Memorandum 2019-49

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

In this study, the Commission 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. The Commission decided to proceed with the recodification of Chapter 6.8 first, then move to the recodification of Chapter 6.5.

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.

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.

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


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

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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. Any other proposed changes to the language of the provision would also be described in the corresponding Comment or Staff Note.

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. Where the appropriate resolution was unclear, the staff requested comment on the issue.

In addition, the staff identified a few provisions that could seemingly benefit from further study and possible substantive reform. 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. 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:

2. Recovery of Specific Costs or Funds
3. Parties

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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., Staff Note for proposed Section 69890.
7. See, e.g., Comment for proposed Section 69865.
8. See, e.g., Staff Notes for proposed Sections 70070 (Note 1) and 70090.
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.
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.\textsuperscript{11} The chapter is organized into the following articles:

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.\textsuperscript{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.

\textsuperscript{11} See proposed Section 70000(b).
\textsuperscript{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.” 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. 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).
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

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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


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

DIVISION 45. HAZARDOUS SUBSTANCE RESPONSE


PART 2. HAZARDOUS SUBSTANCE ACCOUNT


CHAPTER 8. COST RECOVERY


§ 69650. Recovery of costs generally

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

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

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

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

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

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

Comment. Section 69650 restates former Section 25360 without substantive change. This provision was restated to singularize the phrase “liable person or persons.” This is a nonsubstantive change. See Section 13.
See Sections 68050 (“department”), 68085 (“person”), 68100 (“regional board”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”), 68165 (“state account”).

§ 69655. Interest on liability to department

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

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

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

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

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

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

§ 69660. Judgment not bar to future action

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

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

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

§ 69665. Strict liability

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

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

§ 69670. Contribution and indemnity

69670. (a) A person who has incurred response or corrective action costs in accordance with this part, Chapter 6.5 (commencing with Section 25100) of Division 20, or the federal act may seek contribution or indemnity from any person who is liable pursuant to this part.
(b) An action to enforce a claim may be brought as a cross-complaint by any defendant in an action brought pursuant to Section 69650 or this section, or in a separate action after the person seeking contribution or indemnity has paid response or corrective action costs in accordance with this part, Chapter 6.5 (commencing with Section 25100) of Division 20, or the federal act.

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

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

Comment. Section 69670 continues former Section 25363(d) without substantive change. See Sections 68055 (“director”), 68065 (“federal act”), 68085 (“person”), 68140 (“response”).

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

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

Article 2. Recovery of Specific Costs or Funds

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

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

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

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

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

(2) This provision appears to be stating a transitional rule for the recovery of costs originally paid out of accounts that no longer exist (as of July 1, 2006). Given that over a decade has passed since these accounts were consolidated, the staff is unsure whether this provision has ongoing utility. The staff welcomes comment on this issue.
§ 69685. Recovery for natural resource damages

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

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

Staff Note. Section 25352(c) requires the Governor or authorized state representative to recover certain costs “[n]otwithstanding Section 25355.” Section 25355 is proposed for recodification as multiple sections (proposed Sections 68850, 69005, 69130(a), and 69135). It is unclear which provisions of Section 25355 are relevant to this cross-reference, as none appear to limit or place conditions on the recovery of funds. Proposed Section 69135 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 staff welcomes comment on how this cross-reference should be updated.

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

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

Comment. Section 69690 continues former Section 25353(c) without substantive change.

See Section 68050 (“department”).

Article 3. Parties

§ 69700. State account

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

Comment. Section 69700 continues former Section 25361(a) without substantive change.

See Sections 68165 (“state account”).

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

69705. (a) In the event a district attorney or a city attorney has brought an action for civil or criminal penalties pursuant to Chapter 6.5 (commencing with Section 25100) of Division 20 against any person for the violation of any provision of that chapter, or any rule, regulation, permit, covenant, standard, requirement, or order issued, adopted, or executed thereunder, and the department has expended moneys from the state account pursuant to Section 68875 for immediate corrective action in response to a release, or threatened release, of a hazardous substance that has resulted, in whole or in part, from the person’s acts or omissions, the state account may be made a party to that action for the purpose of recovering the costs against that person.
(b)(1) If the state account is made a party to the action, the Attorney General shall represent the state account for the purpose of recovering the moneys expended from the account.

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

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

Comment. Section 69705 continues former Section 25361(b) without substantive change. See Sections 68050 (“department”), 68075 (“hazardous substance”), 68085 (“person”), 68105 (“release”), 68140 (“response”), 68165 (“state account”).

Staff Note. Proposed Section 69705(a) refers to moneys expended “pursuant to Section 25354.” Section 25354 is proposed for recodification as multiple sections (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. Absent comment on this issue, this proposed cross-reference update will be presumed correct.

§ 69710. Joinder of potentially liable person

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

Comment. Section 69710 continues former Section 25362 without substantive change. See Section 68085 (“person”).

Article 4. Timing

§ 69725. Commencement prior to expiration of limitations period

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

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

§ 69730. Cost recovery actions

69730. (a)(1) Except as provided in paragraph (2) and subdivision (b), an action under Section 69650 for the recovery of costs incurred by the department or a regional board in carrying out or overseeing a response or corrective action pursuant to this part or Chapter 6.5 (commencing with Section 25100) of Division
20, or as otherwise authorized by law, shall be commenced within three years after
completion of all response or corrective actions has been certified by the
department or a regional board.
(2) If operation and maintenance is required as part of the response or corrective
action, the action for recovery of costs incurred by the department or a regional
board shall be commenced within three years after completion of operation and
maintenance has been certified by the department or a regional board.
(b) No action described in subdivision (a) may be brought that, as of December
31, 2015, had not been commenced by the department within three years after the
certification of the completion of the removal or remedial action.

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

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

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

§ 69735. Recovery actions for natural resources damages
69735. An action under Section 69685 for costs incurred by the department for
the purposes specified in Section 69450 shall be commenced within three years
after certification by the department of the completion of the activities authorized
under Section 69450.

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

See Section 68050 (“department”).

§ 69740. Reserved and continuing jurisdiction
69740. (a)(1) In an action described in Section 69730 or 69735 for recovery of
response or corrective action costs, oversight costs, or damages, where the court
has entered a judgment for past costs or damages, the court shall also enter an
order reserving jurisdiction over the case and the court shall have continuing
jurisdiction to determine any future liability and the amount of the future liability.
(2) The department or regional board may immediately enforce the judgment for
past costs and damages.

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

Comment. Section 69740 continues former Section 25360.4(c) without substantive change.
See Sections 68050 (“department”), 68080 (“operation and maintenance”), 68100 (“regional board”), 68140 (“response”).

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

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

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

§ 69745. Article inapplicable to cost recovery under Water Code

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

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

See Section 68100 (“regional board”).

Article 5. Scope of Liability

§ 69760. Determination of party’s liability

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

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

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

§ 69765. Contractor liability

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

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

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”).
§ 69795. Certification required to bring action

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

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

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

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

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

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

(3) Interferes with response action activities.

Comment. Section 69795 continues former Section 25360.2(c) without substantive change. See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140 (“response”), 68165 (“state account”), 69780 (“owner,” “property”).

§ 69800. Rebuttal of presumption

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

Comment. Section 69800 continues former Section 25360.2(d) without substantive change. See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140 (“response”), 68165 (“state account”), 69780 (“owner,” “property”).

Staff Note. Section 25360.2(d) describes how the presumption of nonliability can be rebutted in an action to recover costs “incurred from the state account,” but does not address how the presumption could be rebutted in other cases. The presumption appears to apply in other types of cases, like a contribution action brought by a private party. See proposed Sections 69670 (contribution and indemnity), 69790 (presumption of no liability pursuant to this part). The statute, however, is silent on how to rebut the presumption in those cases. The staff would recommend adding this issue to the list of substantive issues for possible future study.
Article 7. Liability of Easement Holder or Special District

§ 69810. Definitions

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

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

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

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

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

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

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

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

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

Comment. Section 69810 continues former Section 25360.3(a) without substantive change. See Sections 68075 (“hazardous substance”), 68105 (“release”).

§ 69815. Application

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

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

Comment. Section 69815 continues former Section 25360.3(d) and (e) without substantive change. Redundant language citing to the applicable definitions was not continued. See Section 69810 (“owner,” “property”).

§ 69820. Presumption

69820. (a) Notwithstanding any other provision of this part, if an environmental assessment of property discovers no evidence of the presence or likely presence of a release or a threat of a release of a hazardous substance, and a hazardous...
substance release is subsequently discovered on, to, or from that property, the owner of that property is entitled to a rebuttable presumption, affecting the burden of producing evidence, that the owner is not a liable person or responsible party for purposes of this part. An owner is entitled to this presumption whether the action is brought by the state or by a private party seeking contribution or indemnification.

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

Comment. Section 69820 continues former Section 25360.3(b) without substantive change. See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68140 (“response”), 68145 (“responsible party”), 68165 (“state account”), 69810 (“environmental assessment,” “owner,” “property”).

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

§ 69825. Certification required to bring action

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 9. Liability Agreements

§ 69860. Agreement not effective to transfer liability for recoverable costs or expenditures
69680. Except as provided in Article 10, no indemnification, hold harmless, conveyance, or similar agreement shall be effective to transfer any liability for cost or expenditures recoverable under this part. This section shall not bar any
agreement to insure, hold harmless, or indemnify a party to the agreement for any
costs or expenditures under this part.

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

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

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

Article 10. Former Kaiser Steel Corporation Steel Mill Site

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

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

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

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

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

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

Staff Note. Section 25364.1(a)(4) defines the term “site.” “Site” is defined for the entire part in
proposed Section 68155. The staff welcomes comment on whether the two definitions of
“site” have caused problems in practice.
§ 69880. Authority of director to release specified persons from liability

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

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

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

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

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

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

§ 69885. Conditions required for release to be granted

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

(a) A responsible party owner has entered into a stipulated settlement of an order issued by the department pursuant to Section 25187, 68870, or 69055 to perform the removal or remedial action at the site in accordance with the remedial action
plan and has arranged financing, contingent only upon obtaining releases from potential liability pursuant to Section 69880, for the costs of performing the removal or remedial action.

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

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

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

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

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

See Sections 68050 (“department”), 68055 (“director”), 68075 (“hazardous substance”), 68085 (“person”), 68105 (“release”), 68125 (“remedy”), 68135 (“remove”), 68145 (“responsible party”), 68155 (“site”), 68975 (“affiliate,” “responsible party owner,” “site”).

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

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

§ 69890. Limitations on release from liability

69890. Notwithstanding any other provision of this article, a release from liability granted pursuant to Section 69880 shall not extend to any of the following:
(a)(1) Any person who was a responsible party for a hazardous substance release existing at the site before the release from liability was granted

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

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

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

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

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

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

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

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

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

§ 69895. Required content of release from liability

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

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

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

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

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

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

See Sections 68125 (“remedy”), 68135 (“remove”), 68155 (“site”), 69875 (“site”).
Article 11. Costs Incurred at BKK Landfill Site

§ 69910. Contribution towards liability

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

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

Comment. Section 69910 continues former Section 25363.5 without substantive change. See Sections 68065 ("federal act"), 68075 ("hazardous substance"), 68105 ("release"), 68140 ("response"), 68155 ("site").

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

Article 12. Settlement

§ 69920. Settlement involving minor portion of response costs

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

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

2) The potentially responsible party is the owner of the real property on or in which the site is located, did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the site, and did not
contribute to the release or threat of release of a hazardous substance at the site through any act or omission. This paragraph does not apply if the potentially responsible party, at the time of the purchase of the real property, knew or should have known that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

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

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

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

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

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

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

Article 13. Liens

Staff Note. Section 25365.6(a) provides that a lien arises when response action costs are incurred by “the department or regional board.” However, subdivisions (b) and (c) of Section 25365.6 refer only to the department as the lienholder. It is unclear whether the department would necessarily be the lienholder if a lien is imposed pursuant to these provisions, particularly in a situation where the regional board incurred the costs. The staff welcomes comment on this issue.
§ 69935. Lien on real property

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

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

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

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

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

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

§ 69940. Force and effect of lien

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

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

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

§ 69945. Contents of lien

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

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

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

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

§ 69950. Department not responsible party due to lien

69950. The department shall not be considered a responsible party for a hazardous substance release site because a claim and lien is imposed pursuant to this article.
Comment. Section 69950 continues former Section 25365.6(b) without substantive change.
See Sections 68050 (“department”), 68075 (“hazardous substance”), 68105 (“release”), 68145 (“responsible party”), 68155 (“site”).

§ 69955. Deposit of funds recovered
69955. All funds recovered pursuant to this article shall be deposited in the state account.
Comment. Section 69955 continues former Section 25365.6(e) without substantive change.
See Section 68165 (“state account”).

CHAPTER 9. ORPHAN SHARE REIMBURSEMENT


§ 70000. Definitions
70000. For purposes of this chapter, the following definitions shall apply:
(a) “Fund” means the Orphan Share Reimbursement Trust Fund established pursuant to Section 70020.
(b) “Orphan share” means the share of liability for the costs of response action that is attributable to the activities of persons who are defunct or insolvent, as determined pursuant to Section 70070.
Comment. Section 70000 continues former Section 25390 without substantive change.
See Sections 68085 (“person”), 68140 (“response”).

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

§ 70005. Legislative findings and declarations
70005. The Legislature finds and declares all of the following:
(a) This chapter, which establishes an Orphan Share Reimbursement Trust Fund, operates in conjunction with the federal liability scheme under the federal act as in effect on July 1, 1998, for the recovery of response costs expended by government agencies.
(b) Under federal liability, at sites where there are insolvent or defunct parties that cannot contribute to the cost of cleanup, viable responsible parties pay the share of liability for that cleanup that may be attributable to insolvent and defunct parties.
(c) The Orphan Share Reimbursement Trust Fund is created to mitigate the payment of an insolvent or defunct party’s liability share by viable responsible
parties, to the extent money in the fund is available, and to encourage responsible
parties to quickly and efficiently remediate contamination.

Comment. Section 70005 continues former Section 25390.1 without substantive change.
See Sections 68065 (“federal act”), 68140 (“response”), 68145 (“responsible party”), 68155
(“site”), 70000 (“fund”).

§ 70010. Effect of chapter
70010. (a) This chapter does not prohibit, and is not intended to prohibit, the
department, the regional board, or the Attorney General from pursuing any
existing legal, equitable, or administrative remedies, pursuant to federal or state
law, against any potentially responsible party.
(b) No liability or obligation is imposed upon the state pursuant to this chapter,
and the state shall not incur a liability or obligation beyond the payment of claims
pursuant to this chapter, to the extent that money is available and has been
allocated by the administrator under subdivision (a) of Section 70050. No legal
action may be brought against the Orphan Share Reimbursement Trust Fund in its
own name.

Comment. Section 70010 continues former Section 25390.2 without substantive change.
See Sections 68050 (“department”), 68100 (“regional board”), 68125 (“remedy”), 68145
(“responsible party”).

Article 2. Orphan Share Reimbursement Trust Fund

§ 70020. Creation, administration, and funding of Orphan Share Reimbursement Trust
Fund
70020. (a) The Orphan Share Reimbursement Trust Fund is hereby created in
the State Treasury.
(b) The administrator of the fund may expend the money deposited in the fund
as provided in this chapter, upon appropriation by the Legislature. The
administrator of the fund shall act in a fiduciary capacity, shall prudently
administer the fund, and shall protect the fund from any unreasonable or
unjustified claims, including any unreasonable or unjustified determinations of the
orphan share percentage.
(c) If an appropriation from the General Fund is made to the fund in any fiscal
year and an amount greater than five million dollars ($5,000,000) in unexpended
funds, beyond any amount approved by the administrator of the fund to pay claims
pursuant to this chapter from that General Fund appropriation, remain in the fund
at the end of that fiscal year, and if the department determines that additional
funding for orphan sites beyond that appropriated from the state account is
required for the next fiscal year, the administrator may expend the amount in
excess of five million dollars ($5,000,000) from the General Fund appropriation to
pay for response costs incurred by the department or the regional boards under this
part at sites listed pursuant to Article 5 (commencing with Section 68760) of Chapter 4 where no viable responsible parties exist.

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

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

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

§ 70025. Permissible expenditures

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

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

(b) For the costs of implementing this chapter.

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

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

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

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

Article 3. Claims for Orphan Share Reimbursement

§ 70040. Persons who may file claim

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

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

(b) The department or the regional board has approved a final remedy for the site under Article 12 (commencing with Section 69190) of Chapter 5.
(c) The department and the potentially responsible party have entered into a written, enforceable cleanup agreement or order embodied in a consent order issued pursuant to Section 68870 or 69055, or the regional board and the potentially responsible party have entered into a written, enforceable cleanup agreement or order that provides for the completion of all response actions necessary at the site, conducted pursuant to this part and under the oversight and at the direction of the department or the regional board. The agreement shall provide for the payment by the potentially responsible party of the department’s or the regional board’s response costs.

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

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

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

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

Comment. Section 70040 continues former Section 25390.4(a) without substantive change. See Sections 68050 (“department”), 68100 (“regional board”), 68125 (“remedy”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”).

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

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

(2) Section 25358.3 has been proposed for recodification as several sections (proposed Sections 68650, 68655, 68660, and 68870). Proposed Section 68870 (which recodifies Section 25358.3(a)) is the only provision that addresses the department’s issuance of orders to parties and, thus, appears to be the only provision that is relevant to this cross-reference. Proposed Section 68660 relates to relief sought in court, in which case the court would be the one to issue orders. However, this provision does not appear to encompass court orders. For this reason, the cross-reference to Section 25358.3 has been updated to refer only to Section 68870. **Absent comment on this issue, this proposed cross-reference update will be presumed correct.**
§ 70045. Forms and procedures for claims

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

(a) Requirements that the claimant provide, at a minimum, all of the following documentation:
   (1) A sworn verification of the claim to the best of the information known to the claimant or within the claimant’s possession or control.
   (2) All records and information pertaining to the site and relevant to the ownership, operation, or control of the site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the site, within the possession or control of the claimant, including, but not limited to, the information specified in subdivision (a) of Section 68440.
   (3) Certification of all response costs that have been, or will be, incurred at the site by the potentially responsible party, and an estimate of the total cost of completion of the approved final remedy at the site.

(b) Procedures specifying that claims shall be filed only at the two following specific time periods during the performance of a response action:
   (1) After the final remedy is selected under Article 12 (commencing with Section 69190) of Chapter 5.
   (2) After the department or the regional board determines that the response action is complete. The department or the regional board shall not include operation and maintenance activities in determining whether the response action is complete under this paragraph.

Comment. Section 70045 continues former Section 25390.4(b) without substantive change. See Sections 68050 (“department”), 68075 (“hazardous substance”), 68100 (“regional board”), 68125 (“remedy”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”), 70000 (“fund”).

§ 70050. Payment of claims

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

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

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

(3)(A) The administrator shall allocate the money available in the fund for the fiscal year among the claims filed by the July 30 deadline. The allocation shall be
based on the determination of the orphan share percentage at the facility under the
process set forth in Section 70070, the long-term financial stability and short-term
resources available in the fund, and the administrator’s fiduciary duty with respect
to the fund. Except as provided in subparagraph (B), the administrator shall pay
claims for funds in the order in which they are received.

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

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

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

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

Comment. Section 70050 continues former Section 25390.4(c) and (d) without substantive
change. See Sections 68145 (“responsible party”), 68155 (“site”), 70000 (“fund,” “orphan share”).

§ 70055. Sites for which claims not permitted

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

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

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

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

(d) Sites, or portions of sites, that have been fully remediated for which the
department or the regional board has determined that the response action is
complete prior to January 1, 1999. The department or the regional board shall not include operation and maintenance activities in determining whether the response action is complete under this section.

Comment. Section 70055 continues former Section 25390.7 without substantive change. See Sections 68050 (“department”), 68065 (“federal act”), 68080 (“operation and maintenance”), 68100 (“regional board”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”).

Article 4. Determination of Orphan Share

§ 70070. Manner for determination

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

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

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

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

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

(e) A potentially responsible party shall not assert, and the administrator of the fund shall not determine, that the orphan share percentage includes the share of liability attributable to a potentially responsible party’s acts that occurred before January 1, 1982, unless that share of responsibility is attributable to a person who is defunct or insolvent.
(f) In determining the orphan share percentage under this section, the administrator of the fund may perform any of the activities authorized in subdivisions (a) and (c) of Section 68440.

(g) 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.

Comment. Section 70070 restates former Section 25390.5 without substantive change. This provision was restated to singularize the phrase “party or parties.” This is a nonsubstantive change. See Section 13. An erroneous reference to “subdivision (a)” in subdivision (c) was corrected to refer to “subdivision (b).” See Sections 68050 (“department”), 68085 (“person”), 68100 (“regional board”), 68135 (“remove”), 68145 (“responsible party”), 68155 (“site”), 70000 (“fund,” “orphan share”).

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

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

Article 5. Enforcement and Cost Recovery

§ 70080. Recovery of costs paid from fund

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

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

See Sections 68050 (“department”), 68100 (“regional board”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”), 70000 (“fund”).
§ 70085. Penalty for withholding information or submitting false information

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

Comment. Section 70085 continues former Section 25390.6(b) without substantive change. See Sections 68050 (“department”), 68100 (“regional board”), 68140 (“response”), 68145 (“responsible party”), 68155 (“site”).

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

§ 70090. Lien for incurred costs

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

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

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

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

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

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

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

(2) The lien shall contain the legal description of the property, the assessor’s parcel number, and the name of the owner of record, as shown on the latest equalized assessment roll. The lien shall also contain a legal description of the property that is the site of the hazardous substance release, the assessor’s parcel number for that property, and the name of the owner of record, as shown on the latest equalized assessment roll, of that property.
(d) All funds recovered pursuant to this section shall be deposited in the fund.

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

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

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

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

Article 6. Operative Date

§ 70100. Operative date

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

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

(2) Establishes a revenue source for the fund.

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

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

See Section 70000 (“fund”).

Staff Note. Section 25390.9(a) provides that this law becomes operative “on the operative date of a statute” that meets at least one of specified conditions. The staff welcomes input on whether the specified conditions have been met such that this law is operative. If this law is operative, 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.

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**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.

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