

February 18, 2016

Mr. Josh Tooker  
Legislative Director  
Department of Toxic Substances Control  
1001 I Street  
Sacramento, CA 95814

Ms. Jane Numazu  
Project Manager, Violation Scoring Procedure (VSP)  
Department of Toxic Substances Control  
1001 I Street  
Sacramento, CA 95814

**RE: REGULATED COMMUNITY INFORMAL COMMENTS REGARDING DTSC'S VIOLATION SCORING PROCEDURE (VSP) PROPOSAL**

Dear Mr. Tooker and Ms. Numazu:

The California Chamber of Commerce and the below-listed organizations (hereinafter, "Coalition") appreciate the opportunity to submit informal comments regarding the Department of Toxic Substances Control's (DTSC) proposed Violation Scoring Procedure (VSP) concept. Our Coalition consists of organizations that represent many of the private hazardous waste permit holders throughout the state, as well as companies that rely on hazardous waste facilities to dispose of their hazardous waste and other concerned organizations.

On January 29, 2016, several DTSC representatives gave a presentation to our Coalition regarding DTSC's plans to propose a draft VSP. Importantly, DTSC has not yet released a pre-regulatory proposal or formal rulemaking proposal to implement the VSP. Instead, DTSC's presentation regarding the VSP was based solely on information contained in a PowerPoint presentation entitled "Draft Violation Scoring Procedure: Presentation to Representatives of the Regulated Community." During the presentation, DTSC requested feedback regarding several aspects of the proposal, including whether it would even be appropriate to pursue this regulation at all.

According to DTSC, the purpose of the VSP is to create clear and objective criteria for making denial or revocation decisions that are based on valid standards of performance and risk. The VSP would be promulgated in response to a perception that DTSC does not deny or revoke permits as often as it should. Although it is unclear precisely how the process would work in practice, at its core, the VSP process would empower DTSC to (1) identify, within an unknown period of time, Class I violations and Class II violations when those violations are chronic or committed by a recalcitrant violator, (2) assign each violation a score based on the extent of deviation and potential for harm, characterized in terms of "minor," "moderate," or "major," and (3) total up the scores against an unknown numerical threshold to determine whether to deny or revoke a permit.

The Coalition respectfully requests that DTSC not pursue the VSP and instead prepare guidelines or regulations for proper implementation of AB 1075 (Alejo). As discussed in greater detail below, AB 1075 establishes standards for what constitutes a "violation" or "noncompliance" that shows a

“repeating or recurring pattern,” and further specifies the enforcement or permit revocation action to be taken by DTSC if such repeat or recurring violations or instances of noncompliance occur. In fact, AB 1075 established the *only* types of violations or instances of noncompliance that can serve as grounds for permit denial or revocation. (Health and Safety Code, §25186.05(a) [“For the purposes of this section, ‘violation’ and ‘noncompliance’ mean **only** the following:”] (emphasis added).) Indeed, the very purpose of AB 1075 mirrors the stated purpose of the VSP, i.e., to create clear and objective criteria for making denial or revocation decisions. Put simply, AB 1075 exclusively addresses through statute the very issue that DTSC is seeking to address through regulation.

As we understand it, DTSC believes it has the authority nonetheless to promulgate the VSP because of the following statutory provision, which was part of AB 1075: “This **subdivision** does not limit or modify the department’s authority to deny, suspend, or revoke any permit, registration, or certificate pursuant to Section 25186 or any other law.” (Health and Safety Code, § 25186.05(d)(3) [emphasis added].) Importantly, that catch-all provision pertains only to “this subdivision,” i.e., subdivision (d). It does *not* apply to the entire Section or other subdivisions, and thus it does not apply to subdivision (a), which specifies the “only” violations and instances of noncompliance that can give rise to permit denial, revocation or suspension. Accordingly, our Coalition firmly believes that DTSC does not have the statutory authority to promulgate the VSP and should instead focus on how to properly implement its recently articulated authority through AB 1075.

Notwithstanding DTSC’s lack of statutory authority to promulgate a VSP regulation, the VSP concept is extremely problematic and should be eliminated from further consideration. The numerical scores upon which the VSP intends to rely cannot possibly serve as clear and objective criteria for making denial or revocation decisions. Indeed, there is an inherent subjectivity of the VSP even though it attempts to give the appearance of empiricism. The result of the VSP process would be a numerical value that appears to be empirical, but such a number, using the process DTSC envisions, would be based on nothing more than a cascading series of subjective decisions. The process of evaluating the nature of past violations—especially when viewing how such violations should impact a facility’s ability to continue operating—is an extraordinarily complicated, technical, and data-driven inquiry that should not and indeed cannot be distilled to a numerical value. The VSP would paralyze the permitting process through endless appeals based on subjective claims, which will be impossible for a governmental arbiter to resolve in an objective manner.

The balance of this letter highlights these concerns in more detail in sections 1 and 2. Additionally, in the remaining sections, we raise additional concerns and provide recommendations in the event DTSC ultimately elects to proceed with a regulatory proposal. Should DTSC proceed with a regulatory proposal, we highly encourage DTSC to first issue a pre-regulatory proposal to allow stakeholders an opportunity to comment on the proposal in a more fluid and informal setting before proceeding to the more rigid formal rulemaking process. In fact, in its Initial Report to the Governor and the Legislature, the Independent Review Panel (IRP) recommended that DTSC adopt guidance or publish *draft* regulations by January 1, 2017.

## **1. THE VSP EXCEEDS DTSC’S STATUTORY AUTHORITY**

Under current law, DTSC has the authority to deny, revoke or suspend hazardous waste permits for any violation of or noncompliance with certain laws if the violation or noncompliance shows a repeating or recurring pattern. (Health & Safety Code, § 25186(a).) Notwithstanding its

longstanding and broad authority to take action on permits for repeating or recurring violations, a recent program analysis of DTSC carried out by CPS HR Consulting found that there has been significant dissatisfaction with the performance of DTSC's permitting office in part due to a perception that the office does not deny, revoke or suspend permits as often as it should to address community concerns.

In response to this perception and the lack of specificity in current law regarding what constitutes a serious or recurring violation or noncompliance, Assembly Member Alejo, the Chair of the Environmental Safety and Toxic Materials Committee, introduced AB 1075 to establish "standards for what constitutes a repeat serious hazardous waste violation" and to specify "the enforcement or permit revocation action to be taken by [DTSC]." (Assembly Floor Analysis, AB 1075, May 28, 2015.)

The Coalition made it clear to the author at the outset that the regulated community had no objections to the notion of penalizing bad-faith hazardous waste permit holders or applicants who commit serious and repeated violations of the law that present imminent and substantial endangerment to the public health, safety or the environment. However, the Coalition also voiced concerns with regards to some of the vagaries of the language contained in AB 1075 as originally introduced, noting that as drafted, the bill would have given DTSC authority to deny, revoke or suspend a hazardous waste permit for mere minor or paperwork violations posing absolutely no endangerment to the public health, safety or the environment.

In the final weeks of the 2015 legislative session, the author agreed to several clarifying amendments, including eliminating the bill's previous language, which would have applied to minor or paperwork violations. By this action, the Coalition was able to remove its opposition to the bill.

Ultimately, as passed by the Legislature and signed by the Governor, AB 1075 defined the *only* actions that can amount to a "violation" or "noncompliance" giving rise to a permit denial, revocation or suspension. Specifically, AB 1075 states that "[f]or the purposes of this section, 'violation' and 'noncompliance' mean **only** the following:"

1. Three violations within a five-year period that creates a significant risk of harm to the public health/safety/environment resulting from acute or chronic exposure to hazardous waste or hazardous waste constituents;
2. Three federal or state felony convictions within a five-year period related to the hazardous waste control law; or
3. One violation of or noncompliance with an order issued by DTSC.

Further, AB 1075 expressly states that DTSC need not deny, revoke or suspend a hazardous waste permit on a third violation or noncompliance within a five-year period if DTSC finds that extraordinary circumstances exist, including that a denial, suspension, or revocation would endanger the public health or safety or the environment.

As we understand it, DTSC believes it has the statutory authority to implement the VSP notwithstanding the passage of AB 1075 because (1) AB 1075 did not define "repeating and recurring," and (2) AB 1075 contains a catch-all provision stating that the provisions of a particular subdivision do not limit or modify DTSC's authority to deny, suspend or revoke permits. The Coalition believes DTSC's rationale is flawed. First, while AB 1075 did not expressly define the

phrase “repeating and recurring pattern,” it did so impliedly by establishing a time and frequency threshold before DTSC’s authority to deny, revoke or suspend a hazardous waste permit could trigger (i.e., three violations/convictions within a five-year period). It is clear, if not entirely obvious, that AB 1075 intended to deem certain types of violations that occur three times within a five-year period as ones showing a “repeated and recurring pattern.” Second, the catch-all provision upon which DTSC relies, Health and Safety Code section 21586.05 subdivision (d)(3), pertains only to subdivision (d), and not the entire Section or other subdivisions. Accordingly, the statutory language identifying the *only* types of violations or instances of noncompliance is not qualified or limited by subdivision (d)(3) in any way. DTSC may not legally occupy a space in the regulatory arena that, since the passage of AB 1075, is now occupied solely and exclusively by statute.

Notwithstanding DTSC’s lack of statutory authority to promulgate the VSP, the Coalition believes that there is enough specificity in the law for DTSC to use clear and objective criteria for making denial, revocation and suspension decisions to penalize bad-faith hazardous waste permit holders or applicants. Indeed, DTSC also has the statutory authority to elaborate in greater detail, through regulation, how the provisions of 1075 will operate in practice, and we would welcome the opportunity to participate in that regulatory process.

## **2. THE VSP REQUIRES AN OVERLY SUBJECTIVE INQUIRY INTO WHAT SHOULD BE A HIGHLY OBJECTIVE PROCESS**

Notwithstanding DTSC’s lack of statutory authority to promulgate a VSP regulation, the Coalition believes that that the concept of distilling violations down to numerical values, totaling up those numerical values against an arbitrary numerical threshold, and determining the fate of a hazardous waste facilities based on that calculation is bad public policy and would demonstrate a fundamental lack of appreciation for the highly technical and data-driven evaluations required to determine the severity (or lack thereof) of permit violations. Equally as problematic, while there is an inherent subjectivity in evaluating permit violations, the VSP attempts to give the appearance of empiricism by establishing bright-line numerical values and thresholds. The result of the VSP process would be a numerical value that appears to be empirical, but such a number, using the process DTSC envisions, would be based on nothing more than a cascading series of subjective decisions. Further, the VSP would paralyze the permitting process through endless appeals based on subjective claims, which will be impossible for a governmental arbiter to resolve in an objective manner.

With regard to the Draft Scoring Matrix, it lacks a clear definition for the axis labels “major,” “minor,” and “moderate.” We are also concerned because the matrix should include a process for facilities to contest subjective conclusions which will be used to determine their standing on the matrix. Of course, this will result in more time and expense for all parties, and should be given careful consideration in order to develop an expeditious review process. Finally, it appears that this proposal seeks to incorporate the opinions and judgment of community members which will certainly not be guided by objective analysis.

AB 1075, on the other hand, appropriately does not establish a numerical value system, but instead establishes objective criteria upon which DTSC can rely to take action on permits. A scoring system based upon an objective standard, such as that proposed by AB 1075, is essential in order to develop a durable system that can be relied upon to measure both actual public risk as well as provide DTSC with a tool for “self-auditing” its success at managing public risk from facility to facility, year to year. Indeed, as noted above, DTSC has the authority to elaborate how the 1075 process should work, and we highly encourage DTSC to devote its time and attention to that effort.

With these concerns in mind, the following sections are intended to provide the Coalition's concerns and recommendations should DTSC pursue a VSP proposal.

### **3. THE VSP MUST DEFINE WHAT DECISIONS ARE SUBJECT TO ADMINISTRATIVE APPEAL**

Based on DTSC's presentation, it is unclear what scoring decisions, if any, will be subject to administrative appeal. Consider the following scenario:

*DTSC establishes a numerical value of 60 as the threshold for warranting a permit denial or revocation and a three-year time period during which it may sum up violation scores. During an inspection in Year 1, DTSC identifies two prior violations occurring within a two-year period. DTSC attributes scores of 25 and 15, respectively, to each violation. During an inspection in Year 2, DTSC identifies another violation occurring within the previous year and attributes a score of 25. The violation scorecard for that facility would now total 65 within a three-year period, thereby exceeding the 60 threshold.*

This scenario raises a number of questions regarding how administrative appeals would function in the VSP process. First, would the facility operator be entitled to notice and an opportunity to contest the score during an administrative hearing before each score is finalized? Second, would each inspection score be subject to administrative appeal by either the facility operator or the public (i.e., would an appeal be available after the Year 1 inspection), or would administrative appeal only be available if and when DTSC determines that the facility's scorecard has exceeded the 60 threshold (i.e., would an appeal only be available after the Year 2 inspection)? Third, if the public is permitted to appeal a VSP determination, must they demonstrate some level of interest in the facility at issue to satisfy certain standing requirements, or will administrative appeals be available to anyone no matter their interest or geographic locations? Fourth, if DTSC determines that the sum of the violations within a three-year period is *below* the 60 threshold, would those determinations also be subject to appeal by the public?

These questions demonstrate the need for some sort of defined administrative appeals process. Perhaps more importantly, they demonstrate that the VSP process would likely paralyze the permitting process through endless appeals for both violation scorecards that exceed or are below the numerical threshold. DTSC's final decisions during these administrative appeals will, in turn, result in litigation against DTSC filed by facility operators, community groups, and environmental groups.

### **4. THE VSP MUST DEFINE WHAT CONSTITUTES AN "INSPECTION"**

Based on DTSC's presentation, DTSC will attribute a score to violations assessed during an "inspection." It is unclear, however, what constitutes an "inspection." This term needs to be defined to ensure that facilities are treated consistently statewide for purposes of the VSP. Indeed, some facilities, such as federal facilities, are inspected bi-annually, and others are inspected almost daily. The nature of such "inspections" vary per facility. For purposes of the VSP, however, the term "inspection" must mean the same thing uniformly. Further, to be fair and reliable, the VSP must guarantee a high level of consistency among DTSC inspectors. Lacking any current or past measure for inspector standardization, the Coalition believes it is essential that such a metric be included to provide some level of confidence regarding regulatory consistency.

**5. THE VSP MUST DEFINE WHAT CONSTITUTES A “CHRONIC” CLASS II VIOLATION OR A “RECALCITRANT” CLASS II VIOLATOR**

According to DTSC’s PowerPoint presentation entitled “Draft Violation Scoring Procedure: Presentation to Representatives of the Regulated Community,” the VSP will apply to certain types of Class I violations, as well as Class II violations that are “chronic” or “committed by a recalcitrant violator.” These terms are not defined in current law or regulation and therefore there is no guidance regarding how these concepts will be applied during the VSP process. The VSP must define these terms, but in doing so, must provide enough specificity to ensure that these determinations will be made objectively and not subject to routine challenge.

Additionally, in defining these terms, the VSP should exclude from consideration chronic administrative violations (as opposed to operational violations). Importantly, the Coalition believes that operators should be penalized for chronic administrative or “record keeping” violations through the form of a penalty, etc., but incorporating violations that pose no direct threat to public health, safety or the environment into permitting decisions would be extraordinarily problematic and unjustified.

**6. THE VSP MUST NOT CONSIDER VIOLATIONS OR PENALTIES IMPOSED BY OTHER ENTITIES**

As DTSC is well aware, hazardous waste facilities are complex land uses that are subject to a multitude of environmental and public health laws and regulations. Those laws and regulations are generally administered and enforced by separate permitting entities, such as, for example, the Regional Water Quality Control Board for waste discharge permits and the Air Quality Management District for air permits. Those authorities are well-equipped to ensure that facility operators are complying with applicable laws, regulations and permit conditions, and indeed they have the enforcement authority to revoke permits for failure to comply. Accordingly, the VSP should only require considerations of minimal, moderate, and major violations related to the hazardous waste control law and associated regulations.

**7. THE VSP MUST NOT APPLY TO VIOLATIONS OF PERMIT CONDITIONS**

Past violations should not include violations of permit conditions under the VSP calculation. Facility operators often agree to novel permit conditions that are subject to interpretation. Including permit condition violations in the VSP calculation would further exacerbate its already subjective calculation. While violations to permit conditions should be enforced, they should be subject to qualitatively different treatment.

**8. THE VSP MUST NOT APPLY TO PERMIT MODIFICATIONS**

The VSP should apply to permit applications for new facilities or permit renewals. Doing so would provide on average a ten-year increment during which DTSC could consider previous violations within whichever timeframe it ultimately establishes. However, assume that DTSC established a four-year timeframe during which to consider past violations, and a facility obtains a new permit on year 1, a permit renewal on year 10, and applies for a permit modification on year 13. In such a circumstance, during the permit modification process, DTSC would be required to consider violations that may have occurred during year 9, when the previous and since expired permit was in effect. This, of course, would make no sense, because a violation that occurred during year 9 would have already been considered under the VSP methodology during the permit renewal process on year 10.

**9. DTSC MUST HAVE DISCRETIONARY AUTHORITY NOT TO DENY OR REVOKE A PERMIT IF EXTRAORDINARY CIRCUMSTANCES EXIST OR OPERATORS AGREE TO FACILITY UPGRADES**

As previously noted, the process of evaluating the nature of past violations—especially when viewing how such violations should impact a facility’s ability to continue operating—is an extraordinarily complicated, technical, and data-driven inquiry that should not and indeed cannot be distilled to a numerical value. If DTSC proceeds with doing so, however, it should provide itself with some flexibility to fashion an appropriate remedy if the circumstances would suggest that permit denial or revocation would be extreme. Indeed, AB 1075, which didn’t even establish a numerical scoring structure, recognized the need to give DTSC flexibility in allowing facilities to operate after a third violation if “the department finds that extraordinary circumstances exist, including that a denial, suspension, or revocation would endanger the public health or safety or the environment.” (Health & Safety Code, § 25186.05(d)(3).)

Some consideration should also be given to facilities that may have exceeded the numerical threshold for denial or revocation but which nonetheless voluntarily undergo facility upgrades to improve the functionality and safety of the operation. Additionally, if an operator demonstrates that previously high VSP scores have been consistently reduced over time, that positive “trend factor” should work favorably to the facility operator as DTSC considers whether to deny or revoke a permit.

**10. THE COALITION CANNOT RECOMMEND A TIME-FRAME FOR CONSIDERING VIOLATIONS OR A NUMERICAL THRESHOLD FOR DENIAL/REVOCAION UNTIL WE BETTER UNDERSTAND THE VSP PROCESS AND METHODOLOGY**

As evident by this letter, the Coalition has serious concerns with the VSP concept. We have also not had an opportunity to review any pre-regulatory draft language and, as such, it is impossible for the Coalition to recommend a time-frame for considering violations or a numerical threshold for denial or revocation. Once we have a better understanding of how the VSP would function in practice and the methodology DTSC would apply in evaluating past violations, the Coalition can provide recommendations regarding these issues.

Thank you for considering our comments, and we look forward to working with DTSC on this very important effort.

Sincerely,



Anthony Samson  
Policy Advocate  
California Chamber of Commerce

On behalf of the following organizations:

Alhambra Chamber of Commerce  
Automotive Specialty Products Alliance  
California Building Industry Association  
California Business Properties Association

Mr. Tooker and Ms. Numanzu  
February 18, 2016  
Page 8

California Cement Manufacturers Environmental Coalition  
California Manufacturers and Technology Association

**California Metals Coalition**

Chemical Industry Council of California  
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  
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 Plant Health Association  
Western States Petroleum Association

cc: Barbara Lee, Director, Department of Toxic Substances Control  
Graciela Castillo-Krings, Deputy Director of Legislative Affairs, Office of the Governor  
Senator Bob Wieckowski, Chairman, Senate Environmental Quality Committee  
Assembly Member Luis Alejo, Chairman, Assembly Environmental Safety and Toxic  
Materials Committee