Study E-200 December 10, 2020

Memorandum 2020-70

Recodification of Toxic Substance Statutes: Hazardous Substance Account Recodification Act (Comments on Tentative Recommendation)

In this study, the Commission[1] 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]

Previously, Memorandum 2020-62 began discussing the comment on and remaining issues to address in the tentative recommendation to recodify Chapter 6.8. This memorandum continues that discussion, using the same proposed consent practices outlined in Memorandum 2020-62.[4]

Unless otherwise indicated, any statutory citations are to the Health and Safety Code. Citations to proposed sections refer to the proposed sections contained in the Commission's tentative recommendation for the recodification of Chapter 6.8.

REMAINING COMMENTS AND NOTES ON TENTATIVE RECOMMENDATION

These issues are presented in numerical order using the section numbering from the proposed law.

Each proposed consent item is identified as "PROPOSED CONSENT" in the relevant heading.

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 2020 Cal. Stat. res. ch. 46 (ACR 173 (Gallagher)).
3. Minutes (Feb. 2019), p. 3.
4. See Memorandum 2020-62, pp. 4-10.

Proposed Section 68200. Items to be Scheduled in Budget Act

At the November meeting, the Commission discussed a defect in the language of existing Section 25342, which had been proposed for continuation in proposed Section 68200.

The existing language of Section 25342 implies that the Director of Finance, an officer in the executive branch, can schedule projects in the annual Budget Act. However, the Budget Act must be enacted by the Legislature and approved by the Governor. As such, the Director of Finance does not have the authority to control the contents of that act.

In practice, it seems likely that the Director of Finance's obligation is to schedule the specified projects in the Governor's proposed budget.[5] The staff proposes the following restatement to address this issue:

> **§ 68200. Items to be scheduled in annual budget**
> 68200. The Director of Finance shall schedule in the annual ~~Budget Act~~ proposed budget the projects proposed in any fiscal year, that will incur direct costs for removal and remedial actions at hazardous substance release sites.

Does the Commission approve of this restatement?

PROPOSED CONSENT: Proposed Section 68260. Site Remediation Account

Proposed Section 68260 continues Section 25337. Section 25337 contains a seemingly erroneous cross-reference to the "federal act."[6] The tentative recommendation includes a Note that requests comment on this issue.

Section 25337 governs the site remediation account. Subdivision (a) allows expenditures for "direct site remediation costs" from that account "[c]onsistent with the requirements of Section 114(c) of the federal act (42 U.S.C. Sec. 9614(c))." However, the referenced federal act section does not relate to expenditures.

In their comments, Department of Toxic Substances Control ("DTSC") staff indicated that the appropriate cross-reference for this provision is Section 104(c) of the federal act. The substance of Section 104(c) of the federal act relates to state expenditures, so appears to be a good fit here. In addition, proposed Section 68260

5. See generally, e.g., Gov't Code § 15971(a) ("The Director of Finance shall identify in the proposed budget all state funds that are available for the support of social service transportation services….").

6. Proposed Section 68065 defines "federal act" for the part as "the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sec. 9601 et seq.)."

already includes another reference to Section 104(c)(3) of the federal act, in defining "direct site remediation costs."

Unless the Commission directs otherwise, the cross-reference in proposed Section 68260(a) will be corrected to refer Section 104(c) of the federal act (42 U.S.C. Sec. 9604(c)), as opposed to Section 114(c).

PROPOSED CONSENT: Proposed Section 68285. Definitions

Proposed Section 68285 continues Section 25385.1. Section 25385.1 defines terms, including "orphan site" and "orphan share." The definitions apply only to specified provisions. However, the terms "orphan site" and "orphan share" are not used in the provisions to which the definitions apply. A Note requests comment on whether these definitions could be discontinued.

DTSC staff commented that these terms are used throughout Chapters 6.5 and 6.8, but are defined inconsistently. DTSC staff also noted that these terms are used in the regulations and in practice. At this point, DTSC staff is concerned that eliminating these definitions could be disruptive. DTSC staff requests that these definitions be continued in the proposed recodification.

The definitions were proposed for continuation in the tentative recommendation, so no change to the tentative recommendation is needed. **In line with DTSC staff's comment, the staff recommends that these definitions be continued, as proposed in the tentative recommendation.**

DTSC staff also responded to another issue of inconsistent definitions raised in the Note to this proposed provision. This proposed provision continues the existing definition "responsible party" in Section 25385.1. "Responsible party" is, however, already defined for the part as a whole.[7] The two definitions for this term are drafted quite differently. DTSC staff expressed uncertainty about the reason for this separate definition for responsible party.

These comments highlight a broader problem of inconsistent use of terminology for terms defined with only a limited application (e.g., for the purposes of a single article or section). Although addressing this issue in its entirety would be a substantial undertaking (and, likely, not worthwhile), it may be possible that addressing inconsistent definitions for certain key terms would be a significant improvement. **For this reason, the staff recommends adding the following issue to the list of items for possible future study:**

7. See proposed Section 68145.

Should limited application definitions be adjusted to improve consistency for terminology used in this proposed part and Chapter 6.5 (commencing with Section 25100) of Division 20?[8]

PROPOSED CONSENT: Proposed Section 68450. Entry, Inspection, and Sampling of Property

Proposed Section 68450 relates to DTSC's authority to enter, inspect, and sample property. This section was flagged in a Note as a candidate for future work and restatement. DTSC staff's comments respond to a few of the possible problems highlighted in the Note.

DTSC staff comments also raise the question of whether there is a drafting error in this section. This relevant provision provides, in part (with key text in italics):

> 68450. (a) Any officer or employee of the department, representative of the director, or person designated by the director may, in accordance with Section 68455, enter, at reasonable times, any of the following properties:
>
> …
>
> (4) Any nonresidential establishment or other place or property where entry is needed to determine the need for a response action, or *the appropriate remedial action, to effectuate a response action under this part*.

The possible problem with the italicized text results from the fact that "remedial action" is only one type of "response action."[9] The other type of "response action" is a "removal action."[10] The staff cannot see why DTSC would be permitted to enter property to determine an appropriate remedial action, but not an appropriate removal action. It seems likely that this was a drafting error.

However, we cannot rule out the possibility that replacing the term "remedial action" with the broader "response action" would be a substantive change. **The staff recommends that the Commission continue this provision as is for now and leave this as a matter to be addressed in future work.**[11]

---

8. This issue would replace the items related to specific limited-application definitions. See Memorandum 2020-62, Exhibit pp. 1-2 ("Should the limited-application definition of 'responsible party' in proposed Section 68285 be adjusted, in light of the definition of 'responsible party' in proposed Section 68145 (which applies to the entire part)?"; "Should the limited-application definition of 'site' in proposed Section 69875 be adjusted, in light of the definition of 'site' in proposed Section 68155 (which applies to the entire part)?").

9. See proposed Section 68140 (defining "response," "respond," and "response action" by reference to the federal act); 42 U.S.C. § 9601(25) ("the terms 'respond' or 'response' means remove, removal, remedy, and remedial action;, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.").

10. *Id*.

11. See Memorandum 2020-62, Exhibit p. 3 ("Should proposed Section 68450 (regarding the authority to enter, inspect, and sample property) be restated for clarity?").

Proposed Sections 68555 and 68565. Recovery of Incremental Costs & Consideration of Cost-Effectiveness

Existing law requires DTSC to maintain a list of sites selected for response action.[12] Prior to late 2000, that list was divided into three categories, which were prescribed in paragraphs (1) through (3) of subdivision (b) of Section 25356.[13]

Existing Sections 25368.6 and 26368.8 relate to a technology demonstration program. Those sections provide, in part, that certain rules for the program only apply to sites listed pursuant to Section 25356(b)(2) and (3). In other words, the rules do not apply to sites listed under Section 25356(b)(1).

In 2000, Section 25356 was amended.[14] The structure of the list was changed significantly. Now the section only requires a single list of sites "selected for, and subject to, a response action under [Chapter 6.8]."[15]

The new unitary listing approach is inconsistent with the cross-references in Sections 25368.6 and 26368.8, which refer to some, but not all sites that might be included in the unitary list. A Note requests comment on how the cross-references to the listed sites should be updated.

DTSC suggests that the reference to the listed sites be updated to refer to the sites on the current unitary list. However, the staff is unsure whether that might result in a substantive change (extending the program rules at issue to sites that previously were not covered – the sites formerly listed in Section 25356(b)(1)).

The staff has requested additional information from DTSC on this issue. The staff will present this issue for Commission decision in a future memorandum.

PROPOSED CONSENT: Proposed Article 9 of Chapter 3 (Sections 68575-68580). Content of Biennial Report

Proposed Article 9 (commencing with Section 68575) of Chapter 3 includes two sections that relate to the required contents of a biennial report prepared by DTSC. Those sections only address a small part of the content of that report. Most of the content is prescribed in Section 25178, which is a provision of a different chapter (Chapter 6.5).

A Note asked whether the two provisions of Article 9 should somehow be consolidated with Section 25178. We received no comment on that point. The tentative recommendation does not make such a change. That approach should be

12. See Section 25356(b) (proposed Section 68760).
13. See former Section 25356(b), as added by 1999 Cal. Stat. ch. 23, § 2.
14. See 2000 Cal. Stat. ch. 912, § 16.
15. See proposed Section 68760 (continuing Section 25356(b)).

continued for now. **However, the staff recommends that the issue of better coordinating the biennial report rules should be added to the list of issues for future study.**[16] **The staff also recommends that the Commission consider this issue in the course of its upcoming work on Chapter 6.5.**

PROPOSED CONSENT: Proposed Section 68590. Definitions

Section 25358.6.1(a) defines "engineering, architectural, environmental, landscape architectural, construction project management, or land surveying services." In order to simplify drafting, the proposed law replaces "engineering, architectural, environmental, landscape architectural, construction project management, or land surveying services" with "professional service," both in the definition and everywhere the defined term is used.

Specifically, proposed Section 68590(c) defines "professional service" as follows:

> "Professional service" includes a professional service of an engineering, architectural, environmental, landscape architectural, construction project management, land surveying, or similar nature, as well as an incidental service that members of these professions and those in their employ may logically or justifiably perform.[17]

DTSC staff did not raise concerns about the proposed restatement, but noted that the existing definition is slightly different from a definition in Section 4525 of the Government Code. Government Code Section 4525 contains definitions for a chapter of law related to "Contracts with Private Architects, Engineering, Land Surveying, Construction Project Management Firms," which is within a division related to "Public Work and Public Purchases."[18] Government Code Section 4525(d) provides:

> "Architectural, landscape architectural, engineering, environmental, and land surveying services" includes those professional services of an architectural, landscape architectural, engineering, environmental, or land surveying nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.[19]

16. See Memorandum 2020-62, Exhibit p. 4.
17. See proposed Section 68590(c).
18. See Headings of Chapter 10 (commencing with Section 4525) of Division 5 of and Division 5 of Title 1 of the Government Code.
19. Government Code Section 4525(e) and (f) separately define related terms: "construction project management" and "enviromental services."

The differences between these definitions are in existing law. Both these definitions relate to a similar topic — government contracting powers. The proposed sections in this study relate specifically to contracting powers of DTSC, while the Government Code provisions relate to contracting powers of government agencies more broadly.[20]

DTSC staff's comment suggests that it may be helpful for these provisions to be made consistent. DTSC staff also note that changing the "professional service" definition to match the language of the Government Code provision would be a substantive issue. The staff agrees that addressing this issue would require a substantive change.

Given the substantive nature of addressing this issue, the staff recommends that this concern be added to the list of items for possible future study, as follows:

> Should the definition of "professional service" in proposed Section 68590 be adjusted for consistency with the definition of "architectural, landscape architectural, engineering, environmental, and land surveying services" in Government Code Section 4525?

PROPOSED CONSENT: Proposed Section 68600. Prequalified Lists

Proposed Section 68600 restates Section 25358.6.1(c)(1)-(4). Section 25358.6.1(c) governs a contracting process and specifies a process for the department to develop "prequalified lists" of professional services firms. However, this provision uses inconsistent terminology to refer to the prequalified list and a Note sought comment on this issue. The Note provides, in part:

> In places, Section 25358.6.1(c) refers to a "prequalified list adopted pursuant to paragraph (3)" or a "prequalified list developed pursuant to paragraph (3)." However, Section 25358.6.1(c)(3) uses the term "short list" as opposed to "prequalified list." It appears that the ranked short list, prepared pursuant to that paragraph (which would be recodified as proposed Section 68600(c)), is the "prequalified list." If that is true, it would be helpful to clarify the statute accordingly.

In its comments, DTSC staff agree that the inconsistent terminology should be addressed and state that "[t]he prequalified list is the short list."

20. See Gov't Code §§ 4525(b), (c) (defining "state agency head" and "local agency head"), 4526 (regarding selection of architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms by state or local agency heads).

DTSC staff suggest addressing the issue by changing the applicable definition of prequalified list in proposed Section 68590(b). The staff believes that this is a good approach. The staff recommends adjusting the current definition of prequalified list, as follows (changes shown in strikeout and underscore):

> "Prequalified list" means a short list of professional service firms that possess the qualifications established by the department to perform a specific type of professional service, with each firm ranked in order of its qualifications and ~~costs.~~ costs, pursuant to subdivision (c) of Section 68600.

Unless the Commission directs otherwise, the definition for "prequalified list in proposed Section 68590(b) will be restated as proposed. In addition, the staff will make conforming changes to proposed Section 68600 to eliminate the repeated references to the prequalified list being "pursuant to subdivision (c)" or similar (as these references will now be redundant).[21]

PROPOSED CONSENT: Proposed Section 68655. Authority to Take or Contract for Response or Other Authorized Actions

Proposed Section 68655 was adjusted to substitute the defined term, "federal act," for "the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sec. 9601 et seq.)." DTSC staff commented that, in the context of this provision, the use of the defined term reads funny.

This substitution was made in a lengthy list of different state and federal statutes, as follows. That list includes (with the substituted term in bold):

> …this part, Chapter 6.5 (commencing with Section 25100) or Chapter 6.7 (commencing with Section 25280) of Division 20, the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code), **the federal act**, the federal Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Sec. 6901 et seq.), the federal Hazardous Materials Transportation Authorization Act of 1994, as amended (49 U.S.C. Sec. 5101 et seq.), the federal Toxic Substances Control Act (15 U.S.C. Sec. 2601 et seq.), or any other equivalent federal or state statute or any requirement or regulation adopted pursuant thereto relating to the generation, transportation, treatment, storage, recycling, disposal, or handling of a hazardous waste, as defined in Section

21. These change would resolve the issue with differing terminology in proposed Section 68600. For this reason, this issue would not be included on the list of issues for future study. See Memorandum 2020-62, Exhibit p. 3 ("Should the different terminology ('short list,' 'prequalified list') in proposed Section 68600 be revised for consistency?").

> 25117, a hazardous substance, as defined in subdivision (a) of Section 68075, or a hazardous material, as defined in Section 353 of the Vehicle Code…[22]

While it is generally preferable to consistently use defined terms, there are situations where the use of a defined term might impair the readability of the section. Given the particular concern about readability here, the staff recommends that the proposed section revert to using the full name of the federal act.

Unless the Commission directs otherwise, the language of proposed Section 68655 will be adjusted to use the full name of the federal act, as in existing law.

Proposed Article 2 of Chapter 5 (Sections 68870-68885): Exigent Actions

Proposed Article 2 (commencing with Section 68870) of Chapter 5 is entitled "Exigent Actions." DTSC staff's comments requested that this article name be changed because the term "exigent" is not used in the statutes.

The staff will continue to work with DTSC staff to find an appropriate name for this article.

PROPOSED CONSENT: Proposed Section 68870. Powers of Director to Address Imminent or Substantial Endangerment

Proposed Section 68870 would restate existing Section 25358.3(a). Section 25358.3(a) authorizes the director to, in a situation of imminent or substantial endangerment to the public health or welfare or to the environment, order a responsible party to take or pay for a response action. However, the section seems to preclude an order in certain situations, referencing provisions in the federal act.[23]

Specifically, Section 25358.3(a) provides in part, that:

> No order under this section shall be made to an owner of real property solely on the basis of that ownership as specified in Sections 101(35) and 107(b) of the federal act (42 U.S.C. Secs. 9601(35) and 9607(b)). The director shall give the responsible party an opportunity to assert all defenses to the order.[24]

Both of these referenced federal act provisions establish defenses and specify that a landowner has the burden to establish their applicability (by a preponderance of the evidence).[25] Section 101(35) pertains to "innocent

22. See proposed Section 68655(b)(2).
23. See generally https://www.epa.gov/enforcement/defenses-and-exemptions-superfund-liability.
24. See proposed Section 68870(a).
25. See 42 U.S.C. §§ 9601(35)(A), 9607(b).

landowners" who received the property by specified means.[26] Section 107(b) pertains to acts of God, war, or third parties. DTSC staff commented that the landowner can raise these defenses if issued an order.

It is odd that the provision seems to bar the issuance of an order based on the availability of defenses, when any defense must necessarily be raised and proven *after* an order has been issued.

At this point, the staff does not recommend making changes to this provision, given the risk of substantive change. **Rather than addressing this issue at this time, the staff recommends that this matter be included on the list of issues for possible future study.**[27]

PROPOSED CONSENT: Proposed Section 69060. Conditions Where Required Actions Not Applicable for Expenditure

Proposed Section 69060(c) restates Section 25355.5(b). A Note suggests that it might be helpful to revise the provision to add a cross reference to a related provision. DTSC staff comments agree that the cross-reference should be added.

Section 25355.5(b) pertains to situations in which "[t]he director determines that removal or remedial action at a site is necessary because may be an imminent and substantial endangerment to the public health or welfare or to the environment." However, this provision does not cross-refer to Section 25358.3(a) (restated as proposed Section 68870), which provides the director authority to take actions in those situations. Specifically, Section 25358.3(a) allows the director to, among other things, "take or contract for any necessary removal or remedial action" when:

> …the director determines that there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or a threatened release of a hazardous substance.

Given that DTSC staff agrees that cross-referencing this related provision would be helpful, the staff recommends revising Section 69060(c), as follows (with changes shown in strikeout and underscore):

---

26. See https://www.epa.gov/enforcement/third-party-defensesinnocent-landowners; see also 42 U.S.C. § 9601(35)(A)(i)-(iii) (specified means include escheat or other involuntary transfer to government, inheritance or bequest, and situations in which, at time of acquisition, owner did not know or have reason to know that the property had hazardous substances).

27. See Memorandum 2020-62, Exhibit p. 1 ("Should proposed Section 68870 be adjusted for consistency with the operation of the defenses in Sections 101(35) and 107(b) of the federal act in practice?").

(c) The director determines that removal or remedial action at a site is necessary because there may be an imminent and substantial endangerment to the public health or welfare or to the ~~environment.~~ environment, as provided in Section 68870.

Unless the Commission directs otherwise, the language of proposed Section 69060(c) will be adjusted, as indicated above, to cross-refer to proposed Section 68870.[28]

PROPOSED CONSENT: Proposed Section 69065. Authorized Expenditures

Proposed Section 69065(b) restates existing Section 23555.5(d). The provision references "the state's share of a *removal or remedial* action pursuant to Section 104(c)(3) of the federal act."

DTSC staff commented that the existing Section 23555.5(d) contains an error. In their comments, DTSC staff point out that Section 104(c)(3) of the federal act only specifies a state share of costs for *remedial* actions (not *removal* actions). For that reason, DTSC staff suggests that it may be appropriate to revise Section 69065(b) to either delete the reference to a "removal action" or replace the reference to a "removal or remedial action" with "response action." "Response action" is defined to include both removal and remedial actions.[29]

Section 104(c)(3) of the federal act precludes the federal government from undertaking remedial actions unless the state provides certain assurances, including that:

> [T]he State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of any sums expended in response to a release at a facility, that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein. …

While Section 104(c)(3) pertains to remedial actions overall, it does refer to sums expended "in response to a release at a facility." It is unclear whether such expenditures could include costs associated with a "removal action."

---

28. With the addition of this cross-reference, this issue would be resolved and would, thus, not be included on the list of issues for future study. See Memorandum 2020-62, Exhibit p. 2 ("Should a cross-reference to proposed Section 68870 (related to imminent and substantial endangerment) be added to proposed Section 69060(c)?").

29. See *supra* note 9.

Given this uncertainty, simply deleting the reference to removal action would pose a risk of substantive change.

DTSC's second suggestion, substituting "response action" for "removal or remedial action" would not pose the same risk of substantive change. It would, however, remove the express reference to "removal action." For this reason, it seems that the change would likely reduce the likelihood of confusion or dispute.

Consistent with DTSC's second suggestion, the staff recommends that the reference to "removal or remedial action" be replaced with "response action." Unless the Commission directs otherwise, the language of proposed Section 69065 will be adjusted accordingly.

PROPOSED CONSENT: Proposed Section 69230. Waiver from Required Standards for Plan

Proposed Section 69230 continues Section 25356.1(h)(3). Section 25356.1(h)(3) contains what appears to be a redundant requirement. A Note describes this issue and seeks comment. DTSC staff commented and agreed that the identified requirement appears to be redundant.

Section 25356.1(h)(3) allows the department to waive the requirement that a remedial action plan meet certain standards if specified conditions are met. One of those conditions is that "[t]he total cost of the removal action is less than two million dollars ($2,000,000)."[30] However, if that condition is met, it appears that a remedial action plan would not be required at all. Section 25356.1(h)(1) indicates that a remedial action plan is not required where "the department, a regional board, or a responsible party takes a removal action at a site and the estimated cost of the removal action is less than two million dollars ($2,000,000)."

Despite DTSC staff's agreement that this condition appears to be redundant, the staff believes that it would be best to leave this provision unchanged for now. The staff recommends that this matter be included on the list of issues for possible future study, along with other seemingly redundant or obsolete provisions.[31]

30. See proposed Section 69230(d).
31. See Memorandum 2020-62, Exhibit p. 2 ("Should proposed Section 69230(d) be repealed as redundant, given the rule in proposed Section 69225(a)?").

PROPOSED CONSENT: Proposed Section 69685. Recovery for Natural Resources Damages

Proposed Section 69685 continues Section 25352(c). Section 25352(c) contains a cross-reference for which the appropriate update is unclear. A Note sought comment on this issue:

> Section 25352(c) requires the Governor or authorized state representative to recover certain costs "[n]otwithstanding Section 25355." Section 25355 would be recodified as multiple sections (proposed Sections 68850, 69005, 69130(a), and 69135). It is unclear which provisions of Section 25355 are relevant to the cross-reference in Section 25352(c), as none appear to limit or place conditions on the recovery of funds. Proposed Section 69135 (recodifying Section 25355(c)(1) and (d)) requires the department to make a reasonable effort to notify potentially responsible parties before undertaking a response action, but expressly provides that "[a] responsible party may be held liable pursuant to this part whether or not the person was given the notice …." **The Commission welcomes comment on how this cross-reference should be updated.**

DTSC staff commented that only one of the proposed sections recodifying Section 25355 refers to the Governor and, thus, seems to be the correct reference. The referenced proposed Section provides:

> 68850. The Governor is responsible for the coordination of all state response actions for sites identified in Article 5 (commencing with Section 68760) of Chapter 4 in order to assure the maximum use of available federal funds.

If the cross-reference were updated to refer to proposed Section 68850, proposed Section 69685 would require that certain costs be recovered from a responsible party, even if that might be in conflict with the directive in proposed Section 68850 to maximize the use of federal funds. It makes sense that the law would prioritize imposing costs on responsible parties over maximizing the use of federal funds.

The staff recommends that the cross-reference to Section 25355 be updated to refer to proposed Section 68850.

Unless the Commission directs otherwise, the cross-reference in proposed Section 69685 will be updated to refer to proposed Section 68850.

PROPOSED CONSENT: Proposed Section 70070. Manner of Determination

Proposed Section 70070 restates Section 25390.5. Section 25390.5(g) contains a seemingly erroneous cross-reference to "this subdivision." A Note sought comment on whether the cross-reference should be generalized to apply to the

section as a whole or some subset of the section. Section 25390.5(g) provides (with cross-reference in bold, bracketed text):

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

The provision refers to a "party submitting information under this subdivision" (i.e., subdivision (g)), but the subdivision does not provide for a party to submit any information. Prior subdivisions (Section 25390.5 (b), (c)) provide for the potentially responsible party seeking reimbursement to submit a "responsible party search report" and allows other parties to submit additional information related to the proposed orphan share percentage or the list of responsible parties (required contents of the responsible party search report).

DTSC staff comment suggests that, read in context, subdivision (g) limits judicial review to "a showing of fraud by a party submitting information to support apportionment or payment of claims (the agency's decision on apportionment or payment of claims is a final agency action)." DTSC staff concludes that the reference to "this subdivision" should instead refer to the entire section.

The staff recommends that the cross-reference be updated accordingly.

Unless the Commission directs otherwise, the reference to "this subdivision" in proposed Section 70070(g) will be corrected to refer instead to "this section."

PROPOSED CONSENT: Proposed Section 70230. "Eligible Property"

Proposed Section 70230 restates Section 25395.20(a)(6) and (7). Section 25395.20(a)(6) contains several problematic cross-references. Notes request comment on how to address these cross-references.

Proposed Section 70230 defines "eligible property." That definition provides in part (with relevant cross-references in bold):

> (a) "Eligible property" means a site that is any of the following:
> …

(3) An underutilized property that is a property located [**in an enterprise zone established pursuant to the Enterprise Zone Act (Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government Code), in a project area for which a redevelopment plan has been approved pursuant to Article 4 (commencing with Section 33300) of Chapter 4 of Part 1 of Division 24, or in an eligible area, as determined pursuant to paragraph (2) of subdivision (c) of Section 7072 of the Government Code]**.

…

(5) A brownfield or an underutilized property described in paragraph (3) that will be the site of a contiguous expansion of an operating industrial or commercial facility owned or operated by one of the following:

…

(C) A small business incubator that is undertaking the expansion with the **[assistance of a grant authorized by Section 15339.3 of the Government Code or a loan guarantee provided pursuant to Section 14090 of the Corporations Code]**.

The proposed updates for the cross-references in paragraph (a)(3) and subparagraph (a)(5)(C) will be discussed, in turn, below.

Proposed Updates for Paragraph (a)(3)

Paragraph (a)(3) specifies that underutilized properties located in any of three referenced locations are "eligible properties." For two of those three locations, the relevant laws authorizing those locations to be designated have been repealed. A Note describes the issue, providing in part:

> [Regarding the cited provisions in paragraph (a)(3), the] Enterprise Zone Act and Government Code Section 7072 have been repealed. See 2013 Cal. Stat. ch. 69, § 2. While these obsolete cross-references could be excised, it is unclear whether the relevant enterprise zones and eligible areas designated under these former provisions may have ongoing effect.
>
> In 2012, legislation "eliminate[d] redevelopment agencies (RDAs) and specifie[d] a process for the orderly wind-down of RDA activities." See Senate Floor Analysis of Assembly Bill 26 (1st Ex. Sess.) (June 15, 2011), p. 1. While redevelopment plans prepared before this change may have continuing effect, this provision is likely to become obsolete over time as old plans expire and no new plans are prepared.
>
> The Commission does not know whether [proposed Section 70230(a)(3)] is obsolete (or will become so soon) or could be adjusted to achieve the intended legislative purpose (and, if so, what changes are needed). The Commission welcomes comment on how this provision should be addressed in the proposed recodification.
>
> …

The Commission did not receive comment on how to update these cross-references.

The staff conducted some additional research to determine whether the enterprise zones and eligible areas designated under the former Enterprise Zone Act have continuing effect. For enterprise zones, the staff found a couple of Revenue and Taxation Code provisions that cite to enterprise zones under former law.[32] It appears that those zones have some ongoing effect on taxation.

For the repealed provisions cross-referenced in paragraph (a)(3), the staff recommends against deleting the cross-references. As indicated above, there is some indication that the areas designated under the former Enterprise Zone Act have continuing effect. For this reason, the staff proposes to update these references to refer to former law. For readability, the staff proposes organizational changes to the provision. In addition, the staff proposes a technical correction to the redevelopment law reference. Specifically, the staff proposes to revise paragraph (a)(3) as follows:

> (3) An underutilized property that is a property located in any of the following:
>
> (A) An ~~an~~ enterprise zone established pursuant to the former Enterprise Zone Act (former Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government ~~Code), in a~~ Code).
>
> (B) A project area for which a redevelopment plan has been approved pursuant to Article 4 (commencing with Section ~~33300)~~ 33330) of Chapter 4 of Part 1 of Division ~~24, or in an~~ 24.
>
> (C) An eligible area, as determined pursuant to paragraph (2) of subdivision (c) of former Section 7072 of the Government Code.

Unless the Commission directs otherwise, the language of proposed Section 70230(a)(3) will be revised as presented above.

Proposed Updates for Subparagraph (a)(5)(C)

For the repealed provisions cross-referenced in subparagraph (a)(5)(C), the Note describes the history regarding those provisions:

---

32. See, e.g., Rev. & Tax Code § 17053.73(b)(8)(A) (an "economic development area" includes "[a] former enterprise zone. For purposes of this section, 'former enterprise zone' means an enterprise zone designated and in effect as of December 31, 2011, any enterprise zone designated during 2012, and any revision of an enterprise zone prior to June 30, 2013, under former Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government Code, as in effect on December 31, 2012, excluding any census tract within an enterprise zone that is identified by the Department of Finance pursuant to Section 13073.5 of the Government Code as a census tract within the lowest quartile of census tracts with the lowest civilian unemployment and poverty."); see also Rev. & Tax Code § 23626(b)(8)(A).

> Proposed Section 70230(a)(5)(C) … cross-refers to two repealed sections related to small business grants and loan guarantees. Although the cross-referenced sections were repealed, it appears that the legislation repealing these sections shifted (rather than eliminated) the authority for small business grant and loan guarantee programs. More specifically, the 2003 bill repealing Government Code Section 15339.3 moved duties related to small business loans from one agency, which was being abolished, to another agency (the Business, Transportation and Housing Agency). See Legislative Counsel's Digest for Assembly Bill 1757 (2003 Cal. Stat. ch. 229). In 2013, the legislation repealing Corporations Code Section 14090 transferred functions of the Business, Transportation and Housing Agency related to small businesses to a new agency, the California Infrastructure and Economic Development Bank. See Legislative Counsel's Digest for Assembly Bill 1247 (2013 Cal. Stat. ch. 537). However, it is unclear how the small business grant and loan guarantee program may have changed over this time and whether this provision should be deleted as obsolete or updated to achieve the intended legislative purpose. The Commission welcomes comment on how to address this provision in the proposed recodification.
>
> …

DTSC staff commented that these cross-references should be updated and remain in place.

For one of the referenced sections, there appears to be a clear successor provision. Specifically, the section references a loan guarantee under Corporations Code Section 14090. Formerly, that section specified that "[c]orporations shall give high priority to the issuance of loan guarantees to small business incubators, and to businesses that lease space in incubators."[33] That substance is largely continued in Government Code Section 63089.71. The staff recommends that the cross-reference to Corporations Code Section 14090 be updated to refer to this Government Code section.

For the other referenced section, however, the staff could not find a successor provision. Former Government Code Section 15339.3 authorized grants to nonprofits or public agencies to provide funding to incubator businesses. The staff did not find a current provision of the code that authorizes similar grants. For this reason, the staff proposes to delete the reference to "a grant authorized by Section 15339.3 of the Government Code" from proposed Section 70230(a)(5)(C).

With these changes, subparagraph (a)(5)(C) would be updated as follows:

33. See former Corp. Code § 14090, as amended by 1994 Cal. Stat. ch. 785, § 29.

(C) A small business incubator that is undertaking the expansion with the assistance of a ~~grant authorized by Section 15339.3 of the Government Code or a~~ loan guarantee provided pursuant to Section ~~14090 of the Corporations Code.~~ 63089.71 of the Government Code.

Unless the Commission directs otherwise, the language of proposed Section 70230(a)(5)(C) will be revised as presented above.

Addition to List of Issues for Possible Future Study

In general, the staff recommends a conservative approach to addressing the cross-references in proposed Section 70230 for now. **The staff also recommends that this provision be included on the list of issues for possible future study, as follows:**

> **Should proposed Section 70230 (defining "eligible property") and related provisions that cross-refer to this section be revised in light of the repeals and changes to the cross-referenced laws, which are used to determine whether a property is an "eligible property"?**[34]

PROPOSED CONSENT: Proposed Section 70280. "Urban Area"

Proposed Section 70280 continues Section 25395.20(a)(19). Section 25395.20(a)(19) contains a broken cross-reference. A Note requests comment on the best way to update this cross-reference and offers some possibilities:

> [This provision] refers to an urbanized area as defined in Public Resources Code Section 21080.7(b)(2). The cross-referenced section was repealed in 2003. See 2002 Cal. Stat. ch. 1039, § 7. It is unclear how the cross-reference should be updated. **The Commission welcomes comment on this issue.**
>
> Based on the history of Public Resources Code Section 21080.7, the Commission identified two candidates for replacing the obsolete cross-reference:
>
> (1) Before its repeal, Public Resources Code Section 21080.7 cross-referred to "urbanized areas" designated by the U.S. Census Bureau. See former Pub. Res. Code § 21080.7, as amended by 1993 Cal. Stat. ch. 1130, § 6. The cross-reference to Public Resources Code Section 21080.7(b)(2) in Section 25395.20(a)(19)(2) could be updated to incorporate the substance of the former rule (i.e., it could refer to urbanized areas designated by the U.S. Census Bureau). See, e.g., https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html.

34. This issue would replace the the issue related to proposed Section 70230 that was listed in the Exhibit to Memorandum 2020-62. See Memorandum 2020-62, Exhibit p. 4 ("Should proposed Section 70230 (defining 'eligible property') be adjusted, in light of changes to the provisions it cross-references, to achieve its intended legislative purpose?").

(2) The legislation that repealed Public Resources Code Section 21080.7 also added a new section that defines "urbanized area." See Pub. Res. Code § 21071. That new definition of "urbanized area" is significantly different from the one in the repealed provision. The current definition focuses on incorporated areas above a specified population threshold and unincorporated areas that meet specified criteria (related to population, compact development, and location in proximity to incorporated areas or urban growth boundaries). The cross-reference to Public Resources Code Section 21080.7(b)(2) in Section 25395.20(a)(19)(2) could be updated to refer to the new definition of "urbanized area" in Public Resources Code Section 21071.

Looking beyond the legislative history, one could identify other reasonable candidates to replace this outdated cross-reference. For instance, the Commission received informal input from DTSC staff that, from a practical perspective, the definition of "urban area" in Section 25395.79.2 would be a good alternative. Although this option may be preferable from a practical perspective, such a change would likely be seen as substantive.

The Commission welcomes comment on how to update the cross-reference to Public Resources Code Section 21080.7(b)(2) in Section 25395.20(a)(19)(2). The Commission also seeks comment on whether to add this provision to the list of substantive issues for possible future study that is located at the end of its recommendation, so that it could consider a more robust set of options.

DTSC staff commented that each of the options presented in the Note would constitute a substantive change.

For now, the best approach appears to be updating the provision to refer to former law and adding this provision to the list of items for future study.

The staff recommends that proposed Section 70280 be revised as follows:

70280. "Urban area" means either of the following:

(a) The central portion of a city or a group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile.

(b) An urbanized area as defined in paragraph (2) of subdivision (b) of former Section 21080.7 of the Public Resources ~~Code.~~ Code, as enacted by Section 6 of Chapter 1130 of the Statutes of 1993.

Unless the Commission directs otherwise, the language of proposed Section 70280 will be revised as presented above.

In addition, the staff recommends that this issue be included on the list of issues for possible future study, as follows:

Should proposed Section 70280 (defining "urban area") be revised in light of the repeal of former Section 21080.7 of the Public Resources Code?[35]

PROPOSED CONSENT: Proposed Section 70805. Amount of Subsidies

Proposed Section 70805 continues Section 25395.42(b). Section 25395.42(b) contains a seemingly erroneous cross-reference. In particular, this section refers to "cost overrun insurance provided pursuant to subdivision (b) of Section 25395.41." A Note describes the problem:

> It is not clear how the cross-reference to Section 25395.41 in Section 25395.42(b) should be updated, as Section 25395.41(b) does not seem to relate to the providing of insurance products. Rather it appears that this cross-reference should instead point to subdivision (c) of Section 25395.41, which is twice cross-referenced in this proposed section as a provision pursuant to which insurance products are provided.

DTSC staff comment agreed that it appears that this reference should be to subdivision (c) (as opposed to subdivision (b)) of Section 25395.41.

Given that, the staff recommends that this reference be updated to refer to proposed Section 70770, which continues Section 25395.41(c).

PROPOSED CONSENT: ADDITION OF AUTHORIZING PROVISION FOR FUTURE WORK

Previously, in its nonsubstantive recodification of the deadly weapons statutes, the Commission's recommendation included a list of issues for possible future study.[36] In the proposed legislation, the Commission included a corresponding uncodified provision authorizing the Commission to work on the issues identified on the list.[37] The staff recommends that the Commission take a similar approach in its recommendation in this study.

At the November meeting, the Commission discussed the character of the list of issues that will be included in its recommendation. The Commission decided that the list would be a comprehensive list of issues and include items that may not be appropriate for future study by the Commission.

---

35. This issue would replace the the issue related to proposed Section 70280 that was listed in the Exhibit to Memorandum 2020-62. See Memorandum 2020-62, Exhibit p. 4 ("Should the definition of 'urban area' in proposed Section 70280 be adjusted in light of the repeal of the referenced provision defining urbanized area?").

36. See *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217, 265-280 (2009).

37. See *id*. at 940.

In line with that decision, the staff proposes the following uncodified provision be added to the proposed legislation in the Commission's recommendation:

> **Law Revision Commission Studies**
> SEC. ____. The California Law Revision Commission is authorized to study and to make recommendations to the Legislature and the Governor regarding minor substantive improvements to Part 2 (commencing with Section 68000) of Division 45 of the Health and Safety Code, including improvements of that type identified in the report prepared by that commission pursuant to Resolution Chapter 46 of the Statutes of 2020.

PROPOSED CONSENT: REVISIONS TO THE LIST

In the tentative recommendation, the introductory text describing the list of substantive issues for possible future study specifies that "[f]or the most part, the listed issues are relatively minor, clean-up issues, but the issues could not be addressed without risking the possibility of a substantive change." Given the character of the list as a comprehensive catalog of the items the Commission encountered in this study, **the staff recommends deleting this language from the recommendation.**

Early in the course of this study, the Commission agreed in principle to add statutory concerns identified by the Independent Review Panel ("IRP") to the list of issues for possible future study.[38] From 2015 to 2018, the IRP studied DTSC and made recommendations to improve DTSC's programs.[39] As the Commissioners may recall, the Commission's work on this topic was first proposed by the IRP and, after the IRP completed its work, the legislative assignment to the Commission soon followed.[40] The staff will review the IRP's reports to determine whether there are issues that should be included on the list for this recommendation. **The staff will present any possible additions in a future memorandum.**

APPROVAL OF PROPOSED CONSENT MATTERS

Does the Commission approve of the proposed consent treatment for the items described in this memorandum?

38. See Minutes (Oct. 2018), pp. 3-4.
39. See generally https://dtsc.ca.gov/independent-review-panel/.
40. See Memorandum 2018-52, pp. 2-3.

NEXT STEPS

Consistent with the Commission's decisions, the staff will prepare a draft final recommendation for the Commission's consideration at a future meeting. The future memorandum will also address the outstanding issues flagged in this memorandum.

Respectfully submitted,

Kristin Burford
Staff Counsel