



Oct. 25, 2012

Ms. Deborah O. Raphael, Director
Department of Toxic Substances Control
1001 I Street
P.O. Box 806
Sacramento, California 95812-0806
FAX: 916-324-3158

RE: DTSC Powers

Dear Ms. Raphael,

At your Sacramento confirmation hearing in April 2012, Consumer Watchdog expressed concern that the Department of Toxic Substances Control is allowing polluters to poison communities across California while keeping communities in the dark and letting polluters off the hook.

You acknowledged our concerns and agreed to work with us on the key issues we articulated: repeated out-of-court settlements and wrist-slap fines for serial toxic polluters like oil re-refiner Evergreen Oil in Newark; allowing serial toxic polluters, like chemical company Phibro-Tech in Santa Fe Springs, to function on expired permits for years at a time; and a years-long lack of enforcement follow-up in the case of Pacific Steel's auto scrap yard in National City near San Diego to see if toxic waste piles were removed.

Your department is the leading regulator of toxic substances in the state, yet it looks like the weakest. From 2007 through 2010, according to CAL EPA information, the amount of penalties your department collected went down by half to some \$2.2 million a year. By contrast, the California Air Resources Board collected between \$9 million and \$20 million each year in the same time period.

In our last meeting we promised to articulate DTSC's powers so that you could make an informed decision about the agency and how it should proceed. We have done that.

After two meetings and numerous letters to your Department about the need to change the way it does business, we are appalled at the department's response. We called on the DTSC to sanction Chevron in the wake of the Richmond fire and Evergreen Oil following another major leak at this used oil re-refinery in Newark. Your response, in writing, models the agency's official position: "DTSC's

enforcement authority is expressly limited to hazardous waste, and not to other hazardous materials oversight.”

Clearly, you have been misadvised. As we have made brutally plain, we believe the DTSC does not want to fulfill its mission “to protect California’s people and environment from the harmful effects of toxic substances through the restoration of contaminated resources, enforcement, regulation and pollution prevention,” as stated on the DTSC’s own website.

To refuse to utilize your reach is to abdicate your responsibility to all Californians. Now is the time re-direct the DTSC to be a regulator of toxics, rather than being a toxic regulator.

California law (California Health and Safety Code Section 25186) gives the DTSC authority over hazardous waste, hazardous materials, and hazardous substances—biological, chemical or physical agents that can cause harm to humans, animals or the environment. It is regulatory obfuscation to suggest that hazardous waste is a distinctly separate subset of hazardous materials. In fact, hazardous wastes and materials share virtually the same properties as defined in the California Health and Safety Code Sections 25501 and 25141(b).

Here is what we find California law empowers you to do:

- The California Health and Safety Code Section 25186 expressly gives the DTSC enforcement authority over generation not just of hazardous waste, but also hazardous substances and materials and gives the department the right to deny, suspend or revoke any permit, registration or certificate in situations where a generator’s violation or noncompliance shows a repeating or recurring pattern or may pose a threat to public health or safety or the environment.
- California’s Health and Safety Code Section 25316 says the DTSC oversees not just hazardous waste but also federally defined toxic pollutants and hazardous air pollutants, as well as any imminently hazardous chemical substance or mixture.
- Under California’s Health and Safety Code Section 25189.5(a), it is illegal to dispose of hazardous wastes outside of permitted facilities, or to cause the disposal, and therefore the DTSC can bring charges against companies for doing so (Chevron Richmond’s refinery, as discussed below).
- California’s Health and Safety Code section 25358.3(a) authorizes DTSC to issue an imminent or substantial endangerment order when there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or a threatened release of a hazardous substance.

These powers are not matter of interpretation, or debate. Yet DTSC top staff has repeatedly rejected calls to use these powers to protect California families and communities from the poisons that surround them. We are not the only observers who feel this way.

Dan Hirsch of the Committee to Bridge the Gap has battled for 33 years to clean up the contaminated Santa Susana Field Laboratory. He says Consumer Watchdog's experience is par for the course. "You ask the agency to do something to protect the public and you always get an excuse as to why they can't that helps the polluter."

He and a majority of California's environmental community have now given up on the DTSC. In a letter written to you, the community says, "Ever since your appointment as director, the DTSC has reversed course and taken numerous actions to undercut the cleanup and to do what Boeing, the company responsible for pollution at the site, wishes. DTSC seems now to be a wholly owned subsidiary of the polluter it is supposed to be regulating."

You have dedicated workers who echo distaste for DTSC's relationship to industry. One source close to the department says of your trusted DTSC advisors: "They fold like a wet paper bag before industry. They forget who they work for, and that's the public."

We now call on the DTSC not to fail a third litmus test, but do the right thing and shut down a serial toxic polluter, Phibro-Tech of Santa Fe Springs, that has spent years not cleaning up its pollution, despite fines and directives from the DTSC. We also call on you to rethink DTSC's position regarding Chevron's Richmond fire and Evergreen's serial leaks over two decades. Finally, we ask for a clarification of your powers and give an ultimatum that your top staff utilize them or leave the Department.

DTSC should step in on one of the most massive toxic releases recently at Chevron's Richmond refinery and sanction the company.

In August, the Chevron refinery in Richmond spewed toxic substances in a vast black cloud as a byproduct of a massive fire in Richmond, including hazardous sulfur dioxide, nitrogen oxide, and sulfuric acid. Ultimately the fumes sent thousands of people to the hospital with breathing and eye irritations, endangering the community's health and the safety of the environment.

The situation cries out for a lead regulator and the DTSC has extensive statutory authority over toxic emissions in a situation where the fragmented oversight of refineries in California is woefully inadequate. The Federal Chemical Safety Board now investigating the Richmond fire has no power to punish. The Bay Area Air Quality Management District has cited Chevron dozens of times for violating air quality, but the fines are clearly seen by Chevron as the simple cost

of doing business. A recent federal audit of CAL/OSHA's industrial process safety unit found that the division was conducting few, if any, comprehensive workplace safety inspections of refineries and chemical plants in the state.

The EPA has launched a criminal investigation of Chevron after discovering the company detoured pollutants at the Richmond refinery around monitoring equipment for four years. According to the *San Francisco Chronicle*, workers complained to regulators that unchecked corrosion of the sort suspected in the August blaze was responsible for another fire at the plant last year. Understandably, they fear for their lives. There is a way to hold Chevron accountable.

The hazardous particles Chevron belched would have landed far outside its premises, in territory not permitted by the DTSC for hazardous waste disposal. That is a felony.

The DTSC could also have issued an imminent and substantial determination and order against Chevron when the fire happened and called for remedial action such as the company using some of its \$29 billion dollars to retrofit its piping. That contradicts your chief deputy director, Odette Madriago, who maintained in our last meeting that the DTSC simply cannot prevent releases and harm. We would like a written response on this from Ms. Madriago.

These avenues provided the DTSC with an opening big enough to roll a train through, yet DTSC chief counsel Reed Sato maintains it is up to the discretion of the department whether to respond or to leave Chevron to other regulators who have been wholly ineffective in preventing routine air pollution violations by refiners who are fined a pittance or not at all.

DTSC should suspend Evergreen Oil's permit, despite DTSC's refusal to even acknowledge power in the situation.

Ms. Raphael, in an August 16, 2012 letter to me, on behalf of the DTSC, you write,

"The Evergreen facility has nearly a dozen environmental permits, each establishing separate compliance requirements for the numerous operations, and equipment at the site... These permits reflect the current statutory and regulatory structure in California which largely address each environmental media individually and in separate areas of the law." You say the department does not have the legal authority to allow more "holistic" oversight.

You point out that by law, the DTSC cannot respond because the leak took place in a portion of the plant that involves certified recycled oil, which is at that point a "product" and so exempt from regulation. You also say that the heat transfer agent that leaked is not considered "hazardous," though Alameda County

authorities told Consumer Watchdog that Evergreen lists it as such in its own business plan.

This is a stunning abdication of DTSC's responsibilities. Evergreen Oil is still a serial violator of environmental laws. Your agency has repeatedly cited and fined the company for everything from cracked containment systems to inadequate waste storage areas over the years. Last year, a burst oil pipe triggered a large blaze and acid-tank spill. Evergreen continues to pose a threat to public health, safety, and the environment. This incident gives you a hook for suspending their permit.

Here is a third opportunity to do the right thing: deny Phibro-Tech a new permit.

Chemical company Phibro-Tech, in the working class Latino community of Santa Fe Springs, accepts hazardous industrial wastes and then recovers metals from those wastes. Now it wants a new, expanded permit. The DTSC should not grant it a new permit, let alone permission to expand, until it has cleaned up extensive pollution at the site, as the community is requesting.

That your department would even consider granting such a request defies comprehension. This company has violated state and federal pollution laws since at least 1988. Your department has issued numerous citations and fined Phibro-Tech hundreds of thousands of dollars for shoddy containment systems and a release of hazardous sludge.

The U.S. EPA has identified hexavalent chromium, a confirmed carcinogen, in groundwater at the site and linked it to Phibro-Tech. The level of hexavalent chromium at the site is nearly three million times the new public health goal in California of 0.02 ppb for hexavalent chromium in drinking water. This level of hexavalent chromium in groundwater is only 500 feet from the City of Santa Fe Springs municipal water supply.

Yet inexplicably, your department has allowed this company to operate on an expired license for 15 years, buying the company's pleas of poverty as an excuse for failing to perform clean up the department ordered but has, at best, only lethargically overseen.

And now, your department plans to issue a new and expanded permit based on a flawed and now expired City of Santa Fe Springs "negative declaration" essentially clearing Phibro-Tech's record without accurately characterizing current conditions at the site, identifying potential environmental impacts of continued and expanded operations, or assessing the health risks faced by the surrounding population that is reporting elevated cases of cancer. By law, the DTSC can require that an Environmental Impact Report be performed. Nothing

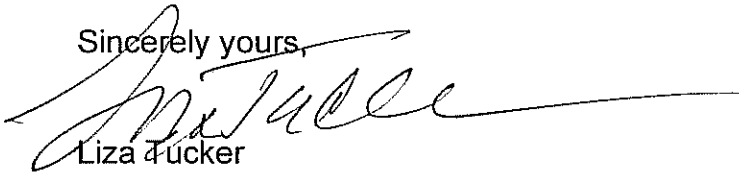
compels your department to accept a flawed judgment on this matter from a local agency.

Granting Phibro-Tech a new and expanded permit would show that the DTSC is out of touch with the times and not living up to what the public or governor would expect when it comes to protecting communities from environmental harm. Will you reconsider and start a new beginning or will this become another strike against the agency?

If you take issue with our recommendations or views, we ask that you request a California Attorney General opinion on your statutory and regulatory authority. Your top staffers, many of whom have spent two decades at a broken agency, are either resistant to performing its mission or ignorant of it. So all Californians are depending on you to make a break with the past and usher in a new future.

We hope you will respond swiftly to the incidents we raise and to the fundamental issue of your powers. We remain available to help the DTSC with any needed legislation to clarify those powers.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Liza Tucker", with a long horizontal flourish extending to the right.

Liza Tucker
Consumer Advocate
Consumer Watchdog