



April 9, 2012

California Senate Rules Committee
Chairman Darrell Steinberg
Sen. Bob Dutton, Vice Chair
Sen. Elaine Alquist
Sen. Kevin de Leon
Sen. Jean Fuller

Re: Confirmation of Debbie Raphael, Director of Department of Toxic Substances Control

Dear Chairman Steinberg and Members:

Your April 11 confirmation hearing for Director Debbie Raphael at the California Department of Toxic Substances Control is an opportunity to help right an agency that has too often failed communities where homes and schools are under siege by polluting companies. We hope that you will probe longstanding enforcement and other problems at the DTSC and ask Ms. Raphael to define her plans for strengthening the department's enforcement process.

Industry efforts to compromise the mission of the DTSC and consumer protection laws have left middle-class and working-class communities frightened for their families. They feel overwhelmed by the unknown smells, dust and runoff emanating from chemical plants, refiners and toxic waste processors, and see state and local regulators as unresponsive.

Consumer Watchdog's research and contacts with members of affected communities indicate that the DTSC has historically suffered from:

- **Lack of transparency**, which cripples local activists. The DTSC does not release or post original inspection reports or violation notices, and often forces citizens who seek documents affecting their communities to visit distant regional offices in person, at their own cost, to even find out what is publicly available on paper. Consent decrees scrubbed of details, or rare court enforcement actions, occur months or years after violations occurred. In the meantime, residents may live in fear of their own drinking water or the dust that is blowing into a school playground from a toxic industrial site.
- **Disconnection between inspection and enforcement**, and fragmentation of oversight among multiple state and local agencies. State inspections of toxic producers and waste sites are often performed by county-based agencies certified under Cal-EPA, while enforcement actions are in-house at DTSC. Local zoning, planning and development agencies may work at odds with community safety. DTSC appears to suffer from poor coordination and its own strong preference to settle violations rather than prosecute or sue even repeat violators. Certain companies, even frequent violators, have operated for

decades on expired permits through delay, revision of proposals and claims of corporate poverty. Defunct companies may leave behind toxic piles, ignoring DTSC orders that they be permanently protected or removed.

- **Weak out-of-court settlements.** Consent orders, the most common response of the DTSC to toxic releases or other safety violations, assess fines that are often just a few thousand dollars, no more than a minor cost of doing business. Violations are tersely described, devoid of explanation that laypersons worried about their health and homes could understand. Some violations may be omitted or diminished as a result of negotiation with the violator--the extent of this cannot be determined without access to original inspection and violation reports. Correction is left to the violator, without regularly published follow-up reports.
- **A “corruption of process” at the local level.** City officials and agencies may be cowed by industry threats of lost jobs and tax revenue. The small cities and their industries operate largely under the radar of big-city media. Activists describe local regulators issuing permits and allowing expansions of toxic sites despite strong community protests, and feel no one is listening. While this corruption of process is not within the power of the DTSC to control, it makes DTSC the chief protector of the toxics-affected communities that ring larger urban areas.

We have attached summaries of research into three companies – Evergreen Oil, Phibro-Tech and Pacific Steel – that appear to have manipulated or ignored the DTSC and other agencies to the detriment of concerned and frustrated local residents.

Ms. Raphael has strong consumer and environmental protection credentials, and Consumer Watchdog hopes that she will bring relief to besieged communities. Her initial year at the DTSC has surely familiarized her with the department’s long delays in holding careless violators to account, fines that do not deter the poisoning of air, ground and water, and poor follow-up to enforce compliance with consent orders. The Director’s answers to specific questions below will allow her to offer hope to frustrated communities and challenge the toxic industries that seek a “business as usual” relationship with their regulator.

The DTSC often resolves violations through a consent order with facilities because, as the settlements always note, “The parties wish to avoid the expense of litigation and to ensure prompt compliance.” Yet many of these facilities are repeat offenders that do not appear deterred by the fines and compliance requirements of the consent orders.

- At what point does the Director believe that a facility has violated the law too many times and should not be offered the benefit of a consent order rather than full accountability under the law?

In National City, near San Diego, the DTSC shut a metal recycling facility, ordering the owners to secure the site’s hazardous material and implement a plan to properly remove dangerous waste. However, when a local TV station visited the site nine years after DTSC’s finding of “imminent and substantial endangerment,” to schoolchildren, residential neighborhoods and nearby waterways, the violating entity had done virtually no remediation other than draping tarps over waste piles.

- How will the Director organize Department resources to ensure that known violators will be monitored and forced to comply in whole with consent orders?

Local residents, activists and advocates living in toxics-affected communities report that it is far too difficult, and often impossible, to get timely information from DTSC regarding toxic events, inspection reports, investigations and confirmed violations.

- What will the Director do to increase transparency at the DTSC, including timely and well-disseminated release of information that affects local communities? What can the DTSC do on its own toward this goal, and what if any actions would require higher-level action, including legislation?

These questions about how the DTSC will address noncompliant or defiant existing industries are intertwined with the important role of the DTSC in the state's Green Chemistry Initiative. The development of proposed regulations aimed at protecting Californians from exposure to potentially harmful products has attracted close attention from industries as well as environmental and consumer advocates. It will surely consume significant time and effort at the DTSC. The Director's leadership in San Francisco's precautionary approach to environmental decision-making makes her an ideal leader in the Green Chemistry initiative. This leadership will also have to extend to improving protection of communities already affected by toxic industries.

- How will the Director balance DTSC resources and priorities between the long-term goal of future protections and the urgency of better responses to communities affected by toxic byproducts and wastes today? Are DTSC resources sufficient to accomplish both aims successfully? If not, what must the Administration and Legislature do to prevent neglect of one aim or the other?

Thank you for considering these concerns during this confirmation process.

Sincerely,



Judy Dugan
Research Director



Douglas Heller
Executive Director

Cc: Debbie Raphael, Director, Department of Toxic Substances Control

ATTACHMENT: Hazardous sites illustrating concerns

In researching community concerns about a variety of hazardous waste sites, Consumer Watchdog has identified a series of examples in which DTSC has not efficiently or sufficiently addressed the public health and safety concerns or meaningfully held site owners to account for ongoing problems. Below are summaries of three sites that illustrate this problem.

1. Evergreen Oil Co., a recycler of waste oil and chemicals, Newark.

This company has been cited repeatedly for cracked and inadequate waste storage areas, failure to track contaminated petroleum waste both coming in and going out, careless soil contamination and careless omissions in its own inspection system. Yet it was fined less than ~~\$45,000~~ (correction: \$60,00) under six separate consent agreements with DTSC between 2006 and 2011. A burst pipe that spewed hot waste oil and an ensuing large blaze that endangered employees and the neighborhood shut down much of the facility last year. The facility has partially reopened, even though the operating portion lacks final local permits.

2. Phibro Tech, a maker of “specialty chemicals” for the semiconductor industry, Santa Fe Springs. The company has operated for more than 15 years on an expired and outdated state toxics-industry permit. It has been cited repeatedly for illegal storage, spillage and transportation of dangerous chemical waste near residences and a school, including signing a fourth consent order in less than a decade earlier this year. It has manipulated and delayed the permit renewal process, apparently revising plans whenever an original plan was due to go into effect. Waste byproducts of this plant include hexavalent chromium (think Erin Brockovich), a host of heavy metals and volatile organic compounds. It was also cited repeatedly for cracks, gaps and crumbling of its waste detainment.

3. Pacific Steel auto recycling yard, National City. The DTSC declared this scrap yard an "imminent and substantial endangerment" in 2002 from chemical and metal contamination including PCBs and ordered immediate action to cover acres of waste piles. In 2005 the DTSC closed the case. In reality the cleanup was only tattered blue tarps thrown over the waste piles. By 2011 little had been done at the abandoned site. Residents reported what they feared was toxic dust still blowing over a nearby school and neighborhood. Only an investigative report by a San Diego television station triggered more clean-up in recent months.