

Memorandum 2021-65

Recodification of Toxic Substance Statutes: Hazardous Substance Account Recodification Act (2021 Legislative Updates)

Early in 2021, the Commission¹ approved a recommendation to nonsubstantively reorganize Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.² The Commission also approved an associated recommendation to make the necessary conforming revisions (updating provisions that cross-refer to Chapter 6.8 or its contents).³

During the 2021 legislative season, a few bills were enacted that made changes to the contents of Chapter 6.8 or to the provisions cross-referring to Chapter 6.8 or its contents. This memorandum discusses the legislative changes to the contents of Chapter 6.8, while Memorandum 2021-66 discusses the legislative changes to provisions referencing Chapter 6.8 or its contents.

This year, there were four provisions of Chapter 6.8 that were affected by legislation. Minor revisions were made to two existing sections of Chapter 6.8.⁴ And, more significantly for the Commission's work, two new provisions were added to Chapter 6.8.⁵

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. *Hazardous Substance Account Recodification Act*, 48 Cal. L. Revision Comm'n Reports __ (Feb. 2021).

3. *Hazardous Substance Account Recodification Act: Conforming Revisions*, 48 Cal. L. Revision Comm'n Reports __ (Feb. 2021).

4. See 2021 Cal. Stat. ch. 615, § 252 (updating Section 25358.7's cross-reference to the California Public Records Act to reflect that Act's recodification); 2021 Cal. Stat. ch. 153, § 15 (amending Section 25366.5 to change the term "conditionally exempt small quantity generator" to "very small quantity generator" to conform to changes in federal law). See also Assembly Committee on Environmental Safety and Toxic Materials Analysis of AB 698 (April 4, 2021) (noting the need to update terminology in state law "to conform to recent changes in federal hazardous waste regulation").

5. See 2021 Cal. Stat. ch. 73, § 79 (adding Health & Safety Code Section 25355.3); 2021 Cal. Stat. ch. 474, § 1 (adding Health & Safety Code Section 25358.6.2).

Health & Safety Code Section 25355.3 was added in a budget bill, which has already taken effect. Health and Safety Code Section 25358.6.2 will take effect on January 1, 2022.

This memorandum briefly describes these new provisions and discusses how to incorporate them into the Commission’s recodification proposal.

The attached document contains proposed legislation to recodify the newly-added provisions as described in this memorandum.

Commissioners and other interested persons should review the attached document and raise any concerns that they might have. **Comments on any aspect of the document are welcome.**⁶

GENERAL LOCATION FOR NEW PROVISIONS IN RECODIFICATION

In the Commission’s recommendation, Chapter 6.8 is proposed to be recodified as Part 2 (Hazardous Substance Account) of a new Division 45.⁷

Both of the newly-added provisions relate to hazardous substance cleanups.⁸ For this reason, both of the provisions would be recodified in proposed Chapter 5 (Cleanup of Hazardous Substance Releases) of Part 2.

Currently, the articles in proposed Chapter 5 are as follows:

- Article 1. General Provisions
- Article 2. Rules for Specified Circumstances
- Article 3. Referral of Site to Department by State or Regional Board
- Article 4. Public Participation
- Article 5. Community Advisory Groups
- Article 6. Oversight and Review of Responsible Party Actions
- Article 7. Orders to Potentially Responsible Parties
- Article 8. Expenditures
- Article 9. Preliminary Endangerment Assessment
- Article 10. Initiation of Removal or Remedial Actions
- Article 11. Local Government Removal or Remedial Actions
- Article 12. Planning
- Article 13. Standards
- Article 14. On-site Hazardous Waste Facility for Response Action
- Article 15. Operation and Maintenance
- Article 16. Illegal Drug Lab Cleanup
- Article 17. Judicial Review of Response Actions

6. Written comments can be in any form. They should be directed to kburford@clrc.ca.gov. Comments may also be made orally at the upcoming Commission meeting (scheduled for December 16, 2021), which will be held via zoom teleconference. The agenda is available at: http://www.clrc.ca.gov/Menu1_meetings/agenda.html.

7. *Hazardous Substance Account Recodification Act*, 48 Cal. L. Revision Comm’n Reports __ (Feb. 2021).

8. See 2021 Cal. Stat. ch. 73, § 79 (adding Health & Safety Code Section 25355.3); 2021 Cal. Stat. ch. 474, § 1 (adding Health & Safety Code Section 25358.6.2).

NEW SECTION 25358.6.2: CLEANUP RULES FOR CONTRACTING
AND INFORMATION AVAILABILITY

Section 25358.6.2 provides general rules for contracting and administering hazardous substance cleanups. Specifically, Section 25358.6.2 contains two subdivisions, which require the Department of Toxic Substances Control (“department”) to:

- (a) Where feasible, incorporate fixed-price contracts in hazardous substance cleanups conducted by the department; and
- (b) Establish performance milestones for cleanups conducted or overseen by the department and provide specified information on such cleanups on the department’s website.⁹

In the attached document, these two subdivisions are proposed for recodification as separate sections (proposed Sections 78890 and 78895). These new sections are located within a newly-proposed Article 2.5 (Department Obligations) in Chapter 5 (Cleanup of Hazardous Substance Releases).

Proposed Article 2.5 follows proposed articles on general provisions¹⁰ and rules for specified circumstances (cleanups requiring immediate or urgent action), but comes before a series of proposed articles that contain rules governing the process for and conduct of a cleanup.

NEW SECTION 25355.3: FINANCIAL ASSURANCES FOR CORRECTIVE ACTION

Section 25355.3 contains rules requiring financial assurances for cleanups.¹¹ This section is proposed for recodification as several sections comprising a single proposed article.

The material from Section 25355.3 would be located in proposed Article 11 (Financial Assurances) in Chapter 5. The originally-proposed Article 11 would be renumbered as Article 10.5 to accommodate this change. The staff suggests this renumbering change as it better reflects the relationships between the surrounding articles (i.e., the proposed Article 10.5 material relates more to the preceding article pertaining to the initiation of response actions than it does to financial assurances).

9. See 2021 Cal. Stat. ch. 474, § 1.

10. The staff considered recodifying Section 25358.6.2 within the general provisions article for proposed Chapter 5, however, the other sections in that article are focused specifically on “response actions,” as opposed to “hazardous substance cleanups.”

11. 2021 Cal. Stat. ch. 73, § 79.

The Article 11 location was selected because Chapter 5 is organized based, in part, on the chronology of procedural steps in a cleanup. Section 25355.3 requires the demonstration of financial assurances in connection with the preparation of a feasibility study.¹² The feasibility study would generally occur before preparation of a remedial action plan (see proposed Article 12. Planning).

The attached document includes one Note pertaining to the Section 25355.3 material, which is summarized briefly below:

- The Note, following proposed Section 79184, discusses an apparent cross-reference error. The existing language refers to a release source regulated pursuant to “this chapter or Chapter 6.8 (commencing with Section 25300).” Since the section is located in Chapter 6.8, this language is redundant, referring twice to Chapter 6.8. Because Section 25355.3 expressly applies to corrective action under a determination pursuant to Section 25246.1 (from Chapter 6.5), the staff believes that the reference was intended to refer to “this chapter or Chapter 6.5 (commencing with Section 25100).” For this reason, the staff proposes correcting the reference accordingly.

COMMISSION DECISION

Does the Commission approve of the proposed recodification of the newly-added provisions as reflected in the attached document?

At this stage, the Commission’s final recommendation has not been finalized for hard copy printing. **Does the Commission want to incorporate these changes, as well as the minor legislative adjustments to existing provisions, into its recommendation before printing?**

Respectfully submitted,

Kristin Burford
Staff Counsel

12. See Section 25355.3(b), (c).

Draft Legislation for Sections Added in 2021

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DRAFT LEGISLATION FOR SECTIONS
ADDED IN 2021

1 DIVISION 45. HAZARDOUS SUBSTANCE RESPONSE

2 ...

3 PART 2. HAZARDOUS SUBSTANCE ACCOUNT

4 ...

5 CHAPTER 5. CLEANUP OF HAZARDOUS SUBSTANCE RELEASES

6 ...

7 Article 2.5. Department Obligations

8 **§ 78890. Contracting for hazardous substance cleanup**

9 78890. For contracts for the cleanup of hazardous substances released into the
10 environment carried out by the department pursuant to this part or Chapter 6.5
11 (commencing with Section 25100) of Division 20, the department shall, wherever feasible,
12 at least partially incorporate fixed-price contracting to protect against high costs and to
13 ensure the best value pricing for the department.

14 **Comment.** Section 78890 continues former Section 25358.6.2(a) without substantive change.
15 See Sections 78050 (“department”), 78075 (“hazardous substance”), 78105 (“release”).

16 **§ 78895. Performance milestones and information availability for hazardous substance**
17 **cleanup**

18 78895. For cleanups of hazardous substances released into the environment carried out
19 or overseen by the department pursuant to this part or Chapter 6.5 (commencing with
20 Section 25100) of Division 20, the department shall do both of the following:

21 (a) Establish performance milestones to ensure that the cleanups are performed at the
22 appropriate pace.

23 (b) Make available on the department’s internet website easily accessible information
24 about the cleanups, including all of the following for each cleanup:

25 (1) The address of the site at which the cleanup is taking place.

26 (2) The nature of the contamination.

27 (3) The proposal to clean up the contamination, when available.

28 (4) The estimated or actual time for review of the cleanup proposal.

29 (5) Performance milestones for the cleanup established pursuant to subdivision (a).

1 (6) A link to more detailed information on the cleanup in the department’s EnviroStor
2 database.

3 **Comment.** Section 78895 continues former Section 25358.6.2(b) without substantive change.
4 See Sections 78050 (“department”), 78075 (“hazardous substance”), 78105 (“release”), 78155
5 (“site”).

6 ...

7 Article 11. 10.5. Local Government Removal or Remedial Actions

8 ...

9 Article 11. Financial Assurances

10 **§ 79180. Financial assurances required for corrective action**

11 79180. The department shall require a responsible party who is required to undertake
12 corrective action obligations pursuant to a determination issued pursuant to Section
13 25246.1 to demonstrate and maintain financial assurances in accordance with this article.

14 **Comment.** Section 79180 continues former Section 25355.3(a) without substantive change.
15 See Sections 78050 (“department”), 78145 (“responsible party”).

16 **§ 79182. Timeline for cost estimate and financial assurances**

17 79182. (a) When submitting a feasibility study, a responsible party shall include a cost
18 estimate for the response action.

19 (b) The responsible party shall demonstrate financial assurances within 90 days of
20 approval of a feasibility study and shall maintain financial assurances until all required
21 response actions are complete, as determined by the department.

22 (c)(1) For purposes of subdivision (b), the responsible party shall demonstrate and
23 maintain one or more of the financial assurance mechanisms set forth in subsections (a) to
24 (e), inclusive, of Section 66265.143 of Title 22 of the California Code of Regulations.

25 (2)(A) As an alternative to the financial assurance requirement of paragraph (1), a
26 responsible party may demonstrate and maintain financial assurances by means of a
27 financial assurance mechanism other than those described in paragraph (1), if the
28 alternative financial assurance mechanism has been submitted to, and approved by, the
29 department as being at least equivalent to the financial assurance mechanisms described in
30 paragraph (1).

31 (B) The department shall evaluate the equivalency of the proposed alternative financial
32 assurance mechanism principally in terms of the certainty of the availability of funds for
33 required corrective action activities and the amount of funds that will be made available.
34 The department shall require the owner or operator to submit any information deemed
35 necessary by the department to make a determination regarding the equivalency of the
36 proposed alternative financial assurance mechanism.

1 **Comment.** Section 79182 continues former Section 25355.3(b), (c), and (d) without substantive
2 change. A cross-reference to the California Code of Regulations was corrected to refer to
3 “subsections” as opposed to “subdivisions.”

4 See Sections 78050 (“department”), 78060 (“feasibility study”), 78140 (“response,” “respond,”
5 or “response action”), 78145 (“responsible party”).

6 **§ 79184. Waiver of financial assurance requirement**

7 79184. (a) If the source of the release is regulated by the department pursuant to this part
8 or Chapter 6.5 (commencing with Section 25100) of Division 20, the department shall
9 waive the financial assurances required by Section 79180 if the owner or operator of the
10 facility is a federal or state governmental entity, unless the waiver would conflict with
11 applicable law.

12 (b) If the source of the release is not regulated by the department pursuant to Chapter 6.5
13 (commencing with Section 25100) of Division 20, the department may waive the financial
14 assurances required by Section 79180 if the department makes one of the following
15 determinations:

16 (1) The responsible party is a small business and demonstrates all of the following:

17 (A) The responsible party cannot qualify for any of the financial assurance mechanisms
18 set forth in subsection (b), (c), or (d) of Section 66265.143 of Title 22 of the California
19 Code of Regulations.

20 (B) The responsible party financially cannot meet the requirements of subsection (a) of
21 Section 66265.143 of Title 22 of the California Code of Regulations.

22 (C) The responsible party is not capable of meeting the eligibility requirements set forth
23 in subsection (e) of Section 66265.143 of Title 22 of the California Code of Regulations.

24 (2) The responsible party is a small business and has demonstrated that the responsible
25 party is financially not capable of establishing one of the financial assurance mechanisms
26 set forth in subsections (a) to (e), inclusive, of Section 66265.143 of Title 22 of the
27 California Code of Regulations while at the same time financing the response action
28 applicable to the site.

29 (3) The responsible party is not separately required to demonstrate and maintain a
30 financial assurance mechanism for a response action at a site because all of the following
31 conditions apply:

32 (A) The site is a multiple responsible party site.

33 (B) Financial assurances that the response action at the site will be carried out is
34 demonstrated and maintained by a financial assurance mechanism established jointly by
35 all, or some, of the responsible parties.

36 (C) The financial assurance mechanism specified in subparagraph (B) meets the
37 requirements of Section 79180 and subdivision (b) of Section 79182.

38 (4) The responsible party is a local governmental entity.

39 (c) The department shall withdraw a waiver granted pursuant to subdivision (b) if the
40 department determines that the responsible party that obtained the waiver no longer meets
41 the eligibility requirements for the waiver.

1 **Comment.** Section 79184 continues former Section 25355.3(e), (h), and (i) without substantive
2 change. The cross-references to the California Code of Regulations were corrected to refer to
3 “subsections” as opposed to “subdivisions.”

4 A reference to “this chapter or Chapter 6.8 (commencing with Section 25300)” was corrected
5 and updated to refer to “this part or Chapter 6.5 (commencing with Section 25100).”

6 See Sections 78050 (“department”), 78105 (“release”), 78140 (“response,” “respond,” or
7 “response action”), 78145 (“responsible party”), 78155 (“site”).

8 **Note.** Section 25355.3(e) refers to a release regulated pursuant to “this chapter or Chapter 6.8
9 (commencing with Section 25300).” Since this provision is in Chapter 6.8, these references are
10 redundant. It appears, however, that the reference should have referred to “this chapter or Chapter
11 6.5,” as the following subdivision provides a specific rule for releases regulated pursuant to Chapter
12 6.5.

13 For this reason, the staff has proposed correcting the reference to refer to “this part (Chapter 6.8)
14 or Chapter 6.5.”

15 **§ 79186. Requirement satisfied by demonstration of financial assurance to State Water**
16 **Resources Control Board or California regional water quality control board**

17 79186. A responsible party may satisfy the requirements of this article by demonstrating
18 to the department that it has provided financial assurance for corrective action to the state
19 board or a regional board for the same release identified by the department.

20 **Comment.** Section 79186 continues former Section 25355.3(f) without substantive change.

21 The terms “State Water Resources Control Board” and “California regional water quality control
22 board” were replaced with the applicable defined terms “state board” and “regional board.” See
23 Section 78100, 78168.

24 See Sections 78050 (“department”), 78100 (“regional board”), 78105 (“release”), 78145
25 (“responsible party”), 78168 (“state board”).

26 **§ 79188. Financial assurance for sites for which sole jurisdiction granted according to**
27 **hazardous waste facility regulation and permitting consolidation program**

28 79188. For sites for which sole jurisdiction has been granted pursuant to subdivision (b)
29 of Section 25204.6, the department shall not require additional financial assurances unless
30 it is the lead agency or is directed by the lead agency that has sole jurisdiction pursuant to
31 subdivision (b) of Section 25204.6.

32 **Comment.** Section 79188 continues former Section 25355.3(g) without substantive change.

33 See Sections 78050 (“department”), 78155 (“site”).

34 **§ 79190. Implementation of article contingent upon appropriation**

35 79190. The department’s duties to implement this article are contingent upon an
36 appropriation by the Legislature for purposes of implementing the requirements of this
37 article.

38 **Comment.** Section 79190 continues former Section 25355.3(j) without substantive change.

39 See Section 78050 (“department”).

DISPOSITION OF EXISTING LAW

Existing Provision	Corresponding New Provision
25355.3(a).....	79180
25355.3(b), (c), (d)	79182
25355.3(e), (h), (i)	79184
25355.3(f)	79186
25355.3(g)	79188
25355.3(j)	79190
25358.6.2(a).....	78890
25358.6.2(b)	78895

DERIVATION OF NEW LAW

Proposed New Provision	Corresponding Existing Provision
78890	25358.6.2(a)
78895	25358.6.2(b)
79180	25355.3(a)
79182	25355.3(b), (c), (d)
79184	25355.3(e), (h), (i)
79186	25355.3(f)
79188	25355.3(g)
79190	25355.3(j)
