Petition for Review

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

Reviewer

Permit Appeals Officer
Department of Toxic Substances Control
700 Heinz Avenue
94109 Berkeley, California 94710
Email: appeals@dtsc.ca.gov

Submitted June 23, 2014 via email by:

Greenaction for Health and Environmental Justice
559 Ellis Street, San Francisco, CA
and
P.O. Box 277, Kettleman City, CA 93239

Greenaction for Health and Environmental Justice, on behalf of our members and constituents in Kettleman City and Avenal, ("Greenaction") hereby petitions the Department of Toxic Substances Control ("DTSC") to review the Final Hazardous Waste Facility Permit ("Permit") decision for the Chemical Waste Management Kettleman Hills Facility ("KHF") issued by DTSC on May 21, 2014.

This Petition demonstrates the factual, legal and policy reasons that require DTSC to accept our Petition for Review and deny Chemical Waste Management's application to expand the violation-plagued hazardous waste facility in the suffering, overly burdened and at-risk low-income, Latino and Spanish-speaking community of Kettleman City.

We call on DTSC to review the fundamentally flawed and incorrect determination that the permit and its conditions are fully protective of public health and the environment. Pursuant to 22 CCR § 66271.18(a), Greenaction specifically petitions the Department to review General Condition 2(B): The Permittee is permitted to treat, store and dispose of hazardous wastes in accordance with conditions of this Permit.

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Greenaction has the right to petition for a review of any and all conditions of the permit decision. In this petition, Greenaction incorporates our previous comments, responds to DTSC's responses, demonstrates that the entire permit including Condition 2(B) is based on findings of facts and conclusions at law that are clearly erroneous, and that DTSC's permit decision has a prohibited negative and discriminatory impact on Latinos and Spanish-speaking residents, in violation of California Government Code 11135 and Title VI of the United States Civil Rights Act of 1964.

Our Petition/Appeal must be accepted for review for the following reasons:

(1) All issues raised in this Petition were raised by Greenaction in written and verbal comments during the public comment period for this permit process;

(2) Our Petition clearly describes the important policy considerations regarding environmental health and justice, civil rights, chronic violations and cumulative impacts that require DTSC to exercise its discretion to review our Appeal and Petition;

(3) This Petition challenges the entire Permit and all permit conditions as they are:

- inadequate to protect public health and will allow a significant and unacceptable increase in pollution that will threaten the health of residents in a community already overburdened with pollution and health problems and that the state acknowledges is highly vulnerable;

- inadequate to assure compliance with a permit due to DTSC's failure to properly evaluate the chronic violations and the implications of the violation history on future compliance;

- based on scientifically defective studies;

- based on the flawed, biased, inadequate and blatantly racially discriminatory Kings County Environmental Impact Report permit process that systematically denied Spanish-speaking Latino residents meaningful opportunities to participate in the process, and the DTSC's reliance on the defective Kings County EIR document and CEQA process are in violation of California Government Code 11135 and Title VI of the United States Civil Rights Act of 1964;

- in violation of state and federal civil rights laws (California Government Code 11135 and Title VI of the United States Civil Rights Act of 1964) which prohibit DTSC – a recipient of state and federal funding – from taking actions that have a discriminatory and disparate impact on people of color and non -English speakers;

- based on findings of facts and conclusion of law that are clearly erroneous;

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(4) Our Petition demonstrates that DTSC's description of key permit issues in a public document is false;

(5) Our Petition demonstrates that many of DTSC's "Response to Comments" are incomplete and/or inaccurate and that numerous key comments were not responded to at all.

The Chemical Waste Management Kettleman Hills Facility, the Community and Environment:

The Chemical Waste Management (CWM) facility is located approximately 3.5 miles southwest of Kettleman City. Diesel trucks carrying hazardous wastes and PCBs to the facility travel just yards from residential areas and near the Kettleman City School. According to the U.S. Census, some 96% of Kettleman City's population is Hispanic or Latino, and the per capita income of that population is $15,081. People living in the communities near the facility 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. Kings 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 proximity to toxic waste facilities – than any other sector of our population. 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 with numerous stationary and mobile pollution sources including the Chemical Waste Management hazardous waste, PCB and solid waste landfill, widespread pesticide use, massive diesel traffic on Interstate 5 and Highway 41, diesel truck transfer stations and idling hot spots, old oilfield contamination, current fracking and oilfield operations and a former PG&E toxic site.

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. DTSC proposes to allow the continued and massively expanded dumping of toxic waste despite the disproportionate impact this will have on Kettleman City residents.

The Cal EPA's own CalEnviroScreen has confirmed that residents of Kettleman City are highly vulnerable and at risk from pollution and other social factors.

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. CWM plans to add another hazardous waste landfill (B-20) at the site once the B-18 expansion is complete.

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CWM's facility is already the largest hazardous waste facility in the West. The community has experienced elevated rates of birth defects in recent years, and agencies have repeatedly fined the facility for chronic and serious violations of hazardous waste laws and regulations. For example, the U.S. Environmental Protection Agency ("EPA") and DTSC records show that over the years, 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 and practice of chronic and repeated violations at KHF, some spanning a period of several years. 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 operating at 1 or 2% of capacity, KHF violated the terms of its permit yet again. DTSC is still investigating the violation, even as it approves an expansion of the site.

If DTSC allows KHF to expand, it is almost guaranteed that CWM will continue to violate environmental laws and permits, and will negatively impact a low-income, community of color who the state admits is highly vulnerable to pollution and whose health is already heavily burdened by proximity to the landfill and other environmental pollution.

Policy Considerations Requiring a Thorough Review of Our Petition/Appeal:

(1) The DTSC acknowledges that this permit decision was extremely important. DTSC claims that the permit decision was "(B)ased on the most comprehensive review of a permit application in California history…" Our Petition demonstrates that this supposedly comprehensive review of such an important permit decision was severely flawed and violates the civil rights of residents, and thus is a terrible policy and permitting precedent for other communities around the state.

(2) DTSC is required by policy and law to uphold environmental justice and civil rights, and we call on DTSC to review our petition to truly analyze if DTSC violated these mandates as we allege and document.

(3) DTSC is mandated by policy and law to conduct unbiased and accurate environmental reviews and permit processes, and it is important state policy for the agency to do so. DTSC should accept our petition for review to truly and fairly analyze if the environmental reviews and permit processes were flawed, inaccurate and biased as we allege and document.

(4) DTSC is mandated by policy and law to provide meaningful opportunities for public participation in permit decisions, and DTSC should accept our Petition to truly and fairly analyze if DTSC violated these mandates due to biased and incorrect information being distributed, and most importantly the reliance on Kings County's EIR that DTSC and Cal EPA have acknowledged used an unacceptable racially discriminatory process.

(5) DTSC's reliance on the Kings County EIR sends a profoundly ominous policy message to other agencies that they may use racial discrimination and police intimidation to approve polluting projects and the state will not object. If the permit decision is not

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reversed, DTSC will have set a precedent that it is acceptable for agencies that receive state funds such as Kings County to use racially discriminatory rules, police dogs and police intimidation to secure approval of a controversial and polluting project. This is an ominous precedent that has no place in a democracy, and is illegal under state and federal civil rights laws and violates the DTSC/Cal EPA's own environmental justice policy.

(6) DTSC's approval of the permit despite CWM's well-documented and chronic history of violations sends an ominous message to other industrial polluters who want permits – and that message is that you can have dozens of violations, including violations that continue for years, and still get a permit. This is terrible public policy that puts public health and our environment at risk.

(7) DTSC's failure to conduct a cumulative impact analysis as DTSC Director Raphael promised the state legislature she would do is another terrible policy precedent and undermines the integrity and accuracy of the legislative confirmation processes for top state officials, and undermines the integrity and accuracy of the permit decision.

(8) DTSC's permit approval makes a mockery of the state's own CalEnviroScreen tool that was designed to gather information about pollution and the vulnerability of affected populations and then to use that information to help reduce cumulative impacts. While the DTSC decision quotes from and references CalEnviroScreen's information that documents the vulnerability of Kettleman City residents, it's permit is based on a Statement of Overriding Consideration in order to justify adding pollution to a population that the state itself admits is already highly vulnerable.

(9) DTSC's approval of a massive landfill expansion will directly undermine their stated goal of reducing hazardous waste disposal in the state. If the permit is upheld, hazardous waste disposal at the KHF landfill will increase from the current one or two trucks per day to 400. Such a massive increase in landfill capacity in the state will eliminate the incentive for industrial generators of hazardous waste to implement waste reduction programs as once again they can just continue to send their toxic waste to the farmworker town of Kettleman City for disposal.

(10) DTSC's approval of a permit at the same time as it recognizes it lacks criteria for permit decisions reflects poor policy and should be reviewed by the permit appeals officer.

<u>DTSC's Permit Approval Violates State and Federal Civil Rights Laws:</u>

Greenaction hereby incorporates its written comments submitted to DTSC on the draft permit, including the following:

> The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels,

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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.

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 the 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. See 2010 U.S. Census. 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.

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.

The 1984 Cerrell Report, commissioned by the California Waste Management Board and funded with taxpayer dollars, set forth criteria and factors that encourages the siting of polluting facilities in low-income, Latino communities. 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—a description that fits Kettleman City and the two other communities that host hazardous waste facilities in the State. The Cerrell Report explains that these communities are the least likely to oppose undesirable waste projects. 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 practice of permitting hazardous waste landfills solely in low-income, Latino communities has a disproportionate impact and violates State and Federal

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civil rights laws. DTSC is well aware of the discriminatory impact of hazardous waste siting, yet continues to issue permits - even to chronic violators of permits like CWM - and exercises lax enforcement against violations.

DTSC's Response to Comments claims that comments alleging that approval of the permit violates Title VI or Government Code section 11135 "…are substantially similar to allegations contained in a 1994 Title VI complaint investigated by EPA and dismissed without adverse findings in August of 2012."

In fact, as DTSC is well aware, our allegations of violations of both Title VI and Government Code section 11135 are much more extensive, specific and comprehensive than the 1994 civil rights complaint – and some of the violations are particularly glaring, systemic, and blatantly racially discriminatory on their face.

DTSC's response to comments stated 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, the role that DTSC plays in permitting hazardous waste facilities cannot be isolated from the "program or activity" of waste management in the state of California. It is not the footprint of the landfill that causes harm to nearby communities. Rather, it is shipping and disposal of hazardous waste to the facility that causes risk and harm to nearby residents. 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 waste facilities have on nearby residents are directly caused by DTSC's approval of the facilities' permits. CWM has held a conditional use permit from the local land use authority for years but has been unable to receive waste pursuant to that permit because it did not hold a valid hazardous waste permit from DTSC.

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) (stating conditions under which the suitability of the facility location will *not* be considered by DTSC when issuing a permit). This section makes clear 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.

As explained in our comments, DTSC's permitting program and DTSC's permitting of the KHF expansion discriminates against California's Latino residents. DTSC's program and activity violates the Equal Protection Clause, as well as state and federal civil rights laws.

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

Greenaction hereby incorporates its written comments, including:

> 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 it programs, including its permitting program. DTSC is the permitting authority for hazardous waste landfills in California. An operator cannot build a hazardous waste landfill or receive hazardous waste without a RCRA hazardous waste permit, issued by DTSC. Therefore, if DTSC approves the KHF expansion, it is directly responsible for the facility's impacts on nearby residents.
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> The facility has, and an expansion would have, a disproportionate and adverse impact on nearby residents. As acknowledged by the EIR, the project would have significant and unavoidable impacts. The project's significant and unavoidable air quality impacts would impact nearby residents to a greater degree than other populations.
>
> In addition, the expansion would add 400 trucks transporting hazardous waste near or through Kettleman City each day. The 400 diesel trucks would add to the significant air quality burdens in the area and will exacerbate the extremely high levels of asthma in Kettleman City. Residents would 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. The close proximity of the hazardous waste landfill and the presence of trucks constantly carrying hazardous waste through town would negatively impact property values in the town.
>
> These impacts would 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." Tsom- banidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003). 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

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agency and has decision-making jurisdiction over the entire state. To determine disparate impact, one need only compare the impacted community (96 percent Latino) with the rest of the State (38 percent Latino). Using this Census data, it is readily apparent that DTSC's approval of the KHF expansion would have a disparate and prohibited 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. Comparing this Census data with statewide 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. Collectively, these communities have 76% more minority residents when compared to the rest of the state.

DTSC 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 demonstrate that DTSC's decision did 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 some of a project's impacts does not relieve the agency from liability under 11135 if any disproportionate impact remains.

Here, the SEIR and DTSC's own permit decision acknowledge that there will be significant and unavoidable impacts from the facility. Even newer model trucks travelling to and from the facility will add to the significant air quality burdens in the area and will exacerbate the high levels of asthma in Kettleman City. Increasing hazardous waste disposal from the current 1 or 2 trucks per day to 400 trucks per day will clearly have a significant impact even if the trucks are not older than 2007.

The fact that both the SEIR and the DTSC permit use a Statement of Overriding Consideration to attempt to justify their decision is proof that there will be a negative and prohibited impact on a population protected by state and federal civil rights laws.

Further, DTSC failed to respond at all to the identified significant air quality burdens from the permitted 400 diesel trucks that will be transporting hazardous waste near or through Kettleman

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City each day, exasperating the already extremely high levels of asthma there. Nor did DTSC respond to the unavoidable air quality impacts from the project itself, identified in the County's own SEIR, nor the greater risk of toxic exposure from accidental releases from trucks or the disposal site, nor the negative impact to property values.

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 relied significantly on the racially discriminatory Kings County EIR process so cannot pass the buck or avoid responsibility for using that racially discriminatory EIR. In addition, 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.

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

Greenaction hereby incorporates our comments including:

> 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 citing 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. Most Kettleman City residents' first language is Spanish, and a high percentage of residents 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. Kings County excluded Latino Kettleman City residents from the Local Advisory Committee considering the Kettleman Hills expansion. Kings County did not provide equal time for Spanish speakers to testify at the public hearing as English speakers. Kings County contracted with a large police and security force that had the effect of intimidating local residents and preventing them from participating in the decision-making process.

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> 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 King's County's environmental review process.
>
> 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.

Despite DTSC's response that "it is unclear from the comments which 'criteria or methods of administration' DTSC has allegedly utilized to perpetuate discrimination," we stated in our comment 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 EIR 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." However, the Court never reached the merits of the claim as the legal challenge was resolved on procedural grounds that have been remedied during DTSC's CEQA comment period. DTSC's use of its conclusion to say that Kings County's SEIR was non-discriminatory is misleading at best.

DTSC's Response 5469-3 states that "DTSC has reviewed the Final SEIR prepared by Kings County and determined that it, along with an Addendum prepared by DTSC, is adequate."

DTSC Response 5525 states that "DTSC has concluded that the County's SEIR adequately evaluated the potential environmental impacts associated with this project and that the mitigation measures are appropriate."

DTSC 's assertion of adequacy flies in the face of the racially discriminatory hearing rules, the English-only process, the presence of many uniformed and plainclothes police and police dogs, and the violent removal by police of a Spanish-speaking resident/US citizen who objected to the denial of his right to equal time to testify. DTSC is well aware that a legitimate and non-discriminatory public process with fair and robust public engagement is required to produce a legitimate environmental review process, yet it is clear that was not the case for the SEIR where Latinos and Spanish-speakers were systematically discriminated against and barred from equal or meaningful participation in the process.

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 EIR 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.

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DTSC's Response 5469-7 states that "Also, DTSC observes that there is no evidence that the alleged wrongful composition of the local assessment committee was challenged.."
In fact this issue was raised during the Kings County EIR process repeatedly, and was included in Title VI and Government Code 11135 civil rights complaints filed by El Pueblo Para el Aire y Agua Limpia in 2010. Unfortunately and improperly, the California Attorney General has failed to even investigate this complaint.

As stated in our comment, DTSC must deny the permit for the KHF expansion to avoid perpetuating the discrimination of Kings County's EIR. California Code of Regulations, Title 22, Section 98101(i)(3) requires DTSC to do so.

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.

Greenaction hereby incorporates its comments including:

> 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).
>
> 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 the discrimination.

DTSC responded 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. We 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. The law forbids DTSC from granting the permit for the KHF expansion.

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

Greenaction hereby incorporates its comment:

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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.

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.

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DTSC responded by claiming that its 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 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," but this simply ignores the fact that the permit decision at issue here, the *KHF expansion*, 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.

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

Greenaction hereby incorporates its comment:

> 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

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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."

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

- The vast racial disparities in where DTSC approves hazardous waste facilities in California.

- 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 100% 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 acknowledgment that is does not have any standardized criteria to determine when it is appropriate to deny a hazardous waste facility permit.

- 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'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.

- DTSC's significant reliance in the permit decision on Kings County's racially discriminatory permit process that top DTSC and Cal EPA officials themselves have denounced as unacceptable.

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

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> California's hazardous waste capacity needs. This meets the standard for intentional discrimination.

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. The law forbids DTSC from granting the permit for the KHF expansion.

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 delineated in our comment, the circumstantial evidence strongly demonstrates otherwise. Given the findings of the Cerrell report, DTSC knows that the most vulnerable population, such as the highly segregated Kettleman City made up of 96% Latino residents with language barriers, low education levels, and lack of political representation, is an easy target for this hazardous waste facility expansion. 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 intentional discrimination.

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

Greenaction incorporates our comment:

> 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.
>
> DTSC's proposed approval of the KHF expansion and its larger pattern of issuing permits to hazardous waste facilities that target Latino communities violate the Equal Protection Clause.

In response, 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 respond to the evidence cited in our comment letter. This evidence demonstrates that DTSC believes that the only politically viable option to permit hazardous waste facilities is in

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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 is in violation of the Equal Protection Clause of the U.S. Constitution. DTSC is constitutionally bound to deny the permit for the KHF expansion.

DTSC Lacks Criteria to Make Permit Decisions:

Greenaction hereby incorporates our comment:

> In the face of mounting criticism of DTSC's permit and regulatory actions, the Director of the Department of Toxic Substances Control, Debbie Raphael, released an open letter on February 15, 2013 announcing that the agency had "launched a comprehensive review of its permit process." The letter explains that "[d]uring the past two years, stakeholder feedback and our own internal observations have demonstrated that there is room for improvement in the process of permitting hazardous waste treatment, storage, and disposal facilities."
>
> One of the stated reasons for the review was that "the department does not have clear guidelines for when to deny a permit." The purpose of the review was 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.
>
> On October 8, 2013, the department formally released the report. The report notes many areas of deficiency including there being no clear and objective criteria for making denial/revocation decisions that are based on valid standards of performance and threats. The study recommends that DTSC develop policy to determine what factors to use to support a decision to continue with permitting versus those to use to support a denial or revocation action.
>
> 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

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> controversial permit in such an overburdened community 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.
>
> This permit decision will impact nearby residents for generations to come and needs to be done right. If DTSC approves the expansion permit 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.
> We incorporate DTSC's permit review into our comments:
> http://dtsc.ca.gov/HazardousWaste/upload/DTSCPermitReviewProcessFinalReport.pdf

In response to this objection, DTSC wrote "DTSC 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."

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 the agency to help address this problem. DTSC is aware of this legislation and its contents. 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, the permit appeals officer should accept this appeal

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based on an inappropriate exercise of the agency's discretion. DTSC's approval of a permit at the same time as it recognizes and attempts to address the lack of criteria for permit decisions reflects poor policy and should be reviewed by the permit appeals officer.

DTSC's Decision Violates Its Environmental Justice Policies and its "Environmental Justice Review" Was Flawed, Inadequate and Biased Towards CWM:

Greenaction incorporates our comments:

> One of the DTSC permit documents used to justify its draft decision to approve the proposed landfill expansion is entitled "Environmental Justice Review."
> DTSC claims it "…prepared this Environmental Justice Review to identify and address environmental justice concerns related to the Kettleman Hills Facility operated by Chemical Waste Management, Inc. (Applicant). The Environmental Justice Review also assesses the potential harmful offsite impacts from the facility as well as existing environmental burdens on the people in the community….. Finally, this document reviews 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 the multiple impacts of other activities. This review is informed by the policies set forth in Government Code section 11135, Public Resources Code sections 71110-71113, California Environmental Protection Agency (Cal/EPA) Environmental Justice Action Plan (2004), and DTSC's own policies for environmental justice."
>
> However, DTSC's so-called "Environmental Justice Review" is in reality a document that promotes environmental racism due to inaccurate analysis, the omission of key information that should have been analyzed, and the unethical and inappropriate use of certain information.
>
> Specific inaccuracies and defects in DTSC's "Environmental Justice Review" include:

- This review failed to identify or address environmental justice concerns related to the Kettleman Hills Facility, and in fact no concerns were addressed by DTSC;

- Contrary to DTSC's claim, this review does not include an assessment of Cumulative Impacts, and the assessment of "potential harmful offsite impacts from the facility as well as existing environmental burdens on the people in the community" that DTSC claims is in the review is simply not in this document;

- Even if the information about assessing harmful impacts was in this review, a real Cumulative Impact Assessment and analysis would include the toxic waste facility, other existing environmental hazards, proposed environmental hazards and existing and recent health and environmental quality information – this DTSC "Environmental Justice Review" failed to analyze these issues cumulatively if at all;

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- It was completely improper, and a biased attempt to justify dumping more hazardous waste and PCBs on Kettleman City, for this document to review "…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 the multiple impacts of other activities."

- These voluntary actions are irrelevant to a permit decision that should be based on facts and the law, not on a giant corporation using its vast wealth to greenwash their polluting operations and attempt to win the support of residents;

- A major flaw is that DTSC cites various incentive programs and the US Environmental Protection Agency Environmental Justice Small Grant that was given to Greenaction to reduce diesel pollution from illegal truck idling in Kettleman City - and DTSC mentions this grant as grounds to support granting Chem Waste its permit. This is unacceptable. As the State says it wants to provide more funding for highly impacted communities to remediate past disparities based on the CalEnviroScreen tool, this cannot be used as grounds to permit additional disproportionate impacts. The goal of the tool and of those who participated in its creation is to reduce impacts in these highly impacted communities;

- DTSC's claim that "To address the issue of air pollution, the Applicant has agreed to an enforceable plan to reduce diesel truck emissions …" is absurd and Orwellian, as the DTSC is proposing to allow a massive increase in diesel truck traffic and diesel emissions;

  If the expansion is approved, diesel truck trips carrying hazardous waste will increase from the current level of approximately one per day to about 400 per day. Using cleaner, but not clean, diesel vehicles will in no way "address the issue of air pollution" as DTSC claims and will not result in cleaner air and less diesel emissions;

  The only way to truly reduce diesel emissions is to reject the expansion, and make sure that there are not 399 more diesel truck trips per day more than are currently occurring.

- DTSC's claim that they are addressing the long-standing issue of water quality and the lack of a safe drinking water supply for Kettleman City residents is also absurd, as DTSC knows very well that the people of Kettleman City drink, bathe and wash in toxic contaminated water every day and have done so for decades;

- In the section on "Public policy basis for environmental justice consideration in the permitting process," DTSC writes that "Environmental justice is defined in California law (Government Code, section 65040.12) as "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws and policies."

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DTSC is absolutely correct that there is a public policy and legal basis for environmental justice consideration in the permitting process, but the draft decision to permit a massive expansion of a violation plagued hazardous waste facility in an overburdened, vulnerable and suffering community whose residents have faced Jim Crow-style racism in the permitting process for this project is a clear violation of environmental justice and civil rights;

- The discussion of air quality in this "review" focuses on air monitoring requirements, but fails to mention anywhere the undeniable and well-documented fact that CWM has violated some of its permit requirements on monitoring, including for years at a time. Essentially the DTSC details a wishful thinking, make-believe world where CWM complies with its permit and does all the required monitoring and reporting;

- The "review" mentions US EPA's Air Emission Study on KHF Ponds, which despite being based on a one day (November 12, 2010) inspection , allegedly indicated "… that the Kettleman Hills Facility did not appear to be a significant source of the measured compounds at the time of inspection." The use of a one day inspection to conclude that the facility was not a significant source of measured compounds at the time of inspection is not a representative sample to make any conclusions;

- The DTSC "review" cites the " US EPA KHF PCB Congener Study", yet this study allowed a toxic polluter with a serious record of violations, including failing to report spills and failing to conduct some of the required monitoring, to conduct most of the testing;

- DTSC's "review" cites the "Cal EPA Kettleman City Community Exposure Assessment" ordered by Governor Arnold Schwarzenegger in January 2010 which directed Cal EPA to assess possible environmental contaminants in the air, groundwater and soil that may have contributed to the increase in birth defects in the Kettleman City community since 2007.

  We discuss the enormous scientific and technical flaws with this study elsewhere in these comments, but once again DTSC failed to point out that the pollution and waste disposal activities at the landfill were reduced by over 95% at the time the study took place compared to the full operations taking place several years earlier when the spike in birth defects took place;

- DTSC's "review" cites the state's birth defect study, but omits key information including the clear fact that the state knowingly and intentionally understated and withheld the true number of birth defects. DTSC's "review" also failed to mention the state agencies had refused to investigate until the Governor ordered an investigation in the wake of major national news coverage;

- DTSC's "review" correctly states that "Environmental justice requires not only fairness in the distribution of environmental and public health burdens and benefits, but also

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access to government's process for making decisions affecting environment and public health."

However, DTSC violated this very clear mandate and requirement in many ways, most blatantly in relying in significant part on Kings County's EIR that was approved using Jim-Crow style racism including police intimidation and racially discriminatory hearing rules.

As DTSC has publicly acknowledged that Kings County's actions were unacceptable, DTSC improperly is using that EIR to partly justify its draft permit decision;

- DTSC's review correctly discusses and provides information on the findings of the state's own CalEnviroScreen cumulative impacts tool and study, which concluded that "The population characteristics indicators show that residents may be more vulnerable to the effects of pollution." As an expansion of the landfill would clearly result in more pollution and thus more of an impact on an already vulnerable community, the state should use the information in CalEnviroScreen to reject, not approve, the permit;

- It is an outrage that the DTSC included in its so-called "Environmental Justice Review" actions proposed to be taken by a giant corporation that has repeatedly violated its permits to essentially buy off and sway public opinion. These include paying for a walking track, soccer field lighting, pavilion, and parking lot at the Kettleman City Elementary School. Children's ability to participate in sports should not be dependent on money from a company that dumps hazardous wastes and PCBs next to their town and has a terrible compliance history;

- DTSC's mention of funds that may be provided by Chem Waste to help pay off the water service debts of the Kettleman City Community Services District is improper, as many now believe that the only way Kettleman City will get a new and safe water supply is if the dump expands. This is an unethical way to garner support for a toxic waste landfill, essentially sending a message to residents that if you want clean water for your family and babies, you must allow more toxic waste to be disposed of in your town.

DTSC Response 5469-19 states "In regards to the assertion that residents have faced Jim Crow-style racism in the permitting process, DTSC is committed to ensuring equal application of environmental protection for all communities and citizens without regard to race, national origin or income." DTSC has however violated its commitment by relying on the Kings County SEIR that was approved with racially discriminatory rules, police intimidation and police dogs. DTSC cannot claim it supports equality when relying on such a flawed and racially discriminatory process.

DTSC'S Response to Comments claims that "The Environmental Justice Review also assessed the potential harmful offsite impacts from the facility as well as existing environmental burdens on people in the community." However, this claim is not correct as DTSC never conducted a

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cumulative impact analysis that truly evaluated the cumulative impacts of the proposed expansion combined with existing environmental and social burdens.

DTSC's Response to Comments claim that the "poor drinking water quality in Kettleman City is not related to DTSC's permit decision…" is factually incorrect as DTSC directly linked approval of the expansion permit with securing the remaining funds needed for a new water supply and treatment system.

DTSC responded by stating that "each of the studies has ruled out the facility's operation as a demonstrable cause." Page 96. This statement is simply incorrect and will be addressed below.

The State's 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 links to any cause of the birth defects. Contrary to DTSC's statement however, it never ruled out the facility or any other polluting source as a cause.

DTSC 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 failed to detect other, unknown PCB releases.

Cumulative Impacts: DTSC's Permit Approval of Toxic Dump Expansion Violates their Environmental Justice Policy and Ignores Cal EPA's CalEnviroScreen Cumulative Impact Methodology Which Proves Kettleman City Residents Are Highly Vulnerable and At-Risk From Additional Pollution:

Greenaction incorporates our comments including:

> DTSC's Environmental Justice policy states that DTSC will "minimize potential cumulative impacts from facilities and sites on community health and the environment by significantly reducing exposure risks from individual sites." Even though DTSC 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 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.

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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." Despite Director Raphael's explicit promise to conduct a cumulative impact study, and despite CalEnviroScreen's identification of Kettleman City as a very at-risk and burdened community, DTSC failed to conduct a cumulative impact analysis for their permit decision.

DTSC's alleged cumulative impact analysis is a far cry from what the Director promised the legislature and fails to evaluate the cumulative impacts at all. 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. . ." EJ Review at 4. 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." Id. 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." EJ Review at 4.

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

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and Environmental Justice; and 4) plans for a new drinking water source. Many other cited actions are 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 in an attempt to mitigate the significant cumulative impacts from the proposed 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.

During the DTSC phone briefing on July 2, 2013 about their draft permit decision, Director Raphael stated that the promised cumulative impact study was actually part of the DTSC's permit document entitled "Environmental Justice Analysis." However, a comprehensive cumulative impact analysis is not in that document or in any other permit document.

The permit documents do contain a listing of many of the multiple pollution sources impacting Kettleman City, but this list is incomplete and completely fails to evaluate the combined cumulative impact of all these existing and proposed pollution sources on a community the state itself admits is highly vulnerable. A list of pollution sources is not a cumulative impact analysis.

The permit documents do include valuable and highly relevant information compiled by Cal EPA in their cumulative impacts analytical tool and methodology, the CalEnviroScren, and this model and tool resulted in the state ranking Kettleman City in the top 10% of the most vulnerable and at-risk communities in the state to pollution.

DTSC is thus making a mockery of CalEnviroScreen by approving a massive increase in pollution at the same time acknowledging that this community is highly vulnerable and after promising to reduce pollution impacting this suffering town.

The failure to conduct a comprehensive cumulative impact study of the potential impacts of expanding the toxic waste landfill combined with existing and other proposed pollution sources in this community already suffering high rates of serious health problems has resulted in inadequate analysis of the potential and real impacts of the proposed expansion.

Greenaction further commented as follows:

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The DTSC's "Environmental Justice Review" (pages 18-19) states…:

"CalEnviroScreen identifies which portions of the state have higher pollution burdens and vulnerabilities than other areas. It examines indicators related to exposures, environmental effects, sensitive populations, and socioeconomic factors. The Kettleman City census zip code is identified as in the top 10% highest scoring census zip codes in the state based on these indicators, which indicates a comparatively high level of pollution burden and vulnerability.

For the purposes of this analysis, we compared Kettleman City to two neighboring communities, Lemoore and San Miguel, examining the raw data identified by CalEnviroScreen for their respective pollution burden and population characteristics indicators. The table on the next page provides CalEnviroScreen data for the Kettleman City zip code, a nearby zip code in Kings County, and a nearby zip code in a community to the southwest of Kettleman City. The indicators show how residents of Kettleman City compare to the other communities across the 18 CalEnviroScreen indicators.

The pollution burden indicators show that residents of Kettleman City may experience comparatively higher impacts. Although some indicators are not present or show lower burdens, other indicators show high burdens. The ozone indicator shows that the portion of the daily maximum 8 hour ozone concentration over the federal standard is about 0.11. The average PM2.5 air pollution is 14.1 and exceeds US EPA's standard for ambient PM2.5 concentration. Use of pesticides filtered for hazard and volatility in the area is much higher than the two comparison zip codes, with 3,706.2 pounds reported. In addition, hazard-weighted pounds of chemicals from toxic releases are 39,120,229. Unlike the two comparison zip codes, CalEnviroscreen does not identify impacts from cleanup sites or groundwater threats for the Kettleman City zip code.

The population characteristics indicators show that residents may be more vulnerable to the effects of pollution. The educational attainment indicator shows that 57.2% of the population has less than a high school education. This percentage is significantly higher than the two comparison zip codes.

The linguistic isolation indicator measures the percentage of households where no one speaks English "very well," and identifies 23.6% of households in Kettleman City as in this category. This percentage is also significantly higher than the two other comparison zip codes. Kettleman City is also high on the tool's measure of poverty, with 39.8% of the population living below twice the federal poverty level. The percent low birth weight in Kettleman City, 6.03%, is comparable to the two comparison zip codes. Finally, CalEnviroScreen identifies 96.27% of the population of Kettleman City as non-white or Hispanic/Latino, significantly higher than the two comparison zip codes."

DTSC's response 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

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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 track 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 Response 5469-19 claims: "DTSC evaluated the cumulative impacts of projects that were not known or were not considered during certification of the SEIR as part of CEQA." However this response is incorrect because DTSC never did a full cumulative impact analysis. Merely listing and briefly describing a pollution source is not a cumulative impact analysis.

DTSC's "response to comments" are nothing more than a post-hoc and piecemeal attempt to justify its failure to take a comprehensive look at cumulative impacts. The record indicates that DTSC did not conduct a cumulative impact analysis pursuant to its environmental justice policy and did not fulfill Ms. Raphael's commitments during her confirmation hearing.

DTSC Should Deny the Permit Based on CWM's Compliance History of Repeat and Recurring Pattern of Violations and Noncompliance:

Greenaction hereby incorporates our comments, including:

> It is a matter of public record, and an undeniable fact, that Chem Waste has frequently been in repeat, chronic and often ongoing violation of its hazardous waste permit often for years at a time. It is a mockery of reality for DTSC to pretend that somehow all of a sudden Chem Waste will operate within the requirements of its permit.
>
> DTSC and other agencies must reject the proposed permit due to the fact that Chemical Waste Management has a long track record of serious, repeat and chronic violations of their permits regarding handling and disposal of hazardous wastes and PCBs at the Kettleman Hills Facility.
>
> In the last few years alone, Chem Waste has been cited for violations including years of illegal disposal of hazardous wastes and PCBs, years of failing to conduct some of the required monitoring, failing to report 72 spills of hazardous waste over a four year period, and faulty laboratory results.
>
> These chronic violations clearly are grounds for a permit denial, yet the state's decision to issue a draft permit sends a message to polluters that they can violate their permit dozens of times as Chem Waste has, yet still get new permits….
>
> 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…. In 1984, EPA fined

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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. ..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 IX issued a Notice of Violation 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.

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." DTSC FAQ. 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.

We also challenge DTSC's claim that none of the violations threatened public health or the environment. For example, DTSC was unaware of CWM's failure to report 72 spills spanning a four year period – and unaware of the spills – until they discovered the violations after the fact. In reality, DTSC has absolutely no independent, verifiable evidence to assert these spills and the failures to report them (as required by CWM's permit) did not threaten public health. These incidents very likely could have posed a serious health threat to company workers or even to school kids that CWM tries to bring on picnics to the hazardous waste facility.

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In addition, it is absurd for DTSC to claim that the failures to conduct required monitoring, or relying on unreliable laboratory testing, or illegally disposing of hazardous wastes and PCBs do not in any way threaten public health.

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." 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. ..

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. 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.

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

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a. 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.

b. 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.

c. 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 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.

In response, DTSC acknowledges that "these violations could be viewed as meeting the repeating or recurring standard under which DTSC may exercise its discretion to deny." DTSC refers 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…"

DTSC abuses its discretion because CMW's compliance history indeed demonstrates that the applicant is unable to comply with the terms of its permit and environmental laws. DTSC have 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. CWM most recently violated the terms of its permit and the law in February, ***when the facility was not receiving more than a few truckloads 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 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

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of violation as significant. DTSC has not disclosed the type of waste that DTSC mischaracterized publically, 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 is 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.

Additionally, 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, especially when all the evidence demonstrates that CWM cannot comply with applicable requirements. DTSC's finding regarding CWM compliance history is an abuse of its 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 clearly erroneous. Pursuant to Health & Safety Code 25186, DTSC may deny, suspend, or revoke any permit if the applicant has engaged in any violation of applicable requirements if the violation or 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***. Page 26a. 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 440 ppm 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.

We 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.

<u>DTSC Did Not Conduct a Comprehensive Compliance Review:</u>

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Greenaction incorporates our comment:

> DTSC reports that TSCA/PCB records from before 1998 are not available. 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.

Therefore DTSC's Response 319-2 which states that "DTSC carefully reviewed the entire compliance record which dates back to 1983…" is incorrect.

DTSC responds by saying 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. The violations that may well pose the highest risk to public health, safety and the environment would be TSCA/PCB violations. 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 states 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 literally violated the terms of its various permits on hundreds of occasions and each of the listed agencies has repeated found violations at KHF. DTSC appears unwilling to find a pattern of repeating or recurring violations no matter how many times the applicant violates its permits. It simply does not matter to DTSC how many times CWM violated TSCA and its PCB permit prior to 1998; the agency would never find a recurring or repeating pattern of violations.

As we stated in our written comments, "If DTSC approves a final permit despite CWM's extensive, chronic, repeat and serious violations, it will give the green light to other industries that they too can repeatedly violate their permit and still get new permits. This would be an unacceptable precedent and set terrible policy that would threaten the health and environment of all Californians, especially the low-income and people of color who disproportionately live near polluting industries including hazardous waste facilities."

<u>The Proposed Expansion Meets Other Criteria for Permit Denial:</u>

Greenaction incorporates its comment:

A. Misrepresentation of Relevant Facts:

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DTSC guidance outlines criteria the agency should use to determine whether to deny a permit. One criteria is "the permittee's misrepresentation of any relevant facts at any time."

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. Permit, 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."). 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.

On February 7, 2010, the New York Times had a major story about the birth defect and hazardous waste issues in Kettleman City. The story included the following and referenced a claim made by Kit Cole, a Chemical Waste Management spokesperson: "Ms. Cole said that the Kettleman Hills facility was safe and that a vast majority of the waste handled was run-of-the-mill garbage from municipalities. Only 60 acres was devoted to the most dangerous material, she said, including hazardous chemicals and byproducts from manufacturing and agriculture, which are stabilized in cement blocks before they are buried." (emphasis added).

Greenaction promptly emailed the DTSC about this claim made by Chem Waste that they stabilized the hazardous waste in cement. We asked DTSC if the claim was accurate, as we knew it to be false…..on April 6, 2010 we received a response from Nathan Schumacher, DTSC Public Participation Specialist. His response on behalf of DTSC confirmed that the statement attributed to Chem Waste in the New York Times was not true. He wrote the following: "No, Waste Management does not encase all its waste in cement. However, to minimize mobility of the waste, Waste Management does stabilize or solidify some waste before burying it in the landfill. According to our data, the amount of hazardous waste stabilized or solidified was 7% of the total placed in the hazardous waste landfill."…

B. Permitted Activity Would Endanger Public Health and Cannot Be Adequately Regulated:

Another criteria for permit denial is "[a] determination that the permitted activity endangers human health or the environment and cannot be adequately regulated under a permit." 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. According to DTSC, after all feasible mitigation measures have been imposed, the project will significantly increase ozone, course particulate matter ("PM10") and fine particulate matter ("PM2.5") emissions, result in a significant and unavoidable cancer risk at the KHF property

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

Massive diesel truck traffic would also have a severe impact. Kettleman City is heavily 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.

DTSC responds by stating that since the facilities' failure to report spills did not result in a threat to human health or the environment, DTSC would not consider denying the permit request. 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 are related to impacts 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 is contributing to levels of pollution that may pose a threat to public health. DTSC may not divorce impacts of pollution to the attainment status of an air basin from the health impacts on residents living in a 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.

Second, DTSC has failed to properly mitigate impacts from the 400 trucks that would be transporting waste to and from the site. Requiring the use of trucks no older than 2007 does not eliminate pollution from these diesel vehicles and the large increase in the number of trucks would clearly add to pollution. However, DTSC does not address why these transportation related impacts would not pose a threat to human health.

DTSC Response 5469-28 states that "The commenters purpose in providing the quotation from the New York Times is unclear." Our comments made it very clear: CWM provided false

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information to the public via the New York Times regarding their hazardous waste disposal practices.

DTSC Improperly Relied on the State's Scientifically Flawed "Environmental Exposure" Study to Incorrectly Conclude that Chemical Waste Management Facility Could Not Have Caused the Birth Defects Plaguing Kettleman City:

Greenaction incorporates its comments:

> …This state study was conducted by reluctant agencies with a historical and well-documented bias in favor of Chemical Waste Management, and was done only after the Governor ordered an investigation of the birth defects and pollution impacting Kettleman City. State agencies had earlier refused to investigate the birth defects until ordered to do so… We assert that the evidence clearly proves that the State study's conclusion was without basis in fact or science.
>
> State Study Was Flawed and Misleading, and Compared Apples to Oranges:
>
> The state's study was flawed and misleading and used improper evaluation methods to reach its conclusion. The clear and unequivocal fact – ignored by the state agencies that did the study - is that actual operating conditions, monitoring and emissions at the Chem Waste landfill facility were dramatically different between the times the birth defects spiked in 2007 and when the testing and exposure study were conducted in 2010. Despite this enormous discrepancy in disposal operations, the state improperly and unscientifically equated emissions when the facility operated at full capacity with emissions when it was operating at less than 5% capacity.
>
> 1. CWM was in full scale operation in 2007:
>
> When the birth defects and infant deaths spiked in 2007, hazardous waste disposal operations at the Chem Waste landfill were at 100% normal levels and PCB dumping had soared:
> • Hundreds of diesel truck trips going to and from the landfill were taking place daily
> • Emissions from the full scale landfill operations were not being independently monitored on a daily or regular basis
> • Chem Waste was producing faulty or unreliable laboratory results, as documented later by USEPA (and was the subject of enforcement action)
> • Chem Waste had numerous other violations including illegal disposal of wastes and failure to conduct some of the required monitoring
> • Shipments and disposal of PCBs, a banned substance that is a known reproductive toxin, had skyrocketed, probably due to the increased shipments from the PG&E Hunters Point power plant in San Francisco that was being demolished
> • The PCB monitor had been turned off prior to the huge increase PCB disposal

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2. CWM Operations Were Dramatically Reduced and at Less Than 5% of Capacity in 2010:

When the state conducted its environmental exposure study in early 2010, hazardous waste operations at the Kettleman Hills landfill were only about 5% of normal, down by over 95% when compared to 2007 when the birth defects problem erupted:

- The state's environmental exposure study negligently or intentionally failed to note the crucial fact that hazardous waste and PCB disposal activities at the landfill were at or near 100% of normal operations when the number of babies born with birth defects erupted in 2007, compared to less than 5% of normal operations when the testing and study took place in 2010.

- In a July 26, 2013 email from Wayne Lorentzen of DTSC to Bradley Angel of Greenaction, Mr. Lorentzen stated "… the Kettleman Hills hazardous waste landfill (B-18) had less than 5% of permitted capacity remaining in January 2010 by our estimates..."

- It is clear that a landfill experiencing more than a 95% decrease in waste disposal transport and disposal activity would have dramatically less emissions than when it was operating at full capacity and normal operations.

- When the study took place in 2010, Chem Waste knew they were being monitored and watched closely by government, the media and the public, so they may have been more careful than usual during their operations – in contrast to their decades of well documented permit violations.

3. State Study Was Biased Towards Chem Waste:
This flawed study was done by state agencies biased in favor of Chemical Waste Management, as evidenced by the refusal of state agencies to investigate the birth defects and infant deaths until ordered by the Governor to "investigate", and their decades of public statements defending the company's landfill operations at the same time that years of chronic and repeat violations were taking place.

It is a documented fact that the California Department of Public Health intentionally understated and withheld the true number of known birth defects, including in a presentation to the Kings County Board of Supervisors, until challenged with the true, accurate number by Greenaction and the Kettleman City community group El Pueblo Para el Aire y Agua Limpia/People for Clean Air and Water…

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

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monitoring samples would be the same during a time period when the facility accepted hundreds of trucks 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 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's Response 5469-13 fails to respond to our comments that the CDPH intentionally understated and withheld the true number of known birth defects. DTSC's Response makes the totally inaccurate claim that "…potentially relevant cases of birth defects were not included in the study because three mothers declined an interview and two could not be reached."

This DTSC Response is incorrect and non-responsive. It is a fact that when CDPH was ordered by the Governor to investigate and their top staff came to the Kings County Board of Supervisors and made a presentation, they intentionally understated the number of known birth defects and admitted that when challenged by Greenaction and residents at that meeting. This was before any interviews took place or were declined.

DTSC's Response 5469-19 incorrectly claims "There was no refusal to investigate" by the CDPH. In fact, CDPH ignored appeals for an investigation until the Governor ordered them to do so after the news of the birth defects reached national media.

DTSC Improperly Failed to Conduct Biomonitoring:

Greenaction hereby incorporates its comment:

> Despite repeated and public requests from residents including mothers who had babies with birth defects, the state erred by refusing to conduct biomonitoring of residents to determine the extent of toxic contaminants in their body. This testing could possibly have identified possible links between certain types of pollutants coming from specific pollution sources and health problems being experienced by mothers, babies, kids and other residents.
>
> 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."
>
> 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

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impacts from living near so many pollution sources in important, especially in the face of DTSC's proposed decision to approve yet another pollution source…

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 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.

DTSC responds 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 Kettelman 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 promises of Ms. Raphael at her confirmation hearing.

DTSC Should Have Prepared a Supplemental or Subsequent EIR:

Greenaction hereby incorporates its comment:

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> 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 was unnecessary with substantial evidence in the record.
>
> DTSC erred in failing to 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.

In its response, DTSC simply reiterated its rationale stated in its Addendum by quoting the Addendum as to why a supplemental or subsequent EIR was not prepared. However, in our comments, we had 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 we had commented that DTSC must prepare a subsequent or supplemental EIR. We had identified abundantly substantial evidence in light of the whole record that: "1) the

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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 cannot have met its statutory obligation. DTSC must prepare a subsequent or supplemental EIR.

New Information Which Was Not Known and Could Not Have Been Known at the Time of EIR Certification Was Available:

Greenaction incorporates its comments, including:

> 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)… 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.

Our comments showed that there is new information that should have triggered a supplemental EIR, including information regarding the analysis of the proposed Avenal power plant and the Office of Environmental Health Hazard Assessment's release of 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;

The new information we referred to was the new evidence relevant to determine KHF's cumulative impact from short-term NO_2 emissions. The new evidence shows that: (1) background NO_2 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 NO_2 NAAQS of 100 ppb; (2) background NO_2 levels in Hanford and Visalia under-represent 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 NO_2 NAAQS.

Given this new information, the background levels of NO_2 are far higher than they were assumed to be in the EIR. Given that DTSC considered the significance of the impacts to be the level stated in the EIR, then DTSC considered the identified mitigation measures to be sufficiently calibrated. Therefore, this new evidence not available at the time of EIR certification calls into question the adequacy of the mitigation measures, and DTSC must determine whether NO_2 emissions associated with the KHF project will have a significant impact on public health

CalEnviroScreen Identifies Significant New Information on the Vulnerability of Kettleman City Residents:

Greenaction incorporates our comment:

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> As discussed above, 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." California Communities Environmental Health Screening Tool, Version 1.1 September 2013 Update (hereafter "CalEnviroScreen v.1.1") at ii.
>
> 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. CalEnviroScreen v.1.1 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.

DTSC responded that it "went above and beyond CEQA and reviewed the multiple pollution burdens while considering the community's vulnerabilities." However, DTSC did not include the new information of the CalEnviroScreen score in its CEQA analysis. As stated in our comment, the CalEnviroScreen is not intended as a stand-alone substitute for the cumulative impact analysis required by CEQA, but this new information released by the California Environmental Protection Agency and the Office of Environmental Health Hazard Assessment is highly relevant. This new information adds to the weight of new information compelling DTSC to prepare a subsequent or supplemental EIR.

<u>Substantial Changes in the Circumstances Under Which the Project is Taken Require Additional CEQA Analysis:</u>

Greenaction hereby incorporates its comment:

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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.

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. 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.

DTSC acknowledges that the SEIR did not include an analysis for Valley Fever impacts, but argues that mitigation measures for fugitive dust emissions are required as a condition of approval. 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 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). Greenaction 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. CEQA

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Guidelines 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. DTSC must use the best available data to assess the impact and provide adequate mitigation measures to prevent the environmental harm. It has failed to do so.

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

Greenaction incorporates the following comment:

> 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 about 100 trucks of hazardous waste each day…By artificially and incorrectly 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 by a factor of hundreds.
>
> DTSC's 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. DTSC must 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.

DTSC responds 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 projects transportation related impacts.

DTSC next argues that this argument was rejected by the Court of Appeal. This argument evidences a lack of understanding of the procedural background of the case. The Court of Appeal did not consider or issue a ruling on the merits of this issue. In any case, El Pueblo's

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challenge to Kings County's actions are independent of any challenge to DTSC's separate actions in approving a hazardous waste permit for KHF and its findings regarding the environmental impacts of its decision. We challenge 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

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

Greenaction hereby incorporates its comment:

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

DTSC does not respond to our comments 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 our comment that DTSC failed to disclose the types of air quality impacts the oil and gas projects would have.

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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. 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's CEQA Findings Are Clearly Erroneous:

Greenaction hereby incorporates its comment:

> 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.
>
> **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 it 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. See EPA draft Environmental Justice Review

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("Each business day, approximately 250 trucks containing waste travel to KHF from various directions. Of the 250 trucks, approximately 180 trucks contain hazardous waste."). 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 erred in failing to assess project impacts based on current existing conditions to accurately determine the project's effects on health and the environment.

DTSC responds by stating that our objection to the baseline should have been raised at the administrative level for the Kings County's approval. However, Greenaction 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 air quality, transportation and traffic, and greenhouse gas emissions are considered significant or cumulatively significant does not relieve DTSC of its duty to analyze impacts that increase those impacts, such as the addition of 400 trucks per day traveling to and from the facility.

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

Greenaction hereby incorporates our comments:

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 §

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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 may not need 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 benefiting 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 from Mexico. Existing facilities have sufficient capacity for this very small

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> 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.

DTSC responded 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 whatever justification DTSC may claim to have for approving the KHF expansion 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 justification after the fact 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.

<u>DTSC Fails to Analyze Impacts from the Whole of the Project:</u>

Greenaction incorporates our comments:

> 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.

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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 Clearner 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 being 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's Permit Conditions Are Inadequate to Protect Public Health and the Environment:

The history of this facility shows clearly that CWM repeatedly violates many permit conditions, often for years at a time. The history of this facility also shows clearly that DTSC often fails to even know about the violations for significant periods of time, with some violations having continued for years before the violations were discovered and enforcement action taken.

In light of these facts and well-documented reality, DTSC's permit approval is improper. DTSCs' Response to Comments including Response 5469-1 is inadequate:

"DTSC …finds that this decision to approve the permit modification is appropriate because operation of the facility in compliance with the permit, permit conditions and applicable laws and regulations will be protective of public health and the environment."

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In light of CWM's well-documented and long and chronic history of violations, it is improper and without basis in fact for DTSC to presume that CWM will operate in compliance. As it is highly likely there will be new violations, DTSC's entire premise of assuring that the facility operations will be protective of health and the environment are without merit.

DTSC is also incorrect in asserting that the permit conditions including increased monitoring will help protect public health and the environment. CWM has a history of monitoring violations, some of which continued undetected by regulators for several years.

CWM also recently had enforcement action taken against it by DTSC for failing to report 72 spills, a reporting requirement DTSC has stated clearly that CWM knew it had responsibility for yet failed to do the required reporting of the spills.

DTSC Response 5469-23 claims that "Of the 72 spills, only one involved a quantity greater than 2 gallons…DTSC has no evidence to suggest that any of the 72 spills posed any threat to human health or the environment." In fact, DTSC has zero independent evidence to back up these claims, relying instead on the company that committed these toxic spills and failed to report them, in repeated violation of specific permit requirements. This is another example of the fox guarding the hen house.

State Is Breaking Its Promise to Reduce Pollution in Kettleman City:

At the conclusion of the state's inadequate and flawed investigation into the birth defects plaguing Kettleman City, state officials publicly announced a promise to the people of Kettleman City: the state would supposedly work to reduce pollution impacting Kettleman City.

It is a clear and unequivocal fact, admitted by Kings County and the State DTSC/Cal EPA, that approval of permits to expand the violation-plagued Chemical Waste Management hazardous waste and PCB landfill would increase pollution in the overburdened community of Kettleman City.

This broken promise is yet another example of the bias of state agencies who are willing to increase pollution in a community where they promised to reduce pollution, a community that the State itself admitted and documented is among the most vulnerable and at-risk communities in the state of California.

DTSC's Response 5469-14 states "DTSC is requiring specific permit conditions in the permit modification to reduce air pollution in the area surrounding the facility." This claim is without merit and completely false. Approving a massive expansion of the hazardous waste landfill from its current level of operations of approximately one or two trucks per day traveling to and from and disposing waste at the facility to 400 trucks per day will without a doubt increase, not reduce, pollution.

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Defective Public Notice and Invalid Public Comment Period - DTSC Failed and Refused to Provide the Legally Required Notice to Greenaction, Kettleman City residents and Your Mandatory Notice List for the Chemical Waste Management Kettleman Hills Facility:

Greenaction hereby incorporates its comments including:

> DTSC is required to provide the public a meaningful opportunity to participate in this permit decision. DTSC claims that their extensions of the "public comment period" provided ample opportunity for people to comment.
>
> Unfortunately, either through negligence, incompetence or intention to exclude meaningful participation, DTSC has committed serious violations of their public participation mandate, failed to provide the legal official notice to the public as required, and created a confusing public comment period that impeded and made difficult the public's right to participate in the process.
>
> A. DTSC'S Initial Notice Defect:
>
> DTSC publicly announced their draft permit decision on the proposed landfill expansion on July 2, 2013, yet Greenaction was not provided a copy of the public notice in a timely fashion despite the fact that we are on the DTSC's mandatory contact list. On July 26, 2013, Greenaction's Executive Director emailed DTSC to inform them we never received notice, a violation of DTSC's public notification requirements…
>
> DTSC's problems and violations of their public notice requirement subsequently increased and continued, rendering the public comment period and public hearing invalid.
>
> B. DTSC Failed to Notify Residents & Contact List Where to Submit Written Comments:
>
> DTSC issued a "Community Notice" dated July 2013 and another one dated August 7, 2013. Neither of these notices provided to the public and DTSC's mandatory contact list informed the reader of where to submit written comments, an enormous defect in the notice…As a result of this fatal defect in the notice, the public comment period and public hearing were not properly noticed and thus are invalid.
> In addition, the information subsequently sent to your entire mailing list on how to submit written comments does not correct the defect in the "Community Notices" which failed to contain the required information about submitting written comments. Your failure to provide that information when the public comment period supposedly started on July 2, 2013 resulted in recipients losing one month of time in which to prepare written comments on this complicated, technical and multi-faceted permit issue….
>
> The failure to provide full, legal and timely notice to all that are entitled to it renders your entire comment period invalid, has had a discriminatory and disproportionate impact on people of color and Spanish-speakers, and constitutes a violation of state and federal civil

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rights laws. The fact that Greenaction was subsequently provided the official notice does not remedy the original failure to provide the actual legal notice to us and others…

DTSC asserts that it mailed Community Notices on July 1, 2013 and on August 8, 2013, but this did not constitute legal and proper notice for the reasons stated above. The fact that DTSC did some public outreach and notification does not cure these fatal defects.

July 31, 2013 DTSC "Open House" Was Improperly Noticed, and was Biased in Favor of Chem Waste Due to Inaccurate and Misleading "Information" and Problematic Meeting Format:

A. Defective Notice for Open House:

As DTSC has now acknowledged, the agency failed to provide the legally required notice of the initial public comment period including the "open house" to all members of the public that they were required to provide notice to.

B. Meeting Format:

The format of the meeting was designed and/or had the effect of preventing attendees from hearing all the discussions, questions and answers regarding permit-related issues. This was not conducive to learning the issues or having a transparent process.

C. Misleading and Omitted "Information:"

The DTSC "Open House" was promoted by DTSC/Cal EPA as an opportunity for the public to learn more about the proposed approval of Chemical Waste Management's application for a major expansion of their hazardous waste landfill. Instead, members of the public attending the open house were given biased, one-sided, incomplete and misleading "information" by DTSC and several other agencies.

Despite the fact that the DTSC and other agencies present at the "open house" have taken repeated enforcement action against Chemical Waste Management, members of the public entering the meeting were surprised and outraged that there was not one mention, not one word, fact sheet, display or document provided by any agency at the meeting informing the public about the numerous and chronic permit violations committed by the company.

Particularly disturbing and problematic was the DTSC's display board entitled "Enforcement" had no mention at all of even one violation. The DTSC's failure to provide any information about violations on fact sheets or display boards is especially problematic as DTSC is well aware that the chronic violations committed by Chemical Waste Management are a major permit issue.

It was only after members of the public, including residents who are members of El Pueblo/People for Clean Air and Water of Kettleman City and Greenaction, objected to this blatantly biased omission by the DTSC and other agencies, that a DTSC staff

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member pulled some information about violations out of a file folder. There were no copies in Spanish, and there no copies even in English to provide to the attendees.

DTSC's failure to provide information on Chem Waste's troubled violation history demonstrates bias and the tainting of the permit process.

DTSC's Response 5469-13 claims that "In regards to the assertion that DTSC failed to provide a compilation of compliance/violation history, DTSC prepared a summary of RCRA and TSCA inspections for the July 31 and August 1 Open Houses in Kettleman City." DTSC further asserts they set up information tables at the open houses.

DTSC may have prepared a summary of inspections, but they did not put this information on the information tables or display boards, did not have copies for attendees, had nothing in Spanish on the issue, and provided no information on violations until challenged by many in the audience who then forced DTSC to read the information aloud in English and Spanish. DTSC's Response is thus a rewriting of reality.

Four Overlapping Public Comment Periods Undermine Public's Ability to Fully Comment and Participate in the DTSC Permit Process:

Three state-related agencies (DTSC, the Regional Water Quality Control Board and the San Joaquin Valley Air Pollution Control District) are having overlapping comment periods on the proposed hazardous waste landfill expansion.

These overlapping comment periods made it literally impossible for residents and advocates, including Greenaction, to participate meaningfully and comprehensively in all three as is their right. Greenaction and others had to choose which draft permit approvals we would focus on the most, resulting in less time and effort being allocated to all three comment periods for very important agency permit decisions.

Each of the agency permit processes involve distinct laws, complex regulations and large technical documents, and to meaningfully participate in the process it takes time to read, research, evaluate and comment on these documents and the proposed permit actions. . Greenaction, residents and allies made our concerns about overlapping comment periods clear to state agencies and officials, but they continued with the overlapping periods and with the DTSC hearing taking place the same night as an important CEC workshop on HECA.

It does not appear the DTSC responded to this comment.

DTSC's description of key permit issues is false and misleading:

(1) DTSC's "Frequently Asked Questions" document released with the permit includes the question "What type of waste does CWM accept at Kettleman Hills?" DTSC's answer is that "CWM is permitted to dispose of or treat and store hazardous waste from all over California."

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In fact, CWM is permitted to dispose of or treat hazardous wastes from all over the United States and other nations. In addition, the FAQ omitted PCBs from its description of permitted waste streams.

(2) DTSC's "Frequently Asked Questions" document claims the permit requires "(R)educing diesel truck air emissions…." It is incredibly misleading and false for DTSC to claim this permit would reduce diesel truck air emissions when in fact diesel truck emissions will skyrocket over current levels. Currently about one or two trucks per day take hazardous waste to the landfill. The permit would allow up to 400 trucks per day, so even with the use of more modern trucks the emissions will be significantly higher than currently being experienced.

This misinformation and pro-CWM bias by the DTSC and should not have been used to justify the permit issuance and to attempt to influence public opinion.

Conclusion:

As a state agency mandated to protect public health and the environment, ensure compliance with the law including permits, provide meaningful opportunities for public involvement, and required to comply with and uphold civil rights laws and environmental justice policies and mandates, DTSC's permit is defective and DTSC must accept our Appeal and Petition for Review and then deny new permits to Chemical Waste Management.

For environmental justice,

Bradley Angel
Executive Director
Greenaction for Health and Environmental Justice

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