

Petition for Review

**Hazardous Waste Facility Permit Modification
for Chemical Waste Management, Inc.,
Kettleman Hills Facility**

Reviewer

Permit Appeals Officer
Department of Toxic Substances Control
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Berkeley, California 94710

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Submitted by:

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The Center on Race, Poverty & the Environment and El Pueblo para el Aire y Agua Limpio (collectively “El Pueblo”) hereby petition the Department to review the Final Hazardous Waste Facility Permit (“Permit”) decision for the Chemical Waste Management Kettleman Hills Facility (“KHF”) issued by the Department of Toxic Substances Control (“DTSC”) on May 21, 2014. Pursuant to 22 CCR § 66271.18(a), El Pueblo specifically petitions the Department to review General Condition 2; General Condition 2(A); General Condition 2(B); General Condition 3; General Condition 4(A)(1)(e); General Condition 7; and B-18 Unit Condition 5. El Pueblo also objects to the absence of conditions that DTSC should impose in order to protect Kettleman City residents, including prohibiting future incineration, prohibiting disposal of polychlorinated biphenyls (PCBs), and ensuring additional financial assurances to cover long term post-closure care and corrective actions.

El Pueblo further objects to DTSC’s withholding of important evidence from the public that is relevant to this permit decision. DTSC failed to publically disclose prior to issuing this permit that the permit applicant, Chemical Waste Management (CWM), significantly violated the terms of its permit in February, 2014. This yet undisclosed violation is relevant to the decision because the applicant’s compliance history and its ability to conform to the terms of its permit is a key consideration when DTSC determines whether to issue a hazardous waste permit. DTSC should have provided the public and other interested parties an opportunity to review and comment on information regarding the violation prior issuing this permit.

El Pueblo submitted written comments on the draft permit approval on October 24, 2013. Additionally, El Pueblo provided oral testimony on September 18, 2013. El Pueblo, therefore, has the right to petition the Department to review any condition of the permit decision. In this petition, El Pueblo objects to permit conditions adopted by DTSC, requests additional permit conditions that DTSC failed to adopt, incorporates its previous comments, responds to DTSC’s responses to its previous comments, presents important policy considerations, and demonstrates that DTSC’s permit is based on findings of facts and conclusions at law that are clearly erroneous.

BACKGROUND

KHF is located approximately 3.5 miles southwest of Kettleman City. According to the U.S. Census, 96% of Kettleman City’s population is Hispanic or Latino. Per capita income in Kettleman City is just \$15,081.¹ People living in the communities surrounding this Project are already living with significant respiratory health problems as the Central Valley, including Kings County, has worse air quality than any other region in the Nation. The County is in extreme nonattainment of current 8-hour and 1-hour ozone standards, and is in non-attainment of 24-hour and annual average fine particulate matter (PM 2.5) standards. Drinking water in the town is contaminated with benzene and arsenic.

Latinos and other people of color have a much greater exposure to environmental hazards – including air pollution, pesticide poisoning, lead poisoning, groundwater contamination and

¹ U.S. Census Bureau, *Kettleman City CDP, California*, 2010.

proximity to toxic waste facilities – than any other sector of our population.² This holds true for Kettleman City residents, who must drink contaminated water, breathe air that is well over state and federal health-based standards, and live and work in an environment where pesticides are ubiquitous. At the same, Latinos nationwide and in Kettleman City have the least resources to cope with this exposure, having less occupational and residential mobility, less access to health care, fewer financial resources, and less political power than almost any other sector of U.S. society.³

CWM proposes to expand its hazardous waste landfill B-18 both vertically and laterally– the expansion would increase the footprint of the landfill from 53 acres to 67 acres, and would increase the volume of the landfill from 9.7 million cubic yards to 15.6 million cubic yards. This expansion will extend the life of the landfill by 8 or 9 years. CWM plans to add another hazardous waste landfill (B-20) at the site once the B-18 expansion is complete. Together these projects would add at least 32 years and 19 million cubic yards of capacity at the site.

KHF is already the largest hazardous waste facility in Western United States. The community has experienced elevated rates of birth defects in recent years, and agencies have repeatedly fined the facility for chronic violations of hazardous waste laws and regulations.⁴ For example, according to the U.S. Environmental Protection Agency (“EPA”) and DTSC records, CWM has repeatedly failed to report toxic spills, improperly disposed of PCBs and other hazardous waste, and failed to conduct required monitoring. CWM has demonstrated a pattern of chronic and repeated violations at KHF, some spanning a period of several years. Remarkably, just months before DTSC issued this permit and despite not receiving waste shipments, KHF violated the terms of its permit yet again. DTSC is still investigating the violation, even as it approves an expansion of the landfill.

STATEMENT OF REASONS

I. DTSC’s Proposed Approval of the KHF Expansion Violates State and Federal Civil Rights Laws.

El Pueblo challenges General Condition 2(B) because the treatment, storage, and disposal of hazardous waste at KHF will have a disproportionate impact on Latino residents. DTSC’s authorization of the treatment, storage, and disposal of hazardous waste at KHF violates State and Federal civil rights laws. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-3 by DTSC:

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

2 See Bullard, R., Mohai, P., Saha, R., Wright, B., *Toxic Wastes and Race at Twenty 1987-2007: A Report Prepared for United Church of Christ Justice & Witness Ministries*, (2007), attached as Appendix A (hereafter “United Church of Christ”).

3 See Quintero-Somaini A., Quirindongo, M., *Hidden Danger, Environmental Health Threats in the Latino Community*, 2004, attached as Appendix B.

4 CWM Kettleman Hills Facility RCRA/TSCA Inspections 1983-Present, attached as Appendix C.

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. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin under any program or activity that receives federal financial assistance. The 14th Amendment of the Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. 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 must issue a permit before any toxic waste disposal facility can operate in California. Health & Safety Code § 25200. 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. *Id.* Additionally, a review of California commercial offsite hazardous waste facilities indicates that out of 55 total permitted facilities, DTSC approved 54 in areas with above average poverty rates or non-white populations.

In 1984, the California Integrated Waste Management Board commissioned a report, funded with taxpayer dollars, that set forth criteria and factors to help companies and government entities identify communities that would be least likely to oppose undesirable waste projects. That report implicitly advised companies and governmental entities to site waste facilities in small, poor, rural, Catholic communities with low education levels whose residents were engaged in extractive industries—criteria that describes rural Latino communities. The Cerrell Report criteria describe Kettleman City and the two other communities where DTSC has approved hazardous waste landfills. The Report cautions that “[m]iddle and higher-socioeconomic strata neighborhoods should not fall at least within the one-mile and five-mile radii of the proposed site.”

DTSC’s permitting program disproportionately impacts California’s Latino residents, and therefore, violates the Equal Protection Clause, and State and Federal civil rights laws.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's authorization of KHF to treat, store, and dispose of millions of tons of ignitable, carcinogenic, and extremely toxic wastes at KHF will subject Latino residents in Kettleman City to disproportionate impacts to their health and well-being. This petition for review presents an important policy consideration because low-income Latino residents closest to the site, who are already disproportionately impacted by environmental harms, should not bear the full brunt of the burdens and risks of the facility, while the rest of California receives the benefit.

DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous. DTSC response to comments argues that "DTSC does not site hazardous waste facilities," and that "DTSC conducts its programs in a manner that ensures fair treatment of all races, cultures, and income levels . . . [by] impos[ing] permit conditions to ensure that facilities are well designed and will be operated safely[.]"

DTSC's response is factually and legally erroneous. First, DTSC's role in permitting hazardous waste facilities cannot be isolated from the "program or activity" of waste management in the state of California. Local jurisdictions, who issue land use permits, have no authority to authorize the treatment, storage, and disposal of hazardous waste at any facility, nor do they have the expertise to assess and determine the potential risks of such operations to nearby residents. Therefore, it is not the siting of the landfill that causes harm to nearby communities. Rather, it is shipping and disposal of hazardous waste to the facility that creates risk and harm. DTSC is the permitting authority for hazardous waste landfills in California; an operator cannot construct a hazardous waste landfill or receive hazardous waste without first obtaining a permit from DTSC. Whatever disproportionate and adverse impacts that waste facilities have on nearby residents are directly caused by DTSC's authorization to accept hazardous waste. In this case, CWM has held a conditional use permit from the local land use authority for years, yet the facility has been unable to accept hazardous waste pursuant to that permit, and residents have not been disproportionately impacted by shipments of hazardous waste to the expanded B-18 landfill. A hazardous waste facility requires numerous permits in order to operate. However, it is DTSC's authorization of the treatment, storage and disposal of hazardous waste at a facility that harms nearby residents.

Second, DTSC is mistaken as to its authority under law. DTSC has express regulatory power to consider siting when considering threats to human health for permit modification. Subsection (c) of 22 CCR 66270.41, titled Facility siting, explains when it is and is not appropriate to consider the suitability of the facility location when modifying an existing permit. *See* 22 CCR 66270.41(c) (limiting conditions under which DTSC should not consider the suitability of the facility location when issuing a permit). This section establishes that DTSC has a responsibility to consider the suitability of the facility location when assessing health impacts to nearby communities prior to making permit decisions.

DTSC should accept this petition for review based on the important policy consideration presented regarding KHF's disproportionate impacts to nearby Latino residents, as well as DTSC's clearly erroneous conclusions of fact and law in its response to comments.

A. DTSC's Approval of the KHF Expansion Will Violate California Government Code Section 11135.

El Pueblo challenges General Condition 2(B) because DTSC's decision to permit the treatment, storage, and disposal of hazardous waste at KHF violates California Government Code § 11135. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-4 by DTSC:

California Government Code, section 11135 prohibits discrimination "under[] any program or activity that . . . receives any financial assistance from the state." An agency violates section 11135 if it receives state funding and takes an action that results in a significantly adverse or disproportionate impact on minorities. Unlike intentional discrimination claims, proving disparate-impact discrimination does not require a showing of discriminatory intent. To make a showing of disproportionate impact, statistical evidence of a kind and degree showing that the practice in question has negatively impacted minorities to a greater degree than non-minorities is sufficient.

DTSC is a state agency, and therefore receives state funding for all of its programs, including its permitting program.⁵ DTSC is the permitting authority for hazardous waste landfills in California. An operator cannot build a hazardous waste landfill or receive hazardous waste without first obtaining a RCRA hazardous waste permit, issued by DTSC. Therefore, if DTSC approves the KHF expansion, its actions will be a direct cause of any impacts from the landfill on nearby residents.

The landfill will have a disproportionate and adverse impact on nearby residents. As acknowledged by the County's Supplemental Environmental Impact Report (EIR), the project will have significant and unavoidable impacts. The project's significant and unavoidable air quality impacts will impact nearby residents to a greater degree than other populations. In addition, the expansion will add 400 trucks transporting hazardous waste near or through Kettleman City each day. The 400 diesel trucks will add to the significant air quality burdens in the area and will exacerbate the extremely high levels of asthma in Kettleman City.⁶ Residents will be at greater risk of toxic exposures than other areas of the State due to accidental hazardous waste releases from the trucks or the disposal site. The close proximity of the hazardous waste landfill and constant threat of accidental toxic releases negatively impacts residents' mental health and sense of safety and well-being.⁷ The close proximity of the hazardous waste landfill and the presence of

⁵ See Executive Order W-5-91.

⁶ Sierra Club, *Highway Health Hazards*, 2004, attached as Appendix F.

⁷ See Fleming, I., O'Keeffe, M. K. and Baum, A. (1991), *Chronic Stress and Toxic Waste: The Role of Uncertainty and Helplessness*. *Journal of Applied Social Psychology*, 21: 1889-1907, Abstract attached as Appendix G; Greenberg, M., Schneider, D., Martell, J. (1994) *Hazardous Waste Sites, Stress, and Neighborhood Quality in USA*. *Environmentalist*, 14:2, 93-105, Abstract attached as Appendix H.

trucks constantly carrying hazardous waste through town will negatively impact property values in the town.⁸

These impacts will disproportionately affect Latinos. According to the 2010 U.S. Census, Kettleman City is 96 percent Hispanic or Latino; Kings County is 52 percent Hispanic or Latino; and California is 38 percent Hispanic or Latino. “The basis for a successful disparate impact claim involves a comparison between two groups — those affected and those unaffected by the facially neutral policy.” *Darensberg v. Metro. Trans. Comm’n*, 636 F.3d 511, 519-520 (9th Cir. 2011). In determining disparity, it is usually appropriate to measure the racial proportionality of the allegedly affected populations against the population of the agency’s decision making jurisdiction. DTSC is a state agency and has decision-making jurisdiction over the entire state. To determine disparate impact therefore, one need only compare the impacted community (96 percent Latino) with the rest of the State (38 percent Latino). This Census data demonstrates that DTSC’s approval of the KHF expansion will have a disparate impact based on race when compared to the rest of the state.

DTSC’s overall permitting of hazardous waste landfills also has a disparate impact on the basis of race. DTSC has permitted three hazardous waste landfills in California; one in Kettleman City, one in Buttonwillow, CA, and one in Westmoreland, CA. Buttonwillow is 78 percent Hispanic or Latino. And Westmoreland is 87 percent Hispanic or Latino. The population of the three communities together is 87 percent Latino. This Census data demonstrates that DTSC’s approval of hazardous waste landfills in California disproportionately impacts Latino residents.

Finally, DTSC’s overall permitting of hazardous waste management units also has a disparate impact based on race. DTSC permits 55 commercial offsite hazardous waste facilities. These facilities are also predominantly permitted near areas with high Latino populations.⁹ Collectively, these communities are in the 76 percentile for number of minority residents when compared to the rest of the state.¹⁰

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC’s authorization of the treatment, storage, and disposal of millions of tons of ignitable, carcinogenic, and extremely toxic wastes at KHF violates California Government Code 11135. This petition for review presents an important policy consideration because review will clarify DTSC’s role and responsibilities in applying California Government Code § 11135. DTSC should also grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

8 Mundy, B. (1992) *The Impact of Hazardous Materials on Property Value*. The Appraisal Journal, April 1992, attached as Appendix I.

9 California Commercial Offsite Hazardous Waste Facilities by Race and Income.

10 *Id.* Calculation derived from averaging all race percentiles in affected zip codes.

DTSC's response to comments stated that "DTSC acknowledges that Kettleman City is among the long list of California communities most burdened by pollution from multiple sources. That is why DTSC added permit conditions to address impacts." DTSC argues that CWM's agreement to prohibit older model trucks from making deliveries at the site is sufficient to ensure that DTSC's decision will not result in disproportionate impacts.

DTSC misinterprets the requirements of California Government Code § 11135. An agency violates section 11135 if it receives state funding and takes an action that results in an adverse or disproportionate impact on minorities. The fact that DTSC had adopted conditions that may reduce a project's impacts does not relieve the agency from liability under Section 11135 if any disproportionate impact remains. Here, the SEIR acknowledges that there will be significant and unavoidable impacts from the facility. Even newer model trucks travelling to and from KHF will add to the significant air quality burdens in the area and will exacerbate the high levels of asthma in Kettleman City. DTSC also did not address the unavoidable air quality impacts from the project itself, identified in the County's own SEIR, nor the risk of toxic exposure from accidental releases, nor the negative impact to property values. El Pueblo raised each of these impacts in its comment letter and received no response.

DTSC dismisses the studies submitted by El Pueblo to demonstrate the mental health impacts of living near hazardous waste facilities, arguing that the studies included "persons [who] live much closer than the distance from Kettleman City to the facility" and that the KHF expansion will not have any "significant impacts . . . identified" from toxic air contaminants to residents 3.5 miles from the site. However, this response fails to acknowledge that the studies indicate that mental health impacts result from *uncertainty and helplessness*, and therefore can result regardless of actual exposure.

Finally, DTSC's response asserts that "the siting of a facility is, by law, a local decision made in this case by Kings County." Again, DTSC is the permitting authority for hazardous waste landfills in California, and an operator cannot build a hazardous waste landfill or receive hazardous waste without first obtaining a permit from DTSC. Whatever disproportionate and adverse impacts that the KHF expansion has on nearby residents are directly caused by DTSC's approval of the facility's permit.

DTSC should accept this petition for review based on the need to address and clarify DTSC's responsibilities under California Government Code, Section 11135, an important policy consideration. DTSC should also accept this petition based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

B. DTSC's Approval of the KHF Expansion Will Violate California Regulations by Perpetuating Kings County's Discrimination.

El Pueblo challenges General Condition 2(B) and General Condition 3 because DTSC's decision to permit the treatment, storage, and disposal of hazardous waste at KHF and its reliance on Kings County's SEIR perpetuates the discriminatory actions of Kings County in violation of Title 22, Section 98101 of the California Code of Regulations. El Pueblo has previously raised

this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-5 by DTSC:

Decision-making about siting and regulating hazardous waste facilities is an integrated process, involving the facility operator, local, state, and federal agencies, including DTSC. DTSC, if it approves the KHF expansion, will perpetuate the disproportionate siting of hazardous waste facilities in low-income, Latino communities in California.

California law establishes that an agency is liable for perpetuating discrimination perpetrated by others. According to Title 22, Section 98101 of the California Code of Regulations, “[i]t is a discriminatory practice for a recipient, in carrying out any program or activity directly . . . on the basis of ethnic group identification . . . to utilize criteria or methods of administration that: perpetuate discrimination by another recipient on the basis of ethnic group identification. . .” 22 CCR § 98101(i)(3).

Kings County is a recipient of State funds. Here, DTSC perpetuates the discriminatory action of Kings County in siting the KHF expansion. Kings County issued a land use permit to Chemical Waste Management in an area where the facility will have a disproportionate impact on Latino residents. Kings County used a process that discriminated against its Latino residents. Upon receiving the request for a permit for expansion of KHF, the County was required to appoint a seven member local assessment committee (LAC) to act in an advisory capacity in considering Chemical Waste Management’s application. Kings County selected only one member who actually resides in Kettleman City.¹¹ The lone Kettleman City resident on the LAC is one of the few known local supporters of Chemical Waste Management. After extensive criticism and just a few weeks before the end of the LAC process, Kings County selected one Latino from Avenal to serve on the LAC. This member was unable to effectively participate in the LAC process, because his first language is Spanish and all LAC and permit documents were provided in English only.

Most Kettleman City residents’ first language is Spanish, and a high percentage are monolingual Spanish speakers. In spite of Kettleman City residents’ continued request and demand for documents in Spanish, the County provided documents in an English-only format.¹² During the permit hearing, Kings County provided Spanish-speaking Latinos with only half the time to testify as English speakers. While English speakers were allotted a full five uninterrupted minutes to testify, the County effectively allowed Spanish speaking Latinos only two and a half minutes to testify—using the remaining time to have Chemical Waste Management translators translate the testimony into English.¹³ Kings County contracted with a large police and security force that had the effect of intimidating

11 *FSEIR*, at 3-191 to -196 (indicating that only one member of the Local Advisory Committee was Latino).

12 *FSEIR* at 3-200; Kings County Planning Commission, Meeting Transcript, October 5, 2009.

13 Kings County Planning Commission, Meeting Transcript, October 5, 2009, at 152:16-19.

local residents and preventing them from participating in the decision-making process.

DTSC relies on Kings County's discriminatory process to make its own decision on the hazardous waste permit. DTSC explicitly relies on Kings County's EIR that was the product of this discriminatory process. DTSC's decision to issue the permit is contingent and dependent on Kings County's environmental review process.¹⁴

To avoid perpetuating Kings County's discriminatory conduct DTSC must 1) prepare its own environmental impact report using a process that does not discriminate against Latino residents; and 2) deny the permit for this particular location because of its disproportionate impacts on Latino residents. Only by denying this permit can DTSC prevent the disproportionate impact of Kings County's decision.

El Pueblo petitions DTSC to review Condition 2(B) and General Condition 3 on the grounds that DTSC's reliance on Kings County's SEIR and its authorization of KHF to treat, store, and dispose of millions of tons of ignitable, carcinogenic, and extremely toxic wastes at KHF perpetuates the discrimination of King County. This petition for review presents an important policy consideration because review will address DTSC's reliance on the discriminatory processes of other governmental entities. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

Despite DTSC's response that "it is unclear from the comments which 'criteria or methods of administration' DTSC has allegedly utilized to perpetuate discrimination," El Pueblo explained in its October 24, 2013 comment letter that DTSC relied on Kings County's discriminatory process to make DTSC's own decision on the hazardous waste permit. DTSC explicitly relied on Kings County's SEIR that was the product of this discriminatory process. DTSC's decision to issue the permit was contingent and dependent on Kings County's environmental review process.

DTSC's response states that "DTSC is aware that the SEIR was challenged in court and that the County's SEIR certification was affirmed by both trial and appellate courts." This statement is misleading as the Court never reached the merits of the claim. The Court denied the legal challenge on exhaustion grounds which are not relevant here, since El Pueblo has properly exhausted the issue for purposes of DTSC's CEQA compliance.

DTSC next asserts that El Pueblo could have pursued other avenues to challenge Kings County's discriminatory actions. However, California Government Code, Section 11135 does not require El Pueblo to pursue alternative avenues in order to raise a challenge in the current context. Rather, Section 11135 provides a right to review independent of other possible avenues to

¹⁴ Department of Toxic Substances Control, Addendum & Initial Study/Environmental Checklist to the Final Subsequent Environmental Impact Report Prepared for the Existing B-18 Class I/Class II Landfill Expansion Project (hereafter "Addendum"), May 21, 2013, at 4.

redress the harm. The fact that there may be alternative avenues to address Kings County's discrimination does not relieve DTSC obligation to avoid perpetuating that discrimination through reliance on Kings County's SEIR.

Finally, DTSC asserts that it has neither the ability nor duty to reject the SEIR. While DTSC may not be able to "reject" the SEIR, it certainly has the ability and duty to supplement the SEIR if the document is not adequate. In fact, DTSC acknowledged that the document was not adequate to support DTSC's decision and drafted an addendum. DTSC had the opportunity to remedy Kings County's discriminatory actions but failed to do so.

DTSC should accept this petition for review based on an important policy consideration concerning the propriety of relying on a document that was the product of a discriminatory process. DTSC should also accept this petition based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

C. DTSC's Approval of the KHF Expansion Will Violate California Regulations by Discriminating Against Kettleman City Residents in Permitting the Selection of the Site of the KHF Expansion.

El Pueblo challenges General Condition 2(B) because DTSC's decision to permit the treatment, storage, and disposal of hazardous waste at KHF violates Title 22, Section 98101 of the California Code of Regulations, prohibiting the permitting of selections of sites that have a discriminatory effect. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-6 by DTSC:

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).

Here, DTSC did not itself select the KHF expansion site, but permitted the selection of a site that will subject Latino residents to discrimination on the basis of race and national origin. Under California regulation, this makes DTSC liable for discrimination.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's permitting of a selection of a site that will have a discriminatory impact on the basis of race violates the California Code of Regulations. This petition for review presents an important policy consideration because review will address DTSC's reliance on the discriminatory processes of other governmental entities. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo's comments by asserting that "[s]ite selection is a local decision, not a DTSC decision." The regulation, on its face, does not limit its application to those who selected a site. El Pueblo acknowledged that DTSC did not itself select the KHF expansion site, but it did *permit the selection of a site* that will subject Latino residents to discrimination on the basis of race and national origin. California Code of Regulations, Title 22, Section 98101(j)(1) expressly forbids DTSC from "permit[ting discriminatory] selections of sites," which is precisely what DTSC has done. Again, DTSC is the permitting authority for hazardous waste landfills in California, and an operator cannot build a hazardous waste landfill or receive hazardous waste without first obtaining a permit from DTSC. Whatever disproportionate and adverse impacts that the KHF expansion has on nearby residents by receiving hazardous waste are directly caused by DTSC's approval of the facility's permit.

DTSC should accept this petition for review based on an important policy consideration and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

D. DTSC's Violations of the California Health & Safety Code Have Led to Pervasive Patterns of Discriminatory Siting Statewide.

El Pueblo challenges General Condition 2(B) because the discriminatory impact of DTSC's decision to permit the treatment, storage, and disposal of hazardous waste at KHF could have been avoided had DTSC complied with Section 25170 of the California Health & Safety Code, requiring statewide hazardous waste planning. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-7 by DTSC:

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 of low-income and minority communities for the most undesirable toxic waste facilities, a practice that is well documented.¹⁵

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 Latino, communities, DTSC has contributed to the widespread discrimination against Latinos in hazardous waste facility siting decisions.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC’s failure to comply California Health & Safety Code, Sections 25170 and 25135.9 contributed to the discriminatory decision to permit the treatment, storage and disposal of hazardous waste at KHF. This petition for review presents an important policy consideration because review will determine DTSC’s responsibilities for statewide hazardous waste planning. DTSC should also grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo’s comments by claiming that the statutory mandate requiring DTSC to provide statewide planning for hazardous waste facility site identification, is not a “condition precedent” for local siting decisions. However, as pointed out in our comment, DTSC’s failure to follow this statutory mandate contributed to DTSC’s pervasive patterns of discriminatory siting statewide. Moreover, the statute contradicts DTSC’s oft repeated assertion that hazardous waste facility siting is entirely a local decision isolated from DTSC’s permitting of the selected sites. This statutory mandate demonstrates the legislature’s intent for DTSC to provide statewide planning for site identification and assessment and conferred DTSC with the power and obligation to coordinate and plan for such siting.

DTSC next asserts that “the legislature did not provide sufficient funding to prepare a plan and did not provide further legislative direction.” This “lack of adequate resource” argument – no matter how valid – cannot be used as an excuse for non-compliance with the law. *See Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (rejecting lack of agency funding as an excuse for non-compliance with statutory mandate); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir.1999) (same). As explained by one court, “[b]udgetary constraints, far from being exceptional, are an everyday reality.” *Center for Biological*

¹⁵ See e.g. Cerrell Report, *supra* note 7; United Church of Christ, *supra* note 2.

Diversity, 304 F. Supp. 2d at 1179. “To the extent the [agency] feels aggrieved by Congress’ failure to allocate proper resources in which to comply with [its] statutory duty, Congress, not the courts, is the proper governmental body to provide relief.” *Id.* at 1179 (citations omitted). Unless and until the legislature reverses this statutory mandate, it remains DTSC’s legal duty to comply.

Finally, DTSC stated that “the siting of the Kettleman Hills facility predates the legislature’s requirement to approve a Statewide Hazardous Waste Management Plan by 1991.” This argument simply ignores the fact that the permit decision at issue here does not predate the legislature’s requirement. By failing to prepare and provide the required planning documents, DTSC contributes to the widespread discrimination against Latinos in hazardous waste facility permitting decisions.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC’s responsibilities to provide statewide planning on appropriate site identification, and based on DTSC’s clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

E. DTSC’s Approval of the KHF Expansion Will Violate Title VI of the Civil Rights Act of 1964.

El Pueblo challenges General Condition 2(B) because DTSC’s decision to permit the treatment, storage, and disposal of hazardous waste at KHF violates Title VI, prohibiting discrimination by recipients of federal funding. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-8 by DTSC:

Title VI prohibits discrimination by recipients of federal funding. Section 601 provides that “[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

A claim under Section 601 requires a showing of discriminatory intent. However, circumstantial evidence of impact may prove intent. The Ninth Circuit has held that evidence of “gross statistical disparities” may be used to satisfy the intent requirement of a Title VI claim where the evidence “tends to show that some invidious or discriminatory purpose underlies the policy.” Though statistical evidence of discriminatory impact alone does not prove intent to discriminate, it, along with supporting circumstantial evidence, may be “considered in determining whether there is evidence of intent or purpose to discriminate.”

Factors that may be illustrative for courts considering whether the totality of the circumstances shown by indirect evidence may give rise to an inference of discriminatory intent in addition to disparate impact, include:

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. . . . The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Village of Arlington Heights v. Metro. Hou. Dev. Corp., (2007) 429 U.S. 252, 267-268.

Here, there is sufficient circumstantial evidence to infer discriminatory intent. This evidence includes:

- The Cerrell Report, commissioned by California, which provided private companies and governmental entities with criteria to determine which communities would be least likely to oppose undesirable land uses. The criteria described low-income, rural, Latino communities.
- DTSC has, in fact, permitted all of the State's hazardous waste landfills in low-income, rural, Latino communities.
- DTSC's preparation of a draft approval despite acknowledging that Kettleman City is in the top 10% of most vulnerable communities in California, factoring in demographic data and pollution sources.
- DTSC's admission that it does not have any standardized criteria to determine when it is appropriate to deny a hazardous waste facility permit, even with the knowledge that private companies target low-income Latino communities.
- DTSC's preparation of a draft approval for the KHF prior to reviewing and implementing a report that it commissioned to critique its permitting program.
- DTSC's failure to prepare required statewide hazardous waste planning that would determine appropriate siting criteria.
- DTSC does not consider alternative locations to Latino communities pursuant to its CEQA authority.
- DTSC's oft repeated concerns that policies designed to prevent disproportionate siting decisions in California would lead to hazardous waste being disposed of out of state. This indicates that the agency believes that the only politically viable locations for a

hazardous waste landfill are in areas with high minority populations.

In total, circumstantial evidence sufficiently demonstrates that DTSC has acted in the belief that permitting hazardous waste landfills is most feasible in low-income Latino communities; that California requires additional hazardous waste capacity; and that it must approve hazardous waste landfills in Latino communities in order to meet California's hazardous waste capacity needs. This meets the standard for intentional discrimination.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's decision to permit the treatment, storage and disposal of hazardous waste at KHF violated Title VI of the Civil Rights Act. This petition for review presents an important policy consideration because review will determine whether DTSC's decision was based on improper bias. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

In its response to comments, DTSC reiterates that "[i]t should be noted that DTSC does not site hazardous waste facilities." Again, DTSC is the permitting authority for hazardous waste landfills in California, and an operator cannot build a hazardous waste landfill or receive hazardous waste without first obtaining a permit from DTSC. Whatever disproportionate and adverse impacts that the KHF expansion has on nearby residents by receiving hazardous waste are directly caused by DTSC's approval of the facility's permit.

DTSC further responded by stating that "DTSC is committed to ensuring equal application of environmental protection for all communities and citizens without regard to race, national origin or income," yet, as described in El Pueblo's comment, circumstantial evidence demonstrates otherwise. The most vulnerable populations in California, such as the highly marginalized Latino residents of Kettleman City, with language barriers, low education levels, and lack of political representation, are easy targets for inherently dangerous land uses like the KHF expansion. As demonstrated in the Cerrell Report, the State has an interest in permitting necessary, but undesirable, land uses in areas where it is most feasible to do so. The evidence shows that DTSC has permitted the selection of sites in the belief that permitting hazardous waste landfills is most feasible in low-income Latino communities; that California requires additional hazardous waste capacity; and that it must approve hazardous waste landfills in Latino communities in order to meet California's hazardous waste capacity needs. The evidence cited in our comment demonstrates that DTSC's permitting of the KHF expansion is unlawful and the result of intentional bias and discrimination.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's intentional or inherent bias in permitting the treatment, storage, and disposal of hazardous waste at KHF, and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

F. DTSC's Approval of the KHF Expansion Will Violate the Equal Protection Clause.

El Pueblo challenges General Condition 2(B) because the treatment, storage, and disposal of hazardous waste at KHF will have a disproportionate impact on Latino residents. DTSC's authorization of the treatment, storage, and disposal of hazardous waste at KHF violates the Equal Protection Clause. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-9 by DTSC:

The Equal Protection Clause of the Fourteenth Amendment provides the primary constitutional cause of action available to remedy inequities. The constitutional prohibition on disparate treatment in this context prevents government actors from allocating environmental benefits and burdens on racial grounds. To prove a violation, plaintiffs must show that persons who are similarly situated are being treated differently (i.e., a disparate impact) and must also provide evidence of intent to effectuate the discriminatory practice.

Based on the evidence cited above, DTSC's approval of the KHF expansion, and its larger pattern of issuing permits to hazardous waste facilities that target Latino communities violates the Equal Protection Clause.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's decision to permit the treatment, storage and disposal of hazardous waste at KHF violated the Equal Protection Clause. This petition for review presents an important policy consideration because review will determine whether DTSC's decision was based on improper bias. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

In its response to El Pueblo's comments, DTSC describes its Environmental Justice Policy and explains how it believes it implemented that policy in deciding to issue a permit for the KHF facility. However, DTSC does not challenge the circumstantial evidence cited in our comment letter, which demonstrates a bias toward permitting undesirable land uses in Latino communities based on political feasibility. The evidence demonstrates that DTSC believes that the only politically viable option to permit hazardous waste facilities is in low-income Latino communities. This is demonstrated by the findings of the Cerrell Report, the fact that DTSC only issues hazardous waste landfill permits in low-income Latino communities, that DTSC issues all of its hazardous waste permits in either low-income or majority non-white communities, that DTSC violated its mandate to develop a statewide plan to determine where to site facilities, and that the agency has opposed attempts to develop a non-discriminatory hazardous waste plan because it believes that any such plan would result in inadequate disposal capacity in California. In general, the evidence shows that DTSC has permitted the selection of sites in the belief that permitting hazardous waste landfills is most feasible in low-income Latino communities; that California requires additional hazardous waste capacity; and that it must approve hazardous waste landfills in Latino communities in order to meet California's hazardous waste capacity needs. This intentional discrimination by DTSC against Latino communities violates the Equal Protection Clause of the U.S. Constitution.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's intentional or inherent bias in permitting the treatment, storage, and disposal of hazardous waste at KHF, and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

II. DTSC Lacks Criteria to Make Permit Decisions

El Pueblo challenges General Condition 2(B), authorizing the treatment, storage, and disposal of hazardous waste at KHF, because DTSC lacked criteria to make this permit decision. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-10 by DTSC:

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.”¹⁶ 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.”¹⁷ 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. The recommendations and findings were due to be released by June 30, 2013.¹⁸

On October 8, 2013, the department formally released the report.¹⁹ 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.

However, DTSC is proposing to move forward with a permit decision on the KHF expansion despite knowing that it does not have clear criteria in place to use and before having any opportunity to develop the criteria recommended in its own consultant's report. It is irresponsible for the agency to move forward with permitting such a controversial permit at the same time it has recognized the absence of clear criteria on when to deny the permit and is actively seeking ways to improve their permit process. DTSC must wait until it has the opportunity to implement changes to its permitting program to continue the KHF permitting process. This decision will impact nearby residents for generations to come and needs to be done right. If DTSC moves forward

16 February 15, 2013 Open Letter from Debbie Raphael, attached as Appendix J.

17 *Id.*

18 *Id.*

19 CPS HR Consulting, Department of Toxic Substances Control Permitting Process Review and Analysis Final Report, October 2, 2013, attached as Appendix K.

without taking the time to implement recommended changes to the permit process, the agency will have acknowledged that the permit is the result of a flawed process, made without the benefit of any clear guidelines on when to deny a permit. Kettleman City residents deserve a deliberate process with clear and objective criteria for permit approval or denial. Without such criteria, the process is subject to the whims of individual staff and political persuasion. Kettleman City residents should not suffer because of the incompetency of the agency.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's lack of criteria prevented it from making a well-reasoned and supportable decision to authorize the treatment, storage, and disposal of hazardous waste at KHF. This petition for review presents an important policy consideration because DTSC's decision to issue a permit at the same time it recognized the lack of any clear criteria to guide that decision is an abuse of the agency's discretion.

In response to El Pueblo's objection, DTSC states that it "agrees that Kettleman City residents deserve a deliberate process with clear and objective criteria. . . . That is why DTSC has followed the criteria set forth in regulation and statute for this decision. DTSC's criteria for permit decisions are firmly founded in CCR and HSC." This statement directly contradicts the CPS report and DTSC's official response to the CPS report. The CPS report states that "a principal stakeholder complaint is that there are no clear criteria for making denial/revocation decisions that are based on valid standards of performance and threats. **In fact, department officials admit this is true.** Two significant and related factors are that there are no clear and objective standards for violations that would support a decision to deny or revoke a permit; and there is no standard for denial or revocation based on three issued Notices of Deficiency." DTSC responded to the report by stating that "DTSC is researching best management practices utilized by other states to identify approaches that would provide for more defined standards for permit denial and revocation and will consult with USEPA and other stakeholders to determine the most effective approach to defining standards for these actions. We anticipate that this research will conclude in the first quarter of 2014."²⁰

DTSC cannot on the one hand affirm that it lacks clear and objective criteria for permit decisions, and on the other assert that existing regulations and statutes provide clear and objective criteria for permit denial. The inconsistent position taken by DTSC on this issue casts serious doubt on the validity of its analysis. *See U.S. v. Mead*, 533 U.S. 218, 228 (2001).

In fact, DTSC reports that it is currently researching approaches to define standards for permit denials and revocations and the Legislature is currently considering two bills that would provide guidance to the agency to help address this problem. DTSC's decision to issue a permit while concurrently working on standards that would directly affect the decision reflects an abuse of the agency's discretion.

DTSC also argues "there is nothing that precludes it from exercising its statutory authority to act on current permit applications." However, DTSC should grant this Petition for Review based on an on important policy considerations concerning DTSC's inappropriate exercise of its

²⁰ Department of Toxic Substances Control Response to CPS Permitting Process and Analysis Report, December 2013.

discretion. DTSC's decision to approve this permit at the same time as it recognizes and attempts to address the lack of criteria for permit decisions reflects poor policy and is an abuse of the agency's discretion.

III. DTSC'S DECISION VIOLATES ITS OWN ENVIRONMENTAL JUSTICE POLICIES

A. Precautionary Principle

El Pueblo challenges General Condition 2(B) because the authorization of the treatment, storage, and disposal of hazardous waste at KHF violates DTSC's own environmental justice policies. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-11 by DTSC:

DTSC's environmental justice policies states that the agency will "[p]rotect public health or the environment if a reasonable threat of serious harm exists based upon the best available science and other relevant information, even if absolute and undisputed scientific evidence is not available to assess the exact nature and extent of risk."²¹ This policy codifies the basic precautionary principle. The precautionary principle holds that when significant risks to public health are suspected, efforts should be made to reduce those risks, even when scientific knowledge is inconclusive, and to seek alternatives. The principle critically shifts the burden of proof from the general public to the initiator of that public health or environmental risk. Instead of the public having to show they have been harmed, the project proponent has to show that the activity, process, or chemical exposure is harmless.

Officials, organizations, and residents throughout California suspect significant risks to Kettleman City residents from KHF; no agency has been able to provide a conclusive explanation for the elevated levels of birth defects in Kettleman City. The State has confirmed that birth defect levels are higher than would be expected in a town the size of Kettleman City.²² The State has ruled out genetics and behavior or lifestyle risk factors as causes of the birth defects.²³ The State has not ruled out environmental causes such as pollution. The State ultimately found that "although the overall investigation found levels of pollutants in the air, water and soil of Kettleman City, the comprehensive investigation did not find a specific cause or environmental exposure among the mothers that would explain the increase in the number of children born with birth defects in Kettleman City."²⁴

In fact, DTSC suspended PCB monitoring in April 2008, exactly when mothers started to give birth to children with birth defects, and did not begin PCB monitoring again until

21 See Department of Toxic Substances Control, Environmental Justice Review Attachment 1, June 2013, at 5 (hereafter "Environmental Justice Review").

22 California Environmental Protection Agency, California Department of Public Health: Investigation of Birth Defects and Community Exposures in Kettleman City, CA, December 2010.

23 *Id.* at 2-3.

24 *Id.* at 1.

after the bulk of the birth defects had been discovered, in 2010. Birth defects of the type experienced in Kettleman City have been linked to PCB exposure in scientific studies. Since DTSC suspended the PCB analysis during the birth defect cluster, the agency actually caused some of the scientific uncertainty about whether KHF caused or contributed to the birth defect cluster. The fact that DTSC is only now requiring a monitor that will detect PCBs when wind is blowing toward Kettleman City, is an acknowledgement that their prior monitoring was inadequate to identify risks when conditions were most dangerous to the community.

Pursuant to the precautionary principle and DTSC's environmental justice policy, the State's uncertainty over the cause of the elevated birth defects rates does not pave the way for DTSC to move forward with a permit decision; rather it shifts the burden of proof to Chemical Waste Management to conclusively demonstrate that its facility did not and will not contribute to health risks. The unequivocal health impacts in Kettleman City, coupled with evidence that the birth defects can be caused by the chemicals disposed at KHF, coupled with the State's difficulty in ascertaining the cause of the health impact, makes Chemical Waste Management's burden very difficult to meet.

Residents also complain of elevated levels of cancer, asthma, miscarriages, anemia, and asthma. No agency has conducted a comprehensive health survey of Kettleman City to determine whether residents face elevated risks from other suspected health impacts. The State did conclude that childhood leukemia rates were higher than expected but have not attempted to find out the cause of the high rates.²⁵ Without a more comprehensive health survey determining the extent and cause of other health impacts in town, DTSC should not move forward with the permit.

DTSC has not followed its environmental justice policies in the face of scientific uncertainties over the cause of the birth defect cluster, elevated childhood leukemia rates, and the extent and cause of other health problems experienced in Kettleman City. Rather, it demands that the public provide definitive proof linking health problems to KHF. DTSC is treating the State's finding that it was unable to determine the cause of the birth defects cluster as proof that KHF was not a contributing cause. DTSC should deny the permit because Chemical Waste Management cannot meet its burden showing conclusively that the facility did not and will not contribute to health impacts in Kettleman City.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's authorization of the treatment, storage, and disposal of hazardous waste at KHF violates its own environmental justice policies, including the precautionary principle. This petition for review presents an important policy consideration because review will determine DTSC's responsibilities under its environmental justice policies.

In its response to El Pueblo's comments, DTSC argues that there is no uncertainty regarding KHF's impacts on nearby residents and that "each of the studies [on potential impacts] has ruled

²⁵ *Id.* at 3.

out the facility's operation as a demonstrable cause." Page 96. This statement is simply incorrect.

The State's *Investigation of Birth Defects and Community Exposures in Kettleman City* study was unable to find a definitive link between the facility and the birth defects experienced in Kettleman City; in fact it was unable to establish any probable cause of the birth defects. Contrary to DTSC's statement however, it did not rule out any pollution source as a cause, including KHF. The fact that the State was unable to pinpoint any cause of the birth defect cluster is not surprising as the state has never been able to definitely link a disease or birth defect cluster to a particular cause. Given the complexity of the issue, science remains inadequate to establish causal links between a certain polluting source and birth defects and other diseases, especially in cases like Kettleman City where the cumulative impact of several polluting sources is suspected to exacerbate health impacts experienced by Kettleman residents. This scientific uncertainty is precisely why using the precautionary principle is necessary. Because the State was unable to rule out the facility as a cause of the birth defects, the burden should shift to CWM to demonstrate that KHF could not have contributed to the serious health problems experienced in Kettleman City.

DTSC next discusses EPA's PCB study at length. DTSC acknowledges that EPA conducted its PCB study at a time when KHF was not accepting PCBs. Furthermore, DTSC issued KHF a violation for known PCBs spills, yet the EPA found that PCB concentrations found in soil at the facility "are similar to those measures elsewhere in the country." The fact that there were known PCB spills at KHF that the EPA study failed to detect, indicate that the study may have also failed to detect other, unknown PCB releases.

DTSC finally lists the steps it states it has taken to implement its Environmental Justice Policy. However, DTSC does not indicate that it has applied the precautionary principle to assess project impacts.

DTSC should grant this petition for review based on an on important policy considerations concerning DTSC's failure to comply with the precautionary principle when determining that the KHF did not cause or contribute to health impacts in Kettleman City.

B. Cumulative Impacts

El Pueblo challenges General Condition 2(B) because DTSC's authorization of the treatment, storage, and disposal of hazardous waste at KHF will not minimize cumulative impacts from KHF as required by DTSC's environmental justice policies. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-12 by DTSC:

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."²⁶ Even though DTSC acknowledges that Kettleman City residents face a cumulative risk from multiple pollution sources, it does little to identify the nature of those impacts or address them. As

²⁶ Environmental Justice Review at 5.

discussed in more detail below, DTSC's entire cumulative impact analysis consists of listing new or proposed projects that have emerged since Kings County certified its EIR for the project and summarizing any existing CEQA documentation for the new projects. DTSC did not analyze the combined impact of multiple environmental stressors in the area, and certainly did not minimize potential cumulative impacts by significantly reducing exposure risks from individual sites.

DTSC is well aware of the widespread concern over cumulative impacts in Kettleman City. In fact, during her confirmation hearing, members of the legislature explicitly asked DTSC Director Debbie Raphael to explain how she planned to address cumulative impacts. The Director responded that "we need to take additional information into account, look at what other facilities have been cited around the Kettleman community, look at the issue of birth defects, look at pesticide exposures, to try to have an idea of what - - paint a picture of the reality of the situation for the residents of Kettleman, and how does the facility play into that. And that's part of the additional work that we are working on right now."²⁷ DTSC's cumulative impact analysis is a far cry from what the Director promised the legislature. The analysis did not "look at the issue of birth defects," did not "look at pesticide exposures," and did not "paint a picture of the reality of the situation for the residents of Kettleman and how does the facility play into that."

Outside the CEQA context, 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. Impacts will take into account sensitive populations and socioeconomic factors, where applicable and to the extent data are available.

DTSC prepared an Environmental Justice Review "to identify and address environmental justice concerns related to the Kettleman Hills Facility. . ."²⁸ The document "review[ed] authoritative and voluntary actions taken by DTSC, local government, federal government, and the Applicant to address impacts on the people in the community from the facility or from multiple impacts of other activities."²⁹ DTSC "acknowledges the multiple environmental pollution burdens borne by the Kettleman City community, and the presence of poverty, language barriers and other factors which tend to make those people vulnerable to the impacts of pollution."³⁰ However, DTSC does not address the cumulative impacts associated with its permit decision. Rather DTSC describes residents' concerns and summarizes ongoing activities by itself and other agencies that are completely independent of and unrelated to the facility and the ultimate decision. For example, DTSC lists 1) agreements made by the company pursuant to the Tanner Act process, 2) EPA's prevention of pesticide exposure project to educate local residents; 3) EPA's Diesel Truck Emissions grant to Greenaction for Health and Environmental Justice; and 4) plans for a new drinking water source. Many other cited actions are

27 Senate Rule Committee, Transcript of Hearing on April 11, 2012, at 36-37, attached as Appendix L.

28 Environmental Justice Review at 4.

29 *Id.*

30 *Id.*

merely inconclusive studies with no associated pollution reductions. All these activities would have occurred even without DTSC's approval of the proposed facility. Yet DTSC relies upon these activities to mitigate cumulative impacts from the KHF expansion. DTSC risks stifling improvements and positive programs for vulnerable areas if it relies upon them as justification for permitting undesirable land uses. DTSC must address cumulative impacts from the KHF expansion by significantly reducing exposure risks from that individual site, not by reliance on the positive steps that are already being taken in the community. Where, as here, cumulative impacts are so severe, the only way to acceptably reduce the cumulative risk presented by the KHF expansion is to deny the permit.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's authorization of the treatment, storage, and disposal of hazardous waste at KHF failed to comply with DTSC's environmental justice policies on cumulative impacts. This petition for review presents an important policy consideration because review will determine DTSC's responsibilities under its own environmental justice policies.

In its response to comments, DTSC states that it "identified the issues that most concern residents: air and drinking water" and "consider[ed] the studies of birth defects, pesticide exposures and considered the facility's contribution, which is minimal." This does not constitute a cumulative impact analysis. The record contains no analysis, description, or quantification of the multiple sources of pollution faced by Kettleman City residents. In fact, even though DTSC was aware that the Office of Environmental Health Hazard Assessment (OEHHA) had classified the census tract containing Kettleman City as in the highest risk category for cumulative impacts and social vulnerabilities, the agency failed to consider or address OEHHA's findings.

DTSC's response is nothing more than a post-hoc and piecemeal attempt to justify its failure to comprehensively consider cumulative impacts. The record indicates that DTSC did not conduct a cumulative impact analysis pursuant to its environmental justice policy and did not fulfill commitments Ms. Raphael made during her confirmation hearing.

DTSC should grant this Petition for Review based on an on important policy considerations concerning DTSC's failure to comply with DTSC's environmental justice policies on cumulative impacts.

V. DTSC SHOULD DENY THE PERMIT BASED ON CHEMICAL WASTE MANAGEMENT'S COMPLIANCE HISTORY

A. DTSC Should Deny the Permit Based on Chemical Waste Management's Repeating or Recurring Pattern of Violations and Noncompliance.

El Pueblo challenges General Condition 2(B) and each and every other condition of the permit because DTSC should not have authorized the treatment, storage, and disposal of hazardous waste at KHF based on CWM's repeating and recurring pattern of violations and noncompliance. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-13 by DTSC:

The KHF expansion project takes place against a backdrop of repeated environmental violations and fines for failure to meet basic operating standards. Agencies have fined Chemical Waste Management millions of dollars for violations at KHF since it was built, and continue to issue fines to the company as recently as this year.

Chemical Waste Management has been fined repeatedly for violations at KHF. In 1984, EPA fined Chemical Waste Management \$2.5 million for a total of 130 violations. Among other incidents, Chemical Waste Management was charged with allowing leaks from the dump to contaminate local water supplies. In 1985, EPA and Chemical Waste Management's parent company, Waste Management, Inc., agreed to a consent decree involving \$4 million in fines for failing to adequately monitor ground water and for mishandling hazardous waste, including PCBs, at the Kettleman Hills dump. In 2005, EPA and Chemical Waste Management entered into a consent decree for extensive monitoring violations. The California Department of Health Services fined Chemical Waste Management \$363,000 for eleven administrative and operational violations at the Kettleman dump.

Agencies have consistently and continually levied violations and fines against Chemical Waste Management. On April 8, 2010, EPA issued Chemical Waste Management a letter outlining that the company was engaged in improper disposal and improper handling of highly toxic materials. And, on May 27, 2010, EPA Region 9 issued a Notice of Compliance to Waste Management stating that, "the data quality control system at the KHF Laboratory is not adequate to ensure reliable analytical results," and "should not be used for decision making." On March 2013, DTSC fined Chemical Waste Management \$311,194 for 72 violations for failing to report hazardous waste spills on its property during a four year period between 2008 and 2012.

Health & Safety Code, Section 25186 authorizes DTSC to deny or revoke a permit based on violations of or noncompliance with environmental protection statutes and regulations, if the violation or noncompliance shows a repeating or recurring pattern or may pose a threat to public health or safety of the environment. Moreover, Title 22 of the California Code of Regulation, Section 66270.43 authorizes DTSC to revoke or deny a permit for noncompliance by the applicant with *any condition* of the permit.

Agencies found violations at KHF on April 9, 2012, November 10, 2011, September 1, 2011, July 21, 2011, July 28, 2010, June 2, 2010, February 8-12, 2010, September 28, 2009, July 25, 2008, November 16, 2006, December 6-15, 2005, August 22-23, 2005, June 10, 2003, September 7, 2004, November 20, 2003, April 2, 2001, November 18, 1999, September 28, 1999, October 6, 1998, April 15, 1996, November 7, 1995, May 3, 1995, March 13, 1995, September 9, 1994, April 5, 1994, April 23, 1993, November 19, 1992, November 3, 1992, September 18, 1992, May 12, 1992, November 26, 1991, July 30, 1991, May 13, 1991, November 19, 1990, April 27, 1989, April 24, 1989, February 20, 1989, February 8, 1989, August 24, 1988, March 19, 1988, January 26, 1987, May 23-24, 1984, March 21-April 18, 1984, and April 13-14, 1983.³¹

31 CWM Kettleman Hills Facility RCRA/TSCA Inspections 1983-Present.

In response to a question about whether Chemical Waste Management's enforcement record was taken into account in the draft permit modification decision, DTSC explained that "DTSC carefully reviewed the facility's entire enforcement record, dating back to 1983 and concluded that none of the violations threatened public health or the environment."³² By considering only whether violations threatened health and the environment, DTSC applies the wrong standard. Pursuant to Health & Safety Code Section 25186, DTSC must consider whether violations of or noncompliance with environmental protection statutes and regulations shows a repeating or recurring pattern. This consideration is in addition to and separate from its consideration of whether the violations pose a threat to public health or safety of the environment.

In a separate document, DTSC provides a different answer to how the agency considered the compliance history of the KHF. DTSC explains that its enforcement review "concluded that the facility is not a serial violator as there have been long stretches of time without violations."³³ This is factually incorrect as Chemical Waste Management has not gone any substantial period of time without violating statutes, regulations or its permits, as demonstrated above. Additionally, DTSC's interpretation of its authority is contrary to the plain language of the statute, and constitutes the setting of an underground regulation without first complying with the California Administrative Procedure Act. According to DTSC's new interpretation of what constitutes a pattern or practice of violations, an applicant would have to violate statutes, regulations or permits at consistent time intervals for the entire life of the project. This is an arbitrary interpretation of what constitutes a repeating or recurring pattern of noncompliance, renders Health & Safety Code Section 25186 virtually meaningless, and sets up very dangerous precedent for other facilities across the state.

By any reasonable measure, Chemical Waste Management's violations and noncompliance show a repeating or recurring pattern. By sheer number: DTSC and other agencies have issued hundreds of violations against KHF. By timeframe: the violations span 30 years. By consistency: KHF has operated for 30 years; in 24 of those years, it has been found in violation of statutes, regulations or its permits at least once. By continuity: the facility has continued to violate statutes, regulations, and its permits even as it seeks this expansion. In fact, some of the facility's largest fines have been issued within the last two years, after it filed its permit application with DTSC.

El Pueblo petitions DTSC to review Condition 2(B) and each and every other condition of the permit on the grounds that DTSC abused its discretion in determining that CWM's compliance history did not reflect a repeating and recurring pattern of violations. This petition for review presents an important policy consideration because review will clarify what constitutes a repeating and recurring pattern of violations. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

32 Department of Toxic Substances Control, Frequently Asked Questions: DTSC Issues Draft Decision on Kettleman Facility and Announces Initiative to Reduce Landfill Waste by 50 percent, July 2013 at 5.

33 DTSC Fact Sheet of Approval of Class 3 Permit Modification Request (Updated-October) at 1.

In response to El Pueblo's comments, DTSC acknowledges that CMW's "violations could be viewed as meeting the repeating or recurring standard under which DTSC may exercise its discretion to deny." DTSC refers El Pueblo to its General Response – Compliance History which states: "DTSC has identified circumstances under which denial should be considered. These include: when an act of the permit applicant or holder . . . shows a clear unwillingness or inability to comply with environmental laws..."³⁴ DTSC states that it does not find that CWM showed a clear unwillingness or inability to comply with environmental laws.

DTSC abuses its discretion because CMW's compliance history indeed demonstrates that the applicant is unwilling or unable to comply with the terms of its permit and environmental laws. DTSC has issued hundreds of violations to CWM, yet the company continues to violate its permit. Most importantly, even when KHF is not accepting waste, CWM still violates the law and its permits. CWM most recently violated the terms of its permit and the law in February, *when the facility was not receiving more than one truckload of waste per day*. If the CWM cannot comply with the terms of its permit when receiving virtually no waste, the facility will be unable to comply when receiving 400 truckloads of waste every day.

The February 2014 violation is not insignificant: CMW mischaracterized waste and land disposed of hazardous waste that did not meet land treatment standards. DTSC itself characterized this type of violation as significant. *See* DTSC Response to Comments at 25 (Describing a similar 2012 violation for "failure to properly treat a shipment of hazardous waste to meet land disposal restriction requirements prior to placement in the landfill" as significant.) DTSC has not publically disclosed the type of waste that DTSC mischaracterized, and in fact, had not informed the public or any other interested part about the violation prior to issuing the permit. This information is critically important to the public, who are especially concerned about the facility's inability to comply with the terms of its permit and California's environmental laws.

DTSC should re-open the permit process so that the public has an opportunity to review the violation and submit additional comments on the applicant's compliance history and its ability to comply with its permit in the future.

DTSC's findings that CWM's compliance history does not warrant a permit denial is unsupported by the record. DTSC cannot conclude that the facility's compliance history does not show an unwillingness or inability to comply with applicable requirements without explaining the basis for making that determination along with supporting evidence. DTSC's finding regarding CWM compliance history is unsupported by the record and an abuse of the agency's discretion.

DTSC additionally finds that CWM's violations did not represent a threat to public safety or health or the environment. DTSC's interpretation of relevant law is erroneous. Pursuant to Health & Safety Code, Section 25186, DTSC may deny, suspend, or revoke any permit if the applicant has engaged in any violation of applicable requirements if the violation or

³⁴ This policy is tantamount to an underground regulation and violates the intent of Health & Safety Code, Section 25186.

noncompliance shows a repeating or recurring pattern *or* may pose a threat to public health or safety or the environment. The plain meaning of this statute is that DTSC may deny a permit if the applicant demonstrates a recurring or repeating pattern of violations even if none of the violations poses a threat to public health or safety or the environment.

Furthermore, several of the violations did pose a threat to public health, safety or the environment. For example, EPA found violations involving the illegal disposal of PCBs through spillage, including in an area that had samples as high as 440 ppm of PCBs. DTSC found that the nature and location of these spills did not pose a threat to public health and safety or the environment “*beyond the location of the spills.*” With this statement, DTSC implicitly acknowledges that the spills posed a threat at and near the location of the spills. At the very least, PCB levels as high as 440ppm posed a serious safety risk to onsite workers as well as anyone entering the site, such as those driving trucks transporting waste. The law makes no distinction between on-site and off-site risks to public health, safety and the environment. Many of CWM’s violations involve spills, unlawful disposal, and inadequate testing and monitoring. These violations are not merely paperwork violations but represent serious lapses that could threaten public health, safety and the environment. CWM’s consistently poor compliance history demonstrates that DTSC should deny the permit.

El Pueblo challenged each of DTSC’s stated reasons in its draft permit approval for determining that CWM’s compliance history demonstrated a recurring or repeating pattern on violations. DTSC did not respond to these comments. Instead, in its response to comments, DTSC introduced an entirely new basis for its finding that the violations do not represent a repeating or recurring pattern. DTSC’s analysis and the basis of its decision should be consistent throughout the process. The failure to acknowledge the agency’s previous position and explain why DTSC now uses an entirely different basis is the hallmark of an arbitrary and capricious decision. An inconsistent position taken by an agency on an issue casts serious doubt on the validity of its analysis. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) (no deference to the agency’s “expertise” when the agency position has fluctuated). *See also U.S. v. Mead*, 533 U.S. 218, 228 (2001), *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944) (Inconsistency is a strong indication of unpersuasiveness).

DTSC should accept this petition for review based on an important policy consideration concerning DTSC’s decision to permit the treatment, storage, and disposal of hazardous waste near Kettleman City despite CMW’s persistent recurring and repeating history of violations, and based on DTSC’s clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

B. DTSC Should Deny the Permit Based on Chemical Waste Management’s Violations of its Permit.

El Pueblo challenges General Condition 2(B) and each and every other condition of the permit because DTSC should not have authorized the treatment, storage, and disposal of hazardous waste at KHF based on CWM’s significant violations and noncompliance. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-14 by DTSC:

DTSC ignores other regulatory authority that allows it to deny a permit based on noncompliance by the applicant with any condition of a permit. *See* 22 CCR § 66270.43. DTSC has previously considered what types of violations are sufficiently significant so as to support a permit denial.³⁵ Examples include:

- (a) failure to install an adequate environmental monitoring system;
- (b) failure to construct the facility properly, for example, inadequate containment systems; inadequate run-on/run-off collection systems; systems that do not meet seismic and precipitation design standards; or use of construction materials that are incompatible with waste being handles; and
- (c) failure to manage waste handles at the facility properly, e.g., failure to comply with waste analysis requirement; failure to maintain adequate security; improper handling of incompatible reactive or ignitable wastes; or spillage of wastes onto soil.³⁶

Agencies have issued violations against Chemical Waste Management that would fall under each of these categories.

1. Monitoring Violations

EPA and DTSC have issued violations to Chemical Waste Management for failure to implement a groundwater monitoring program and failure to implement an unsaturated zone monitoring program. EPA has issued a violation for failure to perform monthly monitoring of lysimeters for presence of liquids. The Regional Water Quality Control Board has issued a number of violations for failing to monitor groundwater. The San Joaquin Air Quality Management District issued violations for failing to conduct required monthly monitoring.

2. Inadequate Construction

The facility had one of the largest ever failures of a hazardous waste liner. A landslide occurred on one of the site's slopes and tore out part of the liner system. This resulted in a displacement of over a million cubic yards of hazardous waste. Subsequent analysis suggests that the landslide resulting from design and construction issues.

3. Waste Mismanagement

DTSC and EPA have issued numerous violations to Chemical Waste Management for failing to adequately treat waste prior to placement in the landfill, impermissibly land disposing prohibited waste, failing to maintain and operate facility to minimize releases, and improper disposal. For example, during a series of 2010 inspections, EPA

35 Memorandum from Office of Legal Counsel to Ted Rauh re: Revision of OPP 87-15, Permit Denial Policy, July 1993, at 4, attached as Appendix M.

36 *Id.*

investigators found that Chemical Waste Management improperly managed PCBs at the facility. Further analysis revealed spills next to the facility's PCB Storage and Flushing Building. Samples taken by EPA and Chemical Waste Management in and around the building detected PCBs at elevated levels ranging from 2.1 parts per million (ppm) up to 440 ppm. These levels are above the regulatory limit of 1 ppm and, in soil, demonstrate that PCBs were improperly disposed of in violation of federal law.

El Pueblo petitions DTSC to review Condition 2(B) and each and every other condition of the permit on the grounds that DTSC abused its discretion in issuing a permit despite CMW's history of significant violations. This petition for review presents an important policy consideration because review will establish when a history of significant violations justifies permit denial. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responds to El Pueblo's comments by stating that the DTSC guidance document cited by El Pueblo also explains that "denial or revocation of a permit should only be considered when an act of the permit applicant or holder poses a threat to public health or the environment, results in conviction of a crime significantly related to fitness to perform under the permit, is a violation of an administrative or court order, shows a clear unwillingness or inability to comply with environmental laws, or results in the revocation or suspension of any related permit." This guidance document provided examples of the types of violations that would fall under these categories. El Pueblo referenced these types of violations in its comment letter and demonstrated that CWM's violations fell into the categories that DTSC previously stated met its criteria for permit denial. DTSC now alleges that the very types of violations it initially determined sufficient to warrant permit denial are no longer sufficient.

If an agency departs from policies set forth in a handbook or manual, this constitutes evidence that the agency decision is illegal and the agency must at least defend its departure with an articulated justification that is itself reviewable. *See, e.g., Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."). DTSC provides no rationale for departing from its earlier position on the types of violations that the agency should consider sufficient to justify a permit denial.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's decision to permit the treatment, storage, and disposal of hazardous waste near Kettleman City despite CMW's significant violations, and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

C. DTSC Failed to Adequately Consider Chemical Waste Management's Compliance History Pursuant to CEQA.

El Pueblo challenges General Condition 3 because DTSC violated CEQA when it failed to consider CWM's compliance history to assess the adequacy of mitigation and monitoring measures. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-15 by DTSC:

The consideration of a facility proponents' environmental record is expressly mandated by the California Supreme Court in *Lauren Heights Improvement Ass'n v. Regents of the University of California*, 47 Cal.3d 376, 420. Because an EIR cannot be meaningfully considered in a vacuum devoid of reality, a project proponent's prior environmental record is properly a subject of close consideration in determining the sufficiency of the proponent's promises in an EIR.

Consideration must also be given to measures the proponent proposes to take in the future not just the measures it took or failed to take in the past. In balancing a proponent's prior shortcomings and its promises for future action, an environmental impact report should consider relevant factors including: the length, number, and severity of prior environmental errors and the harm caused; whether the errors were intentional, negligent, or unavoidable; whether the proponent's environmental record has improved or declined; whether he has attempted in good faith to correct prior problems; and whether the proposed activity will be regulated and monitored by a public entity. *Id.* Based on the five-prong test set forth in *Laurel Heights*, Chemical Waste Management cannot be trusted to properly perform the activities, mitigation measures, closure and post closure monitoring proposed in the EIR and addendum.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC's failure to consider CWM's compliance history violated CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

In its response to comments, DTSC admits that it did not consider the compliance history in the context of CEQA, which provides different requirements and basis for considering the past compliance of an applicant than Health & Safety Code, Section 25186. However, DTSC argues that El Pueblo has no right to raise such a challenge because Kings County has already certified the SEIR. This argument represents a fundamental misunderstanding of DTSC's independent role and responsibilities as a responsible party pursuant to CEQA.

DTSC has an independent duty to consider the SEIR and reach its own conclusions on whether and how to approve the project; issue findings pursuant to CEQA; and adopt a statement of overriding considerations, if necessary. If the responsible agency finds that any alternatives or mitigation measures within its powers are feasible and would substantially lessen or avoid a significant effect, the responsible party may not approve the project as proposed. 14 CCR § 15096(g). Each responsible agency must certify that its decision-making body reviewed and considered the information in the EIR. 14 CCR § 15050(b); *See generally RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1202.

Therefore, DTSC had an independent duty to ensure the adequacy of mitigation given the applicant's known history of violations. And, DTSC has an independent duty to adopt findings, including on the suitability of the mitigation and monitoring program, given the applicant's known history of violations. Moreover, CEQA requires that an agency consider an applicant's compliance history when reviewing an EIR; it does not expressly mandate that the EIR itself

contain this analysis. The fact that Kings County certified an SEIR for the project does not prevent DTSC, as a responsible agency, from considering the applicant's compliance history when reviewing the SEIR and issuing findings on the sufficiency of the mitigation and monitoring program.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

D. DTSC Did Not Conduct a Comprehensive Compliance Review

El Pueblo challenges General Condition 2(B) and each and every other permit condition because DTSC failed to consider CWM's full compliance history. DTSC's failure to consider all violations is an abuse of the agency's discretion. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-16 by DTSC:

DTSC reports that TSCA/PCB records from before 1998 are not available.³⁷ Since DTSC must review compliance history as part of its permit decision process and its CEQA review, the missing records are inexcusable. DTSC does not explain why these records are unavailable. However, DTSC must take considerable efforts to find and review these records. Until DTSC does an exhaustive and multi-agency search for these records, comprehensive review of the applicant's compliance history is not possible.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC's failure to consider all of CWM's past violations is an abuse of the agency's discretion. This petition for review presents an important policy consideration because review will determine DTSC's responsibilities to search for compliance history when it is not readily available to the agency. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responds to El Pueblo's comment by stating that its compliance review is adequate to make a determination as to whether the facility's compliance shows a repeating or recurring pattern or may pose a threat to public health or safety or the environment. However, DTSC admittedly did not review TSCA/PCB inspection records prior to 1998. TSCA/PCB violations pose the highest risk to public health, safety and the environment due to the high level of toxicity posed by PCBs. A single violation that poses a threat to public health, safety or the environment is a sufficient basis upon which to deny a permit. Without the full TSCA/PCB inspection reports, DTSC has no way of determining past threats posed by KHF. DTSC does not explain why EPA was unable to turn the inspection documents over to DTSC or what additional efforts DTSC took in order to obtain the missing records.

While DTSC alleges that it had the opportunity to review records from RWQCB, SJVAPCD, and Kings County Environmental Health Department to determine that the facility's compliance history with these other agencies does not show a recurring pattern of non-compliance, this finding is simply not borne out from the facts. CWM has violated the terms of its various permits on hundreds of occasions and each of the listed agencies has repeatedly found violations

³⁷ See CWM Kettleman Hills Facility RCRA/TSCA Inspections 1983-Present.

at KHF. DTSC appears unwilling to find a pattern of repeating or recurring violations no matter how many times the applicant violates its permits.

DTSC should accept this petition for review based on an important policy considerations concerning DTSC's decision to permit the treatment, storage, and disposal of hazardous waste near Kettleman City without considering CMW's full compliance history, and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

VI. THE KHF EXPANSION MEETS OTHER CRITERIA FOR PERMIT DENIAL

El Pueblo challenges General Condition 2(B) and each and every other permit condition because the KHF expansion meets DTSC's previously defined criteria for permit denial. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-17 by DTSC:

A 1993 DTSC guidance document outlines criteria the office of legal counsel believed the agency should use to determine whether to deny a permit. This may be the only criteria that currently exist to determine when to deny a permit. One listed criteria is "the permittee's misrepresentation of any relevant facts at any time."³⁸ The permit expressly states that the failure to submit any information required in connection with the Permit, or falsification and/or misrepresentation of any submitted information, is grounds for revocation of this Permit.³⁹ Chemical Waste Management's recent citation for intentionally withholding information about 72 spills at the site over a four year period is grounds for a permit denial.

Another criterion for permit denial is "[a] determination that the permitted activity endangers human health or the environment and cannot be adequately regulated under a permit."⁴⁰ This evaluation includes not only the potential for releases of hazardous wastes at significant levels, but also other environmental impacts as well. The guidance document explains that significant impacts not directly associated with releases of wastes from a facility can be identified through the EIR process.⁴¹ According to DTSC, after all feasible mitigation measures have been imposed, the project will significantly increase ozone, coarse particulate matter ("PM10") and fine particulate matter ("PM2.5") emissions, result in a significant and unavoidable cancer risk at the KHF property

38 Memorandum from Office of Legal Counsel to Ted Rauh re: Revision of OPP 87-15, Permit Denial Policy, July 1993, at 4.

39 Department of Toxic Substances Control, Hazardous Waste Facility Permit for Chemical Waste Management, Incorporated, Kettleman Hills Facility, *citing* 22 CCR § 66270.43; *see also* Health & Safety Code § 25186(d) (Grounds for denial include "[a]ny misrepresentation or omission of . . . information subsequently reported to the department.").

40 Memorandum from Office of Legal Counsel to Ted Rauh re: Revision of OPP 87-15, Permit Denial Policy, July 1993, at 5.

41 *Id.*

boundary, significantly increase traffic impacts, and contribute to cumulatively considerable and significant greenhouse gas emissions.⁴²

The guidance document specifically states that “[v]ehicular traffic associated with the operation of a facility, for example, can have a severe impact on some communities. This situation would primarily be associated with large, commercial, off-site hazardous waste facilities that create a large flow of heavy truck traffic over extended periods.”⁴³

Here, Kettleman City is already severely impacted by vehicular traffic because of its location at the intersection of two freeways, including Interstate 5, its proximity to a large transfer station, and its location in one of the most contaminated air basins in the U.S. Asthma rates are extremely high. Yet, the facility proposes to add an additional 400 trucks per day. This increase in vehicular traffic will endanger human health and cannot be adequately regulated under a permit.

El Pueblo petitions DTSC to review Condition 2(B) and each and every other permit condition on the grounds that the KHF expansion meets DTSC’s previously defined criteria for permit denial. This petition for review presents an important policy consideration because review will determine DTSC’s responsibilities to follow previously defined criteria. DTSC should also grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responds to El Pueblo’s comments by stating that since KHF’s failure to report spills did not result in a threat to human health or the environment, DTSC would not consider denying the permit request. However, pursuant to Title 22, Section 66270.43 of the California Code of Regulations, DTSC may deny a permit based on the permittee’s misrepresentation of any relevant facts at any time. This criteria is separate from the criteria listed in Health & Safety Code § 25186, and does not require a showing of a threat to human health or the environment. DTSC’s guidance document instead lists six criteria DTSC should consider when assessing whether to deny a permit based on the acts and omissions of the permit applicant: 1) the nature and seriousness of a violation, noncompliance, failure to disclose or misrepresentation of information, etc.; 2) the date of the event referred to in #1; 3) whether the event referred to in #1 was an isolated or repeated incident; 4) whether the event referred to in #1 was an intentional or negligent act; 5) the nature and seriousness of any potential threat to public health or the environment; and 6) the circumstances surrounding the behavior. DTSC did not consider these six criteria but instead considered only one: the threat to human health or the environment.

DTSC next contends that the significant air quality impacts from the facility relate to the attainment status of the San Joaquin Valley Air Basin rather than to threats to human health or the environment. This argument is flawed for two reasons. First, the attainment status of the air basin is based on compliance with health-based state and federal air quality standards. If pollution from a facility contributes to the non-attainment status of an air basin, that facility

42 California Department of Toxic Substances Control: California Environmental Quality Act Findings of Fact and statement of Overriding Considerations. July 2013.

43 Memorandum from Office of Legal Counsel to Ted Rauh re: Revision of OPP 87-15, Permit Denial Policy, July 1993, at 6.

contributes to levels of pollution that may pose a threat to public health. DTSC may not divorce impacts to the attainment status of an air basin from the health impacts to residents living in that nonattainment air basin. In fact, nearly every resident in the San Joaquin Valley regularly experiences air pollution levels known to harm health and to increase the risk of early death by virtue of the fact they live in a nonattainment area.⁴⁴

Second, DTSC failed to address the impacts from the 400 trucks transporting waste to and from the site. The SEIR failed to include those impacts, and even though DTSC repeatedly references impacts from these diesel trucks, nowhere has the agency quantified or analyzed what those impacts would be. DTSC's guidance document explicitly references the severe impact vehicular traffic associated with the operation of a facility can have on communities. The guidance document states that "[t]his situation would primarily be associated with large, commercial, off-site hazardous waste facilities that create a large flow of heavy truck traffic over extended periods." This hypothetical example describes KHF and the potential impacts of traffic on Kettleman City residents. However, DTSC does not explain why these transportation related impacts would not pose a threat to human health.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's decision to permit the treatment, storage, and disposal of hazardous waste near Kettleman City even though the KHF expansion met DTSC's previously defined criteria for permit denial, and based on DTSC's clearly erroneous conclusions of fact and law as stated in the aforementioned response to comments.

VII. DTSC HAS INSUFFICIENT INFORMATION ON KETTLEMAN CITY HEALTH TO APPROVE AN ADDITIONAL POLLUTION SOURCE IN THE AREA.

El Pueblo challenges General Condition 2(B) because DTSC does not have sufficient information on health impacts in Kettleman City to determine whether to approve an additional polluting source nearby. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-18 by DTSC:

Kettleman City residents have long requested the State to conduct a comprehensive health survey of the town to determine whether the residents are experiencing increased rates of disease and other health issues. Even despite recognizing elevated birth defect rates in town, the State has refused to conduct a comprehensive health survey. The entire town of Kettleman City has only about 350 total households, so collecting data from residents would not be time or resource intensive.

When CRPE, El Pueblo and Greenaction staff recently visited Kettleman City residents door to door, numerous residents informed them of various health problems they were experiencing. Most notably, on a one block radius on 9th Street, nine different residents reported being diagnosed with cancer. Ninth Street is one of the closest streets to Highway 41, where a considerable number of diesel trucks pass by.

44 Jane Hall, et. al. The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins, November 2008.

Based on the information provided by residents, CRPE with support from El Pueblo and Greenaction, prepared and administered a health questionnaire to help identify health vulnerabilities in the town. About a quarter of Kettleman City households participated in the questionnaire. The results of the questionnaire were troubling and call for a more intensive health survey to fully understand the health vulnerability in Kettleman City.⁴⁵ Some results include:

- Residents who had lived in Kettleman City the longest had the highest incidence of illness and ailments that are often associated with environmental factors. Seventy-five percent of residents that had been in Kettleman City for over 15 years reported cancer, valley fever, anemia, miscarriage, or a birth defect in the household. More investigation is needed.
- Three additional birth defects were identified that occurred subsequent to the State's birth defect investigation and subsequent to the State's report that birth defect levels have returned to "normal." More investigation is needed.
- The questionnaire identified 20 households with a resident with cancer and a total of 24 cancers. The Evaluation of the Pattern of Cancer Occurrence in the Vicinity of Kettleman City, California,⁴⁶ included as part of the State's *Investigation of Birth Defects and Community Exposures in Kettleman City* only identified 28 cases from Kettleman City. However, since the health questionnaire identified 24 cancer cases by just looking at 88 households, the State's data either reflects a dramatic undercount of the cancer cases or rates have rapidly increased. Under either scenario, more investigation is needed.
- The State's Evaluation also explains that "[t]he age distribution of new cases of cancer in the Kettleman City area shows that as age increases, the number of cancers increases dramatically, such that 71% of all cancers diagnosed are in people 55 years of age or older."⁴⁷ However, in 15 out of the 18 cases where the questionnaire participant provided an age at diagnoses, the resident with cancer was under 55 when diagnosed. Therefore 83 percent of residents with cancer identified by the questionnaire were diagnosed before they turned 55. This may indicate that Kettleman City residents face different risks that are causing them to develop cancer at younger ages than other places in California. More investigation is needed.
- The State's Evaluation also identified breast cancer, prostate cancer and lung cancer as the leading forms of cancer in the Kettleman City area. However, responses to the questionnaire indicate that kidney cancer and uterus cancer may be the leading forms of cancer, along with other cancers of the reproductive system. More investigation is needed.

45 Center on Race, Poverty & the Environment, Kettleman City Health Questionnaire – Summary of Results, October 24, 2013, attached as Appendix N.

46 Mills, P., Yang, R., Bates, J., An Evaluation of the Pattern of Cancer Occurrence in the Vicinity of Kettleman City, California, November 2010.

47 *Id.*

There are considerable questions about elevated health risks in Kettleman City. Before approving another source of pollution, DTSC should take all the necessary steps to understand the health vulnerabilities facing Kettleman City residents. DTSC should conduct a comprehensive health survey by meeting directly with residents and compiling aggregate health data. Because so many questions remain and the results of the previous cancer investigation seem to be invalid, DTSC should not permit the KHF expansion until the true health vulnerabilities of Kettleman City are documented and considered.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC does not have sufficient information about health impacts in Kettleman City to approve an additional pollution source such as the KHF expansion. This petition for review presents an important policy consideration because DTSC should fully consider existing threats to Kettleman City residents prior to permitting an additional pollution source. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact that are clearly erroneous.

DTSC responded to El Pueblo's comment, stating that "no available evidence demonstrates facility operations have contributed to these [health] effects. On this basis, DTSC "concluded that this facility is not causing any health impacts to Kettleman City residents..." DTSC describes no basis upon which it concludes that the facility is not causing any impacts to Kettleman City residents. The absence of evidence of impacts is not the same as evidence of no impacts. This is especially the case when the agency made a decision not to analyze transportation related impacts on Kettleman City residents. DTSC is aware of higher than expected health impacts in Kettleman City; that there has been no explanation of the elevated rates; and that multiple pollution sources impact Kettleman City residents, including diesel trucks, which are known to cause health impacts.

As stated in El Pueblo's comments, health impacts in Kettleman City appear far worse than any of the studies relied upon by DTSC have previously identified. No agency has done a comprehensive health investigation, including canvassing and interviewing residents of Kettleman City. DTSC should not permit KHF until it can identify the full extent of health impacts in Kettleman City.

DTSC should accept this petition for review based on an important policy considerations concerning DTSC's decision to permit the treatment, storage, and disposal of hazardous waste near Kettleman City even though the agency has never conducted a comprehensive health survey of Kettleman City and that health impacts appear far worse than previously thought, and based on DTSC's clearly erroneous conclusions of fact as stated in the aforementioned response to comments.

VIII. DTSC SHOULD NOT RELY UPON THE FLAWED BIRTH DEFECT INVESTIGATION.

El Pueblo challenges General Condition 2(B) because DTSC based its decision to approve the treatment, storage, and disposal of hazardous waste at KHF on a flawed birth defect

investigation. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-19 by DTSC:

DTSC relies in part on the Investigation of Birth Defects and Community Exposures in Kettleman City, CA to support its proposed approval of the KHF permit. The investigation was not able to find a cause of the birth defect cluster, including from the Kettleman Hills Facility. It did find that maternal medical, family, and pregnancy risk factors were unlikely to explain the occurrence of birth defects.⁴⁸

The Investigation took place under conditions that would have been unable to identify the Kettleman Hills Facility's on-going hazardous waste operation as a potential cause. The State conducted its investigation in 2010, during which time the hazardous waste disposal operations at KHF had all but ceased. During the time when the State conducted its investigation it appeared that the birth defect rates were no longer as elevated as they were in 2007-2008.

When birth defects were at their highest rate, KFH was accepting more than the usual amount of shipments of PCBs, a chemical linked to cleft palate and other birth defects in scientific literature. At the same time, DTSC had permitted Chemical Waste Management to stop monitoring PCB emissions. By the time the investigation took place, monitoring had resumed.

While we may not know what caused the elevated birth defect rates, DTSC must not rule out KHF as a possible cause or contributor. The State's investigation was incapable of determining whether KHF was a cause or contributor because it was unable to replicate the conditions when the birth defect rates were most elevated.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC based its decision to authorize the treatment, storage, and disposal of hazardous waste at KHF, in part, on the state's flawed birth defect investigation. This petition for review presents an important policy consideration because DTSC should fully consider existing threats to Kettleman City residents prior to permitting an additional pollution source. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact that are clearly erroneous.

DTSC acknowledges that the State's investigation occurred when operation at the facility had all but ceased and at a time when birth defects were not elevated, but explains that the agency had sufficient information to determine KHF was not a cause. DTSC states that a comparison between CARB monitoring data from 2010 and 2007 does not show a substantial difference in levels. DTSC does not explain what CARB monitored for, nor does the agency explain why air monitoring samples would be the same during a time period when the facility accepted hundreds of truckloads of hazardous waste per day and when it received just one a day. Simply put, a study conducted at a time when a facility is not in operation will not be able to determine impacts of the facility when it is in operation. The potential impacts from KHF stems from the

48 California Environmental Protection Agency, California Department of Public Health: Investigation of Birth Defects and Community Exposures in Kettleman City, CA. December 2010, at 2.

transportation and disposal of hazardous materials. KHF was not transporting or disposing of hazardous material at the time of the study. The study also could not capture any discrete event, such as an accidental or intentional offsite release of hazardous materials destined for the facility that may have occurred during the spike in birth defects.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's reliance on a flawed study to authorize the treatment, storage, and disposal of hazardous waste at KHF, and based on DTSC's clearly erroneous conclusions of fact as stated in the aforementioned response to comments.

IX. DTSC FAILED TO ADDRESS REQUEST FOR BIOMONITORING

El Pueblo challenges General Condition 2(B) because DTSC failed to follow through with its commitment to address the need for biomonitoring in Kettleman City prior to authorizing the treatment, storage, and disposal of hazardous waste at KHF. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-20 by DTSC:

According to the California Department of Public Health, "Biomonitoring is the measurement of chemicals (or their metabolites) in a person's body fluids or tissues, such as blood or urine. It tells us the amount of the chemical that actually gets into people from all sources (for example, from air, soil, water, dust, and food) combined. Because of this, biomonitoring can provide useful information on how much exposure to toxic chemicals a person has had."⁴⁹ Because of the multiple pollution sources, it is important for Kettleman City residents to know how much exposure they have compared to other areas of the state. Even if the biomonitoring was unable to pinpoint a single source, the information about cumulative impacts from living near so many pollution sources is important, especially in the fact of DTSC's proposed decision to approve yet another pollution source.

Residents have long requested that the State conduct biomonitoring to help determine whether unexpected chemicals are in their bodies. At her confirmation hearing, Senator Alquist questioned DTSC Director Debbie Raphael specifically about her commitment to conduct biomonitoring in Kettleman City. The following dialogue occurred during the Senate confirmation hearing for Debbie Raphael:

Ms. Raphael: . . . You are correct in saying biomonitoring has not been offered to the residents of Kettleman. What I will commit to and am excited to do is to go deeper into the why on that and to work with the Department of Public health to ask the question: Is this an appropriate place for biomonitoring? If not, why not? Let's talk to the community members, bring them into the conversation to get a realistic view of what could biomonitoring – how could it help: what kind of information could it give to the community members that they don't already have. The idea of finding out what's in their bodies, can we link it to anything in the environment, are the chemicals that they're being

⁴⁹ Biomonitoring California, What is Biomonitoring, *available at* www.biomonitoring.ca.gov, last accessed on October 23, 2013.

exposed to even - - sorry- - contained in their bodies, that some of the pesticides won't be picked up in biomonitoring, is what I want to say.

Senator Alquist: Would you commit to, in the next three months, asking these questions?

Ms. Raphael: I will.

Senator Alquist: And at that point, putting out a statement after you evaluate the answers to those questions, stating either specifically why biomonitoring would not be a good thing to use in Kettleman City, or why it would be to implement the process.

Ms. Raphael: Yes. I would...I'm committing to do what you say.⁵⁰

However, DTSC has not put out a formal statement on whether biomonitoring would be a good thing to use in Kettleman City. DTSC has not talked to the community members to get a realistic view of how biomonitoring could help provide residents with information that they do not already have.

El Pueblo petitions DTSC to review Condition 2(B) on the grounds that DTSC failed to follow through with commitment to the California Senate to address the need for biomonitoring in Kettleman City prior to authorizing the treatment, storage and disposal of hazardous waste. This petition for review presents an important policy consideration because DTSC should fully consider existing threats to Kettleman City residents prior to permitting an additional pollution source. DTSC should also grant the petition for review on this ground because DTSC's decision is based on findings of fact that are clearly erroneous.

DTSC responds to El Pueblo's comment by stating that it included a statement on biomonitoring in its Frequently Asked Questions document when it issued its draft decision to approve the permit in 2013, some 15 months after Ms. Raphael's commitment to the Senate committee. The confirmation testimony is clear that the decision and discussion around biomonitoring was to be independent from the KHF decision and need not be solely linked to whether chemicals in Kettleman City residents came from the KHF facility. Biomonitoring could have established if Kettleman City residents' bodies contained higher levels of chemicals than expected. This information is relevant to assessing the cumulative impact of living next to so many polluting sources and would confirm that residents should not be exposed to any further risks from chemical exposures. DTSC's statement in its FAQ simply does not comport with the commitments Ms. Raphael made at her confirmation hearing.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's failure to comply with commitments made to the California Senate regarding the need for biomonitoring in Kettleman City, and based on DTSC's clearly erroneous conclusions of fact as stated in the aforementioned response to comments.

50 Senate Rule Committee, Transcript of Hearing on Wednesday, April 11, 2012 at 1:30pm, at 11-12.

X. DTSC Must Prepare a Supplemental or Subsequent EIR

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-21 by DTSC:

Any time a discretionary approval is required by a responsible agency for a project for which an EIR has already been adopted, the agency must determine if a subsequent or supplemental EIR is required. The agency must prepare a subsequent or supplemental EIR if changes are required to make a previous EIR adequate. A responsible agency must prepare a subsequent or supplemental EIR when 1) substantial changes are proposed in the project that will require major revisions of the EIR, 2) substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions in the EIR, or 3) new information of substantial importance to the project that was not known and could not have been known at the time the EIR was certified as complete becomes available. Pub. Res Code § 21166; 14 CCR § 15162.

Addendums are only to be used when none of the conditions requiring a supplemental or subsequent EIR is present, but minor corrections or changes to the previous EIR are necessary. An addendum must document and support with substantial evidence the agency's determination that a subsequent or supplemental EIR is not required. 14 CCR § 15164(e).

DTSC did not prepare a subsequent or supplemental EIR for the proposed project. Rather, DTSC elected to prepare a 77-page Addendum that identified changes to the proposed project and listed recently approved projects in the area which may contribute to increased cumulative impacts. The Addendum did not consider new impacts associated with project changes, multiple changed circumstances, and substantial new information not previously available. Nor did the Addendum support its finding that a supplemental or subsequent EIR is unnecessary with substantial evidence in the record. DTSC must prepare a subsequent or supplemental EIR because: 1) the applicant is proposing changes to the project that will lead to increased impacts; 2) circumstances under which the project will be undertaken have changed significantly; and 3) new information of substantial importance, which was not known at the time of EIR certification, has become available. *See* Pub. Res. Code § 21166; 14 CCR § 15162.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

In its response to El Pueblo's comments, DTSC simply reiterated its rationale stated in its Addendum as to why a supplemental or subsequent EIR was not prepared. However, in El Pueblo's comments, El Pueblo identified that, despite having prepared an uncommonly

voluminous 77-page Addendum, DTSC had still failed to address multiple significant changes and new information that it is legally compelled to address.

DTSC correctly responded that it “must follow rules required by the CEQA guidelines,” which is precisely why El Pueblo requested that DTSC prepare a subsequent or supplemental EIR. El Pueblo identified substantial evidence in light of the whole record that: “1) the applicant is proposing changes to the project that will lead to increased impacts; 2) circumstances under which the project will be undertaken have changed significantly; and 3) new information of substantial importance, which was not known at the time of EIR certification, has become available.” Without addressing these changes and new information, DTSC does not meet its statutory obligation. DTSC must prepare a subsequent or supplemental EIR.

DTSC should accept this petition for review based on DTSC’s clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

A. New Information Which Was Not Known and Could Not Have Been Known at the Time of EIR Certification Is Now Available.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-22 by DTSC:

CEQA requires a responsible agency to prepare a subsequent or supplemental EIR if “new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.” Pub. Res. Code § 21166(c). Since the time Kings County certified the EIR, EPA has updated health protective air quality standards and the California Office of Environmental Health Hazard Assessment released a screening tool that identified Kettleman City as being in the top ten percent of California communities most disproportionately burdened by multiple sources of pollution. Kings County did not have or consider this information when preparing its EIR for the project. This new information suggests that the project may have additional or more severe impacts than the County analyzed in the EIR. The new information triggers the need for a supplemental or subsequent EIR.

1. EPA’s Approval of a New Standard for Short-Term Nitrogen Dioxide Emissions Is Significant New Information.

New information has become available since Kings County certified the Supplemental EIR indicating that the project will likely have a significant and unavoidable impact on public health due to short-term exposure to nitrogen dioxide emissions. On February 9, 2010, after Kings County certified the Supplemental EIR for the project, EPA established a new primary National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO₂) based on a 1-hour averaging time (1-hour NO₂ NAAQS). The rule became

effective April 12, 2010.⁵¹ EPA lowered the primary NO₂ NAAQS in response to studies showing increases in respiratory symptoms and hospital visits related to short-term exposure to high levels of NO₂.⁵² EPA found that the existing NAAQS did not sufficiently protect public health, especially in light of high incidences of near roadway exposure to NO₂.⁵³

Exposure to nitrogen dioxide, a by-product of fossil fuel combustion, is associated with children's hospital admissions, emergency department visits, and aggravation of asthma, including symptoms, medication use, and lung function. Persons with preexisting respiratory disease, children, and older adults may be more susceptible to the effects of NO₂ exposure. Individuals in sensitive groups may be affected by lower levels of NO₂ than the general population or experience a greater impact with the same level of exposure. In addition to intrinsically susceptible groups, people living and working near roadways may be at increased vulnerability due to higher exposures.

Kings County's SEIR relied upon EPA's now-outdated 1-hour NO₂ NAAQS to determine the project's air quality impacts on nearby residents. EPA's finding that this standard was not sufficiently protective of public health and its adoption of a lower 1-hour NO₂ NAAQS is important new information that was not available at the time of EIR certification. DTSC must determine whether NO₂ emissions associated with the project will have a significant impact on public health in light of EPA's approval of new 1-hour NO₂ NAAQS.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo's comments by stating that "[t]he new information described by the commenter does not change the project or its impacts," but rather that "[t]he new information consists of new standards and metrics." While true that the new information does not change the project, DTSC's argument sidesteps the point that the new information does, or should, change DTSC's *understanding* of the project's impacts. The EPA did not create the new NO₂ standards in response to a change in the physical impacts of short-term exposure to high levels of NO₂, but rather to a changed *understanding* of those impacts in light of studies. In turn, EPA's changed standards should inform DTSC's analysis of those impacts.

DTSC further clarified that the reason it considers EPA's new NO₂ standard to be insignificant is "because the [ozone precursor] impacts were already considered significant," and "[t]he SEIR already identifies mitigation measures for ozone precursors including NO_x." This is flawed for two reasons: (1) the new EPA standards recognize the health impacts of direct NO₂ exposure, not simply ozone exposure with NO_x emissions measured as a proxy; and (2) the *degree* of significance of health impacts affects the appropriateness of mitigation measures implemented, as well as the decision to approve the project. In light of EPA's newly heightened NO₂ standard,

51 75 Fed. Reg. 6474 (Feb. 9, 2010), attached as Appendix O.

52 *Id.*

53 *Id.*

the sufficiency of the mitigation measures and the appropriateness of project approval must be reexamined. Therefore, DTSC must determine, and disclose to the public, the full effects of NO₂ emissions associated with the project on public health in light of EPA's approval of new 1-hour NO₂ NAAQS.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

2. Evidence Collected During EPA's Analysis of the Avenal Power Plant Is Significant New Information.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-23 by DTSC:

On May 5, 2011, EPA issued a Prevention of Significant Deterioration Permit for the Avenal Energy Project, a new 600 megawatt natural gas-fired power plant in Avenal, just a few miles from Kettleman City and KHF. Despite numerous attempts, the applicant for the Avenal Energy Project was unable to satisfy EPA that the power plant would not cause an exceedance of the new-health based 1-hour NO₂ NAAQS. Rather than delay the project any further, EPA made the unprecedented decision to grandfather the facility from the agency's new 1-hour NO₂ NAAQS. This decision is currently being challenged in the Ninth Circuit Court of Appeals. However, evidence EPA gathered for the Avenal Energy Project PSD permit is relevant to determine KHF's cumulative impact from short-term NO₂ emissions. This information was not available at the time of Kings County's EIR certification. Therefore, DTSC must now include and analyze this information as part of a supplemental or subsequent EIR.

Based on evidence in the Avenal Energy Project record, Kings County residents will soon be subject to NO₂ exposures near or over the NAAQS limit, even without the KHF expansion. In its analysis for Avenal Energy Project's Prevention of Significant Deterioration (PSD) permit, the EPA reported background NO₂ levels of 50 parts per billion (ppb) in Hanford and 61 ppb in Visalia, where the two closest monitoring stations are located. EPA concluded that operational emissions from the Avenal Power Project would add an additional 44 ppb to the maximum one-hour NO₂ impact.⁵⁴ Therefore, without the KHF expansion, background NO₂ levels in the area after the power plant is constructed would be between 91 and 102 ppb, nearly exceeding or exceeding the 1-hour NO₂ NAAQS.

Evidence from the Avenal Energy Project record also indicates that background NO₂ levels in Hanford and Visalia under-represent emissions in Kettleman City. EPA explains that "NO₂ concentrations on or near major roads are appreciably higher than

54 Avenal Energy Project, Supplemental Statement of Basis at 27, attached as Appendix P.

those measured at monitors in the current network . . . and near-roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads.”⁵⁵

Kettleman City is directly adjacent to Interstate 5, one of the State’s main commerce freeways, averaging 35,400 vehicles per day. Given EPA’s own data, Kettleman City should have background levels of NO₂ of at least 65 ppb (30 percent greater than Hanford’s 50 ppb background level) and could have background levels in Kettleman City as high as 130 ppb (100 percent greater than Visalia’s 65 ppb). In Kettleman City, these background levels are exacerbated by the near roadway impacts from Interstate 5 and Highway 41, and impacts from the planned Avenal Energy Project. The expansion of KHF, with its addition of 400 trucks per day, will subject Kettleman City residents to unhealthy levels of NO₂.

Finally, the Avenal Energy Project record contained an analysis the local air district prepared for the Avenal Energy Project’s compliance with the State’s 1-hour NO₂ standard. The air district concluded that the project’s cumulative total impact for 1-hour NO₂ (maximum facility impact and background) is 327.2 µg/m³ or 179 ppb. This emission level, while complying with California’s air quality standards,⁵⁶ is well above the federal 1-hour NO₂ NAAQS of 100 ppb.⁵⁷ The KHF expansion will increase emissions even more, subjecting Kettleman City residents to unsafe levels of NO₂.

This additional information triggers the need for DTSC to prepare a subsequent or supplemental EIR because it is new information, not available at the time of EIR certification, and indicates that the KHF expansion project will have more severe impacts than previously disclosed.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

In responding to comments, DTSC’s mischaracterized El Pueblo’s comment as asserting “that *changes in the emissions standards* for the Avenal Power Plant is significant new information.” (emphasis added). El Pueblo actually stated that “*evidence collected during EPA’s analysis of the Avenal Power Plant is significant new information.*” (emphasis added). Due to this mischaracterization, DTSC simply reiterated its flawed response to the previous section that it numbered 499-22.

However, the new information El Pueblo referred to was evidence relevant to determine KHF’s cumulative impact from short-term NO₂ emissions. The new evidence shows that: (1) background NO₂ levels as measured in Hanford and Visalia after the Avenal Energy Project is completed would be 91 and 102 ppb, respectively, nearly or actually exceeding the 1-hour NO₂ NAAQS of 100 ppb; (2) background NO₂ levels in Hanford and Visalia under-represent

⁵⁵ *Id.* at 19.

⁵⁶ The State standard for NO₂ is 180 ppb.

⁵⁷ EPA Response Letter at 5, 14.

emissions in Kettleman City by anywhere from 30 to 100 percent; and (3) the Avenal Energy Project's cumulative total impact, combining the maximum facility impact with the background, is 179 ppb, close to double the federal 1-hour NO₂ NAAQS.

Given this new information, the background levels of NO₂ are far higher than reflected in the SEIR. Given that DTSC accepted the SEIR's air quality findings and required no additional mitigation, DTSC underestimated the project's NO₂ impacts to human health. Therefore, new evidence not available at the time of SEIR certification demonstrates that impacts are more significant than previously stated and existing measures are insufficient to mitigate these impacts.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

3. The CalEnviroScreen Identifies Significant New Information on the Vulnerability of Kettleman City.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-24 by DTSC:

In April of 2013, the California Environmental Protection Agency, along with the Office of Environmental Health Hazard Assessment, released a science-based tool for evaluating multiple pollutants and stressors in communities for use by its boards, departments, and office. The tool shows which portions of the state have higher pollution burdens and vulnerabilities than other areas. The tool uses environmental, health, demographic and socioeconomic data to create a screening score for communities across the state. According to the Cal/EPA Secretary, an area with a high score would be expected to experience much higher impacts than areas with low scores. The Secretary also explained that "knowing which areas of the state have higher relative environmental burdens will not only help with efforts to increase compliance with environmental laws in disproportionately impacted areas, but also will provide Cal/EPA and its boards, departments, and office with additional insights on the potential implications of their activities and decisions."⁵⁸

According to the CalEnviroScreen, the zip code containing Kettleman City is ranked in the top 10 percent of communities in California over-burdened by pollution from multiple sources and most vulnerable to its effects, taking into account their socioeconomic characteristics and underlying health status.⁵⁹

58 California Environmental Screening Tool Version 1.1 September 2013 Update : California Environmental Protection Agency and Office of Environmental Health Hazard Assessment, (hereafter "CalEnviroScreen v.1.1") at ii, attached as AppendixQ.

59 *Id.* at 105.

Though DTSC references the CalEnviroScreen results in its Environmental Justice Review, the agency does not address, analyze, or include the new information in its CEQA analysis to determine what impact the KHF expansion will have on Kettleman City given the communities' existing pollution burden and its extreme vulnerability to pollution. Though the CalEnviroScreen is not intended as a stand-alone substitute for the cumulative impact analysis required by CEQA, there is nothing that prevents DTSC, as a department of Cal/EPA, from considering information contained in the CalEnviroScreen about the community's high vulnerability to pollution as part of its CEQA analysis.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. This petition for review presents an important policy consideration because DTSC should consider information contained in CalEnviroScreen about the pollution burdens and social vulnerabilities in Kettleman City residents prior to permitting an additional pollution source. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo's comments, stating that it "went above and beyond CEQA and reviewed the multiple pollution burdens while considering the community's vulnerabilities." However, DTSC did not analyze the best available information on risks and vulnerabilities in Kettleman City. This data is collated in CalEnviroScreen. As stated in our comment, though the CalEnviroScreen is not intended as a stand-alone substitute for the cumulative impact analysis required by CEQA, this new information released by the California Environmental Protection Agency and the Office of Environmental Health Hazard Assessment is accurate, relevant, and comprehensive. For example, CalEnviroScreen presents census level data on ozone, PM2.5, diesel emissions, pesticide applications, toxic releases, traffic density, drinking water quality, toxic clean-up sites, groundwater threats, hazardous waste facilities and generators, impaired water bodies, and solid waste sites and facilities relevant to Kettleman City. Though the SEIR examined a few of these indicators, it certainly did not include all of them and certainly did not assess their combined impact on Kettleman City residents. The SEIR also did not include any information on the social vulnerabilities of Kettleman City residents which may exacerbate local pollution burdens. Ignoring this available evidence is an abuse of the agency's discretion.

DTSC should accept this petition for review based on important policy considerations on the use of information contained in CalEnviroScreen that are relevant to the project's cumulative impacts and based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

B. Substantial Changes in the Circumstances Under Which the Project Is Undertaken Require Additional CEQA Analysis

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-25 by DTSC:

An agency making a discretionary decision on whether to carry out or approve a project must consider any substantial change in circumstances that occurs after preparation of the EIR if the changed circumstances could lead to new or more severe significant impacts. Pub. Res. Code § 21166; 14 CCR § 15162(a)(2).

1. The Recent Valley Fever Epidemic in Kings County Is a Changed Circumstance That May Lead to New or More Severe Impacts from the KHF Expansion.

Valley fever is caused by a soil fungus that is inhaled into the lungs. The fungus grows in the soil. The fungus can become airborne when the ground is broken and the dirt and dust spread into the air. Experts say people who work in dusty fields or construction sites are most at risk, as are certain ethnic groups and those with weak immune systems. Newcomers and visitors passing through the region may also be more susceptible.

The valley fever fungus grows particularly well in the alkali soils on the San Joaquin Valley's west side. The fever has hit Kings County particularly hard in recent years, with incidence dramatically increasing in 2010 and 2011, after EIR certification. Valley fever cases in Kings County rose sharply in 2010, and remain at record level highs. Most valley fever cases in Kings County occur in Kettleman City and Avenal. For example, although Kettleman City and Avenal represent only 12% of the County population, from 2007-2010 they accounted for 67% of the reported cases.⁶⁰

The SEIR, prepared prior to the recent sharp increase in valley fever, did not consider the project's construction related impacts on valley fever. Expansion related construction will disturb soils and increase airborne dust. Construction workers, nearby residents, and travelers stopping in the heavily used Kettleman City truck stop area are all at risk from any activity that increases dust and airborne soil spores. Neither the County, nor DTSC, is requiring mitigation to avoid increasing valley fever risk from land disturbing activities at KHF. The recent spike in valley fever cases near KHF is a changed circumstance pursuant to Public Resource Code, Section 21166 that necessitates additional CEQA review and mitigation.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC acknowledges that the SEIR did not include an analysis of valley fever impacts, but argues that mitigation measures for fugitive dust emissions are sufficient to address any potential valley fever threat posed by the project. However, DTSC offers no substantiation that the measures required to control dust are sufficient to protect people from spores that cause valley fever. CEQA requires DTSC to discover, analyze, and mitigate the project's significant impacts. Pub. Res. Code §§ 21002, 21002.1(b), 21100(b)(1). Conclusory statements unsupported by factual information are not an adequate response; questions raised about significant

⁶⁰ Mac Lean, Michael, *An Estimate of the Burden of Valley Fever in Kings County*, April 12, 2011, attached as Appendix R.

environmental issues must be addressed in detail. 14 CCR § 15088(c); *Cleary v County of Stanislaus* (1981) 118 Cal.App.3d 348.

DTSC also asserts that there is no reliable method to test soils for spores to determine whether they are present in a particular area. CEQA requires DTSC to make a good faith effort to reasonably discover and disclose the project's environment impacts. Pub. Res. Code § 21092(b)(1). El Pueblo submitted evidence suggesting that such spores are prevalent in the area where the project is located. When evidence in the record suggests that potential impacts may be severe, CEQA requires DTSC to analyze those impacts in greater detail. 14 CCR § 15143 (Project impacts should be discussed at a level of detail proportional to their potential severity.). The lack of ready data does not excuse an impact analysis from summarizing and analyzing the impacts. Instead, it creates an impetus to discover the facts that are required to make an informed decision. *Kings County*, 211 Cal.App.3d at 723-724. DTSC must use the best available data to assess the impact and provide adequate mitigation measures to prevent the environmental harm. Its failure to do so violates CEQA and threatens the health of nearby residents and travelers.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

2. The Facility Receives Far Fewer than the 400 Trucks Estimated in the EIR.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-26 by DTSC:

DTSC bases its calculation of current project impacts on the faulty assumption that the facility accepts the maximum of 400 truckloads of waste per day (or 7,200 cubic yards per day). This assumption vastly overstates the amount of waste that is presently accepted by the facility. Currently, CWM's facility accepts no more than 10 trucks per week or just over one truck per day. Even at its peak, the facility accepted 575,000 tons of hazardous waste annually, or 100 trucks each day.

In considering project impacts, DTSC assumed that the facility would continue to accept 400 truckloads of waste per day after the expansion. By artificially assuming that the facility currently accepts the maximum peak amount of 400 truckloads per day and that it will continue to accept this amount of waste after expansion, the DTSC obscures and understates the effects of expansion on the facility's emissions profile.

This method of assessment makes it appear as if the expansion will not result in any significant increase in emissions, which is not the case. Residents will be impacted by far more emissions than they currently experience. El Pueblo requests that DTSC revise its analysis of emissions in order to accurately reflect the current state of emissions at the

facility, and to accurately reflect the significant environmental and public health effects of expanding the CWM facility. The drastic reduction in the number of truckloads of waste received at the facility is a changed circumstance that requires a substantial revision of the EIR to accurately reflect the environmental impacts of vastly increasing the number of trucks travelling to the facility.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responds to El Pueblo's comment by stating that the 400 daily trucks estimate is actually a more protective and more conservative estimate of facility emissions related to truck activity because emission estimates are based on a higher level of activity than is actually occurring. This statement reflects a fundamental misunderstanding of CEQA, the concept of a project baseline, and the SEIR DTSC relies upon. By assuming that the existing facility accepts 400 trucks a day and using that figure as the project baseline, the SEIR avoids disclosing, analyzing and addressing the transportation related impacts of the expansion. Using a 400-truck baseline did not result in a more protective and more conservative estimate; rather the artificially high baseline obscured virtually all the project's transportation related impacts. **Nowhere in the SEIR or addendum does any agency disclose or mitigate air impacts from trucks transporting waste to KHF.**

DTSC next argues El Pueblo's argument was rejected by the Court of Appeal. However, DTSC fails to acknowledge that the Court of Appeal did not consider or issue a ruling on the merits of this issue. In any case, El Pueblo's challenge to Kings County's actions are independent of its challenge to DTSC's actions in approving a hazardous waste permit for KHF and its findings regarding the environmental impacts of its decision. El Pueblo challenges DTSC's analysis and findings and has appropriately exhausted all administrative remedies required to raise this issue. DTSC was well-aware that the current project baseline is at most 1 truck per day. DTSC must assess the impacts associated with the 399 additional trucks that will transport waste to the site.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

3. DTSC's Waste Reduction Initiative Is a Changed Circumstance that Will Increase the Time that the Facility Will Be Operational.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-27 by DTSC:

On the same day it announced its draft decision to approve the permit for the KHF expansion, DTSC also announced its initiative to reduce the amount of hazardous waste disposed in California by 50 percent by the year 2025.⁶¹ According to DTSC, this initiative would affect the amount of wastes going to landfills in Kettleman City. The EIR analyzed the project as adding approximately 32 years of additional capacity for the disposal of hazardous waste at KHF. However, the DTSC hazardous waste reduction initiative will increase the number of years the facility will be operational. Even though the total waste received may remain the same, by spreading it out over a longer period of time, residents may be faced with different risks than analyzed in the EIR. For example, residents may be impacted by fewer diesel trucks on a day to day basis, but will be impacted by diesel emissions from trucks transporting waste to the site for a much longer time period (64 years rather than 32). Unless the agency limits the operational life of the facility or reduces its capacity by half, the 50 percent hazardous waste initiative may not reduce project impacts but will simply change the type of risk posed by the facility. DTSC must analyze and mitigate the impact of its initiative as a changed circumstance.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC asserts that any attempt to evaluate DTSC's initiative to reduce hazardous wastes going to landfill would be complete speculation because the initiative is in the early stages of development and involves many variables. While the variables and process by which DTSC will implement its initiative may be unclear, the result of the initiative is not. The initiative will reduce hazardous waste disposal in California by 50 percent. This would mean that the KHF would have capacity for many more years than what was analyzed in the SEIR and residents would be exposed to environmental impacts for many more years than analyzed in the SEIR. DTSC need not determine the methods by which it will reduce disposal in the State to know that reducing disposal rates will allow KHF to operate for a longer period of time than the agency analyzed in its CEQA documents.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

4. The Addition of Pollution from Related Projects Is a Changed Circumstance that May Lead to New or More Severe Cumulative Impacts than Previously Analyzed.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-28 by DTSC:

61 DTSC News Release, DTSC Issues Draft Decision on Kettleman Facility and Announces Initiative to Reduce Landfill Waste by 50 percent, July 2, 2013, attached as Appendix S.

CEQA requires DTSC to discuss and reasonably analyze the project and related projects' cumulative effects on the environment. CEQA Guidelines § 15130(a). A cumulative impact "is a change in the environment that would result from the incremental impact of the project [under consideration] when added to other closely related past, present, and reasonably foreseeable probable future projects." *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 117, citing 14 CCR § 15355. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b). A cumulative impact analysis must include (1) an identification or summary of related past, present, and probable future projects; (2) a summary of the related projects' expected environmental effects, and (3) a reasonable analysis of the related projects' cumulative impacts. CEQA Guidelines § 15130(b).

While DTSC listed some of the additional projects proposed or approved in the area, the agency did not adequately assess the cumulative impacts from these related projects. CEQA requires that DTSC consider the *combined* effect of related projects in the vicinity. CEQA Guidelines § 15355 (defining cumulative impacts as "two or more individual effects which, *when considered together*, are considerable or which compound or increase other environmental impacts,") (emphasis added); *see also Resources Agency*, 103 Cal.App.4th at 120 (to make a significance finding, the analysis must determine whether a proposed Project's incremental contribution is cumulatively considerable *in light of the existing environment*) (emphasis added.).

DTSC violated CEQA, therefore, when it merely listed and summarized related projects, rather than assessing their combined cumulative impacts with the KHF expansion project.⁶² Cumulative impacts may be significant whether or not each individual project has significant impacts.

i. FedEx Transfer Facility

DTSC acknowledges that the FedEx transfer facility will increase the number of diesel trucks in the area. The facility will receive up to 212 trucks per day and up to 125 additional employee vehicle trips. DTSC argues that some of these trips would not be new truck trips because they were previously associated with another, much smaller, Kettleman City facility. However, DTSC does not disclose how many of the trucks will consist of new truck trips to Kettleman City. This information is critical to understand how the transfer facility will contribute to cumulative impacts from the KHF expansion.

DTSC concludes that the transfer facility "does not change the Final SEIR findings or conclusions" because the project does not increase the number of trucks travelling through Kettleman City. Instead, trucks will turn from SR-41 onto 25th Avenue to the facility which is 1.5 miles from the residential part of town. What DTSC does not mention is that the turnoff from SR-41 to 25th Avenue is right at the boundary of the

62 Addendum at 11-42.

residential area and that all the trucks traveling to the facility will pass within a couple hundred yards of the town's residents.⁶³

Studies conclude that traffic pollution causes asthma attacks in children, and may cause a wide range of other effects including: the onset of childhood asthma, impaired lung function, premature death and death from cardiovascular diseases, and cardiovascular morbidity. The area most affected, the studies concluded, was roughly 0.2 mile to 0.3 mile (300 to 500 meters) from a busy road.⁶⁴ Therefore, transfer facility trucks travelling right past town will increase cumulative impacts to Kettleman City residents. DTSC's contentions to the contrary are not supported by evidence in the record.

DTSC also states that the transfer station will not increase air quality impacts from these diesel trucks because these trucks would travel past Kettleman City on the I-5 even without the project. However, as discussed above, the project now brings the diesel trucks within a few hundred yards from residents. DTSC has not considered this potential cumulative impact.

DTSC asserts that the air quality impacts from the facility were included as part of the Investigation of Birth Defects and Community Exposures in Kettleman City (December 2010). However, the transfer facility was not built, or even approved at that time. DTSC is simply incorrect in its assertions that the impacts from diesel emissions were previously analyzed. DTSC actually referred to a prior analysis of a smaller overnight facility. This analysis is simply not relevant to assess the impacts of the much larger FedEx transfer facility. DTSC must consider the cumulative air quality and safety impacts from the transfer facility because its truck traffic impacts will exacerbate air quality and traffic impacts from the KHF expansion.

Finally, DTSC argues that the (non-CEQA) traffic study for the transfer station included the KHF expansion in its cumulative impact analysis. This confirms rather than negates the need for DTSC to prepare and consider a similar analysis as part of its KHF expansion permit decision.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC does not respond to El Pueblo's criticism that DTSC violated CEQA when it merely listed and summarized related projects, rather than assessing their combined cumulative impacts with the KHF expansion project.⁶⁵

In its response to comments, DTSC does argue that El Pueblo misstates DTSC's conclusions about the FedEx transfer station and cites portions of the addendum. However, the portions DTSC cite confirm that El Pueblo accurately summarized DTSC's conclusions. DTSC states

63 See Annotated Map of Kettleman City, attached as Appendix T.

64 Sierra Club, *Highway Health Hazards*, 2004.

65 Addendum at 11-42.

that “Trucks traveling to and from the new Federal Express Facility will continue to travel, as they do to the existing California Overnight Facility . . . Truck trips related to the Federal Express Project are therefore not expected to create an increase in the number of trucks travelling through Kettleman City.” DTSC does not explain how El Pueblo mischaracterized its conclusion, and does not respond to El Pueblo’s demonstration that the Transfer Facility will actually increase the number of trucks and increase impacts in Kettleman City.

DTSC does not respond to El Pueblo’s concern that DTSC failed to assess the much larger FedEx transfer facility in any study, including the Investigation of Birth Defects and Community Exposures in Kettleman City.

Finally, DTSC asserts that the transfer facility does not change the Final SEIR findings or conclusions because the SEIR already considered air quality impacts significant and cumulatively significant. This conclusion reflects DTSC misunderstanding of the purpose and requirements of CEQA. As a responsible agency, DTSC has a duty to supplement the SEIR if a substantial increase in the severity of previously identified significant effects becomes known. Under this standard, it is simply irrelevant that the County already found air impacts cumulative considerable because new information suggests air quality impacts are more severe than previously thought.

DTSC should accept this petition for review based on DTSC’s clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

ii. Oil and Gas Projects

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-29 by DTSC:

DTSC listed a number of oil and gas projects involving fracking near Kettleman City. However, DTSC’s analysis consisted of listing DOGGR’s findings as part of each Initial Study/Negative Declaration. DTSC did not consider the cumulative impacts of the fracking projects, much less the combined impact of all related projects with the KHF expansion as required by CEQA.

For example, DTSC reported that the Initial Study/Negative Declaration for the Jaguar wells found that construction would result in short term, less than significant air quality impacts. However, except for providing the example of particulate matter emissions, DTSC does not disclose what air quality impacts the project would have, and failed to assess the impacts in combination with the KHF expansion and other related projects. Since “cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time” (14 CCR § 15355(b)), DTSC must do more

than identify the projects' individual impacts. Rather, DTSC must assess project impacts in combination with other related sources.

Since the oil and gas projects would likely contribute to air quality, greenhouse gases, water quality and supply, hazardous materials, and biological resources impacts, DTSC must consider their combined impact with the KHF expansion project and other related projects.

DTSC acknowledges that if a well is determined to be economically viable, it will be completed as a producing well. However, DTSC failed to consider cumulative impacts associated with producing wells, but instead assumes that every single well would prove to be unproductive and capped. CEQA requires that a cumulative impact analysis include impacts from probable future projects. 14 CCR § 15065(a)(3). DTSC should look at well-established data on the percentage of exploration wells that are typically completed as producing wells to determine their likely cumulative impact. DTSC cannot rely on its belief that DOGGR may evaluate individual production wells in the future to avoid analyzing impacts. DTSC has an independent obligation to consider cumulative impacts from probable future projects such as production wells before approving the KHF expansion permit.

DTSC fails to consider cumulative impacts associated with nine oil and gas wells owned by Innex California Inc. DTSC does not consider the cumulative impact from these wells because DOGGR did not require environmental review for the wells for various reasons. However, the previous lack of environmental review does not insulate DTSC from its independent duty to assess the cumulative impact of the KHF expansion with these related projects.

DTSC also fails to consider the Zodiac Energy LLC Processing Facility in determining whether the KHF expansion has cumulatively significant impacts in combination with related projects. DTSC did not consider the Zodiac Processing facility a related project because the applicant requested that the processing of its application be put on hold. However, the applicant has not withdrawn its application. The County has already initiated the CEQA process through an Initial Study/Mitigated Negative Declaration which found areas of potentially significant impacts. Once the environmental review process for a project is underway, an agency should consider it as a probable future project for purposes of a cumulative impact analysis under CEQA. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61.

DTSC must provide a summary of expected cumulative environmental effects and a reasonable analysis of the cumulative impacts of the relevant projects. 14 CCR § 15130(b)(4)-(5). This discussion must be more than simply describing related projects and coming to a conclusion "devoid of any reasoned analysis." *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 411. For fracking oil and gas wells, DTSC should specifically consider potentially cumulative air quality impacts, water quality and

supply, hazardous materials, greenhouse gas emissions, and habitat loss along with impacts from the KHF expansion and other related projects.⁶⁶

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC does not respond to El Pueblo's argument that DTSC should have analyzed and addressed the cumulative impacts from the oil and gas projects it identified in the Addendum. DTSC does not respond to El Pueblo's comment that DTSC failed to disclose the types of air quality impacts the oil and gas projects would have.

DTSC states that it does not include any analysis of future fracking projects because the agency does not attempt to predict the viability of exploratory wells. However, if a company drills numerous exploratory wells in an area where they own oil rights, such as the operations DTSC describe in its Addendum, it is reasonably foreseeable that the company intends to drill production wells and frack that area. DTSC must, therefore, consider fracking operations in the cumulative impact analysis.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

C. DTSC Proposes to Approve Changes to the Project Which Will Increase the Project's Impacts.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-30 by DTSC:

The applicant is proposing a phased build-out of the B-18 landfill to provide for earlier use of a portion of the B-18 Landfill expansion while construction of the remaining portion of the liner system and landfill is completed. The phased approach will create impacts not previously analyzed as part of the EIR.

The phased approach will allow the applicant to submit a certification report for a 3.5 acre area. Once DTSC and other agencies approve this small area, the applicant will begin placement of waste at the B-18 landfill prior to construction of the entire expansion. Pursuant to this new design, construction-related impacts and operation-related impacts will overlap to a greater degree than analyzed in the EIR. Diesel emissions from construction equipment and diesel emissions from trucks disposing of hazardous waste at the site will cumulatively impact air quality and the health of nearby

⁶⁶ Ridlington, E. and Rumpler, J. Environment California Research & Policy Center, *Fracking by the Numbers, Key Impacts of Dirty Drilling at the State and National Level*, October 2013, attached as Appendix U.

residents. These increased diesel emissions will have a greater impact on the environmental and nearby residents than previously analyzed in the EIR.

By phasing the placement of the liner, CWM places the liner integrity at risk. This phased liner construction will lead to additional seams or other places of weakness. An examination of the best available landfill liners concluded that brand-new state of the art liners can be expected to leak at the rate of about 20 gallons per acre per day even if installed with optimal quality-control procedures. This rate of leakage is caused by pinholes during manufacture and holes created when seams are welded together during landfill construction. The more seams in a liner, the greater chance for liner seepage or failure. DTSC did not consider this potential impact in the addendum.

CWM proposes to eliminate the geosynthetic clay liner from the side slope design that the County analyzed as part of the EIR. DTSC states that this design will maximize the flow rate and allow prompt removal of liquids from the landfill. In other words, the removal of the geosynthetic clay liner will increase the permeability of the liner system. The very purpose of a liner system is to slow the progression of contaminated liquids through a series of protective barriers. DTSC must thoroughly analyze and disclose impacts from increasing the rate of liner permeability.

The remaining liner system relies heavily on flexible membrane liners (FML). The US EPA has explained that it “realizes that even with a good construction quality assurance plan, flexible membrane liners will allow some liquid transmission either through water vapor permeation of an intact FML, or through small pinholes or tears in a slightly flawed FML. Leakage rates resulting from these mechanisms can range from less than 1 to 300 gallons per acre per day (gal/acre/day). DTSC must analyze potential impacts of removing geosynthetic clay liner and the risk of seepage through the remaining liner system.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC argues that the SEIR’s analysis of the concurrent operation of the B-18 landfill and construction of the three landfill cells at landfill B-20 satisfied DTSC’s duty to analyze the phased B-18 build-out which would allow for portions of B-18 to accept hazardous waste as construction on the landfill is ongoing. DTSC has done no analysis to determine that impacts from the phased B-18 build-out would be the same as impacts from the future B-20 periodic construction.

DTSC next argues that the potential impacts from the phasing of the liner construction are consistent with those identified in the SEIR. DTSC does not address El Pueblo’s specific concern that phasing the construction of the liner will lead to additional seams and risk of leakage.

Finally DTSC argues that the removal of the side slope liner will allow for faster removal of liquids from the side slopes and of the landfill. El Pueblo expressed concern that the elimination of a liner would increase the rate of seepage of liquids through the liner system. DTSC must at the least prepare a reasoned analysis to demonstrate that the removal of the liner does not negatively impact the environment. *See e.g. Dunn-Edwards v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 657-58; *California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 196 (“It cannot be assumed that activities intended to protect or preserve the environment are immune from environmental review.”).

DTSC should accept this petition for review based on DTSC’s clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

XI. DTSC’s CEQA Findings Are Clearly Erroneous

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-31 by DTSC:

As described in the CEQA Guidelines, “[a] Responsible Agency complies with CEQA by considering the EIR ... prepared by the Lead Agency and by reaching its *own conclusions* on whether and how to approve the project involved.” Pursuant to CEQA Guidelines section 15096(h), a Responsible Agency “shall make the findings required by Section 15091 for each significant effect of the project and shall make the findings in Section 15093 [Statement of Overriding Considerations] if necessary.” If the responsible agency believes that the final EIR is not adequate for use by the responsible agency, it may prepare a subsequent EIR under Section 15162. *Id.*

Here, DTSC decided not to prepare a Supplemental EIR, relied on the inadequate analysis in the County’s EIR, and issued independent findings that are clearly erroneous and not supported by the record.

A. DTSC’s Findings Are Based on an Improper Baseline.

The project baseline should normally be the existing physical condition in the affected area. CEQA Guidelines §§ 15125(a), 15126.2. Establishing a baseline at the beginning of the CEQA process is a fundamental requirement so that an agency may evaluate changes in context and analyze impacts. *Communities for a Better Environment v. Richmond*, 184 Cal.App.4th 70, 89. The EIR baseline should, therefore, reflect the current level of operations at the existing B-18 landfill. Today, this baseline would be a facility receiving about one truckload a day of hazardous waste.

DTSC does not analyze impacts using existing conditions as its baseline. Instead it relies on the clearly erroneous baseline set by the County in its EIR. The County’s baseline

was inadequate even for its own analysis because it did not reflect normal operating conditions at the B-18 landfill when the CEQA analysis first commenced. The County set its baseline at peak level of operations. This peak level was generated using data from only 16 days over a five-year period (2001-2005) when the facility received over 380 loads. Using this arbitrary methodology, the County set its baseline at 400 daily truckloads of hazardous waste.

Even when the CEQA Analysis commenced in 2005, the existing B-18 landfill received approximately 180 daily truckloads.⁶⁷ Even at its peak, the facility accepted 575,000 tons of hazardous waste annually, which averages out to just 100 trucks each day.

By establishing a baseline based on historic “peak” daily conditions rather than actual conditions at the time CEQA review commenced, the County’s EIR failed to disclose and analyze the project’s true impacts on noise, air quality, global climate change, traffic, and public health. Based on the faulty baseline, the County’s EIR erroneously concludes that “the proposed project would not result in an increase in the existing number of daily truck round trips to and from KHF.” Assuming there is no increase in daily truck-trips, the County then concluded that the proposed project would not result in additional truck-related noise impacts; increases in existing traffic; or net increases in global GHG emissions. Using the same rationale, the County’s EIR states that “emissions from the proposed Project operations would represent a continuation of the emissions from the existing disposal of hazardous waste and designated waste at KHF.”

In reality, the expansion will add at least 220 truck-trips per day over conditions when the CEQA review first commenced and 399 trucks over current conditions at the facility. By relying on an artificially elevated baseline, DTSC avoids disclosing and mitigating the potential impacts from virtually all truck traffic and hazardous waste shipments to KHF. DTSC should assess project impacts based on current existing conditions to accurately determine the project’s effects on health and the environment.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responds to El Pueblo’s comment by stating that El Pueblo’s objection to the baseline should have been raised at the administrative level for the Kings County’s approval. However, El Pueblo here challenges DTSC’s decision and CEQA findings, not the County’s. CEQA requires that DTSC “make the findings required by Section 15091 for each significant effect of the project and shall make the findings in Section 15093 [Statement of Overriding Considerations] if necessary.” CEQA Guidelines § 15096(h). DTSC’s findings regarding air quality impacts are clearly erroneous because the agency ignores impacts from the 400 additional trucks that will transport hazardous waste to KHF. The fact that the SEIR considers air quality, transportation and traffic, and greenhouse gas emissions to be significant or cumulatively significant does not relieve DTSC of its independent duty to assess an increase of impacts

⁶⁷ See EPA Draft Environmental Justice Review (“Each business day, approximately 250 trucks containing waste travel to KHF from various directions. Of the 250 trucks, approximately 180 trucks contain hazardous waste.”).

associated with 400 trucks per day traveling to and from KHF, which was not addressed in the County's SEIR.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

B. DTSC's Statement of Overriding Considerations Is Clearly Erroneous and Cannot Support Project Approval.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-32 by DTSC:

When an agency approves a project with significant environmental effects that will not be avoided or substantially lessened, it must adopt a statement that, because of the project's overriding benefits, it is approving the project despite its environmental harm. 14 CCR § 15043. The agency must set forth the reasons for its action based on the final EIR or other information in the record. Pub. Res. Code § 21081(b); 14 CCR § 15093(a). The statement of overriding consideration must be supported by substantial evidence in the record of the agency's proceedings. 14 CCR § 15093(b); *see also Sierra Club v. Contra Costa County* (1992) 10 Cal. App.4th 1212, 1223 (statement of overriding considerations should be treated like findings and therefore must be supported by substantial evidence.). A statement is legally inadequate if it does not accurately reflect the significant impacts disclosed by the EIR and mischaracterizes the relative benefits of the project. *See Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, 717.

DTSC found that specific economic, legal, social, technological and other anticipated benefits of the Project outweigh the significant and unavoidable impacts to justify project approval. DTSC specifically relies upon six benefits to make this finding. Most of the stated benefits concern the need for added hazardous waste disposal capacity within the state. However, nowhere in the permitting process has DTSC provided a useful review or consideration of the needed state capacity for hazardous waste disposal in California. State law required DTSC to provide this analysis in a statewide hazardous waste management plan beginning in 1991 and updated every three years. *See Health & Safety Code § 25135.9*. However, DTSC has never prepared the requisite analysis. Without this analysis, DTSC has no way of knowing whether the state needs additional hazardous waste disposal capacity and no way to support its finding of an overriding project benefit.

DTSC cites an increase in hazardous waste generation in California from 1997 through 2002 as the only evidence supporting its statement of overriding considerations. However, 10-year-old data about increased hazardous waste generation is not evidence supporting DTSC argument that the state needs additional capacity today. DTSC does not disclose or analyze how much waste is currently generated and how much capacity

remains at existing hazardous waste facilities in California. Without providing any information on the state's supply and demand for hazardous waste disposal options, DTSC has no evidence demonstrating that the project will achieve any of the stated benefits.

In fact, if DTSC meets its goals of reducing hazardous waste to less than 500,000 tons per year, the state will have even less need for the additional 5 to 19 million cubic yards of capacity at Kettleman Hills. The expansion of landfill capacity will reduce the costs of disposal and actually act as a disincentive to reaching the state's 50% hazardous waste reduction goal. Rather than providing a benefit to the state, the expansion will undermine statewide hazardous waste goals.

DTSC also explains that one of the project benefits is to receive hazardous waste generated by U.S. businesses with facilities in Mexico. However, DTSC also acknowledges that the facility only receives the equivalent of half a truckload of waste per year. Existing facilities have sufficient capacity for this very small amount of waste. DTSC does not provide any evidence that demonstrates that the KHF expansion is needed to provide capacity for waste from Mexico.

Because DTSC has no support for its findings of overriding considerations, and is unable to demonstrate that the facility provides any benefit, DTSC should not approve the expansion permit.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo's comments by pointing to "[t]he need for hazardous waste disposal capacity [having been] acknowledged by the California State Legislature[.]" However, this ignores the fact that DTSC's justification for approving the KHF expansion despite the existence of significant impacts is statutorily required to be stated in the record. 14 CCR § 15093(b) ("When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action *based on the final EIR and/or other information in the record*. The statement of overriding considerations *shall be supported by substantial evidence in the record*.") (emphasis added). No amount of post-hoc justification can compensate for DTSC's failure to include that justification in the record. Because DTSC has no support for its findings of overriding considerations based on the record, and is unable to demonstrate that the KHF expansion provides any benefit based on the record, such findings are baseless and unlawful.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

XII. DTSC Fails to Analyze Impacts from the Whole of the Project

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-33 by DTSC:

CEQA requires agencies to examine “the whole of an action, which has the potential for resulting in either a direct physical change to the environment, or a reasonably foreseeable indirect physical change in the environment.” 14 CCR § 15378.

Chemical Waste Management is proposing to add capacity at its Kettleman Hills Facility by expanding the existing landfill (B-18) by 4.9 million cubic yards of landfill space and by adding a new landfill (B-20) with 14.2 million cubic yards of landfill space. DTSC’s CEQA analysis considered only the first phase of the project, the expansion of the B-18 landfill. DTSC did not consider impacts from the new landfill. CEQA requires agencies to examine the “whole of an action” that can result in a direct or reasonably foreseeable indirect change in the environment. 14 CCR § 15378(a). Where a phased project is to be undertaken and where the total undertaking compromises a project with significant environmental effect, agencies must prepare a single analysis for the ultimate project. *Id.*

Though DTSC relies primarily on Kings County’s SEIR for its analysis, once DTSC prepared an addendum, CEQA required the agency to look at the whole project rather than simply its first phase. This is especially the case here, where the agency considered whether newly approved or proposed related projects would have a cumulative impact when combined with the KHF expansion project. By excluding the B-20 landfill from this determination, DTSC’s analysis is incomplete.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

While DTSC noted that the B-20 landfill “is not a subject of this permit modification decision,” DTSC does not and cannot deny that it is part of the “whole of the action.” This includes the underlying activity being approved, not to each governmental approval. 14 CCR § 15378(a), (c)-(d); *RiverWatch v. Olivenhain Mun. Water Dist.*, 170 Cal.App.4th 1186 (2009); *Association for a Clearer Env’t v. Yosemite Community College Dist.*, 116 Cal.App.4th 629, 637 (2004). CEQA requires that environmental considerations not be concealed by separately focusing on isolated parts, overlooking the cumulative effect of the whole action. *See City of Sacramento v. State Water Resources Control Bd.*, 2 Cal.App.4th 960 (1992); *McQueen v. Board of Directors*, 202 Cal.App.3d 1136, 1144 (1988); *Lexington Hills Ass’n v. State*, 200 Cal.App.3d 415 (1988); *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal.App.3d 229, 241 (1986); *Bozung v. LAFCO*, 13 Cal.3d 263, 283 (1975). DTSC may not divide a single project into smaller individual subprojects to avoid responsibility for considering the environmental impact of the project as a whole. *Orinda Ass’n v. Board of Supervisors*, 182 Cal.App.3d 1145, 1171 (1986); *Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4th 1214

(2007); *Association for a Cleaner Env't v. Yosemite Community College Dist.*, 116 Cal.App.4th 629, 638 (2004); *Plan for Arcadia, Inc. v. City Council*, 42 Cal.App.3d 712, 726 (1974). The B-20 landfill is the bulk of the expansion at nearly 3 times the volume of the B-18 landfill. The B-20 landfill undoubtedly “has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment.” 14 CCR § 15378(a). While not subject to this permit modification, the whole of the action is not divided into each governmental approval. The B-20 landfill is clearly part of the “whole action.”

DTSC further responded that Kings County’s “SEIR did evaluate the impacts from the construction and operation of B-20,” and that “DTSC has reviewed the Final SEIR and determined that it, along with an Addendum prepared by DTSC, adequately evaluates the impacts associated with the proposed permit modification.” By taking upon itself to prepare the Addendum and therein examining the B-18 landfill, DTSC is required to examine the whole of the action, which includes the B-20 landfill.

DTSC should accept this petition for review based on DTSC’s clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

XIII. DTSC DEFERS ANALYSIS IN THE GUISE OF MITIGATION

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-34 by DTSC:

The permit states “[t]o ensure that air emissions do not result in unacceptable risks to human health, the Permittee shall prepare a Health Risk Assessment (HRA) in accordance with the DTSC-approved ambient air monitoring program work plan.” The health risk assessment should not be a condition of the permit; rather DTSC must prepare and consider the health risk assessment prior to issuing the permit. DTSC must review and consider information in the Health Risk Assessment in determining whether to approve or deny the permit. The HRA needs to be completed prior to issuance of permit, not as mitigation.

The permit also requires the applicant to select a new location for a monitoring location that would capture air pollution when wind is blowing toward Kettleman City. The fact that DTSC is requiring a new monitoring station to collect data on air pollution travelling toward Kettleman City indicates that the existing monitors are currently insufficient to determine the air pollution risks in the community. DTSC should review and consider the information that will be collected by the monitor prior to issuing the permit rather than merely requiring a new monitoring location.

With these permit conditions, DTSC unlawfully defers analysis and mitigation. In *Communities for a Better Environment v. City of Richmond*, (2010) 184 Cal.App.4th 70,

89, the lead agency required that the project applicant hire and fund an expert to inventory the project's greenhouse gas emissions within one year of the project approval.

The Court rejected the deferred analysis of greenhouse gases as mitigation and held that:

the time to analyze the impacts of the Project and to formulate mitigation measures to minimize or avoid those impacts was during the EIR process, before the Project was brought to the Planning Commission and City Council for final approval. . . . The solution was not to defer the specification and adoption of mitigation measures until a year after Project approval, but, rather, to defer approval of the Project until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment.

Id. at 96.

This issue is well-settled; reliance on post-approval studies significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and constitutes improper deferral of environmental assessment. *See, e.g., Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396 (conditioning a permit on "recommendations of a report that had yet to be performed" constituted improper deferral of mitigation); *Sundstrom v. City of Mendocino* (1988) 202 Cal.App.3d 296, 306 (future study of hydrology and sewer disposal problems held impermissible).

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC argues that the Health Risk Assessment has been a permit condition since 2003 and is required to monitor the estimated risk from facility to receptors. El Pueblo does not assert that this condition should be removed from the permit, rather it voices its concern that the data required from such an HRA should also be made available to the public and considered by DTSC as part of this decision making process.

DTSC also argues that existing monitors capture emissions from facility operations during the predominant wind direction. El Pueblo asserts that DTSC should have considered ambient air emissions when the wind is not blowing in the predominant wind direction, especially since this is when air emission present the biggest risk to Kettleman City residents. El Pueblo does not assert that this condition should be removed, rather it believes that DTSC should require and collect this data before making a decision on the permit.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

XIV. DTSC's Permit Process Restricts Public Participation

A. DTSC's Public Notice for the Hearing and Comment Period Is Legally Inadequate.

El Pueblo challenges General Condition 2(B) and each and every condition of the permit because DTSC did not provide adequate public notice and opportunity to comment on its proposed decision. DTSC's authorization of the treatment, storage, and disposal of hazardous waste at KHF without providing the public an adequate opportunity to comment on that decision violates state law. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-35 by DTSC:

California Code of Regulations, Section 66271.9 required DTSC to provide public notice at least 30 days before the public hearing and 45 days before the close of public comment. State law also requires that DTSC provide the public notice by mailing it to all persons on DTSC's mailing list. 22 CCR § 66271.9(c)(1)(D).

On or about September 11, 2013, DTSC issued its official public notice for the hearing and comment period. DTSC issued the official public notice just 30 days prior to the close of public hearing and just one week prior to holding the official public hearing. DTSC did not provide the official public notice by mailing it to all persons on DTSC's mailing list, but rather just posted it on its website.

DTSC's noticing of the comment period and public hearing for its draft permit approval and public hearing violated State law and must be redone.

El Pueblo petitions DTSC to review General Condition 2(B) and each and every other permit condition on the grounds that DTSC failed to comply with state public participation requirements. DTSC should grant the petition for review on this ground because DTSC's decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC asserts that it mailed Community Notices on July 1, 2013 and on August 8, 2013. However, DTSC did not mail the Notices to all interested parties, including the attorney for El Pueblo, as required by 22 CCR § 66271.9. The Notice sent by DTSC on August 8, 2013 did not include an address to provide public comment. The public was first notified of the correct location in which to provide public comment on September 11, just one week prior to the official meeting and far short of the 45-day comment period required by 22 CCR § 66271.9.

DTSC should accept this petition for review based on DTSC's clearly erroneous conclusions of fact and law.

B. DTSC's CEQA Documents Are Not Written in Plain Language.

El Pueblo challenges General Condition 3 because the addendum prepared by DTSC fails to comply with CEQA and the Mitigation Monitoring and Reporting Plan is insufficient to reduce project impacts to the extent feasible or to less than significant levels. El Pueblo has previously

raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-36 by DTSC:

CEQA documents must be in plain language to ensure public participation in the permitting process. The legislature intended that CEQA documents be understandable to the public. The documents must be “organized and written in such a manner that they will be meaningful and useful to decisionmakers and to the public.” Pub. Res. Code § 21003(b). CEQA Guidelines mandate that CEQA documents “shall be written in plain language so that decision makers and the public can rapidly understand the documents.” CEQA Guidelines § 15140.

The addendum does not meet this standard. It is not understandable to the residents of Kettleman City. It is written in technical language that excludes most of the Kings County public from reading and understanding it. This is especially true of the project description for the B-18 phased project, which is written in such technical language that no layperson would be expected to understand what is being proposed.

For example, the Project Description section of the addendum states:

As part of the design for the vertical and lateral Phase III expansion of the B-18 Landfill, to maintain the maximum flow rate through the geocomposite drainage layer/geotextile above the secondary FML, the geosynthetic clay liner (GCL) will be eliminated from the side-slope liner design. The refined side-slope liner system is the same as the existing side-slope liner at the existing B-18 Landfill. A GCL below the secondary FML may be allowed in conjunction with a low-permeability soil liner. Elimination of the GCL maximizes the flow rate through the geocomposite drainage layer/geotextile, thus allowing prompt removal of liquids from the landfill.

The Project Description section also states:

A temporary intermediate fill slope condition could also result from construction of Phase IIIA for a short time. A cross section through the temporary slope was evaluated to ensure static stability and compliance with applicable requirements. (See Technical Report A, pp. 57-58 and Appendix H.4.) A static stability analysis was conducted for the Phase IIIA intermediate waste slope. The result in Table 5.2 for this condition is a static factor of safety of 1.5 which is considered acceptable. (Technical Report A, p. 58.) The Phase IIIA stability analyses were performed for the south-facing 2H:1V interim waste slope.

California Courts have interpreted the “plain language” requirements of CEQA to ensure that the public has access to EIR documents. “The message of this regulatory scheme is clear: an EIR in this state must be written and presented in such a way that its message can be understood by governmental decisionmakers and members of the public who have reason to be concerned with the impacts which the document studies.” *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 193 Cal.App.3d 1544, 1549

(1987). The people of Kettleman City certainly have reason to be concerned with the impacts which the addendum studies. “If the function of an EIR is to inform decisionmakers and the public (*see* 14 CCR § 15140) about the impacts of a project, then documents which are hypertechnical and confusing in their presentation may be incomprehensible to the very people they are meant to inform.” *Id.* at 1548.

“The portions of the EIR that must without compromise be understandable by the lay public are those which describe the project. . .” *Id.*; 14 CCR § 15124. Here, the Project Description is utterly indecipherable. Acronyms are used prior to being defined, if they are defined at all. The project description contains hyper-technical information on multiple project phases and cite to tables and graphical references that do not exist. The information appears to have been pulled directly from technical appendices without any attempt to explain the B-18 phased approach in plain language. DTSC’s failure to explain the project in a way Kettleman City residents and other members of the public would understand violates CEQA and appears to have the purpose and effect of stifling public participation.

El Pueblo petitions DTSC to review Condition 3 on the grounds that DTSC failed to comply with CEQA. DTSC should grant the petition for review on this ground because DTSC’s decision is based on findings of fact and conclusions of law that are clearly erroneous.

DTSC responded to El Pueblo’s comments by stating that it added explanations as to why the changes were being considered in the Addendum: “For example, the last sentence in the first quoted section in the Addendum was added by DTSC.” This unhelpful addition changes nothing. An EIR should be written in a way that readers are not forced “to sift through obscure minutiae or appendices” to find important components of the analysis. *San Joaquin Raptor Rescue Ctr. v. County of Merced* 149 Cal.App.4th 645, 659 (2007). While DTSC’s translation of “the Addendum for Spanish speakers in the Kettleman City community” is helpful, it does not compensate for a text that is incomprehensible to non-experts before it is translated. Instead, it should have been organized and written in a manner that would make it “meaningful and useful to decision-makers and to the public,” which it was not. Pub. Res. Code § 21003(b).

DTSC should accept this petition for review based on DTSC’s clearly erroneous conclusions of fact and law as stated in the addendum, CEQA findings, and the aforementioned response to comments.

XV. DTSC’s Permit Conditions Are Inadequate.

A. Air Monitoring

El Pueblo challenges General Condition 4(A)(1)(e) because the location of monitoring stations should not be selected by the project applicant due to self-interested bias. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-37 by DTSC:

DTSC requires that Chemical Waste Management propose a new location for one additional ambient air monitoring location for ambient air sample collection located between the active hazardous waste landfill operations and Kettleman City to assess releases when the predominant wind direction is from the facility toward Kettleman City. However, DTSC should not delegate the authority to determine where to locate the monitoring location to Chemical Waste Management. The applicant has a vested interest in placing a monitoring station in the area least likely to capture air pollutants to avoid liability. Given Kettleman City residents' concern about pollution from KHF impacting the health of residents in town, coupled with the serial non-compliance and mistrust of Chemical Waste Management, DTSC should pick the location of the monitoring station, with input from interested stakeholders.

DTSC explains that DTSC will deny CWM's monitoring location if it is not appropriate. El Pueblo remains concerned that there is not sufficient oversight from, and accountability to, concerned residents to ensure an appropriate location for the monitoring station.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's authorization of CWM to pick the location of an additional monitoring station without any public notice or input.

B. Soil Cover

El Pueblo challenges B-18 Landfill Unit Specific Condition 5 because it permits to use of contaminated soil and a landfill cover. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-38 by DTSC:

DTSC requires the use of a soil cover at the site. However, according to the air district, Chemical Waste Management proposed to use VOC-tainted soil instead of clean soil. Other landfills in the area do not use contaminated soils, including the nearby Clean Harbors hazardous waste landfill. Using contaminated soil as cover increases air emissions. DTSC has not disclosed or considered this potential source of pollution. DTSC should prohibit the use of contaminated soil as cover.

DTSC states that it currently does prohibit the use of contaminated soil as cover and cites the California Code of Regulations. El Pueblo does not agree that the cited sections would prohibit the use of contamination soils. El Pueblo requests that DTSC add a permit condition that specifically prohibits the use of contaminated soils as cover.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's authorization of CWM to use contaminated soil as cover and to clarify existing regulations that address this issue.

C. Nuisance Odor

El Pueblo challenges B-18 Landfill Unit Specific Conditions because they fail to address nuisance odor at the unit. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-39 by DTSC:

Odors have the potential to originate from various waste treatment and disposal units at KHF, including the B-18 landfill. In fact, as noted in the EIR, the CWM facility “does accept ammonia and other ‘cover immediately loads’ and designated waste that may contain petroleum hydrocarbons, so there is a potential for unpleasant odors.” In order to address such odors, the Air District provides that “[a]ny malodorous material received at the facility which exhibits odors detectable at or beyond the facility property boundary shall be covered at the end of the working day with acceptable cover material.” In addition, the Air District states that “KHF staff working throughout the facility will monitor odors using their sense of smell,” and “[a]ny complaints received from the public regarding odors will be investigated by KHF staff.” There are several problems with this approach. First, a requirement to cover any malodorous material “at the end of the working day” means that any such material received at the CWM facility at the start of the working day could create nuisance conditions for several hours before being addressed by CWM staff. This approach makes no sense with regard to air emissions from volatile compounds, since it is well established that within a few hours after application or tilling, such emissions “will be substantially less than the maximum rate because the volatiles at the surface have been removed by the wind and the remaining volatiles must diffuse up through a layer of porous solids.”

Furthermore, the stated procedures to deal with nuisance odors are weak and explicitly allow such nuisances to continue. As stated in the ATC, “If KHF is the source of the odor, operations *may* be modified and mitigation measures taken to *reduce* the nuisance odors.” This condition does not actually require any modification of operations causing odors, stating only that the company “may” do so, and if they voluntarily choose to modify operations, they do not have to eliminate the nuisance, only “reduce” it. Since the Air District has not adequately protected Kettleman City residents from odors, DTSC should add a provision in its permit to require immediate cover of materials that may cause odors.

DTSC states that it does not anticipate odor impacts from the facility to be significant for Kettleman City residents and concludes no additional permit conditions are necessary. El Pueblo requests that DTSC reconsider to address impacts when winds do blow toward Kettleman City.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC’s failure to include a condition to control nuisance odors at the B-18 landfill unit.

D. Overloaded Trucks

El Pueblo challenges B-18 Landfill Unit Specific Conditions because they fail to address the risk associated with overloaded trucks transporting waste to KHF. El Pueblo has previously raised this challenge and hereby incorporates its October 24, 2013 comment, numbered 499-40 by DTSC:

In January of 2011, I received an anonymous phone call from an employee of a trucking company that transported hazardous waste to KHF. According to this employee, Chemical Waste Management allows dangerously overloaded trucks to dispose of waste at the site. According to the employee, around 50 to 70 percent of Northern California trucks destined for KHF bypass required CHP scales. According to the caller, Chemical Waste Management is aware of and even encourages these infractions, accepts waste from these trucks, and fails to report the infractions to the appropriate authorities. I relayed the information to the regulatory agencies, including DTSC, but received no response to these concerns.

By accepting trucks that are overloaded and by not reporting the infractions, KHF is placing the public at risk. Overloaded trucks are more prone to accident because 1) the breaking distance increases; 2) stress places on tires can lead to blow-outs; 3) continuous stress from overlarge loads can cause breaks to fail; 4) failing brakes and additional momentum from the load can affect the driver's ability to steer; and 5) shifting loads are possible, which can unbalance the truck and force it to shift lanes—or even topple on one side—without warning. In any truck this presents an unsafe public safety risk; in a truck carrying hazardous waste, the consequences of an accident are exponentially more dangerous.

There are no conditions in the hazardous waste permit to ensure that trucks transporting waste are not overloaded. DTSC should add a condition that CWM shall turn away any truck that is overloaded.

DTSC responds that it does not concur that a permit condition should be added to the permit to reject overloaded trucks because overloaded trucks will be equally unsafe when leaving the facility. DTSC does not consider the deterrent effect of such a condition. An operator that is turned away because it has overloaded a truck will be unlikely to violate the condition a second time. DTSC also states that the permit does not apply to transporters of hazardous waste. However, El Pueblo's suggested condition applies only to the permittee in that it prohibits CWM from accepting waste from overloaded trucks. DTSC should consider other permit conditions that would prevent the widespread transport of overloaded trucks to KHF, such as warnings, posting of signs, better monitoring of incoming vehicle weight, etc.

DTSC should accept this petition for review based on an important policy consideration concerning DTSC's failure to restrict overloaded trucks transporting hazardous waste to the B-18 landfill unit.

E. Prohibit PCB Disposal at KHF

El Pueblo challenges General Condition 7 because DTSC should prohibit or otherwise restrict the disposal of PCBs at KHF. Members of El Pueblo and others previously raised this issue during public testimony on September 18, 2013 and during conversations with DTSC staff during the pendency of this permit.

Given concerns regarding possible links to birth defects and exposures to PCBs, DTSC should add PCBs to the list of prohibited waste at KHF. This prohibition is further supported by the high toxicity and persistence of PCBs, past PCB spills at KHF, and CWM's mischaracterization and unlawful disposal of PCBs in the landfill.

DTSC should accept this petition for review based on an important policy consideration concerning the high risk posed by PCBs on nearby residents.

F. Prohibit Future Incineration at KHF

El Pueblo challenges General Condition 2 because DTSC should place additional restrictions on the effect of the permit, including the permanent prohibition of the incineration of waste at KHF. Members of El Pueblo and others previously raised this issue during public testimony on September 18, 2013 and during conversations with DTSC staff during the pendency of this permit.

Kettleman City residents have long feared that CWM will eventually attempt to incinerate waste at the KHF. CWM has added, and DTSC has approved, unit after unit to increase capacity at KHF. Given DTSC's decision to approve this permit, and the likelihood that CWM will continue to seek additional capacity in just a few years, El Pueblo requests that DTSC insert an additional condition prohibiting any future incineration at KHF.

DTSC should accept this petition for review based on an important policy consideration concerning the likelihood that CWM will continue to seek additional capacity at the site and the dangers posed by waste incineration.

G. Financial Assurances and Future Liability

El Pueblo challenges General Condition 2(A) because DTSC should place additional financial and liability assurances on CWM than imposed by federal and state statutes. Members of El Pueblo and others previously raised this issue during public testimony on September 18, 2013 and during conversations with DTSC staff during the pendency of this permit.

Existing law limits the need for financial limits to the first 30 years after a facility closes. However, in cases where waste may remain toxic for hundreds of years, 30 years is simply an insufficient time period to ensure post-closure care. Rather, CWM should be held liable for future costs associated with site clean-up and care indefinitely.

Additionally, DTSC should require financial assurances to cover liabilities for corrective actions. Given CWM's poor compliance history, this condition is vital to ensure that CWM has sufficient funds to clean-up any contamination at or near the site.

DTSC should accept this petition for review based on an important policy consideration regarding the sufficiency of financial assurances provided by CWM.

CONCLUSION

For the aforementioned reasons, El Pueblo requests that DTSC accept this petition for review of the agency's decision to approve a Hazardous Waste Permit Modification for KHF.

Sincerely,

Ingrid Brostrom
Senior Attorney
Center on Race, Poverty & the Environment