Center for Community Action and Environmental Justice

Centro de Acción Comunitaria y Justicia Ambiental

CCAEJ

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July 13, 2016

Mr. Gideon Kracov, Chair
And Members
Independent Review Panel
Sacramento, CA

Dear Chairperson Kracov and Members of the Independent Review Panel:

On behalf of the Center for Community Action and Environmental Justice we write to make known our deep concerns and disappointment with the current draft of the Independent Review Panel's Third Report to the Governor and the Legislature Pursuant to Health & Safety Code Section 57014 (f). We support and incorporate comments submitted by the Center on Race, Poverty & the Environment in its July 12, 2016 letter to the panel members and attached herein.

CRPE has eloquently and thoroughly expressed our concerns and those of other impacted communities on the current direction of the committee. The report reads like a regurgitation of the responses we have seen previously from DTSC. Simply relying upon the response from DTSC Administration to criticisms is not an independent review and will not lead to needed changes to improve the agency's operation. We expect a more thorough, comprehensive analysis with sincere consideration of the extensive input provided from stakeholders outside the agency.

There are hundreds of communities around the state relying upon this panel to do a thorough and comprehensive review of the agency and develop significant recommendations to improve a truly broken system. We ask that you do better.

Sincerely,

Penny J. Newman

Penny J. Newman
Executive Director

CRPE

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July 12, 2016

Dear Chairperson Kracov and Members of the Independent Review Panel:

On behalf of the Center on Race, Poverty & the Environment, I write to share our concerns and disappointment with the current draft of the Independent Review Panel's Third Report to the Governor and the Legislature Pursuant to Health & Safety Code Section 57014(f). The Report merely summarizes the statements and findings of the Department of Toxic Substances Control (DTSC) and fails to reflect any consideration of other information sources or independent analysis of the data the panel has received. The Report ignores widely recognized issues in DTSC's enforcement programs, and recommends minor stopgap fixes to the very few problems it does identify. Unfortunately, this draft report confirms many advocates fears about the structure of the panel and its ability to conduct an impartial and unbiased review of the Department while being housed within DTSC and while relying on the Department as its primary source of information. I request that the panel extensively revise this report, consider data and other information from alternate sources, acknowledge, validate and address communities' experiences and concerns with DTSC's enforcement programs, and provide additional and more robust recommendations to improve the agency's performance. I outline below our specific concerns with the structure and content of the report followed by specific recommendations for your consideration.

I. The Report Is Overly Reliant on DTSC Self-Reporting as the Basis for its Findings

The vast majority of the report consists of the "Enforcement Program Summary" which summarizes DTSC's statements on its own enforcement performance. Not surprisingly, DTSC has painted a rosy picture of the state of its enforcement programs. Nothing in the IRP report indicates that the Panel analyzed or corroborated DTSC's statements. Rather the IRP presents DTSC's findings as fact. For example, the IRP report states on page two that "the department's performance has exceeded national goals and averages for the most part of the past five years," yet nothing in the report indicates that the IRP verified this statement with the Federal Environmental Protection Agency. The statement turns out to be simply inaccurate. These types of unconfirmed and blanket statements which so closely parrot DTSC's own perspectives undermine the credibility and independence of the panel and its work.

Further undermining the panel is the panelists own statements at the June 8, 2016 meeting highlighting the importance of supporting the Director. Vice-chairman Mike Vizzier cautioned the panel against undermining the Director of the Department by asking too many questions and

also noted that the IRP should "listen carefully to, and support, the DTSC director and senior staff." Draft meeting minutes for June 8, 2016. The IRP must not view its role as supporting the Director and other top management but instead must provide an unbiased assessment of the agency's performance and recommendations for improvement.

II. IRP Report Erred When It Stated that DTSC Has Met Targets Included in DTSC's RCRA Grant

The report states that "the department has met or exceeded its federal inspection targets under the RCRA Grant." This is simply not the case. The RCRA grant set a target of at least 50% of all compliance monitoring activities in high-risk, disproportionately exposed communities, as determined by using CalEnviroScreen." California Department of Toxic Substances Control Resource Conservation and Recovery Grant Work Plan at 3. Yet, DTSC reports it has only achieved a 40 percent rate of enforcement activities in disproportionately impacted communities. *See* May 6, 2016 Letter to Mr. Kracov, *Enforcement Priorities Related to Environmental Justice and Health Risk* at 1. This is despite the fact that over 80 percent of permitted hazardous waste facilities are located in vulnerable communities.[1] The IRP should identify and address this deficiency in its report.

The RCRA grant also requires EERD to conduct facility and generator inspections in accordance with prevailing policies and procedures and incorporated by reference EERD's target frequency of inspections by facility class. However, a cursory review of the inspection results available for all permitted facilities on Envirostor demonstrates that DTSC has not met its targeted frequency rates historically or currently. The following graph indicates facilities where DTSC has on one or more occasions failed to meet its targeted inspection frequency and the greatest time period between inspections:

Facility Type	Frequency
Operating Federal Facility with HW Permit	**Required Every year**
Naval Air Weapons Station China Lake	(2 years)
Travis Air Force Base	(2 years)
Lawrence Livermore National Laboratory	(3 years) (4/29/13 to present)
Sandia National Laboratories	(3.5 years) (10/18/2012 to present)
Dept of Air Force Vandenberg AFB	(3.5 years)
Lawrence Livermore National Laboratory – Site 300	(4 years) (3/29/12 to present)
Lawrence Berkeley National Laboratory	(8 years) (self-reporting since 4/17/08)
Operating treatment or storage facility with a HW Permit	**Required Every 2 years**
Pacific Scientific Energetic Materials	(3 years)
Safety Clean – Fresno	(3 years)
Chevron Refinery	(3 years)
Veolia ES Technical Solutions	(3 years)
Safety-Kleen Systems	(3 years)
United Tech. Corp Pratt and Whitney Rocketdyne San	(3 years)

1 Given the high percentage of permitted facilities in environmental justice communities, DTSC's 40 percent inspection rate in disproportionately impacted communities also indicates the agency's likely non-compliance with AB 1329 (Perez).

Jose	
Rho-Chem LLC	(3 years)
San Diego Gas & Electric Miramar	(3.5 years)
Chevron El Segundo Refinery	(3.5 years)
Raytheon Space and Airborne Systems	(4 years)
The Dow Chemical	(4 years)
Southern California Gas Co	(4 years)
PG&E/Diablo Canyon	(8 years) (4/30/2008 to 6/1/2016)
BKK Corporation	(12 years)
Standardized or State-Only Operating HW Permit	**Required Every 1 - 3 years**
Bakersfield Transfer Inc DBA Coles Environmental	(3.5 years)
Bayside Oil II Inc.	(4 years)
Crane's Waste Oil Inc.	(4 years)
WIT Sales and Refining	(4 years)
J&B Refining DBA J&B Enterprises	(4 years)
Ashbury Environmental Services – Fortuna	(4 years)
Agritec Inc DBA Cleantech Environmental Inc.	(4 years)
Safety-Kleen of California Inc. – Davis	(4.5 years)
Safety-Kleen of California Inc. – Carson	(4.5 years)
Asbury Environmental Services-Chico II LLC	(5 years)
AERC Com Inc.	(5 years)
Safety-Kleen of California Inc. – Santa Maria	(5 years)
Safety-Kleen of California Inc. – Fresno	(5.5 years)
American Oil Company	(6 years)
Riverbank Oil Transfer, LLC	(6 years)
World Oil – San Joaquin LLC	(6.5 years)
Ashbury Environmental Services	(6.5 years)
Ecology Control Industries	(7 years)
Best Environmental LLC	(8 years)

III. IRP Report Fails to Include Any Recommendations on the Department's Complaint Response and Office of Criminal Investigations

The IRP report states that the department received 531 complaints and referred 460 of those to other entities. The IRP report did not identify how many of those complaints were ultimately resolved. Neither did the report address a common community perception that agencies often claim a lack of jurisdiction over environmental concerns so that communities are never sure where to turn to for help. The IVAN networks are helping to resolve these issues, but DTSC's very high rate of outside referrals calls into question whether DTSC appropriately responds to community concerns where it may have some jurisdiction. The IRP report does not include information on whether any of the remaining 33 complaints resulted in a satisfactory response and resolution. The documents provided by DTSC demonstrate that the vast majority of complaints that make it to the Office of Criminal Investigation (OCI) never get prosecuted or resolved. In fact, in 2015-2016, the OCI summarily closed 226 backlogged cases that it "discovered." The IRP should investigate what factors led to this wholesale closure of cases including why the backlog was not "discovered" earlier, how many cases were closed due to mismanagement such as failing to act within the statute of limitations, and what steps should be taken to avoid similar situations in the future.

IV. The Draft Report's Recommendation on Revised Penalty Sets Amounts Too Low

The IRP recommends that the maximum penalty for violations be increased. CRPE agrees with this recommendation. However, the IRP report recommends that the increase match a 13-year old EPA policy which would result in raising the maximum penalty for the most serious and harmful violations by just $2,500. Penalties rates must be set at levels high enough to achieve some deterrent effect. DTSC's penalty and collection rates are far lower than other agencies even though egregious hazardous waste violations present far greater risks to health and the environment. The IRP should seek additional information on what level to set minimum and maximum penalties to deter noncompliance.

V. The IRP Report Ignores Many Areas of Community Concerns with DTSC's Enforcement Programs

Advocates and residents impacted by DTSC have detailed numerous problems in DTSC's enforcement programs. The IRP report does not address any of these concerns. The community concerns previously presented to the IRP include:

- Statement from deputy director that DTSC should make compliance "easy and economic" for those it regulates
- Fines are not levied at high enough rates to incentivize compliance
- DTSC is overly reliant on settlements with those it regulates which results in little deterrent effect on violators
- Very low level of criminal enforcement despite DTSC having the only peace officers in Cal/EPA
- Fines and settlements are not used to benefit communities where violations took place
- Insufficient inspections and monitoring to uncover violations
- DTSC's reliance on self-monitoring from the regulated industry allows violations to escape notice
- Once an enforcement action is taken, industry response is often untimely or lacking altogether
- DTSC does not prioritize enforcement in environmental justice communities as required by AB 1329

VI. The IRP Should Include Additional Recommendations to Address Community Concerns in its Report

The Draft IRP report includes a total of five recommendations to address all of DTSC's enforcement programs. The recommendations provided are non-responsive to the primary community concerns. The IRP should consider adding the following recommendations to its report:

- Adopt mandatory minimums for different types of penalties
- Track and post settlement amounts
- Provide opportunity for public comment on proposed settlements
- Track and post the amount of time for companies to come into compliance with agency orders
- Adopt a multiplier penalty when compliance not achieved in timely fashion
- Increase frequency of mandatory inspections for all classes of permitted facilities
- Work with communities to enable community policing and monitoring of hazardous waste facilities and sites
- Move the Office of Criminal Investigations to Cal/EPA in order to increase multi-media coordination and responsiveness to other agencies that enforce environmental laws
- Adopt policy to prioritize inspections in environmental justice communities

VII. The IRP Should Include Additional Data Requests in its Report

The Draft IRP report includes no data requests to track DTSC's performance over time. Without objective measurements as a performance tracking mechanism, the IRP would be forced to rely entirely on DTSC to self-report its progress or lack thereof. The IRP should consider adding the following data requests to its report:

- Number of enforcement actions taken and amount of money collected from fines
- Number of criminal enforcement proceedings undertaken
- Amount of enforcement fines diverted to EJ supplemental environmental projects
- Average length of time for violators to return to compliance or fulfill corrective action
- Frequency of inspections conducted at each permitted hazardous waste facility
- Percentage of enforcement actions and inspections taken in EJ communities

We continue to hope that the IRP can overcome some of the structural impediments it faces in order to provide effective oversight over the Department of Toxic Substances Control. With its latest Draft Report, the IRP appears to be at a crossroads. We sincerely hope the IRP will choose the correct path and revisit this particular report to ensure that the information it contains is properly vetted and that the IRP is committed to undertaking an objective and unbiased review of DTSC's performance. Thank you for your consideration.

Sincerely,

Ingrid Brostrom,
Senior Attorney