

Memorandum 2021-7

**Recodification of Toxic Substance Statutes:
Hazardous Substance Account Recodification Act – Conforming Revisions
(Draft Recommendation)**

In January 2020, the Commission¹ prepared a tentative recommendation for the conforming revisions needed to reflect the proposed recodification of Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.² This tentative recommendation was circulated for public comment for several months, but received no comment.

This memorandum discusses issues that need to be decided in order to finalize the Commission's conforming revisions recommendation. **All of the matters in this memorandum are proposed consent, in line with the Commission's prior direction on addressing purely technical or uncontroversial matters.**³ The Commission will need to decide whether to approve the attached draft as a final recommendation, either with or without additional changes.

Unless otherwise indicated, all statutory citations are to the Health and Safety Code. References to proposed sections refer to the proposed sections in the draft final recommendation for the recodification of Chapter 6.8.⁴

Unless the context requires otherwise, "department" refers to the Department of Toxic Substances Control ("DTSC").

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 Tentative Recommendation on *Hazardous Substance Account Recodification Act: Conforming Revisions* (January 2020) (hereafter, "Conforming Revisions TR").

3. 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.

4. The draft final recommendation is attached to Memorandum 2021-6. The draft final recommendation for the recodification of Chapter 6.8 is referred to as "draft recodification recommendation."

MINOR CONFORMING CHANGES TO TENTATIVE RECOMMENDATION

Legislative Changes

The staff updated the code sections in this draft recommendation to reflect the changes made in legislation enacted this year.⁵

The staff does not plan to seek implementing legislation in 2021. For this reason, the staff made technical updates to the uncodified provisions to reflect that we anticipate seeking implementing legislation in 2022. Before doing so, the staff will update the provisions contained in this draft to reflect any legislative changes that are made in 2021.

Adjusted Section Numbering in Recodification

As indicated in Memorandum 2021-6, the section numbering for the recodification of Chapter 6.8 was adjusted. The references in the attached recommendation have been updated accordingly.

Inclusion of Conforming Revision in Recodification Act

The tentative recommendation discussed the fact that the conforming revisions would likely be introduced as separate legislation. Specifically, to ensure that the provisions about the nonsubstantive effect of this project apply to the conforming revisions, the tentative recommendation noted that the conforming revisions legislation would be defined as part of the “Hazardous Substance Account Recodification Act.”⁶

The staff has made that change to proposed Section 78000(b) in the draft recodification recommendation and the discussion of this issue in the attached draft has been updated accordingly.

NOTES IN CONFORMING REVISIONS TENTATIVE RECOMMENDATION

Informational Notes

For the most part, the Notes in the tentative recommendation were informational. They are intended to facilitate stakeholder review.⁷

5. See 2020 Cal. Stat. ch. 166, § 4 (amending Gov’t Code § 65941.1), 2020 Cal. Stat. ch. 194, § 1.5 (amending Gov’t Code § 65913.4), 2020 Cal. Stat. ch. 244, § 1 (amending Pen. Code § 803), 2020 Cal. Stat. ch. 264, § 11 (amending Health & Safety Code § 17021.8), 2020 Cal. Stat. ch. 276, § 1 (amending Health & Safety Code § 25215.1), 2020 Cal. Stat. ch. 312, § 57 (amending Bus. & Prof. Code § 7058.7).

6. See Conforming Revisions TR, *supra* note 2, at 2-3.

7. See, e.g., Notes to Civ. Code § 850 in Conforming Revisions TR.

In most cases, these Notes specify that, in the absence of comment, the proposed treatment of the cross-reference will be presumed correct.⁸ Given the fact that no comment was received on this document, the staff does not see a need to discuss these informational Notes further, with the exception of notes pertaining to cross-references to Section 25358.3 (which are discussed later in this memorandum).

Aside from the individual provisions discussed in this memorandum, the staff recommends that the provisions be left as proposed in the tentative recommendation.

Notes Welcoming Comment on Proposed Treatment for Cross-Reference

In a few cases, the appropriate treatment for a cross-reference was somewhat less clear. In these cases, the tentative recommendation offered a proposed treatment for the cross-reference, but a Note welcomed comment on that treatment.⁹

Given the lack of comment on these items, the staff reviewed them in more detail to determine whether any adjustment should be made. In one case, the staff proposes an adjustment, described later in this memorandum, to the treatment proposed in the tentative recommendation. **Except as discussed later in this memorandum, the staff recommends that the proposed treatment of the cross-references be left as presented in the tentative recommendation.**

For one provision, the tentative recommendation simply sought comment on how a cross-reference (to Section 25358.3) should be updated, without offering a proposed treatment.¹⁰ This memorandum discusses how to address that cross-reference.

8. See, e.g., Notes to Civ. Code §§ 850, 2079.7; Educ. Code § 17213.1; Fish & Game Code §§ 12015, 12017; Gov't Code § 53321.5, Health & Safety Code §§ 11374.5, 25117.13, 25173.6, 25174, 25178, 25220, 25224, 25225, 25226, 25227, 25250.54, 25262 (Note #2), 25279.1, 25299.50.6, 25403.1 (except the portion of Note #1 re Section 25358.3), 25404.1, 101483; Rev. & Tax Code § 402.3 in Conforming Revisions TR.

9. See Notes to Civ. Code § 853 and Health & Safety Code §§ 25174.7, 25262 (Note #1) in Conforming Revisions TR.

10. See Note to Health & Safety Code § 25403.1 (Note #1 re Section 25358.3) in Conforming Revisions TR.

Notes Identifying Potential Problem or Possible Improvement

A few Notes identified a potential problem in the existing section or a possible improvement, typically unrelated to the required conforming revision.¹¹ Later in this memorandum, the staff offers a proposal for how to address these matters.

CROSS-REFERENCES TO SECTION 25358.3

This section of the memorandum discusses cross-references to Section 25358.3. The proposed recodification would divide that existing provision into multiple sections. The division of this section raises questions about how to treat cross-references to Section 25358.3 as a whole. In general, for such cross-references, the proposed treatment is to refer only to the proposed sections that contain material that appears to be relevant to the purpose of the cross-reference.

In one case, discussed below, it was not entirely clear which of the proposed provisions recodifying Section 25358.3 were relevant to the cross-reference.

After having reviewed Section 25358.3 in detail, the staff re-evaluated the other cross-references to this provision.

A few adjustments to the tentative recommendation's proposed treatment of these cross-references are recommended below. Those changes have already been incorporated into the attached draft recommendation.

Health & Safety Code § 25403.1(a)(1)(B)(v)

Health and Safety Code Section 25403.1(a)(1)(B)(v) refers to "an agreement entered into by the department pursuant to Section 25187, 25355.5, or 25358.3, for the investigation or cleanup at a site." It is unclear which parts of Section 25358.3 might be relevant to that cross-reference (i.e., might give rise to "an agreement entered into by the department"). That issue was discussed in a Note in the tentative recommendation, but no comment was received.

Provisions of Section 25358.3 Related to Agreements

Section 25358.3 is proposed to be recodified as four sections.¹² The staff took a more in-depth look at the contents of those sections to determine which might give rise to a relevant "agreement."

11. See Notes to Gov't Code § 53313, Health & Safety Code §§ 25395.94, 25411 in Conforming Revisions TR.

12. Section 25358.3 is proposed for recodification as four sections: proposed Sections 78650, 78655, 78660, and 78870. The first three of these sections are all contained in the same article, but the final section is recodified in a different location. See Proposed Article 1 of Chapter 4 of, and Proposed Article 2 of Chapter 5 of, Part 2 of Division 45.

The staff concluded that any of the four proposed sections could relate to an agreement involving DTSC. Specifically, such agreements might include the following:

- A contract between DTSC and a service provider for cleanup actions, investigations, or studies under proposed Section 78655.¹³
- A settlement agreement between DTSC and a responsible party in a situation when the director has requested that the Attorney General seek necessary relief under proposed Sections 78660 and 78870.
- A negotiated agreement between DTSC and a responsible party, in lieu of an administrative order authorized by proposed Section 78870.

This list includes *all* of the proposed sections that would recodify Section 25358.3. While it is not clear that all of these kinds of agreements are actually relevant to the cross-reference,¹⁴ none of them are plainly irrelevant.

Proposed Treatment of Section 25358.3 Cross-Reference

In the absence of certainty about which provisions of Section 25358.3 pertain to the “agreements” specified in Section 25403.1(a)(1)(B)(v), the most conservative approach is to update the cross-reference to refer to all of the proposed sections that recodify portions of Section 25358.3.

For this reason, the staff recommends that Section 25403.1(a)(1)(B)(v) cross-refer to all of the provisions that recodify Section 25358.3 (i.e., proposed Article 1 (commencing with Section 78650)¹⁵ of Chapter 4 of Part 2 of Division 45 and proposed Section 78870).

Health & Safety Code § 25403.1(a)(1)(B)(vi)

The subsequent clause of Section 25403.1 also refers to Section 25358.3. This clause refers to specified orders or agreements issued pursuant to the referenced provisions, as follows:

- (vi) A remedial action order, an imminent or substantial endangerment order or agreement, a prospective purchase

13. Proposed Section 78655 grants authority to contract for actions authorized by proposed Section 78650, so both of these sections could be relevant authority for such a contract.

14. Although its not entirely clear, the context of Section 25403.1 suggests that the relevant “agreement” would be one between the department and a responsible party (i.e., *not* a contract with a non-liaible, third-party entity to undertake work on behalf of the department).

15. The proposed article also includes proposed Section 78665, related to penalties, that does not contain material from Section 25358.3. The inclusion of the penalty provision in the cross-reference would not appear to have a substantive effect. For this reason, the proposed cross-reference update would refer to the article as a whole (proposed Article 1 of Chapter 4 of Part 2 of Division 45).

agreement, or an order on consent issued pursuant to Section 25355.5, 25356.1.3, or 25358.3, as applicable.

The staff re-evaluated the proposed treatment to the cross-reference to Section 25358.3 in this clause.

Proposed Treatment of Cross-Reference in Tentative Recommendation

Clause (vi) refers to “an imminent or substantial endangerment order or agreement.” For this clause, the tentative recommendation proposes replacing the reference to Section 25358.3 with a reference to proposed Section 78870, which recodifies the portion of Section 25358.3 that authorizes action in a situation of imminent and substantial endangerment.

The staff believes that it would be appropriate to also refer to proposed Section 78660, which relates to seeking relief through the Attorney General. It seems possible that one of the specified orders or agreements could arise in litigation conducted pursuant to proposed Section 78660. For this reason, the conservative approach would be to refer to this (possibly relevant) proposed provision.

For this reason, the staff recommends that Section 25403.1(a)(1)(B)(vi) cross-refer to proposed Section 78660, as well as Section 78870.

Other Cross-References to Section 25358.3

The staff reviewed the other provisions that cross-refer to Section 25358.3, to determine whether the proposed treatment of those cross-references should be adjusted.¹⁶

For the most part, the proposed treatment of the cross-references appears to be appropriate. In some cases, the cross-references are updated to refer to all of the proposed provisions that recodify Section 25358.3.¹⁷ In other cases, the references are updated to refer only to the seemingly relevant subset of proposed sections recodifying Section 25358.3.¹⁸

16. See Health & Safety Code §§ 25262, 25299.50.6, and 101483 in Conforming Revisions TR and proposed Sections 78665, 79020, 79030, 79550, 79570, 79885, and 80040 in draft recodification recommendation.

17. See Health & Safety Code § 25262 in Conforming Revisions TR and proposed Section 78665 in draft recodification recommendation.

18. See Health & Safety Code § 25299.50.6 (department requires the responsible parties to undertake work pursuant to an [presumably administrative] order issued pursuant to proposed Section 78870) in Conforming Revisions TR and proposed Sections 79020 (department shall issue orders pursuant to proposed Section 78870), 79030 (related to a department’s authority to issue orders under proposed Section 79020), 79550 (orders issued pursuant to either proposed Section 78660 or 78870), 79570 (refers to “an order of the director, pursuant to Section 78870, or an order of the court, pursuant to Section 78660”), 79885 (refers to an order issued by the department pursuant to proposed Section 78870), and 80040 (department and responsible party have entered into an

For one provision in the attached draft, however, the staff recommends that the tentative recommendation's proposed treatment of a Section 25358.3 cross-reference be adjusted. The cross-reference is found in Health and Safety Code Section 101483, which, like one of the provisions discussed previously, references Section 25358.3 as authority for "an order or enforceable agreement."

As described above, it is unclear which of the provisions of Section 25358.3 authorize "agreements" and it may be that the "orders" relevant to Section 101483 would include court orders, pursuant to proposed Section 78660.

Consistent with conservative approach taken previously, the staff recommends that Section 101483 cross-refer to all of the provisions recodifying Section 25358.3 (i.e., proposed Article 1 (commencing with Section 78650)¹⁹ of Chapter 4 of Part 2 of Division 45 and proposed Section 78870).

MATTERS FOR POSSIBLE FUTURE STUDY

For each of the issues discussed below, the staff recommends that the issue be addressed, if at all, as a matter for future study. In each case, the issues are either potential problems or possible improvements to the existing law. These are not the type of matters that the Commission would typically address in a conforming revisions recommendation. Moreover, given the character of these issues, there is some question about either whether to address the issue at all or how best to resolve it.

The Commission appears to have authority to work on these matters, as they would all fall within the Commission's authority to address technical or minor substantive defects in the law.²⁰

In line with the recommendation that these issues be addressed as matters for future work, the staff recommends that the provisions discussed below remain as proposed in the tentative recommendation.

Gov't Code § 53313. Services Financed by Community Facilities District

Government Code Section 53313(f) requires that notice of a hazardous substance response action undertaken by a community facilities district be provided to the State Department of Health Care Services ("DHCS"). It appears

order embodied in a consent order pursuant to proposed Section 78870) in draft recodification recommendation.

19. See *supra* note 15.

20. Gov't Code § 8298.

that this notice should be provided to DTSC, either instead of or in addition to DHCS.

Both of these agencies were originally part of the same department. And, DTSC succeeded to the responsibilities related to the cleanup of hazardous substance releases. A Note explains:

The programs and services of the DTSC and DHCS were both formerly part of the State Department of Health Services. See 1991 Governor's Reorganization Plan No. 1 of 1991, § 146 (proposed Health and Safety Code § 58804); Health & Safety Code § 100100. Section 53313 formerly referred to the State Department of Health Services. See former Section 53313, as amended by 2013 Cal. Stat. ch. 219, § 2.

DHCS's work does not appear to relate to hazardous substances. The mission of the DHCS is "to provide Californians with access to affordable, integrated, high-quality health care, including medical, dental, mental health, substance use treatment services and long-term care." See <https://www.dhcs.ca.gov/Pages/AboutUs.aspx>. None of DHCS's programs and services appear to relate to hazardous substance contamination or pollution more generally. See <https://www.dhcs.ca.gov/services/Pages/AllServices.aspx>.

On the other hand, DTSC succeeded to "the duties, powers, purposes, responsibilities, and jurisdiction of the Toxic Substances Control Program of the State Department of Health Services." See 1991 Governor's Reorganization Plan No. 1 of 1991, § 146 (proposed Health and Safety Code § 58804). DTSC's charge expressly includes the powers and duties in Chapter 6.8 of Division 20, which relate to cleanup of hazardous substance releases. See *id.*²¹

The staff recommends that the Commission consider the following issue as a matter for possible future study:

Should the notice required in Government Code Section 53313(f) be provided to the Department of Toxic Substances Control, either instead of or in addition to the State Department of Health Care Services?

Health & Safety Code § 25395.94. Site Assessment Plan

Health and Safety Code Section 25395.94 contains a cross-reference that may be in need of updating. Section 25395.94 cross-references a provision of Chapter 6.8 that provides standards for health risk assessments. Specifically, Section 25395.94(a)(2) specifies that any health risk assessment "shall be prepared in accordance with subdivisions (b), (c), and (d) of Section 25356.1.5."

21. See Note to Gov't Code § 53313 in Conforming Revisions TR.

Section 25395.94 was added in 2004 and has not been amended.²² The cross-referenced provision, Section 25356.1.5, was amended in 2007 to add a subdivision (e).²³ Similar to the referenced subdivisions, subdivision (e) also contains standards for health risk assessments. It is unclear whether the cross-reference in Section 25395.94 should be expanded to include the standards for health risk assessments in subdivision (e), as well as those in subdivisions (b), (c), and (d).

The staff recommends that the Commission consider the following issue as a matter for possible future study:

Should the cross-reference identifying standards for the preparation of health risk assessments in Health and Safety Code Section 25395.94(a)(2) be revised to also refer to the standards in proposed Section 79275(b) (existing Section 25356.1.5(e))?

Health & Safety Code § 25411. Definitions

Health and Safety Code Section 25411 contains two obsolete, limited-application definitions. Those definitions are proposed for deletion. The relevant terms (“agency” and “secretary”) are not used in the chapter to which the definitions apply. Instead, two similar, but undefined terms are used in the chapter. A Note asks whether those similar, undefined terms should be defined:

Section 25411 defines “agency” and “secretary.” However, those terms are not used in the chapter and the obsolete definitions for those terms are proposed for deletion. However, the chapter uses similar undefined terms, “department” and “director.” See, e.g., Sections 25411 and 25416. Given the subject matter of this chapter (hazardous materials information), it seems likely that these terms are intended to refer to the Department of Toxic Substances Control and the Director of Toxic Substances Control. The Commission welcomes comment on the intended meaning of the terms, “department” and “director,” and whether these terms should be defined in Section 25411.²⁴

Upon taking a more detailed look, the staff is unsure whether the term “department” is intended to refer to DTSC or whether it is used consistently to refer to a single agency (i.e., it appears that different provisions may use “department” to refer to different agencies).²⁵ Regardless, this issue appears to be

22. See 2004 Cal. Stat. ch. 705, § 1.

23. See 2007 Cal. Stat. ch. 597, § 1.

24. See Note to Health & Safety Code § 25411 in Conforming Revisions TR.

25. Health and Safety Code Section 25416 relates to epidemiological studies related to hazardous materials exposure. References to “department” in this section may have been intended to refer to the California Department of Public Health, which contains an environmental epidemiology

one that should be resolved – either the terms should be defined or the appropriate agency names should be substituted.

To address this issue, the staff recommends that the Commission consider the following issue as a matter for possible future study:

Should Health and Safety Code Section 25411 be amended to add definitions of the terms “department” and “director”? Alternatively, should the full name of the relevant department or director be substituted where these terms are used in Chapter 6.91 (commencing with Section 25411) of Division 20 of the Health and Safety Code?

APPROVAL OF RECOMMENDATION

Does the Commission approve the attached draft as a final recommendation, either with or without changes, for publication and submission to the Governor and Legislature?

Respectfully submitted,

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Staff Counsel

section. See <https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/EHIB/EES/Pages/Program-Landing1.aspx>.

Health and Safety Code Sections 25417 and 25417.1 require the department to publish a consumer information booklet described in a section of the Business and Professions Code. In the Business and Professions Code section, the relevant agency appears to be the Department of Real Estate. See Bus. & Prof. Code §§ 10050(a), 10084.1.