
Independent Review Panel

DEPARTMENT OF TOXIC SUBSTANCES CONTROL



Gideon Kracov, J.D., *Chair*
Mike Vizzier, *Vice Chair*
Dr. Arezoo Campbell, *Member*

Edmund G. Brown Jr.
Governor

Independent Review Panel Meeting Minutes November 16, 2016

1. Call to Order

Chair Gideon Kracov called the meeting to order at 9:03 a.m. in Room 3191 of the State Capitol in Sacramento, CA.

Panel members present: Chair Kracov, Vice Chair Mike Vizzier, and Panel Member Arezoo Campbell. A quorum was declared.

2. Welcome and Introductions

Chair Kracov introduced himself and asked the following individuals to introduce themselves: Vice Chair Vizzier; Panel Member Campbell; Deputy Attorney General Russell Hildreth, legal counsel for the IRP; IRP Program Analyst Larry Rohlfs; and IRP Office Technician Mike Singh.

Chair Kracov led the Panel in the Pledge of Allegiance.

3. Announcements

Chair Kracov announced that there would be no translation service for this meeting because no member of the public requested the service in advance. He noted that there would be public comment under the General Public Comment agenda item and all other agenda items. He announced that there would be no video webcast of the meeting, but said that an audio webcast may be posted on the IRP website after the meeting. He thanked Kip Lipper, chief policy advisor for Senator Kevin De León, for securing permission to hold the meeting in a state Capitol hearing room.

4. Agenda Review

Chair Kracov reviewed the agenda and said the IRP probably would not go into closed session.

5. Minutes of September 20, September 21, and October 14, 2016 Meetings

The Panel agreed to change the minutes of the September 20, 2016 meeting to state that Christina Walsh "knocked" her microphone to the floor instead of "threw" the microphone to the floor.

Chair Kracov suggested that the minutes of the September 21, 2016 meeting in Commerce be changed to reflect that Father John Moretta's comments were probably referring to several parkways/easements throughout the community rather than one small parkway/easement.

The Panel members agreed to approve the minutes of the September 20, September 21, and October 14, 2016 minutes with the suggested changes.

6. General Public Comment

Penny Newman of the Center for Community Action and Environmental Justice said that the IRP's recommendations for DTSC public outreach did not seem to have sufficient urgency. She said the air monitors being used at Riverside Agricultural Park (Ag Park) were inadequate because they were designed for use in enclosed areas. She said that if DTSC continues to do the wrong thing, it does not make any difference if the Department spends more money on public outreach. She said the Department simply needs to listen to the people who feel that they are treated with a condescending, racist attitude from DTSC staff. Ms. Newman said she would like to see how CalEnviroScreen is being used with respect to environmental justice communities, especially in regard to toxic substance cleanups.

In response to a question from Vice Chair Vizzier, Ms. Newman said DTSC and other CalEPA entities should look at communities more comprehensively and take a multi-media, multi-agency approach. She said DTSC was ignoring the Office of Environmental Health Hazard Assessment and had too much discretion on cleanups.

Ingrid Brostrom of the Center on Race, Poverty, and the Environment said the recent detection of hexavalent chromium in Paramount illustrated that communities should be trusted and taken more seriously. She said that funding was needed for the DTSC Community Protection and Hazardous Waste Reduction Initiative projects. Ms. Brostrom said she hoped the IRP had an opportunity to read the People's Senate Groundtruthing October 16, 2016 report on DTSC's September 20, 2016 response to the People's Senate site-specific benchmarks, which she said was not sufficiently responsive.

Vice Chair Vizzier said the Paramount contamination seemed to be more of a responsibility for other agencies than DTSC.

Panel Member Campbell said the IRP's October report was devoted to public outreach and that it might have had a more urgent tone if it had been devoted to site mitigation.

Chair Kracov noted that DTSC was brought in to do additional sampling in Paramount in 2014 and asked Ms. Brostrom if she and the Paramount community were happy with this work. Ms. Brostrom responded that they were not for the reasons expressed in the Groundtruthing report.

Vice Chair Vizzier said better coordination between agencies was needed.

7. Chair's Report

Chair Kracov noted that the IRP submitted its 90-day, Health and Safety Code section 57014(f) report on October 24, 2016 and that it was devoted to DTSC public outreach.

8. Staff Report

Mr. Rohlfes reviewed the updated tracking reports on IRP recommendations for the Governor and the Legislature, recommendations for DTSC, and suggested performance metrics for DTSC.

Chair Kracov adjourned the meeting for a break at 9:42 a.m. and reconvened it at 10 a.m.

9. Presentation and Discussion on DTSC Fiscal Management, Cost Recovery, and Billing Procedures

Dot Lofstrom, division chief of the DTSC Brownfields and Environmental Restoration Program, gave a presentation on DTSC Cost Recovery. A PowerPoint version of the presentation is available on the IRP website at: <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Meetings.cfm>.

The presentation covered recent cost recovery history and upcoming key activities, a historical costs update, and procedures for cleanup program cost estimates and informal invoice dispute process.

Ms. Lofstrom said that 87 percent of the 1,621 backlogged sites have been fully addressed. The remaining 13 percent have been fully evaluated, although all possible actions have not yet been completed. Furthermore, a strong foundation has been put in place for the future. She said cost recovery has been a major focus for the Department during the past three years, but it has not been placed before the primary DTSC mission of protecting health and the environment. She said the Department recovers all of the response costs from the polluter that it can, once liability is determined, but cost recovery is a complex process, and sometimes the costs cannot fully be recovered. She said that once the Department determines it cannot recover them, it files a No Further Cost Recovery Action (NIFRA), which means that the costs will be written off. She said there was a formal procedure for this.

Ms. Lofstrom reviewed DTSC cost recovery efforts since May of 2013, when the Department acknowledged the large backlog of unrecovered response costs. Those efforts included procedural changes, staff training on the procedures, the hiring of focused resources, responding to the State Auditor's recommendations, evaluating all uncollected response costs, getting a higher interest rate for money owed as well as more information request authority from AB 273, and working on a new billing system that was scheduled to go on line in 2021. Ms. Lofstrom said cost recovery concerns resulted in the creation of a new position: administrative project manager (APM). The APMs were assigned specific projects, worked side by side with technical project managers, and made sure an EnviroStor profile was set up accurately for billing information. She then discussed current procedures for preparing cost estimates, which have been formalized in Departmental Procedure Memorandum (DPM) 1. Ms. Lofstrom then discussed the involvement of technical support specialists in complex projects and mentioned that each technical support branch had an operations plan with an "on time, on budget" performance metric for cleanup projects.

Chair Kracov asked Mr. Rohlfes to obtain those operations plans from DTSC.

Ms. Lofstrom next highlighted the Cost Tracking Report and Resource Estimate Worksheet on EnviroStor and discussed the informal and formal cost dispute process.

In response to questions from Panel Member Campbell and Vice Chair Vizzier, Ms. Lofstrom said DTSC recovered roughly \$6.9 million of the approximately \$90 million in costs from the 1,410

backlogged, addressed sites. She clarified that not all of the unrecovered costs were write-offs. Some were data corrections or the results of settlement agreements, for example.

In response to a question from Chair Kracov, Ms. Lofstrom said that as of November 14, 2016, DTSC had addressed the last of the nine 2014 cost recovery recommendations made by the State Auditor.

In response to another question from Chair Kracov, DTSC Staff Services Manager Mike O'Docharty said that there were two uncompleted elements from cost recovery work plans that DTSC submitted to the IRP earlier in 2016: a new billing system and DPM updates.

Chair Kracov asked Mr. Rohlfes to follow up with DTSC on the cost recovery DPM updates that have not yet been completed in the Sustainable Cost Recovery Systems Workplan.

Chair Kracov asked what lessons could be learned from the recent cost recovery progress. Ms. Lofstrom responded that when a light is shined on a problem, everyone pulls together; cost recovery became a big focus for the Department after a wake-up call, and staff members made it part of their everyday life.

Chair Kracov said the IRP should consider metrics mentioned by DTSC in its December 8, 2015 report to the Panel on cost recovery and think about additional metrics.

Vice Chair Vizzier said he recently heard a presentation by Michael Foster on conducting cleanups more efficiently and suggested that the IRP invite him to speak to the Panel.

DTSC Administrative Services Deputy Director Andrew Collada and DTSC Fiscal Officer Sara Murillo gave a presentation on DTSC Fiscal Overview. A PowerPoint version of the presentation is available on the IRP website at: <https://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Meetings.cfm> .

Mr. Collada reviewed the cleanup billing process.

Chair Kracov asked Mr. Rohlfes to obtain a copy of the DPM on billing.

Mr. Collada next summarized the payment process, invoice dispute process, calendar year 2015 financial results of formal disputes, collection process and strategies, FY 2015-16 financial results of collection process, calculation of direct and indirect costs, and the Cost Recovery Billing System (CRBS). Mr. Collada said the CRBS was 20 years old, ran on obsolete technology that was no longer supported by the technology vendor, and lacked functionality for DTSC as well as transparency for third parties. He said the complex conversion to new technology was one of the Department's highest priorities and was expected to be completed in 2021.

Chair Kracov asked Mr. Collada if he had any comments on a November 9, 2016 letter submitted to the IRP from the California Chamber of Commerce on DTSC's billing procedures and billing structure reform. Mr. Collada agreed that DTSC invoices do not have as much detail as they should have and that DTSC should always be evaluating its billing processes. However, he said that billing disputes are a small portion of the overall billing, that DTSC was diligent about resolving them in a timely manner, and that the Department does not charge for time spent on disputes.

Chair Kracov asked Mr. Collada if any billing improvements can take place before 2021. Mr. Collada responded that most improvements would have to wait until 2021 because the Department is locked into using its current technology until then.

Panel Member Campbell asked what happens when a responsible party declares bankruptcy. Mr. Collada responded that it then goes to litigation and is handled separately from the billing process.

In response to a question from Vice Chair Vizzier, Mr. Collada said DTSC collects roughly 80 percent of what it invoices, but he expected the rate to increase because of the new, higher interest rate.

Chair Kracov said the collection rate should be a metric.

Mr. Collada then gave an overview of the DTSC budget. The Department's budget increased from \$234,847,000 in FY 2015-16 to \$280,364,000 in FY 2016-17.

Vice Chair Vizzier observed that much of this increase was a result of the money budgeted for the Exide Technologies residential cleanup.

Chair Kracov asked if the issue of future shortfalls in the Site Remediation Account had been addressed to date. Mr. Collada responded that they had not.

Mr. Collada then reviewed DTSC funding sources, which increased from \$234,847,000 in FY 2015-16 to \$280,364,000 in FY 2016-17.

Chair Kracov asked if DTSC was under budget in FY 2015-16. Mr. Collada responded that it was.

Chair Kracov asked Mr. Rohlfs to obtain DTSC financial statements for FY 2015-15 when they are released in December of 2016.

Chair Kracov said that, in general, it appeared that DTSC had a good hold on its cost recovery and billing system improvements.

Chair Kracov adjourned the meeting for a break at 11:15 a.m. and reconvened it at 11:26 a.m.

10. Presentation by Anthony Sampson, Senior Attorney/Policy Advisor, Arnold & Porter, LLP, Regarding California Chamber of Commerce Concerns with, and Recommendations for, DTSC's Billing Policies

Mr. Sampson began his presentation by stating that it addressed DTSC's billing policies for permitted facilities in addition to responsible parties for cleanup projects.

Referring to a letter that he sent to the IRP on November 9, 2016 on behalf of the California Chamber of Commerce (Chamber), Mr. Sampson made several recommendations for DTSC's billing policies: establish time deadlines for resolution of billing disputes; establish deadlines for meet and confer, preparation of cost estimates, and disputes concerning cost estimates pursuant to HSC section 25269.5; establish consequences for failure to comply with HSC section 25269 et seq. and for failure to timely resolve billing disputes; provide DTSC with the organizational structure and budget management tools necessary for active project management; establish procedures to substantially reduce DTSC's indirect cost rate; establish guidelines to ensure parties are not billed for fee disputes, provide the daily logs as a matter of course with all invoices; change practices to ensure that interest is not charged for any unpaid amounts subject to a dispute; and provide its staff a concentrated training program in budgeting and billing practices and procedures.

Mr. Sampson also made several recommendations for structural reform. He suggested legislation to do the following: give DTSC the discretion and the resources to identify 10 to 15 facilities/sites for

specialized expertise and attention; expand on the IRP's recommendation to create a crisis management team within the Public Participation Program to create a team devoted to the 10 to 15 identified facilities; and provide General Fund expenditures in matters of extraordinary public interest to devote the requisite resources and expertise to complicated permitting processes or cleanups.

Chair Kracov asked Mr. Samson to provide the IRP with information on the indirect costs the Chamber's members were paying to other state agencies.

Panel Member Campbell asked Mr. Samson to provide the IRP with data on the disputes the Chamber's members had with the DTSC.

Public comment on the agenda item:

Ms. Brostrom said she wanted the polluter to pay for all of the costs of cleanups. She said she was concerned about the recommendation to enforce collection deadlines for DTSC. Ms. Brostrom also questioned the Chamber concern about DTSC allegedly assessing fees on fees, since she said that historically DTSC has under billed and under collected.

11. Discussion about DTSC Health and Safety Code Section 57007 Quality Government Programs Biennial Report

DTSC Chief Deputy Director Francesca Negri provided an update on the report due in December of 2016. She said DTSC was compiling information for the report and basing it around the Fixing the Foundation strategic plan. She said it will address various DTSC accomplishments and improvement efforts.

Chair Kracov adjourned the meeting for a lunch break at 12:10 p.m. and reconvened it at 1 p.m.

12. Presentation and Discussion on the IRP, Its Recommendations to Date, and Its Future Work Plan

Mr. Rohlfs gave a presentation on the Independent Review Panel. A PowerPoint version of the presentation is available on the IRP website at:

<http://www.dtsc.ca.gov/GetInvolved/ReviewPanel/Meetings.cfm>.

13. IRP Reporting Requirements

Chair Kracov said the IRP would next hold an interactive, big picture discussion on DTSC for possible use in the annual report that the Panel must submit to the Legislature and the Governor at the time of the submission of the Governor's FY 2017-18 budget. Chair Kracov said he believed there were four keys to future Department strength. The first, he said, was stable leadership. The second was an appropriate budget. The third was high quality human resources. The fourth was transparency and accountability.

Vice Chair Vizzier said collaboration with other agencies also was important.

Panel Member Campbell said the IRP and DTSC Director Lee need to work well together and that the former's recommendations should be constructive.

Chair Kracov said he would like to divide the agenda item discussion into four topic areas: permitting, enforcement, public outreach, and site mitigation.

Permitting:

Chair Kracov mentioned the following permitting challenges: the HSC permitting provisions were in need of simplification, updating, and cross referencing; there was still a big backlog in expired permits; financial assurances were in need of updating; there were problem facilities; and the Hazardous Waste Management Plans have fallen by the wayside.

Gene Erbin of Nielsen, Merksamer, Parrinello, Gross, & Leoni LLP, representing Waste Management, Exide Technologies, and other clients, said he agreed that the statutes should be rewritten. Mr. Erbin said that he believed DTSC did a great job with the vast majority of the permitted hazardous waste facilities, but if the state tried to repair the system for the few problem sites, it would make things worse. He said the IRP should keep in mind that the permitted facilities have many permits from different agencies and that a better understanding was needed of the complexities confronted by them.

Chair Kracov asked Mr. Erbin for his thoughts on a proposed permit appeals board. Mr. Erbin said it would be a bad idea if it placed political appointees in an adjudicatory capacity.

In response to another question from the Chair Kracov, Mr. Erbin said he believed that eliminating the flat permitting fees without accountability measures will lead to more billing disputes as well as pricing that would potentially cause facilities to go out of business. He added that the expenditure of state funds on permitting was warranted.

Ms. Brostrom said permitted facilities are often located in vulnerable areas and the state was asking the communities to bear a big burden. She said California had no long-term planning for hazardous waste. She said the Tanner Act was meant to fast track hazardous waste facilities and limit public involvement and needed to be revisited.

Chair Kracov asked Mr. Brostrom for her thoughts on a proposed permit appeals board. Ms. Brostrom responded that she supported the concept and said there was precedent for such a board. Ms. Brostrom added that she also favored a governing board because it would make the Department more transparent.

Enforcement:

Chair Kracov mentioned the following enforcement challenges: poor enforcement tracking, demonstrated lapses with certain facilities, such as with Exide Technologies, and haphazard EnviroStor information.

Vice Chair Vizzier said there was a lot of robust collaboration on enforcement and that he wasn't sure the IRP and communities understood that.

Panel Member Campbell said enforcement was the most complex and difficult area within DTSC.

Ms. Brostrom said DTSC's Office of Criminal Investigations (OCI) was underutilized and not working with other agencies in a collaborative way. She said OCI should be moved to CalEPA and allowed to

do more multi-media enforcement. She also said fines should be increased for chronic violators or violations in vulnerable areas as per CalEnviroScreen.

Chair Kracov said it was his understanding that CalEnviroScreen was designed to be used in allocating Cap-and-Trade Program funds and not as an enforcement tool. Ms. Brostrom agreed that it was designed for Cap-and-Trade purposes, but said it nevertheless can be used to highlight where the most vulnerable communities are.

Chair Kracov asked Mr. Samson to comment on the use of CalEnviroScreen for enforcement. Mr. Samson responded that it was designed to identify communities for grant purposes and that it was expressly not designed for permitting decisions.

Rachel Machi Wagoner, chief consultant to Senate Environmental Quality Committee, said that while CalEnviroScreen was created for Cap-and-Trade purposes, it gave greater clarity as to how disadvantaged communities are defined and has a broader purpose. Ms. Wagoner added that she could not speak directly to the issue of permitting.

Ms. Brostrom added that community complaints go into a “black box.”

Public Outreach:

Chair Kracov mentioned the following public outreach challenges: the Exide cleanup, a Public Participation Manual that hasn't been updated since 2001, the past due UC Davis Extension Collaboration Center public participation recommendations, information in EnviroStor that has not been maximized, and DTSC's decision-making not being communicated in a way that inspired confidence.

Jean Kayano of the Center for Community Action and Environmental Justice said she supported all of the IRP's recommendations and especially the one regarding an oversight board.

Vice Chair Vizzier said getting agencies to work together was more important than adding an oversight board. Vice Chair Vizzier added that he did not see board members collaborating with one another.

Panel Member Campbell said there was a lack of trust because of bad communication and that better communication could make a big difference.

Chair Kracov said he was as told by one past DTSC Director that it would be a relief to have an oversight board because the Director is always at “the point of the spear” at the Department.

Mr. Samson said a permit appeals board would be a bad idea and that an oversight board would be a big challenge for DTSC, but that he would support the creation of a public participation entity such as the forum that CalRecycle has for the public to raise issues and receive information on a monthly basis.

Panel Member Campbell spoke in favor of a forum for stakeholders.

Chair Kracov said DTSC has more localized concerns and controversy than does CalRecycle. He added that if nobody is asking questions and demanding answers, all of the IRP's work could go by the wayside.

Site Mitigation:

Chair Kracov mentioned the following site mitigation challenges: problem sites, complaints about several voluntary cleanup sites, and concerns about the adequacy of the Site Remediation Account.

Robert Doty, a private practice attorney with Cox, Castle, and Nicholson in San Francisco, said DTSC site mitigation had suffered from a lack of human resources and especially a loss of senior staff. He said relationships between DTSC and state and local jurisdictions, especially redevelopment agencies, had been allowed to wither. He said that from a local, redevelopment perspective, cleanups were taking more time than in years past due to a lack of urgency and shared vision. He said there was a desire on the part of DTSC to have absolute certainty regarding contamination, even though that certainty often wasn't necessary for a redevelopment site. He said DTSC was inconsistent in the way it handled cleanups, depending upon the DTSC branch office involved or the project manager assigned to a particular cleanup.

Chair Kracov asked Mr. Doty what recommendations he would suggest the IRP make. Mr. Doty responded that he would suggest more staffing and an articulation that DTSC should work in partnership with local redevelopment agencies.

Chair Kracov asked Mr. Doty to compare DTSC's site mitigation efforts with those of the water boards. Mr. Doty responded that the DTSC response has been better than most water boards.

Ms. Brostrom said she had several concerns and recommendations pertaining to site mitigation. She said the orphan fund was being depleted. She said dry cleaning establishments were suspected of causing contamination in numerous locations and suggested the creation of a dry cleaning site mitigation fund. She said DTSC should find ways to use citizen sampling/data better. She said many communities were dissatisfied with the characterization of their sites and that DTSC had no clear criteria for it. She said sampling results sometimes were not communicated to communities in a timely fashion. She said that affected communities needed more say in cleanup options.

Chair Kracov adjourned the meeting for a break at 3:20 p.m. and reconvened it at 3:25 p.m.

Next Steps:

Chair Kracov offered to work with staff in drafting the annual report for discussion at the IRP's December 9, 2016 meeting.

Vice Chair Vizzier offered to work with staff in drafting the next 90-day report on DTSC progress due on January 22, 2017.

Panel Member Campbell asked if the annual report should focus on the state's FY 2017-18 budget.

Ms. Wagoner said she understood that the Legislature set the annual report deadline to coincide with the submission of the Governor's annual budget for the purpose of allowing it to review the Department's budget in light of the recommendations.

Chair Kracov said he thought the annual report should be limited to the four DTSC programs just discussed and that it should highlight the four overall topics he mentioned earlier in the meeting because those threads seemed to run through the programs. He said he thought the report should include all of the recommendations made for the Legislature and the Governor to date, including those that have been adopted. He said he did not think the report should include the

recommendations for DTSC, the performance metrics for DTSC, or the data requests for DTSC to date. The IRP agreed to this approach and to not include any recommendations in addition to those already made.

The IRP asked Mr. Rohlfes to put together a list of possible fiscal management recommendations for discussion at the December meeting if he had time to work on it. Panel members agreed to submit their ideas to him. Chair Kracov said Mr. Rohlfes should accept ideas from anyone and include ideas from this meeting.

Chair Kracov noted that John Little, a DTSC site mitigation staff member, had asked the IRP to make a list of questions and issues to help the Department prepare for the Panel's upcoming review of the Site Mitigation Program. The IRP decided to discuss the request at its December meeting.

14. Organizational, Operational, and Administrative Matters

Panel Member Campbell suggested that more time be set aside at meetings for thorough discussion amongst the Panel members. Chair Kracov offered to indicate on future meeting agendas that Panel members would possibly respond to general public comments.

15. Future Meeting Schedule and Agenda Items

The IRP scheduled its next meeting on December 9, 2016 at the DTSC Berkeley Regional Office. The IRP agreed to include a presentation on the Berkeley Environmental Chemistry Laboratory and tour of the lab. The IRP also agreed to include a presentation by DTSC on its organizational excellence efforts. The IRP agreed not to include the presentation on the UC Davis Collaboration Center Public Participation Program recommendations at the December meeting.

The IRP decided to hold the January meeting on January 11, 2017 in the Sierra Room of the CalEPA Building in Sacramento.

The IRP set the March meeting for March 1, 2017.

16. Closed Session

There was no closed session.

17. Reconvene and Report on Closed Session

There was no closed session.

18. Adjournment

Motion: Adjourn meeting. Panel Member Campbell moved. Vice Chair Vizzier seconded. The motion carried unanimously.

Chair Kracov adjourned the meeting at 4:50 p.m.