



Department of Toxic Substances Control



Winston H. Hickox
Agency Secretary
California Environmental
Protection Agency

Edwin F. Lowry, Director
1001 "I" Street; 25th Floor
P.O. Box 806
Sacramento, California 95812-0806

Gray Davis
Governor

August 1, 2003

Mr. William Rostov
Staff Attorney
Communities For A Better Environment
1611 Telegraph Avenue, Suite 450
Oakland, California 94612

**RESPONSE TO APPEAL REQUEST REGARDING DOW CHEMICAL COMPANY,
BOILER AND INDUSTRIAL FURNACE PERMIT, PITTSBURG, CALIFORNIA, EPA ID
No: CAD 076 528 678**

Dear Mr. Rostov:

This letter is in reply to your letter dated April 21, 2003, wherein Communities for a Better Environment appealed the Department of Toxic Substances Control's (DTSC) decision to issue a permit to Dow Chemical Company in Pittsburg, California to continue to operate two Boiler and Industrial Furnaces. Your letter cited concerns regarding several areas of DTSC's California Environmental Quality Act (CEQA) — analysis.

An analysis of your April 21, 2003, letter indicates that you have submitted an appeal of the CEQA Initial Study and Negative Declaration. DTSC would like to inform you that there is no administrative process for appealing CEQA analyses or decisions. The mechanism to address CEQA concerns consists of the following judicial process:

In accordance with Public Resources Code section 21167, subdivisions (b), (c), (d) and (e) the filing of a Notice of Determination, anticipated by about the end of the month, begins a 30-day statute of limitations for challenging DTSC's decision under CEQA. When a lawsuit is filed against a public agency for failing to comply with CEQA, the person filing suit must also, within ten business days, file a request with the agency requesting preparation of the administrative record. The challenger in the action is responsible for the cost of preparation of the record. The costs can include all necessary and reasonable charges for agency staff time spent in record compilation and preparation. See Public Resources Code section 21167.6, subdivision (a).

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.dtsc.ca.gov.*

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DTSC believes that it has fully complied with the requirements of CEQA and Title VI. Our analysis indicated that an Environmental Impact Report is not required for this project. DTSC's Response to Comments document provided the supporting information for our decision to issue a permit for the continued operation of the Boiler and Industrial Furnaces.

Accordingly, the permit number 01-NC-08 issued to The Dow Chemical Company on April 28, 2003, is fully in effect with an expiration date of April 27, 2013. DTSC remains committed to complying with CEQA and environmental justice requirements. We believe we have done so in this matter. If you have any questions on this matter, please contact Mr. Mohinder Sandhu, Chief, Standardized Permits and Corrective Action Branch at (510) 540-3974.

Sincerely,



Watson Gin, P.E.
Deputy Director
Hazardous Waste Management Program

cc: Marvin Louie
BIF Project Manager
The Dow Chemical Company
P.O. Box 1398
Pittsburg, California 94565

Barbara Coler, Chief
Permitting and Corrective Action Division
Hazardous Waste Management Program
Department of Toxic Substances Control
700 Heinz Avenue
Berkeley, California 94710

Mohinder S. Sandhu, Chief
Standardized Permits and Corrective Action Branch
Hazardous Waste Management Program
Department of Toxic Substances Control
700 Heinz Avenue
Berkeley, California 94710

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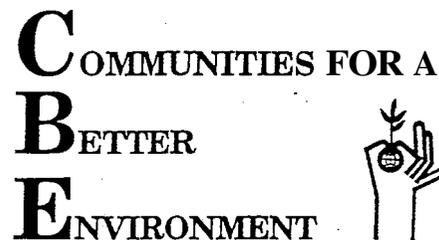
cc: Charlene Williams, Chief
Statewide Compliance Branch
Hazardous Waste Management Program
Department of Toxic Substances Control
700 Heinz Avenue
Berkeley, California 94710

Nancy Long
Office of Legal Counsel
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806

Guenther Moskat, Section Chief
Program Audits and Environmental Analysis
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806

April 21, 2003

Watson Gin, Deputy Director
Hazardous Waste Management Program
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806



RECEIVED BY:
Hazardous Waste Management

APR 24 2003

DEPARTMENT OF TOXIC
SUBSTANCES CONTROL

Dear Mr. Gin:

On behalf of its numerous members living in and around the City of Pittsburg, Communities for a Better Environment ("CBE") hereby appeals DTSC's decision to reissue without modifications and certify the Initial Study and Preliminary Negative Declaration, rather than prepare an environmental impact report (EIR) as required under the California Environmental Quality Act (CEQA), for the Dow Chemical Company (Dow) Boiler and Industrial Furnace (BIF) Permit in Pittsburg, California.

In the current project, DTSC is proposing to issue Dow a permit that would allow storage and incineration of hazardous waste. On this same site, Dow is also attempting to develop a new pesticide production operation to triple its current capacity for producing Sulfuryl Flouride. To make matters worse, the Dow site that is housing both projects is located within a mile of an earthquake fault line. In its comment letter dated November 8, 2002, to Waqar Ahmad of DTSC, CBE has presented substantial evidence of potentially significant environmental impacts generated by the BIF project related to air quality, geologic, hazardous materials as well as risks of upsets affecting public safety. Furthermore, CBE has documented that DTSC has failed to appropriately define and consider the potential for adverse cumulative impacts for this project in relation to other nearby projects. Other commenters on the Preliminary Negative Declaration have also raised legitimate concerns about potentially significant environmental justice impacts resulting from Dow's BIF project.

Despite these compelling facts, DTSC has inexplicably attempted to sidestep its environmental review responsibilities under CEQA. In September 2002, DTSC reissued without modifications and reopened for public review the Initial Study and Preliminary Negative Declaration (Dow BIF PND) which was prepared and appealed a year earlier. DTSC's "Response to Comments, Dow Chemical Company, Pittsburg, Hazardous Waste Facility Boiler and Industrial Furnace Permit and CEQA Negative Declaration" (Dow BIF Responses of September 20, 2002) did not fully respond to many of the potentially significant environmental impacts which had been identified concerning the 2001 Dow BIF PND. DTSC's "Second Response to Comments, Dow Chemical Company, Pittsburg, Hazardous Waste Facility Boiler and Industrial Furnace Permit and CEQA Negative Declaration" of March 19, 2003 (Dow BIF Second Responses) also failed to adequately respond to and address many of the potentially significant environmental impacts which were identified by CBE and others during the reopened public review period. DTSC has issued its "Notice of Final Permit Decision for Hazardous Waste Facility Permit, Boiler and Industrial Furnace, Dow Chemical Company, Pittsburg" (BIF NOD) with a decision date of March 21, 2003. In its decisions to certify the DOW BIF PND and issue the BIF NOD despite substantial evidence of potentially significant environmental impacts,

1611 Telegraph Avenue, Suite 450 • Oakland, CA 94612 • T (510) 302-0430 • F (510) 302-0437

In Southern California, 5610 Pacific Blvd., Suite 203 • Huntington Park, CA. 90255 • (323) 826-9771

DTSC has violated CEQA and demonstrated a disregard for the public's right to be fully informed and have adverse impacts that affect their health and environment addressed.

I. **A Full Environmental Impact Report Is required by CEQA, Which Mandates the Fullest Possible Protection of the Environment.**

California's courts have uniformly determined that CEQA must be interpreted to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors of Mono County* (1972) 8 Cal. 3d 247, 259. "CEQA was enacted to ensure that long-term protection of the environment is the guiding criterion in public decisions." Cal. Pub. Res. Code § 21001(d). Because of the centrality of the EIR to the entire CEQA process, CEQA establishes a very low threshold for its preparation, requiring an EIR whenever there is a "fair argument" that a proposed "project may cause significant [adverse] effects on the environment." *Quail Botanical Gardens v. Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Dunn-Edwards* (1992) 9 Cal. App. 4th 644, 654-55.

An EIR is required whenever contrary substantial evidence about a potential significant impact has been presented in the record, even if "substantial evidence was presented that the project would not have such impact." *Friends of "B" Street v. City of Hayward*, 106 Cal. App. 3d at 1003. In these circumstances, CEQA mandates that questions raised based on contradictory substantial evidence must be resolved by preparation of an EIR. See *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th at 1316; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, 29 Cal. App. 4th at 1607.

As codified in Cal. Pub. Res. Code § 21151 from CEQA case law precedents, preparation of an EIR is mandated "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impacts." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75; see also, *Friends of "B" Street v. City of Hayward* (1980) 106 Cal. App. 3d 988.

Appellants are not required to "prove" that there will be adverse impacts but must merely show that significant environmental impacts may occur. "In the CEQA context, substantial evidence is enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal. App. 3d 1337, 1348; see also CEQA Guidelines § 15384(a) (The substantial evidence threshold is met if there is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached"); *Laurel Heights I*, 47 Cal.3d at 393. The important factor in determining whether to prepare an EIR is whether it can be fairly argued that significant impacts may occur. *Quail Botanical*, 29 Cal.App.4th at 1601; *Dunn-Edwards*, 9 Cal.App.4th at 653. In other words, once a fair argument of a possible significant impact is established, "contrary evidence is not adequate to support a decision to dispense with an EIR." *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal. App. 4th, 144, 150-151, quoting from *Sierra Club v. Sonoma*, 6 Cal. App. 4th at 1317; see also, *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1001-1003.

Under Cal. Pub. Res. Code §§ 21080(d) and 21082.2(d), and California Code of Regulations (*CEQA Guidelines*) § 15064(f)(1), an EIR is required for any project whenever substantial evidence in the record supports a fair argument that significant impacts may result. Cal. Pub. Res. Code section 21151 "creates a **low threshold** requirement for initial preparation of

an EIR and reflects ‘a preference for resolving doubts in favor of environmental review when the question is whether **any** such review- is warranted.’ *Sierra Club v. Sonoma*, 6 Cal. App. 4th at 1316-1317 (emphasis added).

As described below, there is substantial evidence constituting much more than a fair argument that the BIF incinerator project may have significant adverse impacts. Therefore, DTSC was legally prohibited from issuing a negative declaration and should have prepared an EIR.

II. An EIR Is Required Because Substantial Evidence Supports A Fair Argument that the Dow BIF Project May Have a Significant Effect on the Environment.

Certification of the Dow BIF PND for Dow’s hazardous waste storage and incinerator project would violate the requirements of CEQA as codified in California Public Resources Code section 21000, *et. seq.* As discussed below, CEQA requires the preparation of an EIR for the Dow BIF project because CBE and others have presented substantial evidence supporting a fair argument of potentially significant environmental impacts resulting from this project.

In its BIF Second Responses identified as Responses to Comments 38D and 39, DTSC evinces a total lack of understanding of the fair argument standard which DTSC is legally required under CEQA to apply to any decision to prepare a negative declaration instead of an EIR. In its confused and legally inadequate Responses to Comments 38D and 39, DTSC asserts that CBE’s statements regarding the fair argument standard “relate to the City of Pittsburg local land use and CEQA processes.” Proceeding from such a fundamental misunderstanding of CEQA requirements, DTSC clearly failed to recognize that preparation of *an* EIR was mandated.

II. (A) DTSC Failed to Adequately Evaluate Potentially Adverse Air Quality Impacts.

1. DTSC Certified the Dow BIF PND Despite Substantial Evidence that NO_x Emissions from the Dow BIF Project May Constitute Significant Impacts.

The Dow BIF PND acknowledges that the project would generate substantial amounts of nitrogen oxides (NO_x), a criteria pollutant for which the Bay Area fails to attain federal and state *air* quality standards. DTSC concludes that the project’s NO_x contribution would be insignificant, apparently because the amount would be within the levels allowed under Dow’s existing BAAQMD permit and would be “quite small” as representing about one percent of the Bay Area daily total. A similarly dismissive approach is evident in DTSC’s Dow BIF Responses of September 20, 2002 and its Dow BIF Second Responses regarding air **quality** for *this* project.

California’s appellate courts have clearly determined that a project’s incremental contributions to existing adverse regional *air* quality conditions cannot be dismissively characterized. The appellate court in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 718 (“*Kings County*”) determined that the City of Hanford had improperly characterized a project’s small contribution of ozone precursors as insignificant despite serious ozone problems in the air basin. In *Communities for a Better Environment v. California Resources Agency* (2002) Cal. App. Lexis 4867 at 39, the appellate court cited *Kings County* and related cases, e.g., *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1024-

1025 and emphasized that “the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.”

The proposed project’s generation of NO_x represents one percent of the regional daily total for a criteria pollutant for which federal state standards have not been attained. This amount cannot be implicitly dismissed as *de minimis* and represents a potentially significant air quality impact, especially when considered in conjunction with Dow’s new pesticide production proposal on the same site.

In another document, the DTSC contradicts the above conclusion of “*de minimis*” NO_x emissions by stating that when a test burn of the incinerator took place, “SO₂ and NO_x were not tested for.” DTSC’s DOW BIF Response to Comments of September 20, 2002, Response to Comment 3, p.7. This is surprising given that NO_x emissions are a common result of the combustion process.

DTSC goes on to rely on limits to NO_x emissions from the incinerator units on permits issued under the Bay Area Air Quality Management District’s (BAAQMD) regulations. Unfortunately, the permitted level of emissions from a particular unit is not determinative of the “possible” level of emissions from that unit. Under CEQA, the measure of significance is not based on the permitted level of emissions, but the possible level of emissions from that unit, or the environmental impact that “may” occur due to the project. *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.* (1993) 6 Cal.4th 1112, 1123.

DTSC relies on evaluative tools the BAAQMD uses for permitting actions under a different statute, the federal Clean Air Act, to evaluate CEQA impacts. In finding that the City of Hanford had inappropriately determined that compliance with the regional air quality district’s permitting requirements satisfied CEQA, the appellate court in *Kings County*, 221 Cal. App. 3d at 716-717, emphasized that CEQA’s requirements are exacting and may not necessarily be satisfied by reliance on permitting standards used to enforce other statutes. The *Kings County* court noted that such reliance “assumes all project-related emissions are measured by the relied-upon standards ... [and may not recognize that air district] rules and standards are designed to measure pollution emissions from more narrowly drawn sources ... [which] require the division of a project into parts for purposes of review. CEQA, on the other hand, is designed to measure all project-related pollution emissions and prohibits the division of a project into parts for purposes of environmental review.” *Id*

In its Dow BIF Responses of September 20, 2002, Dow BIF Second Responses to Comment 40, and the Dow BIF PND, DTSC fails to address according to CEQA standards the potentially adverse effects of NO_x, raised by CBE. Thus, because CBE has presented substantial evidence supporting a fair argument regarding the potential for significant air quality impacts due to NO_x emissions, an EIR must be prepared.

2. The Project’s Increase in Particulate Matter Pollution, Combined With the Potential Increase of PM₁₀ Pollution from the Pesticide Plant Is A Significant Impact Which Triggers CEQA’s EIR Requirement.

Dow’s proposed pesticide plant is projected to emit 93 pounds per day of PM₁₀ pollution. See Exhibit A. The increase in particulate matter pollution exceeds the significance threshold of 80 lbs/day established specifically for CEQA evaluations under the Bay Area Air Quality Management District’s CEQA Guidelines. See Exhibit B. This potential impact alone triggers CEQA’s EIR

requirement. The significant impact of the anticipated particulate matter pollution from the pesticide plant, coupled with the increase in particulate matter pollution from the BIFs', provide an even stronger need for full environmental review in an EIR, as required by CEQA.

In its comment letter of November 8, 2002, CBE noted that DTSC failed to provide all the necessary information to determine the potential increase in PM10 emissions for the Dow BIF project. Specifically, although the Dow BIF PND provides concentration levels for particulate pollution (p. 11) from one of the units, the BIF fails to provide the flow rate capacity of that incinerator. Without those flow rates, potential emissions cannot be calculated. This is an inadequate project description under CEQA and does not satisfy CEQA's requirements to provide information sufficient to determine potential environmental impacts.

Despite CBE's specific requests for adequate information, DTSC's Dow BIF Second Responses to Comment 41 does not disclose any of the required information. In its Response to Comment 41, DTSC does not address how the compounded effects of Dow's activities would clearly exceed BAAQMD's CEQA significance threshold of 80 lb/day regarding PM10 pollution as specified in the *BAAQMD CEQA Guidelines*. DTSC also fails to provide the requested information on particulate concentration levels based on the flow rate capacity of the proposed incinerator. Finally, DTSC asserts ~~that it~~ assessed health risks associated with chemical-specific exposures only and acknowledges that it neglected to assess broader health risks associated with PM10.

In summary, DTSC's environmental documents ignore the substantial evidence presented by CBE that the combined effects of the Dow BIF project and the Dow pesticides plant would exceed the *BAAQMD CEQA Guidelines* threshold of 80 lbs/day for PM10. DTSC has also failed to disclose basic information necessary to fully assess the actual magnitude of PM10 impacts. For these reasons, an EIR is required to fully disclose and address potentially significant air quality impacts due to emissions of PM10.

3. The Impacts of Hydrogen Chloride Must Be Studied in an EIR.

In its comment letter of November 8, 2002, CBE noted that the Dow BIF project may result in increased emissions of hydrogen chloride (HCl). This increased level of emissions, coupled with the potential increase in HCl from the new pesticide plant on the same site, is potentially significant.

In its Dow BIF Second Responses to Comment 42, DTSC fails to address the combined effects of hydrogen chloride emissions associated with the proposed incinerator and the proposed new pesticide plant. This failure is astonishing because DTSC elsewhere (in Dow BIF Second Responses to Comment 46B) acknowledges that it wasn't even aware of the pesticide plant proposal when the initial PMND was prepared. Because DTSC conducted no additional analysis even after CBE brought the existence of the proposed Dow pesticides plant to its attention, DTSC has not considered the combined potential effects from HCl emissions from these two facilities.

Because DTSC's environmental documents provide incomplete analysis of potentially adverse HCl impacts, these impacts must be studied in an EIR.

4. An EIR Is Required Because the Initial Study Fails To Discuss Potential Dioxin Releases.

¹The initial study estimates a potential increase of PM pollution from only one of the units (MS HAF) to be 0.08 gr/dscf). See CEQA Initial Study for the BIF project, p. 11.

In its comment letter of November 8, 2002, CBE pointed out that DTSC's Dow BIF PND discusses the project's anticipated incineration of chlorinated compounds but does not discuss the potential for dioxin formation and the potential impact of dioxin on human health and the environment.

In its Dow BIF Second Responses to Comment 43, DTSC asserts that it did evaluate the health risks associated with dioxin. Based on the spotty evidence presented in DTSC's environmental documents, however, it remains unclear whether DTSC's evaluations adequately addressed the potential for dioxin formation. If DTSC did not fully assess the potential for dioxin formation, its environmental documents are deficient because the full extent of dioxin risks has not been evaluated.

Because DTSC's environmental documents provide incomplete documentation and analysis of potentially adverse dioxin impacts, these impacts must be studied in an EIR.

II.(B) An EIR Must Be Prepared Because DTSC Failed to Recognize and Mitigate Known Geologic Risks from Seismic Events.

In its comment letter of November 8, 2002, CBE brought to the attention of DTSC geological problems with a potentially significant impact warranting mitigation, which were identified in the PND prepared by the City of Pittsburg for the proposed Dow pesticides plant at the same Dow facility. See Exhibit C. Both projects are located within approximately one (1) mile of the Pittsburg earthquake fault which was recently discovered and is classified as active. The Dow facility not only produces but stores hundreds of thousands of pounds of toxic chemicals. The chance of an accidental or catastrophic release due to seismic activity including potential fault rupture leading to "total structural collapse" could have devastating environmental and human effects.

The PND for the Dow pesticides plant admits that "most lowland soils in Pittsburg have a high potential for subsidence" and Shrink/Swell potential exists in Lowland Zone Bay Mud Deposits. The City of Pittsburg's finding of possible adverse significant environmental impact due to the existence of the Pittsburg earthquake fault is an admission which is clearly relevant to potential impacts of the current project and demands the preparation of an EIR for the Dow BIF project under CEQA.

Despite the availability of more comprehensive information which showed the potential for significant impacts from seismic events based on the studies conducted for the City of Pittsburg for the proposed Dow pesticides plant, DTSC failed to disclose this new information nor require mitigation in advance of its permitting decision. While an inadequate monitoring program was proposed for Dow pesticides plant, potential geologic and seismic impacts related to the Dow BIF permit are not even acknowledged in any of DTSC's environmental documents. In its Dow BIF Second Responses to Comments 38B and Comment 44, DTSC's assertions are self-contradictory. First, DTSC says that Dow will later be required to submit a geotechnical report regarding the potential for soil subsidence. Then, DTSC asserts that it evaluated seismic and geologic conditions early in the review process, even though it is deferring this investigation and failed to address other relevant seismic information raised by CBE in either DTSC's Dow BIF Second Responses to Comment 38B or Comment 44.

As the lead agency for the Dow BIF project permit, DTSC cannot under CEQA defer development of a mitigation program, contingent upon studies to be conducted in the future after

issuance of a discretionary permit. In *Sundstrom v County of Mendocino* (1988) 202 Cal. App. 3d 296, the appellate court rescinded the County of Mendocino's approval of a conditional use permit for a sewage treatment plant. That permit required the applicant to conduct post-permit studies to determine if there were significant environmental effects and to propose mitigation for those effects, subject to the planning **staff's** approval. The court rejected this approach and concluded that the required environmental analysis could not be put off to a future date. The policy of CEQA "requires environmental review at the earliest feasible stage in the planning process". *Id.* (citing California Public Resources Code section 21003.1; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68,84). **As** the court explained:

Environmental problems should be considered at a point in the planning process "where genuine flexibility remains." A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that have been repeatedly condemned in CEQA decisions. *Id.* (citations omitted).

The *Sundstrom* court also held that allowing **the** applicant to conduct the study and propose mitigations that were only subject to planning staffs approval, violates the CEQA requirement that an agency's decisionmaking body must make the final review and approval of the environmental analysis mandated by CEQA.

As in *Sundstrom*, a plan apparently implied in DTSC's environmental documents for **the** Dow BIF project to mitigate significant impacts that are discovered in some future environmental assessment is not permitted by CEQA. Because DTSC **has** allowed mitigation of seismic and soil stability problems related to the **risk** of accident to be determined after the issuance of the Negative Declaration and approval of the project, the public will be improperly denied the opportunity to review the environmental impacts of the project. In addition, the **staff's** proposed approval of mitigation measures proposed by the applicant after the permit is approved violates the CEQA requirement that the decisionmakers, not the agency staff, **be** responsible for approving the final environmental analysis.

II.(c) An EIR Must Be Prepared Because DTSC Fails to Accurately Identify the Risks from Hazardous Materials.

Although DTSC provides a list of hazardous materials in the Dow BIF PND, it does not adequately describe the properties of these chemicals nor discuss the potential environmental health and human impact of each of these chemicals. Furthermore, despite the request for adequate information detailed in CBE's comment letter of November 8, 2002, neither the Dow BIF PND nor the Dow BIF Second Responses to Comment **45** and Comment 46A discuss the interaction of the various materials and the potential impact resulting from those interactions. Instead, DTSC arrogantly asserts that the nature of chemical reactions is complicated, the details of which it need not disclose. Thus, DTSC **has** failed to provide the information needed to assess the **full** extent of the **risks** associated with the many highly toxic materials at the Dow facility and **an** EIR is required to assess these potentially significant and dangerous environmental impacts.

The Dow BIF PND also indicates that the Dow incinerator facility is located over groundwater. There is also information related to underground Solid Waste Management **Units** (SWMUs) in place at the site. **As** CBE pointed out in its comment letter of November 8, 2002, the Dow BIF PND does not discuss the potential impacts of these SWMUs on the groundwater, let alone the impacts on groundwater that may result from the new-project, especially as related

to the storage of hazardous waste and the potential leaks that may be associated with that storage. In its Dow BIF Second Responses to Comment 45, DTSC relies on "engineering and institutional controls in place" to conclude that there would be no potential adverse effect to groundwater. DTSC does not provide details regarding the breadth of these controls, and DTSC again presumes that regulations developed under a different statute would fully address CEQA requirements. However, this is in error (*See Kings County*, 221 Cal. App. 3d at 716-717), an EIR should be prepared which fully assesses the adequacy of other regulatory controls in relation to CEQA requirements.

II.(D) DTSC Improperly Relies on Unsubstantiated Assessments by Dow in Its Characterization of Risks of Upset and to Public Safety.

As is true of much of the Dow BIF PND, more information is needed to understand the magnitude of the risk of the increased generation of hazardous waste. As CBE emphasized in its comment letter of November 8, 2002, the Dow BIF PND does not identify the nature of the waste, nor does it support its finding of less than significant impact. These serious deficiencies render the project description legally inadequate under CEQA.

The Dow BIF PND and DTSC's Dow BIF Second Responses to Comment 46C and Comment 46D assert that the BIF Project does not pose a significant health or safety hazard to the community. Despite CBE's request, the application for the use permit fails to include a complete inventory of the amounts, sources and types of hazardous materials, and an emergency response plan as required under PMC section 18.84.470.

CBE pointed out in its November 8, 2002, comment letter that DTSC's discussion of impacts from explosions, fires, or a major catastrophe focuses on the danger to the community, but does not consider the health and safety impacts of such accidents on the workers. Even though major industrial accidents in Contra Costa County have increased and, for example, Dow Chemical has had two major leaks, both of which injured several workers, DTSC's Dow BIF Second Responses to Comment 46C and Comment 46D vaguely refer to an undeveloped "business plan" to wish these concerns away. The Dow BIF PND's discussion of the hazards of human exposure still fails even to mention industrial accidents and the exposure of workers on site. Given the very real danger of such major accidents, an EIR is required to fully analyze the risks and to take all steps possible to protect the health and safety of the workers and the impacted community.

The courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]." *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d at 193. *Sundstrom* requires that the City analyze this impact prior to project approval and study feasible ways to mitigate the impact during the CEQA review process. DTSC has illegally failed to conduct such an analysis in advance of its certification of the Dow BIF PND. Therefore, an EIR is required to fully assess the actual risks of spills of chemicals and toxic materials and to consider all the possible methods of safeguarding public health and safety.

II. (E) The Proposed Negative Declaration Contains Errors and Omits Required Information that Make it Legally Deficient.

CEQA provides that before a Negative Declaration can be issued, the initial study must "provide documentation of the factual basis for the finding in a Negative Declaration that a project will not have a significant effect on the environment." CEQA Guidelines section 15063(c)(5). Agencies "must also disclose the data or evidence upon which the persons

conducting the study relied.” *Citizens for Sensible Development & Bishop v. County of Inyo* (1985) 172 Cal.App.3d 151,171. The public should not have to “ferret out the true nature of the public agency’s project and its possible environmental consequences [...] public reaction to a proposed project is no substitute for adequate consideration of environmental concerns by the lead public agency.” *McQueen v Board of Directors of Mid-Peninsula Regional Open Space District*(1988) 202 Cal. App. 3d 1136, 1151.

In contrast to these standards, the Dow BIF PND as certified and the supporting environmental documents make bald conclusory statements that the BIF Project will not have significant impacts. In its Dow BIF Second Responses to Comment 48, DTSC misses the irony of its conclusory and unsubstantiated assertions regarding the conclusory statements in the DOW BIF PND to which CBE objected. CEQA holds that the public cannot be expected to take on faith the assertions of the project proponent nor the unsubstantiated statements of the lead agency staff. However, that is precisely the situation here and, thus, an EIR is required to be prepared.

II. (F) The Proposed Negative Declaration Fails to Consider the Cumulative Effects of the Entire Dow Chemical Project.

As CBE emphasized in its November 8, 2002, comment letter, -the Dow BIF PND limits its consideration of cumulative impacts to Dow’s Pittsburg BIF facility. Even by this impermissibly narrow definition, the Dow BIF PND as certified by DTSC fails to consider other recent, pending, and known projects at the same Dow facility, including construction of a, new pesticide plant.

According to Dow Chemical's website, the Pittsburg plant is "is the largest integrated chemical manufacturing complex of its kind of the west coast.[...] Products on site include herbicides and pesticides [...] latex and anti-microbials."² In the year 2000 the Toxic Release Inventory documented emissions of 130 pounds of SF, 2,350 pounds of HCl, 350 pounds of C1 and 18 pounds of HF from Dow's Pittsburg facility. In addition, the plant had NO_x emissions of 790 tons in one year. The Toxic Release Inventory quantifies annual emissions of at least 27 separate toxic chemicals from Dow Chemical’s Pittsburg facility. The particular dangers of accidental releases from Dow’s facility include the possible synergistic effects of chemical combinations which should also be examined under the review of cumulative impacts required by CEQA. Commenting on the purpose of the cumulative impacts analysis, one commentator states, “One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact.” *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 720. (citing Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. Davis L. Rev. 197,244) Similarly, the synergistic effects of multiple chemicals which in isolation may appear insignificant can also assume threatening proportions.

CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” *Bozung v. Local Agency Formation* (1975) 13 Cal.3d 263,283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438,

² www. Dow.com/facilities/namerica/pittsburg.litni.

1452. In the permitting actions of DTSC and other agencies, this is exactly what has been done to the exclusion of comprehensive analysis of cumulative impacts. Before undertaking a project, the lead agency must assess the cumulative environmental impacts of all reasonably foreseeable projects. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal App. 3d 61.

In its BIF Second Responses identified as Response to Comment 49, DTSC is non-responsive and evinces a total lack of understanding of CEQA's requirements for analysis of cumulative environmental impacts. DTSC's inability to respond or even recognize the need for cumulative impacts analysis constitutes a prima facie admission that the requirements of CEQA have not been addressed.

DTSC should be required to consider the impacts of the proposed Dow BIF project together with those of other facilities, including the proposed new Dow pesticide plant. In addition, an EIR should consider the impacts of the Dow projects together with the impacts of other polluting facilities in the area. Finally, the EIR should consider the impacts of these projects together with impacts of reasonably foreseeable projects, such as the expansion of Highway 4. DTSC failed to even summarize and include information about or the nearby projects. The impacts of increased traffic from the Dow BIF and Dow pesticides projects, together with traffic impacts from construction on Highway 4, plus vehicle emissions from these and other reasonably foreseeable projects, will have a cumulative impact on the City and region which should be analyzed in an EIR.

11. (G) The Proposed Negative Declaration Fails to Consider the Project's Disproportionate Health Impact on an Environmental Justice Community.

The proposed negative declaration fails to carry out an environmental justice analysis of the project. DTSC failed to ensure that its "actions and rulemaking avoid[ed] adding to disproportionate environmental and/or health impacts on affected [environmental justice] communities."³ The population surrounding the proposed project is an environmental justice community. Dow BIF Second Responses, Comment #2. The USEPA analyzed demographic data, within three miles of the site, and recommended that the community be considered an environmental justice community. According to Care's comments in the record, the community surrounding the project is over 60 percent minority and low income. The Pittsburg Unified School District also has the same representation. *Id.*

The DTSC is supposed to be dedicated to "reduce[ing] disproportionate environmental and related health impacts on such communities." Draft Env. Justice Policy. However, DTSC demonstrates an extremely disturbing, fundamental misunderstanding of Environmental Justice. During the second public hearing when CARE commented, once again, that a proper environmental justice analysis had not been performed, DTSC made the following remarks:

"From a health risk perspective, there is no direct evidence that minority children are genetically more susceptible to health effects from hazardous *air* pollutants than non racial minority children. Where differences have been reported, socioeconomic and environmental factors have generally been the most significant causative agent, with poverty being the greatest risk factor of all." Second Response to Comments, Response to Comment 30.

³ Department of Toxic Substances Control, Draft Environmental Justice Policy (2003) [Thereinafter "*Draft Env. Justice Policy*"].

Environmental Justice has nothing to do with genetic predisposition, but rather focuses on disparate impacts.

DTSC's statement does not reflect the environmental justice policy set forth in DTSC's own draft environmental justice policy. According to DTSC's Draft Environmental Justice Policy, "The [DTSC] is committed to ensuring that all of the state's population without regard to color, national origin or income are equally protected from adverse human or environmental effects as a result of the [DTSC's] policies." Instead of ensuring that low income people and minorities are equally protected, DTSC's comments seem to ignore the issue and focus on a red herring; whether minority children are genetically more susceptible to hazardous pollutants than non-minority children.

The inquiry should be whether the rights of minorities and low income people are as equally protected as other communities, not whether their physiological composition makes them more susceptible to pollutants. The DTSC has failed to perform a proper environmental justice analysis of the proposed project in violation of their own draft environmental justice policy. There is substantial evidence before the agency that the project may have a significant effect on an environmental justice community and is thus subject to CEQA review. However, DTSC has apparently decided to ignore its policies and not conduct the necessary analysis.

Conclusion: CEQA Requires the Preparation of an EIR for the Proposed Project

For all of the above reasons, CBE respectfully appeals the DTSC certification action of the Dow BIF PND and Dow BIF NOD because the project must prepare an EIR that fully complies with CEQA, analyze all of the project's environmental and public health and safety impacts, and propose all feasible methods to reduce or eliminate those impacts. Should you have any questions regarding this matter, please do not hesitate to contact me at 510-302-0430 ext. 202.

Respectfully submitted,



William Rostov
Staff Attorney

cc: Mohinder S.