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Subject: UNDERESTIMATION OF CLOSURE COSTS BY DEFERRAL TO CORRECTIVE ACTION - EVRGREEN OIL EXAMPLE
Date: Wednesday, July 13, 2016 11:00:58 AM
Attachments: [Attachment to IRP e-mail - Evergreen Closure and Post-closure Care AFR June 25 2014v.1.docx](#)

Back in 2013 I wrote to Debbie Rafael, then Director of the Department of Toxic Substances Control (DTSC) that “As you no doubt know, Evergreen Oil recently filed for Chapter 11 bankruptcy. The poster child for clean, green recycled motor oil has just become the poster child for continuing fiscal mismanagement by the Department of Toxic Substances Control (DTSC).” I can find no record of any response from Director Raphael then or anyone else on her “team” nor subsequently anyone else. I request that the Independent Review Panel (IRP) light a fire under DTSC to respond to me---even at this late date (three years later). Attached is the subsequent re-issuance of the original letter to then-acting director Miriam Ingenito.

Liza Tucker of Consumer Watchdog correctly identified Evergreen Oil as an overall problem for DTSC. However, she was unaware at that time of many of the DTSC “insider” issues such as its pervasive “habit” of trading off closure---effectively low-balling closure assurance of financial responsibility (AFR)--- for corrective action where DTSC has a long-time illegitimate “policy” of not requiring any AFR until after a remedy is selected (in the case of Phibrotech, Inc. or “PTI” I believe it was nearly 8 years after I finalized the remedy selection before such AFR was actually in place).

My expressed concern was that DTSC fails to require that there be enough money to cover the true cost of closing the hazardous waste units and cleaning up all the known contamination of ground water and soil. At the time, there may not even have been enough money to cover the real cost of closing the operation down safely---not even including the soil and groundwater contamination that emanated from the permitted hazardous waste management units (HWMUs”. I noted then that the last public listing of financial assurance for closure and post-closure was little more than \$400,000 nearly a decade before 2013 and stated to the then-Director that as she and your Sacramento-based Executive Management Team should well know by that time, that if Evergreen “handed her the keys” through the bankruptcy, the DTSC will have to hire contractors to do the work and those costs have likely risen in the decade since the then-available estimate.

The biggest problem however, was that original cost estimate ignored the likelihood that soil and groundwater contamination had result from facility operations and did not include removal of that contamination. DTSC has been investigating the site for years and has indeed found soil and groundwater contamination. DTSC did not increase its original lowball closure cost estimate to address that contamination. It shuffled the true HWMU closure costs off to the corrective action process where it then proceeded to ignore those costs. It neither added a corrective action cost estimate through permit modification nor required any additional closure AFR to address the unfolding cleanup problems.

This situation could/should have been avoided and can still be addressed. I told the then-Director that as she and her Sacramento-based Executive Management Team should know, the California Health and Safety Code clearly requires that any time a corrective action cannot be completed PRIOR to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action. The financial assurance can be in the form of a trust fund, surety bond, letter of credit, insurance, or other corporate guarantee. When DTSC pulls this kind of “fast shuffle”---there are harsher names for it---the people who may have to pay the real price will be California taxpayers.

In 2004, the DTSC found multiple on-site sources had released or could release hazardous waste at Evergreen and obtained evidence of ground water and soil contaminated with petroleum hydrocarbons, arsenic, chromium and volatile organic compounds like MTBE. DTSC linked this contamination to various on-site activities such as recycling used motor oil and water and oil separation process as well as to past uses of the site. Yet DTSC’s Permitting “Establishment” failed to demand additional financial assurance to clean this up. The HWMUs involved in on-site recycling activities should have been IMMEDIATELY addressed through an increase in closure AFR.

The groundwater basin in Newark, where Evergreen is located, is designated by the State for domestic use. This would imply ground water needs to be cleaned up so hazardous substances that Evergreen discharged ---- while DTSC watched it happening as a permitted facility--- no longer exceed health risk levels. The original permit was issued in 1987 and a renewal granted in 2000. DTSC did not even initiate corrective action investigations until years after the permit's renewal. At the time that I wrote the letter to the then-Director, it was clear that contamination had occurred and should be cleaned up, however in 2013, determination of what exact cleanup steps to take was put off until 2015, according to the DTSC's Envirostor database at the time. THERE WAS NO INCREASE IN THE CLOSURE COST ESTIMATE. This means it will have been 38 years from getting the permit to actually cleaning up contamination caused through its issuance by DTSC

I noted in an aside to a cc recipient at that time to [BEAR IN MIND THAT DTSC'S POSITION MAY BE THAT THE SITE WAS PREVIOUSLY UNOCCUPIED AND THEREFORE NO CONTAMINATION EXISTED AT THE TIME OF THE PERMIT. THAT IS FINE---IT PUTS THE CONTAMINATION SQUARELY ON EVERGREEN AND FAILURE OF DTSC'S INSPECTION/ENFORCEMENT TO PREVENT THIS CONTAMINATION OCCURRING UNDER THE PERMIT, I.E. "PERMITTED CONTAMINATION" OF THE ENVIRONMENT UNDER DTSC AUSPICES]

I pointed out to the then-director that it was inexplicable as to why no corrective action assurance of financial responsibility was required as soon as the permit was originally issued, before the permit was renewed, after contamination was encountered, or why the closure AFR was not increased when it was determined that the HWMUs had caused soil and groundwater contamination. I noted in a further aside to a cc recipient at that time that [A DTSC EXPLANATION THAT NO CONTAMINATION WAS PRESENT WHEN THE PERMIT WAS ORIGINALLY ISSUED IS UNACCEPTABLE. THIS IS THE REASON THAT ENVIRONMENTAL MONITORING---SOIL, AIR, SURFACE- AND GROUND-WATER---NEED TO BE A FUNDAMENTAL PERMIT ELEMENT-----EVEN THOUGH DTSC'S THEN-PERMITTING GURU DID NOT SUBSCRIBE TO THIS. CONTAMINATION COULD HAVE HAPPENED THE DAY AFTER COMMENCING OPERATIONS]

Evergreen Oil is clearly emblematic of a system of an "underground regulation", that the DTSC has engaged in for years to the detriment of Californians. DTSC's Permitting "Establishment" tells the public that it will require assurance of financial responsibility when the "remedy is selected" and carefully ignores the statute that requires it PRIOR to issuing the permit. There is no reason---except for an overly cozy relationship with industry---for skipping this legal requirement since the cost of cleaning up soil and groundwater contamination can be reasonably estimated based on preliminary studies and extensive departmental knowledge about existing technologies for remediation. Proof that a company can and will pay for corrective action must be demanded up front to shield taxpayers. DTSC is falling down on protecting Californians from fiscal harm. This should not be acceptable to either Governor Jerry Brown or to the state legislature. It certainly isn't acceptable to California consumers.

I ask that the IRP demand that DTSC's current Permitting "Establishment" immediately prepare a cost estimate for all on-going and necessary future corrective action activities and cleanup and to do the long-overdue cost estimate update for closure and post-closure care. Since the then-Permitting "Establishment" was not competent enough to avoid this problem in the first place, I would suggest that you ask the current Director to get some professional help from the contractors that DTSC uses to carry out cleanups at Orphan Sites as well as from DTSC's own excellent cadre of professional geologists and engineers specifically licensed by the State in the applicable areas of expertise who may have such estimating experience from previous years in private practice. I further ask the IRP to investigate the DTSC practice of rolling closure costs over into corrective action to avoid increasing the closure AFR for its permitted facilities. This should take the form of census of sites where there is known soil and groundwater contamination, such as Evergreen and Demenno Kerdoon to determine involvement of the HWMUs in that contamination and determine if the knowledge of that contamination has been used to upgrade the closure cost estimate and then actual AFR funding.

Finally, it needs to be disclosed that I work for DTSC in the Brownfields and Environmental Restoration Program (BERP) at Chatsworth. However, this communication is sent to the IRP as a member of the concerned public not as a State of California employee.

Thank you for your consideration.

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