



ASSEMBLY COMMITTEE ON  
ENVIRONMENTAL SAFETY AND TOXIC MATERIALS

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**CALIFORNIA'S TOXIC WASTE CLEANUP PROGRAM:  
PROTECTING COMMUNITIES AT RISK**

September 25, 2014

To: Members of the Assembly Committee on Environmental Safety & Toxic Materials  
From: Assemblymember Luis Alejo, Chair  
Subject: Oversight Hearing on DTSC's Toxic Waste Cleanup and Cost Recovery Programs

The Assembly Environmental Safety and Toxic Materials (ESTM) Committee oversight hearing on September 25, 2014 will focus on the California Department of Toxic Substances Control's (DTSC) hazardous waste and contaminated site cleanup efforts and the California State Auditor's August 7, 2014 audit report on DTSC's recovery of outstanding costs incurred to clean up contaminated sites.

On August 1, 2013, the ESTM Committee requested that the Joint Legislative Audit Committee (JLAC) approve an audit of the effectiveness of DTSC's cost recovery efforts related to hazardous waste cleanup projects. The JLAC approved the request on August 21, 2013, and directed the California State Auditor to perform the aforementioned audit.

**Background**

In the long history of the state's hazardous waste and contaminated site cleanup programs, there has been a need for clarity, measurable goals, and public transparency in order for the people of California to understand the process and progress being made to reduce the threat from contaminated sites.

DTSC's mission is to protect California's people and the environment from the harmful effects of toxic substances, in part, through the restoration of contaminated resources. In fulfilling its mission, DTSC incurs direct cleanup costs and oversight costs (collectively, "response costs")

when investigating and remediating contaminated properties. Federal and state laws authorize DTSC to recover the costs and expenses it incurs in carrying out activities relating to the cleanup of contaminated sites.

Despite the legal authority to recover costs, there is clear evidence that DTSC has incurred response costs for which it did not issue invoices to responsible and billable parties, as well as costs for which it did issue invoices but then failed to collect the funds.

California has hundreds of toxic waste sites that need to be cleaned up in order to protect public health and the quality of communities. The failure to pursue spent costs hurts all Californians. Any laxity sends the wrong message, not only to responsible parties, but to communities who need clean up and to businesses that are working on being good neighbors. We need a stronger, more transparent system for tracking the cleanup of toxic waste sites, and a robust cost recovery program for those sites where responsible parties have been unwilling or unable to remediate the contamination.

According to the United States Environmental Protection Agency (US EPA), there are as many as 355,000 contaminated sites that will require clean up over the next 30 years at a cost of as much as \$250 billion. California must have an effective cost recovery program in place to manage this ongoing and future problem.

### **Fixing the Foundation: Site cleanup efforts**

In early 2012, DTSC launched "Fixing the Foundation", an internal initiative, to ensure accountability and to address issues that threatened DTSC's ability to achieve its mission. DTSC developed work plans relating to cost recovery that cover the period from April 2013 to April 2014. Since then, DTSC has:

1. Sought funding to cover federal Superfund (those identified under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980) match and state "orphan" site cleanup efforts where no viable responsible party can be identified.

Both the US EPA and DTSC have identified sites that represent an immediate threat to public health and the environment and/or for which no viable responsible parties have been identified to address these projects ("orphan" sites). It is anticipated that within the next two to three years, the amount of money needed to cover California's federal Superfund match obligations and the state's orphan funding needs will be more than what is currently appropriated annually. If that occurs, then DTSC will have to make the difficult decision as to what projects will not be funded and work will either need to stop or slow down.

2. Improved the financial assurance program within the cleanup program so that public money will not be used to pay the cost of long-term clean up at sites where the responsible party goes bankrupt or refuses to complete the work.

With these plans in place, DTSC has much work to do to ensure that the long-term monitoring and tracking of clean up and corrective action projects effectively protects the public and the environment, and to take quick and effective enforcement actions on cleanup efforts when responsible parties underperform.

### **Summary of the State Auditor's findings**

The California State Auditor report, "California Department of Toxic Substances Control: Its Lack of Diligence in Cost Recovery Has Contributed to Millions in Unbilled and Uncollected Costs," was released on August 7, 2014. The report and fact sheet can be found on the State Auditor's website: <https://www.auditor.ca.gov/pdfs/reports/2013-122.pdf>.

Among the findings of the audit were serious concerns about the operation of the DTSC cleanup cost recovery program, including:

1. Long-standing shortcomings with DSTC's recovery of costs have resulted in millions of dollars in unbilled and billed but uncollected cleanup costs (outstanding costs) dating back to 1987.
2. Inadequate procedures, incomplete documentation, and misclassification of certain sites in its database. These issues are so pervasive that DTSC has not yet determined the exact amount it may be able to recover.
3. DTSC's spreadsheet for tracking projects with outstanding costs as of March 2014, shows that it has more than 1,600 projects totaling almost \$194 million in outstanding costs, of which nearly \$142 million was unbilled and almost \$52 million was billed but uncollected.
4. DTSC may not be able to recover all of its outstanding costs due to several factors, such as when the federal and state statutes of limitations for cost recovery have expired on projects. DTSC's preliminary determinations indicated that the statute of limitations has expired for 76 projects with a total of \$13.4 million in outstanding costs, which DTSC may not be able to recover. The outstanding costs also include \$73 million for projects involving litigation and bankruptcy. For these projects, DTSC will not know how much, if any, money it could recover until the legal process concludes for each of the project sites.

**Summary and status of outstanding project costs**

Project Category	Number of Projects	Total unbilled costs	Total billed but uncollected costs	Total outstanding costs	Percent of Total number of projects	Percent of Total outstanding costs
Projects with \$0-\$5,000 in total outstanding costs	722	\$1,082,613	\$114,852	\$1,197,465	43%	1%
Projects with billing issues	493	6,256,744	43,817,161	50,073,935	30	26
Closed projects with outstanding costs	223	52,569,212	1,134,158	53,703,370	13	27
Projects with bankruptcies or ongoing litigation	61	69,529,706	3,267,715	72,797,421	4	38
Projects requiring verification of a No Further Cost Recovery Action designation	67	5,014,183	3,407,834	8,422,017	4	4
<b>TOTAL</b>	<b>1,661</b>	<b>\$141,746,776</b>	<b>\$51,822,194</b>	<b>\$193,568,970</b>	<b>100%</b>	<b>100%</b>

**The State Auditor's recommendations**

The August 2014, California State Auditor report included the following recommendations for DTSC to take to ensure that it maximizes opportunities to recover its costs:

1. By January 2015, develop processes for tracking and monitoring the federal and state statutes of limitations on contaminated sites;

2. By January 2015, develop processes for tracking the progress and resolution of settlement agreements to ensure DTSC staff can verify updated information;
3. By October 2014, develop written procedures for updating and monitoring its collection letter process;
4. By October 2014, update policies and procedures for using liens;
5. Consistently issue collection letters to responsible parties delinquent on payment or recorded liens on the properties of responsible parties; and,
6. Increase the interest rate charged on billed by delinquent unpaid amounts to improve timeliness of payments (requires legislative action).

DTSC is supportive of the findings of the State Auditor and its recommendations. DTSC must report to the State Auditor within 60 days, 6 months, and one year on the status of its implementation of the aforementioned recommendations.

#### **Pending statutory changes**

Currently, DTSC imposes financial assurance requirements for permitted facilities for closure and post closure, as well as for corrective action (clean up at permitted facilities). The financial assurances for permitted facilities are imposed at the time of the permit; however, under current US EPA guidance, financial assurance for corrective action is imposed at the time of remedy selection (which is after the contamination is known, after investigation, and much later in the cleanup process). Currently there is no state or federal law that requires the imposition of financial assurance for corrective action sooner in the cleanup process.

If the responsible party does not pay for the corrective action, then ultimately the state could be left having to use taxpayer dollars to clean up the site.

SB 812 (De León, 2014), which, at the time of print of this document is pending the Governor's signature, would change existing law by giving DTSC the authority to require a hazardous waste facility to provide a written cost estimate for the clean-up of their facility (corrective action) and require DTSC to base those estimates on the American Society for Testing and Materials standard E2150-13. SB 812 also requires the facility to obtain financial assurance for the corrective action cost estimate. SB 812 is designed to ensure that the party responsible for the contamination pays for the cleanup and that the cleanup costs are not shifted to the taxpayers.

In addition, current state law requires DTSC to charge interest for invoices not paid within 60 days at a rate equal to the rate of return earned on investments in the State's Surplus Money Investment Fund (SMIF). However, the SMIF interest rate is substantially lower than the interest rate charged for late payments by other state entities, such as the California State Board

of Equalization (BOE). For example, for the quarter ending June 30, 2013, the SMIF interest rate was 0.246 percent, while the BOE interest rate was 6 percent for the same period. As long as the SMIF interest rate remains low, there is less incentive for responsible parties to make payments on time.

SB 812 would amend that law to require any monetary obligation owed to DTSC to accrue interest at the same rate as the modified adjusted rate per annum.