
Independent Review Panel

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Gideon Kracov, J.D., *Chair*
Mike Vizzier, *Vice Chair*
Dr. Arezoo Campbell, *Member*



Edmund G. Brown Jr.
Governor

Independent Review Panel Meeting Minutes June 8, 2016

1. Call to Order

Chair Gideon Kracov called the meeting to order at 9:02 a.m. at the Department of Toxic Substances Control's Sacramento Regional Office at 8800 Cal Center Drive, Sacramento, CA.

Panel members present: Chair Kracov, Vice Chair Mike Vizzier, and Member Arezoo Campbell. A quorum was declared.

Chair Gideon Kracov led the Panel in the Pledge of Allegiance.

2. Welcome and Introductions

Chair Kracov introduced himself and asked the following individuals to introduce themselves: the other IRP members; the IRP's legal counsel, Deputy Attorney General Deborah Barnes; the Panel's program analyst, Larry Rohlfes; and DTSC Office Technician Erik Erreca, who was helping out with IRP support.

3. Announcements

Chair Kracov announced that there would be no translation service for this meeting because no member of the public requested the service in advance of it. He noted that there would be public comment under the General Public Comment agenda item and all other agenda items. He announced that the meeting was webcast on the CalEPA website and gave out the email address for members of the public to submit comments via email.

4. Agenda Review

Chair Kracov announced that Agenda Item 10, Presentation on Permitting and Regulation of Hazardous Waste in California and Compliance with Civil Rights Laws and Environmental Justice Mandates, with a Focus on the Kettleman Hills Facility, would be postponed until another meeting. He also suggested that Agenda Item 12, Organizational, Operational, and Administrative Matters, and Agenda Item 8, Closed Session, be taken up earlier in the meeting than indicated on the agenda.

5. Minutes of May 12, 2016 Meeting

Vice Chair Vizzier suggested two changes to the draft minutes of the May 12, 2016 meeting: change Elise Rothschild's title to DTSC deputy director of the Hazardous Waste Management Program; and modify his comments on why DTSC's Office of Criminal Investigations (OCI) only referred five criminal cases between January 1, 2016 and April 1, 2016 to more fully reflect his thoughts on that subject.

The Panel agreed to approve the minutes of the May 12, 2016 with the two changes suggested by Vice Chair Vizzier.

6. General Public Comment

There were no general public comments.

7. Chair Report

Chair Kracov noted that he has had discussions with DTSC about IRP interactions with the department's staff and a planned DTSC employee engagement survey.

He said he was interviewed by the Los Angeles Times for a May 28, 2016 article on Exide that included quotes from him about the IRP.

He mentioned that Congress was poised to pass legislation that would reform the nation's Toxic Substances Control Act and suggested a future DTSC report on how the act would impact DTSC and state issues in general.

He announced that the IRP's legal counsel, Ms. Barnes, had been appointed a U.S. magistrate, was in the final stages of being confirmed, and consequently would be leaving the Attorney General's Office and transitioning out as the IRP's legal counsel.

8. Staff Report

Mr. Rohlfs reported that he submitted an IRP support letter on all five of the DTSC's spring finance letters to Senate Budget & Fiscal Review Subcommittee 2 on May 16, 2016, two days before the subcommittee's hearing to decide on various pending items associated with the department's FY 2016-17 budget. At that hearing the subcommittee approved all of the pending items pertaining to DTSC. In addition to the spring finance letters that were still pending, the subcommittee approved an earlier submitted budget change proposal to make eight limited-term permitting positions permanent positions, a proposal the IRP had recommended in its January 28, 2016 report to the Governor and Legislature. In addition, the subcommittee approved a staff proposal to add two permanent DTSC positions, with limited-term funding, to allow for more continuity of staffing for the IRP, with budget bill language requiring the department to provide access for the IRP to facilities and workers in order to provide a more robust review.

Mr. Rohlfs reported that DTSC had extended an offer to an applicant for the IRP's office technician position. The IRP support staff member was scheduled to begin work on June 20, 2016.

Addressing Chair Kracov's request at the May 12, 2016 meeting to obtain a copy of CalEPA's evaluation of the City of Los Angeles' fifth update report on its 2014 unsatisfactory Certified Unified Program Agency (CUPA) evaluation, Mr. Rohlfs reported that the evaluation was not yet available on CalEPA's CUPA evaluation website page.

Chair Kracov asked IRP support staff to send a meeting reminder eblast to the interested public two days before all future meetings. This would be in addition to the eblast sent out when the agenda is posted. All meeting materials should ideally be posted when the second eblast goes out.

12. Organizational, Operational, and Administrative Matters

Mr. Rohlfs summarized the IRP's budget report as of May 31, 2016 for FY 2015-16. Chair Kracov expressed concern about the long wait to date for Panel member meeting travel reimbursements. Panel Member Campbell said she would like to see a more detailed breakdown of IRP expenses at a future meeting.

Ms. Barnes reported on how the IRP should evaluate its staff members. She said the Panel should decide how to communicate its opinion to their DTSC supervisor, Special Assistant for Program Review Terri Hardy.

Vice Chair Vizzier expressed concern that the IRP is trying to do too much. He said that evaluating the four topics mentioned in Panel's enabling legislation is a big job and that the Panel doesn't have infinite resources to stray from its core responsibilities. He cited civil rights, how to deal with disagreements in the Santa Susana Field Labs (SSFL) communities, CUPA performance, and DTSC staff compensation as topics that should be outside the IRP purview. He said the Panel's review efforts create work for the DTSC staff, which already has laid groundwork for many program improvements. The IRP must be careful to avoid undermining the director and being a part of the problem. He also said the 50 questions that the Panel put together for the DTSC staff to answer at this meeting were too many.

Panel Member Campbell responded that some IRP questions may seem inappropriate to the Panel's function, but SB 83 appears to authorize the review of other DTSC programs as well. Yes, the IRP should focus its attention on the four programs specifically mentioned in the legislation, but if stakeholders bring other programs to Panel member attention, the IRP should be responsive. It is a difficult balance, she concluded.

Vice Chair Vizzier agreed that the Panel should respond to stakeholders, but he reiterated that he believed the IRP was straying from its mission by spending too much time reviewing programs and issues that the Governor and the Legislature didn't ask the Panel to review.

Chair Kracov said he wasn't sure he agreed that Governor and Legislature do not want the IRP to do what it is doing. He said the Panel has been spending considerable time on the programs mentioned in SB 83. It has a work plan and should follow it. With the exception of recommending funding for

the Exide cleanup, the Panel had not made site-specific recommendations. Fundamentally, making recommendations is the Panel's core responsibility. Contrary to straying from that mission, he expressed his belief that the IRP is laser-focused on it. He added that this effort is an important one because the IRP is the only transparent, statewide, DTSC-public process.

Chair Kracov asked Vice Chair Vizzier if he agreed that staff organizational culture and structure are important. Does the IRP have a role in looking into whether the DTSC staff is functioning and working well together?

Vice Chair Vizzier responded that the department's culture is an important subject, but said that the IRP should listen carefully to, and support, the DTSC director and senior staff on work culture and management issues. He noted that the department had experienced numerous reorganizations in recent years and expressed his hope that the current director would be in place long enough to resolve some of the problems. He added that he liked the plan for a staff engagement survey.

Panel Member Campbell said the IRP should be cognizant of the fact that the director makes the decisions. At the same time, the employees should be heard. Hopefully what the IRP recommends will be helpful.

Chair Kracov said that for the department to succeed, the director has to succeed. At the same time, the Panel must meet the expectations of the legislative bodies and ask the tough questions in a respectful and pragmatic way.

9. Presentation on Proposed Multi-Agency Task Force to Address Unlicensed and Unregulated Auto Dismantling in California

Gavin McHugh and Ron Dumas of the State of California Auto Dismantlers Association (SCADA) made a presentation to the IRP on unlicensed auto dismantling and a measure under consideration in the state Legislature to address the problem, AB 1858. A Power Point version of the presentation is available on the IRP website at <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Meetings.cfm>.

AB 1858 (Santiago) would require the Department of Motor Vehicles (DMV) to establish an Unlicensed Automobile Dismantling Task Force comprised of representatives of the DMV, the State Board of Equalization, and CalEPA. The task force would be required to investigate the occurrences of underground, unlicensed dismantling, including tax evasion and environmental damage. On or before March 1, 2018, the task force would be required to submit a report to the Legislature on the number of leads or complaints received, the number of complaints investigated, and the resulting civil action or criminal prosecution. The task force also would provide necessary recommendations.

Mr. Dumas highlighted the importance of educating unlicensed auto dismantlers. He said that many may not know they are violating the law.

Chair Kracov said the Panel would consider addressing AB 1858 in its next report to the Governor and Legislature, due July 26, 2016.

Chair Kracov adjourned the meeting for a break at 11:00 a.m. and reconvened it at 11:24 a.m.

15. Closed Session

Chair Kracov adjourned the meeting for closed session at 11:25 a.m. to discuss personnel and litigation matters.

16. Reconvene and Report on Closed Session

Chair Kracov reconvened the meeting at approximately 11:35 a.m.

Ms. Barnes announced that there were no reports out of Closed Session.

6. General Public Comment, Continued

Jane Williams of California Communities Against Toxics said the car dismantling business creates significant environmental health impacts throughout California and that the impacts have been acutely felt in environmental justice communities. She said AB 1858 is a big step forward and an IRP recommendation to support the measure would be appropriate. She also said it is important for the Panel to deal with serious cultural awareness issues at DTSC and make sure the CUPAs are meeting their responsibilities under the law. Finally, she said the IRP should stick to its Work Plan, make its findings transparent to the public, and continue to reach out to the many entities affected by DTSC's decisions.

11. DTSC Presentation on Enforcement Program

DTSC Director Barbara Lee introduced the continuation of the DTSC Enforcement Program presentation begun at the May 12, 2016 meeting. A Power Point version of the presentation is available on the IRP website at <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Meetings.cfm>.

Director Lee introduced the department's new assistant deputy director for DTSC's Site Mitigation and Brownfields Reuse Program, Zoe Bayar.

DTSC Chief Investigator Hansen Pang discussed case profiles on Electro-Forming and Comcast as examples of the department's successful investigations.

Director Lee clarified that large penalty cases generally do not result in large amounts of penalty money for DTSC and its Orphan Fund. If they are prosecuted under the Business & Professions Code instead of Hazardous Waste Control Law in the Health & Safety Code, DTSC generally receives no penalty money unless the prosecuting attorneys choose to allocate funds to the DTSC, usually in the form of a Supplemental Environmental Project (SEP). DTSC collaborates with other prosecution attorneys and enforcement agencies in cases such as these because it is good for the environment to bring forward the most comprehensive case as possible, not because it is good for DTSC. On the other hand, if cases are prosecuted under Section 25192 of the Health & Safety Code, 50 percent of the penalty money goes to the Toxic Substances Control Account in the General Fund, 25 percent to the prosecuting office that brought the action, and 25 percent to DTSC for the CUPA/agency that investigated the action.

In response to a question from Chair Kracov, DTSC Acting Chief Counsel Frances McChesney said DTSC can't file actions in superior or federal court.

Director Lee emphasized that she was not suggesting that the prosecuting attorneys don't do a lot of work and was only trying to make clear that there are two ways of determining how penalty monies are allocated.

Chair Kracov then suggested that the IRP discuss the questions it had submitted to DTSC in advance of the meeting with the department representatives.

Director Lee explained that CalEnviroView is a platform to allow users to view environmental information across media and across jurisdictions. It is not a DTSC program.

Vice Chair Vizzier said he suggested a DTSC presentation on the information historically provided on progress with management goals to give the Panel an idea of what is already reported and because the Panel could find metrics in that information.

Panel Member Campbell suggested the IRP make recommendations on what metrics are not necessary. She noted that metrics can become meaningless if not properly put into perspective or if important matters are lost amongst too many unrelated details.

Vice Chair Vizzier expressed agreement with Panel Member Campbell.

Chair Kracov asked Vice Chair Vizzier if he would be willing go through the information that DTSC reports to CalEPA and US EPA to suggest goals for DTSC for the first draft of the July report to the Governor and Legislature. Vice Chair Vizzier said he would be willing to do that. Director Lee said she could provide a summary of the various reporting mechanisms for Vice Chair Vizzier. The Panel agreed to include a paragraph in the document on the reporting that DTSC is already conducting.

Chair Kracov adjourned the meeting for lunch at 12:30 p.m. and reconvened it at 1:20 p.m.

Rick Brausch, chief of the Policy and Program Support Division for the DTSC Hazardous Waste Management Program, summarized SB 1249, which became law on January 1, 2015, and DTSC's responsibilities to implement it. DTSC has a three-year plan to evaluate metal shredding facilities and the waste they generate in order to determine the appropriate regulatory mechanism for the industry. Mr. Brausch agreed to keep the IRP informed about the department's comprehensive evaluation of metal shredding facilities and waste activities as well as regulations development.

Mr. Brausch said DTSC's hazardous waste manifest/tracking system is fully functional and one of the most robust data systems of its type nationwide.

Director Lee added that there have been requests to present a wider variety of information in more flexible formats, but there are some constraints on DTSC's ability to do that. The department is required to use US EPA's standardized manifest. US EPA is in the process of revamping its paper, document-chain-of-custody system with an electronic system, and DTSC is waiting for US EPA to complete that work before redesigning its hazardous waste tracking system. US EPA has said it should complete that work in the fall-winter of 2018.

Panel Member Campbell said her concern is the people who are not going through the system. Director Lee responded that DTSC has a current initiative that pertains to transporters of undocumented hazardous waste. DTSC is aware of the problem and looks for it. The CUPAs also have an important role in identifying unlicensed operators. Mr. Brausch added that if DTSC visits a business, and the business cannot produce a manifest, that has forensic value.

Mr. Brausch said the biennial report for generators and facilities that treat, store, or dispose of Resource Conservation and Recovery Act (RCRA) hazardous waste is an EPA-mandated report. The report on their hazardous waste activities is waived for exported waste because the same information is required in an annual report.

Mr. Brausch said all of the planned activities for data management goals from the US EPA/Cal DTSC 2015-2017 RCRA Grant Work Plan for January 1, 2016 through March 31, 2016 were completed. He also said DTSC complied with two April 11, 2016 CalEPA Issue One recommendations regarding handler notification data management for hazardous waste.

Director Lee said she can't guarantee that CUPAs will enter 90 percent of all Large Quality Generators in their jurisdictions by September 2016 as agreed to by the CUPA Forum Board, CalEPA, and US EPA at the 2015 CUPA Conference Executive Leadership Meeting. It is CalEPA's role to oversee CUPA performance, not DTSC's. DTSC provides expertise to CalEPA, but CalEPA sets up performance standards and supervises the CUPA evaluation. DTSC funding and staff that support this CalEPA oversight function are separate from the funding and DTSC staff members who administer the DTSC CUPA for Trinity and Imperial counties.

Director Lee said DTSC has no tools to govern what the Los Angeles City CUPA does.

Vice Chair Vizzier said he believed the Los Angeles City CUPA to be outside of the Panel's jurisdiction.

Ms. Barnes said the core purpose of the DTSC is to look at DTSC programs. The technical assistance that DTSC provides CalEPA would be within the Panel's jurisdiction.

Chair Kracov expressed concern that the Office of Criminal Investigations (OCI) Caselog Data Report for 2014, 2015, and first quarter of 2016 shows only two cases handled administratively, six civil referrals, and five criminal referrals. Director Lee pointed out that if there were 83 cases opened in a particular year, as was the case in 2016, that does not mean there were 83 known violations. There was only a suspicion of illegal activity, and that suspicion must be investigated. Criminal noncompliance is not common, but "you still need a police force."

Chair Kracov asked Mr. Rohlfes to get information from DSTC on the funds the department budgets for payments to the Attorney General's Office for prosecutions every year.

Keith Kihara, chief of the DTSC Enforcement and Emergency Response Division (EERD), pointed out that inspection frequencies of permitted facilities are not dictated by statute or regulations. They are largely driven by grant commitments. DTSC is probably close to 100 percent compliance with those commitments. Director Lee added that DTSC is currently looking at whether the current inspection frequencies are warranted.

In response to a question from Chair Kracov about whether DTSC is happy with initiating only five enforcement actions within 240 days in 2015 as indicated on Attachment One of the information it provided the IRP on Enforcement and Emergency Response Division Compliance: CY 2014-April 1, 2016, Director Lee said DTSC is currently focused on doing better than that.

In response to a question from Chair Kracov about why there were only three enforcement settlements on Attachment Two of the information DTSC provided the IRP on EERD Compliance: CY 2014-April 1, 2016, Director Lee said she encouraged the IRP to compare this number with the number of Class One Violations. Mr. Kihara added that Class Two Violations typically do not result in enforcement settlements and Minor Violations never do. Director Lee added that there could be corrective action in the case of Class Two violations.

Director Lee explained that DTSC can't guarantee it will notify complainants of complaint status or outcome 100 percent of the time. Some complaints are anonymous, for example.

Mr. Kihara explained that complaints are tracked by a new CalEPA online system. DTSC's complaint coordinators take the complaints from the CalEPA system and put them in the department's EnviroStor system. An initial email confirmation message with the agency assignment information is sent to the person who made the complaint. This information includes the names of the DTSC complaint coordinators. A second email message is sent 15 days after the complaint was filed. The second message provides the name of the agency the department referred the complaint to if the department made a referral to another agency, such as a CUPA. The system allows the complainant to indicate if he or she does not want follow-up.

Chair Kracov said the new CalEPA complaint tracking system is a new innovation that the IRP should highlight and discuss how it is working at some point.

Director Lee said the DTSC laboratories are among the most highly regarded of their kind in the nation. She invited the IRP to take a lab tour around the month of September and suggested that focused discussion on the department's labs occur then.

Mr. Kihara said a Summary of Violation (SOV) can be issued on the spot. SOVs put the facility on notice of a violation, suggest corrective action, and identify a deadline for corrective action. In the case of Class 2 violations, if the facility misses a deadline for corrective action, the facility becomes a good candidate for enforcement. Director Lee added that sometimes samples have to be taken to determine if a violation occurred, and in those cases the SOV is not issued on the spot.

Mr. Kihara said that DTSC only issued two No Formal Enforcement letters in the period between January 1, 2014 and April 1, 2016. No Formal Enforcement letters are issued when a Class 1 violation is subsequently determined to be less serious than originally thought. Such violations are typically downgraded to a Class 2 violation.

Mr. Kihara said inspectors make a request of DTSC's Financial Assurances Group to verify the financial assurances mechanism in the case of comprehensive inspections. The cost estimate is reviewed every five years.

Director Lee said EERD inspectors make sure that facilities required to monitor groundwater are submitting groundwater data.

Mr. Kihara said DTSC does not pre-announce inspections, with the exception of certain federal facilities with high security.

Chair Kracov adjourned the meeting for a break at 3:30 p.m. and reconvened it at 4 p.m.

Director Lee said she would be unhappy to see OCI taken out of the department and given to CalEPA. DTSC works with CalEPA and other CalEPA boards and departments on cross-media enforcement, and the OCI unit has contributed to some very important cases statewide. Director Lee said she did not know why DTSC was the only CalEPA board or department to have its own criminal investigations unit.

Panel Member Campbell said she believed that having its own criminal investigations unit gave DTSC more teeth.

Vice Chair Vizzier said the real question is whether investigators are paid enough.

Mr. Pang said the Metal Recycling Initiative focuses on unpermitted as well as permitted facilities. Director Lee said that 42 metal recycling inspections over 18 months may not sound like a lot, but the inspections include significant preparatory and follow-up work.

Mr. Kihara said DTSC won't be able to determine the results of the Transportation Enforcement Initiative until July 2017.

Director Lee said the Governor's Office has not taken a position on AB 1858 yet.

Director Lee said metal recycling inspections are taking place in Pomona, as requested by the Center for Community Action and Environmental Justice (CCA EJ). Results of the inspections have not been made public yet.

Mr. Kihara said DTSC has a grant agreement with Cal Recycle to do e-waste inspections at certain frequencies. It conducted 132 inspections of recyclers and collectors in 2014, 143 in 2015, and 45 during the first quarter of 2016.

Mr. Kihara said DTSC is in the process of evaluating the enforcement performances, strengths, and needs of the department's branch offices.

Mr. Kihara said he holds weekly conference calls with branch chiefs and monthly face-to-face meetings with them. He meets with his complete supervisory team every two months.

Director Lee said penalty authority for administrative violations is in statute. The maximum fine is \$25,000 per violation, per day. Mr. Kihara explained that regulations provide a methodology for calculating fines based on gravity and extent of violation, up to the \$25,000. The penalties have not changed since the statute was adopted.

Chair Kracov asked Director Lee to give the IRP the statutory authority for the penalties.

Director Lee illustrated the training that DTSC supervisors receive by calling the IRP's attention to a cart with training manuals on it. Mr. Kihara said all staff members are evaluated with an annual performance appraisal. He said DTSC does not require supervisors to be evaluated by the staff members they manage. DTSC Chief Deputy Francesca Negri summarized the statutorily-required training that is required of supervisors and discussed plans for future department training and employee management improvements.

Director Lee said DTSC does not determine the level of compensation for positions. This is done by Cal HR.

In response to a question from Chair Kracov, Mr. Pang said compensation is a challenge for OCI because state investigators get paid less than regular police officers.

Director Lee said OCI and EERD staff levels declined sharply during the recession, but they are recovering. They were higher in 2008 than they are now.

In response to a request from Chair Kracov, Director Lee said she could provide the IRP with OCI and EERD staff levels in 2008 compared to the present.

Director Lee said DTSC is currently assessing what it is capable of doing with current staff. That will become the benchmark for determining how many staff members will be needed in the future, depending on how many inspections are desired.

Director Lee mentioned that there are significant hurdles to filling OCI/EERS positions. There are extensive background checks that can take six months to a year to complete.

Director Lee said only one employment practice grievance was received from OCI/EERD staff during 2014, 2015, and the first quarter of 2016.

Director Lee said that the Office of Civil Rights investigation on the hostile work environment complaints by "environmental justice scientists" is confidential information.

Director Lee and Mr. Kihara said that permitting and enforcement staff members are working well together and much better than previously.

Director Lee said DTSC would have an Improving Enforcement Performance Initiative Workplan for IRP review by January 1, 2017, as previously promised.

Director Lee said that EnviroStor is an older platform, but the DTSC Executive Team believes that it would be prudent for the department to complete the Enforcement Performance Initiative Workplan before upgrading it.

Director Lee said work on the Violation Scoring Procedure (VSP) pre-dated AB 1075. The latter is very well defined and probably doesn't need additional regulations. The VSP is not inconsistent with AB 1075, but does not implement it. It is more nuanced than AB 1075 and will be more useful. DTSC has not made decisions on whether the VSP should include air and water violations. DTSC doesn't have enforcement authority when it comes to air and water, but it may be informative to include

and give a more robust picture of overall compliance. DTSC is looking to have a VSP regulation proposal by the end of 2016.

6. General Public Comment, Continued

Liza Tucker of Consumer Watchdog said that the seven biggest metal shredders have been exempt from following the rules of all other metal shredders and auto dismantlers. They are not obligated to properly dispose of their hazardous waste and instead take it to cheaper municipal landfills. She asked why the state has been foregoing hundreds of millions of dollars in potential fees for decades, why the state has been allowing the fluff to spill from trucks that are inadequately equipped to take it to landfills, why the state allows landfills to use it for daily cover, and why DTSC created an uneven playing field for businesses. She said that if California needs more hazardous waste facilities to accommodate this waste stream, the state should admit it.

13. IRP Reporting Requirements

Chair Kracov briefly discussed the June 6, 2016 tracking report on the status of IRP information requests.

The Panel discussed the draft survey to the IRP contact list and agreed to instruct support staff to send it out as submitted.

Vice Chair Vizzier agreed to work with Mr. Rohlfes on the first draft of the 90-day report that is due on July 26.

Panel Members suggested that the report address the following:

- Put inspection frequency in statutes
- Address high vacancy levels in OCI/EERD
- Require Inspections in 65 days or timely letter to explain if the department needs more time
- Look into whether penalty authority is sufficient
- Provide reasonable metrics
- Support AB 1858
- Include air and water violations in VSP?
- Make recommendation on multi-media enforcement approach
- Address CUPA evaluations

14. Future Meeting Schedule and Agenda Items

The Panel decided to hold its next meeting on July 13, 2017 in Sacramento.

17. Adjournment

Motion: Adjourn meeting. Panel member Campbell moved. Vice Chair Vizzier seconded. The motion carried unanimously.

Chair Kracov adjourned the meeting at 5:30 p.m.