

**Comments by the Committee to Bridge the Gap
on the Department of Toxic Substances Control's
Revised Proposed Regulations for Toxicity Criteria
for Human Health Risk Assessment, Screening Levels,
and Remediation Goals**

DTSC Reference Number R-2016-8

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Hard as it is to believe, DTSC has succeeded in further weakening its proposed regulations for toxicity criteria, in response to lobbyists from industries that create toxic pollution. Although one feels that the concerns of those who speak on behalf of the victims of that pollution and regulatory neglect will continue to fall on deaf ears, we here nonetheless attempt to identify what is wrong with the latest draft, and with the process that brought us to this point.

Original 2016 Proposal Was Sensible, Until Industry Lobbyists Weighed In

In December 2016, DTSC convened a “pre-rulemaking workshop.” Because it was held in Sacramento, far from where most community members affected by toxic materials reside, and because industry was invited and few if any community group representatives were, it was entirely, or almost entirely, attended by lobbyists and other representatives of parties that have an interest in assuring that standards were as weak as possible.

At the workshop, DTSC was explicit both about longstanding practice and what the proposed rule was designed to do:

the purpose of the proposed draft regulation is to codify DTSC's past and existing practice of applying the more protective toxicity criteria at all sites in California.

p7 emphasis added

What DTSC's practice has been in the past and what current practice is and what our future practice is to use the toxicity criteria from the more health protective source.

p10 emphasis added

So just to reiterate ..., it has been and continues to be DTSC's practice to use the more health protective value in the event OEHHA and [USEPA] IRIS values are protective and use them in human health risk assessment documents in California. So this is a practice that both DTSC and the US EPA Region 9 have been using since 1994 in California. So now DTSC wants to codify this practice.

p. 10 emphasis added

The attendees allied with polluting industries jumped all over this proposal, even though it was, as DTSC repeatedly said, a continuation of DTSC's longstanding practice to use the most protective standards. The Resource Conservation and Recovery Act (RCRA), among other federal statutes, requires states to meet the minimum federal standards, but allows them to employ standards that are more protective. California law and practice has been to use state standards when those are more protective than the federal. This rulemaking was to codify those specific standards, in large measure to assure that the more protective state standards were considered Applicable or Relevant and Appropriate Requirements (ARAR) so that they would be employed at cleanups of federal facilities as well as all other sites in the state.

Draft Proposal as Issued in 2017 Was Significantly Weakened in Response to that Industry Pressure

Having met in advance with industry before the rule was even issued for comment, DTSC proceeded to revise the original draft to meet industry's requests. The draft rule as issued for public comment continued to claim that it was designed to use the most protective standard:

The California Department of Toxic Substances Control (Department) is promulgating this (new) rule to adopt Office of Environmental Health Hazard Assessment (OEHHA) toxicity criteria listed in Appendix I and require their use because they afford greater protection of human health, safety and the environment than the nationwide minimum standard provided by analogous federal toxicity criteria for the same contaminants. This clarification to achieve California's more stringent protections had not been necessary...until recently ...[when] the U.S. Air Force (Air Force) began to insist on using the substantially less stringent federal Integrated Risk Information System (IRIS) toxicity criteria for perchloroethylene (PCE, also known as tetrachloroethylene) and other contaminants for cleanups in California. This is contrary to the Department and U.S. Environmental Protection Agency (U.S. EPA) Region 9's long-standing (i.e., decades) practice of using California toxicity criteria at hazardous substance release sites in California, when state toxicity criteria are more protective than federal criteria.

Initial Statement of Reasons p. 3, emphasis added

However, this was misleading. As we pointed out in our September comments, in fact, for many toxicity criteria, DTSC was now proposing to use the least protective standard. We urged DTSC to return the proposal to its original form and DTSC's self-stated longstanding policy before industry intervention had resulted in altering the draft rule.

DTSC Should Disclose Whether Additional Pressure from Industry Lobbyists Resulted in Further Weakening of the Proposal

On 6 February 2018, we received an email from DTSC stating, “We anticipate sending out later today or tomorrow a response to comments on our draft rule.” However, nothing arrived on February 6th, or the 7th. A month went by; still nothing. We emailed DTSC on 9 March, asking what had happened to the promised release. On 12 March, Mr. Depies of DTSC emailed back, saying, “We intended to release the revised rule on the 6th, but due to unforeseen circumstances have delayed the release. Our hope is that it will be released later this week.” The mysterious “unforeseen circumstances” were not specified.

When we inquired what was the cause of the delay, Mr. Depies wrote, “It required a more rigorous internal review than we anticipated.” This explanation is puzzling. It would be perhaps convincing if it were to explain why it took a long time to respond to comments. But DTSC had emailed us on February 6 to say they would be sending out the response to comments that day or the next. So it would appear there was some intervention, occurring in the hours thereafter.

But despite the second promise that the response to comments would issue soon, weeks more went by until its release on April 5.

Given how dramatically further weakened is the revised draft rule and the positions taken in the response to comments document, DTSC should disclose whether there was any contact by representatives of polluting industries after the comment period on the initial formal draft had closed, and in particular, any such contact in February or March, and whether any changes to the draft rule or response to comments occurred in response to such contacts. The Administrative Procedure Act is designed to create a level playing field.

The April 2018 Draft Significantly Weakens the Already Weakened 2017 Draft Rule

Whatever may be the true story about the “unforeseen circumstances” that resulted in the response to comments being yanked from being sent out hours before the planned release, it seems inescapable that the changes to the draft rule found in the current version reflect industry requests in their written comments and significantly erode the rule’s public protections even further. We oppose these changes and urge DTSC to return to the original 2016 commitments, for a rule that would use the more protective of the OEHHA and USEPA standards.

1. Appendix 1 of the 2017 draft rule had removed a number of OEHHA standards when they were more protective than the EPA IRIS values, and vice versa. We had objected. But rather than strengthen the Appendix I values so that they were the most protective, DTSC in the revised proposal removed even more of the more values, further weakening the proposed rule.
2. Rather than returning to the principle enunciated in the original 2016 proposal, of codifying longstanding practice of using the most protective OEHHA or federal standard, the newest draft makes matters substantially worse. It now gives to DTSC’s toxicologist the power to determine whether s/he agrees with OEHHA’s science and thus to be able to ignore OEHHA standards at will, choosing whenever s/he wishes to use the less protective standard. DTSC’s toxicology

office simply does not have the authority, credibility, or capability to do this; the proposal is a direct assault on OEHHA's role. The proposal would usurp OEHHA's fundamental role.

As DTSC stated in its Initial Statement of Reasons,

OEHHA develops its toxicity criteria using a transparent, scientifically supported and high quality peer-review process that solicits, incorporates and addresses public and professional comments. U.S. EPA ORD uses a similar peer-review process for the IRIS Program. The OEHHA toxicity criteria have been consistently used within the State of California by its boards, departments and offices, and by U.S. EPA Region 9 for hazardous substance release sites to screen and develop remediation goals since at least 1994.

p. 9, emphasis added

It is up to OEHHA, not DTSC, to determine what values are scientifically supported. The current proposal turns those roles on their head, and would result in precisely what the polluter representatives wished who had pushed for it – the use of less protective standards.

The current draft proposal at times implies that the only issue is whether a particular standard has been peer reviewed (but again, that really should be up to OEHHA's determination). However, the draft proposal goes far beyond that, to talk about whether it has been "significantly" peer reviewed, or is the most recent, or otherwise is the best science in DTSC's subjective opinion. We were told in a telephone call with DTSC staff that the proposal actually entailed DTSC being able to ignore OEHHA standards that had in fact been peer reviewed, if there were a more recent and less protective USEPA standard. This makes no sense, and is deeply troubling in light of the assault on science at USEPA by the current Trump Administration. The EPA Administrator has, for example, barred from service on EPA's science panels any independent university scientist who has consulted for EPA while packing those panels with people in industry employ. To default to more recent, non-protective Trump EPA standards over more protective California standards is precisely the opposite of what this regulation was initially intended to do.

3. The proposed rule is virtually completely opaque. No specific basis or supporting evidence is given for why particular OEHHA values are included or excluded in Appendix I (with the exception of a few examples in the response to comments by industry).¹ Generalized assertions are made about peer review or sound science being the basis generally, but essentially nothing is shown about which if any OEHHA values DTSC is now claiming did not go through peer review and the basis for that claim. (In our communications with OEHHA, it said it has no such list. In our communications with DTSC, it said this was based on a phone call (!) with someone at OEHHA, none of which is detailed in the proposal. Similarly, no basis is provided for the individual chemicals and standards for claims that the standards were peer reviewed but should nonetheless be rejected because DTSC doesn't agree with the science.

¹ The reference on the website to the report DTSC used for a particular chemical does not provide explanation for why it rejected the more protective OEHHA or USEPA value for individual toxicity criteria.

This is no way to run a railroad, as the saying goes. If DTSC is going to propose to reject a more protective OEHHA or US EPA IRIS value, it should provide full backing for why it is doing so. Furthermore, DTSC does not even provide in the rule a comparison of the OEHHA and IRIS values so one can see which one was more protective.² Nor does it even provide a table that shows what values to use for each chemical and standard. Instead, it provides, for a fraction of them, an OEHHA value, and merely says that one should default to an unidentified IRIS value if there is no value in the chart and IRIS has one, and if neither has a value, some choice among other standards will be made. It is not useful to not have a single chart with the full set of proposed criteria, and it is not meeting APA notice requirements if DTSC has hidden the basis for rejecting individual OEHHA values that are more protective than UEPA's IRIS, or vice versa. DTSC is hiding the ball, a dangerous step when dealing with toxic materials. Relying on some supposed phone call with OEHHA just doesn't cut it.

The Repeated References to Anticipated Land Use are Inappropriate

Industry commenters pushed DTSC to include language that would help further reduce protectiveness of standards, in particular, by repeated reference to "anticipated land use." [The actual official term is "reasonably foreseeable future land use," which means not what the polluter would assert it anticipates but what land uses are allowable under local zoning and General Plan designations. And it includes foreseeable use not just of the site but the surrounding land.]

The proposed language does not include other site specific factors that should in fact result in tighter standards. The actual statutory language describing site-specific characteristics [H&SC §25356.1(d)(4)] states: "Site-specific characteristics, including the potential for offsite migration of hazardous substances, the surface or subsurface soil, and the hydrogeologic conditions, as well as preexisting background contamination levels."

Furthermore, this insertion in the draft rule appears to be an effort by some within DTSC to undermine the position DTSC and CalEPA leadership have taken, for example in the Santa Susana Field Laboratory matter, that claims by a polluter about how they anticipate the land will be used do not override the need to clean the site up to unrestricted levels.

The reference to anticipated land use should be struck.

Conclusion

DTSC stated repeatedly in 2016 that "the purpose of the proposed draft regulation is to codify DTSC's past and existing practice of applying the more protective toxicity criteria at all sites in California." (emphasis added) After repeated intervention by polluting interests, DTSC has instead put forward a revised proposal that would do the opposite. It should return to its original promise.

² The Response to Comments claims this is provided in appendices to HERO Note 3, but they do not provide the competing toxicity criteria, only the value chosen by DTSC (i.e., no comparison to the value rejected).