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Subject: DFERRAL OF CLOSURE COSTS TO UNFUNDED CORRECTIVE ACTION
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Attachments: [Shift Req Fund Closure FR to Unfunded CA by Deceptive CE Assumptions 9 20 2016 v.1.doc](#)

I attended the Chatsworth meeting last night but pulled my speaker card due to the overwhelming Rocketdyne interest and drama. Attached is a letter to the IRP regarding tricks to defer/reduce Closure and contingent Post-closure AFR. Good meeting----very interesting--- great job maintaining order in a couple of tricky places. Phil

September 20, 2016

Independent Review Panel
Mr. Gideon Kracov, J.D., Chair
Mr. Mike Vizzier, Vice Chair,
Ms. Arezoo Campbell, PhD.
Department of Toxic Substances Control
1001 "I" Street, 25th Floor
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Dear Independent Review Panel members:

**USE OF DECEPTIVE CLOSURE COST ESTIMATE
ASSUMPTIONS TO DELIBERATELY LOW BALL DTSC'S
STATUTE- AND REGULATION-REQUIRED ASSURANCE OF
FINANCIAL RESPONSIBILITY FOR CLOSURE AND POST-
CLOSURE THEREBY SHIFTING CLOSURE COSTS TO
CORRECTIVE ACTION WHERE DTSC'S POLICY IS TO NOT
FUND ASSURANCE OF FINANCIAL RESPONSIBILITY**

As a preface, currently DTSC fails to require assurance of corrective action assurance financial responsibility (CAAFR) in the permits that it issues. Moreover, it does not require assurance of financial responsibility (AFR) in the corrective action orders or so-called corrective action consent agreements (CACAs) that it enters as a soft approach in lieu of actual orders. These CACAs are in reality discretionary decisions----since they are not orders. However, public concerns about cleanup are not taken into account since such CACAs are not noticed to the public and DTSC does not adhere to the California Environmental Quality Act (CEQA) statutes regarding such discretionary decisions. Worse, DTSC arbitrarily, effectively as an "underground regulation", ignores existing statutory requirements for facilities being permitted, and defers assurance of corrective action financial responsibility (CAAFR) to

remedy selection---which becomes in effect an indeterminate extension. The existing statute does not protect the public from such abuse with regard to closing Interim Status (IS) Facilities or those like Exide which operated for decades under IS. This “underground regulation” has been used to allow many facilities, such as Exide, to cease operation and/or declare bankruptcy without ever providing any CAAFR.

This whole business is made even more extremely objectionable, when DTSC also rolls closure and/or post-closure care into corrective action by deceptive cost estimates, mis-apprehension of the existing closure regulations, or other means. Through such sneaky business DTSC has deferred statutory and regulatory required closure and post-closure AFR into the “underground regulation” driven no AFR situation. This of course saves the regulated facilities considerable money and places the public at increased risk of having to pay for not corrective action but also closure and/or post-closure care. Exide is merely the latest example of the public’s paying for DTSC’s lack of requiring sufficient AFR for closure and post-closure care.

On July 13, 2016, I sent you an e-mail that described a longstanding problem at Evergreen Oil, one of DTSC’s permitted facilities, where the original Closure cost estimate ignored the soil and groundwater contamination that had resulted from facility operations and deliberately omitted soil and groundwater remediation costs. Contingent Post-closure care was also ignored in favor of Corrective Action. Soil and groundwater contamination has been known for years at this site but DTSC has not required adequate AFR by increasing its original lowball closure cost estimate to address known contamination. It has shuffled the true HWMU Closure costs off to the corrective action process where it has then used its “underground regulation” CAAFR “policy” to ignore AFR. It neither added a corrective action cost estimate through permit modification nor has it required any additional closure AFR to address the unfolding cleanup problems at Evergreen Oil.

Another used oil recycler, the Demenno/Kerdoon’s (D/K), has an existing 2001 permit (their permit renewal was noticed to the public in June 2016) that states “The Permittee shall conduct corrective action at the facility pursuant to Health and Safety Code, Section 25200.10. Corrective action shall be carried out under the corrective action consent agreement, Docket Number HWCA

99/00-3003, effective September 8, 2000.” The 2016 Permit renewal states “The Permittee shall conduct corrective action at the Facility pursuant to Health and Safety Code sections 25187 and 25200.10. Corrective action shall be carried out pursuant to the Corrective Action Consent Agreement, Docket Number HWCA 99/00/3003, issued by DTSC on September 8, 2000, and amended on March 25, 2002 (“Corrective Action Consent Agreement”), in accordance with DTSC’s December 8, 2011 directive to Permittee to conduct additional corrective action; and any subsequent agreements to be entered into and between DTSC and the Permittee, or any orders to be issued by DTSC.” H&SC §25200.10(b) requires for DTSC that, **“When corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action.”** Remarkably, and to its credit, DTSC included a requirement in its draft permit renewal that “Within thirty days of the effective date of this Permit, the Permittee shall establish a financial assurance mechanism for proposed corrective measures implementation in the DTSC approved amount of \$1,973,000.00. The amount of financial assurance will be adjusted to reflect the approved cost estimate of the final DTSC-selected remedy”. The Closure Plan states “The **TOTAL** estimated closure cost, including contingency is \$6,750,000. A 20 percent contingency has been added to the baseline estimated closure cost and is included in the above figure. Table I-3 is the facility’s closure cost estimate in 2013 dollars.” [Emphasis added]

However in the Closure Plan it is stated that” *Environmental Media – Closure Performance Standards for soil, groundwater, and soil vapor are set forth below. Groundwater and soil vapor are currently being addressed under the Corrective Action program; these media will continue to be addressed under Corrective Action and thus, closure performance standards are not specified here.* “This means that it is likely that necessary Closure AFR is being deferred. It is further stated that “Groundwater and soil vapor/vapor intrusion issues will continue to be managed under the Corrective Action program before, during, and after closure, as necessary.” Once closure is initiated, the cleanup needs to be brought under closure. Moreover, there is no “final DTSC-selected remedy” yet and it is reported that DTSC approved a Closure cost estimate for this Permit renewal that only addresses for removal of contaminated soil to maybe **three (3) feet** below ground surface. The Closure Plan states “Three samples will be collected for analysis from each sampling location, one just below the concrete -soil interface, one

at three feet below the concrete -soil interface, and one at five feet below the concrete -soil interface.” Sampling is to take place no deeper than **five (5) feet** bgs? The cost estimate table in the Closure Plan estimates soil investigation and soil removal costs to only **three (3) feet** bgs!!!! It has been KNOWN from soil borings for years (c.1995), overseen by DTSC, that soil contamination at D/K from the hazardous waste management units (HWMUs), a number of aboveground tanks and appurtenant sumps, piping, etc., extends to and into ground water beneath the facility at approximately **thirty (30) feet** bgs. Subsequent adjustments do not cut it. In the past, D/K was not required to satisfactorily upgrade their Closure and contingent Post-closure AFR to address the unfolding contamination issue. Title 22 California Code of Regulations (CCR) §66264.111 [*Closure Performance Standard*] states that “*The owner or operator shall close the facility in a manner that (a) minimizes the need for further maintenance; and (b) controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated rainfall or run-off, or waste decomposition products to the ground or surface waters or to the atmosphere; and (c) complies with the closure requirements of this chapter including, but not limited to, the requirements of sections 66264.178, 66264.197, 66264.228, 66264.258, 66264.280, 66264.310, 66264.351, 66264.601 through 66264.603, and 66264.1102.*” [California Code of Regulations, Title 22, Article 7, section 66264.111]” In other words the contamination from **3 feet** bgs to **30 feet bgs** needs to have been addressed in the closure cost estimate.

It is absolutely great, wonderful in fact, if DTSC cleans this soil contamination up as part of Corrective Action before Closure is required, however, the cost estimate for Closure AFR must include the possibility that such costs might be incurred by DTSC/public. Once the soil contamination is **ACTUALLY** cleaned up, the Closure AFR may be adjusted downward to reflect the changed situation. A similar problem exists for ground water. It is wonderful that D/K has been for years addressing such contamination under corrective action, however, the contingent Post-closure care AFR should have been adjusted to reflect the cost estimate for this work. DTSC has exposed the public to the risk---should D/K have declared bankruptcy/insolvency as, for example, AAD--- of paying for the cleanup for nearly 25 years. This is wrong. As cleanup occurs under Corrective Action, if the long-term cost estimate changes,

some of the Closure and/or contingent Post-closure AFR can be always be reduced.

DTSC's continuing expressed policy, despite the welcome new element in the D/K permit renewal, is to defer requiring assurance of CAAFR until after the remedy selection portion of the corrective action process. Such deferral, in my judgment, is not what the legislature had in mind when enacting this particular statute. It is even more immoral to ignore the statutory and regulatory requirements for adequate Closure and/or Post-closure care AFR using the guise of cost estimates that ignore existing contamination. This sneaky practice places the public at greater risk to financially cover clean-ups at facilities that have been given such a "sweetheart" deal.

No permit should be issued or renewed without adequate assurance of financial responsibility for performing Closure---such as the original 2001 D/K permit.. Where the Department has issued permits with Closure and Post-closure or contingent Post-closure assurance of financial responsibility based on a either a bogus representation or simply ignoring contamination from the authorized HWMUs, the Department should notify the owner or operator to submit an application for a permit modification, within 90 days of such notification, to provide adequate assurance of financial responsibility for Closure based on cost estimates that accurately reflect the state of knowledge regarding contamination from the authorized HWMUs. If the owner or operator cannot provide assurance of financial responsibility at the specified time, the Department shall initiate permit denial or rescission proceedings, whichever is applicable. Rolling the cleanup costs from Closure and Post-closure or contingent Post-closure into Corrective Action to avoid adequate AFR must not continue.

Where DTSC has closed either permitted or ISD facilities by deferring Closure and Post-closure costs into corrective action where no financial assurance has been required yet, the agency needs to go back and rescind the Closures and require Closure and Post-closure or contingent Post-closure AFR. If DTSC has "completed" Corrective Action and improperly used Corrective Action to avoid prescriptive long-term Post-closure care, DTSC needs rescind the original Closure and shift any long-term care to fall under the appropriate post-closure regulations. Whether it is by sneaky design or by sheer regulatory ignorance, DTSC needs to stop abrogating its regulatory responsibilities.

I ask the IRP to make an information request of DTSC, such as shown in "The Status of Independent Review Panel Information Requests As of September 19, 2016", to provide information on: (1) closure cost estimates at permitted facilities with known soil and groundwater contamination related to HWMUs; (2) a specific assessment by DTSC that assures that such cost estimates address the full extent (as best as DTSC had determined to the date of the cost estimate) of HWMU contamination at permitted facilities; (3) the specific criteria by which DTSC has adjudged the source of contamination at each permitted facilities; and (4) listing of permitted facilities where DTSC has underfunded Closure and Post-closure AFR and de facto rolled such costs into Corrective Action AND not required CAAFR to cover them.

Sincerely,

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