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January 17, 2013

Permit Appeals Officer
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, CA 95826

Re: *Petition for Review ~ (EPA ID # CAL 000330453)*

To Whom It May Concern:

Please find enclosed a petition for review of a Hazardous Waste Facility Permit for Agritec International, Ltd., d/b/a CleanTech Environmental, Inc., at 5820 Martin Road, in Irwindale, California 91706 (EPA ID # CAL 000330453).

Very truly yours,

Mark T. Gallagher Esq.
CABLE GALLAGHER

CC: Mr. Alfred Wong P.E., Team Leader
Used Oil and Tanks Team
Dep't of Toxic Substances Control
700 Heinz Ave.
Berkeley, CA 94710

ORIGINAL

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Permitting Unit

Petition for Review

Hazardous Waste Facility Permit for Agritec International, Ltd., dba CleanTech Environmental, Inc., 5820 Martin Road, Irwindale, California 91706 (EPA ID # CAL 000330453)

Reviewer

Permit Appeals Officer
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Exhibit 2: Letter from Mark T. Gallagher, Partner, CABLE GALLAGHER, to Alfred Wong, Project Manager, DTSC, *Draft Hazardous Waste Facility Permit and Proposed Negative Declaration: CleanTech Environmental Inc. Hazardous Waste Facility, EPA ID No. CAL 000330453* (Jan. 7, 2012).

Exhibit 3: Excerpts, CITY OF IRWINDALE GENERAL PLAN UPDATE (June 2008).

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Exhibit 8: *210 West Traffic Jammed at Buena Vista due to Tanker Truck Fire*, TOTAL TRAFFIC LOS ANGELES, http://totaltrafficla.com/2012/01/03/210-west-traffic-jammed-at-buena-vista-due-to-tanker-truck-fire/21280 (last updated Jan. 3, 2012; last visited Jan. 10, 2013).

I. INTRODUCTION

This petition is submitted for review of DTSC's decision to approve the Hazardous Waste Facility Permit (the "Permit") for the proposed CleanTech Environmental, Inc. facility at 5820 Martin Road in Irwindale, California (the "Facility" or "Hazardous Waste Facility") (collectively, the "Project"). The decision to approve the Permit was issued by the Department of Toxic Substances Control ("DTSC") on December 20, 2012.

The Project approval is legally deficient on several grounds, including violation of local and state law, particularly the California Environmental Quality Act ("CEQA"). CEQA explicitly requires an environmental impact report ("EIR") for new hazardous waste facilities the size of the Facility. And the Project would place a new hazardous waste facility adjacent to the Santa Fe Dam Recreational Area—which is home to endangered species and impaired water bodies and is a beloved recreational resource used by tens of thousands of low-income and minority citizens. Despite this, DTSC prepared a Negative Declaration, *without a single mitigation measure*. No technical reports were prepared to justify otherwise unsubstantiated conclusions of no or less-than-significant environmental impacts. In contrast, multiple commenters, including an environmental and land use expert with 30 years' experience, described significant impacts the Hazardous Waste Facility may cause.

Accordingly, Petitioner requests DTSC exercise its discretion and review the entire Permit approval in the context of the issues raised below.

II. EXECUTIVE SUMMARY

Review is warranted for the reasons stated below:

- DTSC's administrative appeal process is illegal because it impermissibly excludes consideration of CEQA-related objections and prejudicially limits public participation. DTSC's regulations and practices artificially sever the environmental review process from the permit decision itself and attempt to limit who can comment on the Project and what they may comment on. But CEQA is clear: any member of the public may comment on any environmental issue until the final permit decision.

- The total treatment capacity of the Facility exceeds 1,000 tons per month and requires an EIR. CEQA explicitly requires the preparation of an EIR for a "large treatment facility," which is defined as a facility with a permitted capacity to treat 1,000 or more tons per month of hazardous waste. The Facility greatly exceeds this limit, and DTSC must prepare an EIR for the Facility.

- DTSC failed to analyze and mitigate impacts of the whole of the project, as required by CEQA. Although DTSC conceded that future permit approvals would be necessary for the Project, it failed to analyze and mitigate environmental impacts related to those future discretionary actions. CEQA requires DTSC to evaluate the entire project, including future discretionary approvals and other reasonably foreseeable consequences of the Project (including the use of its full physical capacity).

- DTSC failed to adequately analyze and mitigate impacts related to compatibility with local zoning laws and planning. The plain meaning of the language of the Irwindale General Plan and Zoning Code clearly requires a General Plan Amendment, Zoning Code Amendment, and conditional use permit before the Facility is consistent with local zoning laws and planning. DTSC cannot rely on informal communications with the City of Irwindale's ("City") staff to avoid analyzing and mitigating land use impacts and local land use approvals that are clearly required under the plain language the Irwindale General Plan and Zoning Code.

- There is substantial evidence of a fair argument of significant impacts to the environment; therefore, an EIR is required. Commenters raised many potential impacts that DTSC must analyze and mitigate in an EIR:

    - Impacts to Santa Fe Dam Recreational Area. The Hazardous Waste Facility may have significant impacts to the Santa Fe Dam Recreational Area. The Facility will result in new noise and air quality impacts to this area. Moreover, it will result in trucks laden with hazardous waste traveling through the Santa Fe Dam Recreational Area that could have accidents, spilling their hazardous waste.

    - Air Quality Impacts. The "analysis" appears to have been literally copied from environmental review documents for another, irrelevant project. Applying the correct data and assumptions clearly demonstrates that the Project may have significant air quality impacts.

    - Cumulative Impacts. DTSC utterly failed to analyze cumulative impacts. DTSC cannot conclude, as a matter of law, that merely because there are no individually significant impacts, there cannot be cumulatively significant impacts. Cumulative impacts analysis requires the identification of past, present, and reasonably foreseeable future projects that, in conjunction with the project, may have a significant impact on the environment.

    - Noise. The Project will increase truck traffic by 150%. Trucks are known to cause noise in the range of 73 to 80 dB. The Irwindale Noise Ordinance has a very specific threshold for significance of noise impacts—a 5 dB increase above baseline ambient noise levels—and the City has expressly stated that a project that generates between 65 and 75 dBA would generally be considered to have caused significant noise impacts. Trucks from the Project may exceed this significance threshold.

    - Greenhouse Gases. DTSC completely fails to substantiate its conclusion regarding greenhouse gases in any way. The Project may result in the burning of lightly treated used oil, resulting in significant new greenhouse gas emissions.

    - Biological Resources Impacts. The Project is located adjacent to the Santa Fe Dam Recreational Area, which has been designated as a Significant Ecological Area and is part of the San Gabriel Watershed Mountains Special Resources Study conducted by the U.S. National Park Service. DTSC conceded that a

number of rare, threatened, or endangered species are in the area. But DTSC provides virtually no analysis of the potentially significant impacts to these species.

- Cultural Resources. DTSC concedes that the Project could unearth previously unknown human remains. But it provides no mitigation for this potentially significant impact.

- Geology & Soils. DTSC's analysis of geology and soils is inadequate, and given the location of the Project, it may cause significant impacts. DTSC failed to comply with State law that requires certain conclusions regarding geology and soils to be substantiated by generally accepted and published geologic studies and aerial and physical reconnaissance.

- Hazardous Materials; Transportation & Traffic. The Project will increase truck traffic to and from the Facility by at least 150%, and these trucks will be transporting hazardous waste. The Permit does not require any specific, safe route for transport and does not adequately analyze or mitigate potential impacts from increased traffic and potential accidents involving trucks carrying hazardous waste.

- Hydrology. The San Gabriel Basin Main Watermaster submitted comments alerting DTSC of the need for mitigation measures to protect the water supply. In addition, the Project could foreseeably result in discharges of hazardous waste to impaired water bodies and could have impacts related to flooding. DTSC failed to analyze and mitigate these impacts.

- Public Services. The Project will require local fire and police services not only to respond to accidents, but also to coordinate the increased traffic from the Project's hazardous-waste-transport operations in the area. DTSC failed to adequately analyze and even mitigate this potentially significant impact. Indeed, DTSC admitted that it did not consult with local police and fire units.

- Utilities & Service Systems. The Project will require coverage under the General Industrial Stormwater Discharge Permit and will use the nearby Azusa Landfill for solid waste disposal. But DTSC failed to evaluate the impacts of these approvals, which are certain to occur. DTSC's refusal to evaluate the impacts on utilities and service systems that are certain to occur is piecemealing, which CEQA prohibits.

- DTSC's responses to public comments were legally inadequate because they fundamentally prejudiced the public review process by depriving the public of basic information regarding the Project's impacts to the environment. DTSC persistently failed to respond in a serious and substantive manner to the most serious of the public's comments on the Project.

III. JURISDICTION/TIMELINESS

DTSC has jurisdiction over hazardous waste facility permits pursuant to the Health and Safety Code, section 25200 and the appeal of permits pursuant to California Health and Safety Code, section 25186.1, subd. (b)(1), and California Code of Regulations, title 22, section 66271.18.

Petitioner previously submitted comments on the draft permit.

Pursuant to California Code of Regulations, title 22, section 66217.18, a petition for review must be filed within 30 days after the permit decision. Because the permit decision was issued on December 21, 2012, the deadline for filing a petition for review is January 22, 2013.[1] Accordingly, this petition is timely.

DTSC must issue an order either granting or denying the petition for review within a "reasonable time" following the filing of the petition for review.[2]

In accordance with California Code of Regulations, title 22, sections 66271.14, subd. (b)(2), 66271.15, Petitioner requests a stay of the permit decision during the pendency of this appeal.

IV. FACILITY BACKGROUND

The applicant for the Facility is CleanTech Environmental Inc. (the "Applicant"). The Hazardous Waste Facility site is a rectangular shaped parcel that is approximately 0.98 acres (42,508 ft^2). There are currently no authorized hazardous waste processing activities authorized at the Facility site. The Hazardous Waste Facility's operations will be new.

Multiple sensitive receptors are very nearby the Hazardous Waste Facility. Several schools are located in close vicinity to the Project. Mountain View Elementary School, located 201 North Vernon Avenue in Azusa is approximately 1.2 miles northeast of the Facility. Valleydale Elementary School located at 700 South Lark Ellen Avenue in Azusa is approximately 1.5 miles southeast of the Facility.

The Facility site is virtually adjacent to the Santa Fe Dam Recreational Area, which is a is a county park located off the San Gabriel River Freeway (Interstate 605) in Irwindale, California, in the San Gabriel Valley and maintained by the Los Angeles County Department of Parks and Recreation. It is 836 acres, including a 70-acre (280,000 m^2) lake for year-round recreational fishing and nonmotorized watercraft. During the summer, the Recreational Area activities include a five-acre chlorinated swim beach, which serves as a special water play area

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1 Thirty calendar days after December 20, 2012, is January 19, 2013. January 19 is a Saturday, so the next nonweekend, nonholiday is January 22, 2013. (*See* CODE CIV. PROC., section 12; GOV'T CODE, section 6700; *but see* DTSC, *Notice of Final Hazardous Waste Facility Permit Decision – Agritec International, Ltd., dba CleanTech Enviromental [sic], Inc., 5820 Martin Road, Irwindale, California, EPA ID No.: CAL 000330453* (Dec. 20, 2012) (setting deadline for filing petition for review on Jan. 21, 2012).)

2 CAL. CODE REGS., title 22, section 66271.18, subd. (c).

for small children. The Hazardous Waste Facility site is a mere 0.8 miles to the north of this beach.

The Hazardous Waste Facility is proposed to have five hazardous waste processing units. The total capacity of the Facility is 243,240 gallons or approximately 1.79 million pounds of used oil, based on a specific gravity of 0.88 for oil.[3] Similar facilities typically turn over their total capacity once every one to two days.[4] Accordingly, the Facility would need to operate at just approximately 7 to 11 percent of its total capacity to exceed 1,000 tons of treated or recycled used oil per month, the statutory definition of a "large treatment facility."[5]

V. STATEMENT OF REASONS

In accordance with California Code of Regulations, title 22, section 66271.18, subd. (a), this section includes the following information:

> A statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:
> (1) a finding of fact or conclusion of law which is clearly erroneous, or
> (2) an exercise of discretion or an important policy consideration which the Department should, in its discretion, review.

DTSC should grant review of the entire Permit, including all of its conditions, as having been illegally granted in violation of CEQA, local land use laws, and the environmental statutes discussed below. These reasons supporting review were previously raised in the public comment period. Most of reasons were previously raised in the letter from Mark T. Gallagher and in the technical report by environmental and planning expert Karen L. Ruggels of KLR Planning. The comments in those letters remain applicable to the Project, are attached hereto, and are incorporated by reference as though fully set forth in the body of this petition.[6]

In addition, these reasons and this petition are based on changes from the draft permit to the final permit. The final permit added Special Condition 22, which purportedly set the Facility's capacity at 1,000 tons per month. In fact, the Facility's true physical capacity is well over 1,000 tons per month. DTSC used Special Condition 22 to illegally avoid preparing an EIR, as CEQA specifically requires for large treatment facilities like the Facility. In addition, the Initial Study analyzed the capacity as artificially constrained by Special Condition 22, rather than

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3 *See infra* note 23.

4 *See infra* note 35.

5 *Ibid.*; *see infra* notes 21–22. The Permit purports to limit operations at the Facility to treating or recylcling less than 1,000 tons per month. (*See* DTSC, HAZARDOUS WASTE FACILITY PERMIT, EPA ID NO. CAL 000330453, at p. 25 (Dec. 20, 2012) (hereafter the "Permit").)

6 *Ruggels Comment*, *infra* note 23, attached hereto as Exhibit 5; *Gallagher Comment*, *infra* note 51, attached hereto as Exhibit 6.

the full physical capacity, the use of which is a reasonably foreseeable consequence of the Project. Thus, DTSC's use of Special Condition 22 affects the Initial Study's analysis of nearly every environmental impact—the Initial Study analyzes the Project as operating at a fraction of its capacity. The Project will actually have significantly greater impacts on every resource than the Initial Study discloses.

The reasons supporting review of this petition were previously raised in the public comment period. But as discussed further below, in accordance with CEQA's explicit protections for public participation, DTSC must accept comments by any interested person until the final issuance of the Permit and may not limit the content of those comments. DTSC's regulations that purport to limit what issues may be raised and by whom conflict with CEQA.[7]

In sum, all of the reasons for this petition are procedurally proper and DTSC should accept this petition for the reasons stated herein.

A. DTSC'S ADMINISTRATIVE APPEAL PROCESS IS LEGALLY DEFICIENT BECAUSE IT IMPERMISSIBLY EXCLUDES CONSIDERATION OF CEQA-RELATED OBJECTIONS AND LIMITS PUBLIC PARTICIPATION.

1. DTSC's administrative appeal process is fatally inconsistent with CEQA.

DTSC's administrative appeal process has two fundamental flaws: (1) it purports to limit the issues petitioners can raise to issues that were raised during the initial public comment period;[8] and (2) as interpreted by DTSC, it prohibits petitioners from raising CEQA arguments at all.[9]

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7 *E.g.*, CAL. CODE REGS., title 22, section 66271.18, subd. (a) ("[A]ny person who filed comments on that draft permit or participated in the public hearing may petition the Department to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision."); DTSC, CALIFORNIA ENVIRONMENTAL QUALITY ACT INITIAL STUDY, at p. 2 (May 14, 2012) ("DTSC will reopen the public comment period on the draft permit to give the public an opportunity to comment on these limited issues only."); DTSC, *Responses to Comments on the Draft Hazardous Waste Facility Permit for CleanTech Environmental Inc.*, at pp. 49–50 (Dec. 20, 2012) ("DTSC does not believe that a new comment period is required or appropriate because DTSC has not added new and substantive requirements to the draft permit as it did after receipt of the public comments during the first comment period.") (hereafter *DTSC Response to Comments*).

8 CAL. CODE REGS., title 22, section 66271.18, subd. (a) ("The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate . . . .").

9 Though DTSC's regulations do not prohibit petitioners from raising CEQA arguments, in past administrative appeals, DTSC has erroneously found that petitioners cannot raise CEQA arguments at all. For example, in the Bakersfield Transfer matter, petitioners attempted to raise CEQA arguments, and DTSC held, "To the extent that Petitioner bases this argument on alleged violation of CEQA requirements, such arguments cannot be considered in this forum because California Public Resources Code 21167 provides a separate, exclusive remedy for adjudicating such allegations." *In the Matter of Bakersfield Transfer Inc.*, Docket No. PAT-FY08/09-1, Order Denying Petition for Review of Permit Decision, at 8

Both of these alleged limitations on the appeal process fundamentally conflict with CEQA and illegally limit public participation. Vigorous public participation is a touchstone of an adequate CEQA process.[10] To that end, CEQA permits comments by **any person at any time before the close of public hearing prior to issuance of the notice of determination.**[11]

Here, pursuant to the express provisions of DTSC regulations, the decision on the Permit is not final until the petition for review has been decided: "When a review has been initiated pursuant to subsection (a) or (b) of this section, the order denying review or the decision on the merits shall constitute the Department's final permit decision."[12] And, notably, DTSC has not yet issued a notice of determination for the Project. So comments submitted during the administrative appeal process are timely, and DTSC must accept them under CEQA.

Public comments hold a privileged place in CEQA review: "[c]omments are an integral part of [environmental review] and should be relied upon by the decisionmakers."[13] Moreover, CEQA and the cases interpreting it are clear that comments an agency receives after the formal public comment period must be considered and preserve issues for future litigation: "[e]ven if comments] are untimely, [courts] will address those allegations of errors that were identified in the untimely expert opinions, as well as in any other late comments, that bear upon the issue of whether" environmental review is adequate.[14]

Indeed, the courts have warned that agencies that refuse to consider and respond to public comments proceed at their own risk:[15]

> [I]f a public hearing is conducted on project approval, then new environmental objections could be made until close of this hearing. . . . If the decisionmaking body elects to certify the [environmental review] without considering comments made at this public hearing, it does so at its own risk. If a CEQA action is subsequently brought, the [environmental review] may be found to be deficient on grounds that were raised at any point prior to close of the hearing on project approval.

(Oct. 22, 2008). Similarly, in a 2009 administrative appeal, DTSC held that CEQA issues could not be raised in an administrative appeal: "Finally, CEQA provides a separate process for appealing CEQA issues and it is outside the scope of the permit appeal process." *In the Matter of Advanced Environmental, Inc.*, Docket No. HWCA 07/08-P003, Final Appeal Decision and Order, at 35 (May 11, 2009).

10 *Ocean View Estates Homeowners Ass'n, Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 400 ("Environmental review derives its vitality from public participation.").

11 *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121 ("As [the courts] read section 21177, any alleged grounds for noncompliance with CEQA provisions may be raised by any person prior to the close of the public hearing on the project before the issuance of the notice of determination.").

12 CAL. CODE REGS., title 22, section 66271.18, subd. (d).

13 *Kings Cnty. Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735.

14 *See, e.g., Gray v. Cnty. of Madera* (2008) 167 Cal.App.4th 1099, 1111.

15 *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201.

Thus, under CEQA, (1) any person may comment on any issue until DTSC makes a final permit decision and files a notice of determination, and (2) issues raised in comments submitted to DTSC before then satisfy the issue-exhaustion doctrine and preserve issues for litigation.

In fact, DTSC's process has impermissibly chilled the appeal process and illegally limited the ability of commenters to provide comments regarding the environmental impacts of the Facility. As such, DTSC should restart the process and make clear that commenters may provide any comments on the potential environmental impacts of the Facility.

2. <u>The appeal process shows that DTSC is fundamentally mistaken about the purpose of CEQA</u>.

Aside from being illegal, DTSC's attempt to prevent the appeal process from encompassing CEQA arguments demonstrates a fundamental misconception about the purpose of CEQA. CEQA is not merely "a set of technical hurdles for agencies and developers to overcome."[16] Rather, the basic purposes of CEQA are to "inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities," "identify ways that environmental damage can be avoided or significantly reduced," "prevent significant, avoidable damage to the environment by requiring" feasible mitigation measures or alternatives, and "disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose."[17]

To that end, approval of a project cannot be artificially severed from environmental review, as DTSC proposes in its administrative appeal process. To the contrary, courts have held that environmental review under CEQA must be part of and inform the project-approval process:

> When discussing exhaustion some opinions have identified certification of the EIR rather than approval of the project as the crucial cutoff point. However, section 21177 specifically refers to close of the public hearing on project approval prior to issuance of the notice of determination, not certification of [environmental review]. The correct formulation is . . . [that] a "party can litigate issues that were timely raised by others, but only if that party objected to the project approval on any ground during the public comment period or prior to the close of the public hearing on the project." . . . [T]he apparent inaccuracy in some case law results from the fact that **environmental review is not supposed to be segregated from project approval**. . . . "If an agency provides a public hearing on its decision to carry out or approve a project, the agency should include environmental review as one of the subjects for the hearing." Since project approval and certification of the EIR generally occur during the same hearing, the two events are

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16 *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449 (citation omitted).

17 *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus* (1996) 42 Cal.App.4th 608, 614 (citations omitted).

sometimes treated as interchangeable.[18]

As a matter of policy and legal structure, it is vitally important for DTSC to consider and address CEQA issues raised before the final close of public hearing prior to the issuance of the notice of determination.

3. DTSC's illegal attempt to artificially sever CEQA review from the appeal process prejudices the public.

DTSC's interpretation of its administrative appeal regulations effectively attempts to preclude CEQA lawsuits challenging DTSC's decisions—insulating DTSC's actions from the judicial oversight that makes CEQA such a powerful and effective force for environmental protection. DTSC's regulations require the filing of and decision on a petition to review a permit decision as prerequisites for judicial review.[19] An administrative petition is thus arguably an administrative remedy that petitioners must exhaust before bringing a CEQA lawsuit.[20] But DTSC does not allow a petitioner to raise CEQA issues during an administrative appeal.

Community members concerned with the environmental impacts of DTSC's decision are thus caught in a Catch-22. They arguably must raise CEQA issues in an administrative appeal to preserve them for judicial review, but DTSC will not consider CEQA issues they raise in an administrative appeal. Accordingly, DTSC's administrative process, which attempts to limit the scope of comments during administrative appeals, is fundamentally inconsistent with CEQA and illegal.

* * *

DTSC's administrative appeal process is fundamentally flawed. DTSC must accept and consider all CEQA arguments raised in this petition. In addition, DTSC must notify the affected public that final approval of the Project has not occurred and that, pursuant to CEQA, additional comments that are submitted (by any party on any environmental issue) before a final decision will become part of the administrative record.

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18 *Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at p. 1200 (emphasis added).

19 *See, e.g.*, CAL. CODE REGS., title 22, section 66271.18, subds. (a) ("Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision."), (e) ("A final permit decision on a petition to the Department under subsection (a) of this section is a prerequisite to seeking judicial review of the Department's decision."). *See also supra* note 7.

20 CEQA does not generally permit a petitioner to abandon CEQA arguments during an administrative appeal and then raise them in litigation. "[A] party who raises an issue in the first hearing provided on a project but fails to raise that same issue in an administrative appeal [does not] remain[] free to raise that issue in a subsequent court challenge under section 21177[.] . . . Section 21177 and the exhaustion doctrine prevent such an issue from being raised in a court action." *Tahoe Vista Concerned Citizens v. Cnty. of Placer* (2000) 81 Cal.App.4th 577, 589.

B. THE TOTAL TREATMENT CAPACITY OF THE FACILITY EXCEEDS 1,000 TONS PER MONTH, THUS REQUIRING AN EIR FOR THE PROJECT.

1. CEQA specifically requires an EIR for large treatment facilities like the Project.

State law recognizes that hazardous waste facilities are particularly prone to causing significant environmental impacts and have special need for thorough environmental review that can only be provided through an EIR. CEQA thus explicitly requires an EIR for the "initial issuance of a hazardous waste facilities permit" for an "offsite large treatment facility."[21] "Offsite large treatment facility" means, "in those cases in which total treatment capacity is provided in a permit, . . . capacity to treat, land treat, or recycle 1,000 or more tons of hazardous waste. In those cases in which it is not so provided, [it] means a treatment facility that treats, land treats, or recycles 1,000 or more tons of hazardous waste during any one month of the current reporting period commencing on or after July 1, 1991."[22]

The Facility clearly meets the definition of "large treatment facility," and thus CEQA explicitly requires an EIR. The total storage capacity of all the units at the Project is 243,240 gallons or 1.79 million pounds of oil.[23] If the Facility operates as similar facilities do, then the total capacity treated would be in excess of 8,000 tons per month.[24] DTSC acknowledges that the Facility's capacity is not just the storage capacity of the tanks, but includes the "monthly treatment and recycling throughput using the authorized tanks."[25]

DTSC attempted to avoid the need to prepare an EIR by adding a permit condition limiting the total amount of hazardous waste the permittee is authorized to treat or recycle to less than 1,000 tons a month. But there are several reasons why DTSC's interpretation of state law is clearly erroneous and why this limit does not avoid the need for DTSC to prepare an EIR.

First, State law refers to "total capacity," not "permitted capacity" or "authorized capacity."[26]

Second, DTSC misinterprets the first part of the statutory definition, which provides that "in those cases in which total treatment capacity is provided in a permit," the classification depends on the total treatment capacity provided in the permit. DTSC claims that the permit

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21 PUB. RES. CODE, section 21151.1, subd. (a)(3).

22 HEALTH & SAFETY CODE, section 25205.1, subd. (d).

23 *See, e.g.*, Letter from Karen L. Ruggels, Principal, KLR Planning, to Alfred Wong, Project Manager, DTSC, *Draft Hazardous Waste Facility Permit and Proposed Negative Declaration – CleanTech Environmental Inc.* (July 5, 2012) (hereafter *Ruggels Comment*) [attached hereto as Exhibit 1].

24 DTSC apparently considers a subset (160,000 gallons) of the Facility's total capacity to be treatment capacity. Even using this smaller number, if the Facility turned its tanks over less than twice a month, it would qualify as a "large treatment facility" requiring an EIR.

25 *DTSC Response to Comments*, *supra* note 7, at p. 73.

26 *Compare* HEALTH & SAFETY CODE, section 25205.1, subd. (d), *with, e.g.*, HEALTH & SAFETY CODE, section 25200.15, subd. (b)(2) (using the term "permitted capacity"), *and* PUB. RES. CODE, section 21151.1, subds. (a)(1)(B) (same), (b) (referring to authorized capacity).

"included the individual capacity of the treatment tanks at the facility, but did not provide the total treatment capacity for the facility."[27] This is erroneous. As noted in public comments, the permit *did* provide the Facility's treatment capacity with sufficient detail to demonstrate that the Facility can readily treat more than 1,000 tons a month, thus requiring an EIR.

Third, DTSC erroneously argues that the second part of the definition of "large treatment facility" is the relevant test: a facility that "treats, land treats, or recycles 1,000 or more tons of hazardous waste during any one month of the current reporting period." But this portion of the definition of a "large treatment facility" clearly applies only to plants with some operational history or previous reports of operational capacity. If DTSC's interpretation was correct, therefore, no new plant, regardless of its capacity, could ever qualify as a large treatment facility—because as a new plant, it would not yet have made a report the quantity of hazardous waste it treated in the previous months.

Fourth, DTSC's reasoning conflicts with the purposes of the law, which is to provide decisionmakers and the public the detailed information of an EIR—including mitigation and alternatives analysis—before new hazardous waste facilities with a capacity of 1,000 tons a month or more are approved. DTSC cannot avoid this requirement by approving a hazardous waste facility with a capacity several times greater than the threshold for "large treatment facilities" and then limiting the use of that capacity with a permit condition. Once this large hazardous waste treatment facility is built in this community—next to the Santa Fe Dam Recreational Area and other sensitive receptors—it is too late.

Even if DTSC expressly committed to preparing an EIR if the Facility eventually uses its full physical capacity, the purpose of state law will have already been frustrated. The purpose of the EIR is to inform decisionmaking *before* the project and its environmental effects occur, not after. "A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken. [Courts] have expressly condemned this use of EIR's."[28]

Fifth, CEQA does not permit an agency to artificially limit the environmental review by purportedly prohibiting further development that may result in significant environmental impacts.[29] An agency "may not substitute a provision precluding further development for

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27 *DTSC Response to Comments*, *supra* note 7, at p. 46.

28 *Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 394.

29 *See, e.g.*, *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 444. DTSC asserts that this case "concerns mitigation measures in an EIR which are not applicable here." *DTSC Response to Comments*, *supra* note 7, at p. 48. To the contrary, this opinion supports the proposition that a condition that prohibits future development is not a substitute for environmental analysis of the reasonably foreseeable consequence of a project, whether an agency purports to forbid those consequences or not. In this case, the ineffective prohibition took the form of mitigation, but that does not mean that the law is limited to mitigation.

identification and analysis of the project's intended and likely" development and impacts.[30]

Accordingly, an EIR is required for the Project. The total treatment capacity, by any reasonable measure, far exceeds 1,000 tons per month. DTSC's interpretation of the statute is clearly erroneous.

2. A "project" includes its reasonably foreseeable consequences, which includes the use of the Facility's full physical capacity.

The proposed permit condition limiting treatment to 1,000 tons per month is irrelevant to calculating the Project's capacity. By definition, the "project" a lead agency must analyze under CEQA includes "reasonably foreseeable" environmental consequences of the project.[31] The California Supreme Court specifically held that this includes future expansion: environmental review "must include an analysis of the environmental effects of future expansion" if "it is a reasonably foreseeable consequence of the initial project."[32] Under CEQA, therefore, the "project" DTSC must analyze literally includes the project DTSC has approved, *plus* its reasonably foreseeable consequences and expansion.

Here, the Facility's treatment of more than 1,000 tons of hazardous waste per month would not even require further expansion. It would simply require a permit amendment for the Applicant to use the physical capacity that DTSC has already permitted. And, as the Applicant's comments make clear, it is not only reasonably foreseeable that the Applicant will seek to use this already-permitted capacity, it is probable.

Indeed, the Applicant made clear in its comments that it was dissatisfied with Special Condition 22 limiting the use of the Facility. The Applicant wrongly argues that much of the used oil it treats should not count against 1,000-ton-a-month limit.[33] The Applicant goes further and actually asks DTSC to remove Special Condition 22.[34]

The Applicant, therefore, in asking DTSC to remove Special Condition 22, essentially concedes that the condition would artificially limit its use of the Facility to below its true capacity and that its business plans involve using the full capacity. Indeed, it appears that the Permit currently authorizes the Facility to operate at only approximately 7 to 11 percent of its total capacity—possibly even less.[35] The Initial Study contains no evidence or discussion regarding whether long-term operation of the Facility at this level of operation is sustainable or feasible. Commenters noted that the operations of similar facilities are much greater and questioned why a Facility with such a large capacity would operate at such a limited proportion

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30 *Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at p. 444.

31 PUB. RES. CODE, section 21065.

32 *Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at p. 396; *Ruggels Comment, supra* note 23, at p. 3.

33 *DTSC Response to Comments, supra* note 7, at p. 70 (arguing that used oil that meets purity standards for recycled oil "should not be included in the total monthly gallons treated or recycled at the facility").

34 *Id.* at p. 72.

35 Based on the operation of similar facilities, which typically turn over their total capacity 10 to 15 times per month.

of its total capacity.[36]

It is reasonably foreseeable, even probable in these circumstances, that the Facility will seek to use its additional capacity through a permit amendment. The mere fact that such an amendment would require further agency action does not insulate it from environmental review now as part of the Project.[37]

In sum, CEQA explicitly requires DTSC to prepare an EIR because the Facility is a large treatment facility. This is true even though DTSC has conditioned the Permit to artificially limit the Facility's operations to a fraction of its full physical capacity. It is reasonably foreseeable that the Facility's full physical capacity will be used, and CEQA requires DTSC to study the environmental consequences of this in an EIR before approving the Permit.

As discussed in much further depth below, even if the Facility did not qualify as a large treatment facility, DTSC is still required to prepare an EIR because there is substantial evidence of a fair argument that the Facility may cause significant environmental impacts.

C. THE NEGATIVE DECLARATION AND INITIAL STUDY ARE LEGALLY INADEQUATE UNDER CEQA.

The threshold that triggers the requirement for an agency to prepare an EIR is very low. "If there is substantial evidence in the whole record supporting a fair argument that a project may have a significant nonmitigable effect on the environment, the lead agency shall prepare an EIR, even though it may also be presented with other substantial evidence that the project will not have a significant effect."[38] "[A]n environmental impact report should be prepared 'whenever the action arguably will have an adverse environmental impact.'"[39] As shown below, the record clearly presents substantial evidence that the Project will "arguably" have an adverse environmental impact. Accordingly, an EIR is required, and the Negative Declaration and Initial Study are insufficient to comply with CEQA.

1. The Negative Declaration is legally inadequate because DTSC failed to analyze and mitigate impacts of the whole of the project.

CEQA requires the evaluation of "the whole of an action."[40] An agency is not permitted to avoid CEQA requirements by "overlooking [of a project's] cumulative impact by separately focusing on isolated parts of the whole."[41]

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36 *E.g., Ruggels Comment, supra* note 23, at p. 2.

37 For example, the future expansion that the Supreme Court held must be analyzed in an EIR in *Laurel Heights Improvement Ass'n* also would have required future discretionary decisions. *Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at p. 396.

38 *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.

39 *No Oil, Inc. v. Los Angeles* (1974) 13 Cal.3d 68, 85.

40 *E.g., Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271.

41 *Ibid.*

But this is exactly what DTSC does in the Initial Study—piecemeal various approvals required for the Project out of the scope of environmental review. Most notably, because DTSC artificially defined the project as using only a fraction of its true capacity, the environmental impacts to virtually every resource were understated. Operating at its true physical capacity, the Project will process more hazardous waste, involve more truck trips, emit more air pollutants and greenhouse gases, cause more noise, involve greater risk of an upset or spill, and generally involve greater impacts than the Initial Study discloses. Because the Negative Declaration appears to analyze only perhaps between 7 to 11 percent of the Facility's actual capacity, it understates environmental impacts by roughly a factor of ten, and there is a fair argument that the Facility will cause a significant impact.

In addition, the Initial Study refers to a number of future actions and permits that may or will occur, but fails to analyze them. For example, the Initial Study states that, in the future, the Applicant may "want to discharge into the sewer system," which would require authorization from both the Irwindale Public Works Department and the Los Angeles County Sanitation District.[42] The Initial Study also vaguely refers to the use of the Azusa Land Reclamation Landfill for solid waste disposal needs.[43] The Project will also require coverage under the General Industrial Stormwater Discharge Permit.[44] Public commenters requested to know the basis for DTSC's conclusions of no environmental impact as to these related actions,[45] but DTSC responded simply the Applicant would be required to comply with the terms of those permits.[46]

The fact that future related actions will require a separate approval does not relieve DTSC from evaluating the environmental impacts of those future actions.[47] DTSC similarly ignored commenters' concerns regarding the basis for the conclusion that the Azusa Landfill could accommodate the solid waste requirements of the Facility. The Initial Study makes a conclusory assertion of no impact, but does not explain or provide any evidence to support this conclusion.[48] The Initial Study also fails to explain the potential for the Applicant's future discharge into the local sewer system.

DTSC's failure to squarely address approvals that it knows must occur in the future is fatal to the legality of the Negative Declaration.

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42 DTSC, CALIFORNIA ENVIRONMENTAL QUALITY ACT INITIAL STUDY, at pp. 17, 32 (May 14, 2012) (hereafter INITIAL STUDY). *See also supra* note 7.

43 *Id.* at p. 48.

44 *Id.* at p. 26.

45 *Ruggels Comment*, *supra* note 23, at pp. 3, 10–11.

46 *E.g.*, *DTSC Response to Comments*, *supra* note 7, at pp. 6–7, 31, 60, 64, 68.

47 *E.g.*, *Kings Cnty. Farm Bureau*, *supra*, 221 Cal.App.3d 692, 729 ("The Guidelines require that an adequate cumulative impacts analysis include a list of the projects producing related or cumulative impacts, a summary of the expected environmental impacts from those projects and a reasonable analysis of the cumulative impacts of the relevant projects.") (citing CAL. CODE REGS., title 14, section 15130).

48 *DTSC Response to Comments*, *supra* note 7, at p. 48.

2. **The Negative Declaration is legally inadequate because DTSC failed to adequately analyze and mitigate impacts related to compatibility with local zoning laws and planning, and the Project may cause a significant impact related local planning and zoning laws.**

Inconsistency with the General Plan may represent a significant environmental impact that must be evaluated or mitigated.[49] Indeed, a General Plan Amendment presumptively requires an EIR.[50]

There remain a number of unresolved inconsistencies between the Project and local land use zoning and planning. The General Plan itself lists facilities in the City of Irwindale area that handle hazardous wastes, but the Facility is not listed.[51] A General Plan Amendment thus will be required.

A Zoning Code Amendment and conditional use permit will also be required. The Facility is sited in Irwindale's M-2 Zone for Heavy Manufacturing, and section 17.56.010 of the City's Municipal Code does not list hazardous waste treatment as a permitted use.[52] Moreover, the Zoning Code actually expressly prohibits the Facility, because it would accept "hazardous materials, including but not limited to, automotive fluids."[53] Thus, unless the Zoning Code is amended, the Project cannot be approved. Even if the Zoning Code were amended, the Facility would require a conditional use permit, because it would fall under the classification of "recycling facilities" and because it involves the use or storage toxic or hazardous materials as a substantial part of the total use.[54]

Due to the Facility's location adjacent to Irwindale's border with the City of Azusa, DTSC should have analyzed the Project's consistency with the Irwindale and Azusa General Plans and any applicable habitat conservation plan or natural community conservation plan regarding the Project area.[55] In addition, the Initial Study should have included consultations with the fire department and local authorities to coordinate transportation of hazardous materials through Irwindale, as required by the General Plan.[56]

The Initial Study's analysis regarding land-use consistency was legally inadequate. The Initial Study provides no substantive explanation for the determination of "No Impact" to land

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49 *E.g.*, *Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819, 842.

50 *See Inyo Citizens for Better Planning v. Inyo Cnty. Bd. of Supervisors* (2009) 180 Cal.App.4th 1, 13–15.

51 Letter from Mark T. Gallagher, Partner, CABLE GALLAGHER, to Alfred Wong, Project Manager, DTSC, *Draft Hazardous Waste Facility Permit and Proposed Negative Declaration: CleanTech Environmental Inc. Hazardous Waste Facility, EPA ID No. CAL 000330453* (Jan. 7, 2012) (hereafter *Gallagher Comment*) [attached hereto with exhibits as Exhibit 2].

52 *E.g.*, *Ruggels Comment*, *supra* note 23, at pp. 3–4 (citing City of Irwindale Municipal Code).

53 *Ibid.*

54 *Ibid.*

55 *Id.* at p. 9.

56 *Ibid.*

use and planning.[57] It makes only a conclusory assertion that "construction . . . will be consistent with the established industrial and commercial zoning characteristics of the project site area."[58] DTSC's responses to public comments are similarly shallow, repeating excerpts from the Irwindale General Plan and declaring, "the appropriate level of protection exists to minimize impacts should a spill occur."[59] This is empty analysis and does not satisfy CEQA. What is the appropriate level of protection, and why do existing policies amount to this "appropriate" level?

DTSC also completely ignored comments noting that the Facility is not listed in the Irwindale General Plan, thus requiring a General Plan Amendment. DTSC states that the City of Irwindale does not consider a conditional use permit necessary, but this is irrelevant as to whether a General Plan Amendment may be required or whether the Facility is consistent with the various policies of the General Plan.[60] Part of the Irwindale General Plan was to identify registered hazardous waste generators and handlers in Irwindale in order to facilitate coordination of transport throughout Irwindale.[61] The Facility is not one of those facilities identified by the General Plan.[62]

DTSC notes that it consulted with the City of Irwindale and the City opined that no discretionary local land use approvals are required for the Project.[63] But neither the City of Irwindale nor DTSC may ignore the plain language of the law. The Zoning Code is clear that the Facility is prohibited within the M-2 Zone, and a conditional use permit is clearly required. DTSC's characterization of the City's explanation does not appear to address the clear prohibitions on hazardous waste processing in the Zoning Code and the clear requirements for a permit, but merely re-characterizes (inaccurately) the Facility and its use. The Facility is in no sense an "intensification" of a warehouse or wholesale business. As the Permit clearly details, the Facility is an entirely new facility, not "the intensification of the existing use."[64] It is not, by any reasonable or common sense interpretation, an "intensified" "warehouse, wholesale business, or storage building" that is permitted by right.[65]

A General Plan Amendment, Zoning Code Amendment, conditional use permit, and accompanying analysis of the Project's consistency with local land use laws and planning are required. As public commenters demonstrated, the Project may have significant impacts related

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57 INITIAL STUDY, *supra* note 42, at pp. 35–37.

58 *Ibid.*

59 *DTSC Response to Comments*, *supra* note 7, at p. 65.

60 *See id.* at pp. 3–4, 6–9.

61 CITY OF IRWINDALE GENERAL PLAN UPDATE, at 134 (June 2008) [excerpts attached hereto as Exhibit 3].

62 *Id.* at p. 136 (Exhibit 6-4 Regulated Sites City of Irwindale General Plan).

63 *E.g.*, *DTSC Response to Comments*, *supra* note 7, at p. 7.

64 *Compare DTSC Response to Comments*, *supra* note 7, at p. 7 ("The intensification of the existing use is permitted by right and would not be subject to a Conditional Use Permit as determined under IMC Section 17.48.010.35 'Warehouses, wholesale businesses and storage buildings (no outside storage).'"), *with* INITIAL STUDY, *supra* note 42, at p. 7 ("There are currently no authorized units at the CleanTech Environmental, Inc. facility. This will be a new facility.").

65 *See ibid.*

to land use and planning.[66] DTSC must prepare an EIR to analyze and mitigate the potential impacts before final approval of the Project.

3. **The Negative Declaration and Initial Study are legally inadequate because there is substantial evidence of a fair argument of significant impacts to the environment.**

An EIR is required if there is substantial evidence of a fair argument that the project may have a significant effect on the environment.[67] Public comments have generated substantial evidence that the Project may result in significant environmental impacts.

a. The Initial Study misrepresents and fails to adequately mitigate potentially significant environmental impacts to the Santa Fe Dam Recreational Area.

It is clear that the Project is in extremely close proximity to the Santa Fe Dam Recreational Area and that several different "pathways" exist through which the Project could adversely affect this sensitive environmental area,[68] including, for example, the potential for off-site spills from trucks hauling hazardous waste.

DTSC's response is purely speculative and reveals the inadequacy of its analysis. Commenters questioned the basis for DTSC's conclusion that it "cannot foresee any reasonable pathway for waste at the facility to impact the Santa Fe Dam Recreation Area" despite the complete absence of any requirements for trucks transporting hazardous waste to avoid driving by or through the Santa Fe Dam Recreational Area. DTSC replied only that "trucks hauling the used antifreeze and used oil are not required to pass by the SFDRA[,]"[69] thereby begging the original question. Although DTSC provided maps of truck access to the Facility,[70] it conspicuously ignored commenters' concerns that trucks are not required to follow such routes. Maps of the area in fact show that there is a route to access the Facility from the south, one that would run directly adjacent to the Santa Fe Dam Recreation Area and its recreational lake. It is axiomatic that Los Angeles highways are frequently subject to delays and blockage and that highway users frequently use local surface roads in lieu of highway routes to reach their destinations.

Thus, it is reasonably foreseeable that the Project will result in significant impacts to the Santa Fe Dam Recreational Area. DTSC must accept this appeal, rescind the approval of the Project, and prepare an EIR before considering whether to re-approve the Project.

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66 *Ruggels Comment*, *supra* note 23, at pp. 3–4; *Gallagher Comment*, *supra* note 51, at pp. 15–18.

67 *No Oil, Inc.*, *supra*, 13 Cal.3d at 85; *Pocket Protectors*, *supra*, 124 Cal.App.4th at 927.

68 *Ruggels Comment*, *supra* note 23, at p. 5.

69 *DTSC Response to Comments*, *supra* note 7, at p. 57.

70 *See ibid.*

b. The Initial Study is inadequate as an informational document with respect to air quality; the Project may cause significant impacts related to air quality, which requires DTSC to prepare an EIR.

(1) The Project may have significant impacts on sensitive receptors, which DTSC fails to acknowledge exist.

Commenters identified numerous sensitive receptors in the Project area that may be impacted by the Project's air emissions and requested that a site-specific analysis be prepared.[71] These sensitive receptors include, for example, the Santa Fe Dam Recreational Area. There are two day-care centers within a half-mile of the Project, and a high school and five elementary schools within a mile and half. Nursing homes, assisted living centers, and similar other facilities are within three miles. Other sensitive receptors may include workers at nearby industrial and commercial facilities, including at and inside proposed Facility itself.[72] But DTSC ignored these comments, stating simply, "Project impacts to air were considered"[73] and declaring (erroneously), "[t]here are currently no sensitive receptors identified in the area that would be impacted by from air emissions related to the proposed Project."[74]

Clearly, placing a hazardous waste facility nearby these sensitive receptors may have significant impacts and an EIR is required to analyze and mitigate these impacts. The Negative Declaration is woefully inadequate as an informational document by failing to acknowledge this possibility, let alone conduct a real analysis.

(2) The Negative Declaration relies on air quality analysis that appears to have been literally copied from analysis for another, irrelevant project; if the correct assumptions and data are applied, the Project clearly may have significant air quality impacts.

The Initial Study literally copied the air-quality analysis from a negative declaration for another, unrelated project. As described below, if the correct assumptions are applied to the Initial Study, it is clear that the Project may have a significant impact related to air quality.

The Initial Study used the wrong localized significance thresholds ("LSTs") for the South Coast Air Quality Management District ("SCAQMD"). The Initial Study claims that using the 5-acre, 25-meter chart is a "conservative assumption."[75] In reality, this assumption is incorrect, unnecessary, and the least conservative assumption that could be made in applying the SCAQMD's LST tables. The SCAQMD has prepared LST charts for 1-acre sites, which would

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71 *Ruggels Comment*, *supra* note 23, at p. 6.

72 SQAMD, FINAL LOCALIZED SIGNIFICANCE THRESHOLD METHODOLOGY, at 3-2 (July 2008), *available at* http://www.aqmd.gov/ceqa/handbook/lst/Method_final.pdf ; *Gallagher Comment*, *supra* note 51, at pp. 9–10.

73 *DTSC Response to Comments*, *supra* note 7, at p. 58.

74 INITIAL STUDY, *supra* note 42, at p. 15.

75 INITIAL STUDY, *supra* note 42, at p. 14.

have been appropriate and more conservative.[76] In addition, the Initial Study appeared to use LSTs for Central Los Angeles, but the appropriate Source Receptor Area for the City of Irwindale is East San Gabriel Valley.[77]

Substantial portions of the Initial Study's Air Quality Impact analysis appears to have been copied verbatim from the initial study for the nearby Veolia facility in the City of Azusa, including assumptions and calculations that necessarily must be incorrect. The CleanTech Facility is a fundamentally different project than the Veolia project. The Veolia facility in Azusa is a 7.5-acre site that was expected to generate a maximum of 20 truck trips per day.[78] The CleanTech Facility is a 1-acre site that is expected to generate 30 truck trips per day. It is clearly erroneous to use the results of calculations based on a 7.5-acre site that was expected to generate 20 truck trips per day and apply them to the CleanTech Facility.

The choice to use the 5-acre LST was somewhat understandable for the Veolia facility, because the LST charts do not have tables for sites that are larger than 5 acres.[79] But the choice to use the 5-acre chart for the Project was not the product of any reasoned choice, but rather a simple cut-and-paste from the environmental review for a different facility. To the extent that the Initial Study attempted to a site-specific analysis, it clearly failed to do so by using the incorrect LSTs (those for Central L.A. and not East San Gabriel Valley) and by failing to tailor calculations based on the specific characteristics of the CleanTech Facility (as opposed to the Veolia facility).[80]

Accordingly, the Initial Study's air quality analysis is clearly erroneous. As shown in the following table, **had the Initial Study used the correct LSTs and applied the correct data applicable to the Facility (not Azusa's Veolia facility), it would have revealed that impacts to air quality in fact exceeded SCAQMD significance thresholds for PM10 and PM2.5, which indicates that a significant impact may occur and that an EIR is required.**[81]

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76 SCAQMD, LOCALIZED SIGNIFICANCE THRESHOLDS, APPENDIX C – MASS RATE LST LOOK-UP TABLE (Oct. 21, 2009), *available at* http://www.aqmd.gov/ceqa/handbook/lst/appC.pdf [attached hereto as Exhibit 4].

77 SCAQMD, SOURCE RECEPTOR AREA (SRA)/CITY TABLE (March 2005), *available at* http://www.aqmd.gov/ceqa/handbook/lst/SRA_City.xls [attached hereto as Exhibit 5].

78 DTSC, CALIFORNIA ENVIRONMENTAL QUALITY ACT INITIAL STUDY FOR VEOLIA ES TECHNICAL SOLUTIONS – HAZARDOUS WASTE FACILITY PERMIT, at 7 (Nov. 29, 2010) (hereafter VEOLIA INITIAL STUDY) [attached hereto as Exhibit 6].

79 The initial study for the Veolia facility erred when it applied these charts for that project. *Localized Significance Thresholds*, SCAQMD, http://www.aqmd.gov/ceqa/handbook/lst/lst.html (last updated Feb. 22, 2011 and last visited Jan. 9, 2013) ("The LST mass rate look-up tables only apply to projects that are less than or equal to five acres.").

80 The Initial Study never expressly discloses that it used Central Los Angeles for its LST analysis. But an examination of the LST figures used exactly match those for a 5-acre, 25-meter receptor distance for Central Los Angeles.

81 *E.g., Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 326.

Pollutant	Emissions Increase Due to Project	SCAQMD 1-acre, 25-meter threshold (Correct)[82]	SCAQMD 5-acre, 25-meter threshold (Incorrect Initial Study)
NOx	14.5 lbs./day	89	161
PM10	2.1	2	4
PM2.5	1.79	1	2
CO	84.82	623	1861

Moreover, DTSC's analysis is opaque and its assumptions are not spelled out. It appears that there may be additional errors based on improperly copying the Veolia analysis for this Project. For example, the following discussion appears verbatim in the Initial Study for the Project and for the Veolia project:

> The pollutant that is in the closest proximity to a threshold is $PM_{2.5}$. However a significant portion of these PM emissions account for truck traveling to and from the site. Because much of this traffic occurs away from the site (calculations assume upwards of 50 miles), these totals should not be directly compared to the LSTs as their purpose is generally for a conservative comparison of on-site emissions that would relate to the 2.5 microgram per cubic meter ambient air quality threshold. For example, if the assumed mileage for PM calculations was decreased to just 10 miles to better account for truck travel that is nearby the Facility, then PM emissions would show to be well below a level that would be considered significant (i.e., total baseline PM_{10} and $PM_{2.5}$ would calculate to 1.0 and 0.98 lbs/day, respectively).[83]

It is impossible for these statements to be simultaneously correct for the Veolia project and this Project—the projects are too dissimilar. According to the Initial Study, the Project generates 30 truck-trips per day (18 new); in contrast, the Veolia project generated 20 truck trips per day (5 new).[84] It is very likely that by copying this portion of the Veolia analysis, the Initial Study significantly understated localized air emissions from the Project's truck trips. Moreover, DTSC should not be artificially reducing emissions from the truck trips in the CEQA analysis at all, particularly when the region in general is in nonattainment under the Clean Air Act for PM2.5, PM10, and Sulfate.[85]

In sum, if the Initial Study had used the correct LSTs, it would have concluded the Project may have a significant air quality impact. Thus, DTSC must prepare an EIR.

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82 Based on SRA #9, which is applicable to the City of Irwindale.

83 INITIAL STUDY, *supra* note 42, at p. 14; VEOLIA INITIAL STUDY, *supra* note 78, at p. 7.

84 *Compare* INITIAL STUDY, *supra* note 42, at p. 54, *with* VEOLIA INITIAL STUDY, *supra* note 78, at pp. 7, 9.

85 *See* INITIAL STUDY, *supra* note 42, at p. 13.

(3) The Project may have significant impacts related to odors, and DTSC must prepare an EIR to analyze and mitigate those impacts.

Commenters alerted DTSC to the substantial probability that the Facility may have a significant impact to air quality due to odors. Oil recycling facilities are notorious for causing offensive and unhealthy odors, generating complaints in all regions of the United States—Georgia, Nevada, Oregon, Ohio, and Michigan, among others.[86]

Rather than address these concerns or explain how the Project would not generate odors that appear to be typical to oil recycling facilities, DTSC chose to ignore public comments, stating simply in the Initial Study that odor from the Facility will be subject to SCQQMD's Rule 402.[87] But "[c]ompliance with the law is not enough to support a finding of no significant impact under the CEQA."[88] There was otherwise no evidence or explanation as to DTSC's conclusion of no significant impact.

The lack of engagement by DTSC regarding odor concerns is indicative of the general inadequacy of the environmental review for the Project. DTSC must prepare an EIR to analyze and mitigate the potential impacts of impacts related to odors.

(4) The Project may have significant impacts related to indoor air quality, and DTSC must prepare an EIR to analyze and mitigate those impacts.

The Initial Study was completely devoid of any analysis or consideration of indoor air quality, despite public comments noting this deficiency early in the public review process.[89]

DTSC ignored these comments entirely. DTSC notes that part of the recycling process involves the addition of chemicals to remove metals from used oil.[90] The public asked whether the contaminants stored and processed at the Facility could release gases, toxic vapors, and odors within the warehouse that may affect the health of workers.[91] DTSC completely failed to respond. For many comments, DTSC gave inadequate or nonresponsive answers, but in many other cases—as here—DTSC did not bother to respond at all, even in a minimalist fashion.

Indoor air quality should be one of the primary concerns for this Project considering that

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86 *Gallagher Comment*, *supra* note 51, at p. 10.

87 INITIAL STUDY, *supra* note 42, at p. 16.

88 *Californians for Alternatives to Toxics v. Dep't of Food & Agric.* (2005) 136 Cal.App.4th 1, 17. *See also Citizens for Responsible & Open Gov't v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1341 ("[E]ven though the mitigated negative declaration states that noise levels exceeding the applicable [] general plan noise standard maximum of 65 decibels are prohibited, there is no evidence of any measures to be taken that would ensure that the noise standards would be effectively monitored and enforced vigorously.").

89 *E.g.*, *Gallagher Comment*, *supra* note 51, at p. 9.

90 *DTSC Response to Comments*, *supra* note 7, at p. 28.

91 *E.g.*, *Gallagher Comment*, *supra* note 51, at p. 9.

all storage and processing are supposed to occur indoors. DTSC must prepare an EIR that analyzes and mitigate impacts related to indoor air quality.

c. The Initial Study failed to adequately evaluate potentially significant cumulative impacts.

There are other projects currently under review in Irwindale and in adjacent cities, and the public, including legal and environmental experts, requested evaluation of cumulative impacts from the Project and other development in the area.[92] These other facilities include, for example, at least twelve EPA-regulated facilities that generate, transport, treat, store, or dispose of hazardous waste, all within a 300-foot radius of the Facility.[93] Other projects related to hazardous waste also appear to be under review in the area, such as the Materials Recovery Facility and Transfer Station Project in Irwindale.[94] CEQA requires an evaluation of the cumulative impacts from past, current, and reasonably foreseeable future projects.[95] "The purpose of a cumulative impacts analysis is to assess whether the incremental effects of a project combined with the effects of other development would cause a significant environmental impact."[96]

The Initial Study does not even attempt to assess cumulative impacts, and DTSC did not respond substantively to the public's concerns. DTSC responded only to say that the conclusions reached regarding individual significance supported a finding of no or less than significant cumulative environmental impacts in the community.[97] This demonstrates DTSC's fundamental misunderstanding of cumulative impacts analysis under CEQA. Cumulative impacts analysis relates to when a project may not have individually significant impacts but when viewed in the context of past, present, and reasonably foreseeable future projects, the overall—or cumulative—impact is significant.

DTSC must prepare an EIR to analyze and mitigate the potential cumulative impacts of the Hazardous Waste Facility.

d. The Initial Study failed to properly analyze and mitigate potentially significant impacts related to noise.

The public expressed numerous serious concerns regarding the potential noise impacts from the Project, including improper reliance on draft, uncertified documents related to different projects and failure to prepare any technical reports or studies despite the highly technical nature

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92 *E.g.*, *Ruggels Comment*, *supra* note 23, at p. 11; *Gallagher Comment*, *supra* note 51, at p. 4.

93 *Ruggels Comment*, *supra* note 23, at p. 11

94 *Ibid.*; *Gallagher Comment*, *supra* note 51, at p. 4.

95 *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025.

96 *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278.

97 *DTSC Response to Comments*, *supra* note 7, at p. 69 ("DTSC's examination of the conclusions reached in each of the Resource sections within the Initial Study determined that cumulative impacts associated with the proposed project would be less than significant, or have no impact on the environment in this community and therefore DTSC concludes that the proposed project will not result in a significant cumulative impact on the environment.").

of the conclusions.[98] Commenters, who included expert legal and environmental experts, raised specific concerns regarding the Project's increase in truck traffic—which produce noise that would exceed the threshold for significance under the Irwindale Noise Ordinance—and the Project's impacts from impulsive noise that would result from both construction and operation of the Facility.[99] Understandably, commenters requested a specific noise study to evaluate the true noise impacts from the Project[100] because noise can have a myriad of harmful effects to human health.[101]

DTSC ignored the public's concerns, again falling back on its own flawed and incomplete analysis. DTSC responded by stating that the "project is in an area zoned for heavy industry" and that "truck traffic is calculated to increase by 18 truckloads maximum during the day."[102] DTSC responds elsewhere that an Initial Study and Negative Declaration were prepared.[103] But nowhere is there a serious, substantive response to the public concern's regarding noise.

For example, the Initial Study acknowledges Irwindale's legal requirement that "the noise level from industrial plants shall not exceed the ambient or the ambient base level by more than five (5) dBA when measured at any boundary line of the property from which the noise emanates, except as may be specifically authorized by permit from the city."[104] The Initial Study then fails to apply this legal requirement.

The Initial Study purports to undertake some analysis, but fails to support the analysis with any substantial evidence. It acknowledges that there will be an increase of 18 truck trips per day—which is an increase of 150% over current activity. But the Initial Study then concludes, inexplicably and without any evidence or analysis, that there is no impact regarding a permanent increase in ambient noise levels in the vicinity because "[n]oise from trucks coming and entering the Facility will not be any louder than trucks traveling on Martin Road."[105] The Initial Study again misses the point. Two trucks are louder than one truck, so it stands to reason that 30 trucks will be louder than 12 trucks. The Irwindale Municipal Code clearly sets forth a cut-and-dry legal requirement—no more than a 5 dB increase in the ambient noise at a specified point. Accordingly, the Project requires a noise study to determine the increase in ambient noise from operations.

DTSC also failed to address why it was relying on uncertified, draft documents for a different project. This time, the Initial Study relies on the Irwindale Materials Recovery Facility and Transfer Station Draft EIR from July 2009. Regardless, those assertions are irrelevant. The

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98 *Ruggels Comment*, *supra* note 23, at p. 10; *Gallagher Comment*, *supra* note 51, at p. 11.

99 *E.g.*, *Gallagher Comment*, *supra* note 51, at pp. 10–11.

100 *Id.* at p. 11.

101 *Ibid.*

102 *DTSC Response to Comments*, *supra* note 7, at p. 66.

103 *Id.* at p. 23.

104 INITIAL STUDY, *supra* note 42, at p. 38.

105 *Id.* at p. 39.

Irwindale Municipal Code sets a clear threshold for a permit, one that the public has no way to evaluate because the Initial Study fails to address it.

The Initial Study estimates the ambient noise levels in the vicinity, with apparently no substantial basis or evidence, to be "generally 65 to 75 dBA."[106] Commenters informed DTSC that medium and heavy trucks can produce between 73 to 80 dB of noise, which would exceed the Irwindale's noise significance threshold.[107] The Hazardous Waste Facility clearly may cause a significant noise impact. But there is no way for the public to know for sure, because DTSC's analysis is nearly absent. There is no measurement of the actual ambient noise levels in the area. There is no measurement of the increase in noise levels from the Project.

The Initial Study's reasoning defies logic and common sense. The underlying premise is that because the current noise consists of trucks, there is no potential for a significant impact to noise because the new noise will also consist of trucks. This cannot possibly be true, because the Initial Study concedes that truck trips per day will increase by 150% (12 trips/day to 30).

Accordingly, the Initial Study is fundamentally flawed as an informational document. The Hazardous Waste Facility clearly may cause significant noise impacts. A site-specific noise study must be prepared as part of an EIR, given the highly technical and specific requirements of Irwindale's noise ordinance.

e. The Initial Study failed to adequately discuss and mitigate potentially significant impacts to greenhouse gas emissions.

The public, who included expert legal commenters, expressed valid concerns regarding the Initial Study's unsubstantiated conclusions regarding greenhouse gas emissions. CEQA requires the evaluation of both direct and indirect environmental impacts of greenhouse gas emissions.[108] Commenters noted, for example, that the Project will convert used oil to unprocessed fuel oil as an end product, i.e., the Project will recycle used oil.[109] The re-use of this oil will have very significant greenhouse gas emissions, but the Initial Study completely fails to address this issue.

DTSC's response is dismissive and inadequate. DTSC cites *Save the Plastic Bag Coalition v. City of Manhattan Beach* as allegedly supporting its refusal to analyze reasonably foreseeable greenhouse gas emissions.[110] But the City of Manhattan Beach actually undertook the analysis of greenhouse gases that the public requested for the Project. Unlike the City of Manhattan Beach, DTSC never even attempted the most generalized analysis regarding greenhouse gases. It never, for example, quantified or compared the capacity of the Facility to

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106 *Id.* at p. 38.

107 *Gallagher Comment, supra* note 51, at pp. 10–11.

108 *See* CAL. CODE REGS. title 14, section 15358, subd. (a)(2).

109 *Gallagher Comment, supra* note 51, at p. 18.

110 (2011) 52 Cal.4th 155.

the overall market in Irwindale or otherwise.[111] DTSC simply decided arbitrarily, without even the most basic or minimal analysis, that both direct and indirect greenhouse gas emissions would be insignificant.[112]

This arbitrary decision included more dismissive and illogical reasoning: "Assuming that the recycled oil will be burned as fuel is speculative."[113] But it is not speculative—it is a legal and fairly common use of recycled oil, one that DTSC must analyze the impacts of in an EIR.

f. The Initial Study failed to analyze and mitigate potentially significant impacts to rare, threatened, or endangered species acknowledged to be in the area.

The public commenters provided evidence, including a report by an environmental expert with over 30 years of experience in the private and public sectors, that the Project may have significant impacts related to biological resources.[114]

The Initial Study acknowledges, "[a] number of threatened, rare, and/or endangered species are identified as being located within the general area of the Facility."[115] Indeed, the Santa Fe Dam Recreational Area, which is adjacent to the Project, is home to many endangered species. It is designated as a Significant Ecological Area and is part of the San Gabriel Watershed Mountains Special Resources Study, which the National Park Service conducted.[116]

But DTSC inexplicably declares that it "does not believe the project will have any impact on biological resources and, in particular, the Santa Fe Dam Recreation Area[,]"[117] because "DTSC cannot foresee any reasonable pathway for waste at the facility to impact the Santa Fe Dam Recreation Area."[118] Commenters had, in fact, identified several potential "pathways" by which the Project could affect this environmentally sensitive area, including, for example, potential impacts to air quality and impacts from the transport of hazardous waste near or through the recreational area (including accidents and spills related to crashes), catastrophic events, and accidents.[119] DTSC must analyze and mitigate these potential impacts in an EIR before final approval of the Project.

DTSC's biological resources analysis is wholly inadequate. DTSC attempts to deflect the Initial Study's failure to conduct a biological resources survey and report (which expert Karen Ruggels opined must be prepared) by arguing that the California Department of Fish & Game

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111 The City of Manhattan Beach reasoned their conclusion based on the population and number of retail establishments affected by the plastic-bag ban. *Id.* at p. 174.

112 *DTSC Response to Comments*, *supra* note 7, at p. 28.

113 *Ibid.*

114 *Ruggels Comment*, *supra* note 23, at pp. 6–7; *Gallagher Comment*, *supra* note 51, at pp. 6–8.

115 INITIAL STUDY, *supra* note 42, at p. 18.

116 *Gallagher Comment*, *supra* note 51, at pp. 4–5.

117 INITIAL STUDY, *supra* note 42, at p. 19.

118 *Ibid.*

119 *Ruggels Comment*, *supra* note 23, at pp. 6–7.

reviewed the Initial Study and provided no comments,[120] that a Natural Diversity Database search was conducted and no species are "located in or immediately around the proposed facility site[,]"[121] and that "the trucks hauling the used antifreeze and used oil are not required to pass by the SFDRA."[122] Despite repeated requests for further information by the public,[123] DTSC continued to refuse to disclose the details of what appeared to be a cursory and pretextual biological resources analysis. What does "immediately around" mean? And why did DTSC choose this buffer instead of another distance? DTSC's repetition of the fact that trucks are not required to pass by the recreational area continues to beg another basic question—what is the potential for trucks to use southern or other access routes to the site, and what will that impact be? The Initial Study is inadequate as an informational document. And there is clearly a potential for impacts to biological resources, particularly those in the Santa Fe Dam Recreational Area. DTSC must analyze and mitigate these potential impacts in and EIR before final approval of the Project.

In addition, the Initial Study completely fails to analyze General Plan policies related to the protection of biological resources. The Project appears to conflict with and may cause significant impacts related to the following policies:[124]

- Resource Management Element Policy 5. The City of Irwindale will maintain and improve the existing park facilities in the City for the benefit and enjoyment of future generations.

- Issue Area – Resource Preservation. The City of Irwindale will maintain and preserve those natural and man-made amenities that contribute to the City's livability.

- Resource Management Element Policy 13. The City will encourage environmental considerations and the City's discretionary authority over land use entitlements.

- Resource Management Element Policy 19. The City of Irwindale will consider environmental justice issues as they are related to potential health impact associated with air pollution and ensure that all land use decisions, including enforcement actions, are made in an equitable fashion to protect residents, regardless of age, culture, ethnicity, gender, race, socioeconomic status, or geographic location from the health effects of air pollution.

DTSC's response to the public comments on these issues was completely inadequate and essentially nonexistent. For example, DTSC's response to the comments regarding General Plan policies for biological resources was essentially nonresponsive: "DTSC prepared an Initial Study. The analyses of resource impacts were deemed to be less than significant or to have no

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120 INITIAL STUDY, *supra* note 42, at p. 19.

121 *DTSC Response to Comments*, *supra* note 7, at p. 57.

122 *Ibid.*

123 *Ruggels Comment*, *supra* note 23, at p. 6 (asking for information regarding where sensitive habitat, threatened, rare, and/ or endangered species are located relative to the Project site and proposed facilities).

124 *Gallagher Comment*, *supra* note 51, at p 7.

impact. Subsequently, DTSC prepared a Negative Declaration for the project after determining that the project would not have any significant impacts on the environment."[125] DTSC then referred to two previous responses to different comments and three responses that did not correspond to any comments at all.[126] DTSC must analyze and mitigate these impacts in an EIR before final approval of the project.

In addition, comments on the Initial Study demonstrated that the Project activities may risk violating the California Endangered Species Act by "taking" endangered or threatened species.[127] This is especially a concern given that the Project is adjacent to the Santa Fe Dam Recreational Area, a Significant Ecological Area. DTSC's response to the public comment on these issues was again completely inadequate and essentially nonexistent. DTSC merely repeated vaguely that a database had been conducted and no species had been identified "in or immediately around" the Facility, even though it had conceded, "threatened, rare, and/or endangered species were identified within the general area" of the Facility.[128] As common sense dictates, biological species are often mobile. It is therefore irrelevant that no species are "located in or immediately around the Facility," if it is readily acknowledged that they reside in the general area. DTSC must prepare an EIR analyze how the Project will comply with the California Endangered Species Act (including the conditions of any Incidental Take Permit that will be required) and what mitigation measures are feasible before final approval of the Project.

In sum, the Initial Study suffers from significant defects related to biological resources:

- The Initial Study's analysis is inadequate and does not include the biological resources survey and report expert Karen Ruggels opined is necessary;
- The Project may have significant impacts to biological resources, particularly those in the adjacent Significant Ecological Area;
- The Initial Study fails to analyze and mitigate the potential impacts it may have with respect to inconsistency with General Plan policies related to the protection of sensitive resources; and
- The Initial Study fails to analyze and mitigate significant impacts it may have with respect to "take" of endangered or threatened species under the California Endangered Species Act.

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125 *DTSC Response to Comments*, *supra* note 7, at p. 23.

126 *See ibid.* Response to Comments #II-1-18, #II-1-19, and #II-1-20 do not correspond with any response.

127 *Gallagher Comment*, *supra* note 51, at p. 7; 16 U.S.C. §§ 1532(19), 1538–39.

128 *E.g.*, *DTSC Response to Comments*, *supra* note 7, at p. 57. DTSC's response was actually to another comment. DTSC never directly responded to this comment except in a very general way, usually by stating that an Initial Study was conducted or that "determined, after reviewing various documents such as the Permit Application, the Department of Fish and Game Database, and the neighboring Veolia Initial Study, and due to the project's proximity, nature of waste, and type of operation, that the project will not have a significant impact on the environment." *Id.* at p. 6. In addition, DTSC's practice of relying on the environmental documents for different projects violates CEQA.

The Project clearly may have significant impacts related to biological resources. DTSC must prepare an EIR to analyze and mitigate these potential impacts to remedy the legal defects discussed above, before final approval of the Project.

g. The Initial Study failed to analyze and mitigate potentially significant impacts to cultural resources even though it acknowledged that it is possible that human remains could be excavated.

Public commenters, who included environmental experts, identified the need to implement concrete and discernible mitigation measures regarding cultural impacts, particularly considering that the Initial Study readily concedes, "project activity could unearth previously unknown human remains."[129] Given this conceded possibility, commenters requested mitigation to ensure the preservation of such resources.[130]

DTSC's confusing, imprecise, and unclear analysis demonstrates the general lack of attention to detail and care regarding its consideration of resources. For example, the Initial Study states, "Appendix K of the California Environmental Quality Act (CEQA) Guidelines shall be followed for excavation monitoring and salvage work that may be necessary. Salvage and preservation efforts will be undertaken pursuant to Appendix K requirements outlined in CEQA."[131] But Appendix K of the CEQA Guidelines has nothing to do with salvage and preservation efforts. Appendix K is the "Criteria for shortened clearinghouse review."[132]

In any event, the Initial Study does not include a single mitigation measure. There can be no assurance the Applicant will follow any mitigation unless DTSC imposes the requirement as a mitigation measure. In order to satisfy CEQA, DTSC must require the Applicant to implement a concrete, specific, and coherent mitigation monitoring and reporting program. DTSC must prepare an EIR to analyze and mitigate this potentially significant impact.

h. The Initial Study relies on hearsay and uncertified draft documents to evaluate potentially significant impacts to geology and soils.

The public, including an environmental expert, noted that the analysis regarding Geology and Soils was highly suspect.[133] Among other reasons for this, the Initial Study relied on hearsay by the Applicant and on draft, uncertified documents from an EIR for a completely unrelated project.[134] Commenters, including environmental experts, requested the preparation of a geotechnical report to evaluate the risk of geologic hazards, seismic risks, liquefaction, and

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129 *Ruggels Comment*, *supra* note 23, at p. 7.

130 *Ibid.*

131 INITIAL STUDY, *supra* note 42, at p. 22.

132 ASS'N OF ENVTL. PROFESSIONALS, 2012 CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) STATUTE AND GUIDELINES, at 277 (Jan. 1, 2012), *available at* http://ceres.ca.gov/ceqa/docs/CEQA_Handbook_2012_wo_covers.pdf.

133 *Ruggels Comment*, *supra* note 23, at pp. 7–8.

134 *Ibid.*

seiche risks, particularly considering the Facility's proximity the Santa Fe Dam Recreational Area and the catastrophic damage a release from the Facility could cause to that area.[135]

DTSC ignored these comments as well, stating only that it reviewed a 2010 Fault Activity Map of California that did not show any historic faults "defined as displacement within 200 years near the facility."[136] DTSC then asserted, apparently contrary to the Initial Study, that the nearest fault was located six miles southeast of the facility.[137] There appear to be at least two faults that are closer to the Facility—the Duarte Fault (1.5 miles) and the Raymond Hill fault (4 miles).[138]

The Initial Study is inadequate for the same reasons pointed out by the public—environmental analysis for a project must include its own reasoned analysis, not hearsay from the Applicant or uncertified, draft documents prepared for completely unrelated projects. DTSC never explained the basis for the "statement" that there was "no active earthquake fault which has displacement during the Holocene era" within 3000 feet of the facility.[139] A mere "statement" by the Applicant is legally insufficient.[140] State law requires that this particular requirement be substantiated with published geologic studies, aerial reconnaissance, *and* analysis of aerial reconnaissance, including physical reconnaissance, if necessary.[141] This information "shall be of such quality to be acceptable to geologists experienced in identifying and evaluating seismic activity."[142] The public expressly requested such assurances, but DTSC ignored them, thereby violating state law.

The Initial Study similarly failed to explain how and why the Azusa Target Draft EIR was used. In addition, the public noted that the Draft EIR's analysis contradicted the no-impact conclusions of the Initial Study. For example, the Duarte Fault, which the Initial Study acknowledges is a mere 1.5 miles from the Facility site, has a probable magnitude of 6.0 to 7.0 on the Richter Scale.[143] DTSC ignored this concern as well.

The Initial Study's analysis regarding Geology impacts is vague, inconsistent, and relies on illegal sources, violating both CEQA and other state law requirements. DTSC must prepare an EIR that relies on legally permissible sources and adequately analyzes and mitigates impacts related to geology and soils.

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135 *Ibid.*

136 *DTSC Response to Comments*, *supra* note 7, at p. 62.

137 *Ibid.*

138 INITIAL STUDY, *supra* note 42, at p. 25.

139 *Id.* at pp. 24–25.

140 *See* CAL. CODE REGS., title 22, section 66270.14, subd. (b)(11)(A) (requiring the applicant for a hazardous waste facilities part B permit to demonstrate compliance with applicable seismic standard using "either published geologic data or data obtained from field investigations carried out by the applicant.").

141 *Id.*, subd. (b)(11)(A)(1).

142 *Id.*, subd. (b)(11)(A).

143 INITIAL STUDY, *supra* note 42, at p. 24; TARGET STORE REDEVELOPMENT PROJECT DRAFT EIR ch. 4.4 (2007) [attached hereto as Exhibit 7].

i. The Initial Study failed to properly analyze and mitigate potentially significant impacts related to hazardous waste transport and transportation and traffic.

The public's concerns impacts from the transport of hazardous waste near environmentally sensitive and socioeconomically vulnerable areas were among the most important (and most ignored) comments regarding the Initial Study.[144] Commenters, who included expert legal and environmental experts, noted that there is no requirement for trucks transporting hazardous waste to avoid sensitive environmental and community areas.[145] Although the Initial Study asserts that there are "no residential areas in the area around this industrial zone[,]"[146] these concerns were not necessarily related to residential areas "around" the site, but rather that hazardous waste transport could occur in residential areas or other sensitive resources (including the Santa Fe Dam Recreational Area) near the Facility.[147] Maps clearly show routes of access to the Facility site, including routes that run directly through and by the Santa Fe Dam Recreational Area and routes through residential areas.

DTSC ignored these concerns. DTSC did add maps showing some, but not all, truck access to the Facility,[148] and asserted, without any evidence and contrary to common sense, that it "[could not] foresee any reason why truck traffic would enter the SFDRA."[149] The maps only show one possible access route to the site—which the Permit does not require trucks hauling hazardous waste to follow.[150] And, as any resident or visitor to Los Angeles knows, Los Angeles highways are congestion due to heavy traffic or accidents and often completely stopped.[151] It is common sense that where highways are delayed or blocked, drivers exit highways and use local surface roads to reach their destination.

DTSC also asserted that spills are a "remote possibility," that emergency response "is expected to take the shortest time possible," and that its discussion of possible ignition sources was adequate.[152] DTSC notably provided no evidence regarding the possibility of a spill and emergency response times. Even "remote" possibilities will occur when the activity is repeated 30 times on a daily basis, i.e., trucks transporting hazardous waste to the Facility for treatment and recycling—that is the purpose of the Facility.[153] Instead of treating these concerns with the

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144 *E.g.*, *Ruggels Comment*, *supra* note 23, at pp. 5, 8, 10; *Gallagher Comment*, *supra* note 51, at pp. 12–13.

145 *Ruggels Comment*, *supra* note 23, at p. 5.

146 INITIAL STUDY, *supra* note 42, at p. 30.

147 *E.g.*, *Ruggels Comment*, *supra* note 23, at p. 8; *Gallagher Comment*, *supra* note 51, at p. 12.

148 *DTSC Response to Comments*, *supra* note 7, at p. 57.

149 *Id.* at p. 4.

150 INITIAL STUDY, *supra* note 42, at pp. 42–43.

151 *E.g.*, *210 West Traffic Jammed at Buena Vista due to Tanker Truck Fire*, TOTAL TRAFFIC LOS ANGELES, http://totaltrafficla.com/2012/01/03/210-west-traffic-jammed-at-buena-vista-due-to-tanker-truck-fire/21280 (last updated Jan. 3, 2012 and last visited Jan. 10, 2013) (noting traffic delays and lane closures on Highway 210 West and 605 North) [attached hereto as Exhibit 8].

152 *DTSC Response to Comments*, *supra* note 7, at p. 63.

153 INITIAL STUDY, *supra* note 42, at p. 44.

care they deserve, DTSC merely dismissed the possibility as "remote," required no mitigation or specific, safe transport routes, and refused to engage the public's substantive concerns.

An EIR is required to analyze and mitigate these serious and reasonably foreseeable environmental impacts.

j. The Project has potentially significant impacts related to groundwater contamination, impaired water bodies, and flooding.

As demonstrated in public comments, the Project may have significant impacts related to groundwater contamination, discharges to already impaired nearby water bodies, and flooding. DTSC must analyze and mitigate these impacts in an EIR before final approval of the Project.

(1) The Project has potentially significant impacts to the San Gabriel Groundwater Basin.

Multiple public comments on the Initial study showed that the Project may have a significant impact on the San Gabriel Groundwater Basin.[154] The Project is located over the San Gabriel Groundwater Basin aquifer, and sits over an alluvial fan of the San Gabriel River. If there were a release from the Project or from trucks delivering hazardous waste to the Project, the release would seep into groundwater sources.[155]

Protecting this fragile water supply is so critical to the region that the Main San Gabriel Basin Watermaster—the court appointed expert agency with responsibility to manage and protect the basin—wrote to warn DTSC that "without appropriate mitigat[ion] measures, the proposed facility could provide a source of contamination to the Main San Gabriel Basin Groundwater Basin."[156] The Negative Declaration does not include a single mitigation measure, so clearly the Watermaster was pointing out the need for DTSC to add mitigation. But rather than accept this request by the leading expert on the basin, DTSC simply reiterated conditions in the Permit and insisted they would be adequate.[157] This response is inadequate, and Watermaster's comment demonstrated a potentially significant impact that DTSC must analyze and mitigate in an EIR.

DTSC gave inadequate responses to other Watermaster comments that demonstrated a need for mitigation or a project alternative. For example, the Watermaster expressed concerns over the Facility's underground systems, and DTSC simply responded by stating that these systems were "the only devices located underground."[158] This is completely nonresponsive. DTSC also noted that Facility is sloped towards the sumps, that the sumps are not intended to store waste, or that the contents of the sumps are pumped into a separate holding tanks. But this

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154 *Gallagher Comment, supra* note 51, at pp. 19-20; *Ruggels Comment, supra* note 23, at pp. 8-9; *DTSC Response to Comments, supra* note 7, at pp. 34-40 (comment of Teresa T. Young), 40- 46 (comment of Anthony C. Zampiello [representing Main San Gabriel Basin Watermaster]).

155 *E.g., Gallagher Comment, supra* note 51, at pp. 19-20.

156 *DTSC Response to Comments, supra* note 7, at p. 40.

157 *Id.* at pp. 40-46.

158 *Id.* at p. 45.

is all irrelevant. The comment was concerned with containment of possible leaks from the sumps themselves, not the general purpose and function of the sumps. Although it is helpful that daily inspection of the sumps is required, this does nothing to prevent the damage to groundwater supplies if a leak were to occur and go undetected for some time, even for a day.

A general problem running through DTSC's analysis of potential impacts to groundwater (and to other resources) is that DTSC fails to analyze the consequences of on-site and off-site spills and accidents. In the response to comments, DTSC admits that a spill or leak "may be possible."[159] That makes a spill or leak reasonably foreseeable, and something DTSC must analyze and mitigate in an EIR. But instead of analyzing the consequences of a spill or leak, DTST simply asserts, the "safeguards at the facility ensures [sic] that the probability of any waste impacting the groundwater or surface waters, should there be a spill or leak to be extremely remote."[160] This is plainly inadequate as a response. DTSC does not explain why it considers the impacts from a spill or leak to be remote or what the consequences of a spill or leak would be. Moreover, even if DTSC could assure that there would never be a spill or leak on-site (which DTSC cannot assure), the response says nothing about the potential for off-site spills or leaks (including from accidents from trucks bringing hazardous waste to the Facility). Clearly, off-site spills and leaks are reasonably foreseeable and could have a significant impact.

In sum, the Initial Study is inadequate as an informational document with respect to potential impacts to the water basin. The Project may have significant impacts that DTSC must analyze and mitigate in an EIR.

(2) The Project has potentially significant impacts to impaired water bodies.

Public comments explained that nearby water bodies, including Santa Fe Dam Park Lake, already have impaired water quality and are on the Clean Water Act's section 303(d) list of impaired water bodies.[161] So any discharge to nearby water bodies may have a significant water quality impact.

Rather than analyzing and mitigating this potential impact, DTSC claims that the project does not discharge to any water bodies.[162] But again, DTSC has failed to analyze the impacts of a potential accidental spill or leak. It is reasonably foreseeable that the facility could leak and stormwater could carry that oil to nearby water bodies and that trucks carrying hazardous waste could wreck near those water bodies and spill hazardous waste.

These are potentially significant impacts that DTSC must analyze and mitigate in an EIR.

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159 *Id.* at p. 30.

160 *Ibid.*

161 *Gallagher Comment, supra* note 51, at p. 20.

162 *DTSC Response to Comments, supra* note 7, at p. 31.

(3) The Project has potentially significant impacts related to flooding.

The Initial Study concedes that the project may be "subject to local flood hazard."[163] But the Initial Study does not analyze that impact or impose a single mitigation measure. Commenters demonstrated that this flooding may cause a significant impact that requires an EIR.[164]

DTSC's response was inadequate and only supports the demonstration that flooding "may" cause a significant impact. Rather than conducting any analysis, DTSC cites to a 30-year old letter from the Los Angeles Flood Control District *for another project.*[165] But even that letter concedes that the area "may be subject to local flood hazard." DTSC also cites the presence of a 2.5-inch berm at the Facility's entrance and the fact that the "the majority of the waste" will be stored in secondary containment. There is no analysis of what impacts may occur if flood waters exceed the small 2.5-inch berm and come into contact with waste that is not stored in secondary containment or even waste that has been spilled during operations. Common sense dictates that floodwater coming into contact with such hazardous waste may have a significant impact. DTSC must analyze and mitigate this potentially significant impact in an EIR before final project approval.

k. The Initial Study failed to analyzes and mitigate potentially significant impacts related to public services.

The Initial Study fails to include any substantial evidence regarding its conclusion that there will be no impact to public services. Commenters, who included environmental experts, noted that the Initial Study includes only a general, conclusory statement that the Project "will not impact existing fire or police ratios, response times or other performance objectives."[166] The public also requested that local police and fire units be consulted regarding the project and assurance as to the lack of impact to these vital community services. These are serious potential impacts because the Facility will be a new facility that will store hundreds of thousands of gallons of flammable hazardous waste on site and increase hazardous waste transport to and from the Facility by 150%.

DTSC ignored the public's concerns. DTSC's response highlights the general problem with the Initial Study's environmental review, which is a complete lack of mitigation to ensure that the impacts to the environment and the community are minimized to the extent possible. DTSC failed to even consult the local police and fire units on this issue.[167] The Initial Study's conclusion that the Project will not impact public services, particularly in the absence of any substantial evidence or mitigation, appears impossible considering that the Hazardous Waste Facility will be a new facility to treat, recycle, and store hundreds of thousands of gallons of

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163 INITIAL STUDY, *supra* note 42, at p. 34.

164 *E.g.*, *Gallagher Comment*, *supra* note 51, at p. 21.

165 *DTSC Response to Comments*, *supra* note 7, at p. 10.

166 *Ruggels Comment*, *supra* note 23, at p. 10; INITIAL STUDY, *supra* note 42, at p. 41.

167 *DTSC Response to Comments*, *supra* note 7, at p. 66.

flammable liquid material that will increase truck activity by 150% over current operations.

Though DTSC conducted no analysis, it is clear from the nature and size of the Hazardous Waste Facility that it may cause significant impacts related to public services. DTSC must analyze and mitigate these potentially significant impacts in an EIR.

1. The Initial Study failed to adequately discuss and mitigate potentially significant impacts to utilities and services systems.

Commenters' concerns regarding the Initial Study's lack of analysis regarding the cumulative impacts of future permit approvals or other reasonably foreseeable consequences of the Project apply with similar force to the inadequate evaluation of utilities and service system impacts.[168] The Initial Study acknowledges that the Facility will apply for coverage under the General Industrial Stormwater Discharge Permit and will use the Azusa Landfill for solid waste disposal. But the Initial Study failed to adequately analyze the potential impacts to utilities and service systems. These impacts must be reviewed due to the potential for urban runoff to reach adjacent sensitive environmental and community areas, such as the Santa Fe Dam Recreational Area.[169]

4. The Negative Declaration is legally inadequate because DTSC failed to respond adequately to public comments.

The public comment, review, and response process is an integral part of CEQA, and such comments and responses are a substantive part of the final environmental review document. An agency is required to respond to the most significant environmental questions.[170] If the failure to respond has frustrated the purpose of the public comment requirements, then the error is prejudicial, and the environmental review is invalid under CEQA.[171]

DTSC failed to respond in a serious and substantive manner to many of the public's important concerns, as detailed above. The issues raised were not insignificant, but related to fundamental flaws in the Initial Study's analysis, clearly erroneous identification and use of data, clearly absent evidence to support otherwise unsubstantiated conclusions, and the most serious potential environmental impacts of the Project. DTSC's incomplete and vague responses were prejudicial, because they deprived the public of meaningfully commenting on and evaluating the environmental impacts of the Project. This included, for example:

- Noise impacts: The clearly erroneous premise that if new noise (trucks) takes the same form as old noise (trucks), there cannot be a potential for a significant environmental impact; failure to seriously evaluate compliance with the Irwindale noise ordinance;[172]

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168 *Ruggels Comment*, *supra* note 23, at pp. 10–11; *Gallagher Comment*, *supra* note 51, at p. 14.

169 *E.g.*, *Ruggels Comment*, *supra* note 23, at p. 10.

170 *E.g.*, *Sherwin-Williams Co. v. S. Coast Air Quality Mgmt. Dist.* (2001) 86 Cal.App.4th 1258, 1277.

171 *Envtl. Prot. & Info. Ctr.*, *supra*, 44 Cal.4th at p. 487.

172 INITIAL STUDY, *supra* note 42, at pp. 38–39; *DTSC Response to Comments*, *supra* note 7, at p. 66 (inaccurately responding that the area is zoned for heavy industry, vaguely mentioning guidelines from the

- Air quality impacts: The clearly erroneous use of 5-acre, 25-meter localized significant thresholds for Central Los Angeles to evaluate air quality impacts, when there were directly applicable 1-acre LSTs for East San Gabriel Valley (i.e., Irwindale), the use of which would have revealed exceedances related to at least two criteria pollutants, PM2.5 and PM10; the clearly erroneous practice of copying-and-pasting the analysis from a different project without adjusting the inputs to formulas to reflect the Project;[173]

- Hazardous materials and transport impacts: The failure to require specific, safe truck routes, despite the demonstrated fact that routes directly adjacent to and through environmentally and socioeconomically vulnerable areas and communities can be used to access the Facility site;[174]

- Groundwater contamination and hydrology impacts: The failure to provide for redundant measures or other mitigation to prevent groundwater contamination from leakage from underground equipment;[175]

- Cumulative impacts and reasonably foreseeable consequences: The fundamental misunderstanding of cumulative impacts analysis and failure to conduct any analysis regarding past, present, and reasonably foreseeable future projects and their impacts;[176]

- The failure to provide technical reports or studies to support highly technical conclusions made by the Initial Study, all of which the public requested, including:

    - The conclusion regarding significant noise impacts, defined as a 5 dB increase in ambient noise levels as measured at any boundary line of the property from which the noise emanates;[177]

    - The conclusion regarding impacts to fire and police unit response times or performance measures, despite the fact that the Facility is a new facility to treat, recycle, and store hundreds of thousands of gallons of flammable liquid waste, which will result in an expected 150% increase in truck traffic to and from the site, and despite the fact that DTSC conducted no consultations with local

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Department of Health Service's Office of Noise Control, and offering an irrelevant fact that truck traffic will increase by 18 trucks per day).

173 INITIAL STUDY, *supra* note 42, at p. 14; *DTSC Response to Comments*, *supra* note 7, at p. 58 (responding only by repeating the findings in the Initial Study, even though these findings are demonstrably false); *see supra* note 83 and accompanying text.

174 *DTSC Response to Comments*, *supra* note 7, at p. 4 (responding dismissively that "DTSC [] cannot foresee any reason why truck traffic would enter the SFDRA"); *see supra* note 151 (demonstrating the common sense that highway users will often divert to local surface roads because highway congestion in Los Angeles, and specifically Highways 210 and 605, are frequently subject to congestion).

175 *DTSC Response to Comments*, *supra* note 7, at pp. 40–45 (ignoring comments by repeating the Initial Study and stating that the underground equipment for the Project is the only underground equipment).

176 *Id.* at pp. 68 (merely repeating the requirements for coverage under the General Industrial Stormwater Discharge Permit rather than evaluating the environmental impacts as required by CEQA), 69 (demonstrating fundamental misunderstanding of cumulative impacts).

177 *See supra* note 172.

emergency services;[178]

- The conclusion regarding impacts to geology and soils based on a "statement" by the Applicant, even though state law requires published geologic studies, aerial reconnaissance, and analysis of aerial reconnaissance, including physical reconnaissance if necessary, of such quality to be acceptable to geologists experienced in identifying and evaluating seismic activity; and[179]

- The conclusion regarding impacts to biological resources, even though the Facility is essentially adjacent to a Significant Ecological Area and the Initial Study acknowledged the presence of rare, threatened, and endangered species in the area.[180]

In the end, the public was left with an environmental review document that was full of unsubstantiated, conclusory assertions and bereft of substantial evidence to support its conclusions. DTSC's failure to respond to comments frustrated the purpose of the public comment process, which is to facilitate the identification of potentially significant environmental impacts and develop alternatives and mitigation to those impacts.[181] Accordingly, DTSC's persistent refusal to respond substantively to public comments was prejudicial, and DTSC must prepare an EIR, hold a new public comment period, and adequately respond to comments.

CONCLUSION

Petitioner respectfully requests that DTSC grant this petition for review all of the issues raised above and set a briefing schedule pursuant to California Code of Regulations, title 22, section 66271.18, subd. (c). In addition, in accordance with California Code of Regulations, title 22, sections 66271.14, subd. (b)(2), 66271.15, DTSC should stay the operation of the Permit pending resolution of the administrative appeal.

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178 *DTSC Response to Comments*, *supra* note 7, at p. 66 (responding merely that local police and fire can be consulted regarding response times).

179 *Id.* at p. 62 (failing to explain reliance on draft, uncertified documents or provide documentation required by state law, merely stating that "DTSC reviewed the 2010 Fault Activity Map of California published by the California Department of Conservation, California Geological Survey Section" and making an inconsistent statement regarding the nearest fault).

180 *E.g.*, *id.* at p. 5 (stating that a database search did not reveal any rare, threatened, or endangered species "in or immediately around" the Facility, even though conceding that such species reside in the "general area" and failing to explain or resolve this conflict with any documentation or substantial evidence).

181 *Laurel Heights Improvement Ass'n*, *supra*, 6 Cal.4th at p. 1129.