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**BEFORE THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES
CONTROL**

Order Granting Petition for Review of Two Conditions and Denying Review of Other Conditions for Decision for American Oil Company, EPA Id. No. CAD 981 427 669.

Order No. HWCA 06/07-P001

I. INTRODUCTION

Pursuant to California Department of Toxic Substances Control (“DTSC”) Order Number HWCA 06/07-P001 (“Order”) issued May 1, 2007 granting a petition for review the final permit decision for the American Oil Company storage and treatment facility located at 13736-13740 Saticoy Street, Van Nuys, California, DeMenno/Kerdoon (“D/K”) hereby submits this brief. In its Order, DTSC granted D/K’s petition for review of the provision within the Permit’s “Special Conditions Applicable to All Permitted Units”, Part V, Item I., concerning the requirement to conduct polychlorinated biphenyl (“PCB”) testing at used oil transfer facilities.

II. STATEMENT OF REASONS

D/K submitted comments to DTSC on the American Oil Company’s Draft Standardized Hazardous Waste Permit on May 22, 2006, and submitted a petition for review of the Final Standardized Hazardous Waste Permit on January 12, 2007. In both instances, D/K’s concerns were the same – that DTSC is implementing a policy that changes the PCB testing requirements at used oil transfer facilities in a way that will have adverse unintended consequences for the used oil industry and the environment; and because the PCB testing requirements amount to a statewide change in the regulation of used oil that must be addressed through the rulemaking procedures established in the California Administrative Procedures Act

1 (“APA”) and the analytical framework of the California Environmental Quality Act (“CEQA”).
2 The imposition of uniform new PCB testing requirements at used oil transfer facilities without
3 comprehensive public review and comment constitutes project splitting and violates the principles
4 of transparency and open government.

5 A. DTSC’s PCB testing requirements at used oil transfer facilities will have adverse
6 unintended consequences for the used oil industry and the environment.
7

8 As D/K discussed in its Comments and its Petition for Review, there are important
9 policy concerns for California associated with DTSC’s requirement that used oil transfer facilities
10 test for PCB’s regardless of the destination of the used oil. The application of the proposed testing
11 requirement to used oil bound for in-state recycling represents a fundamental change in DTSC
12 regulatory policy. This policy change was effectuated by an internal DTSC memorandum issued
13 by Watson Gin, Deputy Director for Hazardous Waste Management Program, to Ray Leclerc,
14 Team Leader, Permit Renewal Team, dated March 15, 2007 (“DTSC PCB Policy”).¹ Rather than
15 reducing PCB contamination in waste oil, DTSC’s testing protocol will drive PCB-contaminated
16 oil out of state on single trucks and will increase the size and impact of DTSC’s environmental
17 footprint. These unintended and serious consequences would be documented in the public
18 comment process of an APA rulemaking and accompanying CEQA review. This adoption of this
19 statewide standard serves as a vivid illustration of the types of problems that can result from
20 agencies issuing underground regulations.
21

22 Requiring used oil transfer facilities to test for PCBs will have significant, negative
23 impacts on California used oil transfer facilities, used oil transporters, communities around used
24 oil recycling facilities, the used oil market, and the environment. As D/K pointed out in its
25 Comments, there are already adequate procedures in place to test used oil for PCBs when loads
26 are received at used oil recycling facilities. It is also evident that, if DTSC has determined that
27

28 ¹ The DTSC PCB Policy is attached as Exhibit A.

1 additional steps are required to address the possibility of PCBs in the instate used oil system,
2 approaches exist that are more focused, less costly, less disruptive of commerce and used oil
3 recovery, more protective of the environment, and would avoid the problems that will inevitably
4 result from DTSC's change in policy.

5 1. Negative Impacts on Transfer Facilities and Transporters in California

6 Requiring PCB testing at used oil transfer facilities will have a serious, deleterious
7 effect on the used oil transfer facilities in rural areas of California. Used oil in rural areas is
8 collected in relatively-small, "bobtail" trucks that must be filled and emptied on a daily basis in
9 order for the transporters to remain economically viable. At the same time, most rural transfer
10 facilities have only one receiving tank and are simply too small to have on-site laboratory testing
11 facilities. Therefore, these smaller transfer facilities would be required to lock down their tanks
12 during the time it takes to drive a sample to the nearest regional laboratory and obtain analytical
13 test results. As a practical matter, the DTSC PCB Policy will require transfer facilities in rural
14 areas to lock down their receiving tank for several days at a time. This will have a devastating
15 effect on the viability of rural transfer facilities and the transporters that utilize them.

16
17 Rural transporters cannot remain in business unless they can unload oil on a daily
18 basis. Rather than waiting idle for the local transfer facility to unlock its tank, transporters will be
19 forced to drive to larger receiving facilities, most of which are located in urban areas, or to out-of-
20 state facilities. As a result, rural bobtail transporters will substantially increase the miles they
21 must drive on a daily basis to pick up and deliver used oil. Both the number of trucks on the
22 roads and the number of miles driven will increase significantly and result in substantial
23 environmental and traffic impacts. In addition, the DTSC PCB Policy will have the perverse
24 effect of causing more used oil to leave California for states that have far less protective standards
25 for PCBs in used oil.

26 2. Negative Impacts on Communities Near Used Oil Recycling Facilities

27 DTSC's PCB testing requirement would increase the long-term impacts that
28

1 recycling facilities have on neighboring communities. The influx of transporters required to
2 travel to larger facilities to deliver oil will have a negative effect on unloading efficiency at larger
3 facilities. D/K already has a large number of trucks on average queued up to unload every day.
4 The addition of multiple bobtail loads per day from outlying areas would increase the wait time
5 for deliveries at D/K and create a significant, corresponding decrease in efficiency for drivers.
6 The resulting truck traffic would significantly impact both local roads and truck emissions in the
7 vicinity of receiving facilities. These are real environmental and safety issues for communities,
8 which are often environmental justice communities with multiple environmental challenges. The
9 problems local communities around large receiving facilities would face from the general
10 application of a PCB testing requirement at transfer facilities clearly illustrates that DTSC has
11 failed to consider the bigger picture consequences flowing from the DTSC PCB Policy. Members
12 of these communities have an unambiguous right under California law to engage in the public
13 comment process associated with DTSC's policy. California law places great importance on the
14 cumulative impact analysis in CEQA and implementation of the DTSC PCB Policy at individual
15 permitting projects undercuts the public's ability to assess and comment upon cumulative
16 impacts.

17
18 3. Out-of-State Transport and Negative Impacts on the Used Oil Market

19 Imposing blanket PCB testing requirements on each transfer facility will
20 discourage rather than encourage compliance with PCB testing requirements. Once a transporter
21 drives to another state, the transporter is only required to meet the federal 50 parts per million
22 ("ppm") standard under the federal Toxic Substances Control Act. Eliminating the option of
23 sending the used oil from a transfer facility to an in-state facility without prior testing will
24 encourage transporters to circumvent California standards and ship waste out of state. As fuel oil
25 prices continue to increase, there is even more incentive for transporters to take oil out of state.
26 Far more. Oil that does not meet California standards for used oil and must be managed as a
27 hazardous waste in California can be burned for energy recovery with high levels of impurities
28 and less stringent environmental regulations.

1 Health and Safety Code section 25250.9 was adopted to ensure used oil generators
2 are informed that their used oil may be sent to an out-of-state facility that does not meet stringent
3 hazardous waste management standards when choosing whether to process used oil at a
4 California facility or to send the used oil to another state. This statute evinces the Legislature's
5 preference to safely manage used oil. California standards include secondary containment
6 requirements, comprehensive waste composition analysis and financial assurance for closure and
7 corrective action. These legislative policies have helped prevent used oil from being dumped and
8 have successfully promoted used oil recycling. Proper enforcement of Section 25250.9 would
9 ensure that all used oil is properly tested and is the better approach to ensuring that PCBs do not
10 enter commerce.

11 DTSC's policy will result in transporters driving further and adversely impacting
12 the communities of the receiving facilities. In addition, more arriving trucks will remain idle and
13 loaded at transfer facilities. The end result will be a higher likelihood of sending waste oil with a
14 high PCB content to out-of-state facilities with reduced environmental protections. In addition, as
15 more transporters take used oil out of the state without testing it for PCBs, there will be a huge
16 negative economic impact on the transporters and recyclers who manage used oil in California.
17

18 4. Current PCB Testing Protocols and Reasonable Alternatives

19 The current protocols used to test for PCBs in oil are already effective to eliminate
20 PCBs in used oil destined for the California used oil market. At D/K's Compton facility, each
21 tank receiving used oil must be tested to determine whether the used oil contains less than 2 ppm
22 PCBs. If a tank contains PCBs at a concentration of 2 ppm or greater, D/K must trace the source
23 of the PCBs back to the individual shipment by testing samples that are collected from each of the
24 incoming trucks prior to transferring their loads into a tank. If any of the individual loads
25 contains PCBs at a concentration of 5 ppm or greater, D/K must dispose of the entire tank as
26 PCB-containing hazardous waste.

27 If a change is to be made to current practices, DTSC has ignored other, reasonable
28

1 alternatives that would highlighted in an APA rulemaking and CEQA review. For example,
2 another approach would be to limit the PCB testing at transfer facilities to waste oil that will be
3 sent out of state. This would assure that transporters do not take used oil out of state in an effort
4 to avoid more stringent California regulations. At the same time, limiting PCB testing at used oil
5 transfer facilities to outgoing loads destined for other states will minimize the bottleneck and
6 perverse incentives that the DTSC PCB Policy will have on the routine transportation of used oil
7 in California. Pursuant to the above alternative, used oil processed in-state at a permitted
8 treatment and recycling facility would continue to be tested at the in-state facility consistent with
9 that facility's WAP.

10 B. The DTSC PCB Policy Is An Underground Regulation

11 1. Any "Regulation" Not Adopted in Accordance with the APA is an
12 Underground Regulation

13 The APA provides that "[n]o state agency shall issue, utilize, enforce or attempt to
14 enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general
15 application, or other rule, which is a regulation as defined in Section 11342.600, unless the
16 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other
17 rule has been adopted as a regulation and filed with the Secretary of State pursuant to this
18 chapter."² "Regulation" is defined in the APA as "every rule, regulation, order, or standard of
19 general application or the amendment, supplement or revision of any rule, regulation, order, or
20 standard adopted by any state agency to implement, interpret, or make specific the law enforced
21 or administered by it, or to govern its procedure."³

22
23 Administrative interpretations in California that meet the definition of "regulation"
24 must be promulgated in accordance with the procedural requirements of the APA.⁴ If a regulation
25 was not promulgated pursuant to the APA, it is void and shall receive no deference from

26 ² Gov. Code § 11340.5(a) (emphasis added).

27 ³ Gov. Code § 11342.600; *California Advocates for Nursing Home Reform v. Bonta*, 106
28 Cal.App.4th 498, 506-507 (2003).

⁴ Gov. Code § 11340 *et seq.*

1 California courts. This serves to “prevent agencies from avoiding substantive APA requirements
2 by denominating regulations as ‘policies,’ ‘interpretations,’ ‘instructions,’ ‘guides,’ ‘standards,’
3 and the like, and by placing rules in the internal organs of the agency such as manuals,
4 memoranda, bulletins”⁵ Thus, “[t]he APA was designed in part to prevent the use by
5 administrative agencies of ‘underground’ regulations, and it is the courts, not administrative
6 agencies, which enforce that prohibition.”⁶

7
8 Any rule or standard of general application that is issued without going through
9 APA rulemaking procedures is an “underground regulation” pursuant to California law. An
10 “underground regulation” is defined as “any guideline, criterion, bulletin, manual, instruction,
11 order, standard of general application, or other rule, including a rule governing state agency
12 procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has
13 not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is
14 not subject to an express statutory exemption from adoption pursuant to the APA.”⁷ California
15 law further mandates that “[n]o state agency issue, utilize, enforce, or attempt to enforce any
16 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other
17 rule which is a regulation as defined in Section 11342.600,” unless it has first gone through the
18 APA rulemaking process. Gov. Code § 11340.5.

19 2. DTSC set forth the new PCB policy in a Management Directive

20 As D/K stated in its Petition for Review of the American Oil Company Permit, the
21 application of the proposed PCB testing requirement for used oil bound for in-state recycling
22 represents a fundamental change in DTSC regulatory policy. This change in policy will affect the
23 decisions of generators and transporters as to how and where they ship their used oil. DTSC’s
24 statewide policy establishing a uniform standard in which PCB testing requirements are imposed

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26 ⁵ *Armistead v. State Personnel Board*, 22 Cal.3d 198, 205 (1978) (quoting Senate Interim
Committee on Administrative Regulations, First Report to the 1955 Legislature, at 8-9).

27 ⁶ *Bonta*, 106 App.4th at 506 (citing *Kings Rehabilitation Center, Inc. v. Premo*, 69 Cal.App.4th
215, 217 (1999)).

28 ⁷ 1 C.C.R. § 250.

1 in hazardous waste facility permits is set forth in the DTSC PCB Policy, an internal memorandum
2 issued by DTSC senior management mandating a permitting requirement for the testing of PCBs
3 at all used oil transfer facilities in California with permit renewals pending. The DTSC PCB
4 Policy requires DTSC staff to include the obligation to test for PCBs in permits for used oil
5 transfer facilities. This obligation is not otherwise required by any law. The subject line of the
6 DTSC PCB Policy is "Testing for PCBs in Used Oil Transfer Facilities," and the document is an
7 instruction from senior DTSC management to DTSC's Permit Renewal Team instructing staff to
8 include a permitting requirement to "test all outgoing loads of mixed oil" for PCBs at used oil
9 transfer facilities. The DTSC PCB Policy clearly states: "Permits to be issued to used oil transfer
10 facilities as part of the Permit Renewal Team's efforts should contain this PCB testing
11 requirement." The DTSC PCB Policy further states that it is "critical" that DTSC be "consistent
12 with its permit requirements for like facilities." DTSC's adherence to the DTSC PCB Policy,
13 resulting in the imposition of the PCB testing requirement in the American Oil Company Permit,
14 raises important policy considerations that DTSC should, in its discretion, review. Moreover, the
15 inclusion of a permit condition resulting from implementation of an underground regulation is a
16 clearly erroneous conclusion of law.

17 3. The DTSC PCB Policy is a "Regulation" Subject to the APA

18 The DTSC PCB Policy is a "regulation," as defined in Government Code section 11342.600.
19 Pursuant to California law, "regulation" means every rule, regulation, order, or standard of
20 general application or the amendment, supplement, or revision of any rule, regulation, order, or
21 standard adopted by any state agency to implement, interpret, or make specific the law enforced
22 or administered by it, or to govern its procedure. Gov. Code § 11342.600.

23 The California Supreme Court has found that regulations subject to the APA have
24 two principal identifying characteristics.⁸ The first characteristic of a regulation is that the agency
25 must have intended for the rule to apply generally, rather than in a specific case.⁹ It is not,

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27 ⁸ *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 571 (1996) (citing *see Union of*
American Physicians & Dentists v. Kizer, 223 Cal.App.3d 490, 497 (1990)).

28 ⁹ *Tidewater*, 14 Cal.4th at 571.

1 however, necessary that the rule apply universally; “a rule applies generally so long as it declares
2 how a certain class of cases will be decided.”¹⁰ The second characteristic of a regulation is that
3 “the rule must ‘implement, interpret, or make specific the law enforced or administered by [the
4 agency], or govern [the agency’s] procedure.”¹¹ Under either characterization, the DTSC PCB
5 Policy is a “regulation” subject to the APA.

6
7 4. The DTSC PCB Policy is a Rule of General Applicability

8 The DTSC PCB Policy establishes a new policy for imposing PCB testing
9 requirements in hazardous waste facility permits. The DTSC PCB Policy states that “[t]he three
10 most recently drafted permits ... contain the requirement to test used oil for PCBs.” In addition,
11 this permit condition was imposed in a fourth permit — the American Oil Company Permit.
12 DTSC has imposed the PCB testing requirement in four out of the four most recent permits
13 drafted. DTSC’s consistent application of the PCB testing requirement as directed by the DTSC
14 PCB Policy demonstrates that the DTSC PCB Policy establishes a rule of general applicability.

15 The DTSC PCB Policy opens with the statement “[i]t is critical that this
16 department be consistent in its permit requirements for like facilities.” This is a clear expression
17 of DTSC’s intent to continue to impose the PCB testing requirement in permits for used oil
18 transfer facilities. “A written statement of policy that an agency intends to apply generally, that is
19 unrelated to a specific case, and that predicts how the agency will decide future cases is
20 essentially legislative in nature even if it merely interprets applicable law.”¹² Quasi-legislative or
21 interpretative regulations are subject to the APA.¹³ The DTSC PCB Policy is a written statement
22 of policy that DTSC intends to apply generally to all used oil transfer facilities. The DTSC PCB
23 Policy clearly declares how DTSC will draft future permits and thus the DTSC PCB Policy is

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25 ¹⁰ *Id.* (citing *Roth v. Department of Veterans Affairs*, 110 Cal.App.3d 622, 630 (1980)); *Bonta*,
106 Cal.App.4th 498 at 507 (citations omitted).

26 ¹¹ *Tidewater*, 14 Cal.4th at 571 (citing Gov. Code § 11342(g), repealed and continued without
substantive change, inter alia, in Section 11342.600 (“regulation” defined)); *California Advocates
for Nursing Home Reform v. Bonta*, 106 Cal.App.4th 498, 507 (2003) (citations omitted).

27 ¹² *Tidewater*, 14 Cal.4th at 574-75. (emphasis added).

28 ¹³ See, *Tidewater*, 14 Cal. 4th at 575.

1 quasi-legislative in nature.

2
3 It is clear on its face that the DTSC PCB Policy establishes a standard of general
4 application that implements, interprets and makes specific certain aspects of the law governing
5 used oil transfer facilities. As discussed above, the DTSC PCB Policy is an instruction from
6 DTSC senior management to the Permit Renewal Team to uniformly include a permitting
7 requirement in used oil transfer facility permits to "test all outgoing loads of mixed oil" for PCBs.
8 The DTSC PCB Policy instructs the DTSC Permit Renewal Team that it is "critical" to have
9 permitting consistency at used oil transfer facilities, and that a PCB testing requirement, along
10 with other testing requirements at transfer facilities, "is the only way for the facility to know
11 whether or not" it may legally receive a shipment of used oil. This language further indicates to
12 DTSC permitting staff that a PCB testing requirement must be included in all used oil transfer
13 facility permits. The DTSC PCB Policy plainly states that this requirement is to be applied to all
14 of the used oil transfer facilities on which the Permit Renewal Team is working. No statute or
15 official state regulation requires the inclusion of PCB testing requirements in the permits of used
16 oil transfer facilities. This permitting requirement is entirely created by the DTSC PCB Policy.

17 5. The DTSC PCB Policy Interprets Law Administered by DTSC and
18 Governs DTSC Procedure

19 The DTSC PCB Policy implements and interprets law administered by DTSC, as
20 well as governs the agency's procedure. The DTSC PCB Policy includes a table listing eighteen
21 used oil transfer facility permits that the Permit Renewal Team is now working on statewide, the
22 vast majority of which are permits set to expire in 2007. This table includes a column for
23 indicating whether a PCB testing requirement is currently included in each of the listed permits.
24 Of the permits that the Permit Renewal Team is working on, only one out of eighteen is shown to
25 have a PCB testing requirement as of March 15, 2007. However, as the DTSC Policy Memo
26 states, DTSC imposed the PCB testing requirement in the most recent three permits it drafted.
27 The requirement is also included in the American Oil Company Permit. Thus, DTSC has
28 consistently implemented the requirement in the four most recent permits.

1 The inclusion of the above-described table in the DTSC PCB Policy further
2 establishes that the document was issued with the clear intent that it be utilized to establish PCB
3 testing requirement in the permits for all of the used oil transfer facilities for which the Permit
4 Renewal Team is responsible. D/K does not have specific information about the status of each of
5 these permits; however, the DTSC PCB Policy is an unambiguous directive to the Permit
6 Renewal Team to include a PCB testing requirement in each of these permits. The Permit
7 Renewal Team has been instructed to apply this standard of general application to all the used oil
8 transfer facilities, and D/K expects that this regulatory requirement is already being introduced in
9 negotiations and draft documents, and will be increasingly utilized over the course of the year as
10 numerous existing permits are set to expire. Thus, the DTSC PCB Policy is also a “regulation”
11 because it is a rule that ‘implement[s], interpret[s], or make[s] specific the law enforced or
12 administered by [the agency], or govern [the agency’s] procedure.’¹⁴

13 The DTSC PCB Policy does not stop at simply requiring PCB testing at used
14 transfer facilities. It further implements, interprets, and specifies the law by mandating the exact
15 requirements associated with such testing. Specifically, the DTSC PCB Policy requires testing of
16 each outgoing load to determine whether it contains more than 2 ppm PCBs. Furthermore, in the
17 event that an outgoing load is determined to have greater than 2 ppm PCBs, retain samples from
18 the various constituent loads must be tested to determine whether any one of those loads
19 contained more than 5 ppm PCBs. Through these express permitting requirements, the DTSC
20 PCB Policy unquestionably creates a generally applicable standard that implements, interprets
21 and makes specific the law governing oil transfer facilities.

22 6. The DTSC PCB Policy is an Underground Regulation

23 As discussed above, the DTSC PCB Policy is clearly a regulation for the purposes of the APA.
24 DTSC has not undertaken an APA rulemaking to adopt regulations addressing the PCB testing
25 requirement set forth in the DTSC PCB Policy. Therefore, for the reasons detailed above, the
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27 ¹⁴ *Id.* (citing Gov. Code § 11342(g), repealed and continued without substantive change, *inter alia*,
28 in Section 11342.600 (“regulation” defined)); *Bonta*, 106 Cal.App.4th at 507 (citations omitted).

1 DTSC PCB Policy is an “underground regulation,” as defined by 1 C.C.R. § 250, interpreted by
2 the Supreme Court of California, and set forth in this Brief.

3 7. DTSC Must Undertake a CEQA Evaluation of Potential Environmental
4 Impacts and Feasible Alternatives Before Adopting Regulations Imposing
5 PCB Testing at Used Oil Transfer Facilities

6 CEQA¹⁵ requires a California public agency to evaluate the potential
7 environmental consequences of its discretionary decisions (“projects” under CEQA) in order to
8 promote informed decision-making.¹⁶ An activity undertaken by a public agency that “may cause
9 either a direct physical change in the environment, or a reasonably foreseeable indirect physical
10 change in the environment” is a “project” subject to CEQA.¹⁷ Adoption of a specific regulation is
11 a discretionary decision (“project”). DTSC’s decision to begin imposing PCB testing
12 requirements for used oil transfer facilities as specified in the DTSC PCB Policy is both a specific
13 regulation and a “project” for purposes of CEQA.

14 Moreover, an environmental impact report (“EIR”) is necessary if there is a fair
15 argument that the project under review may have a potentially significant impact on the
16 environment.¹⁸ DTSC must prepare an EIR if “there is substantial evidence supporting a fair
17 argument that the project may have a significant impact on the environment.”¹⁹ If even a
18 reasonable inference can be made that such evidence exists, DTSC must prepare an EIR.²⁰ The
19 evidence does not need to be uncontradicted. Substantial evidence is demonstrated where there is
20 “enough relevant information and reasonable inferences from this information that a fair
21 argument can be made to support a conclusion even though other conclusions might also be
22 reached.”²¹ This brief presents ample evidence to support a fair argument that the testing regime

23 ¹⁵ Public Resources Code §§ 21000 – 21177.

24 ¹⁶ See, 14 CCR § 15002.

25 ¹⁷ PRC § 21065.

26 ¹⁸ *Laurel Heights Improvement Ass’n v. Regents of University of California* (1993) 6 Cal.4th
1112, 1123.

27 ¹⁹ *Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th
1383, 1396.

28 ²⁰ *Id.* at 1402.

1 set forth in the DTSC PCB Policy will have adverse environmental consequences as a result of
2 recyclable used oil being shipped out of state to be disposed of a hazardous waste, and as a result
3 of increases in air emissions as individual truck mileage and truck idling time at transfer facilities
4 increases.

5 In addition to an analysis of the environmental impacts resulting from the
6 proposed regulations, DTSC must also prepare an analysis of feasible alternatives that will
7 mitigate potentially significant impacts. DTSC must “must independently participate, review,
8 analyze and discuss the alternatives in good faith.”²² Once DTSC reviews the statewide impacts
9 of imposing PCB testing at used oil transfer facilities and undertakes an analysis of the feasible
10 alternatives, it will become immediately apparent that the most feasible alternative is the current
11 regulatory regime – which does not require PCB testing at used oil transfer facilities.

12
13 **III. DTSC MUST NOT APPROVE THE PCB TESTING**
14 **REQUIREMENT IN THE AMERICAN OIL COMPANY PERMIT**

15 DTSC must formally adopt the PCB testing requirement as a regulation pursuant
16 to the APA. Until such time as DTSC does undertake a rulemaking to adopt this regulation,
17 DTSC must cease implementing the DTSC PCB Policy. As discussed above, an agency may not
18 implement an underground regulation. The PCB testing requirement should not be imposed in
19 any permits for used oil transfer facilities, including the American Oil Company Permit, until
20 DTSC has completed the necessary administrative procedures. Therefore, D/K requests that
21 DTSC remove the PCB testing requirement from the American Oil Company Permit.

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27 ²² *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*
28 (1980) 106 Cal.App.3d 893, 908-910.

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JODI SMITH
PAUL, HASTINGS, JANOFSKY
& WALKER LLP

By: //original signed by//

JODI SMITH

Attorneys for
DEMENNO/KERDOON

EXHIBIT A



Linda S. Adams
Secretary for
Environmental Protection



Department of Toxic Substances Control

Maureen F. Gorse, Director
1001 "I" Street
P.O. Box 806
Sacramento, California 95812-0806



Arnold Schwarzenegger
Governor

MEMORANDUM

To: Ray Leclerc, Team Leader
Permit Renewal Team

From: Watson Gin, Deputy Director for Hazardous Waste Management Program
Department of Toxic Substances Control //signed by W.Gin//

Date: March 15, 2007

Subject: TESTING FOR PCBs IN USED OIL AT TRANSFER FACILITIES

It is critical that this department be consistent in its permit requirements for like facilities. Permits are very specific to the wastes allowed to be received. Permits include requirements for waste analysis plans that detail the testing the facility is to conduct prior to receiving wastes, designed to ensure that the wastes received are in line with the permit conditions. The PCB testing requirement along with other testing requirements at transfer facilities is the only way for the facility to know whether or not they are allowed to receive the shipment of used oil legally. The three most recently drafted permits (Riverbank Oil Transfer, Evergreen Oil/Carson, and Advanced Environmental) contain the requirement to test used oil for PCBs.

Used oil transfer facilities are not authorized to take other hazardous wastes. PCB concentrations higher than 5 ppm cause the oil to be considered hazardous waste, not used-oil. The PCB testing requirement also allows DTSC and other enforcement agencies to know whether the transfer facility is following its permit. If the outgoing oil is found to be higher than 2 ppm PCBs, the assumption is, because of the dilution that occurs when loads are mixed, there is a high likelihood that one of the incoming loads was "hot" for PCBs. At that point the retained samples can be tested to trace it back to a load.

The permit requirement should allow the facility to retain a sample of each incoming load rather than test the incoming loads. The permit requirement should also require the facility to test all outgoing loads of mixed oil.

Permits to be issued to used oil transfer facilities as part of the Permit Renewal Team's efforts should contain this PCB testing requirement.

FACILITIES THAT THE PERMIT RENEWAL TEAM IS WORKING ON (18 TOTAL)

	COMPANY NAME	EXISTING PERMIT (13)	PERMIT EXPIRATION DATE	APPLYING FOR NEW PERMIT (4)	UNDER ISD (1)	HAS PCB CONDITION IN PERMIT (4)
1	Advanced Environmental Inc. ^(a)				X	X
2	Asbury Environmental	X	12/30/2007			
3	Bakersfield Transfer Inc.			X		
4	Bayside Oil	X	12/22/2007			
5	Chico Drain Oil - Chico	X	12/22/2007			
6	Chico Drain Oil - Fortuna	X	12/31/2007			
7	Clearwater Environmental	X	12/24/2007			
8	Crane Oil	X	12/23/2007			
9	D/K Dixon			X		
10	D/K Environmental - Vernon			X		
11	Evergreen - Davis	X	12/30/2007			
12	Evergreen - Fresno	X	12/30/2007			
13	Evergreen - Santa Maria	X	12/30/2007			
14	J W Butler	X	12/27/2007			
15	Oil Conservation Services ^(a)	X	12/23/2007			
16	Ramos Environmental Services	X	5/18/2009			
17	Remedy Environmental Services ^(a)			X		
18	San Joaquin Filter	X	12/23/2007			

(a) Public noticed but final permit not issued.

(b) May be closing.

(c) Primarily wastewater but may have used oil as result of separation process.

FACILITIES THAT THE PERMIT RENEWAL TEAM IS NOT WORKING ON (4 TOTAL)

1	American Oil Company ^(a)	X	1/16/2017			X
2	Automotive Environmental - Inwindale ^(b)	X	7/17/2010			
3	Evergreen - Carson ^(c)	X	10/14/2014			X
4	Riverbank Oil	X	3/13/2011			X

(a) Permit issued but appealed; Permit Renewal Team may handle depending on outcome of appeal.

(b) May require Agency Initiated Permit Modification

(c) May apply for full Non-RCRA permit as used oil recycling facility.