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8 **STATE OF CALIFORNIA**
9 **ENVIRONMENTAL PROTECTION AGENCY**
10 **DEPARTMENT OF TOXIC SUBSTANCES CONTROL**

11 In the Matter of:

12 PHIBRO-TECH, INC.
13 8851 Dice Road
14 Santa Fe Springs, CA 90607

15 EPA ID. NO. CAD008488025

Docket PAT-FY16/17-002

PHIBRO-TECH, INC.'S OPENING BRIEF

California Code of Regulations, Title 22,
Section 66271.18

1 **I. INTRODUCTION**

2 Phibro-Tech, Inc. (“PTI”) filed this appeal to seek review of the Department of Toxic
3 Substances Control’s (“Department”) decision requiring PTI to commence closure of a secondary
4 containment unit known as “Pond 1” at PTI’s Santa Fe Springs facility (the “Facility”). As the
5 Department knew at the time it made the decision, there is a wastewater treatment system located in
6 and around Pond 1 that is essential to the continuing operation of the Facility. The Department
7 nonetheless required PTI to submit a plan for closure of Pond 1 without provisions for relocating the
8 wastewater treatment system. Further, in approving the closure plan, which PTI submitted under
9 protest, the Department unilaterally required PTI to commence the closure process within six
10 months, despite the fact that the Department knew that relocating the wastewater treatment system
11 would take over *nine* months, and that the Department would have to process a separate permit
12 modification to relocate the system first that would take many months to complete.

13 By failing to allow sufficient time for PTI to relocate the wastewater treatment system, the
14 Department’s decision effectively requires the Facility to shut down in order to close Pond 1. That
15 outcome has far-reaching policy consequences, both because the Facility employs over 60 workers,
16 and because it is the only recycler of certain aqueous metal bearing waste west of the Mississippi,
17 meaning that large volumes of hazardous waste that would otherwise be recycled would instead be
18 sent to landfills or deep-injection wells. Despite these consequences there is no evidence in the
19 record that the Department considered the policy implications of its decision, much less that it
20 thoroughly evaluated and disclosed them to the public as the California Environmental Quality Act
21 (“CEQA”) requires. To the contrary, the record shows that the Department assumed the Facility
22 would remain open and operating throughout the Pond 1 closure process, an assumption that was
23 clearly erroneous in light of the conditions that the Department imposed.

24 In short, the Department’s decision relies upon findings of fact and conclusions of law that
25 are clearly erroneous, and fails to address important policy considerations that the Department
26 could, and should, have reviewed. PTI therefore respectfully requests that the Appeal Officer
27 reverse the Department’s decision and allow PTI to submit a new closure plan that provides for the
28 ongoing operation of the facility.

1 **II. FACTS**

2 **A. Background of the Facility and Pond 1.**

3 The Facility is an inorganic chemical recycling and manufacturing facility in the City of
4 Santa Fe Springs, in Los Angeles County, California. As part of its operations, it treats metal
5 bearing spent materials from the aerospace and electronics industries, and recycles those materials
6 for use in other valuable goods, including industrial chemicals and materials. Among the hazardous
7 wastes that the Facility recycles are etchants, metal slurries, and corrosive wastes containing
8 reclaimable materials. (DTSC000279; 762; 5001-5002; 10940.)¹

9 The Facility employs over 60 workers. It is also the only recycler of certain aqueous metal
10 bearing waste west of the Mississippi River – hazardous waste that would otherwise be sent to
11 landfills or deep-injection wells. Among other things, the Facility recycles over 1.2 million pounds
12 of copper per year, the equivalent of the amount that would be generated by excavating and
13 processing 1.2 billion pounds of earth (approximately 600 tons) from copper mines.²

14 Pond 1 is a steel-reinforced, 6-inch thick, chemical-resistant concrete tank with a capacity
15 of approximately 36,000 gallons, one-third of which is below ground. (DTSC000079.) The pond
16 was built in 1975, and was originally used for impoundment of liquid waste. (DTSC006039.)
17 However, in 1984 the Facility’s owner at the time, Southern California Chemical Company
18 (“SCC”), informed the Department of Health Services (the Department’s predecessor agency) that it
19 intended to convert Pond 1 into a secondary containment unit for two large tanks that are part of the
20 Facility’s wastewater treatment system. (DTSC000059-63.) Pursuant to a 1984 written closure
21 plan, SCC cleaned out Pond 1, relined it, and converted it to secondary containment for the tanks.
22 (DTSC000079-80.)

23
24
25

26 ¹ All citations referring to “DTSC” followed by a number are to pages of the Administrative
27 Record prepared by the Department.
28 ² These facts are not in the Administrative Record because, as discussed below, the Department
 failed to consider the consequences of shutting down the Facility when it made the decision at issue
 in this Appeal.

1 **B. The 1998 Closure Plan.**

2 In 1988, the Department of Health Services and the United States Environmental Protection
3 Agency (“EPA”) jointly approved a modified closure plan for Pond 1 (the “1988 Closure Plan”).
4 (DTSC000762-763; 823-825; 830.) Crucially, the agencies recognized that in order to allow the
5 Facility to continue operating, the plan would have to incorporate provisions for relocating the
6 wastewater treatment system, a process that the agencies acknowledged would take approximately
7 one year to complete. As an EPA Memorandum dated October 6, 1988 summarized:

8 A major issue discussed and finally resolved was the facility's
9 claim that the wastewater tanks sitting on top of the impoundment
10 had to remain operational during closure activities. **It was**
11 **determined that these tanks were necessary to the operation of**
12 **the facility and, therefore, identification of a new tank site and**
13 **tank relocation were incorporated into the schedule of closure**
14 **activities.** The facility has proposed a schedule (in meetings on the
15 3008(h) order) which calls for site characterization of the whole
16 facility prior to tank relocation but it was felt that this
17 unnecessarily delayed the closure of this impoundment. Therefore,
18 the schedule requires the facility to identify likely areas to relocate
19 the tanks, [and] do site characterization and remedial action on
20 those areas prior to full site characterization. **The tanks will be**
21 **relocated within 1 year of closure plan approval and closure of**
22 **the impoundment will then begin.** Closure activities will be
23 completed within 560 days of closure plan approval, as allowed in
24 40 CFR 265.113(b).³

18 (DTSC000824.)

19 Consistent with the EPA Memorandum, the 1988 Closure Plan expressly incorporated
20 provisions for relocating the wastewater treatment system in order to allow the Facility to continue
21 operating:

22 **Since SCC depends heavily on the continued use of it's [sic.]**
23 **wastewater treatment system to conduct normal operations, it**
24 **has been determined that the two wastewater treatment tanks**
25 **located in the unit must be relocated as part of closure.** For this
26 reason, the time necessary to complete closure activities will need
27 to be extended in accordance with 40 CFR 265.113 (b)(1)(ii)(C).
28 The general closure procedures for Pond #1 shall be as follows:

³ In all quotations included in this Brief, bold font is supplied for emphasis unless otherwise noted.

- o Tank Relocation
- o Site Characterization
- o Concrete and Soil Removal, Soil Stabilization
- o Interim Cover/Final Cover
- o Closure Certification
- o Post-Closure Care & Maintenance

TANK RELOCATION

The two (2) 30,000 gallon wastewater treatment tanks currently located in Pond #1 must be removed from the unit in order to proceed with soil sampling activities. However, **due to the critical role they play in normal facility activities, they must remain in continuous service throughout closure of Pond #1.** Therefore the tanks shall be relocated to accommodate this need prior to commencing sampling activities for Pond #1.

(DTSC000734-735.)

C. The RCRA Facility Investigation and Subsequent Revisions of the Closure Plan.

In the years that followed, a series of complications delayed implementation of the 1988 Closure Plan. Among other things, SCC, the Department of Health Services, and the EPA agreed in 1989 that the closure process should be coordinated with a RCRA Facility Investigation required under an EPA Consent Order. (DTSC000960-963; 966-967.)

The Department of Health Services issued a RCRA Permit for the Facility in 1991, and the RCRA Facility Investigation was completed by 1994. (DTSC001371-1435; 2273-2278.) However, operational changes made in the interim, as well as information regarding site conditions developed through the Facility Investigation, rendered elements of the 1988 Closure Plan infeasible and inconsistent with other proposed corrective actions. (DTSC002273-2278.)

In 1995, the Department approved a Hazardous Waste Facility Permit Modification for the Facility, including a corrective action program. The Permit Modification again affirmed the need to relocate the treatment system tanks from Pond 1 before initiating the closure process: “The existing Modified Closure/Post Closure Plan for Pond 1, which was approved by the Department in September 1988, requires the relocation of two wastewater treatment tanks currently located in Pond 1....” (DTSC002520-2521.)

Over the next several years, PTI worked with the Department to attempt to reconcile the requirements of the 1988 Closure Plan with the operational changes, newly-discovered site

1 conditions, and obligations related to the 1995 Permit Modification. As an internal memorandum
2 from the Department's Geological Services Unit dated January 24, 2001 stated, "To place the tanks
3 [currently located in Pond 1] over an already contaminated area would be counterproductive for
4 [PTI] in light of forthcoming facility-wide corrective actions." Accordingly, the Department
5 ordered PTI to develop a new proposal for the tank relocation phase of the closure. However, in the
6 same memorandum the Department again acknowledged that the tanks play a "critical role ... in
7 normal facility activities," and therefore "must remain in continuous service throughout closure of
8 Pond #1." (DTSC003292.)

9 In 2002, the Department informed PTI that instead of requiring that Pond 1 be "clean
10 closed," the Department would allow it to be capped, leaving the existing soil in place after removal
11 of the Pond 1 containment structure. (DTSC003349-3352; 3314-48.) PTI submitted a revised
12 Hazardous Waste Facility Closure Plan, including provisions for relocating the treatment system
13 tanks consistent with the Department's directions. (DTSC003402-3444; 3356; 3613.) At the
14 Department's request, PTI also submitted a Site Conceptual Model, various drafts of which were
15 circulated over the next three years. (DTSC003585-3586.)

16 **D. The 2005 Revised Closure Schedule and 2006 Treatment System Relocation Plan.**

17 On September 19, 2005, PTI submitted to the Department a revised proposed schedule for
18 implementation of the Pond 1 Closure Plan. The schedule included provisions for relocating the
19 wastewater treatment system tanks, a process that PTI now estimated would take nine-and-a-half
20 months from the date of the Department's approval of the relocation plans. (DTSC004265-4267.)

21 The Department responded with a letter dated December 2, 2005, in which the Branch
22 Chief for the Department's Statewide Compliance Division again affirmed that "the approved 1988
23 Modified Closure/Post Closure Plan for Pond 1 requires relocation of the tanks W1 and W2 as part
24 of the implementation of the Pond 1 Closure Plan." The letter then confirmed that the Department
25 had approved the new closure schedule, including the nine-and-a-half month long process for
26 relocating the wastewater treatment system tanks, and ordered PTI to submit a relocation plan for
27 the two tanks by December 30, 2005. (DTSC004268-4269.)

28 However, as PTI pointed out, the Branch Chief's order was inconsistent with Department

1 Management's agreement that the closure of Pond 1 should be integrated into the process for
2 approval of the Facility's permit renewal and modification application, which at that time had
3 already been pending for over 10 years (and still remains pending to this day). (DTSC004278-
4 4279.) On December 20, 2005, PTI met with a Department Management team led by then-Deputy
5 Director Watson Gin. At the meeting, Department Management confirmed its agreement to allow
6 PTI to initiate closure of Pond 1 after the Department made a permitting decision on the Facility's
7 Part B permit application. (DTSC004284-4285.)

8 PTI nevertheless moved forward with formalizing a plan for relocating the wastewater
9 treatment system. On November 22, 2006, PTI submitted to the Department a Site
10 Characterization/Tank Relocation Plan. (DTSC004800-4820.) In a technical memorandum
11 evaluating that plan, the Department's Geological Services Unit stated,

12 According to the 1995 Hazardous Waste Facility Permit
13 Modification, the facility is required to implement the 1988
14 Modified Closure/Post Closure Plan for Pond 1 (Closure Plan).
15 **The 1988 Closure Plan requires the facility to relocate two
16 30,000-gallon above-ground wastewater treatment tanks
17 currently located in Pond 1 in order to proceed with Pond 1
18 characterization activities....**

17 In order to move forward with the closure of Pond 1 and the
18 relocation of the wastewater treatment tanks, GSU recommends
19 approval of the Revised Workplans. ...

19 (DTSC004823-4824.) On December 15, 2006, the Department issued a letter stating that the
20 Department "hereby approves" the November 2006 Site Characterization/Tank Relocation Plan.
21 (DTSC004825.)

22 **E. The Department's Consideration of the Part B Permit Renewal.**

23 Although the plans for closing Pond 1 and relocating the treatment system now appeared to
24 be in place, the closure process remained stalled because of the Department's ongoing consideration
25 of the Facility's application to renew its Part B permit. Consistent with the December 2005
26 meeting, the Department reaffirmed its determination to allow PTI to close Pond 1 only after
27 relocating the treatment system, and to give PTI one full year to complete the relocation process, in
28 the Draft Part B Permit it circulated for public review in March 2010:

1 (f) **The Permittee shall remove the old maintenance building**
2 **and install a new waste water treatment tank system in the old**
3 **maintenance building location within one year of the effective**
4 **date of this Permit.** The Permittee shall obtain all necessary
authorization and permits for new tank installation and
construction.

5 (g) The Permittee shall implement Site Characterization and Tank
6 Relocation Plan, and a Pond 1 Soil Sampling and Analysis Plan
approved by DTSC in 2006, within eighteen months of the
effective date of this Permit.

7 (h) The Permittee shall close Pond 1 pursuant to approved CAPM
8 closure plan and submit a post closure permit application to DTSC
9 within eighteen months of the effective date of this Permit.

10 (DTSC005668.) A Fact Sheet that the Department circulated in connection with the Draft Part B
11 Permit further explained, "PTI will also be closing a former surface impoundment at the facility
12 currently used as secondary containment for the wastewater treatment system. Approval for this had
13 been previously received from DTSC." (DTSC005003.)

14 The Fact Sheet also explained that, to comply with CEQA, the Department would rely on
15 the Negative Declaration dated October 3, 2008 adopted by the City of Santa Fe Springs, which the
16 Department participated in preparing as a responsible agency. (DTSC005002.) That Negative
17 Declaration expressly incorporated the assumption that the wastewater treatment system would be
18 relocated as part of the Pond 1 closure process in order to allow the Facility to continue operating:

19 Removal of the Pond 1 containment structure will cause
20 operational difficulties at the Facility, as it will require the
relocation of the wastewater treatment system, which is currently
located inside Pond 1....

21 An approved 1988 Modified Closure/Post-Closure Plan provides
22 for closure of Pond 1. PTI has begun implementing the 1988
23 Modified Closure/Post-Closure Plan for closure of Pond 1. **As**
24 **Pond 1 is currently being used as secondary containment for**
25 **Waste Water treatment tanks, these tanks must be relocated**
before Pond 1 can be closed. On January 31, 2006 PTI submitted
a Tank Relocation Plan to DTSC.

26 (DTSC004905-4906.)

27 **F. The Department's 2012 Order To Revise The Closure Plan.**

28 In 2012, the Department ordered PTI to revise the 1988 Closure Plan. A letter dated March

1 8, 2012 from the Department Senior Staff Counsel stated:

2 Upon closer review of both the [1988 Closure Plan] and applicable
3 regulations governing closure requirements for a surface
4 impoundment, DTSC has determined some of the requirements of
5 the [1988 Closure Plan] need to be revisited in light of changing
6 conditions of the facility, proposed treatment of groundwater and
7 soil contamination, and applicable regulations. Based on DTSC's
8 review of both the [1988 Closure Plan] and applicable regulations,
9 DTSC has determined that PTI should submit a revised closure
10 plan that meets the closure requirements set forth in Article 7,
11 Chapter 15, of Division 4.5, of California Code of Regulations,
12 title 22 (including, but not limited to, sections 66265.112 and
13 66265.228).

14 (DTSC005997.) The letter also specifically required PTI to include “[i]nformation on how the two
15 tanks attached to the top of Pond 1 (W-1 and W-2) will be closed and removed,” and to provide that
16 information in “a single consolidated closure plan....” (DTSC005998-6000.)

17 Pursuant to the Department’s order, PTI submitted a new Pond 1 Closure Plan in August
18 2012. (DTSC006031-6200.) The plan again confirmed that the only way to avoid closing the
19 Facility during the Pond 1 closure process was to incorporate the wastewater treatment system
20 relocation into the process. (DTSC006039.) The plan therefore included detailed provisions for
21 relocating the tanks. (DTSC006048-6055.)

22 On October 8, 2012, the Department’s Geological Services Branch issued a memorandum
23 approving the plan. (DTSC006203.) However, on March 28, 2013, the Department issued a Notice
24 of Deficiency ordering PTI to include additional information in the plan, notwithstanding that the
25 Department previously considered the plan complete. (DTSC006209-6214.) The Notice of
26 Deficiency again expressly acknowledged the need to remove the wastewater treatment system
27 tanks from Pond 1:
28

 In order to close Pond 1, PTI must first close and remove two
hazardous wastewater treatment tanks designated a Tanks W-1 and
W-2. These tanks are included in the hazardous waste facility
permit issued to PTI. The revised closure plan included the closure
of Tanks W-1 and W-2 which must coordinate with the closure of
Pond 1. DTSC reviewed the closure plan for the closure of Tanks
W-1 and W-2 based on the requirements of California Code of
Regulations, title 22, chapter 14 “[Permit] Standards for Owners
and Operators of Hazardous Waste Transfer, Treatment, Storage,

1 and Disposal Facilities”. Any comments and/or deficiencies on the
2 closure of Tanks W-1 and W-2 are included in the Notice of
3 Deficiency, below.

4 (DTSC006210.) The Notice of Deficiency went on to describe five comments regarding the
5 substance of the wastewater treatment system relocation component of the plan, none of which
6 questioned the fundamental need to coordinate relocating the tanks with closing Pond 1.

7 (DTSC006214.)

8 In May 2013, PTI submitted a further revised closure plan in response to the Department’s
9 comments. (DTSC006224-6417.) The plan again included detailed provisions for relocating the
10 wastewater treatment system tanks. (DTSC006245-6251.)

11 In an August 29, 2013 letter confirming that the Department was still reviewing the revised
12 plan, the Department again acknowledged that, “According to conversations with PTI, the removal
13 of W-1 and W-2 from operation, without a replacement to continue the operation, would cause the
14 PTI Facility to shut down until replacements have been installed and operational.” (DTSC006628.)
15 The Department therefore required PTI to submit certain updated information regarding the
16 relocation process for inclusion in the Facility’s Part B Permit Application, which still remained
17 pending (and still remains pending to this day). (DTSC006628-6629.) PTI promptly submitted the
18 information. (DTSC006633-6635.)

19 In May 2014 PTI submitted a revised schedule for closure of Pond 1 to the Department.
20 The cover-email noted that “it will take 9.25 months to initiate closure,” and stated, “Based on this
21 aggressive schedule, we believe it makes sense to process a permit renewal that includes a schedule
22 of compliance for replacing the applicable equipment and beginning closure of Pond 1 along these
23 lines.” (DTSC007011-7012.)

24 **G. The Department’s Decision to Decouple the Closure Plan and Relocation Plan.**

25 On May 22, 2015, two full years after the latest draft of the closure plan had been
26 submitted, the Department issued a new Notice of Deficiency. (DTSC007695-7713.) That notice
27 stated, somewhat cryptically:

28 Section 1.0 correctly indicates that the Closure Plan is intended to
be a standalone document. However, occasional references to other
DTSC documents, decisions or processes such as the Permit

1 Application, Permit modifications, tank relocation plans, the
2 Corrective Action Consent Order, etc., occur throughout the
3 Closure Plan. DTSC is providing comments with respect to
4 specific sections below, but any other such statements should also
5 be deleted or revised to clarify that implementation of the Closure
6 Plan is not contingent upon or dependent upon other documents or
7 decisions unrelated to the specific activities described in the
8 Closure Plan.

9 (DTSC007697.)

10 In June 2015, PTI submitted yet another revised Pond 1 Closure Plan, which for the first
11 time did not include provisions for relocating the treatment system. (DTSC007715-007899.) In a
12 letter submitted concurrently with the new plan, PTI stated,

13 As you know, the 1988 Closure Plan for Pond 1 authorized the
14 replacement and relocation of the wastewater tanks and associated
15 equipment within Pond 1, which is necessary to allow for the
16 facility's ongoing operations during Pond 1 closure activities.
17 Pursuant to the 1988 plan, DTSC approved a Modified Closure
18 Plan for Pond 1 and a Site Characterization/Tank Relocation Plan
19 for Tanks W-1 and W-2, both of which addressed relocating tanks
20 W-1 and W-2 prior to Pond 1 closure. Consistent with DTSC's
21 prior approvals, the Updated Pond 1 Closure Plan (submitted to
22 DTSC in May 2013) addressed the wastewater tanks and
23 associated equipment in similar fashion.

24 **Because DISC now requires the closure plan to be a standalone
25 document, discussion of the wastewater tanks has been deleted
26 from it.** As a result, the disposition of the wastewater treatment
27 system prior to implementing Pond 1 closure activities is not
28 addressed in the Revised Closure Plan, **notwithstanding that this
remains a logistical and regulatory prerequisite to closing Pond
1, as well as to the continuing viability of the facility.** Instead, as
advised by Mr. Rizgar Ghazi in his June 17, 2015 letter, Phibro-
Tech will separately submit a permit modification request to close
and replace the existing wastewater tanks and associated
equipment. We understand that DTSC intends to process this
permit modification prior to the facility's permit renewal.

(DTSC007906.)

The Department responded in a letter dated July 29, 2015, which asked PTI to re-insert the
information regarding the removal and closure of the treatment system tanks, and stated that the
“May 22, 2015 Notice of Deficiency did not direct PTI to delete that information from the Pond 1
Closure Plan.” (DTSC008117.) However, the letter continued:

1 DTSC hereby directs PTI to resubmit a Revised Pond 1 Closure
2 Plan by August 7, 2015, which must include the requested
3 information concerning the closure and removal of wastewater
4 treatment Tanks W-1 and W-2. **PTI is explicitly directed not to**
5 **reinsert into the Revised Pond 1 Closure Plan extraneous**
6 **information, schedules or conditions related to construction of**
7 **tanks or equipment intended to allow PTI to continue the**
8 **activities currently conducted in Tanks W-1 and W-2.** The
9 Revised Pond 1 Closure Plan must be submitted in compliance
10 with DTSC's request for a modified closure plan (March 8, 2012)
11 and DTSC's Notices of Deficiency (dated March 28, 2013 and May
12 22, 2015) and applicable requirements. A complete and adequate
13 closure plan is required for the closure of Pond 1 and Tanks W-1
14 and W-2. This noncompliance, if not cured, may result in further
15 action by DTSC, including, but not limited to, enforcement action
16 for violations of applicable requirements.

17 (DTSC008118.)

18 To avoid enforcement action, PTI promptly submitted a new August 2015 closure plan,
19 which reincorporated the provisions for removal of the tanks but, as the Department directed, did
20 not include provisions for relocating the wastewater treatment system. (DTSC008120-8565.) In a
21 letter accompanying the submittal, PTI stated that it was submitting the plan under protest, and that
22 the Department's direction to submit the closure plan without regard to the need to relocate the
23 wastewater treatment system was "arbitrary and capricious and not in accordance with the law."
24 (DTSC008566.) The letter noted that the Department had previously found that relocating the
25 wastewater treatment system was a necessary component of the Pond 1 closure process, had
26 reaffirmed that conclusion several times over the previous two decades, and had never made any
27 findings or produced any evidence supporting any contrary conclusion. (DTSC008566-8568.)

28 In September 2015, following additional conversations with Department staff, PTI
submitted a further revised Pond 1 closure plan that, at the Department's direction, again did not
contain provisions for relocating the wastewater treatment system. (DTSC008570-9047.) Although
the parties continued to exchange correspondence regarding the Department's other comments on
the closure plan, the Department made no attempt to defend its decision to exclude the relocation of
the wastewater treatment system from the plan. (See, e.g., DTSC009060-9068.) To the contrary, in
a letter dated November 17, 2015, the Department stated:

The revised Pond 1 Closure Plan is limited to activities necessary

1 to implement the closure of Pond 1, including closure activities for
2 Tanks W-1, W-2, W-3 and W-4, and address contamination related
3 to Pond 1. The revised Pond 1 Closure Plan does not authorize
4 construction of new units or equipment. PTI is required to seek
5 permit authorization prior to constructing new units or equipment.

6 (DTSC009071.)⁴

7 The Department noted in the same letter that relocation of the wastewater treatment system
8 would be necessary “to allow PTI to continue facility operations while Pond 1 closure activities are
9 implemented.” (*Id.*) However, despite the fact that the Department had previously approved
10 relocating the tanks pursuant to a relocation plan in 2006, the Department now directed PTI to
11 pursue authorization of the same process through three separate modifications to the Facility’s
12 operating permit. (DTSC009071-9075.)

13 **H. The Department’s Conditional Approval of the Pond 1 Closure Plan and** 14 **Accompanying CEQA Documents.**

15 On December 4, 2015, the Department issued a letter approving the revised Pond 1 closure
16 plan for public review and comment, subject to several conditions including a requirement that PTI
17 submit various additional surveys, drawings, and plans and specifications within 30 days of the date
18 of final approval. (DTSC010837-10839.)

19 Ten days later the Department issued a CEQA Environmental Document Analysis/Checklist
20 and an Addendum to Previously Adopted Negative Declaration. (DTSC010840-10932; 10933-
21 10936.) Both documents noted that, “As part of Pond 1 closure, PTI is required to close and remove
22 four hazardous waste tanks....” (DTSC010849; 10933.) However, neither document disclosed any
23 possibility that the Facility might stop operating while the Pond 1 closure process was in effect, nor
24 analyzed any of the consequences of such a shut-down. Instead, the Addendum concluded that the
25 environmental impacts of the project as currently contemplated were not substantially changed from
26 the impacts analyzed in the Negative Declarations accompanying the 1988 Closure Plan – a plan
27 that expressly incorporated procedures for relocating the wastewater treatment system and therefore

28 ⁴ In addition to the two tanks located in Pond 1 (known as W-1 and W-2), PTI and the Department
determined that two adjacent ponds (W-3 and W-4) should also be removed during the Pond 1
closure process due to the potential for structural instability caused by the removal and remediation
of the area underneath Pond 1. (DTSC010939.)

1 allowing the Facility to remain operational. (DTSC010935-10936.)

2 Similarly, in a No Effect Determination Request submitted to the Department of Fish and
3 Wildlife, the Department represented that the Facility would “continue[] to operate before, during
4 and after closure” of Pond 1. (DTSC011530.) The Department of Fish and Wildlife recited the
5 same representation in its CEQA Filing Fee No Effect Determination notice. (DTSC011533.)

6 In a final effort to keep the possibility of coordinating the wastewater treatment system
7 relocation with the closure of Pond 1 alive, on December 18, 2015, PTI submitted to the Department
8 a Request for Determination of the Class 2 Permit modifications, which the Department now
9 required to authorize PTI to relocate the treatment system. (DTSC010984-011287.) PTI’s cover
10 letter stated:

11 These modifications are necessary to allow access to the former
12 Pond 1 surface impoundment so that closure activities may
13 commence while still allowing [PTI] to operate the facility safely
14 and efficiently. As explained in prior correspondence, it would be
15 arbitrary and capricious for the Department to implement the Pond
16 1 closure plan prior to implementing the facility modifications
17 sought in this application.

18 (DTSC010984.) PTI therefore requested an expedited review of the Request for Determination.
19 (*Id.*)

20 On January 28, 2016, the Department held a public hearing on the draft Pond 1 closure
21 plan. (DTSC011464-11477.) However, the Department waited until April 29, 2016, over five
22 months after PTI had submitted the Request for Determination, to issue a lengthy letter requesting
23 62 items of additional information regarding the Class 2 Permit modifications. (DTSC011502-
24 11517.)

25 On June 7, 2016, the Department issued a notice constituting its final approval of the
26 revised Pond 1 closure plan. In addition to several other conditions set forth in the notice, the
27 penultimate paragraph imposed a new condition that was entirely incompatible with the notion of
28 coordinating the closure with the relocation of the treatment system:

DTSC directs PTI to begin implementing the approved Revised
Pond 1 Closure Plan **within 6 months** of the effective date of the
DTSC-Initiated Permit Modification for the Revised Pond 1
Closure Plan.

1 (DTSC011675.) The notice did not mention the fact that the Request for Determination that PTI
2 had submitted to allow relocation of the wastewater treatment system in December 2015 remained
3 pending; nor did the notice make any accommodation for the time required to relocate the system, a
4 process that the Department had affirmed on numerous occasions would take longer than six
5 months, or any time to process the necessary permit modification.

6 The Department's notice stated that the modified permit would become effective on July
7 12, 2016 unless a petition for review was filed by that date. (*Id.*) PTI timely submitted its Petition
8 for Review on July 8, 2017, thereby staying the effectiveness of the decision.

9 **III. SCOPE OF APPEAL**

10 PTI's Petition for Review argued that the Department's decision conditionally approving
11 the modified Pond 1 closure process is clearly erroneous and raises important policy considerations
12 that the Department failed to consider. The statement of reasons argued that the Department failed
13 to address or analyze the fact that its decision would effectively shut down the Facility, failed to
14 disclose that fact or the likely consequences of a shut-down to the public, and failed to study these
15 consequences in its CEQA analysis, or anywhere else.

16 In its Order to Set Briefing Period for Petition for Review, the Department found that the
17 Petition for Review met the criteria for granting review under 22 Cal. Code Regs. § 66271.18(a).
18 The Order quoted the Petition's introduction in full, incorporated the entire remainder of the Petition
19 by reference, and stated that the Department was granting review of the issues raised in "this
20 comment." It therefore appears that all issues raised in the Petition are included within the scope of
21 this Appeal.

22 **IV. ARGUMENT**

23 Under 22 Cal. Code Regs. § 66271.18(a), an appeal from a decision to grant, issue, modify,
24 or deny a permit application must show that the condition at issue in the appeal is based on:

25 (1) a finding of fact or conclusion of law which is clearly
26 erroneous, or

27 (2) an exercise of discretion or an important policy consideration
28 which the Department should, in its discretion, review.

As discussed below, this Appeal satisfies both standards, and therefore requires reversal of the

1 Department's decision.

2 **A. The Department's Decision Was Based on Two Clearly Erroneous Findings of**
3 **Fact.**

4 The lengthy history recited above demonstrates that the Department's decision to require
5 PTI to begin implementing the modified Pond 1 closure plan without regard for the need to relocate
6 the wastewater treatment system is based on two findings of fact that are clearly erroneous: first, the
7 assumption that the Facility can continue to operate through the closure process as conditionally
8 approved by the Department; and, second, the finding that there is substantial evidence in the record
9 that the project, as modified by the Department, will have no significant environmental effects.

10 **1. The Department Erroneously Disregarded Whether Its Approval Would**
11 **Allow The Facility To Continue Operating Through the Closure Process.**

12 The first clearly erroneous finding of fact relates to a basic assumption that underpinned the
13 Department's conditional approval of the Pond 1 closure plan: that the Facility could continue
14 operating through the closure process despite the conditions the Department imposed. Before the
15 Department issued the conditional approval, the Department and the EPA acknowledged no less
16 than nine separate times, over an unbroken 25-year period stretching from 1988 to 2013, that in
17 order to prevent the shutdown of the Facility, the wastewater treatment system tanks would have to
18 be relocated before implementation of the Pond 1 closure plan:

- 19 • In an EPA Memorandum dated October 6, 1988 (DTSC000824);
- 20 • In the 1988 Closure Plan (DTSC000734-735);
- 21 • In the 1995 Hazardous Waste Facility Permit Modification (DTSC002520-2521);
- 22 • In a January 24, 2001 memorandum from the Department's Geological Services
23 Unit (DTSC003292);
- 24 • In the Department's approval of the 2005 revised implementation schedule
25 (DTSC004268-4269);
- 26 • In a memorandum from the Department's Geological Services Unit recommending
27 approval of PTI's November 2006 Site Characterization/Tank Relocation Plan
28 (DTSC004823-4825);

- 1 • In the Negative Declaration dated October 3, 2008 (DTSC004905-4906);
- 2 • In the Draft Part B Permit circulated in 2010 (DTSC005668); and
- 3 • In an August 29, 2013 letter confirming its receipt and review of a revised closure
- 4 plan (DTSC006628).

5 There is no evidence in the record – substantial or otherwise – supporting any contrary conclusion.

6 The Department and the EPA further acknowledged at least three separate times that
7 relocating the wastewater treatment system tanks will take over nine months, not accounting for the
8 additional time required to process a separate permit modification to authorize the relocation:

- 9 • In an EPA Memorandum dated October 6, 1988 (DTSC000824);
- 10 • In the approval of the 2005 revised implementation schedule (DTSC004268-4269);
- 11 and
- 12 • In the Draft Part B Permit circulated in March 2010 (DTSC005668).

13 There is, again, no evidence in the record – substantial or otherwise – supporting any contrary
14 conclusion.

15 Despite these facts, the Department in 2015 reversed over two decades’ worth of policy by
16 requiring PTI to commence closure of Pond 1 within six months, and by specifically instructing PTI,
17 over its protests, to remove the provisions for relocating the treatment system from the closure plan.

18 At the same time, the Department clearly failed to revise its fundamental assumption that
19 the Facility would be able to continue operating during the Pond 1 closure process. The
20 Department’s continuing reliance on that assumption is evidenced by its representation to the
21 Department of Fish and Wildlife that the Facility would “continue[] to operate before, during and
22 after closure” of Pond 1. (DTSC011530.) It is also evidenced by the Department’s failure to
23 analyze the consequences of shutting down the Facility; consequences that the Department was
24 required to consider, as discussed below.

25 The Department may argue that it eventually approved the Class 2 permit modifications
26 required to relocate the treatment system tanks, effective February 17, 2017. However, whether the
27 Department’s findings of fact and conclusions of law supporting its June 7, 2016 decision were
28 erroneous must be judged based on the facts known at the time that decision was made. *See, e.g.,*

1 *Kenney v. Barnhart*, No. SACV 05-426-MAN, 2006 U.S. Dist. LEXIS 51068, *38 (C.D. Cal. July
2 26, 2006) (sufficiency of complaint against Social Security Administration must be determine based
3 on whether agency acted properly in light of facts available at the time); *People v. Bookout* (1961)
4 197 Cal.App.2d 457, 462 (in determining legality of arrest, the law looks only at the facts and
5 circumstances known to the officer at the time of arrest).

6 The Department therefore cannot rely upon actions taken after its conditional approval of
7 the closure plan to save the approval from invalidation. Nor can the Department argue that the Class
8 2 permit modification was reasonably likely to be granted at the time it conditionally approved the
9 closure plan, given that the last evidence in the administrative record on the issue was the
10 Department's request for 62 items of additional information related to the modifications in April
11 2016. There simply is no evidence in the record supporting either one of these arguments.⁵

12 Accordingly, given the facts known as of June 7, 2016, the Department's assumption that
13 the Facility could continue operating during implementation of a Pond 1 closure plan as
14 conditionally approved by the Department was clearly erroneous.⁶

15 **2. The Department Erroneously Found That the Conditions it Imposed Would**
16 **Have No Significant Effects on the Environment.**

17 The second clearly erroneous finding of fact relates to the Department's efforts to comply
18 with CEQA, Public Resources Code §§ 21000 *et seq.* CEQA generally requires that public agencies
19

20
21 ⁵ The Department may also argue that the Appeal is moot, and cite a letter from PTI's counsel that,
22 referring to the permit modification necessary to relocate the wastewater tanks, states, "Should the
23 Department approve this permit modification, our disagreement over the contents of the Pond 1
24 Closure Plan will become moot." (DTSC008568.) However, that statement was made before the
25 Department informed PTI that it intended to require PTI to commence the Pond 1 closure process
26 within six months of approving the closure plan. Given that all of the evidence available in the
27 administrative record shows that it would take longer than six months to relocate the treatment
28 system, the Department's subsequent approval of the permit modifications does not ensure that the
Facility will be able to continue to operate. In any event, the Department's actions taken after it
made its decision to approve the Pond 1 closure plan are irrelevant to whether the Department's
decision was arbitrary and capricious when it was made.

⁶ To the extent the Department's brief relies on information that was developed after it made its
decision to approve the Pond 1 closure plan, that information should be stricken. To the extent the
Department cites information that is outside the administrative record that is not stricken, PTI
should be given the opportunity to provide supplemental briefing to address it.

1 analyze, disclose to the public, and adopt any feasible mitigation measures for the likely significant
2 environmental effects of discretionary projects before they approve them. One of the basic
3 components of that mandate is that the agency must analyze the effects of the entire project. 14 Cal.
4 Code Regs. § 15063(a)(1) (requiring that an initial study must consider “[a]ll phases of project
5 planning, implementation, and operation....”). Further, when a project is modified while under
6 consideration, before adopting a negative declaration the agency must ensure that the administrative
7 record contains substantial evidence that the changes will have no significant effects on the
8 environment. *Building Code Action v. Energy Res. Conservation & Dev. Comm’n* (1980) 102
9 Cal.App.3d 577, 592.

10 Here, the “project” at issue is the Pond 1 closure plan. The Department modified that
11 project by directing PTI to remove the provisions for relocating the treatment system from the plan,
12 and by requiring that PTI commence the closure process within six months of the plan’s approval.
13 (DTSC007697; 011675.) But the record shows that the Department made no attempt to determine
14 whether these modifications would result in significant effects on the environment. Instead, the
15 Department simply issued an Addendum finding that the environmental impacts of the project were
16 not substantially changed from the impacts analyzed in a Negative Declaration adopted in
17 connection with the 1988 Closure Plan – despite the fact that the 1988 Closure Plan *did* incorporate
18 provisions for relocating the wastewater treatment system and allowed sufficient time for the
19 relocation to be implemented, thereby allowing the Facility to continue operating. (DTSC010933-
20 10936.)

21 Not only is there no substantial evidence in the administrative record that the project, as
22 modified by the Department, would have no significant effects on the environment; as discussed
23 below, the record contains substantial, unrefuted evidence to the contrary. Accordingly, the
24 Department’s finding that the modifications would not result in significant environmental effects
25 was clearly erroneous.

1 **B. The Department’s Decision Was Based on Clearly Erroneous Legal Conclusions**
2 **that Regulations Required PTI to Remove the Wastewater Treatment System**
3 **Relocation Provisions from the Closure Plan and Apply for Separate Permit**
4 **Modifications.**

5 The Department’s decision is also based on clearly erroneous conclusions of law that the
6 regulations governing the Pond 1 closure plan required PTI to exclude any provisions for relocating
7 the wastewater treatment system from the plan, and to submit a separate request for permit
8 modifications to obtain approval of the relocation provisions.

9 In explaining its decision to abandon the approach it had followed since 1988, of including
10 provisions for relocating the wastewater treatment system in the Pond 1 closure plan, the
11 Department informed PTI that the change was necessary in part because of “applicable regulations
12 governing closure requirements for a surface impoundment.” (DTSC005997.) However, the
13 Department never identified any changes to these regulatory requirements that could justify
14 reversing a position the Department held for over 20 years.

15 In fact, the key regulation on which the Department’s previous position relied did not
16 change during the relevant time period. The 1988 Closure Plan referred to federal regulations
17 codified at 40 Code Fed. Regs. § 265.113(b)(1)(ii)(C) as support for including provisions in the plan
18 extending the closure period in order to relocate the wastewater treatment system tanks.
19 (DTSC000735.) That regulation provides that the Regional Administrator may approve an
20 extension to the closure period if the owner or operator demonstrates that “[c]losure of the
21 hazardous waste management unit or facility would be incompatible with continued operation of the
22 site....” This language was included in the original regulation promulgated in 1986, and has not
23 changed since.

24 The California counterpart to this regulation is 22 Cal. Code Regs. § 66265.113(b)(1)(B)(3),
25 which provides that the Department may approve an extension of the closure period if the owner or
26 operator demonstrates that “closure of the hazardous waste management unit or facility would be
27 incompatible with continued operation of the site.” Although this regulation became effective in
28 1991, after the Department’s approval of the 1988 Closure Plan, it uses language identical to the

1 federal regulation that the Department found sufficient to justify inclusion of the relocation
2 provisions in the closure plan it approved in 1988. In short, the regulations governing this precise
3 issue have not changed in any material respect.

4 The Department's conclusion that PTI was required to request permit modifications in order
5 to obtain authorization to relocate the wastewater treatment system tanks was likewise clearly
6 erroneous. The record shows that the Department previously acknowledged that it had already
7 granted such authorization on three separate occasions:

- 8 • In a December 15, 2006 letter stating that the Department "hereby approves" the
9 November 2006 Site Characterization/Tank Relocation Plan (DTSC004825);
- 10 • In the March 2010 Draft Part B Permit, which required PTI to "implement [the] Site
11 Characterization and Tank Relocation Plan, and a Pond 1 Soil Sampling and
12 Analysis Plan approved by DTSC in 2006" (DTSC005668); and
- 13 • In the Fact Sheet that accompanied the March 2010 Draft Part B Permit, which
14 stated that approval for closing the treatment system tanks "had been previously
15 received from DTSC" (DTSC005003).

16 The Department's new position that PTI was required to seek a permit modification to
17 relocate the tanks therefore reflects an arbitrary reversal in how the Department has regulated the
18 same Facility under the same regulations for over twenty years.

19 **C. The Department's Decision Involves Important Policy Considerations that the**
20 **Department Failed to Review.**

21 Finally, the Department's decision also implicates two important sets of policy
22 considerations that the Department failed to address, and should now review: the immediate
23 practical consequences of imposing conditions of approval that require the Facility to shut down,
24 and the more general consequences of making decisions on permits without full public disclosure of
25 their effects.

26 The Department's failure to consider the practical consequences of its decision is apparent
27 from the facts that are *not* in the administrative record. The Facility employs over 60 workers, most
28 or all of which would have to be laid off if the Facility were to close. Further, the Facility is the

1 only recycler of certain aqueous metal bearing waste west of the Mississippi River - hazardous
2 waste that would otherwise be sent to landfills or deep-injection wells. Among other things, the
3 Facility recycles over 1.2 million pounds of copper per year. Producing the same amount of copper
4 through mining would require excavating approximately 1.2 billion pounds (approximately 600
5 tons) of earth from copper mines.

6 However, none of these facts are in the administrative record because the Department failed
7 to consider the effects of the conditions it imposed. There is no indication in the record that the
8 Department considered the impacts on the Santa Fe Springs community, the businesses that rely
9 upon materials the Facility produces and the services it provides, the landfills and wells that would
10 take the hazardous materials that the Facility currently recycles, or any of the other consequences of
11 shutting down the Facility.

12 Moreover, none of the public disclosures that the Department circulated or published in
13 connection with the approval of the Pond 1 closure plan disclosed even a possibility – much less a
14 certainty, based upon the available evidence – that the conditions the Department intended to
15 impose would require the Facility to shut down. (DTSC010970-10973; 10978-10979; 10982.) To
16 the contrary, the Department’s December 2015 Community Update stated that “DTSC anticipates
17 that PTI will submit a Class 2 Permit modification, requesting authorization to install replacement
18 equipment, including four hazardous waste tanks, necessary to continue facility operations while
19 implementing required closure activities.” (DTSC010972.) Despite this express reference to the
20 need to relocate the wastewater treatment system in order to keep the Facility operating, the
21 Community Update failed to inform the public that the Department intended to require the Pond 1
22 closure process to commence within 6 months, without waiting for the permit modifications to be
23 processed and approved.

24 As a result, the Department’s public notices were patently insufficient to inform the public
25 that the Department intended to take an action that would effectively require the Facility to close.

26 **V. CONCLUSION**

27 The Department’s decision requiring PTI to remove the provisions for relocating the
28 wastewater treatment system from the Pond 1 closure plan and to commence the closure process

1 within six months of approval is arbitrary, capricious, and not supported by substantial evidence in
2 the administrative record. PTI therefore respectfully requests that the Appeal Officer reverse the
3 Department's decision and remand the closure plan so that it is modified to allow for the ongoing
4 operation of the Facility.

5
6 Dated: May 30, 2017

Respectfully submitted,

SSL LAW FIRM LLP

// original signed by //

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8 
Zachary R. Walton, Esq.

9 Attorneys for Appellant Phibro-Tech, Inc.
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