Ms. Maureen F. Gorsen, Director
Department of Toxic Substances Control
1001 "I" Street, 25th Floor
P.O. Box 806
Sacramento, California 95812-0806

Dear Ms. Gorsen:

**PETITION FOR REVIEW OF TITLE 22 CALIFORNIA CODE OF REGULATIONS SECTIONS 66264.101(b) AND 66265.101**

This is a petition under the provisions of California Government Code §11340.6 to the Department of Toxic Substances Control (DTSC) requesting that the agency revise Title 22 California Code of Regulations (CCR)§66264.101(b) and §66264.101(c) which are currently used in a fashion contradictory to the intent of Health and Safety Code (H&SC) §25200.10(b), in that DTSC uses these regulations to interpret this statute as allowing permit applicants to indefinitely defer the establishment of assurances of financial responsibility for corrective action at their facilities. The usual means of deferral is through an enforcement order. The DTSC model order only discusses assurance of financial responsibility after the remedy selection, e.g. ***" As directed by DTSC, Respondents shall establish a financial assurance mechanism for Corrective Measures Implementation. The financial assurance mechanisms may include a performance or surety bond, liability insurance, an escrow performance guarantee account, a trust fund, financial test, or corporate guarantee as described in 22 Cal. Code Regs. section 66265.143 or any other mechanism acceptable to DTSC. The mechanism shall be established to allow DTSC access to the funds to undertake Corrective Measures Implementation tasks if Respondents are unable or unwilling to undertake the required actions."*** DTSC has rarely required such assurance of financial assurance and has even more rarely received it. The regulations should be amended to make it clear that such financial assurance must really be in place at the beginning of the process, not deferred to some magical point in the future when a corrective action remedy is selected for the facility. The investigative work, often including installation of expensive monitoring wells, as well as interim cleanup measures (frequently necessary to stabilize contamination to reduce its spread through various media), and the evaluation necessary to select the remedy are expensive. This petition is made with the knowledge that DTSC is exploring requirement of AFR for an interim measure that meets loose criteria. This requirement as presently described seems to be insufficient and not to be universal. The public purse should not be at risk for these costs regardless of DTSC's continuing reluctance to confront the situation. Therefore, whether or not a corrective action order is cited in the permit as the mechanism for corrective action, the corrective action financial assurance must be in place in the permit. Moreover, the positioning of the regulations in Article 6 of the respective chapters gives the appearance that such regulations apply only to regulated units. Therefore, the regulations should even more clearly specify

that corrective action financial responsibility requirements apply to all facilities regulated by the Resource Conservation and Recovery Act (RCRA)and the California Code of Regulations, title 22. DTSC has the authority under H&SC Division 20, Chapter 6.5, e.g. Article 5, §25150(a) to make these changes.

Part I is a restatement of my June 28, 2002, petition with additional changes to the specific regulatory language being requested, Part II is a response to the DTSC denial letter of October 4, 2002, and Part III is an evaluation of examples of some of the facility bankruptcies that have occurred under DTSC that are the core of why DTSC is failing in many instances to properly fulfill its role to protect human health and the environment in California.

## PART I

### SUMMARY OF RELATED LAWS AND REGULATIONS

The changes requested in this proposed rulemaking address the specifics of financial assurance for corrective action. H&SC requires that, ***"When corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action."*** [H&SC §25200.10(b)] Title 22 states ***"That the permit or order [emphasis added] will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action."*** [Title 22 CCR §66264.101(b)] Currently DTSC fails to require assurance of corrective action financial responsibility in the permits that it issues. Moreover, it does not require assurance of financial responsibility in the corrective action orders that it issues. In fact, it arbitrarily defers assurance of corrective action financial responsibility to remedy selection---which is an indeterminate extension and has allowed many facilities to cease operation and/or declare bankruptcy without any assurance of corrective action financial responsibility ever being in place, thus placing a drain on the resources and taxpayers of the State of California. Through this petition, I request that DTSC bring the §66264.101(b) and §66264.101(c) in line with the intent of the Legislature by explicitly stating that assurance for corrective action financial responsibility will be required whenever a permit is issued. Moreover, in order to redress past failure to comply with the H&SC §25200.10(b), I propose that DTSC modify all permits which issued since the enactment of the H&SC §25200.10(b) to include assurance of corrective action financial responsibility.

### EFFECT OF PETITIONED REGULATION

The petitioned regulation amends §66264.101(b) and §66264.101(c) of Title 22, California Code of Regulations.

### SUMMARY OF RULEMAKING

The petitioned rulemaking would amend §66264.101(b) and §66264.101(c) of Title 22, California Code of Regulations. The petitioner proposes changes to the rules for assurance of corrective action financial responsibility. Under the proposed changes there are requirements to provide

assurance of corrective action financial responsibility at the time a permit is issued and to prevent arbitrary deferral by DTSC to some indeterminate point in the future. In addition, permittees who have received permits subsequent to the enactment of H&SC §25200.10(b) will be required to submit permit modification applications to bring their permits into compliance with the intent of this statute. This will ensure that the taxpayers of the State of California will not have to bear the significant cost of corrective action at permitted facilities.

**GENERAL STATEMENT OF REASONS**

DTSC fails to satisfactorily comply with statutes requiring a corrective action schedule and assurance of financial responsibility to be included in operating and post-closure permits that govern its RCRA facilities. H&SC §25200.10(b) requires, in part, that ***"...any permit issued by the department shall require corrective action for all releases of hazardous waste or constituents from a solid waste management unit or a hazardous waste management unit at a facility engaged in hazardous waste management, regardless of the time at which waste was released at the facility."*** Many of the RCRA permits administered by DTSC make reference to corrective action---mostly to corrective action orders which have been issued in lieu of detailed permit conditions. However, §25200.10(b) continues with ***"When corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action."*** The regulation says, in part, ***"That the permit or order*** [emphasis added] ***will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action."*** The permit is subject to public notice and comment, neither the rarely used corrective action unilateral order nor the more common so-called corrective action consent agreement allows for public participation. This is clearly not what the Legislature intended.

DTSC's expressed policy is to defer requiring assurance of corrective action financial responsibility until after the remedy selection portion of the corrective action process. Such deferral, in my judgment, is not what the legislature had in mind when enacting this particular statute. In contrast, on a routine basis, the statutory and regulatory requirements for assurance of financial responsibility for closure and post-closure care are being required by DTSC as part of permits and facilities made to cover the money determined in cost estimates through a number of prescribed mechanisms. DTSC currently follows a policy which directly contravenes it placing the public at risk for a very large amount of money to cover clean-ups at sites that should otherwise be self-funding.

DTSC may argue that H&SC §25200.10(c), which states that ***"This section does not limit the departments's authority, or a unified program agency's authority pursuant to Chapter 6.11 (commencing with Section 25404), to require corrective action pursuant to Section 25187."***, allows it defer the financial responsibility through an order, but I do not believe that this was the legislative intent here. My same argument would hold for H&SC §25200.10(e, which states, in part, ***"This subdivision does not limit the department's authority, the authority of the local health officer, or other***

***local public officer authorized pursuant to Section 25187.7,, or the authority of a unified program agency approved pursuant to Section 25404.1, to order corrective action pursuant to Section 25187."*** H&SC §25200.10(b) may say, in part, that ***"Except as provided in subdivision (d) and (e)....."***, but it does not refer to (c). Therefore, clearly is directed at application to a permit for temporary household hazardous waste collection (H&SC §25200.10(d) and conditional exemptions (H&SC §25200.10(e). **These exceptions do not mean to exempt permits if corrective action is also required through H&SC §25187.** There is no evidence that the legislature intended DTSC to use these sections as a massive loophole to allow facilities to avoid providing assurance of financial responsibility as part of their permits.

**DETAILED STATEMENT OF REASONS**

Title 22 CCR, §66264.101(b)

Although the corrective action regulations are positioned in Article 6 of the respective chapters and appear to apply only to regulated units, the statute states otherwise. Language needs to be added to the regulations to clearly specify that it applies to all solid waste management units.

The proposed revisions to this subsection are cited below:

*"Corrective action shall be specified in the permit or order in accordance with this article, article 15.5, or article 17, and Health and Safety Code sections 25200.0, 25187, or 25200.14, or 2538.9 where as provided for under the provisions of that section the Department has excluded the removal or remedial action at a site from the hazardous waste facilities permit required by Health and Safety Code section 25201. When corrective action cannot be completed for all solid waste management units and areas-of-concern prior to the issuance of the permit, ~~The~~ the permit ~~or~~ and order, if any, will contain schedules of compliance for completing such corrective action ~~(where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for such corrective action shall be provided~~. Assurance of financial responsibility for completing such corrective action will be provided in the permit and order, if any. Although, this subsection does not limit the authority of the Department to order corrective action pursuant to H&SC §25187, no permit will be issued or renewed without assurance of financial responsibility for completing corrective action being in place within the permit at the time of permit issuance or permit renewal. Where the Department has issued permits without assurance of financial responsibility for completing corrective action, the Department shall notify the owner or operator to submit an application for a permit modification, within 90 days of such notification, to provide assurance of financial responsibility for completion of corrective action*. If the owner or operator cannot provide assurance of financial responsibility at the specified time, the Department shall initiate permit denial or rescission proceedings, whichever is applicable."

Title 22 CCR, §66264.101(c)

The final sentence of this subsection is duplicative of an existing sentence in §66264.101(b) and should be struck.
*"The owner or operator shall implement corrective actions beyond the facility boundary, where necessary to protect human health or the environment, unless*

*the owner or operator demonstrates to the satisfaction of the Department, that despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such actions. The owner or operator is not relieved of all responsibility to cleanup a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such release will be determined on a case-by-case basis. ~~Assurances of financial responsibility for such corrective action shall be provided.~~"*

**PART II**

The October 4, 2002, denial of my June 28, 2002, petition, made under the provisions of California Government Code §11340.6, was severely flawed and quite illogical. Title 22 California Code of Regulations (CCR)§66264.101(b) and §66264.101© continues to be used in a fashion largely contradictory to the intent of Health and Safety Code (H&SC) §25200.10(b). DTSC interprets this statute through its regulations and policies as allowing permit applicants to perpetually defer the establishment of assurances of financial responsibility for corrective action at facilities. DTSC reconsider its denial and provide the public with the protection that the legislature intended in H&SC §25200.10(b). The following represent specific responses to the denial rationales presented in DTSC's October 4, 2002, denial:

C p.1, ¶1, Sentence 3 - The petition addressed my concern that DTSC has failed, through its existing regulations, adopted policies, and standard operating practices to implement the intent of the Legislature to require assurances of financial responsibility for corrective action at the time a permit is issued. DTSC's policy of only requiring such assurances of financial responsibility at the time of remedy selection guarantees delay, in some instances until the facility is no longer able to provide such.

C p.1, ¶2, Sentence 1 - I am in vehement disagreement that the regulations adopted and policies applied by DTSC are consistent with the authorizing statutes. Nothing in H&SC §25200.10(b) even suggests that assurance of financial responsibility be deferred to a particular point in corrective action much less to be indeterminate for years. The statute treats the whole of the corrective action process, not just one piece.

> ***"When corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action."*** [H&SC §25200.10(b)]
>
> DTSC's policy of delaying assurance of financial responsibility until the corrective measures study is complete and a remedy is selected is simply not consistent with the statute. It allows facilities to operate and not set money aside for corrective action. One can simply point to BKK which has used insolvency to avoid the implementation of its corrective action remedy----having not been required by either DTSC or USEPA to provide AFR for corrective action. How many more of these does it take to change DTSC's wrong-headed policy?

C p.1, ¶2, Sentence 2 - While it is easy to see why issues of policy with respect timing and mechanics would be a matter for study, I fail to understand why the fundamental decision to ensure DTSC's compliance with H&SC §25200.10(b) in the future should be a matter for study. Defining additional measures in terms of practicality and protectiveness is again not responsive to my petition or to the legislative intent. The authorizing statute simply does not contain the kind of language that DTSC uses herein ---practicality is not even hinted at in the statute. The Legislature has implicitly set the bar for protectiveness in H&SC §25200.10(b) as being the provision in the permit of assurance of financial responsibility for corrective action. Practicality should enter the picture as a second order consideration, for example, in terms of working with the affected facilities relative to selection of acceptable financial assurance mechanisms and funding mode such as pay-in period to a trust fund. What is protective of public health, safety, and environment is to assure that the money is available, from those facilities that get a very valuable permit from DTSC, to investigate releases at the facility, perform California Environmental Quality Act(CEQA) analysis, cleanup and monitor all contaminated media, as well as and pay for the governmental oversight costs. While some money is required in advance for CEQA and governmental oversight costs, this is clearly insufficient to provide assurance of financial responsibility to complete corrective action at the permitted facilities---to say nothing of the closed or closing Interim Status facilities. Recently, DTSC has facilities which were in bankruptcy, operating under permits where there are significant environmental problems but which did not have one thin dime demonstrated for assurance of financial responsibility for corrective action. The taxpayers are ultimately liable for these costs. My recollection is that the Resource Conservation and Recovery Act (RCRA)was intended to reduce the incidence of Superfund sites. Issuing new or renewing older operating permits, without requiring assurance of financial responsibility for corrective action is not responsive to H&SC §25200.10(b) nor is it protective of human health and the environment. Moreover, in order to correct past failure on the part of DTSC to properly implement the statutes, DTSC needs to perform agency-initiated modifications to many, if not most, existing permits to include assurances of financial responsibility for corrective action.

C p.1, ¶2, Sentence 3 - With all due respect to DTSC, I fail to understand why conducting a public workshop was necessary to begin properly implementing H&SC §25200.10(b). If DTSC was uncertain about the legislative intent, there are certainly other avenues to clarify the situation, such as requesting legislative hearings. It seems to me that the current policy of deferring assurance of financial responsibility for corrective action, in contradiction to the specific requirements of H&SC §25200.10(b), did not occur through workshops. I would have preferred any workshop to be held in the context of a regulation package clearly implementing the specific intent of H&SC §25200.10(b), as I have previously petitioned, or announcing a revised policy under the existing regulations to implement the statute as specifically intended by the Legislature.

C p.2, ¶1, Sentence 1 - It should be noted that DTSC could also issue unilateral orders which are substantially more forceful than a corrective action consent agreement (CACA)---instead of Corrective Action Consent Order. I might add, I have not found in my review of the regulations or statutes where an order euphemistically becomes an "agreement". Perhaps DTSC could enlighten me as to how this terminology has become embedded in the policies and procedures of the agency? Please explain just how enforceable these "agreements" are. Isn't it true that if the agreement goes bad, that DTSC has to issue an order to achieve an enforceable situation.

C p.2, ¶1, Sentence 2 - Incorporation of a CACA by reference does not actually satisfy either the statutory requirement for a schedule of compliance or for assurance of financial responsibility for corrective action. The California Code of Regulations describes the schedule of compliance as being detailed. The model CACA contains a rote recitation of conditional time frames for specific actions such as submittal of an RCRA Facility Investigation work plan which is so diffuse as to provide no detailed roadmap. Nowhere in the CACA are such loose, conditional, time frames pulled together as a coherent compliance schedule.

**The enabling statute states that the schedule must be in the permit---it says nothing about attaching other documents by reference, even though DTSC has given itself such an out in its own adopted regulations. If DTSC placed the various CACA due dates for generalized deliverables in the compliance schedule in the body of the permit, where the public could view them without digging through multiple sections of a 30-page order, then it might come closer to meeting the statutory requirement. DTSC does not even do this. In interests of "streamlining", the detailed information, required by statute or regulation is effectively concealed from the public and subject to considerable undisclosed negotiation after the fact with the facility.**

Incorporation of the CACA by reference into the permit even fails to satisfy some of the specific elements of the corrective action regulations in California Code of Regulations. For example, DTSC's CACA model doesn't seem to acknowledge the Title 22 CCR §66270.33 stricture that conditions in a permit should extend no more than one year from the dtae of permit issuance and that if they do (1) the schedule shall set forth interim requirements and **dates** for their achievement; (2) the permit shall specify **dates** for reports.

Finally, it is noted that even if including a 30-page model CACA and its "diffuse" schedule **(no actual dates)** by reference satisfies the statutory requirement relative to a schedule of corrective action, it in no way satisfies the requirement for assurance of financial responsibility for corrective action. The model CACA wholly fails to require assurance of financial responsibility for even the generalized activities described. Moreover, the only money mentioned, cost reimbursement for DTSC oversight, is totally unsecured except for a fixed up-front percentage. Once DTSC burns through that amount, the respondent is billed on a

quarterly basis. On one specific RCRA site, where the Site Mitigation Program is performing oversight, it is understood that DTSC might have been owed over $800,000 by a bankrupt or nearly bankrupt owner---just for DTSC oversight costs. This is hardly what the Legislature meant by enacting the corrective action AFR statute section.

C p.2, ¶2, Sentence 1 - Whether or not the federal and California regulations are "substantially the same" or not begs the question. The statute enacted by the California legislature makes a specific requirement that assurance of financial responsibility for corrective action be included in the permit. DTSC quite simply weasels out of compliance with this California statute with the regulations that it adopted and its policy of using the incorporation of the CACA by reference as a cover where, in point of fact, the model CACA defers such assurance of financial responsibility nearly indefinitely.

DTSC concludes that the federal and California statutes "are substantially the same", but fails to provide a comparison---or even the specific citation---to support this statement. It is "substantially" irrelevant anyway, because the California statute is very specific about the inclusion of assurance of financial responsibility for corrective action **in the Permit**, RCRA section 3004(u) requires that when corrective action cannot be completed prior to issuance of a permit, that the permit contain corrective action schedules of compliance and financial assurance. Although U.S. EPA typically includes financial assurance in any of its corrective action orders, this does not appear to be a statutory requirement. October 24, 1986, proposed detailed regulations to govern financial assurance which provided that financial assurance demonstration would ordinarily be required at the time of remedy selection. These detailed regulations have not been adopted. p. 19454 of U.S. EPA's proposed rule entitled "Corrective Action For Releases From Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule" [40 CFR Ch.1, May 1 1996], indicates that "in the absence of final rules", program implementers, such as DTSC, have the flexibility to tailor financial responsibility requirements. **Therefore, U.S. EPA is not an impediment to properly implementing the California statute. Lest too much emphasis is placed on the** U.S. EPA approach, consider again BKK where U.S. EPA selected a remedy and there was no money left for BKK to implement it.

C p.2, ¶1, Sentence 2 - What sort of an excuse is "there is no guidance"? This is utter nonsense. Somehow, sometime, somewhere DTSC came to the conclusion that closure and post-closure financial assurance needed to be in place before issuing a permit. What guidance interpreted the statutes concerning closure and post-closure financial assurance? The only guidance I have seen is that developed by DTSC. Is there some other entity that guides DTSC in developing an interpretation of statutes for developing regulations and policies on financial assurance? Why was this entity silent on corrective action financial assurance? As to interpreting regulations, aren't these supposed to be sufficiently well written by the implementing agency so as to not require "interpretation? If the corrective action regulation is written so poorly as to require interpretative "guidance", shouldn't DTSC

rewrite the regulation as has been requested in the petition in such a fashion as to make it crystal clear. It seems that DTSC has its guidance in the "interpretative" policies that it adopts, in this instance of not requiring corrective financial assurance in either the permit or the order. The interpretation is perverted several times over by the time it gets to policy.

C p.2, ¶1, Sentence 3 - Whether or not the statutes and regulations were adopted subsequent to "their federal counterparts" is nonsensical sophistry of the worst kind. The issue is what was adopted and what was the legislative intent. DTSC has utterly failed to provide this and is attempting to draw legitimacy from federal regulations and policies where it needs to examine the specifics its own enabling statute. The "reasonable" conclusion drawn is simply awkward sleight-of-hand, an attempt to confuse the issue. Did DTSC ask the legislative counsel for a specific interpretation of this particular statute? Inferences and "reasonable conclusions" relative to the federal statutes do not suffice to excuse DTSC's longtime failure to require corrective action financial assurance.

C p.2, ¶1, Sentence 4 - What final rules? Federal rules? U.S. Environmental Protection Agency final rules? The draft rules do even preclude U.S. EPA from requiring corrective action financial assurance and certainly don't conflict with the DTSC properly implementing the California Statutes. This argument is more subterfuge. The California implies all---not facility-specific circumstances. How many facility-specific circumstances have resulted in corrective action financial assurance being in place today? How many permitted facilities across the state of California exist? How many are involved currently in corrective action? How many are or have been in bankruptcy?

C p.2, ¶3, Sentence 1 - Earlier, DTSC stated that there is no guidance on the state level for a California Statute, but now it states that there is federal guidance for the federal statutes or regulations which DTSC is following that makes it OK to ignore the intent of a California statute. I would agree that the failure to adequately secure the money necessary to complete cleanups is an implementation similarity between the Hazardous Waste Management and the Site Mitigation and Brownfields Reuse Programs of DTSC. However, the Resource Conservation and Recovery Act (RCRA)has as one of its goals to regulate facilities in such a fashion as to avoid future superfund sites. How does failure to require corrective action financial assurance square with this goal? How many of the bankrupt permitted sites---ignore for the moment those bankrupt Interim Status facilities that should have been included in the statute---have corrective action financial assurance in place? How many come to DTSC and argue that they cannot pay for various elements of investigation and cleanup? How many get reduced investigative or cleanup requirements because of such special pleadings?

C p.2, ¶3, Sentence 2 - Offering the sop of "studying the issues" is not sufficient. These are "issues" that DTSC should have properly dealt with years ago. How many facilities have slid into bankruptcy while this statute has been on the books? How many of these facilities are

currently operating without adequate closure and post-closure financial assurance?

C p.2, ¶4, Sentence 1 - The wording differences between the statute and the regulations adopted by DTSC are not minor. They are significant. Sufficiently so to make the California public liable for multi-million dollar cleanups clear across the state.

C p.2, ¶4, Sentence 2 - Clearly the regulation is not consistent with the statute. Permits continue to be issued without corrective action financial assurance being included as a condition of the permit. This directly contravenes the statute. The argument that the inclusion of CACA into the permit by reference somehow satisfies the statutory requirement for corrective action financial assurance is ludicrous and pure subterfuge. Still worse is the inconsistency with other arguments put forth in the denial that DTSC is in substantial agreement with U.S. EPA. DTSC has no public participation in the CACA whatsoever. These are negotiated with the facilities completely out of view of the public. The public is simply presented with the CACA as a complete entity attached by reference to the permit without being subject to comment. To quote p. 19454 of U.S. EPA's proposed rule entitled "Corrective Action For Releases From Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule" [40 CFR Ch.1, May 1 1996], "U.S. EPA's policy is for corrective actions imposed or overseen using a non-permit mechanism to have the same level of public participation as that associated with permits." DTSC provides no public participation in developing and approving its non-permit mechanism. Through use of the CACA, it totally bypasses any public input on the details of the corrective action to be performed. It corrective action details were to be included as specific conditions in the permit, the public could comment on them. Note, that while on p. 19453 of the same reference, U.S. EPA discusses inclusions of detailed corrective action provisions or conditions in several places, DTSC has chosen to provide only the most general "boilerplate" provisions and conditions in its CACAs.

C p.2, ¶4, Sentence 3 - The leap of logic that inclusion of a CACA by reference, which has no dollars associated with it besides the cost of DTSC oversight, satisfies the statutory requirement for corrective action financial assurance is unbelievable. DTSC can point to no single place where a schedule exists as an entity in the CACA, no single place where a corrective action cost estimate exists, and no single place where the permittee has the mechanism/instrument in place at the time the permit is issued. This is a case of the emperor having no clothes. DTSC creates a fiction that such corrective action financial assurance exists within the CACA and that by incorporating the CACA into the permit, fictitious corrective action financial assurance now satisfies the statutory requirements. This is nonsense.

C p.2, ¶4, Sentence 5 - There is clearly a difference between both the specifics of the regulation as written, DTSC's interpretation or operation of the regulations, and between DTSC's highly elastic interpretation of the statute requiring corrective action financial assurance.

C p.2, ¶4, Sentence 6 - The denial of the petition is based on the erroneous argument that DTSC's procedure of not requiring corrective financial assurance in the permit is somehow obviated by inclusion by reference of a CACA which itself fails to require financial assurance for corrective to be in place at the time of its issuance or the permit's issuance. This is sheer regulatory sleight-of-hand and not a satisfactory basis for denial of the petition.

**PART III**

The following are questions directed at DTSC regarding facilities that have filed for bankruptcy:

**AAD**

This fully permitted former RCRA facility failed to provide adequate closure/post-closure AFR and was not required to have any corrective AFR. Originally, AAD had $ 20,000 in AFR. Despite technical staff recommendations about a minimum AFR of $1.5 million, the AFR was required to be increased only to what amount? RCRA was created to prevent facilities from becoming "superfund". Despite the process, this facility is now being maintained at state expense. In your response to this petition please explain how much this facility has cost the state so far and what the estimated costs are until it is clean and does not threaten further discharge of waste to ground water.

**EXIDE BANKRUPTCY**

Exide is an interim status facility which has applied for a full RCRA permit. During the period in which its application was being evaluated and re-evaluated as the facility responded to notices of deficiency, Exide filed for bankruptcy. Please explain in your response how much corrective action financial assurance had been included in the corrective action consent agreement signed by DTSC. Please include the value of the cost estimate that the Department of Justice used to establish the states claims in bankruptcy court. Please explain how such an estimate can be made for bankruptcy purposes after the fact but not to protect the state from those costs before hand. Please explain how much corrective action financial assurance has been requested since the bankruptcy.

**PHILIPS SERVICES [RHO-CHEM] BANKRUPTCY**

Rho-chem is a fully permitted, active, RCRA facility which has applied for a permit renewal. During the period in which its renewal application was being evaluated and re-evaluated as the facility responded to notices of deficiency, Rho-chem's parent company, Philips Services Corporation (Philips), filed for Chapter 11 bankruptcy in the Southern District Court of Texas (Philips Services Corporation, et al., Jointly Administered Under Case No. 03-37718-H2-11) and provided DTSC with June 13, 2003, notification the Proceedings under Title 11, U.S. Code. Please explain in your response how much corrective action assurance of financial responsibility, if any, had been included in the corrective action consent agreement signed by DTSC on November 25, 2002. **Please include the value of the aggregate cost estimate that DTSC provided to the Department of Justice which it used to establish the State's claims in bankruptcy court [$39,491,040].** Please explain how the cost of corrective action can be developed for such an estimate for bankruptcy purposes after-the-

fact but not to protect the State from the threat of bearing those costs before hand. Please explain whether Philips has emerged from bankruptcy and how much corrective action assurance of financial responsibility has been requested of Philips since the bankruptcy.

**WHITTAKER BERMITE BANKRUPTCY**

Whittaker Bermite is a former interim status facility which has been undergoing closure and corrective action for many years. The facility has been sold on several occasions and various cleanup agreements entered into. During the period in which various investigations and cleanups were being evaluated, Whittaker's purchaser filed for bankruptcy. Please explain in your response how much corrective action assurance of financial responsibility had been included in the consent agreement signed by DTSC. Please include the value of the cost estimate that the Department of Justice used to establish the states claims in bankruptcy court. Please explain how such an estimate can be made for bankruptcy purposes after the fact but not to protect the state from those costs before hand. Please explain how much corrective action financial assurance has been requested since the bankruptcy.

**IT GROUP, INC. BANKRUPTCY**

The IT Group, Inc. consisted over 70 different corporations which included landfills such as IT Vine Hill, LLC. The final filing date for claims by DTSC and others was June 15, 2002. Any costs associated with environmental requirements by DTSC at any facilities comprising the IT Group would have been permanently barred from recovery if not included in a bankruptcy claim. Was any corrective action necessary at the time of the bankruptcy for any of the IT Group, Inc. Facilities being overseen by either DTSC or the State Water Resources Control/Regional Water Quality Control Boards (SWRCB/RWQCBs)? Were any corrective action activities underway at the time of the bankruptcy for any of the IT Group, Inc. Facilities being overseen by either DTSC or the State Water Resources Control/Regional Water Quality Control Boards (SWRCB/RWQCBs)and what was the impact of the bankruptcy, e.g. delays? Were any corrective action orders or consent "agreements" in effect or being negotiated at the time of the bankruptcy for any of the IT Group, Inc. Facilities being overseen by either DTSC or the State Water Resources Control/Regional Water Quality Control Boards (SWRCB/RWQCBs)? Were any RCRA or RCRA-equivalent permits in place at the time of the bankruptcy for any of the IT Group, Inc. Facilities being overseen by DTSC? Have any RCRA or RCRA-equivalent permits been issued since the time of the bankruptcy for any of the IT Group, Inc. Facilities being overseen by DTSC? Has any corrective action AFR been put in place since for any of the IT Group, Inc. Facilities being overseen by DTSC or SWRCB/RWQCBs? Were the costs of investigating and cleaning up the entire facility, from fence line to fence line, based on presumptive investigation and remedy parameters [the equivalent of corrective action financial assurance that should have been in place] for any of the IT Group, Inc. Facilities being overseen by DTSC or SWRCB/RWQCBs included in the bankruptcy claim calculations made by DTSC or SWRCB/RWQCBs for the filing by the Department of Justice (DOJ)? If any, how much? If not, why not? What was the total amount put in by DOJ and what was allowed by the bankruptcy judge. It would seem that if DTSC only made claim for any unpaid claims of debts owed to DTSC, such as oversight costs or facility fees, by any of the IT Group Inc., companies without considering

corrective action assurance of financial responsibility that the claim would have been low. Is the state barred from such future claims by any bankruptcy settlement conditions? What could the eventual costs be to the state?

## TABULATION OF ALL SITES SUBJECT TO CORRECTIVE ACTION

It is requested that DTSC prepare and include in any response, denial or approval, of this petition the following:

1. A tabulation of all sites subject to corrective action, including: (a) primary administrative mechanism (e.g., full, standardized permit, or tiered permit etc.), (b) responsible agency (e.g., DTSC, Water Boards, CUPAs, etc.), (c) whether or not the facility has been or is currently in bankruptcy (d) an estimate of the corrective action expenditure to date by the Facility, (e) an estimate of the future cost of corrective action.

2. A tabulation of the corrective action assurance of financial responsibility (AFR) status for all sites subject to corrective action, including: (a), whether or not any AFR has been put up (b), whether or not any remedy has been selected © how long the individual facility has been subject to corrective action,

3. A tabulation of all sites subject to closure and post-closure care, including:(a) whether or not cleanup of closed units had been deferred to corrective action, (b) whether or or not AFR for closure had been released or otherwise foregone as a result of that deferral, (c) whether or not AFR for post-closure care had been released or otherwise forgone as a result of that deferral, (d) whether AFR for corrective action has been required as a replacement for released AFR for closure and post-closure care or whether DTSC has no AFR of any kind following deferral.

## SUMMARY AND CONCLUSION

The failure to require corrective action financial assurance as prescribed by statute runs the risk of costing the public many hundreds of millions of dollars statewide should facilities go bankrupt before completing corrective action. In point of fact, there are now a number of cases where such bankruptcy has occurred and DTSC may never the taxpayer funds used to clean up those sites. In order to protect the public interest, DTSC should, at a minimum, comply with the existing statute, H&SC §25200.10(c), to require assurance of financial responsibility for corrective action whenever the agency issues a permit.

If you have questions regarding the foregoing, please call me at (310)455-1962 [evening] or (818) 717-6608 [daytime].

Sincerely,

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