

November 9, 2016

Mr. Gideon Kracov, J.D., Chair
Independent Review Panel
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95814

Dr. Arezoo Campbell
Independent Review Panel
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95814

Mr. Mike Vizzier
Independent Review Panel
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95814

RE: Comments and Recommendations Regarding DTSC Billing Procedures and Structure Reform

Dear Chairman Kracov, Dr. Campbell and Mr. Vizzier:

The California Chamber of Commerce and the organizations listed below ("Coalition") appreciate the opportunity to submit comments in anticipation of the Independent Review Panel's ("IRP") forthcoming public meeting on November 16, 2016. This letter contains two parts. The first part identifies concerns with, and provides recommendations for, the Department of Toxic Substances Control's ("DTSC") billing procedures. The second part provides recommendations for broader structural reform.

1. DTSC's Billing Procedures

The Coalition has several concerns with DTSC's current billing procedures, which we believe result in bills lacking justification, explanation, and transparency, and which consequently invite unnecessary disputes. From our perspective, our concerns will be further exacerbated in light of the recent passage of SB 839 (Committee on Budget and Fiscal Review), which eliminates the flat fee option for applicants seeking to obtain a hazardous waste permit from DTSC. Accordingly, all applicants will now be required to enter into an uncapped reimbursement agreement with DTSC, wherein DTSC will bill their time and provide billing statements for both direct *and indirect* costs.

With this in mind, rather than simply identifying our concerns with DTSC's current billing procedures, we also provide recommendations for the IRP's consideration.

a) Establish Time Deadlines for Resolution of Billing Disputes

The applicable cost recovery and reimbursement statutes and DTSC policies do not establish any timelines or deadlines for DTSC's response to billing disputes. DTSC's policies, however, do require billable parties to file their disputes in writing within 45 calendar days from the date of the invoice (See **Attachment 1**).

Recommendation: Establish time deadlines for dispute resolution. For example:

(a) The Department shall respond in writing within 45 calendar days of receipt of a formal billing dispute. The Department's response shall include, but may not be limited to, any factual data, analysis, or opinion supporting the Department's position and any supporting documentation relied upon by the Department. The Department's written response shall be binding upon the billable party unless that party files a motion for judicial review of the dispute.

(b) A billable party shall seek judicial review of the dispute within 30 calendar days of receipt of the Department's written response to the billing dispute. The Department shall respond to the legal action in accordance with court rules.

b) Establish Time Deadlines for Meet and Confer, Preparation of Cost Estimates, and Disputes Concerning Cost Estimates pursuant to Health & Safety Code § 25269.5

Health and Safety Code section 25269.5 requires DTSC to engage in a meet and confer process that includes, among other things, adopting cost estimates for work that DTSC expects to perform for each phase of site cleanup activity. The statute does not establish any time deadline for this process or any rules for disputing a cost estimate. DTSC often fails to provide cost estimates in a timely manner and, at times, not at all. As the legislative history for H&S Code § 25269 *et seq.* indicates, DTSC's failure to provide cost estimates prevents the parties from resolving potential billing disputes before they occur, diverting the parties' time and funds from remediation activities, and hindering open and collaborative communication between the parties.

Recommendation: Establish a deadline by which the meet and confer must occur, by which the cost estimate must be provided, and a procedure for resolution of cost estimate disputes. For example:

(a) No later than 60 calendar days before commencement of a new phase of cleanup activity, the Department and potentially responsible parties must meet and confer in person, or telephonically if the parties are located in different counties, to discuss [the matters set forth in H&S Code § 25269.5(a)].

(b) No later than 30 calendar days before commencement of a new phase of cleanup activity, the Department shall provide to potentially responsible parties a cost estimate for the next phase of work. This cost estimate will define the following cost parameters:

- 1) The Department personnel who will be performing the oversight tasks and their direct cost rate.
- 2) The general categories of work (oversight) the Department personnel will be performing.
- 3) The overall Department cost estimate for each general category of work and the basis for that estimate (i.e. personnel billing to cost category and their hours)

(c) If the Department has not provided a cost estimated 30 days prior to the commencement of the new phase of work, the Department will not be entitled to seek recovery of its oversight costs from the regulated party until 30 days after a cost estimate has been provided to the billable party.

(d) If the Department has provided a cost estimate 30 days prior to the commencement of the new phase of work, but the cost estimate is contested by the responsible party, then:

- 1) Require informal dispute resolution (with timing/deadlines) for disputes concerning cost estimates.
- 2) Establish timeline for initiation and resolution of formal disputes concerning cost estimates.
- 3) The Department is entitled to proceed with all work set forth in its cost estimate while a dispute concerning the cost estimate is pending. If the billable party prevails in the dispute, it shall be entitled to a credit or refund.
- 4) Require Department Project Managers to document in writing and report compliance with all cost estimating requirements and meet and confer proceedings to a supervisor in Department management.
- 5) Require all Department personnel working on a project to complete a detailed time card describing the work that they performed in a manner that allows evaluation of the cost effectiveness of their work efforts.

c) Establish Consequences for Failure To Comply with Health & Safety Code § 25269 et seq. and for Failure to Timely Resolve Billing Disputes

The rules concerning submitting invoices on a timely basis, preparation of cost estimates, issuance of invoices, detail to be provided in invoices, and resolution of cost disputes are fairly well-defined. However, DTSC often fails to comply with these established procedures and requirements. The rules do not provide any consequence for a failure to comply with the statutory requirements. Accordingly, an enforcement mechanism is needed to encourage and incentivize compliance with the statute.

Recommendation: Incentivize compliance by, for example, shifting the burden of proof in billing disputes to the Department regarding any portion of the dispute that concerns the Department's failure to comply with H&S Code § 25269 *et seq.*, when the Department fails to comply with the established rules, including failure to timely respond to billing disputes, failure to meet and confer, failure to provide timely and complete cost estimates, and/or failure to promptly submit timesheets, and/or failure to timely invoice billable parties for work performed.

d) Provide DTSC Project Managers with the Organizational Structure and Budget Management Tools Necessary for Active Project Management

Even after budgets are agreed upon, current DTSC structure and protocol do not give the DTSC Project Manager the ability to actively manage the budget. DTSC Budget Management is performed in retrospect and not prospectively. The current organization draws on specialized support (e.g. geologists, engineers or toxicologists) from multiple units within the Department but leaves management (assignment and monitoring of effort) of those personnel to individuals who have little or no involvement in the project and typically have no fiscal responsibility for the project. Those responsible for the budgets typically are not informed of the progression of effort and budget often until it is too late and a project is over-budget and moving in the wrong direction.

Recommendation: DTSC Project Managers need to have the tools and structure required for technical and fiscal Project Management.

(a) Require all DTSC personnel to provide detailed descriptions of their project efforts (hours spent and activities performed) on a daily basis and give Project Managers ability to access and review those efforts on a daily basis.

(b) Provide current budget report/summary to Project Manager every Monday that contains all effort and budget through the previous Friday. Numerous programs are available and the private sector routinely utilizes this approach.

(c) Provide Project Management with training required for development of scopes and budgets, training for active management of budgets and best practices for billing and project management.

(d) Utilize a project team approach to Project Management where project personnel and allocated hours are defined at the time of budgeting and staff level personnel understand their budgets and scope of work.

(e) Require Project Managers to review invoices before they are finalized and sent to ensure accuracy and to keep Project Management informed throughout the process.

e) Establish Procedures to Substantially Reduce DTSC's Indirect Cost Rate

DTSC has the statutory authority to recover indirect costs incurred. (Cal. Health & Safety Code § 25360 [“Any costs incurred by the department... in carrying out this chapter shall be recoverable pursuant to state or federal law... from the liable person or persons.”].) “Indirect oversight costs” are those for activity that is “of a common or joint purpose” not “readily assignable to a single case objective.” (Cal. Health & Safety Code § 25269.1(c).) Indirect costs include salaries, benefits, and general operating costs and expenditures such as rent and utilities.

DTSC must take the following actions to track indirect oversight costs (Cal. Health & Safety Code § 25269.3):

- Ensure that pro rata costs are allocated appropriately to all departmental activities so that the department's program will only bear those pro rata costs in proportion to the benefits received by potentially responsible parties.
- Routinely include operating expenses in the indirect oversight costs and allocate those expenses using processes that ensure the department's program only bears indirect oversight costs in proportion to the benefits received by potentially responsible parties.
- Exclude the costs of grant development and administration, fee administration, contract development and administration, and public and governmental inquiries.

Indirect costs are determined by multiplying the direct labor costs by the indirect cost rate for the applicable 6-month period. Every 6 months, DTSC is required to establish indirect oversight cost rates specific to each of its programs, which will apply for the following 6-month period. The rate is based upon the previous 12-months' expenditures. (Cal. Health & Safety Code § 25269.4.) The exact method by which DTSC arrives at the 6-month indirect cost rate is set forth in DTSC's Final State Indirect Cost Rate Proposal for the relevant period. This document does not appear to be available online. Additionally, there does not appear to be any requirement that DTSC seek public comment during the rate-setting process.

Remarkably, for the January-June 2015 period, DTSC's indirect cost rate is 169 percent. *This means that for every dollar DTSC charges a party for activities pertaining to a "single case objective," it charges the same party an additional \$1.69 for indirect costs.* Consider the following example using DTSC's indirect cost rate:

Direct Costs: \$100,000
Indirect Labor Rate: 1.69
Indirect Costs (Direct Costs x Indirect Labor Rate): \$169,000
Total Costs Due to DTSC (Direct + Indirect Costs): \$269,000

The following are real examples of recent DTSC invoices. The invoice number has been retracted for confidentiality purposes.

Invoice No.	Direct Costs	Indirect Costs	Total Direct + Indirect Costs
n/a	\$245,042.64	\$415,371.74	\$660,414.38
n/a	\$18,150.36	\$30,802.22	\$48,952.58
n/a	\$26,075.25	\$44,451.86	\$70,527.11
n/a	\$7.93	\$13.44	\$21.37
n/a	\$73,580.18	\$124,738.71	\$198,318.89

Recommendation: The Coalition believes that DTSC's indirect cost rate is far too high, although to DTSC's credit, the rate has decreased from previous years. The solution to addressing this is complex and multi-faceted, and we welcome the opportunity to work with the IRP and DTSC in identifying cost-effective solutions to substantially reduce the indirect cost rate.

f) Establish Guidelines to Ensure Parties Are Not Billed for Fee Disputes

DTSC often bills parties for the time spent on addressing a fee dispute. This practice, wherein DTSC assesses "fees on fees," is problematic because it serves as a deterrent to dispute fees that may very well be unjustified. We expect fee disputes to occur more often upon enactment of SB 839.

Recommendation: Prohibit the practice of billing parties for time spent on fee disputes. We are aware that DTSC is concerned that this will encourage certain parties to perpetually dispute fees. Accordingly, the Coalition would not be opposed to providing DTSC with the discretion to bill parties for fee disputes if certain thresholds are met, i.e., if the disputing party has a demonstrable history of perpetual fee disputes or if the dispute is determined to be in bad faith.

g) Additional Comments and Recommendations

There appears to be a lack of coordination and communication between the billing department and Project Managers. For example, invoices do not automatically include the accompanying daily logs, which are needed to determine whether to dispute any changes within a particular invoice.

Recommendation: DTSC should provide the daily logs as a matter of course with all invoices. Doing so will increase transparency, may reduce or streamline billing disputes, and bring DTSC's practices in line with custom and practice.

When invoices are disputed, the billing department is not advised to halt interest charges for any unpaid amounts subject to the dispute. As such, despite assurances by Project Managers that interest will not be assessed while the dispute is pending, the billing department continues to assess interest on subsequent invoices. This practice violates California Health & Safety Code section 25360.1(b) and DTSC's own billing policy.

Recommendation: DTSC should change its practices to ensure that interest is not charged for any unpaid amounts subject to a dispute.

Descriptions in daily billing entries lack detail, making it difficult to determine the reasonableness or necessity of the work performed. For example, one individual has routinely used the same billing description for every entry, regardless of the day and the amount of time spent. Also, many individuals have entries that appear to be duplicative of one another. Without a more detailed description, it is impossible to determine whether the work performed by these individuals are duplicating work or performing work in coordination with one another. Health & Safety Code sections 25269.6(c) and (e) require DTSC invoices (1) to contain "sufficient detail so that the potentially responsible party can relate the items on the invoice to the benefits served" and (2) to be reviewed for accuracy and appropriateness by a member of department staff who has direct knowledge of the remediation action. Based on experience with its billing, DTSC seldom complies with the first requirement and it is doubtful DTSC attempts to satisfy the second requirement in any meaningful way.

Recommendation: DTSC should provide its staff a concentrated training program in budgeting and billing practices and procedures.

2. Structural Reform

The Coalition believes that virtually all of the systemic issues within DTSC stem from a small minority of the 118 DTSC permitted facilities/sites throughout the State of California. Indeed, efforts to reform DTSC, both by way of legislation and through the IRP's recommendations, are driven by approximately 10-15 controversial facilities/sites, but nonetheless unjustifiably would implicate all 118 facilities/sites. These facilities/sites may be controversial for several different reasons including, but not limited to, the complexity of the underlying permit and/or environmental review, the size or location of the facility or site, and the degree of public involvement. The controversy, whether or not justified, merits specialized expertise and attention above and beyond that which is provided for the remaining, more routine and uncontroversial facilities/sites.

Recommendation: Legislation should be enacted to do the following:

- a) Give DTSC the discretion and the resources to identify 10-15 facilities/sites for which it should provide specialized expertise and attention.
- b) Expanding on the IRP's recommendation in its fourth report (October 2016) in which it suggests creating a "crisis management team within the Public Participation Program," establish a crisis management team specifically devoted to the 10-15 facilities/sites identified by DTSC to require specialized expertise and attention.
- c) In matters of extraordinary public interest (as determined by DTSC), general fund expenditures should be provided to appropriately and adequately respond to public comments and to devote the requisite resources and expertise to complicated permitting processes or cleanups. A portion of these general fund expenditures can be used for enhanced public participation and to ensure that local community groups have the resources necessary for full and informed public participations (e.g., translation services for communities where English is not a first language).

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More broadly speaking, the hazardous waste laws within the Health and Safety Code are complex and arcane. When new legislative concepts are proposed in any statutory framework, but particularly one as complicated as the hazardous waste laws, they are typically done by accretion. Legislation seldom eliminates provisions of law or harmonizes "new" and "old" provisions. Our hazardous waste laws are in desperate need of modernization; the Coalition believes that to the extent the Legislature is inclined to pursue DTSC reform legislation, it should proceed with caution to ensure that any new concepts are not duplicative and, where appropriate, it should eliminate unnecessary or outdated provisions.

Thank you for considering our comments. We look forward to working with the Independent Review Panel on this very important effort.

Sincerely,



Anthony Samson, Senior Attorney/Policy Advisor
Arnold & Porter LLP

On behalf of the following organizations:

California Chamber of Commerce
Alhambra Chamber of Commerce
Automotive Specialty Products Alliance
California Business Properties Association
California Cement Manufacturers Environmental Coalition
California Manufacturers and Technology Association
California Metals Coalition
California Small Business Alliance
Chemical Industry Council of California
Clean Harbors Environmental Services, Inc.
Consumer Specialty Products Association
Greater Fresno Area Chamber of Commerce
Industrial Environmental Association
Institute of Scrap Recycling Industries
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
North Orange County Chamber
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce & Visitors Bureau
Safety-Kleen, Inc.
San Diego Regional Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Simi Valley Chamber of Commerce
Torrance Chamber of Commerce
West Coast Lumber & Building Material Association
Western Mining Alliance
Western Plant Health Association
Western States Petroleum Association

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cc: Barbara Lee, Director, Department of Toxic Substances Control
Francesca Negri, Chief Deputy Director, Department of Toxic Substances Control
C. David Johnson, Jr., Legislative Director, Department of Toxic Substances Control
Graciela Castillo-Krings, Deputy Legislative Secretary, Office of the Governor
Kip Lipper, Chief Policy Advisor, Senate President pro Tem Kevin de Leon
Rachel Wagoner, Chief Consultant, Senate Environmental Quality Committee
Morgan Branch, Senate Republican Caucus
Joshua Tooker, Chief Consultant, Assembly Environmental Safety and Toxic Materials Committee
Paige Brokaw, Consultant, Assembly Environmental Safety and Toxic Materials Committee

Attachment 1

Attachment 1

**Department of Toxic Substances Control
Cost Recovery and Reimbursement Policy
November 19, 2013**

In General

The Department of Toxic Substances Control's (DTSC) mission is to protect California's people and environment from harmful effects of toxic substances through the restoration of contaminated resources, enforcement, regulation, and pollution prevention. DTSC is authorized to recover all identifiable costs incurred by the Department in fulfilling its mission (i.e., direct costs incurred by DTSC contractors and DTSC staff that are working on site- or project-specific activities). This Cost Recovery and Reimbursement Policy summarizes DTSC's cost recovery policies and billing procedures, as required by Health and Safety Code section 25269.2(b).

Program Specific Indirect Rates

In addition to direct costs incurred by DTSC, DTSC also bills its indirect costs associated with direct staff costs. Such indirect costs are only applied to DTSC direct labor costs and not to DTSC contractor costs or DTSC staff travel costs. DTSC calculates separate indirect cost rates (salary/benefits and general operating costs) for each of its major programs (Cleanup, Hazardous Waste Management, and Pollution Prevention and Green Technology). Because the ratio of direct to indirect costs varies among DTSC's various programs, the indirect cost rates associated with those programs will also vary. Pursuant to Health and Safety Code section 25269.4, the Department calculates and updates its indirect cost rates every six months.

Payment Due Date and Late-Payment Interest

Unless otherwise specified by the applicable cost recovery document (i.e., voluntary cleanup agreement, enforceable order), payments must be postmarked within 30 calendar days of the invoice date. Pursuant to Health and Safety Code section 25360, any unpaid principal balance due to DTSC is subject to interest charges from the date of the invoice. DTSC assesses interest charges 60 calendar days from the date of the invoice and interest on unpaid invoices accrues until payment is received. The interest rate used in calculating the late-payment interest charge is equal to the same rate of return earned on investment in the Surplus Money Investment Fund. The interest rate is specified in the billing letter that accompanies the invoice. The interest rate is updated every three months and identified in subsequent billing letters. If you are in litigation with DTSC, any late payment interest charge in this bill will be supplanted by interest pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.

Payment Type

Submit all payment types with the "Invoice" page marked "Return with Remittance" on the bottom.

Checks or Money Orders: Send your check or money order payable to the "Department of Toxic Substances Control" (in U.S. Funds) and mail to:

Department of Toxic Substances Control
Accounting Unit
P.O.Box 806
Sacramento, CA 95812-0806

Credit Card: Fill out the credit card information section on the "Invoice" page marked "Return with Remittance" and submit the Invoice page to DTSC via fax at (916) 322-0274, via email at accounting@dtsc.ca.gov, or via mail to the address above.

Electronic Funds Transfer: Call (916) 327-8514 or email accounting@dtsc.ca.gov for DTSC's bank information.

Application of Payments Received

Payments are applied to the invoice identified on the remittance "Invoice" page returned by the payee and interest balances, if any, on a pro-rata basis. If the payment is not accompanied by remittance "Invoice" page identifying the invoice to be paid (or other identifying information), then the payment will be applied to the oldest outstanding invoice and interest balances, if any, on a pro-rata basis.

Quarterly Billing Statements

In general, DTSC issues billing packages to billable parties on a quarterly basis according to the following schedule:

Billing Periods	Approximate Date Invoices Issued
January - March	Mid-May/Early-June
April - June	Mid-August/Early-September
July - September	Mid-November/Early-December
October - December	Mid-February/Early-March

Each billing package is accompanied by a billing letter addressed to the billable party, and includes an Invoice, Statement of Account, and Summary by Activity report identifying the names of DTSC staff and the number of hours staff directly charged to each site or project for the billing period.

Cost Documentation

DTSC staff track their work activity in site- or project-specific Daily Logs and submit a monthly time sheet for hours worked. Daily Logs are used as the basis for activity charges and provide additional detail about site-specific work activities. Daily Logs are available for review upon request to the DTSC project manager for the site or project.

Project Costs

At the onset of each new project, DTSC develops a cost estimate for the billable party that includes estimates of all foreseeable DTSC charges (i.e., staff hours that are anticipated to be directly charged to the project and estimated indirect charges) related to the site or project. The estimates are updated and provided to the billable party on an annual basis and as necessary based on site- or project-specific developments. DTSC's policy is to meet with persons liable for costs necessary and appropriate to discuss project work plans, timelines, budget and cost estimates, outputs, and related issues. Such discussions are initiated at the onset of each new project and at the beginning of each new major phase of activity for ongoing projects.

Resolution of Disputed Bills

If you have a dispute regarding the charges or related services appearing on the invoice you received from DTSC, you may file an invoice dispute by notifying DTSC of your dispute in writing within 45 calendar days from the date of the invoice. The invoice dispute notice must identify the name of the site or project, Site Code or Project Code, invoice number, invoice date, charges contested, employee name associated with contested charges, and the amount disputed. The invoice dispute notice also must include a detailed statement of the legal and/or factual basis for the dispute, and the remedy sought.

The invoice dispute notice should be addressed to:

Chief, Collections and Resolution Unit
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

A copy of the invoice dispute notice should also be sent to the "Regional Branch Chief" at the address identified at the end of the billing letter.

If you are disputing only a portion of the costs included in the invoice, you should pay for those costs that are not being disputed. Filing a dispute will not stay the imposition of the interest charges for undisputed costs. For additional questions or information regarding filing formal invoice disputes, please call (916) 322-0481.

Other Contact Information

For questions regarding billable party determinations, settlement negotiations, or services rendered, contact your project manager at the number listed on the last page of the billing letter included in this invoice package.

For questions regarding payment methods, contact the Accounting Office at (916) 327-8514 or accounting@dtsc.ca.gov.

For questions regarding indirect rates, interest calculations, application of payments, statements of account, or refunds, contact the Cost Recovery Billing Unit at billing@dtsc.ca.gov.