

July 8, 2016

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**VIA EMAIL & U.S. POSTAL SERVICE**

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**Re: Petition for Review of Decision to Approve Pond 1 Closure Plan**

Dear Mr. Ruffin or Permit Appeals Officer:

In accordance with Title 22, Section 66271.18 of the California Code of Regulations, Phibro-Tech, Inc. (“PTI”) petitions the Department of Toxic Substances Control (“DTSC” or “Department”) to review the decision by Department permitting staff to approve the Pond 1 Closure Plan for PTI’s Santa Fe Springs facility without regard to the need to replace the facility’s existing wastewater treatment system (“WWTS”) before initiating closure activities. If upheld, the Department’s decision will result in the facility shutting down. It is the only facility west of the Mississippi that is able to recycle the types of hazardous wastes it receives. Not only will all the employees at the facility lose their jobs, but all the waste that would otherwise be recycled into valuable products will instead be landfilled or sent to a deep injection well.

The Department provides no justification for forcing the shutdown of the facility through the auspices of the Pond 1 Closure Plan. The Department’s decision is arbitrary and capricious and not in accordance with law. It is environmentally and economically irresponsible. It specifically contradicts the Department’s prior permitting decisions to close Pond 1 in coordination with relocating the WWTS so that the facility may continue to operate.

**I. The Department’s decision is clearly erroneous and raises important policy considerations regarding recycling hazardous waste and promoting open and informed decision-making.**

**a. The Department’s decision is clearly erroneous.**

This petition for review should be granted because the Department’s decision to approve the Pond 1 Closure Plan without regard to the need to relocate the wastewater treatment system is clearly erroneous. The Department previously, formally concluded that relocating the wastewater treatment system is a necessary first step to close Pond 1. There is no evidence in the record to indicate that this is no longer the case. To the contrary, all the evidence demonstrates that the wastewater treatment system must be relocated before initiating closure of Pond 1 without shutting down the facility. The Department’s failure to consider this renders its decision clearly erroneous. Furthermore, the Department has not considered the environmental impacts of shutting down the facility through this decision in the California Environmental Quality Act (“CEQA”) document upon which it relied to approve the Pond 1 Closure Plan. Failure to conduct this analysis is a failure to proceed according to law and is clearly erroneous.

**b. The Department's decision raises important policy considerations.**

This petition for review should also be granted because it raises important policy considerations. The practical result of the Department's decision will be to shut down the Phibro-Tech facility. But the facility serves an important role in the proper management of hazardous waste in California. The PTI facility is the only one of its kind west of the Mississippi that is capable of receiving the wastes it does and recycling them into valuable products. If the facility is shut down, the waste PTI currently recycles will instead be landfilled or injected in a deep well. That result is contrary to the Department's mission to promote recycling.

In addition, the petition raises important policy considerations about the transparency and integrity of the Department's decision-making process. Despite the fact the Department knows that the facility will shut down if it cannot relocate its wastewater treatment system, the Department does not so much as identify that as a potential issue in its decision-making documents. Neither the public, nor other agencies or elected officials, can determine the practical result of the Department's decision. Instead, the consequence of its decision is obscured. This directly contradicts the Department's obligation to provide a reasoned basis for its decisions. It also raises the possibility that the Department is attempting to shut down the facility without saying so.

**II. Statement of Reasons.**

**a. PTI submitted the Pond 1 Closure Plan under Protest.**

PTI submitted the Pond 1 Closure Plan on August 7, 2015, under protest. See Exhibit A. PTI's protest is thus part of the administrative record. PTI protested the plan because it does not address the need to relocate the wastewater treatment system, which is secondarily contained by Pond 1, before initiating Pond 1 closure activities. The facility cannot operate without an operating wastewater treatment system. PTI clarified that it was not waiving any right or defense available to it should the Department attempt to compel the closure of Pond 1 without first addressing the need to relocate the wastewater treatment tanks in a manner that would ensure uninterrupted operation of the facility.

As detailed below, the Department determined on multiple occasions that the wastewater treatment system should be relocated first, before closing Pond 1. However, in 2015, under threat of enforcement action, PTI was required to submit a revised Pond 1 Closure Plan that excludes information regarding relocating the wastewater tanks and the schedule for those activities, which the Department deemed "extraneous." However, this information was specifically *required* by the Department in the 1988 Pond 1 Closure Plan it previously approved.

**b. PTI was forced to apply for a permit modification to relocate the wastewater treatment system independent of the Pond 1 Closure Plan.**

Department staff indicated that it would evaluate the revised Pond 1 Closure Plan pursuant to a DTSC initiated permit modification that would not consider relocating the wastewater treatment system. If PTI wanted to relocate the wastewater treatment system, it was informed it would have to apply separately for its own permit modification to do so. See Exhibit B. To that end, on December 18, 2015, PTI submitted an application for a Class 2 permit modification to relocate the wastewater treatment system. See Exhibit C.

The contents of the application had already been vetted by the Department. On July 31, 2015, PTI submitted a request for the Department's concurrence that the requested relocation of the wastewater treatment system would constitute a Class 2 permit modification. This request included the proposed contents of the application. The Department provided its concurrence and comments on PTI's request on

November 17, 2015. See Exhibit D. The formal application that PTI submitted addressed the Department's comments.

To ensure that the Pond 1 Closure Plan and PTI's Permit Modification would be evaluated (and ultimately implemented) simultaneously, PTI coordinated the public notice and public hearing for the Permit Modification with the Department's public notice and public hearing for the Pond 1 Closure Plan. On January 28, 2016, the Department held a public meeting and hearing on the Pond 1 Closure Plan. On February 3, 2016, PTI held a public meeting on the Permit Modification.

Although the Department has now approved the Pond 1 Closure Plan, it has not completed its evaluation of the Permit Modification. Notwithstanding that the Department had previously provided specific guidance on the necessary content of the application, which was incorporated by PTI into the Permit Modification before the public hearing was held, permitting staff has since concluded that voluminous additional information is required. Much of this information is being requested to amend the 1990 Operations Plan to the 1991 Part B Permit, a tremendous amount of work which will be rendered moot after the upcoming decision by the Department on renewal of the facility's Part B permit. See Exhibit E. PTI understands that the permitting staff that is evaluating the application now is different from the permitting staff that originally evaluated PTI's request for concurrence and the Pond 1 Closure Plan. It therefore appears that PTI is being held to a different standard for the Permit Modification than previously stated solely because the Department decided to put different permitting staff on the project.

It remains unclear when (or if) the Department will complete its evaluation of the Permit Modification. Regardless, the Department is now requiring the closure of Pond 1 before the wastewater treatment system can be relocated. The Department's decision to approve the Pond 1 Closure Plan without regard to the need to relocate the wastewater treatment system amounts to an arbitrary decision to shut down the facility. While this is the practical result, which the Department fully understands, it never provides any justification whatsoever for its capricious decision.

**c. The Department has previously made binding determinations that the wastewater treatment system should be relocated prior to closing Pond 1.**

The Department's insistence that PTI submit a Pond 1 Closure Plan without regard to the need to relocate the wastewater treatment system is diametrically opposed to what the Department previously determined on multiple occasions, including pursuant to binding permitting decisions. This is reflected in the original 1988 Pond 1 Closure Plan, which up until now was the only approved closure plan for Pond 1. See Exhibit F. It states in relevant part that PTI "must" relocate the wastewater tanks prior to closing Pond 1.

Since [PTI] depends heavily on the continued use of its wastewater treatment system to conduct normal operations, it has been determined that the two wastewater treatment tanks located in the unit must be relocated as part of closure. For this reason, the time necessary to complete closure activities will need to be extended in accordance with 40 CFR 265.113(b)(1)(ii)(C)...

The two (2) 30,000 gallon wastewater treatment tanks currently located in Pond #1 must be removed from the unit in order to proceed with soil sampling activities. *However, due to the critical role they play in normal facility activities, they must remain in continuous service throughout closure of Pond #1.* Therefore the tanks shall be relocated to accommodate this need prior to commencing sampling activities for Pond #1. [Exhibit F, 1988 Closure Plan, p. 7]

The Department reaffirmed this decision in 1995 when it amended the facility's permit to include a corrective action program. See Exhibit G. The modified permit states, "The existing Modified Closure/Post Closure Plan for Pond 1, which was approved by the Department in September 1988, requires the relocation of two wastewater treatment tanks currently located in Pond 1...." [Exhibit G, 1995 Permit Mod, p. 52.a.13] Thus, the Department on at least two separate occasions concluded through a formal decision-making process that Pond 1 closure first requires relocating the wastewater treatment tanks, and yet the Department does not address this at all in its approval of the new closure plan.

The requirement to relocate the wastewater treatment system prior to Pond 1 closure was well understood by Department permitting staff. For example, on December 2, 2005, the Branch Chief for the Statewide Compliance Division stated, "As you are aware, the approved 1988 Modified Closure/Post Closure Plan for Pond 1 requires relocation of the tanks W1 and W2 as part of the implementation of the Pond 1 Closure Plan." See Exhibit H. In response to this direction, PTI submitted to the Department a Site Characterization/Tank Relocation Plan on November 22, 2006. See Exhibit I. In a technical memo evaluating that plan, the Department's Geological Services Unit stated,

According to the 1995 Hazardous Waste Facility Permit Modification, the facility is required to implement the 1988 Modified Closure/Post Closure Plan for Pond 1 (Closure Plan). The 1988 Closure Plan requires the facility to relocate two 30,000-gallon above-ground wastewater treatment tanks currently located in Pond 1 in order to proceed with Pond 1 characterization activities. [Exhibit J, 2006 Memorandum Regarding Site Characterization/Tank Relocation Plan, p. 1]

In December 2005, PTI and Department Management (led by then-Deputy Director Watson Gin) reached an agreement that PTI would initiate closure of Pond 1 after the Department made a permitting decision on the facility's Part B permit renewal application (which at that time had been pending for 10 years). Consistent with the December 2005 meeting, the Department reaffirmed its determination to close Pond 1 after relocating the WWTS in the March 2010 Draft Part B Permit it circulated for public review. Exhibit K, 2010 Draft Permit, p. 54. In support of the Draft Permit, the Department circulated a Fact Sheet which states, "PTI will also be closing a former surface impoundment at the facility currently used as secondary containment for the wastewater treatment system. Approval for this had been previously received from DTSC." Exhibit L, 2010 Permit Fact Sheet, p. 2.

The Department also explained in the Fact Sheet that, for CEQA purposes, it would rely on the Negative Declaration prepared by the City of Santa Fe Springs, which the Department participated in preparing as a responsible agency. The Negative Declaration states in relevant part,

An approved 1988 Modified Closure/Post-Closure Plan provides for closure of Pond 1. PTI has begun implementing the 1988 Modified Closure/Post-Closure Plan for closure of Pond 1. As Pond 1 is currently being used as secondary containment for Waste Water treatment tanks, these tanks must be relocated before Pond 1 can be closed. On January 31, 2006 PTI submitted a Tank Relocation Plan to DTSC. [Exhibit M: 2008 Negative Declaration, p. 24]

Thus, the record demonstrates that the Department understood that it was necessary to relocate the wastewater treatment system before closing Pond 1 for the facility to operate. Despite this, the new Pond 1 Closure Plan does not include any provisions at all relating to relocating the wastewater treatment system. The Department has offered no justification at all for deviating from what it has previously determined on multiple occasions.

**d. The Department has approved on multiple occasions a schedule that allows for at least one year to relocate the wastewater treatment system before closing Pond 1.**

The Department may argue that the Pond 1 Closure Plan as conditioned allows for PTI to relocate the wastewater treatment system because closure activities do not need to be initiated until six months after plan approval. The Department does not state in its approval of the plan that this is the reason for the condition. In any event, it is wrong because the Department has not yet authorized PTI to relocate the wastewater treatment system and even if it does it has recognized on multiple occasions that it will take more than six months to relocate the system. For example,

- The 1988 Pond 1 Closure Plan includes a schedule that required PTI to submit for approval a Site Characterization and Tank Relocation Plan and to begin operations of the new system within one year. Exhibit F, 1988 Closure Plan, p. 18.
- The Department proposed a schedule for Pond 1-related activities on December 2, 2005, that anticipated relocating the wastewater treatment system at least 7 months after approving a tank relocation plan.
- The 2010 Draft Permit included a carefully crafted schedule for implementing Pond 1 closure that required PTI to “install a new waste water treatment system in the old maintenance building location within one year of the effective date of this Permit.” 2010 Draft Permit, Part VI, Section 5.f. Within six months after that PTI was to close Pond 1. *Id.*, section 5.h. Exhibit K, 2010 Draft Permit, p. 54.

In addition, on May 6, 2014, PTI provided the Department with a Gantt chart outlining the necessary steps and associated timeline to close Pond 1. See Exhibit N. That schedule shows that it will take at least 10 months to relocate the wastewater treatment system and complete related activities before it is possible to close Pond 1. Thus, there is substantial evidence in the record that it will take more than six months to relocate the wastewater treatment system and no evidence at all suggesting otherwise.

**e. The true effect of the Department’s decision was not evaluated under CEQA and therefore demonstrates a failure to proceed according to law.**

In making its decision to approve the Pond 1 closure plan, the Department relied on an “Addendum to Previously Adopted Negative Declaration”, dated December 15, 2015 (“Addendum”), and a supporting “CEQA Environmental Document Analysis/Checklist: Phibro-Tech, Inc.”, dated December 14, 2015 (“CEQA Environmental Document”). See Exhibits O & P. Both of these documents describe and assess the ongoing operation of the facility, including the replacement of the waste water treatment system to facilitate the closure of Pond 1; neither considers the potential that the Department’s approval of the Pond 1 Closure Plan would cause the closure of the facility because the Department would require the closure of the waste water treatment system without its replacement. In fact, it is not apparent that the Department’s environmental analysis actually considered the closure plan it is purporting to approve. For example, the CEQA Environmental Document explains that the Pond 1 closure plan under consideration would “modif[y] the approved 1988 Closure Plan, and consolidate[] the 2006 Tank Relocation Plan, and Soil Sampling Analysis Plan into a stand-alone document.” Exhibit P, CEQA Environmental Document, pg. 6 (emphasis added). The CEQA Environmental Document further states that “tanks W-1 and W-2 must be relocated to allow access to execute the planned closure of Pond 1.” *Id.*, p. 17 (emphasis added). But the Pond 1 Closure Plan approved by the Department would not relocate the wastewater tanks because the Department previously directed Phibro-Tech to remove any discussion of relocating the tanks. This means that the project the Department evaluated in its environmental analysis is different from the project that it is purporting to approve. The Department’s failure to provide an “accurate, stable and finite project description” in its Addendum and CEQA Environmental Document, and the

corresponding failure to evaluate the potential environmental effects of the actual decision under review, violates CEQA and renders the Department's decision clearly erroneous. See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-93.

**f. The Department's action undermines evolving policies for fostering increased recycling in California and for improving the efficiency and transparency of the Department's permitting process.**

The Department's stated mission is to "protect California's people and environment from harmful effects of toxic substances by restoring contaminated resources, enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products." PTI's operations support the Department's mission by efficiently recycling over 95% of the waste materials that are sent to PTI, thereby significantly reducing a large quantity of hazardous waste that would otherwise require treatment and disposal in a deep well or landfill. PTI is the only recycler of aqueous metal bearing wastes west of the Mississippi. If the PTI facility is shut down, generators of the spent etchant that PTI currently recycles will be forced to dispose of their spent materials in landfills or deep wells in California and elsewhere, to the detriment of the environment and public health.

In addition, the Department has been under increased scrutiny regarding the efficiency, transparency, effectiveness and fairness of its permitting program. Accordingly, the California Legislature has found it necessary to enact legislation aimed at reforming the Department's programs and processes. For example, SB673 requires the Department to adopt regulations to establish or update the criteria for use in determining whether to issue a new or modified hazardous waste facilities permit or a renewal of a hazardous waste facilities permit, and to develop and implement programmatic reforms designed to improve the protectiveness, timeliness, legal defensibility, and enforceability of the Department's program. By taking action that would effectively shut down the PTI facility, without so much as acknowledging—and perhaps actively concealing—that potential result, the Department has acted in direct contravention of these mandates. The Department is not acting to improve its permitting activities and make them more protective, defensible, transparent and fair to both the public and its regulated community; instead the Department is obscuring the true impact and effect of its actions, and by doing so, is depriving the public, as well as other agencies and elected officials, of the opportunity to understand the consequences of the Department's actions.

**III. Conclusion.**

The Department's decision to approve the Pond 1 Closure Plan without regard to the need to relocate the wastewater treatment system is clearly erroneous. On multiple occasions the Department has determined the opposite to be true. There is no evidence in the record to indicate that this central, fundamental fact is no longer the case. In fact, there is nothing in the record to indicate that the Department even officially considered the practical result of its decision. There is thus no reasoned basis for the Department's reversal of position.

The Department's decision is also clearly erroneous to the extent it may attempt to argue that the closure plan, as conditioned, allows for sufficient time to relocate the wastewater treatment system. Notably the Department never says that the plan is conditioned for this purpose. Even if it was, it is inadequate because the Department has not approved the facility's application for a Class 2 permit modification to relocate the wastewater treatment system. Even if it did in the near term, there would be insufficient time to relocate the system prior to Pond 1 closure. On multiple prior occasions the Department has determined that it will take longer than six months to relocate the wastewater treatment system, even after approval is granted for doing so.

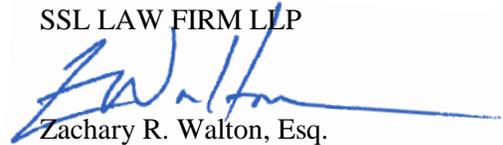
Furthermore, the Department's faulty decision raises important policy considerations. The Department's mission includes encouraging recycling hazardous waste. The PTI facility is the only one of its kind in California or west of the Mississippi that recycles metal-bearing aqueous wastes into valuable products. If the PTI facility is forced to shut down, these wastes will be landfilled or sent to a deep injection well. This result is contrary to the Department's mission to promote recycling.

Finally, the Department has not made its decision in an open and transparent manner. Notwithstanding that PTI has on multiple occasions submitted information detailing that closing Pond 1 without regard to relocating the wastewater treatment system will result in the permanent shut down of the facility, the Department does not acknowledge this at all in its decision-making documents. The result of its decision is obscured to such an extent that no one outside of the Department or PTI could know what the closure plan as approved will achieve. This defies the Department's obligation to be open and clear about its objectives and the consequences of its decisions.

For the foregoing reasons, the petition for review should be granted.

Sincerely,

SSL LAW FIRM LLP

A handwritten signature in blue ink, appearing to read "Zachary R. Walton", is written over a light blue rectangular background.

Zachary R. Walton, Esq.

Enclosures: Pond 1 Closure Plan Petition for Review Exhibits, A through O