

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 March 9, 2016

1. Call to Order

Chair Gideon Kracov called the meeting to order at 10:04 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.

2. Welcome and Introductions

Chair Kracov introduced himself and asked the Panel members, Deputy Attorney General Deborah Barnes, and Panel support staff members, Larry Rohlfes and Erik Erreca, to introduce themselves. Chair Kracov led the Panel in the Pledge of Allegiance.

3. Announcements

Chair Kracov announced that a translator, Carlos Díaz de León, was available for Spanish-speaking members of the public, and he asked Mr. Díaz de León to introduce himself in Spanish. Chair Kracov noted that there would be public comment under the General Public Comment agenda item and all other agenda items. He also announced that the meeting was webcast on the DTSC website.

4. Agenda Review

Chair Kracov reviewed the meeting agenda. He said there probably would be no Closed Session and that the meeting would likely adjourn around 5:30 p.m.

5. Minutes of December 8-9, 2015, December 18, 2015, January 13-14, 2016, and February 10, 2015 Meetings

Mr. Rohlfes said the minutes of the January 13-14, 2016 meeting were not yet ready.

Panel Member Campbell said the December 18, 2015 minutes may not have captured all of the public comments during the afternoon of the meeting, as there was no webcast for that meeting. Panel members agreed to hold the December 18, 2015 minutes open until the next meeting.

Chair Kracov said the December 9, 2015 minutes did not adequately capture his conflict of interest disclosure.

Motion: Approve the December 8, 2015 minutes. Vice Chair Vizzier moved. Panel Member Campbell seconded. The motion carried unanimously.

Motion: Approve the December 9, 2015 minutes as amended with a change to the conflict of interest disclosure. Vice Chair Vizzier moved. Panel Member Campbell seconded. The motion carried unanimously.

Motion: Approve the February 10, 2016 minutes. Vice Chair Vizzier moved. Panel Member Campbell seconded. The motion carried unanimously.

6. General Public Comment

Chair Kracov announced a five-minute limit for comments.

Ingrid Brostrom of the Center on Race, Poverty, and the Environment alerted the Panel about what she said was a growing concern about the ability of the Panel to get its job done. The Panel has a limited existence, it is small, and the nature of its work is highly technical. There also is concern about the IRP's lack of independence. She urged the Panel to push against an agency bias and not overly rely on DTSC for technical expertise. The Panel should rely on community support and involvement as well. She added that she sees a need for a community oversight committee for the DTSC.

Vice Chair Vizzier responded that some of Ms. Brostrom's suggestions are out of the Panel's scope.

Chair Kracov asked Ms. Brostrom if she had suggestions on a structural place within the Panel for community involvement.

Ms. Brostrom responded that she would like a more formalized response to The People's Senate recommendations. She also said the Panel should look to others besides DTSC to give presentations and that the IRP should be hearing about site-specific issues and following through on identified problems.

Panel Member Campbell responded that the Panel devoted almost an entire meeting in January to a site-specific issue. However, the Exide issue will take years to address and the Panel is only in existence for a few months.

Ms. Brostrom responded that she has specific recommendations that could be completed in just a few months.

Vice Chair Vizzier suggested that the permitted facilities and people responsible for cleanup be asked to give presentations, along with The People's Senate. They are also experts.

Public comments via email:

Monika Shankar submitted a February 12, 2016 news release about a letter delivered to DTSC Director Barbara Lee by the Jordan Downs Environmental Justice Coalition demanding the reversal of a No Further Action determination issued by DTSC following a series of environmental tests. Ms. Shankar stated that the coalition believes racist attitudes at DTSC impede the health of residents and environmental justice in the Jordan Downs neighborhood of Watts.

Xonia Villanueva of Concerned Neighbors of Wildomar stated that she was concerned about the IRP's ability to reform the DTSC when the Panel gets much of its information from the department. She said that while U.S. EPA generally agreed with the DTSC investigation in Wildomar, the agency made several findings that are of concern for

the health of the Autumnwood Community and raise concerns about the quality and integrity of DTSC's work. DTSC staff members assigned to the investigation included William Bosan and Theo Johnson, whose emails were recently exposed and, she asserted, show contempt for the community. She also said she was troubled by a statement by DTSC Director Lee that there is no indication that the technical work done by those individuals was problematic.

Denise Duffield of Physicians for Social Responsibility-Los Angeles expressed concerns about the IRP's capacity to impact meaningful change. Panel proceedings have largely been comprised of presentations from DTSC and the industry. The IRP must find a way to give communities equal weight.

Chair Kracov noted information in the meeting packet on supplemental testing at Riverside Agriculture Park and said that anyone who looks at that information would be troubled.

Cindi Gortner of the Rocketdyne Cleanup Coalition said she lives near the Santa Susana Field Lab in Los Angeles and has met several times with DTSC representatives during the past six years. As a result of these experiences, she has concluded that DTSC is controlled by the polluter and does not have the best interests of the community as its priority. She said it is imperative that Director Lee respond to the site-specific concerns outlined by The People's Senate.

7. Chair's Report

Chair Kracov called attention to Gov. Brown's \$176.6 million budget augmentation for the Exide Technologies cleanup, which he said was a victory for DTSC. He noted that the proposal would waive environmental review to speed up the cleanup and that community advocates have objected to the exemption.

He also reviewed recent correspondence to the Panel.

8. Fi\$cal Billing System Transition

A Power Point version of the DTSC presentation is available on the IRP website at: https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/upload/DTSC_FI-Cal_Presentation_3_9_16.pdf.

DTSC Chief Deputy Director Francesca Negri gave an update on Fi\$cal implementation. She said that DTSC is successfully working with Fi\$cal, the Financial Information System for California, on transition to the new system. Initially there were challenges in issuing invoices, but DTSC and Fi\$cal have collaborated closely to address all billing issues. The department has issued all of its federal grant invoices and 85 percent of its cost recovery invoices. It will be current in a few weeks.

Chair Kracov offered his congratulations on making the complicated transition and said this appears to be one of the department's successes. He asked if there are types of invoices other than cost recovery invoices.

Ms. Negri responded that there are other types, but that the bulk are cost recovery and federal grant invoices.

Chair Kracov asked if Fi\$cal will help the department get a handle on cost recovery.

Ms. Negri responded that DTSC has been unable to collect on about ten percent of its cost recovery and that this has been an ongoing problem. She said she expects improvements and that the Fi\$cal tools will help.

Chair Kracov asked Ms. Negri to update the Panel in a few months about how collections are going and whether the regulated community considers the process to be fair.

9. DTSC Permitting Program

A Power Point version of the DTSC presentation is available on the IRP website at https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/upload/DTSC_Permitting_IRP_3_9_2016_Final.pdf.

Director Lee introduced the presentation. She said that Gov. Brown, in addition to augmenting the DTSC budget for the Exide Technologies cleanup, directed the department to do some important work with lead batteries. He charged DTSC with examining the handling and recycling of lead batteries as a pilot project in the department's Hazardous Reduction Initiative. In addition, Gov. Brown directed the department to evaluate whether lead-acid batteries are a Priority 1 Product for the department's Safe Consumer Products Program. If deemed a Priority 1 Product, this program would require the manufacturers to do an analysis of the lifecycle of the product and examine if alternatives can be incorporated into the manufacture of the product to make it safer. Director Lee also mentioned findings of a recent DTSC Safer Consumer Products Program study on the presence of flame retardants in human breast milk. The study showed a 39 percent decline of polybrominated diphenyl ethers (PBDEs) since a legislative ban on the chemicals took effect in 2006. The ban was partly inspired by an earlier DTSC study on the chemicals. DTSC also has done studies on the positive results of the ban with respect to hyperthyroidism in household cats. She said the studies underscore the importance of product reformulation.

DTSC Hazardous Waste Management Program Deputy Director Elise Rothschild continued the presentation. She said DTSC expects to eliminate the backlog within 2 years, issue a minimum of eight permit decisions a year, and make progress toward the goal of issuing 90 percent of decisions in two years. These decisions will be made in a more transparent, consistent, and structured manner.

DTSC Special Assistant for Program Review Terri Hardy next presented an overview of the Permitting Enhancement Work Plan. DTSC is on track to complete all of the 86 work plan actions items by July 1, 2016. DTSC also has added some work actions to the original list. As a result of the reform effort, there is more intra-departmental coordination, and staff became more engaged and took more ownership of the work. The process is more efficient now.

Chair Kracov asked if Ms. Hardy had a list of the additional action items.

Ms. Hardy responded that she could provide the IRP with a list.

DTSC Chief of Permitting, Hazardous Waste Management Program, Rizgar Ghazi next covered permitting work flow improvements. The new process is more focused on the pre-application phase and has more overall clarity.

Chair Kracov adjourned the meeting for a break at 12 noon. He reconvened the meeting at 12:10 p.m.

DTSC Senior Hazardous Substances Engineer Wayne Lorentzen next covered Lean Six Sigma. He explained that Lean Six Sigma is a management methodology pioneered by Toyota that relies on collaborative team effort to improve performance by addressing process-based issues that cause delays. There are five steps: define problem, collect data, analyze data, improve the process by implementing solutions, and control process to monitor solutions. He pointed out that the most significant areas for improvement as a result of Lean Six Sigma were often hidden in processes that staff initially was not aware of. He also said that because Lean Six Sigma is a data-driven process, approvals for changes often become easier. DTSC applied the methodology to technical review time, permit process time, and notices of deficiency (NODs). The goal is to reduce NODs by 50 percent.

Chair Kracov stated that he has heard that the department doesn't take NOD limits seriously and allows hazardous waste facilities to accumulate serial NODs.

Director Lee responded that DTSC is aware that there are long-standing concerns with respect to the number of NODs that the department has issued to permit holders. DTSC's goal is to provide clear criteria for permit denial, revocation, or suspension. To accomplish that, DTSC first needs clear standards that can be enforced. DTSC has not always been consistent, and the criteria have not always been clear to the regulated entities or the nearby communities. It is a process to establish the criteria, and it can't happen overnight, but the department is working on it.

Chair Kracov said there is some concern in the environmental community that in trying to reduce the NODs, the department will become too lenient.

Director Lee said she has heard the general concern that in the attempt to make the process more efficient, the process may become too lenient. Her goal is to establish clear and certain criteria so that everyone can have certainty going forward about how the department will be looking at permit applications and what actions will be taken in response to incomplete applications or noncompliance.

Vice Chair Vizzier said NOD and Notice of Violation are two very different things.

Director Lee responded that she was speaking to the general concern about making the process more efficient and simply was using NODs as an example. Focusing on NODs does not undermine the effectiveness of the process. The opposite is true. The NOD is the critical first step. Everyone thought they knew where the problems were in the permitting process, but it turns out the problems were in places that were not expected, such as the way NODs were approached. Everyone—staff, the regulated community, and anyone who is interested—needs to know up front what is needed.

Panel Member Campbell asked if written summaries of the Lean Six Sigma phases as applied to DTSC permitting could be provided. Mr. Lorentzen said they could.

DTSC Senior Hazardous Substances Engineer Tamara Zielinski spoke next. She reviewed the work plan that she coordinated for the Permitting Division with the goal of creating a strong cost estimate and financial assurance program for hazardous waste facility closure and post-closure, as well as an on-going program to review cost estimates and financial assurances on a five-year cycle.

Panel Member Campbell asked what happens if an applicant is in bankruptcy.

Mr. Ghazi responded that DTSC would not issue a permit unless financial assurances are in place.

DTSC Legal Interim Counsel Frances McChesney clarified that if a cost estimate isn't accurate, the facility is still obligated to pay closure costs. A bankruptcy would be a problem, however.

Chair Kracov asked if financial assurances for corrective action are included in assurances for closure or post-closure.

Ms. McChesney responded that they are separate.

Chair Kracov said the Panel has asked how many of the 118 permitted hazardous waste facilities have known contamination and require corrective action. He said that the Panel has asked for this information, but hasn't received it yet. He asked why corrective action cost estimates and financial assurances aren't timed to take place with permit issuance.

Ms. McChesney responded that when DTSC issues a permit, it isn't expecting a problem. Permit holders must monitor for a release. Only when a problem is discovered can the costs of corrective action be determined.

Chair Kracov responded that the vast majority of contaminated sites have been in the DTSC system for many years. If DTSC hasn't adequately characterized the sites by now, it is taking too long. He said the Panel needs to get to the bottom of the facts on this. The Panel can research this on EnviroStor on its own, but it would appreciate the help of the department. If there are financial assurances for corrective action, the Panel wants to see them.

Chair Kracov asked Mr. Rohlfes to ask DTSC for a copy of its work plan on financial assurances.

Chair Kracov asked clarifying questions about the DTSC backlog.

Ms. McChesney and Mr. Ghazi said that the presentation tables were intended to show that the backlog was 40 in 2014 and 21 currently. Director Lee further clarified that DTSC has almost completed review of the 40 facilities that were on backlog in 2014. By 2019, DTSC will have reviewed all permitted facilities. Going forward, the department plans to review all facilities on a five-year cycle. This is not mandated by law, but it is a DTSC goal.

Chair Kracov adjourned the meeting for a lunch break at 1:30 p.m. and reconvened the meeting at 2:08 p.m.

DTSC Office of Communications Deputy Director Jim Marxen next reviewed environmental justice (EJ) and public participation as they relate to permitting. As a result of two independent reviews in 2013 and 2014 that found limitations in the DTSC public participation process, DTSC has been working on several actions to inform the public about permitting actions and to identify and engage communities near hazardous waste facilities earlier in the permitting process. He pointed out that the law doesn't require DTSC to involve the public early in the permitting process. For example, it does not require the department to organize a pre-application meeting with the public, although it does require the permit applicant to do so. The Permitting Enhancement Work Plan, however, calls for DTSC to organize a meeting. The plan also calls for enhanced review procedures in vulnerable communities with multiple sources of pollution. In addition to the Permitting Enhancement Work Plan, DTSC is working on Public participation modernization with University of California, Davis (UCD). UCD has recommended 27 actions and is organizing focus groups on how DTSC can improve its engagement process. The focus groups will make final recommendations in May of 2016. Meanwhile, DTSC is making other improvements, such as mailing list and social media improvements.

Chair Kracov asked Mr. Marxen how he responds to the suggestion that CalEnviroScreen should be integrated into the permitting process and the rankings used in making decisions.

Mr. Marxen responded that DTSC will be using CalEnviroScreen in the assessment process.

Chair Kracov asked if county waste management plans should be looked at to address the impacts of hazardous waste facilities on disadvantaged communities.

Director Lee responded that this is a complicated subject and one for a future time to examine. She also commented that CalEnviroScreen was not intended by CalEPA to be used as a tool in permitting decisions and that she didn't think the state has a legal basis to make permitting decisions based on EJ.

DTSC Office of Legislation, Legislative Director Josh Tooker and Hazardous Waste Management Program, Chief of Enforcement and Emergency Response Division, Keith Kihara next reviewed the draft violation scoring procedure (VSP). The goal of the draft VSP is to clarify how a facility's compliance history would be used as a basis for determining when violations support denial of a permit application or revocation of a permit. It would apply only to Class One violations. The scoring formulas have not been developed, but would deal with extent of harm and deviation. DTSC plans to move forward with the rulemaking process for VSP regulations in 2017.

Chair Kracov asked how the draft VSP fits in with the AB 1075 and SB 673, legislation signed into law last year. Mr. Tooker said DTSC was still in the process of evaluating those laws.

Public Comment:

Randal Friedman of Navy Region Southwest made a presentation to the IRP on “Department of Defense RCRA Part B Permitted Facilities: A Key Part of Our National Security Mission.” A Power Point version of the presentation is available on the IRP website at <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/upload/Navy-IRP-Brief-9Mar2016-Final-pict.pdf>.

Mr. Friedman made two overall observations: (1) the permitting process is long and arduous, regardless of compliance history, complexity of permit, or scope of the facility; and (2) there is insufficient transparency. The Navy operates seven RCRA part B permitted facilities. One of them, the North Island Mixed Waste Storage Facility, had to wait seven years for a permit application. It had no violations in the last 10 years. It never had a Class One Violation. It had one NOD. The other facility, China Lake, has a renewal application that is still pending after five years. It hasn't had an NOD. There has been no action since CEQA compliance was completed in September. A public hearing, the last step in the process, has not been scheduled. He noted that the public can see a NOD in the EnviroStor, but it can't see the responses. All steps should be available for public review. CEQA documents also should be available to the public. He concluded by saying that the Navy agrees that permitting process needs reform. DTSC should populate EnviroStor with all documents and account for delays.

Michael Huber of Navy Region Southwest said he was pleased with what he has heard from DTSC during this IRP meeting.

Vice Chair Vizzier asked if there was a legal or technical reason for not posting all documents.

Mr. Ghazi responded that DTSC typically does not post draft documents.

Mr. Friedman responded that the Navy does not view many of its responses as draft documents. He said the Navy is not suggesting that every draft be posted. However, there are major milestones that should be included.

Chair Kracov asked the Navy representatives why they believe permitting takes so long.

Mr. Friedman said he doesn't believe the reasons are nefarious.

Ms. Brostrom said DTSC's Permitting Enhancement Work Plan is very process oriented and that she would like to see a difference in outcomes, such as an actual speeding up of the process and a reduction in hazardous waste facilities disproportionately affecting people of color. She said that the Phibro-Tech Inc. facility in Santa Fe Springs, which has been operating on an expired permit for decades, is a good example of the issues she has with DTSC. She said that there are statutes that DTSC has chosen not to follow, and one of them is Health and Safety Code Section 25200.8., which addresses applicants for a hazardous waste facilities permit who do not respond or do not respond properly to three or more NODs. She said she likes the VSP because it would take away some discretion, but she is nervous about the qualitative descriptions of some of the violations. Finally, she asserted that DTSC has a responsibility under Government Code 11135 to take into account disproportional impacts and civil rights when making permitting decisions.

Chair Kracov asked Ms. Brostrom how the department can make permitting decisions based on EJ factors.

Ms. Brostrom responded that SB 673 is intended to address this issue. She also mentioned the need for a hazardous waste management plans. The state's counties do not have the expertise to administer local plans, and therefore state agency coordination is needed. She said she disagreed with DTSC Director Lee that CalEnviroScreen should not

be used to make permitting decisions. Finally, she noted that DTSC has two conflicting goals: maintaining hazardous waste capacity and regulating the hazardous waste facilities.

Chair Kracov asked Ms. Brostrom to provide the Panel with permitting performance metrics for its April report.

Vice Chair Vizzier asked Ms. Brostrom for suggested measurable outcomes for permitting.

Ms. Villanueva stated that she was happy to see Gov. Brown's proposal for additional funding for the Exide cleanup.

10. Organizational, Operational, and Administrative Matters

The Panel discussed the third draft of the IRP Work Plan for 2016-17 and made the following suggestions for a fourth draft: remove dates of future meetings, change the words "expenses to date" to "budget," add review of budget change proposals for the May Revise to 2016 and 2017 tasks, and delete mention of advising DTSC on instituting quality government programs as a December 2017 task.

Motion: Add Consumer Products Program to the Source Reduction Program section of the Work Plan. Vice Chair Vizzier moved to approve the motion. Panel Member Campbell seconded the motion. The motion carried unanimously.

Motion: Direct staff to make the Panel-suggested changes to the Work Plan and post the revised version on the IRP web site. Panel Member Campbell moved to approve the motion. Vice Chair Vizzier seconded the motion. The motion carried unanimously.

The Panel discussed the third draft of the IRP Authority, Composition, and Meeting Procedures document and made the following suggestions for a fourth draft: add DTSC to the name of the document, allow for two-day meetings in the Meeting Dates section, make it clear that IRP can depart from normal meeting schedule in Meeting Dates section, change the word "writings" to "documents" in the Meeting Reports section, ask the public to submit material to the Panel two business days before a meeting instead of five days for distribution to Panel and posting on website, add staff report to the Meeting Content section, establish a five-minute limit for public comments via email, ask Ms. Barnes to review the Meeting Content section, and state that staff "will endeavor" to publish the minutes of a previous meeting two days before the next public meeting.

Motion: Direct staff to make the Panel-suggested changes to the IRP Authority, Composition, and Meeting Procedures and post the revised version on the IRP web site. Panel Member Campbell moved to approve the motion. Vice Chair Vizzier seconded the motion. The motion carried unanimously.

Chair Kracov asked staff to provide the Panel with future updated versions of the list of IRP information requests to DTSC that DTSC IRP Liaison Chris Law provided for this meeting.

11. IRP Reporting Requirements

The Panel discussed the draft Site Mitigation narrative, recommendations, and data requests for possible inclusion in the Health & Safety Code Section 57014(f) report that is due on April 27.

Public comment:

Ms. Brostrom said that what is missing from the Site Mitigation draft is the timing. Decades can go by between discovery and adoption of an implementation plan or between an investigation of contamination and notification to

the community. Suspected contamination should trigger immediate notification to the public. The law requires notification, but she surmised that DTSC would probably say that more investigations may be needed prior to notification. She would like to know why cleanup standards are different from community to community. Relying on DTSC to interpret its own site mitigation data is a big problem. The public can't just rely on the department to interpret their data. Therefore, the public needs more than a presentation. It needs raw data in addition to a presentation. Raw sample information should be verified. The Panel should reconsider the site mitigation recommendations in The People's Senate report.

Panel Member Campbell responded that The People's Senate recommendations were a bit general.

Ms. Brostrom responded that she would be glad to discuss them before the Panel again and be specific.

Panel members agreed to recommend to the Legislature that it support Gov. Brown's proposed \$176.6 million appropriation to fund expedited and expanded testing and cleanup of residential properties, schools, daycare centers, and parks within a 1.7-mile radius of the former Exide Technologies facility in Vernon.

Panel members agreed to recommend to the governor and Legislature that they support SB 820 (Hertzberg), pending legislation that would remove the January 1, 2017 sunset for the California Land Reuse and Revitalization Act. The act qualifies an innocent landowner, bona fide purchaser, or contiguous property owner for immunity from liability from certain state statutory and common laws for pollution conditions caused by a release or threatened release of a hazardous material if certain conditions are met, including entering into an agreement for a specified site assessment and response plan.

Panel members agreed to recommend that DTSC convene relevant regulatory agencies and publish a strategy by January 1, 2017 on how, in appropriate cases, to require fence line/aerial deposition monitoring during site mitigation in situations where there are adjacent sensitive receptors.

Panel members agreed to recommend that DTSC publish on its website an easy-to-read matrix of clean-up standards and sampling levels to enhance transparency of site mitigation at particular sites that are subject to public concern and inquiry.

Panel members agreed to recommend that DTSC provide raw data for site mitigation to the public upon request, once the data are verified.

Panel members agreed to ask DTSC to provide IRP with an oral presentation on disposal requirements for radioactive waste that is above background levels by the February 2017 meeting.

Panel members agreed to ask DTSC to provide IRP with a report on how it uses "averaging" to determine site mitigation standards as well as federal guidance on averaging by January 1, 2017.

Panel members agreed to ask DTSC to provide IRP with an oral presentation by the February 2017 meeting on results of follow-up sampling at Riverside Agricultural Park in 2015 and how it happened that the department concluded that 66 acres were safe to build residential homes in 2014.

Panel members agreed to ask DTSC to provide the Panel with an update on the status of the Exide Technologies facility closure and cleanup, including funding for the efforts by January 1, 2017.

The Panel decided to formally vote on these recommendations as well as the Site Mitigation narrative at the April 7 meeting.

12. Future Meeting Schedule and Agenda Items

Chair Kracov said the next meeting will take place on April 6-7 in Kern County. There will be a site visit on April 6 at the Kettleman Hills Facility. The IRP will meet the next day in Bakersfield, and that meeting will run from 9 a.m. to 6 p.m.

13. Closed Session

There was no Closed Session.

14. Reconvene and Report Out on Closed Session

There was no need to report on Closed Session.

15. Adjournment

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

Chair Kracov adjourned the meeting at 5:02 p.m.