



**CENTER ON RACE, POVERTY & THE ENVIRONMENT**

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Dear Chairperson Kracov and Members of the Independent Review Panel:

On behalf of the Center on Race, Poverty & the Environment, I write to share with you the concerns of environmental justice communities throughout the state who all too often are faced with tragic consequences when DTSC fails its commitment to protect California's residents from the harmful effects of toxic substances.

In addition to the systemic problems in DTSC's permitting and enforcement programs that have been widely publicized in the media, this letter highlights additional issues that DTSC has failed to address which contribute to unacceptable toxic risks in some of California's most vulnerable communities.

**I. DTSC Permit Decisions Disproportionately Impact Communities of Color**

The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state. Pub. Res. Code § 71110.

California Government Code, section 11135 prohibits discrimination on the basis of race, color or national origin under any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. According to the California Code of Regulations, it is a discriminatory practice for an agency in carrying out any program or activity "to make or permit selections of sites or locations of facilities: that have the purpose or effect of excluding persons from, denying them benefits of, or otherwise subjecting them to discrimination under any program or activity." 22 CCR § 98101(j)(1) (emphasis added).

DTSC has issued permits to three operating Class I toxic waste dumps in California, near Buttonwillow, Kettleman City and Westmoreland. All three of the host communities have the same demographics: overwhelmingly high percentages of Latino residents, of residents of Mexican descent, of farm workers, or poor families, and of people who primarily or only speak Spanish. Overall, Latinos comprise 32 percent of the state's population, but Latino communities bear 100 percent of the risk and impact of hosting toxic waste dumps.

PROVIDING LEGAL & TECHNICAL ASSISTANCE TO THE GRASSROOTS MOVEMENT FOR ENVIRONMENTAL JUSTICE

RALPH SANTIAGO ABASCAL (1934-1997) DIRECTOR 1990-1997

LUKE W. COLE (1962-2009) EXECUTIVE DIRECTOR 1997-2009

Additionally, a review of California commercial offsite hazardous waste facilities indicates that out of 55 total permitted commercial facilities, DTSC approved 54 in areas with above average poverty rates or non-white populations. These facilities are predominantly permitted near areas with high Latino populations. Collectively, these communities are in the 76 percentile for number of non-white residents when compared to the rest of the state.

DTSC has a legislative duty to ensure that its permitting decisions do not have a disparate impact based on race. However, DTSC has not adopted any policies or practices that require it to consider disparities in hazardous waste permit decisions. DTSC must take expedient and intentional steps to address the large disparities in where it permits hazardous waste facilities in California.

### Questions for DTSC

1. What steps will DTSC take to ensure that its permitting decisions do not have a disproportionate impact based on race?
2. How does DTSC view its role to ensure that the agency complies California Government Code § 11135?
3. How will DTSC ensure that California's most vulnerable communities are not targeted for the siting of toxic waste disposal and management units?

## **II. DTSC Failed to Adopt Statewide Hazardous Waste Plan as Required by the California Health and Safety Code.**

DTSC is directly responsible for providing statewide planning for hazardous waste facility site identification. According to Section 25170 of the California Health & Safety Code, "The department, in performing its duties under this chapter, shall . . . [p]rovide statewide planning for hazardous waste facility site identification and assessment. . ." Health & Safety Code § 25170. The legislature also specifically requires that DTSC prepare and adopt a state hazardous waste management plan to serve as a comprehensive planning document for the state. The state hazardous waste management plan requires DTSC to identify "areas or regions of the state where new or expanded capacity to manage hazardous waste are needed and the types of facilities that should be sited and constructed." Health & Safety Code § 25135.9. The plan requires "a statement of goals, objectives, and policies currently in effect, or in the process of development, for the siting of hazardous waste facilities." *Id.*

The California legislature expressed its intent that the hazardous waste management plans prepared by or with assistance from DTSC "serve as the primary planning document for hazardous waste management at the local level; that the plans be integrated with other local land use planning activities to ensure that suitable locations are available for needed hazardous waste facilities; that land uses adjacent to, or near, hazardous waste facilities, or proposed sites for these facilities, are compatible with their operation." Health & Safety Code § 25135.

The legislature required DTSC to approve the first plan by 1991, with revisions at least every three years thereafter. Health & Safety Code § 25135(b). However, DTSC has yet to complete any of the required statewide planning documents.

Because DTSC has failed to comply with its statutory mandates in the Health & Safety Code, the State has no guidelines, standards, or plans that would prevent waste disposal companies from

targeting low-income and minority communities for the most undesirable toxic waste facilities, a practice that is well documented. DTSC is the only agency that is tasked with statewide management of hazardous waste disposal and has an obligation to prevent the disproportionate impacts of hazardous waste facility approval across the state through its general authority as well as the specific plans required by the Health & Safety Code. By failing to develop the required planning documents or using its general authority to prevent the targeting of minority communities, DTSC has contributed to the widespread discrimination against people of color in hazardous waste facility siting decisions.

#### Questions for DTSC

1. Why hasn't DTSC adopted the Statewide Hazardous Waste Management Plans required by Health and Safety Code § 25170?
2. What plans does DTSC have for preparing and adopting the Statewide Hazardous Waste Management Plans in the future?

### **III. DTSC Does Not Use Any Criteria to Determine When to Deny a Permit**

On February 15, 2013 the Director of the Department of Toxic Substances Control, Debbie Raphael, released an open letter announcing that the agency had “launched a comprehensive review of its permit process.” The letter explains that “[d]uring the past two years, stakeholder feedback and our own internal observations have demonstrated that there is room for improvement in the process of permitting hazardous waste treatment, storage, and disposal facilities.” One of the stated reasons for the review was that “the department does not have clear guidelines for when to deny a permit.” The purpose of the review is to provide recommendations for process improvements including standardized processes, clear decision-making criteria and corresponding performance standards.

On October 8, 2013, the department formally released the report. The report notes many areas of deficiency including there being no clear and objective criteria for making denial/revocation decisions that are based on valid standards of performance and threats. The study recommends that DTSC develop policy to determine what factors to use to support a decision to continue with permitting versus those to use to support a denial or revocation action.

Yet in DTSC's response to the report, the department did not include specific plans to develop standardized criteria to determine when to deny a permit request. Now, DTSC indicates that it will introduce a new scoring matrix that it will use to determine when to issue a permit based on compliance history. While this type of scoring matrix is a step in the right direction, the value of such a tool will be eroded if its scoring is based on staff discretion. As proposed, DTSC will have considerable discretion to determine scoring based on subjective criteria, and additionally will consider other factors, allowing DTSC to avoid denying a permit based on unknown criteria. DTSC should set specific numerical standards for permit denial based on past violations and other risk factors. These standards must remove staff discretion in finding that an applicant poses too much risk to be issued another permit.

#### Questions for DTSC

1. What is the agency's timeline and plans for involving public stakeholders in developing clear and standardized criteria for permit denial including a numerical

- limit for past violations?
2. What process is DTSC going to use for permit decisions in the interim until such criteria are adopted?

#### **IV. DTSC Does Not Use Any Criteria, Policies, or Regulations to Consider the Cumulative Impacts of its Permit Decisions**

DTSC's environmental justice policy states that DTSC will "minimize potential cumulative impacts from facilities and sites on community health and the environment by significantly reducing exposure risks from individual sites." Even though DTSC recognizes that many communities near hazardous waste sites face a cumulative risk from multiple pollution sources, DTSC has not developed any tools to identify the nature of those impacts or criteria to address them.

Cal/EPA defines cumulative impacts to mean exposures, public health or environmental effects from the combined emissions and discharges, in a geographic area, including environmental pollution from all sources, whether single or multi-media, routinely, accidentally, or otherwise released. DTSC should account for sensitive populations and socioeconomic factors, where applicable and to the extent data are available. The State now has available a tool to help agencies identify communities that are disproportionately burdened by multiple sources of pollution. CalEnviroScreen is designed to assist agencies in carrying out their environmental justice mission: to conduct its activities in a manner that ensures the fair treatment of all Californians, including non-white and low-income populations. DTSC should determine how it will use the tool in its permitting program and in making individual permit decisions. In fact, SB 673 requires the Department to do just that. Yet, DTSC has not affirmed its obligations under this new statute and it remains to be seen whether DTSC will comply with its statutory directives.

##### Questions for DTSC

1. Outside the CEQA context, how does or will DTSC assess and address cumulative impacts in individual permit decisions?
2. What role will CalEnviroScreen play in the permitting program and individual permit decisions?

#### **V. DTSC's Desire to Keep Existing Hazardous Waste Facilities Open and Operational Conflicts with its Statutory Mandate to Protect Public Health.**

DTSC has been delegated the authority to administer the Resources Conservation and Recovery Act (RCRA). *See* 42 U.S.C. § 6902. RCRA's overarching purpose is to protect health and the environment. *Id.* Because EPA delegated the authority to administer the RCRA hazardous waste program to the State, DTSC must comply with RCRA objectives and requirements in order to maintain its delegated status.

According to an external audit, top DTSC officials believe that the agency must "make compliance easy and economic" such that existing permitted facilities can continue to operate. DTSC also believes that costs of compliance to facilities should not get too high, and that facilities should be easily available. The agency's admission that it seeks to make compliance easy for the industry that it is tasked to permit and regulate highlights why community advocates often feel that DTSC protects industry rather than residents who live close to hazardous waste facilities.

DTSC's current interpretation of its role to maintain capacity creates sacrifice zones in the State. DTSC's policy ensures that areas near hazardous waste facilities will continue to bear the burden of hazardous waste disposal even when current permits expire. DTSC ensures continued burdens on these communities by allowing facilities to operate on expired permits (i.e. Phibrotech) or by allowing facilities that are at capacity to expand and/or build new capacity (i.e. Kettleman City). These areas of the state are sacrificed so that other areas will not be subject to the burdens and risks associated with hazardous waste disposal. This means that residents near existing sites have not only experienced the historical burdens associated with living near toxic disposal sites and the transportation of hazardous waste, but that they will be called upon to bear this burden into the foreseeable future. The problem with creating these sacrifice zones becomes even more problematic because of the State's historical legacy of targeting the most vulnerable areas of the state for hazardous waste disposal.

#### Questions for DTSC

1. Does DTSC believe that it has a role in ensuring that existing permitted facilities remain open?
2. Doesn't this belief create a conflict of interest with DTSC's obligation to protect public health?

We continue to look to the IRP to provide effective oversight over the Department of Toxic Substances Control as this agency has consistently failed to protect California's most vulnerable communities and has been plagued by a long history of mismanagement and poor policies. We hope to be able to work with the IRP to inform its recommendations and provide concrete improvements in the lives of those at highest risk from toxic exposures, residents in low-income communities and communities of color.

Sincerely,

Ingrid Brostrom,  
Senior Attorney