

Memorandum 2019-49

**Recodification of Toxic Substance Statutes
(Clean-up Cost Recovery and Reimbursement)**

In this study, the Commission¹ is undertaking a nonsubstantive reorganization of Chapters 6.5 (commencing with Section 25100) and 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.² The Commission decided to proceed with the recodification of Chapter 6.8 first, then move to the recodification of Chapter 6.5.³

The Commission has been preparing a draft of the proposed recodification for Chapter 6.8. Attached to this memorandum is an initial draft of “Chapter 8: Recovery Actions” and “Chapter 9. Orphan Share Reimbursement.”

Commissioners and other interested persons should review the attached draft and raise any concerns identified. **Comments on any aspect of the draft, including issues that the Commission should consider adding to the list of substantive items for possible future study, would be welcome.**

Unless otherwise indicated, any statutory citations are to the Health and Safety Code.

GENERAL DRAFTING APPROACH

As with the prior draft legislation for this project, the staff has taken a fairly conservative approach to drafting. For the most part, the language used in the draft is drawn from existing law verbatim.

Certain minor language changes to conform to legislative drafting practices or correct clear technical errors were made without notation.⁴

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. See 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth)).

3. Minutes (Feb. 2019), p. 3.

4. Changes the staff made to conform to legislative drafting practice included eliminating uses of the word “such,” changing uses of the word “which” to “that,” and using the past tense to

In accordance with the Commission’s prior decisions in this study, certain minor changes were made as a matter of course, but these changes are flagged in the corresponding Comment or Staff Note.⁵ Any other proposed changes to the language of the provision would also be described in the corresponding Comment or Staff Note.⁶

In several instances, the staff discovered problems with the existing language or cross-references. Where possible, the staff proposed correcting the provision and discussed the issue in a Staff Note.⁷ Where the appropriate resolution was unclear, the staff requested comment on the issue.⁸

In addition, the staff identified a few provisions that could seemingly benefit from further study and possible substantive reform.⁹ In these cases, the staff concluded these provisions would be good candidates for future work by the Commission and recommends these provisions be added to the list of substantive issues for possible future study.

The proposed legislation contains an introductory, explanatory Staff Note.¹⁰ This initial Staff Note describes the Commission’s comments, the tables included in the proposed legislation, the Staff Notes, and other helpful information for stakeholders reviewing the proposed legislation. This Staff Note will be reproduced in future drafts of proposed legislation and updated as needed.

STRUCTURE OF PROPOSED CHAPTERS 8 AND 9

Proposed Chapter 8 includes provisions related to actions for the recovery of costs incurred addressing hazardous substance releases. The chapter is organized into the following articles:

- (1) General Provisions
- (2) Recovery of Specific Costs or Funds
- (3) Parties

refer to acts that necessarily occurred in the past. In rare cases where making these changes requires additional, conforming adjustments, these changes may be flagged in a Staff Note. See, e.g., Staff Note for proposed Section 69890.

5. See Minutes (April 2019), pp. 3-4. Such changes are discussed, for example, in Comments for proposed Sections 69920, 70020, & 70080 and Staff Note for proposed Sections 69920.

6. See, e.g., Comment for proposed Section 69865.

7. See, e.g., Staff Notes for proposed Sections 70070 (Note 1) and 70090.

8. See, e.g., Staff Notes for proposed Sections 69685 and 70085.

9. See Staff Notes for proposed Sections 69780, 69800, and 69820; see also discussion of “Addition of Issues to List of Substantive Issues for Future Study” *supra*.

10. See page i of attached draft proposed legislation.

- (4) Timing
- (5) Scope of Liability
- (6) Liability of Residential Property Owner
- (7) Liability of Easement Holder or Special District
- (8) Liability of Operator for Household Hazardous Waste or Used Oil Collection Program
- (9) Liability Agreements
- (10) Former Kaiser Steel Corporation Steel Mill Site
- (11) Costs Incurred at BKK Landfill Site
- (12) Settlement
- (13) Liens

Proposed Chapter 9 includes rules governing orphan share reimbursement. “Orphan share” is the share of liability for costs of a response action that is attributable to persons who are defunct or insolvent.¹¹ The chapter is organized into the following articles:

- (1) General Provisions
- (2) Orphan Share Reimbursement Trust Fund
- (3) Claims for Orphan Share Reimbursement
- (4) Determination of Orphan Share
- (5) Enforcement and Cost Recovery
- (6) Operative Date

PRESUMED CONSENT ITEMS

At the July 2019 Commission meeting, the Commission expressed a preference that the staff use consent procedures to streamline consideration of purely technical and uncontroversial matters.¹² The staff identified the issues discussed below as potential consent items. This memorandum describes these items using the same level of detail as if these matters would be up for discussion at the Commission’s meeting, but the staff does not plan to present these items at the meeting.

If any Commissioner would like to discuss a consent item, the Commissioner may request discussion at the meeting. In the absence of such a request, the staff will presume that the item was approved by all Commissioners who are present when this memorandum is considered.

11. See proposed Section 70000(b).

12. Minutes (July 2019), p. 2.

Addition of Issues to List of Substantive Issues for Future Study

Definitions in Proposed Section 69780

Proposed Section 69780 defines “owner” and “property” for an article that provides certain residential property owners with a presumption of nonliability for a hazardous substance release. The definitions are reproduced below for ease of reference:

69780. For purposes of this article, the following definitions apply:

(a) “Owner” means either (1) the owner of property who occupies a single-family residence or one-half of a duplex constructed on the property, or (2) the owner of common areas within a residential common interest development who owns those common areas for the benefit of the residential homeowners. This subdivision does not include the developer of the common interest development.

(b) “Property” means either (1) real property of five acres or less that is zoned for, and on which has been constructed, a single-family residence, or (2) common areas within a residential common interest development.

The staff found these definitions somewhat confusing, particularly the treatment of duplexes and common interest development property. The definition of “owner” includes an express reference to a duplex, but the definition of “property” does not. That seems inconsistent. For common interest development (“CID”) property, the definition of “property” focuses on the common area of a CID, as opposed to the separate interests. Also, these provisions seem premised on common area being owned by an entity separate from the owners of the separate interests, but that is not the only ownership form for CID common area. These definitions would probably benefit from some reworking to ensure that their scopes are consistent and clear. Any reform to address these issues would be substantive and therefore beyond the scope of this study. **The staff recommends that these definitions be added to the list of substantive issues for possible future work to be included in the Commission’s recommendation.**

Rebuttal of Nonliability Presumption

Proposed Sections 69800 and 69820(b) address rebuttal of presumptions of nonliability afforded to specified property owners. The presumptions would appear to apply in cases brought by the state for cost recovery and cases brought

by private parties seeking contribution or indemnification. By their terms, the provisions describing how the presumption can be rebutted apply only in actions to “recover costs or expenditures incurred from the state account.”¹³ The statute is silent on how the presumption can be rebutted in other actions. This seems to be an oversight. Either the same standards for rebuttal should apply or the statute should provide separate guidance on how to rebut the presumption in the other cases. **The staff recommends that this issue be added to the list of substantive issues for possible future work to be included in the Commission’s recommendation.**

Staff Note and Comment Drafting Practices

In preparing the proposed legislation for this recodification, the staff has tried to maintain a consistent practice with how certain issues are presented and discussed. In a few instances, the staff’s informal practices have resulted in a very high number of Staff Notes or repeated, lengthy Staff Notes addressing simple issues. This could place an unnecessarily high burden on stakeholders and could distract from more critical issues raised.

In light of these issues, the staff proposes minor changes to how it presents certain issues in Staff Notes. Those changes, which are described below, have been incorporated in the attached draft. To maintain consistency, the staff intends to adjust the Staff Notes contained in the cumulative draft to reflect these practices.

The staff will continue to consider ways to streamline the Staff Notes and avoid overburdening stakeholders, while still providing clear guidance as to how the proposed legislation differs from existing law.

Uses of Plural and Singular Form of Words

Previously, the Commission directed the staff to routinely eliminate repetition of the singular and plural form of a word, when doing so would not appear to cause confusion.¹⁴ Such changes are nonsubstantive, as Section 13 provides “[t]he singular number includes the plural, and the plural the singular.”

In preparing the proposed legislation, the staff has been making these changes and including a Staff Note explaining that such changes are not substantive and why.

13. See proposed Sections 69800, 69820(b).

14. Minutes (April 2019), p. 3.

The staff recommends discontinuing the practice of flagging such changes in Staff Notes. Instead, for provisions where such changes are made, the staff would add language along the following lines to the section’s Comment:

This provision was restated to singularize the phrase “party or parties.” This is a nonsubstantive change. See Section 13.

In instances where implementing this change requires a more extensive restatement, the staff will continue to include a Staff Note to highlight the change for stakeholders.

Cross-References to Sections that are Divided into Multiple Sections

In the recodification, it is common for long sections to be divided into several shorter sections. When updating a cross-reference to a section that has been broken up in this way, the staff has to decide which of the resulting parts should be included in the cross-reference. Often, only one or two of the proposed sections contain material that is relevant to the cross-reference. In that case, the cross-reference is updated to refer only to the proposed sections that contain material that is relevant to the cross-reference. A Staff Note is included to describe the change. For instance, the first Staff Note to proposed Section 68880¹⁵ provides:

Section 25358.5 provides exemptions for actions taken “pursuant to Section 25354”

Section 25354 has been proposed for restatement as three provisions (proposed Sections 68240, 68580, and 68875). This cross-reference has been updated to refer only to the provision authorizing expenditures for immediate corrective action (proposed Section 68875). The remaining provisions, which relate to appropriations and the funding of the emergency reserve account (proposed Section 68420) and a reporting requirement (proposed Section 68580), do not appear to be relevant to this cross-reference and will be omitted from the cross-reference.

The staff welcomes comment on this proposed cross-reference update.

Although the staff believes that it is helpful to call out all of these kinds of changes, so that stakeholders can satisfy themselves that the changes are appropriate, the staff does not believe that stakeholders need to comment on every one of them. It would be very important for stakeholders to point out any problem with such a change, but there is no need to repeatedly affirm that

15. See Cumulative Draft attached to Memorandum 2019-48.

changes are correct and unproblematic. **For that reason, the staff recommends that the Staff Notes for such changes be adjusted to ask for comment only where there appears to be a problem, thus: "Absent comment on this issue, this proposed cross-reference update will be presumed correct."**

COMMISSION DECISION ON THE DRAFT

Does the Commission tentatively approve the proposed legislation contained in the attached draft for inclusion in a future tentative recommendation?

If so, the staff will prepare an updated cumulative draft, which incorporates these provisions and reflects the decisions made by the Commission.

Respectfully submitted,

Kristin Burford
Staff Counsel

PROPOSED CHAPTERS 8 AND 9 OF PART 2
OF DIVISION 45 OF HEALTH & SAFETY CODE

Staff Note. This is a work in progress. The material shown below may be changed.

All of the proposed provisions would be located in the Health & Safety Code. All references are to the Health & Safety Code unless otherwise indicated.

Comments. A draft of an official Commission “Comment” follows each proposed code section in the recodification. Such Comments will be included in any final recommendation. The Comments are drafted as if the existing code sections have been repealed and replaced with the proposed legislation. Thus, existing code sections are referred to as “former” sections. The Comments indicate the source of each recodified code section and describe how the recodified code section compares with prior law. Courts have routinely held that the Commission’s Comments are evidence of legislative intent with regard to any legislation that implements a Commission recommendation.

Tables. There is a “disposition table” at the end of the proposed recodification. It summarizes, in tabular form, the disposition of every provision of the existing code that has been included in this draft.

There is also a “derivation table” at the end of the proposed recodification. It summarizes, in tabular form, the statutory derivation of every new code provision in this draft.

Notes. Some provisions in this draft are followed by a “Staff Note.” Staff Notes are typically intended to be temporary and will not be part of the Commission’s final recommendation. Staff Notes are drafted to reflect the state of the law today. Thus, the sections in the proposed legislation are referred to as “proposed” sections.

Staff Notes serve to flag issues requiring special attention or treatment. The staff does not plan to discuss each of these matters at the upcoming meeting. Rather, persons should review the draft, identify any issues of concern, and then raise those issues for discussion at the meeting or express their concerns in writing before the meeting, or both. Where a Staff Note serves as a prompt for public comment, these prompts for comment will typically be continued in the Commission’s tentative recommendation as “Notes” calling for comment. However, where the Commission decides against a staff-proposed restatement and reverts to existing statutory language, the Staff Note would not be continued in future drafts.

Cross-references. In some places, the provisions proposed for recodification in this draft cross-refer to provisions contained in Chapter 6.8. Where the cross-referenced provision has not yet been included in the recodification draft, the cross-reference is unchanged and is shown in bold text. As new Division 45 is drafted, these references will be updated to reflect the new numbering scheme. Where the cross-referenced material is contained in this or a prior draft of the recodification, the cross-reference was updated to reflect the proposed recodification. When a cross-reference needs to be updated, but there are questions about the cross-reference or how it should be updated, the cross-reference is shown in bracketed bold text and a Staff Note describes the issue and seeks comment on how the provision should be changed.

Public comment. The Commission welcomes public comment on any issue relating to the content of this draft or any other aspect of its ongoing Recodification of Toxic Substance Statutes study. Comments should be directed to Kristin Burford (kburford@clrc.ca.gov).

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DRAFT LEGISLATION

1 **Health & Safety Code §§ 68000-[6XXXX] (added). Hazardous substance response**

2 SEC. ____ . Division 45 (commencing with Section 68000) is added to the Health
3 and Safety Code, to read:

4 DIVISION 45. HAZARDOUS SUBSTANCE RESPONSE

5 ...

6 PART 2. HAZARDOUS SUBSTANCE ACCOUNT

7 ...

8 CHAPTER 8. COST RECOVERY

9 Article 1. General Provisions

10 **§ 69650. Recovery of costs generally**

11 69650. (a) A cost incurred by the department or regional board in carrying out or
12 overseeing a response or a corrective action under this part or Chapter 6.5
13 (commencing with Section 25100) of Division 20 shall be recoverable pursuant to
14 state or federal law by the Attorney General, upon the request of the department or
15 regional board, from the liable person.

16 (b) The amount of response or corrective action costs incurred by the department
17 or regional board shall be recoverable at the discretion of the department or
18 regional board, either in a separate action or by way of intervention as of right in
19 an action for contribution or indemnity.

20 (c) The amount of any response or corrective action costs that may be recovered
21 pursuant to this section shall include interest on any amount paid.

22 (d) A person who is liable for response or corrective action costs incurred at a
23 site shall have the liability reduced by any reimbursements that were paid by that
24 person for that site pursuant to Section 69105.

25 (e) Nothing in this section deprives a party of any defense that the party may
26 have.

27 (f) Moneys recovered by the Attorney General pursuant to this section shall be
28 deposited in the state account.

29 **Comment.** Section 69650 restates former Section 25360 without substantive change. This
30 provision was restated to singularize the phrase “liable person or persons.” This is a
31 nonsubstantive change. See Section 13.

1 See Sections 68050 (“department”), 68085 (“person”), 68100 (“regional board”), 68140
2 (“response”), 68145 (“responsible party”), 68155 (“site”), 68165 (“state account”).

3 **§ 69655. Interest on liability to department**

4 69655. (a)(1) Until June 30, 2021, except as provided in subdivision (b), a
5 monetary obligation to the department pursuant to this part or Chapter 6.5
6 (commencing with Section 25100) of Division 20 shall be subject to interest from
7 the date of the demand at an interest rate of 7 percent per annum.

8 (2) Commencing July 1, 2021, except as provided in subdivision (b), a monetary
9 obligation to the department pursuant to this part or Chapter 6.5 (commencing
10 with Section 25100) of Division 20 shall be subject to interest from the date of the
11 demand at an interest rate of 10 percent per annum, except that, for obligations of
12 local governments, the interest rate shall be 7 percent per annum.

13 (b)(1) The department shall waive the interest described in subdivision (a) if the
14 obligation is satisfied within 60 days from the date of invoice.

15 (2) If, within 45 days of receiving an invoice, the liable person provides written
16 notice to the department in accordance with its invoice dispute resolution
17 procedures disputing in good faith the monetary obligation specified in the
18 invoice, or a portion thereof, the department shall waive the interest until the
19 dispute is resolved.

20 **Comment.** Section 69655 restates former Section 25360.1 without substantive change. This
21 provision was restated to singularize the phrase “liable person or persons.” This is a
22 nonsubstantive change. See Section 13.

23 See Sections 68050 (“department”), 68145 (“responsible party”).

24 **§ 69660. Judgment not bar to future action**

25 69660. The entry of judgment against any party to the action shall not be
26 deemed to bar any future action by the state account against any person who is
27 later discovered to be potentially liable for costs and expenditures paid by the state
28 account.

29 **Comment.** Section 69660 continues former Section 25365 without substantive change.

30 See Section 68085 (“person”), 68165 (“state account”).

31 **§ 69665. Strict liability**

32 69665. The standard of liability for costs recoverable pursuant to this part is
33 strict liability.

34 **Comment.** Section 69665 continues former Section 25363(c) without substantive change.

35 **§ 69670. Contribution and indemnity**

36 69670. (a) A person who has incurred response or corrective action costs in
37 accordance with this part, Chapter 6.5 (commencing with Section 25100) of
38 Division 20, or the federal act may seek contribution or indemnity from any
39 person who is liable pursuant to this part.

1 (b) An action to enforce a claim may be brought as a cross-complaint by any
2 defendant in an action brought pursuant to Section 69650 or this section, or in a
3 separate action after the person seeking contribution or indemnity has paid
4 response or corrective action costs in accordance with this part, Chapter 6.5
5 (commencing with Section 25100) of Division 20, or the federal act.

6 (c) A plaintiff or cross-complainant seeking contribution or indemnity shall give
7 written notice to the director upon filing an action or cross-complaint under this
8 section.

9 (d) In resolving claims for contribution or indemnity, the court may allocate
10 costs among liable parties using appropriate equitable factors.

11 **Comment.** Section 69670 continues former Section 25363(d) without substantive change.

12 See Sections 68055 (“director”), 68065 (“federal act”), 68085 (“person”), 68140 (“response”).

13 **Staff Notes. (1)** Section 25363(d) refers to actions or cross-complaints brought pursuant to “this
14 section.” Section 25363 has been recodified as an article, however this proposed section appears
15 to contain all of the provisions of Section 25363 that authorize bringing an action or cross-
16 complaint. Thus, the remainder of the article does not appear to be relevant to this reference and
17 has been omitted. **Absent comment, the proposed treatment of the reference to “this section”
18 will be presumed correct.**

19 **(2)** The final sentence of Section 25363(d) uses the term “liable parties.” This term is similar to
20 the defined terms, “liable person” and “responsible party.” However, the definition applicable to
21 those terms does not appear to apply to the term “liable parties.” The staff is unsure whether the
22 definition was intended to apply to this term. **The staff welcomes comment on this issue.**

23 Article 2. Recovery of Specific Costs or Funds

24 § 69680. Recovery of costs incurred and payable prior to July 1, 2006

25 69680. Notwithstanding any provision of Section 68165, any costs incurred and
26 payable from the Hazardous Substance Account, the Hazardous Waste Control
27 Account, or the Site Remediation Account prior to July 1, 2006, to implement this
28 part, shall be recoverable from the liable person pursuant to Section 69650 as if
29 the costs were incurred and payable from the state account.

30 **Comment.** Section 69680 restates former Section 25324(b) without substantive change. This
31 provision was restated to singularize the phrase “liable person or persons.” This is a
32 nonsubstantive change. See Section 13.

33 See Sections 68145 (“responsible party”), 68165 (“state account”).

34 **Staff Notes. (1)** The introductory clause of Section 25324(b) includes a reference to “any other
35 provision of this section.” Section 25324 only has two subdivisions. This reference has been
36 updated to refer to Section 68165, which continues the other subdivision (subdivision (a)) of
37 Section 25324. **Absent comment, the proposed update to this reference will be presumed
38 correct.**

39 **(2)** This provision appears to be stating a transitional rule for the recovery of costs originally paid
40 out of accounts that no longer exist (as of July 1, 2006). Given that over a decade has passed
41 since these accounts were consolidated, the staff is unsure whether this provisions has ongoing
42 utility. **The staff welcomes comment on this issue.**

1 § 69685. Recovery for natural resource damages

2 69685. Notwithstanding [Section 25355], the Governor, or the authorized
3 representative of the state, shall act on behalf of the public as trustee of the natural
4 resources to recover costs expended pursuant to Section 69450.

5 **Comment.** Section 69685 continues former Section 25352(c) without substantive change.

6 **Staff Note.** Section 25352(c) requires the Governor or authorized state representative to recover
7 certain costs “[n]otwithstanding Section 25355.” Section 25355 is proposed for recodification as
8 multiple sections (proposed Sections 68850, 69005, 69130(a), and 69135). It is unclear which
9 provisions of Section 25355 are relevant to this cross-reference, as none appear to limit or place
10 conditions on the recovery of funds. Proposed Section 69135 requires the department to make a
11 reasonable effort to notify potentially responsible parties before undertaking a response action,
12 but expressly provides that “[a] responsible party may be held liable pursuant to this part whether
13 or not the person was given the notice ...” **The staff welcomes comment on how this cross-
14 reference should be updated.**

15 § 69690. Recovery of funds expended at sites owned or operated by federal, state, or local
16 governments or agencies

17 69690. The department shall recover any funds expended pursuant to
18 subdivision (a) or (b) of Section 69070 to the maximum possible extent pursuant
19 to Section 69650.

20 **Comment.** Section 69690 continues former Section 25353(c) without substantive change.
21 See Section 68050 (“department”).

22 Article 3. Parties

23 § 69700. State account

24 69700. The state account shall be a party in any action for recovery of costs or
25 expenditures under this part incurred from the state account.

26 **Comment.** Section 69700 continues former Section 25361(a) without substantive change.
27 See Sections 68165 (“state account”).

28 § 69705. State account as party to recover costs in an action for penalties

29 69705. (a) In the event a district attorney or a city attorney has brought an action
30 for civil or criminal penalties pursuant to Chapter 6.5 (commencing with Section
31 25100) of Division 20 against any person for the violation of any provision of that
32 chapter, or any rule, regulation, permit, covenant, standard, requirement, or order
33 issued, adopted, or executed thereunder, and the department has expended moneys
34 from the state account pursuant to Section 68875 for immediate corrective action
35 in response to a release, or threatened release, of a hazardous substance that has
36 resulted, in whole or in part, from the person’s acts or omissions, the state account
37 may be made a party to that action for the purpose of recovering the costs against
38 that person.

1 (b)(1) If the state account is made a party to the action, the Attorney General
2 shall represent the state account for the purpose of recovering the moneys
3 expended from the account.

4 (2) Notwithstanding any other provision of law, and under terms that the
5 Attorney General and the department deem appropriate, the Attorney General may
6 delegate the authority to recover the costs to the district attorney or city attorney
7 who has brought the action pursuant to Chapter 6.5 (commencing with Section
8 25100) of Division 20.

9 (c) The failure to seek the recovery of moneys expended from the state account
10 as part of the action brought pursuant to Chapter 6.5 (commencing with Section
11 25100) of Division 20 does not foreclose the Attorney General from recovering
12 the moneys in a separate action.

13 **Comment.** Section 69705 continues former Section 25361(b) without substantive change.

14 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68085 (“person”), 68105
15 (“release”), 68140 (“response”), 68165 (“state account”).

16 **Staff Note.** Proposed Section 69705(a) refers to moneys expended “pursuant to Section 25354.”
17 Section 25354 is proposed for recodification as multiple sections (proposed Sections 68240,
18 68580, and 68875). This cross-reference has been updated to refer only to the provision
19 authorizing expenditures for immediate corrective action (proposed Section 68875). The
20 remaining provisions, which relate to appropriations and the funding of the emergency reserve
21 account (proposed Section 68420) and a reporting requirement (proposed Section 68580), do not
22 appear to be relevant to this cross-reference and will be omitted from the cross-reference. **Absent**
23 **comment on this issue, this proposed cross-reference update will be presumed correct.**

24 **§ 69710. Joinder of potentially liable person**

25 69710. Upon motion and sufficient showing by any party, the court shall join to
26 the action any person who may be liable for costs or expenditures of the type
27 recoverable under this part.

28 **Comment.** Section 69710 continues former Section 25362 without substantive change.

29 See Section 68085 (“person”).

30 Article 4. Timing

31 **§ 69725. Commencement prior to expiration of limitations period**

32 69725. An action may be commenced under Section 69650 or 69685 at any time
33 prior to expiration of the applicable limitations period provided for by this article.

34 **Comment.** Section 69725 continues former Section 25360.4(d) without substantive change.

35 **§ 69730. Cost recovery actions**

36 69730. (a)(1) Except as provided in paragraph (2) and subdivision (b), an action
37 under Section 69650 for the recovery of costs incurred by the department or a
38 regional board in carrying out or overseeing a response or corrective action
39 pursuant to this part or Chapter 6.5 (commencing with Section 25100) of Division

1 20, or as otherwise authorized by law, shall be commenced within three years after
2 completion of all response or corrective actions has been certified by the
3 department or a regional board.

4 (2) If operation and maintenance is required as part of the response or corrective
5 action, the action for recovery of costs incurred by the department or a regional
6 board shall be commenced within three years after completion of operation and
7 maintenance has been certified by the department or a regional board.

8 (b) No action described in subdivision (a) may be brought that, as of December
9 31, 2015, had not been commenced by the department within three years after the
10 certification of the completion of the removal or remedial action.

11 **Comment.** Section 69730 continues former Section 25360.4(a) without substantive change.

12 See Sections 68050 (“department”), 68080 (“operation and maintenance”), 68100 (“regional
13 board”), 68125 (“remedy”), 68135 (“remove”), 68140 (“response”).

14 **Staff Note.** Section 25360.4(a)(2) pertains to an action “that, as of December 31, 2015, had not
15 been commenced ... within three years” after the cleanup was certified complete. This appears to
16 be a transitional provision. **The staff welcomes comment on whether this provision has**
17 **ongoing utility.**

18 § 69735. Recovery actions for natural resources damages

19 69735. An action under Section 69685 for costs incurred by the department for
20 the purposes specified in Section 69450 shall be commenced within three years
21 after certification by the department of the completion of the activities authorized
22 under Section 69450.

23 **Comment.** Section 69735 continues former Section 25360.4(b) without substantive change.

24 See Section 68050 (“department”).

25 § 69740. Reserved and continuing jurisdiction

26 69740. (a)(1) In an action described in Section 69730 or 69735 for recovery of
27 response or corrective action costs, oversight costs, or damages, where the court
28 has entered a judgment for past costs or damages, the court shall also enter an
29 order reserving jurisdiction over the case and the court shall have continuing
30 jurisdiction to determine any future liability and the amount of the future liability.

31 (2) The department or regional board may immediately enforce the judgment for
32 past costs and damages.

33 (b) The department or the regional board may apply for a court judgment for
34 further costs and damages that have been incurred during the response or
35 corrective action, operation and maintenance, or during the performance of the
36 activities authorized by Section 69450, but the application shall be made not later
37 than three years after the certification of completion of the response or corrective
38 action, operation and maintenance, or activities authorized pursuant to Section
39 69450.

40 **Comment.** Section 69740 continues former Section 25360.4(c) without substantive change.

1 See Sections 68050 (“department”), 68080 (“operation and maintenance”), 68100 (“regional
2 board”), 68140 (“response”).

3 **Staff Note.** Section 25360.4(c) refers to activities authorized pursuant to Section 25352.

4 Section 25352 has been divided into multiple provisions in this recodification (proposed
5 Sections 69450 and 69685). The cross-reference to Section 25352 has been updated to refer only
6 to the provisions allowing expenditures for repairing natural resource damages (subdivisions (a)
7 and (b) of Section 25352, which are proposed for recodification as Section 69450). Subdivision
8 (c) of Section 25352 is omitted from the cross-reference, as it relates to cost recovery and does
9 not appear relevant.

10 **Absent comment on this issue, this proposed cross-reference update will be presumed**
11 **correct.**

12 **§ 69745. Article inapplicable to cost recovery under Water Code**

13 69745. This article does not apply to a cost recovery action brought by a
14 regional board under the Water Code.

15 **Comment.** Section 69745 continues former Section 25360.4(e) without substantive change.

16 See Section 68100 (“regional board”).

17 Article 5. Scope of Liability

18 **§ 69760. Determination of party’s liability**

19 69760. (a) Except as provided in Section 69765, a party found liable for costs
20 recoverable under this part who establishes by a preponderance of the evidence
21 that only a portion of those costs are attributable to that party’s actions shall be
22 required to pay only for that portion.

23 (b) Except as provided in Section 69765, if the trier of fact finds the evidence
24 insufficient to establish each party’s portion of costs under subdivision (a), the
25 court shall apportion those costs, to the extent practicable, according to equitable
26 principles, among the defendants.

27 **Comment.** Section 69760 continues former Section 25363(a) and (b) without substantive
28 change.

29 **§ 69765. Contractor liability**

30 69765. Notwithstanding this part, a response action contractor who is found
31 liable for any costs recoverable under this part and who establishes by a
32 preponderance of the evidence that only a portion of those costs are attributable to
33 the response action contractor’s actions shall be required to pay only that portion
34 of the costs attributable to the response action contractor’s actions.

35 **Comment.** Section 69765 continues former Section 25363(e) without substantive change.

36 See Section 68140 (“response”).

Article 6. Liability of Residential Property Owner

§ 69780. Definitions

69780. For purposes of this article, the following definitions apply:

(a) “Owner” means either (1) the owner of property who occupies a single-family residence or one-half of a duplex constructed on the property, or (2) the owner of common areas within a residential common interest development who owns those common areas for the benefit of the residential homeowners. This subdivision does not include the developer of the common interest development.

(b) “Property” means either (1) real property of five acres or less that is zoned for, and on which has been constructed, a single-family residence, or (2) common areas within a residential common interest development.

Comment. Section 69780 continues former Section 25360.2(a) without substantive change.

Staff Note. Proposed Section 69780 would appear to benefit from restatement for clarity. This provision touches on a number of complex real property topics, but does so in a cursory way that makes it difficult to determine the scope of this provision. The staff has particular concerns about the treatment of duplexes in the definition of “property” and the treatment of different forms of common interest development property in both definitions.

More broadly, however, this provision may benefit from consideration of the underlying policies and whether they are being achieved with this provision in its current form.

The staff recommends adding this provision to the list of substantive issues for possible study.

§ 69785. Relation to other law

69785. Notwithstanding any other provision of this part, this article governs liability pursuant to this part for an owner of property.

Comment. Section 69785 continues former Section 25360.2(e) without substantive change. Redundant language citing to the applicable definitions was not continued.

See Section 69780 (“owner,” “property”).

§ 69790. Presumption

69790. (a) Notwithstanding any other provision of this part, an owner of property that is the site of a hazardous substance release is presumed to have no liability pursuant to this part for either of the following:

(1) A hazardous substance release that has occurred on the property.

(2) A release of a hazardous substance to groundwater underlying the property if the release occurred at a site other than the property.

(b) The presumption may be rebutted as provided in Section 69800.

Comment. Section 69790 continues former Section 25360.2(b) without substantive change.

See Sections 68075 (“hazardous substance”), 68105 (“release”), 68155 (“site”), 69780 (“owner,” “property”).

1 § 69795. Certification required to bring action

2 69795. An action for recovery of costs or expenditures incurred from the state
3 account pursuant to this part in response to a hazardous substance release may not
4 be brought against an owner of property unless the department first certifies that,
5 in the opinion of the department, one of the following applies:

6 (a) The hazardous substance release that occurred on the property occurred after
7 the owner acquired the property.

8 (b) The hazardous substance release that occurred on the property occurred
9 before the owner acquired the property and at the time of acquisition the owner
10 knew or had reason to know of the hazardous substance release.

11 (c) The owner of property where there has been a release of a hazardous
12 substance to groundwater underlying the property took, or is taking, one or more
13 of the following actions:

14 (1) Caused or contributed to a release of a hazardous substance to the
15 groundwater.

16 (2) Fails to provide the department, or its authorized representative, with access
17 to the property.

18 (3) Interferes with response action activities.

19 **Comment.** Section 69795 continues former Section 25360.2(c) without substantive change.

20 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140
21 (“response”), 68165 (“state account”), 69780 (“owner,” “property”).

22 § 69800. Rebuttal of presumption

23 69800. In an action brought against an owner of property to recover costs or
24 expenditures incurred from the state account pursuant to this part in response to a
25 hazardous substance release, the presumption established in Section 69790 may be
26 rebutted if it is established by a preponderance of the evidence that the facts upon
27 which the department made the certification pursuant to subdivision (a), (b), or (c)
28 of Section 69795 are true.

29 **Comment.** Section 69800 continues former Section 25360.2(d) without substantive change.

30 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140
31 (“response”), 68165 (“state account”), 69780 (“owner,” “property”).

32 **Staff Note.** Section 25360.2(d) describes how the presumption of nonliability can be rebutted in
33 an action to recover costs “incurred from the state account,” but does not address how the
34 presumption could be rebutted in other cases. The presumption appears to apply in other types of
35 cases, like a contribution action brought by a private party. See proposed Sections 69670
36 (contribution and indemnity), 69790 (presumption of no liability pursuant to this part). The
37 statute, however, is silent on how to rebut the presumption in those cases. **The staff would**
38 **recommend adding this issue to the list of substantive issues for possible future study.**

1 Article 7. Liability of Easement Holder or Special District

2 § 69810. Definitions

3 69810. For the purposes of this article, the following terms have the following
4 meaning:

5 (a) “Easement” means a conservation easement, as defined in Section 815.1 of
6 the Civil Code.

7 (b) “Environmental assessment” means an investigation of real property,
8 conducted by an independent qualified environmental consultant, to discover the
9 presence or likely presence of a release or a threat of a release of a hazardous
10 substance at, on, to, or from the real property. An environmental assessment shall
11 include, but is not limited to, an investigation of the historical use of the real
12 property, any prior releases, records, consultant reports and regulatory agency
13 correspondence, a visual survey of the real property, and, if warranted, sampling
14 and analytical testing.

15 (c) “Owner” means either of the following:

16 (1) An independent special district, as defined in Section 56044 of the
17 Government Code.

18 (2) An entity or organization that holds an easement.

19 (d) “Property” means either of the following:

20 (1) Real property acquired by a special district by means of a gift or donation for
21 which an environmental assessment was completed prior to the transfer or
22 conveyance of the real property to the special district.

23 (2) An easement for which an environmental assessment was completed prior to
24 the transfer or conveyance of the easement to an entity or organization authorized
25 to accept the easement pursuant to Section 815.3 of the Civil Code.

26 **Comment.** Section 69810 continues former Section 25360.3(a) without substantive change.

27 See Sections 68075 (“hazardous substance”), 68105 (“release”).

28 § 69815. Application

29 69815. (a) Notwithstanding any other provision of this part, this article governs
30 liability pursuant to this part for an owner of property.

31 (b) This article is applicable only to property that is acquired by the owner on or
32 after January 1, 1995.

33 **Comment.** Section 69815 continues former Section 25360.3(d) and (e) without substantive
34 change. Redundant language citing to the applicable definitions was not continued.

35 See Section 69810 (“owner,” “property”).

36 § 69820. Presumption

37 69820. (a) Notwithstanding any other provision of this part, if an environmental
38 assessment of property discovers no evidence of the presence or likely presence of
39 a release or a threat of a release of a hazardous substance, and a hazardous

1 substance release is subsequently discovered on, to, or from that property, the
2 owner of that property is entitled to a rebuttable presumption, affecting the burden
3 of producing evidence, that the owner is not a liable person or responsible party
4 for purposes of this part. An owner is entitled to this presumption whether the
5 action is brought by the state or by a private party seeking contribution or
6 indemnification.

7 (b) In an action brought against an owner of property to recover costs or
8 expenditures incurred from the state account pursuant to this part in response to a
9 hazardous substance release, the presumption may be rebutted if it is established
10 by a preponderance of the evidence that the facts upon which the department made
11 the certification pursuant to subdivision (a), (b), (c), or (d) of Section 69825 are
12 true.

13 **Comment.** Section 69820 continues former Section 25360.3(b) without substantive change.

14 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140
15 (“response”), 68145 (“responsible party”), 68165 (“state account”), 69810 (“environmental
16 assessment,” “owner,” “property”).

17 **Staff Note.** Section 25360.3(b) describes how the presumption of nonliability can be rebutted in
18 an action to recover costs “incurred from the state account,” but does not address how the
19 presumption could be rebutted in other cases. The presumption would appear to apply in other
20 types of cases, like a contribution action brought by a private party. See subdivision (a) of this
21 proposed section; see also proposed Sections 69670 (contribution and indemnity). The statute,
22 however, is silent on how to rebut the presumption in those cases. **The staff would recommend**
23 **adding this issue to the list of substantive issues for possible future study.**

24 **§ 69825. Certification required to bring action**

25 69825. An action for recovery of costs or expenditures incurred from the state
26 account pursuant to this part in response to a hazardous substance release shall not
27 be brought against an owner of property unless the department first certifies that,
28 as found by the department, one of the following situations applies:

29 (a) The hazardous substance release occurred on or after the date that the owner
30 acquired the property.

31 (b) The hazardous substance release occurred before the date that the owner
32 acquired the property and, at the time of the acquisition, the owner knew, or had
33 reason to know, of the hazardous substance release.

34 (c) The environmental assessment applicable to the property was not properly
35 carried out, was fraudulently completed, or involves the negligent or intentional
36 nondisclosure of information.

37 (d) The hazardous substance release was discovered on or after the date of
38 acquisition and the owner failed to exercise due care with respect to the release,
39 taking into consideration the characteristics of the hazardous substance in light of
40 all relevant facts and circumstances.

41 **Comment.** Section 69825 continues former Section 25360.3(c) without substantive change.

1 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140
2 (“response”), 68165 (“state account”), 69810 (“environmental assessment,” “owner,” “property”).

3 Article 8. Liability of Operator for Household Hazardous Waste or
4 Used Oil Collection Program

5 **§ 69840. “Household hazardous waste collection program”**

6 69840. For purposes of this article, “household hazardous waste collection
7 program” means a program or facility, specified in Section 25218.1, in which
8 hazardous wastes from households and conditionally exempt small quantity
9 generators are collected and ultimately transferred to an authorized hazardous
10 waste treatment, storage, or disposal facility.

11 **Comment.** Section 69840 continues former Section 25366.5(b) without substantive change.

12 **§ 69845. Limitation on liability of HHW or used oil collection programs**

13 69845. A public agency operating a household hazardous waste collection
14 program or a person operating a household hazardous waste collection program
15 under a written agreement with a public agency, or, for material received from the
16 public as used oil, a person operating a certified used oil collection center as
17 provided in Section 48660 of the Public Resources Code, shall not be held liable
18 in a cost recovery action brought pursuant to Section 69650, including, but not
19 limited to, an action to recover the fees imposed by Section 69105 or an action
20 brought pursuant to Section 69670, for waste that has been properly handled and
21 transported to an authorized hazardous waste treatment, storage, or disposal
22 facility at a location other than that of the collection program.

23 **Comment.** Section 69845 continues former Section 25366.5(a) without substantive change.
24 See Section 68085 (“person”), 69840 (“household hazardous waste collection program”).

25 **§ 69850. Effect on state or federal law obligations or liabilities**

26 69850. Except as provided in Section 69845, this article does not affect or
27 modify the obligations or liabilities of a person imposed pursuant to state or
28 federal law.

29 **Comment.** Section 69850 continues former Section 25366.5(c) without substantive change.
30 See Section 68085 (“person”).

31 Article 9. Liability Agreements

32 **§ 69860. Agreement not effective to transfer liability for recoverable costs or expenditures**

33 69680. Except as provided in Article 10, no indemnification, hold harmless,
34 conveyance, or similar agreement shall be effective to transfer any liability for
35 cost or expenditures recoverable under this part. This section shall not bar any

1 agreement to insure, hold harmless, or indemnify a party to the agreement for any
2 costs or expenditures under this part.

3 **Comment.** Section 69860 continues former Section 25364 without substantive change.

4 **§ 69865. Effect of repeal of Section 25364.6**

5 69865. The repeal of Section 25364.6, pursuant to Chapter 1226 of the Statutes
6 of 1998, shall not affect any indemnity provided pursuant to that section for any
7 cause of action brought because of any act or omission that occurred before the
8 repeal of that section.

9 **Comment.** Section 69865 restates former Section 25364.7 without substantive change. The
10 cross-reference to the “repeal of Section 25364.6” has been updated to refer to the legislation that
11 repealed the provision. See 1998 Cal. Stat. ch. 1226, § 1. The verb “occur” was made past tense,
12 as all of the relevant acts or omissions would have happened prior to the repeal of former Section
13 25364.6.

14 **Article 10. Former Kaiser Steel Corporation Steel Mill Site**

15 **§ 69875. Definitions**

16 69875. For purposes of this article, the following definitions shall apply:

17 (a) “Affiliate” means any entity that directly, or indirectly through one or more
18 intermediaries, controls, is controlled by, or is under common control with, the
19 responsible party owner. For purposes of this subdivision, “control” means the
20 possession, direct or indirect, of the power to direct or cause the direction of the
21 management and policies of an entity, or ownership of shares or interests in the
22 entity possessing more than 50 percent of the voting power.

23 (b) “Qualified independent consultant” means either a geologist who is
24 registered pursuant to Section 7850 of the Business and Professions Code or a
25 professional engineer who is registered pursuant to Section 6762 of the Business
26 and Professions Code.

27 (c) “Responsible party owner” means the owner of all or part of the site on
28 January 1, 1993, or if all or a part of the site is transferred to a joint venture
29 formed for purposes of development of the site, the owner of the site immediately
30 prior to that transfer.

31 (d) “Site” means the site of the former Kaiser Steel Corporation steel mill
32 located near the City of Fontana.

33 **Comment.** Section 69875 continues former Section 25364.1(a) without substantive change.
34 See Section 68155 (“site”).

35 **Staff Note.** Section 25364.1(a)(4) defines the term “site.” “Site” is defined for the entire part in
36 proposed Section 68155. **The staff welcomes comment on whether the two definitions of**
37 **“site” have caused problems in practice.**

1 **§ 69880. Authority of director to release specified persons from liability**

2 69880. Notwithstanding any other provision of law, except as provided in
3 Sections 69885 and 69890, the director may release from liability under this part
4 or Chapter 6.5 (commencing with Section 25100) of Division 20, and from
5 liability for any claims of the state for recovery of response costs under the federal
6 act, any of the following persons, with regard to a removal or remedial action at
7 the site:

8 (a) Any person who provides financing for all, or a substantial part of, the costs
9 of performing a removal or remedial action at the site pursuant to a remedial
10 action plan prepared by a qualified independent consultant and issued by the
11 department pursuant to Section 69210 and subdivision (a) of Section 69215,
12 except that the release from liability shall not release the person providing this
13 financing from liability for any hazardous substance release or threatened release
14 resulting from that person’s exercise of decisionmaking control over the
15 performance of the removal or remedial action while the responsible party owner
16 remains in possession of the site.

17 (b) Any person who enters into an agreement with the responsible party owner
18 to provide development services for the development of all, or a part of, the site,
19 including a developer, who becomes a partner in a joint venture partnership with
20 the responsible party owner, if the joint venture is formed for purposes of the
21 development of the site and legal title to the site is transferred by the responsible
22 party owner to the joint venture. If a release from liability is granted to a developer
23 pursuant to this subdivision and the legal title to the site is transferred by the
24 responsible party owner to a joint venture between the developer and the
25 responsible party owner of the site, the responsible party owner shall not be
26 relieved of liability under this part.

27 (c) Any person who acquires an ownership or leasehold interest in all or a part
28 of the site after performance of the removal or remedial action specified in the
29 remedial action plan for the site, or part of the site, has been completed to the
30 satisfaction of the department.

31 **Comment.** Section 69880 continues former Section 25364.1(b) without substantive change.

32 See Sections 68050 (“department”), 68055 (“director”), 68065 (“federal act”), 68075
33 (“hazardous substance”), 68085 (“person”), 68105 (“release”), 68125 (“remedy”), 68135
34 (“remove”), 68140 (“response”), 68155 (“site”), 69875 (“qualified independent consultant,”
35 “responsible party owner,” “site”).

36 **§ 69885. Conditions required for release to be granted**

37 69885. A release from liability shall not be granted pursuant to Section 69880
38 unless all of the following conditions are met:

39 (a) A responsible party owner has entered into a stipulated settlement of an order
40 issued by the department pursuant to Section 25187, 68870, or 69055 to perform
41 the removal or remedial action at the site in accordance with the remedial action

1 plan and has arranged financing, contingent only upon obtaining releases from
2 potential liability pursuant to Section 69880, for the costs of performing the
3 removal or remedial action.

4 (b) A responsible party owner agrees to pay all applicable oversight fees
5 required by Section 69105 and to pay any additional costs that are recoverable
6 pursuant to Section 69650.

7 (c) No person to be released from liability pursuant to Section 69880 is a
8 responsible party or an affiliate of a responsible party, with respect to any
9 hazardous substance release existing at the site at the time the release from
10 liability is granted.

11 (d) The stipulated settlement requires the responsible party owner to provide
12 irrevocable financial assurances for full performance of the remedial action plan.
13 The financial assurances may consist of one or more of the financial assurance
14 instruments described in Section 66264.143 of Title 22 of the California Code of
15 Regulations. Upon the approval of the department, the forms of these instruments
16 may be revised as appropriate to apply to the costs of performing the removal or
17 remedial action specified in the remedial action plan.

18 (e) The director finds that the release from liability to be granted will promote
19 the purposes and goals of this part and encourage private investment in property
20 that is in need of remediation.

21 **Comment.** Section 69885 continues former Section 25364.1(c) without substantive change.

22 See Sections 68050 (“department”), 68055 (“director”), 68075 (“hazardous substance”), 68085
23 (“person”), 68105 (“release”), 68125 (“remedy”), 68135 (“remove”), 68145 (“responsible
24 party”), 68155 (“site”), 69875 (“affiliate,” “responsible party owner,” “site”).

25 **Staff Notes. (1)** Section 25364.1(c) refers to an order issued pursuant to Section 25355.5. Section
26 25355.5 has been proposed for recodification as multiple sections (proposed Sections 69055,
27 69060, 69065, and 69130(b)). Proposed Section 69055 (which recodifies Section 25355.5(a)) is
28 the only one of those provisions that addresses the issuance of orders and, thus, appears to be the
29 only provision relevant to this cross-reference. For this reason, the cross-reference to Section
30 25355.5 has been updated to refer only to Section 69055. **Unless the Commission receives**
31 **comment suggesting otherwise, this proposed cross-reference update will be presumed**
32 **correct.**

33 **(2)** Section 25364.1(c) also refers to an order issued pursuant to Section 25358.3. Section 25358.3
34 has been proposed for recodification as multiple sections (proposed Sections 68650, 68655,
35 68660, and 68870). Proposed Section 68870 is the only of those sections that expressly authorizes
36 orders issued by the director to a responsible party. For this reason, the cross-reference to Section
37 25358.3 has been updated to refer only to Section 68870. **Absent comment on this issue, this**
38 **proposed cross-reference update will be presumed correct.**

39 **§ 69890. Limitations on release from liability**

40 69890. Notwithstanding any other provision of this article, a release from
41 liability granted pursuant to Section 69880 shall not extend to any of the
42 following:

1 (a)(1) Any person who was a responsible party for a hazardous substance release
2 existing at the site before the release from liability was granted

3 (2) Any entity that is an affiliate of a responsible party described in paragraph
4 (1).

5 (b) Any contractor who prepares the remedial action plan or performs the
6 removal or remedial action provided for in the remedial action plan.

7 (c) Any person who obtains a release pursuant to Section 69880 by fraud or
8 negligent or intentional nondisclosure or misrepresentation.

9 (d) Any liability for a release or threatened release of a hazardous substance first
10 deposited at the site by a person released from liability pursuant to Section 69880
11 after the release from liability is granted.

12 **Comment.** Section 69890 restates former Section 25364.1(e) without substantive change.

13 See Sections 68075 (“hazardous substance”), 68085 (“person”), 68105 (“release”), 68125
14 (“remedy”), 68135 (“remove”), 68145 (“responsible party”), 68155 (“site”), 69875 (“affiliate,”
15 “site”).

16 **Staff Note.** Proposed Section 69890(a) restates part of Section 25364.1(e) Currently, the relevant
17 provision, which describes a person to whom a release from liability shall not extend, provides:

18 Any person who was a responsible party for a hazardous substance release existing at the site
19 before the release from liability was granted, and any entity which is an affiliate of such a
20 responsible party.

21 The provision was restated to eliminate uses of the words “such” and “which.” This restatement is
22 intended to be nonsubstantive. **Absent comment, this proposed restatement will be presumed**
23 **correct.**

24 **§ 69895. Required content of release from liability**

25 69895. Any release from liability granted by the director pursuant to this article
26 shall contain the following provision: “If, for any reason, the responsible party
27 does not complete the removal or remedial action, this release does not extend to
28 any subsequent actions or activities performed by the released party that
29 exacerbate the conditions at the site.”

30 **Comment.** Section 69895 continues former Section 25364.1(f) without substantive change.

31 See Sections 68055 (“director”), 68105 (“release”), 68125 (“remedy”), 68135 (“remove”),
32 68145 (“responsible party”), 68155 (“site”), 69875 (“site”).

33 **§ 69900. Subdivision of site to facilitate or secure financing for removal or remedial action**

34 69900. The site may be subdivided to create subdivided parcels of land, pursuant
35 to the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title
36 7 of the Government Code), in order to facilitate removal or remedial action at the
37 site, secure financing for removal or remedial action, or secure financing for
38 development that would generate funds for removal or remedial action at the site.

39 **Comment.** Section 69900 continues former Section 25364.1(d) without substantive change.

40 See Sections 68125 (“remedy”), 68135 (“remove”), 68155 (“site”), 69875 (“site”).

1 Article 11. Costs Incurred at BKK Landfill Site

2 § 69910. Contribution towards liability

3 69910. (a) Notwithstanding any other provision of this chapter, the costs
4 incurred by a state agency to take a hazardous substance response action at the
5 BKK Landfills Site in West Covina shall be deemed to be a contribution towards
6 any potential liability for response costs or damages imposed pursuant to state law
7 upon a state agency that arranged for the disposal or treatment of a hazardous
8 substance at that site.

9 (b) The Legislature declares its intent that the costs incurred by a state agency to
10 take action in response to a hazardous substance release at the BKK Landfills Site
11 in West Covina shall be deemed to be a contribution towards any potential liability
12 for response costs or damages imposed pursuant to the federal act upon a state
13 agency that arranged for the disposal or treatment of a hazardous substance at that
14 site.

15 **Comment.** Section 69910 continues former Section 25363.5 without substantive change.

16 See Sections 68065 (“federal act”), 68075 (“hazardous substance”), 68105 (“release”), 68140
17 (“response”), 68155 (“site”).

18 **Staff Note.** The introductory clause of Section 25363.5, “[n]otwithstanding any other provision
19 of this article,” is referencing Article 6 (“Recovery Actions”) of Chapter 6.8. Nearly all of the
20 material in that article is proposed for recodification in this proposed chapter, with a few
21 exceptions. See, e.g., proposed Section 68185. In addition, some provisions that were originally
22 located elsewhere have been proposed for inclusion in this chapter. See, e.g., proposed Section
23 69680. These minor adjustments to the content do not appear to have a substantive effect on this
24 reference. For this reason, the reference has been updated to refer to “this chapter.” This update is
25 intended to be nonsubstantive. **Absent comment on this issue, this cross-reference update will**
26 **be presumed correct.**

27 Article 12. Settlement

28 § 69920. Settlement involving minor portion of response costs

29 69920. (a) The department shall, if it determines that it is practicable and in the
30 public interest, propose a final administrative or judicial expedited settlement with
31 potentially responsible parties if the settlement involves only a minor portion of
32 the response costs at a site and, if in the judgment of the department, either of the
33 following conditions are met:

34 (1) The amount of hazardous substances and the toxic or other hazardous effects
35 of the hazardous substances contributed by the potentially responsible party to the
36 site are minimal in comparison to the amount and effects of other hazardous
37 substances at the site.

38 (2) The potentially responsible party is the owner of the real property on or in
39 which the site is located, did not conduct or permit the generation, transportation,
40 storage, treatment, or disposal of any hazardous substance at the site, and did not

1 contribute to the release or threat of release of a hazardous substance at the site
2 through any act or omission. This paragraph does not apply if the potentially
3 responsible party, at the time of the purchase of the real property, knew or should
4 have known that the property was used for the generation, transportation, storage,
5 treatment, or disposal of any hazardous substance.

6 (b) A party who has resolved its liability to the state under this section shall not
7 be liable for claims for contribution regarding matters addressed in the settlement.
8 A settlement under this section does not discharge any of the other potentially
9 responsible parties unless its terms so provide, but it reduces the potential liability
10 of the others by the amount of the settlement.

11 (c) Any person who enters into a settlement under this section shall provide any
12 information relevant to the administration of this part that is requested by the
13 department. In order to obtain the contribution protection provided by subdivision
14 (b), a potentially responsible party participating in a de minimis settlement shall
15 certify that it has responded fully and accurately to all of the department's requests
16 for information, and that it has provided all of the relevant documents pertaining to
17 the site to the department.

18 (d) Nothing in this section shall be construed to affect the authority of the
19 department or regional board to reach settlements with other potentially
20 responsible parties under this part.

21 **Comment.** Section 69920 restates former Section 25360.6 without substantive change. For
22 consistency, the term "site" was substituted for the term "facility." See Section 68155 ("site" has
23 the same meaning as "facility" in federal act); see also Section 68035 (definitions in federal act
24 apply to terms used in this part).

25 See Sections 68050 ("department"), 68075 ("hazardous substance"), 68085 ("person"), 68100
26 ("regional board"), 68105 ("release"), 68140 ("response"), 68145 ("responsible party").

27 **Staff Note.** Section 25360.6 allows for settlement of a minor portion of response costs at a
28 "facility." "Facility" is defined in the federal act. See 42 U.S.C. § 9601(9); see also proposed
29 Section 68035. Proposed Section 68155 defines "site" as having "the same meaning as the term
30 "facility" is defined by Section 101(9) of the federal act (42 U.S.C. Sec. 9601(9))." Typically, the
31 provisions of this part use the term "site." For consistency, the term "facility" in this section was
32 replaced with "site." This is intended to be a nonsubstantive change. **The staff welcomes**
33 **comment on this proposed restatement.**

34 Article 13. Liens

35 **Staff Note.** Section 25365.6(a) provides that a lien arises when response action costs are incurred
36 by "the department or regional board." However, subdivisions (b) and (c) of Section 25356.6
37 refer only to the department as the lienholder. It is unclear whether the department would
38 necessarily be the lienholder if a lien is imposed pursuant to these provisions, particularly in a
39 situation where the regional board incurred the costs. **The staff welcomes comment on this**
40 **issue.**

1 **§ 69935. Lien on real property**

2 69935. (a)(1) Any costs or damages incurred by the department or regional
3 board pursuant to this part constitutes a claim and lien upon the real property
4 owned by the responsible party that is subject to, or affected by, the removal and
5 remedial action.

6 (2) The lien provided by this article shall continue until the liability for these
7 costs or damages, or a judgment against the responsible party, is satisfied.
8 However, if it is determined by the court that the judgment against the responsible
9 party will not be satisfied, the department may exercise its rights under the lien.

10 (b) This lien shall attach regardless of whether the responsible party is insolvent.

11 (c) A lien established by this article shall be subject to the notice and hearing
12 procedures required by due process of the law and shall arise at the time costs are
13 first incurred by the department or regional board with respect to a response action
14 at the site.

15 **Comment.** Section 69935 continues former Section 25365.6(a) and (c) without substantive
16 change.

17 See Sections 68050 (“department”), 68100 (“regional board”), 68125 (“remedy”), 68135
18 (“remove”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”).

19 **§ 69940. Force and effect of lien**

20 69940. The lien imposed by this article shall have the force and effect of, and
21 the priority of, a judgment lien upon its recordation in the county in which the
22 property subject to the lien is located.

23 **Comment.** Section 69940 continues the first sentence of former Section 25365.6(d) without
24 substantive change.

25 See Sections 68075 (“hazardous substance”), 68105 (“release”), 68155 (“site”).

26 **§ 69945. Contents of lien**

27 69945. (a) The lien shall contain the legal description of the real property, the
28 assessor’s parcel number, and the name of the owner of record, as shown on the
29 latest equalized assessment roll.

30 (b) The lien shall also contain a legal description of the property that is the site
31 of the hazardous substance release, the assessor’s parcel number for that property,
32 and the name of the owner of record, as shown on the latest equalized assessment
33 roll, of that property.

34 **Comment.** Section 69945 continues the second and third sentences of former Section
35 25365.6(d) without substantive change.

36 See Sections 68075 (“hazardous substance”), 68105 (“release”), 68155 (“site”).

37 **§ 69950. Department not responsible party due to lien**

38 69950. The department shall not be considered a responsible party for a
39 hazardous substance release site because a claim and lien is imposed pursuant to
40 this article.

1 **Comment.** Section 69950 continues former Section 25365.6(b) without substantive change.
2 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68145
3 (“responsible party”), 68155 (“site”).

4 **§ 69955. Deposit of funds recovered**

5 69955. All funds recovered pursuant to this article shall be deposited in the state
6 account.

7 **Comment.** Section 69955 continues former Section 25365.6(e) without substantive change.
8 See Section 68165 (“state account”).

9 CHAPTER 9. ORPHAN SHARE REIMBURSEMENT

10 Article 1. General Provisions

11 **§ 70000. Definitions**

12 70000. For purposes of this chapter, the following definitions shall apply:

13 (a) “Fund” means the Orphan Share Reimbursement Trust Fund established
14 pursuant to Section 70020.

15 (b) “Orphan share” means the share of liability for the costs of response action
16 that is attributable to the activities of persons who are defunct or insolvent, as
17 determined pursuant to Section 70070.

18 **Comment.** Section 70000 continues former Section 25390 without substantive change.
19 See Sections 68085 (“person”), 68140 (“response”).

20 **Staff Note.** Section 25390(a) cross-references Section 25390.3 for the establishment of the
21 Orphan Share Reimbursement Trust Fund. Section 25390.3 has been proposed for recodification
22 as multiple provisions (proposed Sections 70020 and 70025). The cross-reference has been
23 updated to refer only to Section 70020, which contains the provision establishing the fund.
24 **Absent comment on this issue, this proposed cross-reference update will be presumed**
25 **correct.**

26 **§ 70005. Legislative findings and declarations**

27 70005. The Legislature finds and declares all of the following:

28 (a) This chapter, which establishes an Orphan Share Reimbursement Trust Fund,
29 operates in conjunction with the federal liability scheme under the federal act as in
30 effect on July 1, 1998, for the recovery of response costs expended by government
31 agencies.

32 (b) Under federal liability, at sites where there are insolvent or defunct parties
33 that cannot contribute to the cost of cleanup, viable responsible parties pay the
34 share of liability for that cleanup that may be attributable to insolvent and defunct
35 parties.

36 (c) The Orphan Share Reimbursement Trust Fund is created to mitigate the
37 payment of an insolvent or defunct party’s liability share by viable responsible

1 parties, to the extent money in the fund is available, and to encourage responsible
2 parties to quickly and efficiently remediate contamination.

3 **Comment.** Section 70005 continues former Section 25390.1 without substantive change.

4 See Sections 68065 (“federal act”), 68140 (“response”), 68145 (“responsible party”), 68155
5 (“site”), 70000 (“fund”).

6 **§ 70010. Effect of chapter**

7 70010. (a) This chapter does not prohibit, and is not intended to prohibit, the
8 department, the regional board, or the Attorney General from pursuing any
9 existing legal, equitable, or administrative remedies, pursuant to federal or state
10 law, against any potentially responsible party.

11 (b) No liability or obligation is imposed upon the state pursuant to this chapter,
12 and the state shall not incur a liability or obligation beyond the payment of claims
13 pursuant to this chapter, to the extent that money is available and has been
14 allocated by the administrator under subdivision (a) of Section 70050. No legal
15 action may be brought against the Orphan Share Reimbursement Trust Fund in its
16 own name.

17 **Comment.** Section 70010 continues former Section 25390.2 without substantive change.

18 See Sections 68050 (“department”), 68100 (“regional board”), 68125 (“remedy”), 68145
19 (“responsible party”).

20 **Article 2. Orphan Share Reimbursement Trust Fund**

21 **§ 70020. Creation, administration, and funding of Orphan Share Reimbursement Trust**
22 **Fund**

23 70020. (a) The Orphan Share Reimbursement Trust Fund is hereby created in
24 the State Treasury.

25 (b) The administrator of the fund may expend the money deposited in the fund
26 as provided in this chapter, upon appropriation by the Legislature. The
27 administrator of the fund shall act in a fiduciary capacity, shall prudently
28 administer the fund, and shall protect the fund from any unreasonable or
29 unjustified claims, including any unreasonable or unjustified determinations of the
30 orphan share percentage.

31 (c) If an appropriation from the General Fund is made to the fund in any fiscal
32 year and an amount greater than five million dollars (\$5,000,000) in unexpended
33 funds, beyond any amount approved by the administrator of the fund to pay claims
34 pursuant to this chapter from that General Fund appropriation, remain in the fund
35 at the end of that fiscal year, and if the department determines that additional
36 funding for orphan sites beyond that appropriated from the state account is
37 required for the next fiscal year, the administrator may expend the amount in
38 excess of five million dollars (\$5,000,000) from the General Fund appropriation to
39 pay for response costs incurred by the department or the regional boards under this

1 part at sites listed pursuant to Article 5 (commencing with Section 68760) of
2 Chapter 4 where no viable responsible parties exist.

3 **Comment.** Section 70020 continues former Section 25390.3(a), (b), and (d) without
4 substantive change.

5 See Sections 68050 (“department”), 68100 (“regional board”), 68140 (“response”), 68145
6 (“responsible party”), 68155 (“site”), 68165 (“state account”), 70000 (“fund,” “orphan share”).

7 **Staff Note.** Section 25390.3(d) refers to the “Toxic Substances Control Account.” In the
8 proposed section, this reference was replaced with the defined term, “state account.” See
9 proposed Section 68165.

10 **§ 70025. Permissible expenditures**

11 70025. Except as provided in subdivision (b) of Section 68420 and subdivision
12 (c) of Section 70020, the administrator of the fund may expend the money in the
13 fund for all of the following purposes:

14 (a) To pay claims for reimbursement of all, or any part of, the orphan share at a
15 site paid by the responsible party filed pursuant to Sections 70040, 70045, and
16 70050.

17 (b) For the costs of implementing this chapter.

18 (c) To pay the reasonable costs of the department and the regional board for
19 performance of its duties under this chapter, including, but not limited to, its
20 participation in the orphan share determination process set forth in Section 70070,
21 unless those costs are paid by a potentially responsible party under an agreement
22 specified in subdivision (c) of Section 70040. The expenditures from the fund for
23 purposes of this subdivision shall not exceed 5 percent of the total amount
24 appropriated from the fund in the annual Budget Act for purposes of this section
25 for that fiscal year.

26 (d) To pay the portion of costs attributable to the orphan share incurred by the
27 department and the regional boards to oversee actions of potentially responsible
28 parties, unless those costs are paid by a potentially responsible party under an
29 agreement specified in subdivision (c) of Section 70040.

30 **Comment.** Section 70025 continues former Section 25390.3(c) without substantive change.

31 See Sections 68050 (“department”), 68100 (“regional board”), 68140 (“response”), 68145
32 (“responsible party”), 68155 (“site”), 70000 (“fund,” “orphan share”).

33 **Article 3. Claims for Orphan Share Reimbursement**

34 **§ 70040. Persons who may file claim**

35 70040. A potentially responsible party may file a claim pursuant to subdivision
36 (a) of Section 70025 only if all of the following apply:

37 (a) The site is listed pursuant to Article 5 (commencing with Section 68760) of
38 Chapter 4.

39 (b) The department or the regional board has approved a final remedy for the
40 site under Article 12 (commencing with Section 69190) of Chapter 5.

1 (c) The department and the potentially responsible party have entered into a
2 written, enforceable cleanup agreement or order embodied in a consent order
3 issued pursuant to Section 68870 or 69055, or the regional board and the
4 potentially responsible party have entered into a written, enforceable cleanup
5 agreement or order that provides for the completion of all response actions
6 necessary at the site, conducted pursuant to this part and under the oversight and at
7 the direction of the department or the regional board. The agreement shall provide
8 for the payment by the potentially responsible party of the department's or the
9 regional board's response costs.

10 (d) The potentially responsible party demonstrates, and the department or the
11 regional board finds, that the potentially responsible party has and will have
12 sufficient financial resources to complete all required response actions.

13 (e) The potentially responsible party is in compliance with the agreement
14 provided in subdivision (c), and with any other applicable order or agreement
15 pertaining to the potentially responsible party's obligations with respect to the site.

16 (f) The potentially responsible party has prepared and provided the information
17 required under subdivision (b) of Section 70070.

18 (g) The claim for reimbursement is for the costs incurred for response actions
19 that were subject to the oversight and approval of the department or the regional
20 board.

21 **Comment.** Section 70040 continues former Section 25390.4(a) without substantive change.

22 See Sections 68050 ("department"), 68100 ("regional board"), 68125 ("remedy"), 68140
23 ("response"), 68145 ("responsible party"), 68155 ("site").

24 **Staff Notes.** Section 25390.4(a) refers to "the department and the potentially responsible party"
25 entering an "enforceable cleanup agreement or order... issued pursuant to Section 25355.5 or
26 25358.3." Each of these cross-referenced provisions is discussed in turn below.

27 **(1)** Section 25355.5 has been proposed for recodification as multiple sections (proposed Sections
28 69055, 69060, 69065, and 69130(b)). With the exception of proposed Section 69055, all of the
29 proposed Sections were omitted from this cross-reference, as they do not appear relevant.
30 Proposed Section 69055 (Section 25355.5(a)) is the only provision that addresses the issuance of
31 orders and entry into enforceable agreements and, thus, appears to be the only provision relevant
32 to this cross-reference. For this reason, the cross-reference to Section 25355.5 has been updated
33 to refer only to Section 69055. **Absent comment on this issue, this proposed cross-reference
34 update will be presumed correct.**

35 **(2)** Section 25358.3 has been proposed for recodification as several sections (proposed Sections
36 68650, 68655, 68660, and 68870). Proposed Section 68870 (which recodifies Section 25358.3(a))
37 is the only provision that addresses the department's issuance of orders to parties and, thus,
38 appears to be the only provision that is relevant to this cross-reference. Proposed Section 68660
39 relates to relief sought in court, in which case the court would be the one to issue orders.
40 However, this provision does not appear to encompass court orders. For this reason, the cross-
41 reference to Section 25358.3 has been updated to refer only to Section 68870. **Absent comment
42 on this issue, this proposed cross-reference update will be presumed correct.**

1 **§ 70045. Forms and procedures for claims**

2 70045. The administrator of the fund shall prescribe appropriate application
3 forms and procedures for claims filed pursuant to subdivision (a) of Section 70025
4 that shall include all of the following:

5 (a) Requirements that the claimant provide, at a minimum, all of the following
6 documentation:

7 (1) A sworn verification of the claim to the best of the information known to the
8 claimant or within the claimant’s possession or control.

9 (2) All records and information pertaining to the site and relevant to the
10 ownership, operation, or control of the site, or to the ownership, possession,
11 generation, treatment, transportation, storage or disposal of a hazardous substance,
12 pollutant, or contaminant at or in connection with the site, within the possession or
13 control of the claimant, including, but not limited to, the information specified in
14 subdivision (a) of Section 68440.

15 (3) Certification of all response costs that have been, or will be, incurred at the
16 site by the potentially responsible party, and an estimate of the total cost of
17 completion of the approved final remedy at the site.

18 (b) Procedures specifying that claims shall be filed only at the two following
19 specific time periods during the performance of a response action:

20 (1) After the final remedy is selected under Article 12 (commencing with
21 Section 69190) of Chapter 5.

22 (2) After the department or the regional board determines that the response
23 action is complete. The department or the regional board shall not include
24 operation and maintenance activities in determining whether the response action is
25 complete under this paragraph.

26 **Comment.** Section 70045 continues former Section 25390.4(b) without substantive change.

27 See Sections 68050 (“department”), 68075 (“hazardous substance”), 68100 (“regional board”),
28 68125 (“remedy”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”), 70000
29 (“fund”).

30 **§ 70050. Payment of claims**

31 70050. (a) The administrator of the fund shall annually, on a fiscal year basis,
32 pay claims for reimbursement from the fund filed by potentially responsible
33 parties under subdivision (a) of Section 70025, in accordance with the following
34 procedures:

35 (1) Claims for funds available during each fiscal year shall be filed with the
36 administrator by July 30 of that fiscal year.

37 (2) For sites with multiple responsible parties, all potentially responsible parties
38 that have entered into the cleanup agreement specified in subdivision (c) of
39 Section 70040 shall file a single claim.

40 (3)(A) The administrator shall allocate the money available in the fund for the
41 fiscal year among the claims filed by the July 30 deadline. The allocation shall be

1 based on the determination of the orphan share percentage at the facility under the
2 process set forth in Section 70070, the long-term financial stability and short-term
3 resources available in the fund, and the administrator’s fiduciary duty with respect
4 to the fund. Except as provided in subparagraph (B), the administrator shall pay
5 claims for funds in the order in which they are received.

6 (B) Notwithstanding subparagraph (A), if an appropriation from the General
7 Fund is made to the fund in any fiscal year, the administrator may alter the order
8 of payment of claims required by subparagraph (A) by using funds appropriated
9 from the General Fund to pay claims based on the threat to public health or the
10 environment posed by a site or the need to improve economic and environmental
11 conditions in redeveloping communities.

12 (4) The total amount allocated to any one site shall not exceed 10 percent of the
13 total amount available each fiscal year in the fund. If, due to this limit or to the
14 unavailability of funds, a claimant receives only partial or no reimbursement of the
15 orphan share paid by that claimant, the claim shall be paid in the following fiscal
16 year and shall be given priority over all claims filed after the claim was initially
17 received, subject to the discretion of the administrator set forth in paragraph (3).

18 (5) The administrator’s proposed allocation shall be subject to public review and
19 comment for 30 days.

20 (b) The state and the fund have no obligation to provide full reimbursement to a
21 claimant. The fund shall be allocated at the discretion of the administrator, subject
22 to the requirements of this chapter. In enacting this chapter, the Legislature intends
23 that claimants be reimbursed only to the extent that money is available in the fund
24 and is allocated to the claimant by the administrator.

25 **Comment.** Section 70050 continues former Section 25390.4(c) and (d) without substantive
26 change.

27 See Sections 68145 (“responsible party”), 68155 (“site”), 70000 (“fund,” “orphan share”).

28 **§ 70055. Sites for which claims not permitted**

29 70055. A claim for reimbursement under subdivision (a) of Section 70025 shall
30 not be filed for any of the following:

31 (a) Sites listed on the National Priorities List pursuant to the federal act (42
32 U.S.C. Sec. 9605(a)(8)(B)).

33 (b) Sites remediated pursuant to former Chapter 6.85 (commencing with Section
34 25396) of Division 20.

35 (c) Sites, or portions of sites, for which the potentially responsible party has
36 agreed to take all response action required by the department or the regional board
37 at the site, and that agreement is embodied in a written, enforceable settlement
38 agreement, including, but not limited to, a judicial consent decree, entered into
39 prior to January 1, 1999.

40 (d) Sites, or portions of sites, that have been fully remediated for which the
41 department or the regional board has determined that the response action is

1 complete prior to January 1, 1999. The department or the regional board shall not
2 include operation and maintenance activities in determining whether the response
3 action is complete under this section.

4 **Comment.** Section 70055 continues former Section 25390.7 without substantive change.

5 See Sections 68050 (“department”), 68065 (“federal act”), 68080 (“operation and
6 maintenance”), 68100 (“regional board”), 68140 (“response”), 68145 (“responsible party”),
7 68155 (“site”).

8 Article 4. Determination of Orphan Share

9 § 70070. Manner for determination

10 70070. For the purposes of this chapter, the orphan share shall be determined in
11 the following manner:

12 (a) The orphan share shall be expressed as a percentage in multiples of five, up
13 to, and, including, but not greater than, 75 percent.

14 (b) The potentially responsible party filing a claim for reimbursement of the
15 orphan share shall provide the administrator of the fund with a written potentially
16 responsible party search report that shall include a list of all potentially responsible
17 parties identified for the site, the factual and legal basis for identifying those
18 parties, and a proposed orphan share percentage. The potentially responsible party
19 shall also provide the administrator with the factual documentation necessary to
20 support the proposed orphan share percentage.

21 (c) Upon receipt of the information required by subdivision (b), the
22 administrator of the fund shall invite all identified potentially responsible parties
23 and the department and the regional board to submit any additional information
24 relating to the proposed orphan share percentage or to the list of identified
25 potentially responsible parties.

26 (d) The administrator of the fund, in consultation with the department or the
27 regional board, shall determine a final orphan share percentage based on the
28 volume, toxicity, and difficulty of removal of the contaminants contributed to the
29 site by the party responsible for the orphan share. The administrator shall
30 determine the orphan share timely and efficiently and is not required to precisely
31 determine all relevant factors, as long as the determination is generally equitable.
32 In addition, the administrator may consider the results of any apportionment or
33 allocation conducted by voluntary arbitration or mediation or by a civil action filed
34 by a potentially responsible party, or any other apportionment or allocation
35 decision that is helpful when determining the orphan share percentage.

36 (e) A potentially responsible party shall not assert, and the administrator of the
37 fund shall not determine, that the orphan share percentage includes the share of
38 liability attributable to a potentially responsible party’s acts that occurred before
39 January 1, 1982, unless that share of responsibility is attributable to a person who
40 is defunct or insolvent.

1 (f) In determining the orphan share percentage under this section, the
2 administrator of the fund may perform any of the activities authorized in
3 subdivisions (a) and (c) of Section 68440.

4 (g) The administrator of the fund shall issue all orphan share percentage
5 determinations in writing, with notification to all appropriate parties. The decision
6 of the administrator with respect to either apportionment or payment of claims is a
7 final agency action for the purposes of judicial review of the decision by any party
8 to the proceedings resulting in the decision; however, judicial review of the
9 administrator's decision is limited to a showing of fraud by a party submitting
10 information under [this subdivision]. The administrator shall be represented by
11 the Attorney General in any action brought under this chapter.

12 **Comment.** Section 70070 restates former Section 25390.5 without substantive change. This
13 provision was restated to singularize the phrase "party or parties." This is a nonsubstantive
14 change. See Section 13. An erroneous reference to "subdivision (a)" in subdivision (c) was
15 corrected to refer to "subdivision (b)."

16 See Sections 68050 ("department"), 68085 ("person"), 68100 ("regional board"), 68135
17 ("remove"), 68145 ("responsible party"), 68155 ("site"), 70000 ("fund," "orphan share").

18 **Staff Notes. (1)** Section 25390.5(c) requires the fund administrator to take specified action after
19 "receipt of the information required by subdivision (a)." Subdivision (a) simply states a rule for
20 the orphan share percentage to be expressed as a multiple of five. It appears that this should refer
21 to the information required by subdivision (b), which specifies what information a party filing a
22 reimbursement claim must submit. The reference has been corrected accordingly, and refers now
23 to "information required by subdivision (b)." See proposed Section 70070(c). **Absent comment**
24 **on this issue, this correction will be presumed correct.**

25 **(2)** Section 25380.5(g) limits judicial review to a showing of fraud by a party submitting
26 information under "this subdivision." This reference appears to be erroneous, as subdivision (g)
27 does not provide for a party to submit information. It is unclear whether this reference should be
28 revised to refer to the section as a whole or some subset of the section. **The staff welcomes**
29 **comment on how this reference should be corrected.**

30 Article 5. Enforcement and Cost Recovery

31 § 70080. Recovery of costs paid from fund

32 70080. Any costs paid from the fund pursuant to subdivisions (a) and (d) of
33 Section 70025 shall be recoverable by the Attorney General, at the request of the
34 administrator of the fund, from any liable person who has not entered into, or is
35 not in compliance with, a written cleanup agreement entered into pursuant to
36 subdivision (c) of Section 70040 that provides for the completion of all response
37 actions necessary at the site under the oversight and at the direction of the
38 department or the regional board.

39 **Comment.** Section 70080 restates former Section 25390.6(a) without substantive change. This
40 provision was restated to singularize the phrase "person or persons." This is a nonsubstantive
41 change. See Section 13.

42 See Sections 68050 ("department"), 68100 ("regional board"), 68140 ("response"), 68145
43 ("responsible party"), 68155 ("site"), 70000 ("fund").

1 **§ 70085. Penalty for withholding information or submitting false information**

2 70085. Any potentially responsible party who withholds information required to
3 be submitted under **[this section or Section 70080]**, or who submits false
4 information, is subject to a civil penalty of up to twenty-five thousand dollars
5 (\$25,000) for each piece of information withheld or for each piece of false
6 information submitted.

7 **Comment.** Section 70085 continues former Section 25390.6(b) without substantive change.

8 See Sections 68050 (“department”), 68100 (“regional board”), 68140 (“response”), 68145
9 (“responsible party”), 68155 (“site”).

10 **Staff Note.** Section 25390.6(b) establishes a civil penalty for a party who withholds information
11 “required to be submitted under this section.” Section 25390.6 has been proposed for
12 recodification as two sections (this proposed section and proposed Section 70080). The cross-
13 reference (in bold, bracketed text) was updated to refer to both of these proposed sections.
14 However, nothing in existing Section 25390.6 appears to require a party to submit information. It
15 is unclear what the intended application of this rule should be. **The staff welcomes comment on**
16 **this issue.**

17 **§ 70090. Lien for incurred costs**

18 70090. (a) Any costs incurred and payable from the fund by the administrator
19 pursuant to this chapter shall constitute a claim and lien upon the real property
20 owned by a responsible party that is subject to, or affected by, a response action. A
21 lien established by this subdivision shall have all of the following properties:

22 (1) The lien shall not exceed the increase in fair market value of the site
23 attributable to the response action at the time of a subsequent sale or other
24 disposition of the site.

25 (2) The lien shall attach regardless of whether the responsible party property
26 owner is solvent.

27 (3) The lien shall arise at the time costs to the fund are first incurred by the
28 administrator.

29 (4) The lien shall be subject to the notice and hearing procedures that due
30 process of the law requires.

31 (b) Neither the administrator of the fund nor the fund shall be considered a
32 responsible party for a hazardous substance release site because a claim and lien is
33 imposed pursuant to this section.

34 (c)(1) The lien imposed by this section shall have the force and effect of, and the
35 priority of, a judgment lien upon its recordation in the county in which the
36 property subject to the lien is located.

37 (2) The lien shall contain the legal description of the property, the assessor’s
38 parcel number, and the name of the owner of record, as shown on the latest
39 equalized assessment roll. The lien shall also contain a legal description of the
40 property that is the site of the hazardous substance release, the assessor’s parcel
41 number for that property, and the name of the owner of record, as shown on the
42 latest equalized assessment roll, of that property.

1 (d) All funds recovered pursuant to this section shall be deposited in the fund.

2 **Comment.** Section 70090 continues former Section 25390.8 without substantive change.

3 See Sections 68075 (“hazardous substance”), 68105 (“release”), 68140 (“response”), 68145
4 (“responsible party”), 68155 (“site”), 70000 (“fund”).

5 **Staff Note.** Section 25390.8(d) governs the deposit of all funds recovered pursuant to “this
6 subdivision.” However, subdivision (d) does not otherwise provide for fund recovery. In a very
7 similar section governing other liens, the provision refers to funds recovered pursuant to “this
8 section.” See Section 25365.6. It appears that the reference to “this subdivision” should refer to
9 the section as a whole. For this reason, the reference has been updated to refer to “this section.”

10 **Absent comment on this issue, this reference correction will be presumed correct.**

11 Article 6. Operative Date

12 § 70100. Operative date

13 25390.9. (a) This chapter shall become operative on the operative date of the
14 statute that does either, or both, of the following:

15 (1) Appropriates funds to the fund to implement this chapter.

16 (2) Establishes a revenue source for the fund.

17 (b) Notwithstanding subdivision (a), the operation of this chapter shall be
18 suspended during any fiscal year in which both no funds are appropriated to the
19 fund to implement this chapter and no revenue source for the fund is operative.

20 **Comment.** Section 70100 continues former Section 25390.9 without substantive change.

21 See Section 70000 (“fund”).

22 **Staff Note.** Section 25390.9(a) provides that this law becomes operative “on the operative date of
23 a statute” that meets at least one of specified conditions. **The staff welcomes input on whether
24 the specified conditions have been met such that this law is operative.** If this law is operative,
25 subdivision (a) would appear to be obsolete and should not be continued.

DISPOSITION OF EXISTING LAW

Note. This table shows the proposed disposition, as reflected in this staff draft, of provisions in Chapter 6.8 of Division 20 of the Health and Safety Code (§§ 25300-25395.45), as the law existed on January 1, 2019. Unless otherwise indicated, all statutory references are to the Health and Safety Code.

Existing Provision	Corresponding New Provision
25324(b)	69680
25352(c)	69685
25353(c)	69690
25360	69650
25360.1	69655
25360.2(d)	69800
25360.2(a)	69780
25360.2(e)	69785
25360.2(b)	69790
25360.2(c)	69795
25360.3(a)	69810
25360.3(d), (e)	69815
25360.3(b)	69820
25360.3(c)	69825
25360.4(e)	69745
25360.4(d)	69725
25360.4(a)	69730
25360.4(b)	69735
25360.4(c)	69740
25360.6	69920
25361(b)	69705
25361(a)	69700
25362	69710
25363(e)	69765
25363(c)	69665
25363(d)	69670
25363(a), (b)	69760
25363.5	69910
25364	69860
25364.1(d)	69900
25364.1(f)	69895
25364.1(e)	69890
25364.1(c)	69885
25364.1(b)	69880
25364.1(a)	69875
25364.7	69865
25365	69660
25365.6(a), (c)	69935

25365.6(d), 2nd and 3rd sent.	69945
25365.6(d), 1st sent.....	69940
25365.6(b).....	69950
25365.6(e).....	69955
25366.5(a).....	69845
25366.5(b).....	69840
25366.5(c).....	69850
25390.....	70000
25390.1.....	70005
25390.2.....	70010
25390.3(c).....	70025
25390.3(a), (b), (d).....	70020
25390.4(b).....	70045
25390.4(a).....	70040
25390.4(c), (d).....	70050
25390.5.....	70070
25390.6(b).....	70085
25390.6(a).....	70080
25390.7.....	70055
25390.8.....	70090
25390.9.....	70100

DERIVATION OF NEW LAW

Note. This table shows the derivation of each provision in the proposed Hazardous Substance Account Recodification Act of 2020, as reflected in this staff draft. Unless otherwise indicated, all statutory references are to the Health and Safety Code.

Proposed New Provision	Corresponding Existing Provision
69650	25360
69655	25360.1
69660	25365
69665	25363(c)
69670	25363(d)
69680	25324(b)
69685	25352(c)
69690	25353(c)
69700	25361(a)
69705	25361(b)
69710	25362
69725	25360.4(d)
69730	25360.4(a)
69735	25360.4(b)
69740	25360.4(c)
69745	25360.4(e)
69760	25363(a), (b)
69765	25363(e)
69780	25360.2(a)
69785	25360.2(e)
69790	25360.2(b)
69795	25360.2(c)
69800	25360.2(d)
69810	25360.3(a)
69815	25360.3(d), (e)
69820	25360.3(b)
69825	25360.3(c)
69840	25366.5(b)
69845	25366.5(a)
69850	25366.5(c)
69860	25364
69865	25364.7
69875	25364.1(a)
69880	25364.1(b)
69885	25364.1(c)
69890	25364.1(e)
69895	25364.1(f)
69900	25364.1(d)
69910	25363.5

69920	25360.6
69935	25365.6(a), (c)
69940	25365.6(d), 1st sent.
69945	25365.6(d), 2nd and 3rd sent.
69950	25365.6(b)
69955	25365.6(e)
70000	25390
70005	25390.1
70010	25390.2
70020	25390.3(a), (b), (d)
70025	25390.3(c)
70040	25390.4(a)
70045	25390.4(b)
70050	25390.4(c), (d)
70055	25390.7
70070	25390.5
70080	25390.6(a)
70085	25390.6(b)
70090	25390.8
70100	25390.9