



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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CIVIL RIGHTS

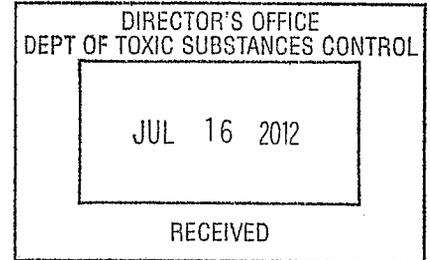
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Certified Mail#: 7004-2510-0004-2241-5506

In Reply Refer to:

EPA File No. 2R-95-R9

Debbie Raphael
Director
California Department of Toxic Substance Control
P.O. Box 806
Sacramento, CA 95812-0806



Re: **Closure of Title VI Administrative Complaint**

Dear Director Raphael:

The purpose of this letter is to notify the Department of Toxic Substances Control (DTSC) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is closing its investigation of the administrative complaint dated August 3, 1995 (Complaint), filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI),¹ by Residents of Sanborn Court represented by the Center on Race, Poverty and the Environment (Complainant) against DTSC. By this letter, OCR is closing its investigation of the claim that DTSC's enforcement efforts evidenced a statewide pattern of discrimination. This allegation constitutes the last remaining claim submitted by Complainant, which had not been previously addressed by OCR.

I. BACKGROUND

The Complaint alleged that DTSC discriminated against Latinos by: (1) treating Spanish-speakers differently than English-speakers during the permitting process and the California Environmental Quality Act (CEQA) public participation process; (2) issuing a final permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas; (3) participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color; (4) willfully ignoring adverse environmental impacts stemming from the facility's operations; and (5) failing to enforce or inadequately enforcing environmental laws and regulations.

By letter dated April 6, 1999, OCR rejected for investigation several of the allegations set forth in the complaint and requested clarification from the Complainant and others. Specifically, OCR rejected as untimely allegations that: (1) DTSC treated

¹ 42 U.S.C. §§ 2000d et seq.

Spanish-speakers differently from English-speakers during the permitting process and the CEQA public participation process; (2) the issuance of the permit to Pure-Etch resulted in discrimination against Latinos; and (3) DTSC participated in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color. A copy of the April 6, 1999, letter is attached hereto.

Additionally, OCR requested that the Complainant clarify the basis for the Complainant's remaining two allegations. By letter dated July 13, 2001, OCR rejected allegation (4), which claimed that DTSC willfully ignored adverse environmental impacts stemming from Pure-Etch's operations, because the Complainant did not provide the information requested. OCR accepted for investigation allegation (5), which claimed that DTSC failed to enforce or inadequately enforced environmental laws and regulations. Specifically, OCR accepted for investigation: (a) an alleged failure by DTSC to enforce against Pure-Etch, which resulted in discriminatory effects upon the Latino residents of the area; and (b) an alleged statewide pattern of discriminatory enforcement by DTSC as evidenced by fewer DTSC resources being dedicated to communities of color than to white communities and overall weak enforcement by DTSC and disproportionate placement of toxic waste facilities in communities of color.

OCR's investigation into the two enforcement claims set forth above was bifurcated in order to first address the claims regarding DTSC's enforcement efforts at the Pure-Etch facility. By letter dated April 17, 2003, OCR transmitted to the Complainant and DTSC an Investigation Report (IR) that concluded that there was insufficient evidence to support a causal connection between DTSC's enforcement efforts with respect to the Pure-Etch facility and the alleged impacts suffered by Complainant. Accordingly, in the absence of any causal connection between DTSC actions and the impacts alleged by the Complainant, the Complainant's allegations regarding DTSC's enforcement efforts with respect to Pure-Etch were dismissed. A copy of the April 17, 2003 IR is enclosed.

II. STATEWIDE CLAIM OF DISCRIMINATORY ENFORCEMENT

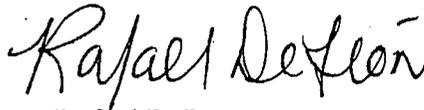
In a July 7, 1999, letter written in response to a request for clarification by OCR, representatives of the Complainant indicated, with respect to the alleged pattern of discriminatory enforcement on a statewide basis, that "DTSC's actions at Pure-Etch are symptomatic of this statewide pattern." As previously stated, OCR found that the allegation with respect to the Pure-Etch facility was not supported by its thorough investigation and was dismissed. Moreover, no evidence of a statewide pattern was presented or discovered during that investigation. Consequently, OCR finds an insufficient basis to warrant proceeding with an investigation of the allegation of statewide discrimination in enforcement.

III. CONCLUSION

For the reasons set forth above, OCR hereby closes its investigation of the claim of a statewide pattern of discriminatory enforcement by DTSC.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,



Rafael DeLeon
Director

Enclosure(s)

cc: Stephen G. Pressman
Associate General Counsel
Civil Rights Law Office
Mail Code: 2399A

Jared Blumenfeld
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Brent Newell
Attorney
Center on Race, Poverty and the Environment
47 Kearny Street, Suite 804
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 17 2003

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RETURN RECEIPT REQUESTED

Mr. Edwin F. Lowry, Director
California Department of Toxic Substances Control
P.O. Box 806
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Mr. Luke Cole, Esquire
Center on Race, Poverty & the Environment
450 Geary Street, Suite 500
San Francisco, California 94102
Certified Mail # 7001 2510 0003 3058 1099

Re: EPA File No. 2R-95-R9 (Sanborn Court Complaint)

Dear Mr. Lowry and Mr. Cole:

By letter dated August 3, 1995, a complaint was filed with the U.S. Environmental Protection Agency's Office of Civil Rights (OCR) on behalf of the Residents of Sanborn Court pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d *et seq.*, and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint set forth a series of claims related to the operations of the former Pure-Etch Company (Pure-Etch) facility located in Salinas, California, in particular with respect to the permitting and oversight of this facility by the California Department of Toxic Substances Control (DTSC). Ultimately, by letter dated July 13, 2001, OCR accepted for investigation two of the allegations contained in the complaint.

At this point OCR has concluded its investigation into one of the claims submitted in the complaint. This letter and the accompanying Investigative Report constitute OCR's findings under Title VI and 40 C.F.R. Part 7 regarding the claims of an alleged lack of enforcement by DTSC with respect to Pure-Etch. This letter adopts the recommendations in the accompanying Investigative Report and dismisses the claims concerning DTSC enforcement at Pure-Etch. The allegations regarding statewide enforcement efforts by DTSC will be addressed in a subsequent document. Each of OCR's findings, and the legal and factual bases for the findings, on each allegation of the complaint are set forth in detail in the Investigative Report, which is incorporated herein by reference.

Legal Background for Complaint. Title VI prohibits discrimination on the basis of race, color, or national origin under programs or activities receiving federal financial assistance. EPA has adopted regulations to implement Title VI. 40 C.F.R. Part 7. EPA's regulations prohibit intentional discrimination and unjustified discriminatory effects which occur in the administration of an EPA recipient's programs or activities. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations, unless the recipient can provide justification and there are no less discriminatory alternatives. DTSC is a recipient of EPA financial assistance and is therefore subject to the requirements of Title VI and EPA's implementing regulations.

The Title VI Complaint. The initial complaint alleged that DTSC discriminated against Latinos by: (1) treating Spanish-speakers differently during the permit hearing and California Environmental Quality Act (CEQA) public participation process; (2) issuing a final permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas; (3) willfully ignoring adverse environmental impacts stemming from the facility's operations (4) participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color; and (5) failing to enforce or inadequately enforcing environmental laws and regulations.

By letter dated April 6, 1999, OCR rejected for investigation several of the allegations set forth in the complaint and requested clarification on others. Specifically, OCR: (1) rejected for investigation the allegation that DTSC treated Spanish-speakers differently from English-speakers during the permitting process and the CEQA public participation process on the basis that the allegations were untimely; (2) rejected for investigation the allegations concerning the issuance of the permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas on the basis that the allegations were untimely; (3) requested clarification regarding the allegation that DTSC was willfully ignoring adverse environmental impacts stemming from the facility's operations; (4) rejected for investigation the allegation that DTSC was participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color on the basis that since the allegation regarding permitting of the Pure-Etch facility had been rejected, this broader allegation would be rejected for investigation as well; and (5) requested additional information concerning the allegation that DTSC was failing to enforce or inadequately enforcing environmental laws and regulations. By letter dated July 7, 1999, Complainants responded to the request from OCR for additional information.

By letter dated July 13, 2001, OCR accepted for investigation the allegations that DTSC was failing to enforce or inadequately enforcing environmental laws and regulations. Specifically, OCR accepted for investigation: (1) An alleged failure by DTSC to enforce against Pure-Etch, which resulted in discriminatory effects upon the Latino residents of the area; and (2) An alleged statewide pattern of discriminatory enforcement by DTSC as evidenced by fewer DTSC resources being dedicated to communities of color than to white communities and overall weak enforcement by DTSC and disproportionate placement of toxic waste facilities in communities of color. OCR did not accept for investigation the allegation of willful discrimination by DTSC in the CEQA process because the additional information requested on

this issue was not provided by Complainants.

The Title VI Investigation. EPA compiled and reviewed information contained in the files of DTSC, EPA Region IX, the Salinas Fire Department, the Monterey County Department of Health, and the Monterey Regional Water Pollution Control Agency. In addition, EPA issued an information request to DTSC on January 14, 2002. After reviewing the above information, EPA decided to bifurcate its investigation and focus initially on the claim pertaining to DTSC's actions with respect to the Pure-Etch facility.

EPA representatives also traveled to California from September 5, 2002 through September 13, 2002 in order to review documents and conduct interviews. The information gathered during this trip was focused almost exclusively on the issue of DTSC's enforcement record with respect to Pure-Etch. During this period, EPA representatives reviewed documents at the offices of DTSC, the Monterey County District Attorney's Office, and the Monterey County Department of Health. Interviews were conducted with DTSC personnel and with a representative of the Monterey County Department of Health, all of whom were personally involved in inspection and enforcement efforts regarding Pure-Etch.

Findings. EPA fully reviewed the information submitted by DTSC, the Complainants, and other independently gathered information. The information we gathered provided no direct evidence to support a causal connection between DTSC's enforcement efforts with respect to the Pure-Etch facility and the alleged impacts suffered by the Complainants. In the absence of any causal connection between DTSC actions and the impacts alleged by Complainants, Complainants' claims of disparate impact discrimination could not be established, and those allegations must be, and hereby are, dismissed.

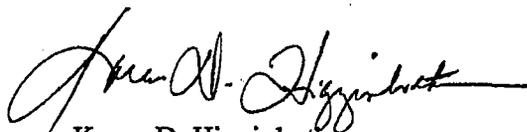
Conclusion. Upon review of the materials submitted and information gathered during its investigation, as well as controlling legal authority, EPA has not found a violation of Title VI or EPA's implementing regulations with respect to DTSC enforcement efforts in connection with the Pure-Etch facility. Accordingly, EPA is dismissing this component of the complaint as of the date of this letter. As indicated previously, EPA will address the issues of statewide discriminatory enforcement by DTSC in a separate document.

Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against any individual or group because of action taken or participation in any action to secure rights protected under Title VI. 40 C.F.R. §7.100.

Under the Freedom of Information Act, 5 U.S.C. § 552, EPA may be required to release this document, the Updated Final Investigation Report, and related correspondence, documents, and records, upon request. In the event of such a request, EPA will seek to protect, to the extent provided by law, any personal information, which, if released, could constitute an unwarranted invasion of the privacy of any individual.

If you have any questions, please feel free to contact Daniel Isales, of EPA's Title VI Task Force, at (410) 305-3016.

Sincerely,



Karen D. Higginbotham,
Director

Enclosure

cc: Stephen Pressman, Associate General Counsel
Office of General Counsel (MC 2399A)

Phyllis Harris, Principal Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance (MC 2201A)

Barry Hill, Director
Office of Environmental Justice (MC 2201A)

Wayne Natri, Regional Administrator
EPA Region 9

Yasmin Yorker, Chair
Title VI Task Force (MC 1201A)

**U.S. Environmental Protection Agency
Office of Civil Rights**

INVESTIGATIVE REPORT

for

**Title VI Administrative Complaint File No. 2R-95-R9
(Residents of Sanborn Court Complaint)**

EXECUTIVE SUMMARY

By letter dated August 3, 1995, a Title VI complaint was filed with the U.S. Environmental Protection Agency's Office of Civil Rights (OCR) on behalf of the Residents of Sanborn Court. Sanborn Court is an apartment complex in very close proximity to the former location of the Pure-Etch Company (Pure-Etch), in Salinas, California. At the time of the complaint, the Sanborn Court apartments were populated primarily by Latinos. The complaint set forth a series of claims related to the operations of the former Pure-Etch facility, in particular the permitting and oversight of this facility by the California Department of Toxic Substances Control (DTSC). DTSC is a recipient of federal financial assistance from the U.S. Environmental Protection Agency. Ultimately, OCR accepted for investigation: (1) An alleged failure by DTSC to enforce against Pure-Etch, which resulted in discriminatory effects upon the Latino residents of the area; and (2) An alleged statewide pattern of discriminatory enforcement by DTSC as evidenced by fewer DTSC resources being dedicated to communities of color than to white communities and overall weak enforcement by DTSC and disproportionate placement of toxic waste facilities in communities of color.

The investigation of the complaint was bifurcated in order to expedite the resolution of the claims pertaining to DTSC's enforcement record with respect to the Pure-Etch facility. This Investigative Report only examines the first of the two claims accepted for investigation, that being, whether there was a failure to enforce by DTSC against Pure-Etch, resulting in discriminatory effects upon the Latino residents of the area. The second allegation, concerning a statewide pattern of discriminatory enforcement by DTSC, will be discussed in a subsequent document. Regarding the claim of discriminatory enforcement by DTSC with respect to the Pure-Etch facility, this report concludes that there is not a sufficient causal connection between the DTSC's enforcement activities regarding Pure-Etch and the alleged adverse effects suffered by the Residents of Sanborn Court. Accordingly, it is recommended that the complaint, as it pertains to the allegations concerning enforcement by DTSC with respect to Pure-Etch, be dismissed.

I. INTRODUCTION

A. Statutory and Regulatory Background

Title VI of the Civil Rights Act of 1964, as amended, (Title VI), 42 U.S.C. § 2000d *et seq.*, prohibits discrimination based on race, color, or national origin under programs or activities of recipients of federal financial assistance. Specifically, Section 601 of Title VI provides that,

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Under the Civil Rights Restoration Act of 1987, "any program or activity" is broadly defined so that Title VI prohibitions are applied institution-wide.

The purpose of Title VI is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination on the basis of race, color, or national origin. Toward that end, Title VI bars intentional discrimination. *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 607-08 (1983).

In addition, under Section 602, Title VI authorizes and directs federal agencies to enact "rules, regulations, or orders of general applicability" to effectuate the provisions of Section 601. 42 U.S.C. § 2000d-1. Most federal agencies have adopted regulations that prohibit recipients of federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin. The Supreme Court has held such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory. *Guardians*, 463 U.S. at 582; *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985).

The United States Environmental Protection Agency's (EPA) regulations, promulgated under the authority of Section 602 and implementing Title VI, are codified at 40 C.F.R. Part 7. Under these regulations, OCR is responsible for investigating complaints alleging intentional discrimination and/or disparate impact discrimination under Title VI in programs or activities of recipients of financial assistance from EPA. 40 C.F.R. § 7.20. EPA regulations governing the investigation of complaints of discrimination in EPA-funded programs and activities are codified at 40 C.F.R. § 7.120. Under Section 7.120(g), if OCR's investigation reveals no violation of EPA's Title VI regulations, OCR will dismiss the complaint.

B. Factual Background

1. Allegations in Complaint

On August 3, 1995, a complaint was filed with OCR on behalf of Residents of Sanborn Court (Complainants) regarding Pure-Etch. The complaint alleged violations of Title VI and EPA's regulations implementing Title VI, found at 40 C.F.R. Part 7, by DTSC. The initial complaint alleged that DTSC discriminated against Latinos by: (1) treating Spanish-speakers differently during the permit hearing and California Environmental Quality Act (CEQA) public participation process; (2) issuing a final permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas; (3) willfully ignoring adverse environmental impacts stemming from the facility's operations (4) participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color; and (5) failing to enforce or inadequately enforcing environmental laws and regulations. *See Letter from Luke W. Cole, Ralph Santiago Abascal, Sally List, and Leo C. Trujillo-Cox, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, on behalf of the Residents of Sanborn Court, to Carol M. Browner, EPA (dated August 3, 1995).* Following the submission

of the complaint, both Complainants and DTSC corresponded with EPA's Office of Civil Rights regarding the scope and merit of the allegations contained in the complaint. *See Letter from Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, Attorney for Residents of Sanborn Court, to Dan J. Rondeau, Director, Office of Civil Rights, EPA (dated January 14, 1996); Letter from Jesse R. Huff, Director, DTSC, to Mr. Dan J. Rondeau, Director, Office of Civil Rights, EPA (dated April 17, 1996); Letter from Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, to Dan Rondeau, Office of Civil Rights, EPA (dated September 16, 1996); Letter from Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, to Ms. Ann Goode, Director, Office of Civil Rights, EPA (dated July 8, 1998).*

By letter dated April 6, 1999, OCR rejected for investigation several of the allegations set forth in the complaint and requested clarification on others. Specifically, OCR: (1) rejected for investigation the allegation that DTSC treated Spanish-speakers differently from English-speakers during the permitting process and the CEQA public participation process on the basis that the allegations were untimely; (2) rejected for investigation the allegations concerning the issuance of the permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas on the basis that the allegations were untimely; (3) requested clarification regarding the allegation that DTSC was willfully ignoring adverse environmental impacts stemming from the facility's operations; (4) rejected for investigation the allegation that DTSC was participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color on the basis that since the allegation regarding permitting of the Pure-Etch facility had been rejected, this broader allegation would be rejected for investigation as well; and (5) requested additional information concerning the allegation that DTSC was failing to enforce or inadequately enforcing environmental laws and regulations. *See Letter from Ann E. Goode, Director, Office of Civil Rights, EPA, to Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated April 6, 1999).* By letter dated July 7, 1999, Complainants responded to the request from OCR for additional information. *See Letter from Luke W. Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, to Ann E. Goode, Office of Civil Rights, EPA (dated July 7, 1999).*

2. Acceptance of Complaint for Investigation

By letter dated July 13, 2001, OCR accepted for investigation the allegations that DTSC was failing to enforce or inadequately enforcing environmental laws and regulations. Specifically, OCR accepted for investigation: (1) An alleged failure by DTSC to enforce against Pure-Etch, which resulted in discriminatory effects upon the Latino residents of the area; and (2) An alleged statewide pattern of discriminatory enforcement by DTSC as evidenced by fewer DTSC resources being dedicated to communities of color than to white communities and overall weak enforcement by DTSC and disproportionate placement of toxic waste facilities in communities of color. OCR did not accept for investigation the allegation of willful discrimination by DTSC in the CEQA process because the additional information requested on this issue was not provided by Complainants. *See Letter from Ann E. Goode, Director, Office of*

Civil Rights, EPA, to Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated July 13, 2001).

II. POSITION STATEMENT FROM THE RECIPIENT

By letter dated May 22, 2002, DTSC requested that EPA dismiss the August 3, 1995 complaint on the basis that: (1) the allegations concerning enforcement were not made in the original complaint; (2) when the allegations concerning enforcement were made, they were untimely; (3) when the allegations concerning enforcement were made, they were not specific; (4) no adverse impact was identified; (5) EPA's Title VI regulations may be unenforceable; and (6) DTSC took effective enforcement at the facility. *See Letter from Nancy J. Long, Senior Staff Counsel, Office of Legal Counsel, DTSC, to Daniel L. Isales, Assistant Regional Counsel, EPA (dated May 22, 2002).* By letter dated June 10, 2002, EPA discussed the first five arguments set forth by DTSC in its May 22, 2002 letter. After a review of these first five arguments, EPA rejected the request for dismissal on the basis that an appropriate basis existed in the initial complaint, or in subsequent clarifying documents, for EPA to investigate allegations concerning DTSC's enforcement. Moreover, this letter re-stated EPA's position that the Title VI regulations, set forth at 40 C.F.R. Part 7, remain in effect and are enforceable. *See Letter from Daniel L. Isales, Assistant Regional Counsel, EPA, to Nancy J. Long, Senior Staff Counsel, DTSC (dated June 10, 2002).*

In its May 22, 2002 letter, DTSC stated as its sixth argument that it took effective enforcement action with respect to Pure-Etch. DTSC points out in this letter that beginning in February 1996, DTSC conducted twenty-one inspections at Pure-Etch, issued six Schedules for Compliance, and three Summaries of Violation. In addition, DTSC pointed out that a search warrant was executed at the facility on February 5, 1996, and that DTSC referred a criminal case to the Monterey County District Attorney's Office on April 9, 1996. DTSC further pointed out that in late 1996 a coordinated approach was undertaken by the Monterey County District Attorney's Office, Office of the Attorney General, and DTSC. DTSC indicated that it issued an Accusation for Revocation of Permit and an order to suspend operations at the facility on March 24, 1997. Ultimately, DTSC and Pure-Etch entered into an agreement on October 27, 1997, whereby Pure-Etch would immediately suspend its operations, but would be given six months to sell the facility. Eventually, Pure-Etch's permit terminated on May 16, 1998. With respect to its record on enforcement, DTSC concludes:

Thus, a little over two years from receiving the initial complaint in January 1996, including a six month period during which operations were suspended, DTSC completed enforcement at the facility culminating in the ultimate enforcement sanction, termination of the facility's permit. DTSC believes the record amply demonstrates that DTSC in no way failed to enforce against Pure-Etch or engaged in a statewide pattern or practice of discriminatory enforcement.

See Letter from Nancy J. Long, Senior Staff Counsel, Office of Legal Counsel, DTSC, to Daniel

L. Isales, Assistant Regional Counsel, EPA (dated May 22, 2002).

In its letter of June 10, 2002, EPA declined to discuss the merits of DTSC's enforcement record with respect to Pure-Etch, as that would be ultimately determined by the investigation into the allegations. This letter made clear that no determination had yet been made by EPA regarding the merits of the allegations concerning inadequate enforcement by DTSC. *See Letter from Daniel L. Isales, Assistant Regional Counsel, EPA, to Nancy J. Long, Senior Staff Counsel, DTSC (dated June 10, 2002).*

III. METHODOLOGY OF THE INVESTIGATION

In order to assure that EPA had the necessary information to assess the allegations raised by Complainants, EPA undertook a comprehensive effort to collect data. That effort began by gathering all of the information that the EPA had in its possession relevant to the complaint. This included all information contained in OCR's files for this complaint, which included, external correspondence, internal communications, research files, and notes from interviews undertaken by prior EPA investigators of representatives of Complainants and representatives of DTSC. In addition, information contained in the files of EPA Region IX was collected. At the same time, EPA contacted and obtained information from the Salinas Fire Department, the Monterey County Department of Health, and the Monterey Regional Water Pollution Control Agency.

In order to further refine the relevant issues, EPA issued an information request to DTSC on January 14, 2002, which set forth twenty-two questions. *See Initial Request for Information from Daniel Isales, Assistant Regional Counsel, EPA, to Michael Shepard, DTSC (dated January 14, 2002).* DTSC provided its response to the information request by letter dated May 22, 2002. DTSC did not provide a narrative response to any of the questions posed, but instead provided EPA with a portion of the documents requested by the information request. DTSC's response indicated that additional documents would be made available to EPA for inspection. *See Letter from Nancy J. Long, Senior Staff Counsel, Office of Legal Counsel, DTSC, to Daniel L. Isales, Assistant Regional Counsel, EPA (dated May 22, 2002).*

After reviewing the above information, EPA decided to bifurcate its investigation and focus initially on the claim pertaining to DTSC's actions with respect to the Pure-Etch facility. EPA prepared draft Findings of Fact, which focused solely on the claims pertaining to enforcement at Pure-Etch, which it shared with the representatives of Complainants and DTSC by letter dated July 12, 2002. *See Letter from Daniel Isales, Assistant Regional Counsel, EPA, to Nancy Long, Senior Staff Counsel, DTSC, and Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated July 12, 2002).* The explicit purpose of this letter was to solicit "input on not only whether what is contained in this draft is factually accurate, but also to point out any areas that have not been addressed which are critical to an understanding of this matter." The letter made clear that the draft findings were not to be considered an initial finding of either compliance or non-compliance pursuant to the procedures

set forth at 40 C.F.R. Part 7. See *Letter from Daniel Isales, Assistant Regional Counsel, EPA, to Nancy Long, Senior Staff Counsel, DTSC, and Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated July 12, 2002)*. In response to this, representatives of the Complainants submitted extensive comments on the draft findings by letter dated July 30, 2002. See *Letter from Erin Conroy and Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, to Daniel Isales, Assistant Regional Counsel, EPA (dated July 30, 2002)*. As of the writing of this report, DTSC has not submitted any comments on the draft findings.

EPA representatives also traveled to California from September 5, 2002 through September 13, 2002 in order to review documents and conduct interviews. The information gathered during this trip was focused almost exclusively on the issue of DTSC's enforcement record with respect to Pure-Etch. During this period, EPA representatives reviewed documents at the offices of DTSC, the Monterey County District Attorney's Office, and the Monterey County Department of Health. Interviews were conducted with DTSC personnel and with a representative of the Monterey County Department of Health, all of whom were personally involved in inspection and enforcement efforts regarding Pure-Etch.

IV. FINDINGS OF FACT

BACKGROUND

1. DTSC was established as a state agency within the California Environmental Protection Agency on July 17, 1991. DTSC is the state agency responsible for administering and enforcing the California Hazardous Waste Control Law, the California Health and Safety Code, division 20, chapter 6.5, section 25100 *et seq.*, and its implementing regulations set forth in title 22 of the California Code of Regulations. On July 23, 1992, the State of California received final authorization under Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended, (RCRA), 42 U.S.C. § 6926(b), to operate its hazardous waste program in lieu of the federal program. See *57 Fed. Reg. 32726 (1992)*. This authorization became effective on August 1, 1992. DTSC is a recipient of federal financial assistance through EPA.
2. In February 1993, Pure-Etch submitted a Part B Permit Application to DTSC seeking a Hazardous Waste Facility permit for its facility located at 1031 Industrial Street, Salinas, California. See *Inspection Report, prepared by Robert Aragon, DTSC, Date of Inspection of February 2, 1996, Date of report of February, 23, 1996*. On October 18, 1994, DTSC issued Hazardous Waste Facility Permit No. CAD 983650490 to Pure-Etch. The permit became effective on November 23, 1994. See *DTSC Hazardous Waste Facility Permit for the Pure-Etch facility (dated October 18, 1994)*.
3. Pure-Etch was a corporation organized under the laws of California. Pure-Etch was a manufacturing company that produced etchants used by the printed circuit board industry

in the fabrication of circuit boards. The etchants manufactured by Pure-Etch, copper oxide and copper sulfate, were hazardous materials under California law. Pure-Etch also accepted and treated the spent ammoniacal and acidic based etchants from its customers and removed copper and nickel from the spent etchants for use as a product in other industries. The facility was designed to process approximately one million gallons per year of spent alkaline etchant solution, 300,000 gallons of copper sulfate, 100,000 gallons of nickel nitrate, and 50,000 gallons of metal salts. The spent etchants were hazardous wastes due to their corrosivity. The reclamation of copper and nickel from the etchants constituted "treatment" of a hazardous waste under state law, which necessitated a permit from DTSC. The spent etchant, before treatment, was a hazardous waste, and the treatment process generated non-hazardous waste water, copper oxide (used in the wood preservation industry or sold as product), and ammonia vapor, which was recovered on site to make fresh etchant. In addition, Pure-Etch received anhydrous ammonia and hydrochloric acid for use in its process, both of which were considered hazardous materials under California law. Hazardous materials that are products, and not wastes, were not normally regulated by DTSC. However, as the CEQA lead agency, DTSC considered the anhydrous ammonia and hydrochloric acid present at Pure-Etch in developing environmental protection measures. *See DTSC Hazardous Waste Facility Permit for the Pure-Etch facility (dated October 18, 1994); Mitigated Negative Declaration for Pure-Etch Hazardous Waste Storage Facility, DTSC (dated October 18, 1994).* Michael N. Silver was the Chief Executive Officer of Pure-Etch from at least 1994 until September 18, 1996, at which time James I. Collins became the Chief Executive Officer of Pure-Etch. *See Inspection Report, prepared by Robert Aragon, DTSC, Date of Inspection of September 27, 1996, Date of Report of December 6, 1996.*

4. The facility was located on the east side of Industrial Street in Salinas, bordered on the north side by a road, on the west by a road and a railroad, and on the east and south sides by industrial manufacturing companies. *See DTSC Hazardous Waste Facility Permit for the Pure-Etch facility (dated October 18, 1994).*
5. The Sanborn Court housing complex was located one block north from the Pure-Etch facility. Sanborn Court was an apartment complex that served as housing for low-income farm workers who worked in the fields and packing houses in and around Salinas. During the time that the facility was in operation, the residents of Sanborn Court were predominantly of Latino heritage. *See Letter from Luke W. Cole, Ralph Santiago Abascal, Sally List, and Leo C. Trujillo-Cox, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, on behalf of the Residents of Sanborn Court, to Carol M. Browner, EPA (dated August 3, 1995).*
6. The area surrounding Pure-Etch and the Sanborn Court apartments consisted of light commercial and industrial practices. *See DTSC Fact Sheet for the Proposed Mitigated Negative Declaration for the Pure-Etch Facility (dated August 1994); Letter from Lloyd Lowrey, Salinas Area Chamber of Commerce, to John Hart, Senior Waste Management*

Engineer, DTSC (dated January 25, 1994). The zoning designation for the area where Pure-Etch was located was "General Manufacturing" and the Pure-Etch operations were consistent with that designation. *See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC (dated March 16, 1995).*

ENFORCEMENT BACKGROUND

7. On July 6, 1992, DTSC and the U.S. Environmental Protection Agency, Region IX, signed a Memorandum of Agreement (Agreement). The Agreement was entered pursuant to 40 C.F.R. § 271.8 and set forth policies, responsibilities, and procedures for the administration of California's authorized hazardous waste program. The Agreement became effective on July 23, 1992, at the time that California received authorization for its hazardous waste program. *See Memorandum of Agreement, State of California DTSC and EPA Region IX (dated July 6, 1992).*
8. The Agreement provided that California had the lead in developing and implementing the RCRA program in the state. *See Memorandum of Agreement, State of California DTSC and EPA Region IX (dated July 6, 1992).*
9. With respect to enforcement activities, the Agreement provides: "The State agrees to take timely and appropriate enforcement action as defined in the State Enforcement Response Policy against persons determined by the State to be in violation of generator and transporter standards (including manifest requirements), facility standards, permit requirements, compliance schedules, and other program requirements." *See Memorandum of Agreement, State of California DTSC and EPA Region IX (dated July 6, 1992).*
10. In addition, the Agreement provides: "Appropriate State enforcement response to violations of the Authorized Program are specified in the State Enforcement Response Policy and may include criminal, civil or administrative enforcement proceedings. Any civil penalty assessed, sought, or agreed upon by the State shall be appropriate to the violation, as specified in 40 C.F.R. § 271.16(c) and the State's Penalty Policy." *See Memorandum of Agreement, State of California DTSC and EPA Region IX (dated July 6, 1992).*
11. DTSC's Enforcement Response Policy (ERP) (EO-95-004-PP), in effect at the time of the Pure-Etch operations, indicated that it was the policy of DTSC to implement its enforcement actions to accomplish the following goals:
 - To return violators to compliance in a timely manner;
 - To promote compliance by other members of the regulated community;
 - To penalize violators, as appropriate, and to deprive violators of any significant benefit gained from violations;
 - To treat generators, transporters, and operators of storage, treatment, transfer, and

disposal facilities equally and consistently with regard to the same type of violations; and
-To initiate and conclude enforcement activities in a timely manner.

See DTSC Enforcement Response Policy, Document Number EO-95-004-PP (dated August 16, 1995).

12. DTSC's ERP states as follows with respect to "Types of Violators,"

DTSC is adopting here a definition for "Significant Non-Complier" from the U.S. EPA's Enforcement Response Policy.

A hazardous waste handler is classified as a Significant Non-Complier (SNC) based upon the nature of the violations, along with a number of other factors. A SNC is a handler who:

- Has caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- Is a chronic (a handler who is regularly found to have many Class I or Class II violations) or recalcitrant violator (a handler who actively refuses to comply with the regulatory requirements); or
- Substantially deviates from the terms of the permit, order, settlement document, or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, settlement agreements, or decrees; or
- Substantially deviates from statutory or regulatory requirements.

SNC represent the category of violators that merit the most stringent and timely enforcement response. SNCs require formal enforcement action, and must be closely tracked to ensure timely and appropriate enforcement.

See DTSC Enforcement Response Policy, Document Number EO-95-004-PP (dated August 16, 1995).

13. In 1994, the California legislature amended certain provisions of the California Health and Safety Code through Senate Bill 1899. The stated purpose of Senate Bill 1899 was, "to provide a more resource-efficient enforcement mechanism, faster compliance times, and creation of a productive and cooperative working relationship between the department and the regulated community." *See Legislative Counsel's Digest, Section 1(d)*. These amendments became effective on January 1, 1995.
14. Senate Bill 1899 imposed restrictions upon DTSC from taking enforcement actions in certain situations. Specifically, Health and Safety Code § 25187.8(e) provided: "Except as otherwise provided in subdivision (g), a notice to comply shall be the only means by

which the department representative [DTSC] or the authorized or designated officer shall cite a minor violation. The department representative or the designated officer shall not take any other enforcement action specified in this chapter against a facility which has received a notice to comply if the facility complies with this section." *See Division 20, Section 25187.8(e) of the California Health and Safety Code.*

15. The revised Health and Safety Code § 25117.6 provided:

(a) "Minor violation" means a deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter, that is not a Class I violation.

(b) (1) A minor violation does not include any of the following:

(A) Any knowing, willful, or intentional violation of this chapter.

(B) Any violation of this chapter that enables the violator to benefit economically from noncompliance, either by reduced costs or competitive advantage.

(C) Any Class II violation that is a chronic violation or that is committed by a recalcitrant violator.

(2) In determining whether a violation is chronic or a violator is recalcitrant, for purposes of subparagraph (C) of paragraph (1), the department shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to the requirements of this chapter.

See Division 20, Section 25117.6 of the California Health and Safety Code.

16. Pursuant to the revised Health and Safety Code, § 25110.8.5., "Class I violation" means any of the following:

(a) A deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter, that is any of the following:

(1) The deviation represents a significant threat to human health or safety or the environment because of one or more of the following:

(A) The volume of the waste.

(B) The relative hazardousness of the waste.

(C) The proximity of the population at risk.

(2) The deviation is significant enough that it could result in a failure to accomplish any of the following:

(A) Ensure that hazardous waste is destined for, and delivered to, an authorized hazardous waste facility.

(B) Prevent releases of hazardous waste or constituents to the environment during the active or postclosure period of facility operation.

- (C) Ensure early detection of releases of hazardous waste or constituents.
- (D) Ensure adequate financial resources in the case of releases of hazardous waste or constituents.
- (E) Ensure adequate financial resources to pay for facility closure.
- (F) Perform emergency cleanup operations or, or other corrective actions for, releases.

(b) The deviation is a Class II violation which is a chronic violation or committed by a recalcitrant violator. "Class II Violation" has the same meaning as defined in Section 66260.10 of Title 22 of the California Code of Regulations.

See Division 20, Section 25110.8.5. of the California Health and Safety Code.

17. In turn, Class II Violations is defined as, "a deviation from the requirements specified in Chapter 6.5 of Division 20 of the Health and Safety Code, or regulations, permit or interim status document conditions standards, or requirements adopted pursuant to that chapter, that is not a Class I violation." *See Division 20, Section 25110.8.5. of the California Health and Safety Code.*

INITIATION OF PURE-ETCH OPERATIONS

18. CEQA was passed by the California legislature in 1970 and was intended as a means to require public agencies to consider the environmental consequences of their actions. Pursuant to CEQA, DTSC was required to evaluate the impacts created by the Pure-Etch facility on human health and the environment. On October 5, 1993, DTSC issued for public review a draft permit and proposed CEQA Negative Declaration for the Pure-Etch facility. The Negative Declaration concluded that there would be no potential significant adverse environmental impacts from the Pure-Etch facility as proposed. When the scheduled public hearing on these documents was postponed, DTSC reissued both documents on December 9, 1993. The CEQA Negative Declaration did not acknowledge the existence of the Sanborn Court apartments in the vicinity of the proposed Pure-Etch facility. *See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC (dated March 16, 1995).*
19. A public hearing was held on January 11, 1994, and a number of residents of the Sanborn Court apartments testified in opposition to the Pure-Etch facility. *See Transcript, Public Hearing on the Draft Hazardous Waste Permit and Proposed Negative Declaration for the Pure-Etch Facility (dated January 11, 1994).* DTSC received comments on the CEQA Negative Declaration and the permit itself until February 25, 1994. *See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC (dated March 16, 1995).*

20. The Pure-Etch proposal very rapidly became controversial and environmental justice concerns were raised with respect to the proposed siting of this facility. See, "Plant Siting Raises Issue of Environmental Justice," by Frank Clifford, *Los Angeles Times*, August 1, 1994; Letter from Art Torres, Senator, California Legislature, to William Soo Hoo, Director, DTSC (dated February 28, 1994); Letter from Jody Sparks, President, Toxic Assessment Group, to Felicia Marcus, Regional Administrator, EPA Region IX (dated March 23, 1994); Letter from Tom Hayden, Senator, California Legislature, to Felicia Marcus, Regional Administrator, EPA Region IX (dated April 19, 1994); Letter from Barbara Boxer, Senator, United States Senate, to Felicia Marcus, Regional Administrator, EPA Region IX (dated June 2, 1994); Letter from Anna Marie Stenberg, Western U.S. Representative, Citizens Clearinghouse for Hazardous Waste, to Felicia Marcus, Regional Administrator, EPA Region IX (dated June 9, 1994); Letter from Anna Marie Stenberg, Western U.S. Representative, Citizens Clearinghouse for Hazardous Waste, to Jim Pappas, Branch Chief, DTSC (dated June 9, 1994). Conversely, Pure-Etch disputed that there were any valid environmental justice issues related to the siting of the facility. See Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to Felicia Marcus, Regional Administrator, EPA Region IX (dated April 5, 1994); Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to the Honorable Barbara Boxer (dated June 10, 1994). In addition, letters from circuit board manufacturers (or associations representing such manufacturers) were submitted to California government officials urging the approval of the operating permit for the Pure-Etch facility. See, Letter from Leo TandECKI, President, Printed Circuit Alliance, to William Soo Hoo, Director, DTSC (dated January 26, 1994); Letter from Ronald H. Donati, President, Zycon Corporation, to Governor Pete Wilson, California (dated March 4, 1994); Letter from Ronald H. Donati, President, Zycon Corporation, to William F. Soo Hoo, Director, DTSC (dated May 4, 1994).
21. DTSC responded to the public comments received during the public comment period in a Response to Comments document dated August 26, 1994. DTSC agreed with a number of the concerns identified with respect to the CEQA determinations and proposed additional requirements upon the operations at Pure-Etch with respect to its management of hazardous waste and hazardous materials at the facility. As a result, DTSC did not conduct a risk of upset analysis with respect to the facility because it believed that the use of mitigation measures was a better approach to preclude any onsite and offsite consequences from operations. Due to the substantial changes to the proposed Negative Declaration, DTSC issued a revised Initial Study and Mitigated Negative Declaration for second public review on August 26, 1994; the public comment period for this review ended on September 30, 1994. See *Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility*, prepared by DTSC (dated March 16, 1995).
22. On September 12, 1994, prior to the issuance of the permit to Pure-Etch, DTSC received a complaint regarding on-going construction at the Pure-Etch facility. In response to this complaint, DTSC inspected the Pure-Etch facility on September 14, 1994. See Letter

from Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, Attorney for Residents of Sanborn Court, to Dan J. Rondeau, Director, Office of Civil Rights, EPA (dated January 14, 1996); Report of Violations, from Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC, and Rick Robison, Acting Branch Chief, Statewide Compliance Division, DTSC, to Tom Moore, Pure-Etch Company (dated September 20, 1994).

23. On September 20, 1994, DTSC issued to Pure-Etch a Report of Violations which indicated that,

On or about September 14, 1994, Pure-Etch Company violated the California Health and Safety Code, Division 20 section 25201 (b), in that Pure-Etch constructed underlying containment systems for their hazardous waste management units prior to permit approval.

This Report of Violations directed Pure-Etch to “[i]mmediately cease all construction of hazardous waste units,” and to submit a signed certification within ten days of receipt of the Report of Violations stating that all construction of hazardous waste units had been discontinued pending permit approval. The Report of Violations indicated that its issuance did not preclude DTSC from taking administrative, civil or criminal action in response to the violations noted. *See Report of Violations, from Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC, and Rick Robison, Acting Branch Chief, Statewide Compliance Division, DTSC, to Tom Moore, Pure-Etch Company (dated September 20, 1994).*

24. By letter dated September 26, 1994, Pure-Etch certified to DTSC that no construction would take place at the facility until permit approval. *See Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC, and Rick Robison, Acting Branch Chief, Statewide Compliance Division, DTSC (dated September 26, 1994).*

25. On October 18, 1994, DTSC issued an Amended Report of Violations which amended the description of the September 14, 1994, violation to read as follows:

On or about September 14, 1994, Pure-Etch Company violated the California Health and Safety Code, Division 20 section 25201 (b), in that Pure-Etch constructed underlying containment systems for their hazardous waste management units prior to permit approval. In addition, four tanks were observed in the hazardous waste processing area.

This Amended Report of Violations directed Pure-Etch to “[i]mmediately cease all construction of hazardous waste units,” and to submit a signed certification within ten days of receipt of the Report of Violations stating that: (1) all construction of hazardous

waste units had been discontinued pending permit approval, and (2) all tanks intended for hazardous waste processing had been removed from Pure-Etch. The Amended Report of Violations indicated that its issuance did not preclude DTSC from taking administrative, civil or criminal action in response to the violations noted. *See Amended Report of Violations, from Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC, and Rick Robison, Acting Branch Chief, Statewide Compliance Division, DTSC, to Tom Moore, Pure-Etch Company (dated October 18, 1994).*

26. By letter dated October 28, 1994, Pure-Etch re-sent its September 26, 1994, letter to DTSC indicating that no construction would take place at the facility until permit approval. *See Letter from Andi Riordan, Office Manager, Pure-Etch, to Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC (dated October 28, 1994).*
27. In a second letter sent by Pure-Etch to DTSC dated October 28, 1994, Pure-Etch indicated that the secondary containment berms at its facility had been constructed between January 8, 1994 and February 9, 1994. *See Letter from Andi Riordan, Office Manager, Pure-Etch, to Keith K. Mitsuyasu, Hazardous Materials Specialist, Statewide Compliance Division, DTSC (dated October 28, 1994).* The secondary containment berms are the "underlying containment systems for their hazardous waste management units" referenced by DTSC in their September 20, 1994, Report of Violations and October 18, 1994, Amended Report of Violations.
28. DTSC never assessed Pure-Etch a penalty for the violations noted in the September 20, 1994, Report of Violations and the October 18, 1994, Amended Report of Violations. *See Letter from Larry Matz, Chief, Statewide Compliance Division, DTSC, to Jody Sparks, Toxics Assessment Group (dated November 4, 1994); Letter from Jesse R. Huff, Director, DTSC, to Mr. Dan J. Rondeau, Director, Office of Civil Rights, EPA (dated April 17, 1996).* These violations, and DTSC's responses thereto, are not within the scope of this investigation and are provided merely as background. OCR specifically rejected for investigation these allegations on the basis that they were untimely. *See Letter from Ann E. Goode, Director, Office of Civil Rights, EPA, to Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated April 6, 1999).*
29. DTSC adopted the Mitigated Negative Declaration and issued Hazardous Waste Facility Permit No. CAD 983650490 to Pure-Etch on October 18, 1994, with an effective date of November 23, 1994. Section I.C. of the permit states:

Issuance of this permit is conditioned and predicated upon regular enforcement by the City of Salinas and/or the County of Monterey, acting as an enforcement agency, of all conditions and requirements contained in those mitigation measures

pertaining to the management and transportation of hazardous materials set forth in the Initial Study and Mitigated Negative Declaration prepared by the Department in connection with this permit. Issuance is further conditioned and predicated upon enforcement by the Department, as an enforcement agency, of all requirements, standards or criteria for the management and transportation of hazardous materials specified in the Initial Study and Mitigated Negative Declaration in accordance with its authority under California Health and Safety Code section 25200(a) & (c), and 25187.

See DTSC Hazardous Waste Facility Permit for the Pure-Etch facility (dated October 18, 1994).

30. Subsequent to the issuance of the permit, a petition for review of the permit issuance decision was filed with DTSC by the Toxics Assessment Group, the California Rural Legal Assistance Foundation, and two nearby residents (Jose Angel Velasquez and Gerardo Flores). On February 22, 1995, DTSC denied the petitions to review the permit decision. *See Order Denying Petition for Review, Docket HWCA 94/95 - P006, DTSC (dated February 22, 1995).*
31. DTSC prepared a response to comments concerning the Mitigated Negative Declaration for the Pure-Etch facility. In this document, DTSC indicated that ammonia and hydrochloric acid (HCl) were the two chemicals of concern for air emissions due to their volatility and the large amounts to be used at the facility. Ammonia was stored in tanks at the facility and hydrochloric acid was brought in and stored in a rail car. *See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC, page vii (dated March 16, 1995).*
32. With respect to the mitigation measures imposed on the management and handling of ammonia and HCl, DTSC stated,

The ammonia and HCl mitigation measures (*e.g.*, enclosures, emission suppression systems, and air scrubbers) establish strict performance standards which must be met by the Facility prior to commencing operations. Prior to constructing, installing and operating these systems, the Facility must obtain regulatory agency approval of design plans certified by a registered professional engineer and demonstrating that compliance with the mitigation measures can be achieved. The system required by these mitigation measures are proven technologies commonly used for this and other similar applications, and there is no evidence to indicate that the Facility cannot install and operate these systems to effectively achieve the required performance standards. These mitigation measures provide redundant protective measures which will effectively control releases so as to prevent exposures to hazardous materials/waste or emissions.

See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC, page viii (dated March 16, 1995).

33. With respect to the comment submitted by counsel to Complainants that Pure-Etch's commencement of construction prior to receiving its permit in September 1994 (See Findings of Fact 22-28) demonstrated a propensity by the facility for breaking the law, DTSC responded as follows:

The commenter's implications that DTSC is not willing to properly regulate the Pure-Etch facility or that DTSC is acting in 'collusion' with the Facility are without basis. DTSC issued a report of Violation (ROV) to the Facility on September 20, 1994 (and an amended ROV on October 18, 1994) pertaining to the Facility's construction activities referenced by this appeal comment. DTSC is continuing to investigate the matter and will take additional enforcement action, as necessary and appropriate. With respect to the Facility's future compliance, this Facility like all other facilities will be subject to ongoing review and oversight by DTSC and other regulatory agencies, and appropriate enforcement actions will be taken if and when necessary.

In DTSC's judgment this situation does not affect the validity or effectiveness of the permit conditions or the mitigation measures for this project, nor does it provide a basis for withdrawing or otherwise revising the Mitigated Negative Declaration, as requested by the commenter.

See Response to Comments on the Mitigated Negative Declaration for the Pure-Etch Facility, prepared by DTSC, pages 5-6 (dated March 16, 1995).

34. DTSC required that measures be implemented by Pure-Etch in order to curtail any potential releases of either ammonia or HCl. Ammonia was to be contained in an enclosure inside the facility (within Building B of the facility) and this enclosure was required to have an ammonia sensor linked to an ammonia suppression system. The ammonia suppression system would neutralize ammonia vapors with foam in the event of an accidental release. In the event that ammonia would get past the suppression system, it would be captured by the ventilation and ammonia scrubber system. With respect to HCl, the rail car containing hydrochloric acid was required to be kept in an enclosure with a containment area that was to capture and retain the contents of a loaded rail car. If a leak occurred, HCl vapors would be controlled by a suppression system using foam and a scrubber. The scrubber would also remove routine emissions. These requirements went far beyond typical industry practice for these materials. *See Declaration of Joseph Ennes III, Account Representative, La Roche Industries Inc. (dated September 14, 1995); Declaration of Colby La Place, Director of Manufacturing, Jones-Hamilton Co. (dated September 14, 1995).*

35. Ammonia has a very strong irritating odor. It is generally detectable by smell before exposure reaches the levels that cause serious effects. However, low levels of ammonia may harm some asthmatics and other sensitive individuals. Short term inhalation exposure to high levels of ammonia can irritate the lungs causing coughing and/or shortness of breath. Higher exposures can cause a build-up of fluid in the lungs with severe shortness of breath. Other symptoms include headache, loss of sense of smell, nausea and vomiting. These symptoms occur immediately or shortly after exposure. Repeated exposure can cause chronic irritation of the eyes, nose and throat. Repeated exposure may also irritate the lungs and cause bronchitis to develop with cough, phlegm, and/or shortness of breath. See <http://www.state.nj.us/health/eoh/rtkweb/0084.pdf>; <http://www.atsdr.cdc.gov/toxprofiles/phs126.html>
36. Short-term high level exposure to hydrochloric acid by inhalation may cause coughing, hoarseness, inflammation and ulceration of the respiratory tract, chest pain, and pulmonary edema in humans. Pulmonary irritation, lesions of the upper respiratory tract, and laryngeal and pulmonary edema have been reported in rodents acutely exposed to hydrochloric acid by inhalation. Effects of long term inhalation exposure caused hyperplasia of the nasal mucosa, larynx, and trachea and lesions in the nasal cavity of exposed rats. See <http://www.epa.gov/ttn/atw/hlthef/hydrochl.html>
37. On May 5, 1995, Complainants filed a Petition for Writ of Mandate and Complaint for Injunctive Relief with the Superior Court of California, County of Sacramento, regarding DTSC's approval of the Pure-Etch facility under CEQA and its issuance of a Mitigated Negative Declaration and Initial Study. Following a hearing held on December 8, 1995, the Superior Court entered a Judgment Granting a Petition for Writ of Mandate. See *Notice of Entry of Judgment and Issuance of Peremptory Writ of Mandate, Residents of Sanborn Court and Office of Appropriate Technology v. Department of Toxic Substances Control (Consolidated Case), Docket No. 95CS01074 (dated April 1, 1996)*. The Superior Court required DTSC to set aside its decision of October 18, 1994 adopting the Mitigated Negative Declaration as inconsistent with CEQA. It further required DTSC to prepare a focused environmental impact report to address the impacts of a catastrophic release of hazardous waste or hazardous materials to the environment. However, it did find that the Mitigated Negative Declaration provided an adequate basis for determining that the project, as mitigated, would not have an adverse effect on the environment, with the exception of the effects from a catastrophic release of hazardous waste or hazardous materials. Lastly, the court stated that DTSC need not revoke Pure-Etch's hazardous waste facility permit on the condition that the mitigation measures in the Mitigated Negative Declaration be incorporated into the facility's permit.

PURE-ETCH OPERATIONS AND DTSC ENFORCEMENT

38. At the end of calendar year 1994, DTSC suffered staffing cuts due to a budgetary reduction. See *Notes from Interview with Charlene Williams, Branch Chief, Northern*

California Branch, Statewide Compliance Division, DTSC, on September 11, 2002. In the early 1990s DTSC's enforcement positions numbered 184, but, due to reductions, were down to 100 by 1998. See California Environmental Protection Agency, Enforcement Progress Report, 1999-2001.

39. On August 29-31, 1995, DTSC staff conducted an inspection of the Pure-Etch facility. Based on the inspection and a review of the as-built drawings and construction report, DTSC "verified and concluded that the facility is designed and built to comply with each of the hazardous waste permit conditions and CEQA mitigation measures." See *Memorandum from John R. Hart, P.E., Chief, Combustion and Storage Unit, DTSC, to James M. Pappas, P.E., Chief, Facility Permitting Branch, DTSC (dated September 7, 1995)*. DTSC informed Pure-Etch of this conclusion by letter dated September 7, 1995. See *Letter from James M. Pappas, P.E., Chief, Facility Permitting Branch, DTSC, to Michael N. Silver, President & CEO, Pure-Etch Co. (dated September 7, 1995)*.
40. On September 7, 1995, the facility was granted final approval to commence operations by DTSC and local regulatory agencies. The first day of operations at the facility was September 7, 1995. See *Letter from James M. Pappas, P.E., Chief, Facility Permitting Branch, DTSC, to Michael N. Silver, President & CEO, Pure-Etch Co. (dated September 15, 1995)*.
41. DTSC conducted an inspection of the facility on October 5, 1995 in order to observe the trial run of the facility. See *Trip Report, prepared by Luz Castillo, DTSC (dated November 28, 1995)*.
42. The Salinas Fire Department received complaints of ammonia emanating from the vicinity of the Pure-Etch facility on December 12, 20, and 21, 1995 and January 26, 1996. During that time, there were five facilities within 1,600 feet of Pure-Etch that used anhydrous ammonia for produce cooling operations. See *Memorandum from Bruce Welden, Senior Hazardous Materials Specialist, Division of Environmental Health, Monterey County Department of Health, to Rick Robison, DTSC (dated February 13, 1996)*. During the incident on December 21, 1995, a representative of the Monterey County Division of Environmental Health was called to the scene. Following an investigation, it was determined that the source of the odor was Pure-Etch. Ammonia odors were detectable down wind of the facility, in particular at an adjoining business, and at the facility itself. The ammonia odors within the processing area at Pure-Etch were described as being at "uncomfortable levels." The plant manager, Tom Moore, indicated that the ammonia odor was due to a recent truck delivery of spent etchant material with a strong ammonia odor. At the time, the doors of the facility were wide opening, possibly allowing ammonia odors to escape without passing through the scrubber system; Mr. Moore was told to keep the doors shut in order to avoid a reoccurrence of the problem. See *Hazardous Material Incident Report, Log # 95-26, Monterey County, Division of Environmental Health (dated December 27, 1995)*.

43. On January 22, 1996, Michael Jones, a former Pure-Etch employee, telephoned the Monterey County Health Department about alleged criminal violations of hazardous waste laws at the Pure-Etch facility. The complaint alleged a variety of illegal activities including discharging thousands of gallons of hazardous waste into the sewer, cracked and leaking tanks and piping, and releases of anhydrous ammonia to the plant and surrounding area. *See Report of Investigation, County of Monterey, Department of Public Health, page 3 (dated February 6, 1996)*. Mr. Jones had been an employee at Pure-Etch from early August 1995 until late November 1995 and his title was maintenance mechanic. *See Declaration of Michael Jones in Support of Motion for Reconsideration, paragraphs 2 and 12 (dated April 4, 1996)*.
44. On January 23, 1996, the Monterey County Health Department notified DTSC regarding the allegations made by Mr. Jones with respect to Pure-Etch, and subsequently a representative of DTSC spoke with Mr. Jones via telephone on January 29, 1996. *Notes from Interview with Charlene Williams, Branch Chief, Northern California Branch, Statewide Compliance Division, DTSC, on September 11, 2002; Notes from Interview with Edward Doty, Criminal Investigator, DTSC, on March 5, 2003*.
45. On January 26, 1996, Michael Jones contacted the Salinas Fire Department to report that there had been a large spill of ammonia and HCl at the facility. When the Fire Department responded to this call, they were met by Mr. Silver and another Pure-Etch employee, who indicated that there had been a small release of ammonia, which had been contained within the facility, but no spill of HCl. When the Salinas Fire Department entered the facility, there was a moderate smell of ammonia, but there were no visible vapors or active leaks. The Pure-Etch representatives who were present when the Salinas Fire Department responded indicated that Mr. Jones had been at the facility approximately one hour previously in order to pick up a Pure-Etch employee. *See Incident Report, City of Salinas Fire Department, Incident Number 96-000498, Incident Date of January 26, 1996*.
46. On January 30, 1996, the Monterey Regional Water Pollution Control Agency installed a monitor to determine if Pure-Etch was disposing of waste via the sewers. As of February 1, 1996, there was no evidence of disposal by Pure-Etch via the sewers. *See Report of Investigation, County of Monterey Department of Public Health (dated February 6, 1996); Notes from Interview with Edward Doty, Criminal Investigator, DTSC, on March 5, 2003*.
47. DTSC inspected the Pure-Etch facility on February 2, 1996, in conjunction with inspectors from the Monterey County Department of Health. During the February 2, 1996, inspection the DTSC inspector was told by a Pure-Etch consultant who was present that there were approximately 2,200 55-gallon drums on the premises. During the course of the inspection, the inspector noted the smell of ammonia on the premises. At the time of the inspection, Mario Van-Cleave was the Plant Manager; during the course of the

inspection, Mr. Van-Cleave indicated that he had not completed the required 40-hour Hazardous Waste Operations and Emergency Response (HAZWOPPER) training class. The HAZWOPPER training is designed to provide safety training to those working at hazardous waste sites and this type of training was required for Mr. Van-Cleave pursuant to Title 22, California Code of Regulations, section 66264.16. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of February 2, 1996, Date of Report of February 23, 1996.*

48. On February 5, 1996, DTSC personnel arrived at the Pure-Etch facility in order to conduct sampling as a follow-up to the February 2, 1996 inspection. Also present at the facility were representatives of the Monterey County Department of Health, Monterey Regional Water Quality Control Agency, Salinas Police Department, and Monterey County District Attorney's Office. DTSC and Monterey County District Attorney's Office representatives served a search warrant on Pure-Etch. A total of 2,610 55-gallon drums were observed on the premises. A total of twelve samples were collected. Following analysis of the samples it was determined that all but one of the samples collected were hazardous. *See Inspection Report, Pure-Etch Company, prepared by Luz Castillo, DTSC, Date of Inspection of February 5, 1996, Date of Report of February 29, 1996.*
49. On February 5, 1996, the Monterey Regional Water Pollution Control Agency (MRWPCA) issued to Pure-Etch a Cease and Desist Order which directed Pure-Etch not to discharge any wastewater other than domestic to the sanitary sewer unless approved by MRWPCA. Access points to the sanitary sewer within a close proximity to the production area were secured by MRWPCA with custody tape as a precaution against unauthorized discharges. *See Cease and Desist Order, issued by Gary Weier, Source Control Supervisor, MRWPCA (dated February 5, 1996).* In a document titled "MRWPCA Informal Show Cause Hearing for Pure-Etch Company," dated February 23, 1996, the MRWPCA sets forth a series of actions or changes Pure-Etch would be required to undertake prior to MRWPCA rescinding the Cease and Desist Order. This document indicated that no fines were being assessed at that time, but that all time spent by MRWPCA personnel in resolving the problems at Pure-Etch, beginning January 26, 1996, and ending when the Cease and Desist Order were lifted, would be billed directly to Pure-Etch. *See MRWPCA Informal Show Cause Hearing for Pure-Etch Company, MRWPCA (dated February 23, 1996).* Representatives of the MRWPCA were at the facility on February 7, 1996 and, over the course of the next year, representatives of the MRWPCA were at the facility on thirty-three different occasions. *See Spot Inspection Report/Field Analysis prepared by the MRWPCA, Source Control Division, for the following dates: February 12, 1996, February 16, 1996, February 29, 1996, March 4, 1996, March 8, 1996, March 14, 1996, March 21, 1996, March 27, 1996, April 18, 1996, May 9, 1996, May 28, 1996, July 9, 1996, July 30, 1996, August 20, 1996, August 22, 1996, August 27, 1996, September 4, 1996, November 5, 1996, November 7, 1996, November 12, 1996, November 13, 1996, November 14, 1996, December 10, 1996,*

December 16, 1996, January 7, 1997, February 14, 1997, February 24, 1997, February 27, 1997, March 3, 1997, March 5, 1997, March 19, 1997, March 25, 1997, and March 27, 1997.

50. On February 8, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). This Schedule for Compliance required Pure-Etch to: stop receiving hazardous waste from off-site locations, prevent releases to the environment (an ammonia leak from a reaction tank was observed during the February 2, 1996 inspection), remove waste from a leaking tank and repair it, separate incompatible wastes, remove excess drums (there were over 2,500 drums at the facility even though it was permitted for only 368 drums), and certify compliance with the order. DTSC found in the Schedule for Compliance that the violations may have posed an imminent and substantial endangerment to the public health or safety or the environment in that there was a risk of an unpermitted release, fire, or explosion due to unsafe handling, treatment, storage, transfer or disposal of hazardous waste. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated February 8, 1996).*

51. The February 8, 1996, Schedule for Compliance, as did all subsequent Schedules for Compliance issued by DTSC, indicated that by issuance of the Schedule, DTSC was not waiving the right to take further enforcement actions and that failure to comply with the terms of the Schedule could subject Pure-Etch to costs, penalties, and/or punitive damages for costs incurred by DTSC as a result of such failure. The February 8, 1996, Schedule for Compliance, and all subsequent Schedules for Compliance issued by DTSC, indicated, however, that no penalties were being collected at that time, but that DTSC reserved all of its rights to impose any fines, penalties, or other assessments. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated February 8, 1996). See also DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated March 6, 1996), DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated April 19, 1996), DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated April 26, 1996), DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated May 9, 1996), DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated May 24, 1996).*

52. DTSC alleges that it did not assess penalties at the time of the issuance of the February 8, 1996 Schedule for Compliance, or at the time of issuance of any subsequent Schedule for Compliance, because the primary focus was upon returning the facility to compliance, and not on assessing penalties. Moreover, given the fact there was a five-year statute of limitations within which to recover penalties, DTSC believed that it had time to complete its investigation into the matter and then initiate a separate process for the recovery of penalties. In addition, DTSC was concerned that Pure-Etch could invoke its right to a hearing to contest the amount of any assessed penalties and this would divert resources from returning the facility to compliance. *See Notes from Interview with Charlene Williams, Branch Chief, Northern California Branch, Statewide Compliance Division, DTSC, on September 11, 2002.* Finally, counsel to DTSC was concerned that the

issuance of civil penalties could adversely affect any subsequent criminal enforcement action against the facility. *See Notes of Colleen Murphy, Senior Staff Counsel, DTSC (dated February 8, 1996); Notes from Interview with Colleen Murphy, former Senior Staff Counsel, DTSC, on September 9, 2002.*

53. By letter dated February 28, 1996, Pure-Etch submitted to DTSC a Certificate of Return to Compliance with respect to the February 8, 1996 Schedule for Compliance. The letter and the attached Certificate explained that the only item that had not been completed was the reduction of the drum inventory to the maximum capacity allowed by the permit; at that time there remained 477 drums in excess of the permitted limit. The letter further indicated that in order to avoid further non-compliance, the Facility Manager, Laboratory Manager, and Maintenance Supervisor had all been removed and replaced with, "well-trained and experienced individuals." Both the letter and attached Certificate requested that DTSC allow Pure-Etch to recommence operations at the facility in order to further reduce drum inventory. *See Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to Colleen Murphy, Senior Staff Attorney, DTSC (dated February 28, 1996).*
54. On March 4 and 5, 1996, DTSC personnel inspected the Pure-Etch facility. The purpose of this inspection was to determine compliance with the February 8, 1996 Schedule for Compliance. During the course of the inspection, Mr. Silver indicated that Mr. Tom Moore had been the Plant Manager, but that he had been reassigned to another plant. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of March 4-5, 1996, Date of Report of March 19, 1996.*
55. On March 6, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). This Schedule for Compliance noted a series of violations that required correction by Pure-Etch. The violations included: failing to tag pumps and valves, failing to connect pressure sensors on the ammonia scrubber to the control room alarms, failing to connect alarms to cutoff valves, failing to connect pressure sensors to the vent gas line, failing to connect a temperature sensor on a vent gas line, failing to record the pH on the ammonia scrubber, failing to notify DTSC regarding changes to the vent gas line, failing to follow the training plan, failing to maintain training records, and failing to empty a leaking tank. DTSC determined that Pure-Etch had corrected all but one of the violations cited in the February 8, 1996 Schedule for Compliance. Accordingly, Pure-Etch was allowed to resume treatment and storage operations at its facility. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated March 6, 1996).*
56. On March 15, 1996, DTSC wrote to Pure-Etch to clarify one of the requirements in the March 6, 1996 Schedule for Compliance related to a pressure monitor on the vent gas piping. *See Letter from Colleen Murphy, Senior Staff Attorney, to Michael N. Silver, Chief Executive Officer, Pure-Etch (dated March 15, 1996).*

57. On March 18, 1996, Pure-Etch submitted a Certificate of Return to Compliance regarding the March 6, 1996 Schedule for Compliance. *See Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to Colleen Murphy, Senior Staff Attorney, DTSC (dated March 18, 1996).* On that date, EPA conducted an inspection of the Pure-Etch facility. *See Site Visit Report, prepared by Dennis Geiser, Hazardous Waste Management Division, Waste Compliance Branch, EPA, Date of Visit of March 18, 1996, Date of Report of April 1996.*
58. On April 4, 1996, Michael Jones provided a forty-three page declaration detailing a series of safety and environmental concerns at the facility. *See Declaration of Michael Jones in Support of Motion for Reconsideration (dated April 4, 1996).* Specifically, Mr. Jones alleged many instances of threats to human health or the environment which occurred during his period of employment at the facility between August and November 1995, including, but not limited to:
- a. Turning off of the ammonia alarm because of its frequent activation (See Paragraphs 153, 155, and 156), covering up an ammonia alarm light (Paragraph 155), and disconnecting the ammonia sprinkler in the ammonia room (Paragraph 157). Mr. Jones alleged a constant smell of ammonia at the facility (Paragraph 159).
 - b. Workers with no hazardous materials training cleaning up spills of chemicals (Paragraphs 93-95).
 - c. Key alarms on the scrubbers never turned on because nobody knew where the switch was (Paragraph 64).
 - d. Spills at the plant set off leak indicators located in the sumps until management ordered that the leak indicators be moved from the bottom of the sump to the top of the berm (Paragraphs 33-37, 59- 60).
 - e. Management ordered employees to pump spilled acid and etch down the sewers (Paragraph 26, 28-32, 93).
 - f. Management ordered cleanups of spills to be flushed down the toilet (Paragraphs 130-131).
 - g. Frequent accidents at the facility that caused injury to employees (Paragraphs 16-19, 27, 139, 146-147, 151-152).
 - h. A release of a large cloud of etch and ammonia fumes because the scrubber was not working, which left the plant and traveled over the highway overpass next to the plant (Paragraph 66). In other instances, the scrubber did not have the

capacity to treat the emissions and fumes would vent to the outdoors (Paragraph 65-67, 71).

i. Complaints from neighboring business concerning odors and fumes (Paragraphs 121, 129).

j. Use of improper or faulty equipment at the facility (Paragraphs 20-25, 47-50, 52-55, 100-102, 135-142).

k. An attempt by Pure-Etch management, which Mr. Jones was forced to participate in, to deceive the DTSC inspectors present during the October 5, 1995 inspection by simulating normal operations, when in fact the facility was not operating properly. Mr. Jones further alleged that one of the DTSC inspectors came upon him lying under a tank, manually operating a valve in order to provide the appearance that the machinery was operating appropriately, yet the inspector said nothing to him or to anyone else at the facility regarding what he observed (Paragraphs 72-89).

Generally, Mr. Jones felt that, "There's so much wrong there that there's a potential for something serious to happen. I think it's an accident waiting to happen With the inexperienced people there, somebody will get hurt, unless people are trained and things are right." *See Declaration of Michael Jones in Support of Motion for Reconsideration, Paragraph 225 (dated April 4, 1996)*. Later that month, on April 23, 1996, Alvin Harrison, also a former Pure-Etch employee, provided a declaration describing Pure-Etch operations during his two periods of employment from October 1995 to mid-December 1995 and from March 25, 1996 to April 10, 1996. Mr. Harrison described one incident of waste etch being dumped down a sewer during his first period of employment and about the release of ammonia vapors during the process of pumping etch into drums. Mr. Harrison further indicated that when he returned to work at Pure-Etch in March 1996, he noticed that rubber seals had been installed at the tops of the drums to reduce ammonia leakage during the drumming process. Additionally, Mr. Harrison indicated that on three separate occasions in March 1996 he smelled strong ammonia odors near the reactors inside the plant. *See Declaration of Alvin Harrison in Support of Motion for Reconsideration, (dated April 23, 1996)*.

59. By letter dated April 8, 1996, Luke Cole, counsel for Complainants, wrote to EPA Region IX requesting that it conduct an immediate inspection of Pure-Etch in light of the allegations contained in the Jones declaration. *See Letter from Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation, to Felicia Marcus, Regional Administrator, EPA Region IX, and Laura Yoshii, Acting Director, Hazardous Waste Management Division, EPA Region IX (dated April 8, 1996)*.
60. By letter dated April 9, 1996, Robert P. Hoffman, Chief Counsel for DTSC, requested

that the Monterey County District Attorney file a criminal action against Pure-Etch under the Hazardous Waste Control Law. See *Letter from Robert P. Hoffman, Chief Counsel, DTSC, to Dean D. Flippo, District Attorney, Monterey County (dated April 9, 1996)*.

61. On April 11, 1996, DTSC personnel inspected the Pure-Etch facility. Also present, were representatives from the Monterey County Department of Health. During the course of the inspection, the inspectors noticed a strong smell of ammonia. The inspection focused on areas of concern highlighted in the April 8, 1996, letter from Luke Cole, Esquire, to the U.S. EPA, Region IX. See *Inspection Report, Pure-Etch Company, prepared by Luz Castillo, DTSC, Date of Inspection of April 11, 1996, Date of Report of May 23, 1996*.
62. On April 18, 1996, a representative of DTSC's Criminal Investigation Branch interviewed Michael Jones for a second time. This followed an earlier refusal by Mr. Jones on February 1, 1996, to cooperate further in the investigation because of alleged threats of legal action received by Mr. Jones from Michael Silver. See *Declaration of Michael Jones in Support of Motion for Reconsideration, Paragraph 212 (dated April 4, 1996); Notes from Interview with Edward Doty, Criminal Investigator, DTSC, on March 5, 2003*.
63. DTSC personnel inspected the Pure-Etch facility on April 17, 18, 22, 23 and 24, 1996. During the course of the inspection on April 18, 1996, DTSC inspectors discussed once again the issues raised by Mr. Cole in his April 8, 1996, letter to the U.S. EPA, Region IX. During the inspection that took place on April 23, 1996, DTSC reviewed training records. Neither Mr. Otterbach nor Mr. Oldhouser had undergone the HAZWOPPER training yet. See *Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of April 17, 18, 22, 23, 24, 1996, Date of Report of September 12, 1996*.
64. On April 19, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). This Schedule for Compliance noted a series of violations that required correction by Pure-Etch. The violations included: treating waste ammonium chloride in tank NK-1 (this tank had been permitted for treatment of copper sulfate only), manufacturing "starter" out of waste ammonium chloride (this treatment was not authorized by the facility permit), releasing ammonia vapors to the air (during the filling of an ammonia tank by a delivery truck, the doors to the building were open and a draeger tube reading just inside the building doorway indicated between 80-100 ppm of ammonia), leaking in the roll-up door that provided secondary containment to the HCl rail car, leaking of copper oxide from a pump, allowing drums of filter cake (a hazardous waste) to remain open during times when they were not being filled, operating a heat exchanger without a permit, and failing to record the pH of the ammonia scrubber while waste was being treated. The Schedule for Compliance ordered Pure-Etch to correct all of these violations. Upon correcting all of the violations, Pure-Etch was to submit a Certification of Return to Compliance. Pure-Etch was not allowed to treat hazardous

waste or resume operations until such time as the DTSC had reviewed and approved the Certificate of Return to Compliance and had determined that all violations had been corrected. The Schedule for Compliance indicated that a number of the violations could pose an imminent and substantial endangerment to the public health or safety or the environment in that there was a risk of an unpermitted release, fire, or explosion due to the unsafe handling, treatment, storage, transfer or disposal of hazardous wastes as described in the violations. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated April 19, 1996).*

65. On April 23, 1996, Pure-Etch submitted a Certificate of Return to Compliance with respect to the April 19, 1996 Schedule for Compliance.
66. Based on the inspections discussed in Finding of Fact 63, on April 26, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). The Schedule for Compliance noted twenty-three violations and thirty-seven items that required corrective action by Pure-Etch. The violations noted included: modifying the facility without having obtained the proper authorization, treating spent etchant in Tank NK-1 without authorization, accepting waste which did not conform to permit conditions, failing to have all required training for employees, failing to use stainless steel for the CO₂ and ammonia lines as specified in the permit, failing to properly characterize and store filter cake, failing to keep the doors closed in the building where hazardous treatment was occurring (this would preclude negative pressure from being maintained in Building B), failing to connect the CO₂ deluge system to the ammonia sensor located in Area no. 5., failing to provide a system that automatically dialed the safety officer upon a high level alarm activation from the room air ammonia sensor in Building B, and failing to provide the required secondary containment of the rail car as specified in the facility permit in that the roll-up door was not sealed in accordance with the permit. DTSC required Pure-Etch to undertake a series of corrective actions in order to address the violations. In addition, DTSC required Pure-Etch to submit a third-party engineering evaluation of both the facility and the facility's ducts and scrubber systems. *See DTSC Schedule for Compliance (Docket HWCA 95/96-050) (dated April 26, 1996).* The time-frames provided by DTSC for corrections of the violations depended on the nature of the violations.
67. Pure-Etch was allowed to resume treatment operations at its facility subject to all requirements and conditions imposed by statutes, regulations, and the facility permit. Provided, however, that Pure-Etch was not to resume treatment operation until it submitted to DTSC a Certificate of Return to Compliance and DTSC had reviewed and approved the Certificate. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated April 26, 1996).* DTSC determined that all of the provisions of the April 26, 1996, Schedule for Compliance were so related that public health and safety of the public could only be protected by immediate compliance with the order as a whole. Accordingly, the April 26, 1996, Schedule for Compliance was effective upon issuance. *See DTSC*

Schedule for Compliance, Docket HWCA 95/96-050 (dated April 26, 1996).

68. By letter dated April 30, 1996, Pure-Etch requested permission from DTSC to modify the permit in the manner outlined in the Schedules for Compliance dated March 6, 1996 and April 26, 1996. Pure-Etch's letter stated that the letter modified their permit, which legally it did not. Also, on that date Pure-Etch submitted a Certificate of Return to Operation Compliance. The Certificate indicates Pure-Etch was in compliance with items nos. 2, 3, 4, 9, 12, 13, 14, and 15. DTSC's inspection on May 3, 1996 confirmed that statement. *See Letter from Michael N. Silver, Chief Executive Officer, DTSC, to Colleen Murphy, Senior Staff Attorney, DTSC (dated April 30, 1996). See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 3, 1996, Date of Report of September 23, 1996.*
69. By letter dated April 30, 1996, the Monterey County Department of Health, Environmental Health Division (EHD), informed Pure-Etch that, due to violations uncovered during inspections performed by EHD and DTSC in February, March, and April, the permit issued by the Monterey County Health Department for Hazardous Materials Storage would be revoked or temporarily suspended unless Pure-Etch met a series of conditions spelled out in the letter. *See Letter from Bruce A. Welden, Senior Hazardous Materials Specialist, Environmental Health Division, Monterey County Department of Health (dated April 30, 1996).*
70. On May 3, 1996, DTSC conducted an inspection of Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 3, 1996, Date of Report of September 23, 1996.*
71. On May 3, 1996, in conjunction with the DTSC inspection, EPA did an inspection of Pure-Etch. The purpose of this inspection was to verify compliance with DTSC Schedule for Compliance dated April 26, 1996. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 3, 1996, Date of Report of September 23, 1996; Memorandum to the File, from Dennis Geiser, EPA Region IX (dated May 25, 1996).*
72. On May 9, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). The Schedule for Compliance noted conditions of noncomformity at the facility and required Pure-Etch to correct, among other things, the following: ensuring that all ammonia sensors read and recorded the appropriate levels of ammonia, ensuring that the ammonia vapor suppression system was a manually operating system, submitting design specifications for a device on the sprinkler system in the HCl railcar building that activated when the HCl monitor read above a certain level to DTSC for review and approval, installing the approved sprinkler in the HCl railcar building, and installing an automated dialing system that dialed the facility's emergency coordinator upon activation of a high level alarm from any of the ammonia or HCl sensors. *See DTSC Schedule for*

Compliance, Docket HWCA 95/96-050 (dated May 9, 1996).

73. DTSC determined in the May 9, 1996, Schedule for Compliance that Pure-Etch had made sufficient corrections in response to the April 26, 1996 Schedule for Compliance that the facility was allowed to resume hazardous waste treatment operations, subject to certain conditions. DTSC further determined that compliance with the order as a whole was necessary in order to protect public health and safety, so the Schedule for Compliance was effective upon issuance. *See DTSC Schedule for Compliance, Docket HWCA 95/96-050 (dated May 9, 1996).*
74. Pure-Etch did not treat waste between April 19 and May 9, 1996. Pure-Etch operated between May 9 and May 17, 1996. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 17, 1996, Date of Report of September 26, 1996; Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.*
75. On May 16, 1996, EPA did an inspection of Pure-Etch. *See RCRA Compliance Evaluation Inspection Report, Waste Management Division, State Programs and Compliance Branch, EPA Region IX, prepared by Dennis Geiser, Date of Inspection of May 16, 1996, Date of Report of July 1996.*
76. DTSC performed an inspection on May 17, 1996, in order to determine compliance with April 26, 1996 and May 9, 1996 Schedule for Compliance. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 17, 1996, Date of Report of September 26, 1996.*
77. Pure-Etch voluntarily shut down on May 17, 1996 when it was determined that their ammonia sensor was not working. On that same date, DTSC sent Pure-Etch a letter directing them not to operate the facility until the ammonia sensor was working to DTSC's satisfaction. *See Letter from, John E. Mueller, Nielsen, Merksamer, Parrinello, Mueller & Naylor, to Robert Borzelleri, DTSC (dated May 17, 1996); Letter from Charlene Williams, Chief, Region 2, Statewide Compliance, DTSC, to Wilson Oldhouser, Pure-Etch (dated May 17, 1996).*
78. By letter dated May 20, 1996, Pure-Etch contested the necessity of requiring that the rail car sprinkler system activate when the HCl monitor located in the rail car building read at or above 5 ppm. *See Letter from Michael N. Silver, Chief Executive Officer, Pure-Etch, to Colleen Murphy, Senior Staff Attorney, DTSC (dated May 20, 1996).*
79. On May 21, 1996, DTSC performed an inspection of Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 21, 1996, Date of Report of October 4, 1996.*

80. On May 22, 1996, the Monterey County Department of Health, EHD hand-delivered a letter to Pure-Etch informing them that EHD was suspending the Health Permit for Hazardous Materials Storage. Pure-Etch was to suspend all operations until such time as the facility returned to compliance and the Health Permit had been re-authorized. *See Letter from Bruce A. Welden, Senior Hazardous Materials Specialist, Environmental Health Division, Monterey County Department of Health (dated May 22, 1996).*
81. On May 22, 1996, Pure-Etch submitted an Updated Certificate of Return to Operational Compliance and Status Report which addressed the requirements of the Schedules for Compliance dated April 26, 1996 and May 9, 1996. *See Updated Certificate of Return to Operational Compliance and Status Report, signed by Michael N. Silver, Chief Executive Officer, Pure-Etch (dated May 22, 1996).*
82. On May 24, 1996, DTSC performed an inspection of Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May 24, 1996, Date of Report of October 7, 1996.*
83. On May 24, 1996, DTSC issued to Pure-Etch a Schedule for Compliance (Docket HWCA 95/96-050). The Schedule for Compliance required, among other things, the following corrections by Pure-Etch: installing a DTSC-approved device in connection with the sprinkler system in the HCl railcar building that would activate upon the HCl monitor detecting a certain level, ensuring that all ammonia sensors and recorders were operating appropriately (among other problems, one of the sensors had tape over it), installing a dialing system that automatically dialed the facility emergency coordinator upon activation of a high level alarm from an ammonia sensor, ensuring that the roll-up doors of Building B were closed during waste treatment, seeking a number of permit modifications, submitting documentation that Mr. Olhouser and Otterbach had received HAZWOPPER training, and repairing and sealing a hole of approximately 4" by 6" in the HCl railcar building (Pure-Etch had been receiving shipments of HCl via trucks and the trucks would transfer the HCl to the railcar inside the HCl railcar building via a hose placed through the hole.). *See DTSC Schedule of Compliance, Docket HWCA 95/96-050 (dated May 24, 1996).*
84. DTSC determined that immediate compliance with the Schedule for Compliance as a whole was necessary to protect public health and safety. All of the items required by the order, with the exception of the HCl suppression system, were required to be completed before Pure-Etch could begin to treat hazardous waste again. *See DTSC Schedule of Compliance, Docket HWCA 95/96-050 (dated May 24, 1996).*
85. By letter dated May 24, 1996, Pure-Etch requested that DTSC authorize a permit modification as required by the May 24, 1996, Schedule for Compliance.
86. On May 28, 1996, DTSC inspected Pure-Etch. Based on this inspection, Pure-Etch was

found to be substantially in compliance and no new violations were noted. *See Inspection Report, Pure-Etch Company, prepared by Rick Robison, DTSC, Date of Inspection of May 28, 1996, Date of Report of June 26, 1996.*

87. On May 28, 1996, Pure-Etch submitted a Certificate of Return to Compliance which addressed the items required by the May 24, 1996 Schedule for Compliance. *See Certificate of Return to Compliance, signed by Michael N. Silver, Chief Executive Officer, Pure-Etch (dated May 28, 1996).*
88. On May 28, 1996, DTSC authorized Pure-Etch to resume hazardous waste treatment operation in accordance with the facility permits and the previously issued Schedules for Compliance. DTSC based this decision on the information contained in the May 28, 1996 Certificate to Return to Compliance, including attachments thereto, and an inspection conducted by DTSC staff. *See Letter from Larry Matz, Division Chief, Statewide Compliance Division, DTSC, to Michael N. Silver, Chief Executive Officer, Pure-Etch (dated May 28, 1996).*
89. On May 29, 1996, EHD, based upon a determination that the facility would not pose an imminent hazard to public health, safety or the environment; re-authorized the Hazardous Materials Storage permit. *See Letter from Bruce A. Welden, Senior Hazardous Materials Specialist, Environmental Health Division, Monterey County Department of Health, to Michael N. Silver, Chief Executive Officer, Pure-Etch (dated May 29, 1996).*
90. On May 29, 1996, Pure-Etch began to treat hazardous waste once again. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of May June 6, 1996, Date of Report of October 8, 1996.*
91. On June 6, 1996, DTSC inspected the Pure-Etch facility. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of June 6, 1996, Date of Report of October 8, 1996.*
92. On June 11, 1996, Pure-Etch submitted an updated Certificate of Return to Compliance which indicated that it had addressed Paragraphs 3.29 and 3.30 of the April 26, 1996 Schedule for Compliance (These requirements pertain to a third-party engineering evaluation of both the facility and the facility's ducts and scrubber systems--See Finding of Fact 66.) and Paragraph 3.4 of the May 9, 1996 Schedule for Compliance (This requirement pertains to the submission of design specifications for a device on the sprinkler system in the HCl railcar building that would activate when the HCl monitor read above a certain level. See Finding of Fact 72.). *See Updated Certificate of Return to Compliance, signed by James I. Collins on behalf of Pure-Etch (dated June 11, 1996).*
93. On June 13, 1996, DTSC performed an inspection of Pure-Etch. No violations were noted at the time, although Pure-Etch was not in compliance with some of the

requirements set forth in prior Schedules for Compliance. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of June 13, 1996, Date of Report of October 9, 1996.*

94. In a letter dated June 18, 1996, Colleen Murphy, Senior Staff Counsel, DTSC, supplied to the Monterey County District Attorney's Office, "draft language for inclusion in any order, judgment, or settlement document you may enter into with the defendant." *See Letter from Colleen Murphy, Senior Staff Counsel, DTSC, to John Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated June 18, 1996).*
95. On June 20, 1996, DTSC performed an inspection of Pure-Etch. Although two violations were noted, a summary of violations was not issued. The inspection report indicates that the violations would be addressed by means of a letter to Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Luz Castillo, DTSC, Date of Inspection of June 20, 1996, Date of Report of July 31, 1996.*
96. On June 24, 1996, DTSC sent Pure-Etch a letter indicating that the documentation of Mr. Otterbach's training was sufficient to comply with the alternative training requirements. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of September 16, 1996, Date of Report of October 11, 1996.*
97. On June 27, 1996, DTSC inspected Pure-Etch. The inspection report indicates that violations observed during the inspection would be addressed by means of a letter to Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Luz Castillo, DTSC, Date of Inspection of June 27, 1996, Date of Report of July 31, 1996.*
98. On June 30, 1996, Pure-Etch submitted to DTSC a Certificate of Return to Operational Compliance signed by Michael Silver. *See Certificate of Return to Operational Compliance, signed by Michael N. Silver, Chief Executive Officer, Pure-Etch (dated June 30, 1996).*
99. By letter dated July 9, 1996, John G. Quirk, from the Monterey County Office of the District Attorney, wrote to Michael Silver indicating that the District Attorney's Office intended to file a civil action against Pure-Etch. The letter invited Mr. Silver to contact the District Attorney's office within ten (10) days of the date of the letter to discuss the matter. *See Letter from John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office, to Michael Silver, Chief Executive Officer, Pure-Etch (dated July 9, 1996).*
100. On July 17, 1996, Brown and Caldwell, a consulting firm retained by Pure-Etch on June 11, 1996, submitted to DTSC a Third-Party Engineering Evaluation of the facility as required by Paragraph 3.29 of DTSC's Schedule for Compliance dated April 26, 1996. Brown and Caldwell made a series of recommendations which they believed necessary in

order for Pure-Etch to comply with its Hazardous Waste Permit. *See Letter from Matthew B. Gerhardt, Principal Engineer, Brown and Caldwell, to Rick Robison, DTSC (dated July 17, 1996).*

101. On July 18, 1996, Brown and Caldwell, submitted a Third Party Engineering Evaluation of the ducts and scrubber systems of the facility as required by Paragraph 3.30 of DTSC's Schedule for Compliance dated April 26, 1996. Brown and Caldwell made a series of recommendations which they believed necessary in order for Pure-Etch to comply with its Hazardous Waste Permit. *See Letter from Scott Parr, Project Engineer, Brown and Caldwell, to Rick Robison, DTSC (dated July 18, 1996).*
102. In a letter dated July 19, 1996, Robert P. Hoffman, Chief Counsel, DTSC, requested that the Monterey County District Attorney's Office file an action under the Hazardous Waste Control Law. The letter further authorized the Monterey County District Attorney's Office to seek civil penalties in connection with the matter. *See Letter from Robert P. Hoffman, Chief Counsel, DTSC, to John Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated July 19, 1996).*
103. On July 24, 1996, ATC Environmental Inc. submitted an environmental audit of Pure-Etch to DTSC. *See Letter from John Geare, Project Manager, ATC Environmental, Inc., to Colleen Murphy, Senior Staff Attorney, DTSC (dated July 24, 1996).*
104. On July 30, 1996, Pure-Etch provided DTSC with the Third-Party Engineering Evaluations and the environmental audit referenced above. All of these had been required by April 26, 1996, Schedule for Compliance. Pure-Etch was required to implement all construction changes found necessary by Brown and Caldwell by September 8, 1996. *See Letter from Rick Robison, Unit Chief, Statewide Compliance Division, DTSC, to James L. Collins, Integrated Environmental Systems (dated August 23, 1996).*
105. By letter dated August 23, 1996, DTSC provided comments to Integrated Environmental Systems, an environmental consultant to Pure-Etch. DTSC indicated that completion dates for some items identified in the engineering audit still needed to be provided. Similarly, DTSC indicated that not all of the items identified by the audit described in Finding of Fact 101 had been addressed. DTSC required a letter from Pure-Etch indicating how it would respond to the items identified in the August 23, 1996 letter. *See Letter from Rick Robison, Unit Chief, Statewide Compliance Division, DTSC, to James L. Collins, Integrated Environmental Systems (dated August 23, 1996).*
106. By letter dated August 30, 1996, Pure-Etch responded to DTSC's August 23, 1996 letter, indicating that it would complete all required work by the end of September. *See Letter from James I. Collins, on behalf of Pure-Etch, to Rick Robison, Unit Chief, Statewide Compliance Division, DTSC (dated August 30, 1996).*

107. On September 12, 1996, DTSC met with Jim Collins and representatives of Brown and Caldwell to discuss the results of the audit. Mr. Collins indicated that Pure-Etch had not completed all of the required modifications by September 8, 1996. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of September 16, 1996, Date of Report of October 11, 1996.*
108. By letter dated September 12, 1996, the Monterey County Office of the District Attorney wrote to counsel to Michael Silver indicating that it intended to file a civil action against Michael Silver (in his individual capacity) and Pure-Etch for violations at the Pure-Etch facility. This letter details the factors that would be taken into consideration in assessing a penalty and makes a penalty demand of \$784,700. The letter indicated that up to that time, Mr. Silver had chosen not to provide information regarding his assets, liabilities, and net worth. *See Letter from John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office, to Tom Griffin, Esquire (dated September 12, 1996).*
109. DTSC conducted an inspection at Pure-Etch on September 16, 1996, the purpose of which was to determine compliance with Section 3.29 and 3.30 of the April 26, 1996 Schedule for Compliance. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of September 16, 1996, Date of Report of October 11, 1996.*
110. Under cover letter dated September 17, 1996, DTSC provided the Monterey County District Attorney's Office with a summary of staff costs that were incurred in connection with the Pure-Etch investigation through July 31, 1996. As of that date, DTSC had incurred investigator and specialist costs totaling \$174,620.23 and laboratory costs for sample analysis totaling \$8,896.49. As of that date, Robert Aragon, the principal DTSC inspector assigned to Pure-Etch, had billed 532 hours relating to the facility. Luz Castillo, another DTSC inspector assigned to the facility, billed 326.5 hours relating to the facility. As a whole, DTSC personnel charged a total of approximately 2,137 hours relating to the Pure-Etch investigation as of July 31, 1996. *See Letter from Mary Locke, Chief Investigator, Criminal Investigations Branch, DTSC, to John Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated September 17, 1996).*
111. Michael N. Silver was the Chairman and CEO of Pure-Etch until September 18, 1996, at which time James I. Collins became Pure-Etch's CEO. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of September 27, 1996, Date of Report of December 6, 1996.*
112. DTSC conducted an inspection at Pure-Etch on September 27, 1996. At this time Howard Kuhlman was identified as the new plant manager. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of September 27, 1996, Date of Report of December 6, 1996.*

113. As a result of violations discovered during the September 16 and 27, 1996, inspections, DTSC issued a Summary of Violations to Pure-Etch on September 30, 1996. The Summary of Violations listed a series of violations, including, but not limited to: failing to make all construction changes found necessary by the Brown and Caldwell Engineering and Scrubber System Evaluations, dated July 17 and 18, 1996, respectively, within the time-frame specified by DTSC, failing to maintain steel tank supports, failing to install a device in the HCl rail car building, approved by DTSC on July 18, 1996, that activated whenever the HCl monitor located in the railcar building read at or above 5 ppm, and storing filter cake in excess of ninety days. *See DTSC Summary of Violations (dated September 30, 1996).*
114. Between October 2, 1996 and November 1, 1996, counsel for Pure-Etch submitted letters to the Monterey County District Attorney's Office in which issues pertaining to potential settlement were discussed. *See Letter from Richard D. Robins, Parker, Milliken, Clark, O'Hara & Samuelian, to John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated October 2, 1996); Letter from Richard D. Robins, Parker, Milliken, Clark, O'Hara & Samuelian, to John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated October 15, 1996); Letter from Richard D. Robins, Parker, Milliken, Clark, O'Hara & Samuelian, to John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated October 21, 1996); Letter from Richard D. Robins, Parker, Milliken, Clark, O'Hara & Samuelian, to John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated November 1, 1996).*
115. On October 14, 1996, someone reported an ammonia smell coming from Pure-Etch to the Salinas Fire Department. The Salinas Fire Department responded and upon arrival at the facility met with Mr. Collins, who indicated that there was no leak. The Salinas Fire Department checked the ammonia recorder and found no recording of any leaks. They also found that the interior and exterior of the plant were clear of leaks. *See Incident Report, City of Salinas Fire Department, Incident Number 96-005760, Incident Date of October 14, 1996.*
116. DTSC inspected Pure-Etch on October 15, 16, 17, 22, and 23, 1996. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of October 15, 16, 17, 22, 23, 1996, Date of Report of December 19, 1996.*
117. By letter dated October 15, 1996, Pure-Etch responded to the Summary of Violations. In this letter, Pure-Etch disputes some of the findings made by DTSC, but also agrees to implement a series of corrections. *See Letter from James I. Collins, Chief Executive Officer, Pure-Etch, to Rick Robison, Unit Chief, DTSC (dated October 15, 1996).*
118. By letter dated October 23, 1996, Pure-Etch notified DTSC of extensive repairs of tanks NK-1 and CR-3 pursuant to facility operation plan section 7.1.6. *See Letter from James I.*

Collins, Chief Executive Officer, Pure-Etch, to James M. Pappas, Chief, Facility Permitting, DTSC (dated October 23, 1996).

119. On October 23, 1996, based upon inspections conducted at the facility by DTSC on October 15, 16, 17, 22, and 23, 1996, DTSC issued Pure-Etch a Summary of Violations. The Summary of Violations identified a number of violations, including, but not limited to, the following: failing to address all construction changes found necessary by the Brown and Caldwell Engineering Audit (which were listed in the September 30, 1996, Summary of Violations), failing to maintain a valve on the HCl line that leaked HCl into area no. 1Q and caused a cloud of ammonium chloride to form, failing to operate the 0-300 ppm ammonia sensor in the ceiling (there was tape over the sensor), failing to operate the ammonia vapor deluge system (CO₂) in the automatic mode when the facility was unoccupied, and failing to install the HCl vapor deluge system in the HCl rail car building. *See DTSC Summary of Violations (dated October 23, 1996).*
120. On November 12, 1996, DTSC inspected Pure-Etch. No violations were reported at the time. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of November 12, 1996, Date of Report of January 2, 1997.*
121. On November 14, 1996, DTSC inspected Pure-Etch. No violations were reported at the time. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of November 14, 1996, Date of Report of January 2, 1997.*
122. By letter dated January 30, 1997, Pure-Etch submitted a letter to DTSC updating its response to the Summary of Violation dated September 30, 1996. The letter indicated that Pure-Etch had addressed issues related to the scrubber in Building B, Tank R-2, fiberglass grating under tanks D-1 and R-1, anchoring heat exchanger in area no. 2, secondary containment or piping in area no. 9B, carbon dioxide pipe, and the HCl deluge system. *See Letter from James I. Collins, Chief Executive Officer, Pure-Etch, to Rick Robison, Surveillance and Enforcement Branch, DTSC (dated January 30, 1997).*
123. In a letter dated February 13, 1997, counsel for Pure-Etch wrote to representatives of the Monterey County District Attorney's Office and the California Office of Attorney General, concerning issues pertaining settlement of the potential action against Pure-Etch. *See Letter from Mark E. Elliot, Esquire, Parker, Milliken, Clark, O'Hara & Samuelian, to Kenneth Alex, Office of Attorney General, and John G. Quirk, Deputy District Attorney, Monterey County District Attorney's Office (dated February 13, 1997).*
124. No inspections were performed at the facility between mid-November 1996 and March 1997 because the inspector assigned to the facility had to attend to other duties and because the most recent DTSC inspections of Pure-Etch did not reveal significant non-compliance by Pure-Etch. *See Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.*

125. On March 4 and 5, 1997, DTSC inspected the Pure-Etch facility. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of March 4-5, 1997, Date of Report of May 6, 1997.* Based upon the violations noted during the inspection, DTSC issued a Summary of Violations on March 7, 1997. All of the violations noted in the Summary of Violations were identified as Class I violations. Pure-Etch's violations included, but were not limited to, the following: failing to maintain, test and calibrate HCl sensors Nos. 4 and 5 (these sensors failed to detect the presence of HCl vapors in the HCl railcar building on March 4, 1997), failing to maintain the HCl vapor suppression system when the liquid detection probes in the rail car building were relocated in a manner that prevented the system from activating, and failing to maintain equipment and pipes at the facility to prevent leaks and spills. *See DTSC Summary of Violations (dated March 7, 1997).*

126. On March 24, 1997, DTSC issued to Pure-Etch an Order for Temporary Suspension (Docket HWCA 96/97-2023) and an Accusation for Revocation (Docket HWCA 96/97-2022). The Order for Temporary Suspension suspended Pure-Etch's Hazardous Waste Facility Permit effective March 24, 1997. *See DTSC Order for Temporary Suspension Pending Hearing, Docket HWCA 96/97-2023 (dated March 24, 1997).* DTSC found that the conditions at the facility constituted an imminent and substantial danger to the public health and safety or the environment. The Order for Temporary Suspension states that,

the Facility has been the subject of approximately twenty (20) inspections which revealed numerous, repeated, serious violations of the hazardous waste statutes and regulations, as well as the facility's permit and several Schedules for Compliance issued to the Facility. The violations include, but are not limited to: disarming various monitors and alarms, allowing unregulated releases of hazardous materials and hazardous wastes, and failure to install a sprinkler system activator for suppression of hydrochloric acid releases. These violations have been noted in six (6) separate Schedules for Compliance and three Statements of Violations. Yet the Facility continues to have numerous serious violations that pose an imminent and substantial danger to public health or safety on [sic] the environment.

127. The DTSC Accusation for Revocation indicated that,

Pure-Etch's operations have repeatedly found to be unsafe, improper, and illegal. No matter how often the Department inspected the facility and no matter how many orders for compliance the Department issued, Pure-Etch continued to violate laws, regulations, permits and order. Pure-Etch ignored portions of some Orders and responded to others only after repeated demands from the Department. In those instances when the company complied with an order, it then violated its permit on other matters. It has shown an on-going pattern and practice of non-compliance, an unwillingness to comply, and an inability to comply with the basic

requirements of the law, regulations, permit, and orders. These violations, including disabling of alarms, inoperative alarms, illegal storage, non-functioning deluge systems, among others, reflect an unsafe operation and an absence of meaningful progress towards compliance.

See DTSC Accusation for Revocation of Permit, Docket HWCA 96/97-2022 (dated March 24, 1997).

128. The Accusation for Revocation also indicates that,

[b]ecause the Department believed during the course of 1996 that Pure-Etch was making efforts toward compliance and that the facility was showing improvement, and because the facility installed new management, the Department continued to issue Schedules for Compliance Orders and continued to inspect the facility to ensure that the company maintained its schedule as ordered. The results of the Department's October 1996 and March 1997 inspections, however, changed the Department's belief. Repeated serious violations found at these inspections included taping over alarm sensors (for detection of the presence of airborne hazardous waste) thereby preventing the detection of airborne hazardous waste and precluding proper operation; disabling of the ammonia vapor suppression system (designed to respond to the release of airborne hazardous waste); and the failure of sensors to detect a serious release of HCl gas.

See DTSC Accusation for Revocation of Permit, Docket HWCA 96/97-2022 (dated March 24, 1997).

129. In the Accusation for Revocation, DTSC identified as among the most serious violations the following:

- a. Storage of 2,610 containers of hazardous waste in an area permitted for 368 (February 1996).
- b. An ammonia leak from a reaction tank (February 1996).
- c. An alarm system (for airborne hazardous waste) that did not signal control valve shut off and isolate a leak pending repairs (March 1996).
- d. An alarm system that was not connected to an automatic shut off device in pressurized lines (March 1996).
- e. An ammonia leak from the ammonia room (April 1996).
- f. A failure to install a sprinkler system activator for suppression of HCl vapors despite Schedule for Compliance Orders requiring it (September and October 1996).
- g. Wrong alarm levels set (October 1996).
- h. Tape over alarm sensors (May and October 1996).

- i. An ammonia Chloride gas release (valve failure, no secondary containment, and an unpermitted connection to the HCl supply) (October 1996).
- j. A failure to install an automatic HCl vapor suppression system despite it being required by a Schedule for Compliance Order.

See DTSC Accusation for Revocation of Permit, Docket HWCA 96/97-2022 (dated March 24, 1997).

130. The Accusation for Revocation indicates that Pure-Etch violated each of the six separate Schedule for Compliance Orders. *See DTSC Accusation for Revocation of Permit, Docket HWCA 96/97-2022 (dated March 24, 1997).*
131. On April 7, 1997, Pure-Etch filed a Notice of Defense requesting a hearing on the allegations contained in the Accusation for Revocation.
132. The suspension of a permit by DTSC was an extraordinary action and there were very few other instances where such action had been taken. *See Notes from Interview with Charlene Williams, Branch Chief, Northern California Branch, Statewide Compliance Division, DTSC, on September 11, 2002; Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.*
133. In the opinion of the primary DTSC inspector for the facility, he believed that one of the problems contributing to Pure-Etch's non-compliance was the permit that had been issued for the facility. He indicated that he believed that DTSC permit writers had not performed an adequate assessment of how the facility was to operate and how the conditions set forth in the permit applied to the operations at the facility. *See Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.* This impression was corroborated by two EPA Region IX inspectors assigned to oversee the actions being taken with respect to Pure-Etch. *See Notes from Interview with Dennis Geiser, former EPA Region IX Inspector, on December 14, 2001 and October 2, 2002; Notes from Interview with Kaoru Morimoto, EPA Region IX, on October 16, 2002.*
134. From the perspective of returning the facility to compliance, DTSC's primary concern centered on releases of ammonia and HCl. *See Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.*
135. On July 10, 1997, DTSC inspected Pure-Etch. *See Inspection Report, Pure-Etch Company, prepared by Robert Aragon, DTSC, Date of Inspection of July 10, 1997, Date of Report of August 20, 1997.*
136. On August 8, 1997, DTSC filed an action seeking civil penalties in the Superior Court of the State of California against Michael Silver in his individual capacity. This complaint

alleged violations based upon fifteen inspections conducted by DTSC at Pure-Etch between February 2, 1996 and September 18, 1996. The complaint alleges that most of these inspections, "were intended to ensure that Pure-Etch was making progress towards complying with the Schedules for Compliance." This complaint was eventually withdrawn. *See Complaint for Civil Penalties Pursuant to California Hazardous Waste Control Law (Health and Safety Code Sections 25189 and 25189.2), People of the State of California v. Michael Silver, Superior Court of the State of California for the County of Alameda, Docket No. 787016-1.*

137. In August 1997, DTSC and Pure-Etch entered into an Agreement and Consent Order filed before the DTSC Office of Administrative Hearings. In this document, DTSC allows Pure-Etch a period of time to negotiate a sale and transfer of the rights to the Pure-Etch permit. Specifically, Pure-Etch's permit was suspended for a period of six months to allow Pure-Etch to negotiate the sale and transfer of the rights to the permit. If sale and transfer of the permit did not occur in six months, then the permit would be revoked. During the suspension period, Pure-Etch was not allowed to handle, generate, store, accept, process, treat any hazardous waste except as necessary to ensure facility safety and to remove hazardous waste from the facility. *See DTSC Agreement and Consent Order, Docket Number 96/97-2022.*
138. Pure-Etch did not admit to any of the violations alleged by DTSC in the Agreement and Consent Order. *See DTSC Agreement and Consent Order, Docket Number 96/97-2022.*
139. DTSC settled all allegations arising from hazardous waste operations at the Pure-Etch facility up to the date of the Agreement and Consent Order based upon Pure-Etch's ability to pay. Pure-Etch was required to pay \$25,000 to the Monterey County District Attorney for reimbursement of the county's costs and \$75,000 to DTSC for partial reimbursement of DTSC's costs. If Pure-Etch transferred its hazardous waste facility permit it was required to pay DTSC an additional \$50,000. *See DTSC Agreement and Consent Order, Docket Number 96/97-2022.*
140. The benefits of the Agreement and Consent Order extended to Pure-Etch, its directors, officers, employees and agents, but not to Michael N. Silver, the former Chief Executive Officer of Pure-Etch. *See DTSC Agreement and Consent Order, Docket Number 96/97-2022.*
141. Although Pure-Etch had previously submitted some financial information to DTSC, a formal ability to pay analysis was not performed at the time of the settlement with Pure-Etch. DTSC considered the previously submitted documentation to be unreliable. Nevertheless, DTSC considered that Pure-Etch had a limited ability to pay due to the fact that it had stopped operating, they did not have much money in the bank, and it owed money to creditors. *See Notes from Interview with Jeff Mahan, DTSC, on September 9, 2002.*

142. DTSC granted Pure-Etch two extensions to the sixth month period provided for the sale of the permit (30 and 45 days respectively). By letter dated June 2, 1998, DTSC denied a request for further extensions and indicated that the permit had been revoked. *See Letter from Charlene Williams, Chief, Northern California Branch, Statewide Compliance Division, to Mark Elliott, Parker, Milliken, Clark, O'Hara (dated June 2, 1998).*
143. DTSC never conducted any monitoring in the area surrounding Pure-Etch in order to determine if emissions from the facility were impacting the surrounding neighborhood. *See Notes from Interview with Luz Castillo, Senior Hazardous Substances Scientist, DTSC, on September 11, 2002; Notes from Interview with Robert Aragon, Senior Hazardous Substances Engineer, DTSC, on September 11, 2002.*
144. Residents at the Sanborn Court apartments allege they were exposed to ammonia odors, which they believed originated from Pure-Etch operations. One resident believed that she recalled one release in December 1995 and one in January 1996. This same resident stated that during the four prior years of living at the Sanborn Court apartments she had never smelled any similar odors. *See Declaration of Petra Lara in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 18, 1996).* Another resident of the Sanborn Court apartments, who had lived in the apartments for approximately nine months, recalled two instances where there was a strong smell of chemicals in the air. This resident believed that both instances were in December 1995, just a few days apart from each other. On the first occasion, the resident called the Salinas Fire Department. *See Declaration of Patricia Durkin in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 18, 1996).* A third resident indicated that over the course of approximately two and one half months, she smelled what she believed to be a chemical leak on four different occasions. This resident recalled the two most recent chemical leaks -- one of the leaks was in late March 1996 and another one in mid-April 1996. The resident did not indicate the time frame of the two other prior chemical leaks that she had experienced. *See Declaration of Margaret Ann Barraza in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 19, 1996).* A fourth resident indicated that she had moved into the Sanborn Court Apartments nearly three months prior to preparing the declaration (dated April 18, 1996) and she had smelled what she believed to be a chemical leak shortly after moving in. *See Declaration of Rosie Angelina Lara in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 18, 1996).* All four residents indicated that they experienced physical reactions to the smells, including dizziness, watering eyes, and trouble breathing.

145. There is not sufficient evidence that can conclusively link all of the odors that affected the residents in the area surrounding Pure-Etch with the Pure-Etch operations. See *Notes of Interview with Bruce Welden, Monterey County Department of Health, on September 10, 2002.*

V. ANALYSIS OF ALLEGATION

A. Legal Background

EPA's Title VI regulations prohibit recipients of EPA funds from using criteria or methods of administering programs that have the effect of subjecting individuals to discrimination because of their race, color, or national origin. See 40 C.F.R. § 7.35(b). For adverse disparate impact allegations, EPA must first ascertain whether the recipient utilized a facially neutral practice that had an adverse disproportionate impact on a member of a group protected by Title VI.¹ *Elson v. Talladega County Board. of Education*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984). In this regard, EPA must show a causal connection between the facially neutral policy and the alleged disproportionate and adverse impact on a protected Title VI group. *New York City Environmental Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000) (plaintiffs motion for preliminary injunction in case brought under EPA Title VI regulations dismissed for failure to present adequate proof of causation). If a causal connection is established between application of the facially neutral policy at issue – in this case, DTSC's enforcement activities – and the alleged adverse disparate impacts complained of – off-site consequences from Pure-Etch's noncompliant operations – OCR then looks for a preponderance of evidence establishing that the impact is *adverse* and *disparate*. However, even if an adverse, disparate impact is established, a recipient of federal financial assistance has the opportunity to “justify” its conduct notwithstanding the adverse disparate impact. Any justification offered may be rebutted, however, if a less discriminatory alternative exists. In order to be considered a less discriminatory alternative, the alternative approach would have to be one that causes fewer discriminatory effects than the practice that was challenged, but is practicable and comparably effective in meeting the needs addressed by the challenged practice.

B. Causation

In the instant case, Complainants allege that DTSC's lack of enforcement with respect to Pure-Etch resulted in adverse disparate impacts upon their community. An essential element in undertaking an analysis of this claim is determining whether there is a causal connection between the facially neutral practice (DTSC's enforcement) and the alleged disproportionate and adverse

¹ The policy or procedure in question need not be formalized in writing, but can also be a practice that is understood as a “standard operating procedure” by its employees or others who implement it.

impact alleged by the Residents of Sanborn Court. The alleged adverse impacts focused upon in this investigation concern releases of ammonia and/or hydrochloric acid which would have reached the Residents of Sanborn Court. (See Findings of Fact 31-32, 34-36, 134)

1. Ammonia Releases

There is no question that there were releases of ammonia from Pure-Etch operations that were noticeable to those upon the Pure-Etch premises, as documented in various DTSC inspection reports or in declarations from former Pure-Etch employees. (See, for instance, Findings of Fact 47, 58, and 61) However, the operative question is whether a causal connection can be established between DTSC's enforcement efforts with respect to Pure-Etch and impacts upon Complainants. More precisely, given the particular facts in this case, in order to determine such a causal connection between DTSC enforcement efforts and impacts upon Complainants the following two questions need to be addressed: (1) Did the DTSC's enforcement or alleged failure to enforce against Pure-Etch cause one or more ammonia leaks during the time frame of interest? (2) Did one or more ammonia leaks from Pure-Etch, during the time frame of interest, cause the alleged health effects? While the evidence of these releases coupled with the observations of the residents of Sanborn Court might seem to suggest a connection between the noncompliant operations of Pure-Etch and impacts on residents, it is less clear that there was a causal connection between DTSC's enforcement activities and Pure-Etch's odor-causing operations. In this respect, it is important to remember that a preponderance of the evidence is required to prove each element of a Title VI claim. Bazemore v. Friday, 478 U.S. 385, 398 (1986). Applying this standard, for the following reasons the evidence in the record is insufficient to prove a causal connection for purposes of establishing a Title VI violation.

a. Time Frame for Analysis

In order to undertake an analysis of causation as it relates to the ammonia releases, the appropriate time-frame upon which to focus must be established. Although Pure-Etch had initiated permitting with DTSC in 1993, January 23, 1996, the date when the Monterey County Department of Health conveyed the information provided by Michael Jones to DTSC, is the proper starting point for an analysis of causation because it represents the earliest point in time when potentially noncompliant operations with off-site impacts were identified to the DTSC. As noted in Findings of Fact 22-28, allegations concerning lack of enforcement by DTSC in 1994 are not part of this investigation because these allegations were previously rejected as untimely. *See Letter from Ann E. Goode, Director, Office of Civil Rights, EPA, to Luke Cole, Center on Race, Poverty & the Environment, California Rural Legal Assistance Foundation (dated April 6, 1999).*

As described in Finding of Fact 41, DTSC did conduct an inspection of the facility in October 1995, shortly after it began operations in September 1995. *See Trip Report, prepared by Luz Castillo, DTSC (dated November 28, 1995).* Although the declaration of Michael Jones suggests that Pure-Etch management purposely misled DTSC during this inspection (See Finding

of Fact 58.k.), the DTSC inspection report prepared for this inspection found only minor violations which were corrected either at the time of the inspection or shortly thereafter. *See Declaration of Michael Jones in Support of Motion for Reconsideration (dated April 4, 1996)*. *See also Trip Report, prepared by Luz Castillo, DTSC (dated November 28, 1995)*. In addition, with respect to the allegation contained in the declaration of Alvin Harrison that waste etch was dumped down the sewer in the Fall of 1995 (See Finding of Fact 58), there is no indication that DTSC knew, or had any reason to know, of this conduct. Accordingly, the record does not support an argument that DTSC should have conducted enforcement activities in connection with Pure-Etch prior to February 1996.

Since Pure-Etch effectively ceased operating in March 1997, this date constitutes the end point for the analysis since the record is devoid of any evidence regarding any releases from the facility after this date.² Accordingly, for purposes of determining whether there is a causal connection between DTSC's enforcement with respect to Pure-Etch and the alleged disproportionate and adverse impact on the Residents of Sanborn Court, consideration will be given only to events that occurred between January 1996 and March 1997.

b. Did DTSC's enforcement or alleged failure to enforce cause one or more ammonia leaks?

The evidence is not sufficient to establish a causal connection between ammonia releases from Pure-Etch and DTSC's enforcement efforts given the investment of time and effort that DTSC undertook to address conditions at Pure-Etch. DTSC undertook the following actions between January 1996 and March 1997:

(i) inspections of the Pure-Etch facility on February 2, 1996 (See Finding of Fact 47), February 8, 1996 (See Finding of Fact 48), March 4-5, 1996 (See Finding of Fact 54), April 11, 1996 (See Finding of Fact 61), April 17-18, 1996 (See Finding of Fact 63), April 22-24, 1996 (See Finding of Fact 63), May 3, 1996 (See Finding of Fact 70), May 17, 1996 (See Finding of Fact 76), May 21, 1996 (See Finding of Fact 79), May 24, 1996 (See Finding of Fact 82), May 28, 1996 (See Finding of Fact 86), June 6, 1996 (See Finding of Fact 91), June 13, 1996 (See Finding of Fact 93), June 20, 1996 (See Finding of Fact 95), June 27, 1996 (See Finding of Fact 97), September 16, 1996 (See Finding of Fact 109), September 27, 1996 (See Finding of Fact 112), October 15-17 and 22-23, 1996 (See Finding of Fact 116), November 12, 1996 (See Finding of Fact 120), November 14, 1996 (See Finding of Fact 121), and March 4-5, 1996 (See Finding of Fact 125);

² It is recognized that a number of actions related to Pure-Etch, such as the civil settlement described in Findings of Fact 137-138 or the extensions of time provided by DTSC to Pure-Etch to sell its permit as described in Finding of Fact 142, took place after this date, but the evidence in the record does not suggest that these types of activities led to any adverse impact upon the Complainants.

(ii) issuance of administrative orders on February 8, 1996 (See Finding of Fact 50), March 6, 1996 (See Finding of Fact 55), April 19, 1996 (See Finding of Fact 64), April 26, 1996 (See Finding of Fact 66), May 9, 1996 (See Finding of Fact 72) and May 24, 1996 (See Finding of Fact 83), September 30, 1996 (See Finding of Fact 113), October 23, 1996 (See Finding of Fact 119), and March 7, 1996 (See Finding of Fact 125);

(iii) shutting down Pure-Etch between February 8, 1996 and March 6, 1996 (See Findings of Fact 50 and 55), between April 19, 1996 and May 9, 1996 (See Finding of Fact 74), and between May 17, 1997 and May 28, 1996 (See Findings of Fact 77 and 88); and

(iv) issuing an Order for Temporary Suspension and an Accusation for Revocation on March 24, 1997 (See Finding of Fact 126).

The above record, detailing extensive enforcement efforts, reveals that DTSC addressed the very risks that the Complainants were concerned about. In particular, the administrative orders issued by DTSC sought to reduce the possibility of ammonia or HCl releases. The consistent presence of DTSC inspectors at the facility, starting immediately after the first reports of potential noncompliance and off-site impacts, was also meant to ensure that the facility was operating in compliance. Taken as a whole, the record strongly suggests that DTSC made a considerable and focused effort to have Pure-Etch comply with its legal obligations. The operative question for this analysis is whether DTSC had the opportunity to address the potential for ammonia releases and either did not address it at all or did so inadequately. The record is heavy with evidence of frequent inspections by DTSC, identification of compliance problems and issuance of orders to correct, prompt followup by DTSC, periodic shut-downs in facility operations until violations were corrected, initiation of further civil actions, all culminating in facility closure and permit revocation. The record, therefore, does not suggest a shortcoming and, in fact, suggests that DTSC's actions can not be linked to any releases of ammonia from the facility. The combination of frequent inspections, followed promptly by administrative orders which addressed the observed shortcomings, indicate that any releases of ammonia from the facility were solely the responsibility of Pure-Etch and not ones for which DTSC's enforcement actions could be found that have been a contributing factor.

c. Did one or more ammonia leaks from Pure-Etch cause the alleged health effects?

Even though no causal connection was found between DTSC's enforcement actions and ammonia releases from Pure-Etch, this investigation also considered whether any of the ammonia leaks from Pure-Etch caused the alleged health effects described by the Residents of Sanborn Court. Although this additional analysis is not necessary given the fact that no causal connection was found between DTSC's enforcement actions and ammonia releases from Pure-Etch, it was performed in order to present a comprehensive record of the events. The evidence in the record concerning adverse impact upon Complainants revolve around the allegations in the declarations

of Michael Jones and Alvin Harrison, former Pure-Etch employees (See Finding of Fact 58), and the allegations in the declarations submitted by four residents of the Sanborn Court Apartments in connection with litigation in state court. (See Finding of Fact 144)

The majority of the allegations contained in the declaration of Michael Jones, although indicative of emissions of ammonia from Pure-Etch, took place prior to January 1996 since Michael Jones did not work at the Pure-Etch facility after November 1995. Accordingly, there can be no causal connection between alleged instances of ammonia releases prior to January 1996 and DTSC exercise of its enforcement discretion.³ The allegations contained in the declaration of Alvin Harrison do indicate releases of ammonia in March 1996, but all of them refer to releases within the plant itself (*i.e.*, no evidence of off-site impacts). (See Finding of Fact 58)

With respect to the allegations contained in the declarations submitted by four residents of the Sanborn Court Apartments, three of them indicates potential ammonia releases after January 1996: one of the declarations indicates one release in January 1996, another declaration indicates one release in March 1996 and one in April 1996, and a third declaration indicates a release approximately three months prior to April 18, 1996. *See Declaration of Petra Lara in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 18, 1996); Declaration of Rosie Angelina Lara in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 18, 1996). Declaration of Margaret Ann Barraza in Support of Motion for Reconsideration, Residents of Sanborn Court v. DTSC, Superior Court of the State of California, County of Sacramento, Docket Number 95 CS 01074 (dated April 19, 1996).* However, it remains difficult to establish a causal link between these releases and the alleged health effects suffered by the Residents of Sanborn Court since there were a number of other facilities in the area which utilized ammonia, thus making establishing a link between an ammonia release and Pure-Etch more difficult. (See Finding of Fact 42) A good example of this uncertainty was demonstrated when Michael Jones called the Salinas Fire Department on January 26, 1996. The Salinas Fire Department Report only indicates that there was a moderate smell of ammonia at the facility, but not visible vapors or active leaks. *See Incident Report, City of Salinas Fire Department, Incident Number 96-000498, Incident Date of January 26, 1996.* Similarly on October 14, 1996, when the Salinas Fire Department was called regarding a suspected ammonia release (See Finding of Fact 115), the Salinas Fire Department upon responding to the call could not find any evidence of ammonia leaks within Pure-Etch. *See Incident Report, City of Salinas Fire Department, Incident Number 96-005760, Incident Date of*

³ Moreover, a pleading submitted on behalf of Complainants indicated that no one got hurt as a result of the release of ammonia which Michael Jones described left the facility and went over the highway overpass next to the plant (See Finding of Fact 58.h.). *See Memorandum of Points and Authorities in Support for Motion for Reconsideration (No. 95 CS 01074, Superior Court of the State of California, County of Sacramento, dated April 5, 1996).*

October 14, 1996. In these instances, Pure-Etch was one of several *potential* sources, but the evidence is not sufficient to establish that Pure-Etch was the most likely source. See Bazemore, 478 U.S. at 398. Accordingly, there is not sufficient evidence to establish a causal connection between one or more ammonia leaks from Pure-Etch and the alleged adverse health effects.

2. HCl Releases

As stated above, DTSC undertook extensive enforcement efforts with respect to Pure-Etch which make it difficult to establish a causal connection between its enforcement efforts and impact upon the Complainants. Moreover, there is evidence in the record of only two instances where HCl was released at the Pure-Etch facility. (See Finding of Fact 119 and 125) However, there is no evidence in the file which suggests that these releases went beyond the facility premises. Accordingly, there is no causal connection between any enforcement action taken or not taken by DTSC and a release of HCl which affected Complainants.

C. Conclusion

Prior to closing this discussion it is appropriate to make the following observations. Complainants are palpably frustrated by the allegations contained in the complaint. This report does not attempt to speak for Complainants, but based on the documents contained in the file for this matter it appears that from Complainant's perspective not only was their presence ignored at the beginning of the CEQA process (See Finding of Fact 18), but once their presence was acknowledged, their concerns pertaining to the construction of Pure-Etch (these allegations were untimely for purposes of this investigation) and, in particular, Pure-Etch's potential non-compliance with environmental regulations, were ignored by DTSC. (See Finding of Fact 33) From Complainants' perspective, they would likely allege that Pure-Etch's permit violations were to be expected and did, in fact, impact them. (See Finding of Fact 33) Moreover, from Complainants' perspective, the addition of a facility which utilized ammonia in an area which was already surrounded by facilities which utilized large quantities of ammonia for purposes of refrigeration was a burden that they felt should not be imposed upon them. (See Finding of Fact 20) This report does not seek to diminish or downplay those concerns, but a review of the record does not support a finding of a causal connection between DTSC's enforcement activities and the alleged effects felt by Complainants.

Accordingly, it is recommended that EPA find no violation of its regulations at 40 C.F.R. Part 7, and that the complaint filed on behalf of the Residents of Sanborn Court, EPA File No. 2R-95-R9, as it pertains to the allegations concerning enforcement by DTSC with respect to Pure-Etch, be dismissed. EPA will evaluate the merits concerning the claim of a statewide pattern of discriminatory enforcement in a subsequent document.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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In Reply Refer to:

EPA File No. 2R-95-R9

Brent Newell
Attorney
Center on Race, Poverty and the Environment
47 Kearny Street, Suite 804
San Francisco, CA 94108-5528

Re: **Closure of Title VI Administrative Complaint**

Dear Mr. Newell:

The purpose of this letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is closing its investigation of the administrative complaint dated August 3, 1995 (Complaint), filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI),¹ by Residents of Sanborn Court represented by the Center on Race, Poverty and the Environment against DTSC. By this letter, OCR is closing its investigation of the claim that DTSC's enforcement efforts evidenced a statewide pattern of discrimination. This allegation constitutes the last remaining claim submitted, which had not been previously addressed by OCR.

I. BACKGROUND

The Complaint alleged that DTSC discriminated against Latinos by: (1) treating Spanish-speakers differently than English-speakers during the permitting process and the California Environmental Quality Act (CEQA) public participation process; (2) issuing a final permit to Pure-Etch to operate a hazardous waste treatment and storage facility in Salinas; (3) participating in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color; (4) willfully ignoring adverse environmental impacts stemming from the facility's operations; and (5) failing to enforce or inadequately enforcing environmental laws and regulations.

By letter dated April 6, 1999, OCR rejected for investigation several of the allegations set forth in the complaint and requested clarification on others. Specifically, OCR rejected as untimely allegations that: (1) DTSC treated Spanish-speakers differently from English-speakers during the permitting process and the CEQA public

¹ 42 U.S.C. §§ 2000d et seq.

participation process; (2) the issuance of the permit to Pure-Etch resulted in discrimination against Latinos; and (3) DTSC participated in a statewide pattern of permitting toxic facilities in Latino communities and other communities of color. A copy of the April 6, 1999 letter is attached hereto.

Additionally, OCR requested clarification on the basis for the remaining two allegations. By letter dated July 13, 2001, OCR rejected allegation (4), which claimed that DTSC willfully ignored adverse environmental impacts stemming from Pure-Etch's operations, because the information requested was not provided. OCR accepted for investigation allegation (5), which claimed that DTSC failed to enforce or inadequately enforced environmental laws and regulations. Specifically, OCR accepted for investigation: (a) an alleged failure by DTSC to enforce against Pure-Etch, which resulted in discriminatory effects upon the Latino residents of the area; and (b) an alleged statewide pattern of discriminatory enforcement by DTSC as evidenced by fewer DTSC resources being dedicated to communities of color than to white communities and overall weak enforcement by DTSC and disproportionate placement of toxic waste facilities in communities of color.

OCR's investigation into the two enforcement claims set forth above was bifurcated in order to first address the claims regarding DTSC's enforcement efforts at the Pure-Etch facility. By letter dated April 17, 2003, OCR transmitted to you and DTSC an Investigation Report (IR) that concluded that there was insufficient evidence to support a causal connection between DTSC's enforcement efforts with respect to the Pure-Etch facility and the alleged impacts suffered by your clients. Accordingly, in the absence of any causal connection between DTSC actions and the alleged impacts, the allegations regarding DTSC's enforcement efforts with respect to Pure-Etch were dismissed. A copy of the April 17, 2003 IR is enclosed.

II. STATEWIDE CLAIM OF DISCRIMINATORY ENFORCEMENT

A July 7, 1999 letter, written in response to a request for clarification by OCR with respect to the alleged pattern of discriminatory enforcement on a statewide basis, stated that "DTSC's actions at Pure-Etch are symptomatic of this statewide pattern." As previously stated, OCR found that the allegation with respect to the Pure-Etch facility was not supported by its thorough investigation and was dismissed. Moreover, no evidence of a statewide pattern was presented or discovered during that investigation. Consequently, OCR finds an insufficient basis to warrant proceeding with an investigation of the allegation of statewide discrimination in enforcement.

III. CONCLUSION

For the reasons set forth above, OCR hereby closes its investigation of the claim of a statewide pattern of discriminatory enforcement by DTSC. If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at

U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,



Rafael DeLeon
Director

Enclosure(s)

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