANIZATIONAL APPROACH

Memorandum 2021-8 discussed the possibility of recodifying the contents of Chapter 6.5 in multiple divisions (as opposed to a single division). As indicated in that memorandum, recodifying the contents of Chapter 6.5 in a single division has significant practical benefits, as Chapter 6.5 is often referenced as a whole in the codes. The memorandum sought comments on whether there were problems with the single-division approach.

The staff has not received any comments on this issue to date. If the staff receives comments, those comments will be shared with the Commission in a future memorandum.

In the absence of comment, the staff has proceeded with drafting the recodification based on the tentative outline previously approved by the Commission.⁵

GENERAL DRAFTING APPROACH

Drafting Practices

As with the prior draft legislation for this project and consistent with the Commission's decisions, the staff has taken a fairly conservative approach to drafting.⁶ For the most part, the language used in the draft is drawn from existing law verbatim.

Certain minor language changes to conform to legislative drafting practices or correct clear technical errors were made without notation.⁷

In accordance with the Commission's prior decisions in this study, certain minor changes were made as a matter of course, but these changes are flagged in the corresponding Comment or Staff Note.⁸ Any other proposed changes to the language of the provision would also be described in the corresponding Comment or Staff Note.⁹

5. See Memorandum 2020-13; Minutes (May 2020), p. 4.

6. See Memorandum 2020-13, p. 3.

7. Changes the staff made to conform to legislative drafting practice included eliminating certain uses of the word "such," standardizing the format of the phrase "internet website," and changing uses of the word "which" to "that." In rare cases where making these changes requires additional, conforming adjustments, these changes may be flagged in a Staff Note. See, e.g., Staff Note for proposed Section 60655.

8. See Minutes (May 2020), p. 4; Memorandum 2020-13, p. 4. Such changes are discussed, for example, in the Comment for proposed Section 60075 and the Staff Notes for proposed Sections 60495 (Note #1) and 60550 (Note #1).

9. See, e.g., Staff Note to proposed Section 60110.

In several instances, the staff discovered problems with the existing language or cross-references. Where possible, the staff proposed correcting the provision and discussed the issue in a Staff Note.¹⁰ Where the appropriate resolution was unclear, the staff requested comment on the issue.¹¹

In addition, the staff identified a few provisions that could seemingly benefit from further study and possible substantive reform. In some cases, a Note seeks comment on whether the provision is causing problems in practice.¹² In other cases, the staff concluded the provision would be good candidate for future work and recommends the provision be added to the list of substantive issues for possible future study.¹³

The proposed legislation contains an introductory, explanatory Staff Note.¹⁴ This initial Staff Note describes the Commission’s comments, the tables included in the proposed legislation, the Staff Notes, and other helpful information for stakeholders reviewing the proposed legislation. This Staff Note will be reproduced in future drafts of proposed legislation and updated as needed.

Additional Changes Made Consistently

In the course of preparing this draft, there were several issues that the staff identified as matters that should be subject to consistent treatment throughout the recodification. Those issues (and their proposed treatment) are described below:

- References to applicable definitions — in some cases, a section will use a term that is defined for Chapter 6.5 and then include a reference to the definition (e.g., “RCRA hazardous waste, as defined in Section 25120.2”). The “as defined in ...” language is redundant. Where a section provides a reference to an already applicable definition, that redundant language was not continued.¹⁵
- Obsolete state agency references — in some cases, a referenced state agency has been renamed or the agency’s responsibilities have changed, but the referencing section has not been updated accordingly. In these cases, the appropriate agency has been

10. See, e.g., Staff Note to proposed Section 60230 (Note #2); Comment and Staff Note (Note #2) to proposed Section 60670; Comment and Staff Note (Note # 2) to proposed Section 60700.

11. See, e.g., Staff Notes for proposed Sections 60215 (Note #3), 60245 (Note #1), 60380, 60385 and 60670 (Note #1).

12. See Staff Notes for proposed Sections 60075, 60230 (Note #1), 60245 (Note #2), 60370 (Note #2).

13. See Staff Notes for proposed Sections 60255, 60365, 60495 (Note #2), and Staff Note to proposed Chapter 4 of Part 1; see also discussion of “Addition of Issues to List of Substantive Issues for Future Study” *supra*.

14. See page i of attached draft proposed legislation.

15. See, e.g., Staff Notes to proposed Sections 60265, 60455 (Note #1).

substituted in the proposed law. The substitution is noted in the Comment.¹⁶ In some cases, the change is also described or flagged in a Staff Note.¹⁷

- References to the “Environmental Protection Agency” where the federal agency is intended¹⁸ — In each case, the reference to the federal agency was recodified as the “*United States* Environmental Protection Agency.” This change is not noted in the Comment, but is flagged in a Staff Note.¹⁹
- References to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 — several provisions in the draft refer to this federal law, which is the main federal law at issue in Chapter 6.8.²⁰ In Chapter 6.8, the “federal act” definition includes an “as amended” designation. In all but one case (in this draft), the provision specifies that reference is to this federal act “as amended.” In general, it seems very unlikely that this reference is intended to refer to the federal law as originally adopted. To avoid possible confusion, the staff recommends consistently referring to the federal law “as amended.” This change is noted in the Comment and Staff Note.²¹

CONTENTS OF DRAFT

The Commission previously approved an organizational outline and proposed location for the recodification of Chapter 6.5.²² The recodification of Chapter 6.5 would be located in a new Division 44 in the Health and Safety Code.

Consistent with the Commission’s tentative outline for the recodification, the attached draft presents proposed legislation for Chapters 1-5 of Part 1 of the new Division 44.

The remainder of this memorandum discusses a few specific issues that the staff encountered in preparing the attached draft.

Proposed Name of Division 44 & Recodification Act (proposed Section 60035)

Currently, Chapter 6.5 is designated “Hazardous Waste Control.”²³

16. See, e.g., Comments to proposed Sections 60575, 60670.

17. The substitution would be noted in a Staff Note if the staff concluded additional explanation may be helpful. See, e.g., Staff Notes to proposed Sections 60575 (Note #1), 60670 (Note #2).

18. This change is to avoid possible confusion between the federal agency and California’s state Environmental Protection Agency. See Section 57000.

19. See, e.g., Staff Note to proposed Section 60385, 60670 (Note #1).

20. See Section 25315.

21. See Comment and Staff Note (Note #2) to proposed Section 60575.

22. Memorandum 2020-13, Minutes (May 2020), p. 4.

23. The chapter does not have a formal, codified short title (i.e., a section that specifies that the chapter “shall be known and may be cited as” a specified name).

Since this study will be recodifying Chapter 6.5, the staff elected to use the name of Chapter 6.5 in the short title for the recodification act.²⁴ The recodification act is designated the “Hazardous Waste Control Recodification Act.” This name is used in the provisions that describe the nonsubstantive nature of the act.²⁵

In naming the new Division, however, the staff sought to find a better description of the actual contents of Chapter 6.5. As noted previously, Chapter 6.5 contains a great deal of material related specifically to hazardous waste generation, management, transportation, and disposal.²⁶ However, Chapter 6.5 also contains material related to reducing toxics in products (i.e., rules about sale and manufacture of products).²⁷ Given that, the tentatively proposed name for Division 44 is “Toxics Reduction and Management.” A Note requests comment on this proposed title, seeking input on whether an alternative would better describe the contents for users of the law.

Proposed Section 60005. Legislative Declarations

Proposed Section 60005 continues the legislative declarations for Chapter 6.5. The section contains several obsolete cross-references, as well as obsolete references to a “Hazardous Waste Management Council” (that was created by those now-repealed provisions).

In general, the staff makes minimal changes to legislative findings and declarations provisions in a nonsubstantive recodification project. And, in this case, the obsolete references could not be updated or easily excised without disrupting the substance of the Legislature’s declarations.

For this reason, the staff elected to simply reproduce the declarations section without change, noting in the Comment that the obsolete references have been retained for ease of historical reference.

Definitions, Generally (Proposed Chapter 3 of Part 1)

Unused Definitions

The staff identified four defined terms for Chapter 6.5 that were not used in the chapter, nor were they used elsewhere in the California codes. Given that, the staff proposed discontinuing the definitions of those terms.

24. See proposed Section 60035.

25. See proposed Chapter 2 of Part 1.

26. See, e.g., Articles 5.6, 6.5, 7.7, 9.1, and 11.5 of Chapter 6.5.

27. See, e.g., Articles 10.1.1, 10.4, and 14 of Chapter 6.5.

A Note on the heading for Chapter 3 identifies the terms and seeks comment on whether any of those definitions have ongoing utility (and should, thus, be continued).

Definitions Applicable to the Entire Chapter

For the most part, all of the definitions that apply to the whole of Chapter 6.5 are currently in Article 2 of that chapter. And, those chapter-wide definitions would be recodified together in Chapter 3 of Part 1 in the recodified law.

The staff identified two defined terms (“manifest,” “Electronic manifest system”) that apply to the entire chapter, but are not currently located with the other chapter-wide definitions.

The staff proposes recodifying the definitions for those terms in proposed Chapter 3 of Part 1 with the other chapter-wide definitions. If the staff encounters other definitions that apply chapter-wide, the staff would propose placing those definitions in this location as well.

Definitions with Significant Substantive Content

The definitions for two defined terms, “disclosure statement” and “storage facility,” were quite lengthy. Each definition includes significant substantive requirements related to the term at issue. Rather than retain the substantive details in the definition provision, the staff proposes brief definitions that cross-reference the substantive rules and restrictions, which would be recodified later in the division.²⁸

For each of these proposed Sections defining these terms, a Note briefly describing this approach is included to facilitate stakeholder review.

Proposed Section 60075. Applicable Definitions

Proposed Section 60075 continues Section 25110, which provides for the application of definitions in state regulations, federal law, and federal regulations to Chapter 6.5.

The staff looked briefly at the other possibly applicable definitions in the state regulations, federal law, and federal regulations. The staff found that there were many potentially applicable definitions and, in some cases, defined terms may have a much narrower definition than the term’s colloquial meaning.

28. See proposed Sections 60170, 60355.

The staff did not propose restating this provision. However, the staff raised several issues in the Notes, seeking comment on whether this provision provides sufficient clarity as to which definitions found outside of Chapter 6.5 apply to the chapter. The staff believes that this may be an issue that could benefit from future attention, depending on the comment received.

Proposed Section 60190. “Environmental Assessor”

Proposed Section 60190 continues Section 25114.5, which defines “environmental assessor.” The definition expressly states that it applies “for all California statutes, unless the context requires otherwise.”

Given this extremely broad scope, the staff was unsure whether this definition should be relocated (or reproduced) elsewhere in the codes. A Note requests comment on this issue.

ADDITION OF ISSUES TO LIST OF SUBSTANTIVE ISSUES FOR FUTURE STUDY

In the proposed legislation, the staff recommends the addition of several issues to the list of issues for future study.²⁹ Those issues are discussed in turn below.

Defined Types of Violations³⁰

Proposed Section 60255 defines “minor violation.” This term is related to other terms for violations of differing severity (“class I violation,” “class II violation”). Overall, the rules do not seem to be fully coordinated and appear to be somewhat redundant.

In proposed Section 60255, “minor violation” specifically excludes both a “class I violation” and a “class II violation that is a chronic violation or that is committed by a recalcitrant violator” (hereafter, “repeated class II violation”). The section also includes a rule for assessing whether a class II violation is a repeated class II violation. The rule only applies for the purposes of that section.

However, a “class I violation” is also defined to include a repeated class II violation, but does not contain the same rule for determining whether a class II violation is a repeated violation.³¹

The staff believes that the rule regarding repeated class II violations is likely intended to apply more broadly. And, that such violations do not need to be

29. See *supra* note 13.

30. See Staff Note for proposed Section 60255

31. See proposed Section 60110(b).

separately excluded from the definition of “minor violation” (since they would be “class I violations” and excluded on that ground).

The staff recommends adding this issue to the list of substantive issues for future work.

“Treatment”

Proposed Section 60365 defines “treatment.” The definition is a bit difficult to follow and could benefit from a restatement for clarity. Given the complexity of the definition and the degree of restatement that is needed, the staff believes that this matter could better be addressed as a matter for future work.

The staff recommends adding this issue to the list of substantive issues for future work.

Use of Defined Terms from Chapter 6.8 (Without Reference to the Definition)

In several cases, provisions of Chapter 6.5 use terminology that is defined in Chapter 6.8, without reference to the applicable definitions.³²

In particular, this issue occurs in the financial provisions of Chapter 6.5, which are proposed for recodification in Chapter 4 of the attached draft. Those provisions pertain to the accounts and funding of the Department of Toxic Substances Control generally, applying also to department programs found in Chapter 6.8.

In some cases, it seems sufficiently clear that the definitions from Chapter 6.8 should apply to the uses of those terms.

The staff recommends adding this issue to the list of substantive issues for future work. In general, it is not clear whether this matter should be addressed as a global issue (incorporating certain definitions from Chapter 6.8 for the whole of Chapter 6.5) or individually (adding references to the relevant Chapter 6.8 definition each time a term is used).

Proposed Section 60700

Proposed Section 60700 specifies information that the department is obligated to post on its website. The Independent Review Panel (“IRP”), whose work preceded the assignment of this study to the Commission, concluded that this section is at least partially obsolete.³³

For this reason, the staff recommends adding this issue to the list of substantive issues for future work, with attribution to the IRP.

32. See, e.g., Staff Notes to proposed Chapter 4 of Part 1 and proposed Section 60490 (Note #2).

33. See Staff Note to proposed Section 60700 (Note #3).

COMMISSION DECISION ON THE DRAFT

Does the Commission tentatively approve the proposed legislation contained in the attached draft for inclusion in a future tentative recommendation?

PREPARATION OF CUMULATIVE DRAFTS

In the Commission's prior work on this study, the staff prepared cumulative drafts of proposed legislation. The staff plans to prepare such drafts for the recodification of Chapter 6.5, unless otherwise directed by the Commission.

Respectfully submitted,

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