

Performance Enhancement Report:

**The Actions of the California Department of Toxic Substances Control
(DTSC)
With Regards to the
Acceptance of Non-Resource Conservation Recovery Act (RCRA)
Hazardous Waste by
Western Environmental, Inc (WEI) in Mecca, California**

Issue: Information from hazardous waste manifests indicate that since 2003, Western Environmental, Inc., (WEI) has operated a non-RCRA Hazardous Waste Facility (HWF) on Cabazon Band of Mission Indians (CBMI) Indian country in Mecca, California, from here on referred to as WEI's "Mecca HWF." WEI does not have a hazardous waste facility permit from DTSC for its Mecca HWF. The CBMI do not have a cooperative agreement with the Secretary of the California Environmental Protection Agency (Cal/EPA) in connection with WEI's Mecca HWF, but discussions are currently underway for a cooperative agreement. WEI's Mecca HWF obtained an Environmental Protection Agency (EPA) Identification Number from U.S. EPA. DTSC's Hazardous Waste Tracking System (HWTS) indicates that in 2003 and 2004, two manifests show the acceptance of a total of 38 tons of non-RCRA hazardous waste at WEI's Mecca HWF. During this period the CBMI was in discussions with Cal/EPA and DTSC concerning a cooperative agreement for a hazardous waste facility on Indian country in Mecca to be operated by Remedy Environmental Services. DTSC's files do not indicate that the CBMI contacted Cal/EPA or DTSC concerning a cooperative agreement in connection with WEI's Mecca HWF, although CBMI proposed that one cooperative agreement cover all facilities operating in their business park. The U.S. EPA's Enforcement and Compliance History Online (ECHO) database identifies WEI's Mecca HWF as a transporter/handler that uses the North American Industry Classification System (NAICS) Codes of Petroleum Lubricating Oil and Grease Manufacturing (324191) and Other Nonhazardous Waste Treatment and Disposal (562219)¹ to describe its business activities. WEI's Mecca HWF was added into DTSC's HWTS in December 2004 and the NAICS code is 562219. HWTS includes manifests with WEI's Mecca HWF EPA Identification Number as a generator, transporter, treatment storage

¹ The NAICS code 562219 is defined as "This U.S. industry comprises establishments primarily engaged in (1) operating nonhazardous waste treatment and disposal facilities (except landfills, combustors, incinerators and sewer systems or sewage treatment facilities) or (2) the combined activity of collecting and/or hauling of nonhazardous waste materials within a local area and operating waste treatment or disposal facilities (except landfills, combustors, incinerators and sewer systems or sewage treatment facilities). Compost dumps are included in this industry."

and disposal facility, and an alternative treatment, storage and disposal facility. By 2009 and 2010, the combined two-year total of non-RCRA hazardous waste sent to WEI's Mecca HWF was 164,089 tons, based on information from 9,719 manifests. In December 2010, as a result of complaints of odors from the Mecca community, the South Coast Air Quality Management District (SCAQMD) initiated a series of investigations and sampling activities that concluded that the odors were emanating from WEI's Mecca HWF and a facility operated by a related entity, Waste Reduction Technologies, which also operates on CBMI Indian country in Mecca.

On May 9, 2011, U.S. EPA issued a unilateral administrative order to WEI and Waste Reduction Technologies concerning their operations at Mecca. The order was issued pursuant to U. S. EPA's authority under Section 7003 of RCRA, which allows U.S. EPA to take enforcement action against an owner or operator when there is evidence that past or present handling, storage, treatment, and/or transportation of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment.

In June 2011, newly appointed DTSC Director Deborah Raphael commissioned a review of DTSC's involvement concerning WEI's Mecca HWF. The goal of the review was to identify actions to improve and enhance the efficiency and effectiveness of DTSC and to correct any flawed processes or actions in DTSC's regulation of hazardous waste facilities in California, if any.

Historical Context: DTSC is authorized by U.S. EPA to implement the federal hazardous waste management program, RCRA, in California. Authorized states must ensure that their hazardous waste laws and regulations meet or exceed federal standards. California's definition of hazardous waste is broader than the federal definition of hazardous waste and therefore under State law DTSC also regulates non-RCRA hazardous waste. Non-RCRA hazardous waste is also referred to as "California only" regulated hazardous waste, as this waste is not regulated under RCRA.

In 1991, AB 240 was signed into law. It added Article 8.6, Development of Hazardous Waste Management Facilities on Indian country, to Chapter 6.5, Division 20 of the California Health and Safety Code at sections 25198.1 – 25198.9 (Article 8.6). Article 8.6 provides that a tribe considering construction and operation of a hazardous waste facility on the tribe's Indian country may enter into negotiations with the Secretary of Cal/EPA for the purpose of reaching a cooperative agreement for the construction and operation of such a facility. This is a separate statutory alternative to the permitting requirements of the Hazardous Waste Control Act (HWCA), California Health and Safety Code section 25100 et. seq., thus providing hazardous waste facilities on Indian country two options through which to be permitted to accept non-RCRA hazardous waste in California.

Chronology:
2002 -2005

In 2002, Remedy Environmental Services (RES) contacted DTSC permitting staff and DTSC legal staff about RES' desire to operate a non-RCRA hazardous waste facility on CBMI Indian country. Throughout 2002 to mid-2005, RES DTSC and CBMI representatives were in discussions concerning the requirements of a permit for a hazardous waste facility on the Tribe's Indian country. In late November 2003, RES wrote DTSC permitting staff stating its interest in cooperating with DTSC on RES' plans to operate a hazardous waste facility on Indian country owned by the CBMI although RES, in consultation with CBMI, did not believe Article 8.6 of the Health and Safety Code was applicable. On January 14, 2004, DTSC's legal counsel responded and informed RES of the provisions of Article 8.6 and set forth DTSC's position that the provisions of Article 8.6 applied to hazardous waste facilities on a tribe's Indian country that accepted and managed non-RCRA hazardous waste.

On June 30, 2004, the CBMI submitted a written request to the Secretary of Cal/EPA to convene the negotiations under the provisions of Article 8.6 for a cooperative agreement in connection with RES's desire to operate a non-RCRA hazardous waste facility on CBMI's Indian country in Mecca. On July 12, 2004, Cal/EPA responded indicating that a meeting would be arranged through DTSC's legal office. DTSC's counsel contacted the representatives of the CBMI and informed them of the Article 8.6 requirements for a cooperative agreement.

During 2004 through 2005, discussions continued between representatives of RES, the CBMI, DTSC and CAL/EPA concerning a cooperative agreement for the operation of a non-RCRA hazardous waste facility on CBMI's Indian country at Mecca.

On March 7, 2005, CBMI representatives informed DTSC's legal counsel that CBMI would adopt a regulatory system based on the requirements previously outlined by DTSC, but with certain exceptions concerning inspections, enforcement and sovereign immunity. On March 14, 2005, DTSC responded notifying CBMI of the provisions that were required by law under Article 8.6 and, thus, were not negotiable. After 2005 there is no further documentation that we found within DTSC of CBMI's efforts to enter into a cooperative agreement with the Secretary of Cal/EPA, until the current discussions on this subject

In December 2004, DTSC's Criminal Investigations Branch (CIB) received a complaint that WEI was treating waste on CBMI Indian country in Mecca without the benefit of a Treatment, Storage, or Disposal Facility permit. DTSC's CIB initiated an investigation. DTSC CIB investigators met with WEI representatives and were shown a permit issued to WEI by the CBMI, but were not allowed to inspect WEI's Mecca HWF without tribal permission. DTSC's CIB investigation was closed in January 2010.

2006-2011

During this period, DTSC received various inquiries about non-RCRA hazardous waste being transported to WEI's Mecca HWF.

Date	Contact	DTSC Response
June 2007	Summary of Violations Transporter Inspection	During the inspection, the DTSC inspector noted that the transporter was transporting hazardous waste to an unauthorized facility, WEI Mecca HWF. The transporter was told that no action would be taken until DTSC decides the regulatory status of treatment, storage and disposal facilities on Indian land.
July 2009	Call from generator to DTSC asking if generators are liable for paying California land disposal fees for hazardous waste sent to an Indian Reservation in California since the facility is apparently not in California's jurisdiction.	DTSC responded that generators shipping waste to a facility located on an Indian Reservation in California might be held liable for payment of disposal fees. Health and Safety Code section 25174.1 states: "Any person who disposes of hazardous waste at any site that is not an authorized hazardous waste facility shall be responsible for payment of fees pursuant to this section..." [Disposal Fee]
May 2010	E-mail from private party to DTSC requesting confirmation that WEI Mecca HWF was acceptable to DTSC to receive non-RCRA lead	As long as the facility confirms that they would accept the soil, it's acceptable to DTSC.

Date	Contact	DTSC Response
	and organochlorine pesticide (OCP) contaminated soil	
July 2010	E-mail from private party to DTSC requesting confirmation that WEI Mecca HWF is authorized by DTSC to accept hazardous waste (for treatment or disposal) from generators located in California. If WEI Mecca HWF is not authorized to accept hazardous waste provide a statement to that effect.	Based on a review of our records, we do not believe we have any record of authorizing this facility to accept hazardous waste.
October- November 2010	Inspection Report. In October 2010, Generator self reported that non-RCRA waste was transported by generator's contractor to WEI's Mecca HWF.	DTSC's Inspector contacted U.S. EPA to determine which federal agency had jurisdiction over WEI. U.S. EPA stated that as the waste was non-RCRA waste that the federal Bureau of Indian Affairs and the Tribal Council had the authority over the facility. In the Inspection Report, the inspector reported telling the generator's representative that DTSC has no authority to regulate non-RCRA hazardous waste on the Indian reservation.

This list of communications identified above reflects that DTSC did not have a consistent response to questions concerning the operations at WEI's Mecca HWF.

In 2009, a DTSC staff person collecting and analyzing data from the HWTS for hazardous waste revenue analysis discovered that the WEI Mecca HWF was receiving large volumes of hazardous waste. The staff person contacted staff working with the HWTS and permitting to see if they were aware of a permit or

variance for the facility to operate. Upon learning that there were no permits or variances issued for WEI's Mecca HWF, the staff person initiated confidential communications with DTSC legal counsel. This is the only instance we have found where an analysis of the HWTS identified a potential problem with the WEI Mecca HWF. The HWTS data system does not have automatic alerts that would flag potential violators of hazardous waste laws such as potentially unauthorized facilities accepting hazardous waste.

From 2006 to 2011 there were ongoing confidential communications between DTSC program staff and DTSC legal counsel concerning WEI's Mecca HWF. Based on our review, it appears that prior to 2010 discussions that occurred concerning WEI's Mecca HWF were, in general, confined to two DTSC units and communication outside of those units to DTSC staff was minimal.

In mid-September of 2010, the then Acting Director became aware of soil being taken to WEI's Mecca HWF due to complaints alleging that material from a Los Angeles Unified School District (LAUSD) cleanup site was disposed of inappropriately. The data DTSC had received concerning the soil from this LAUSD site indicated that the soil transported to WEI's Mecca HWF was not hazardous waste and it was shipped to the facility as nonhazardous waste.

In 2011, as a result of reporter inquiries and community complaints of odors emanating from WEI's Mecca HWF, DTSC's Executive Staff became involved in responding publically to issues concerning WEI's operations of its Mecca HWF.

In conducting this performance review, we reviewed DTSC guidance documents related to transportation plans, remedial and removal action work plans, and remedial action orders; DTSC and US EPA fact sheets and guidance on obtaining EPA Identification Numbers; and talked with DTSC performance managers about the responsibilities project managers have with respect to the disposal of hazardous waste from contaminated sites.

Finding: While individuals within DTSC knew of the issues concerning WEI's HWF operation in Mecca it appears that the primary impediment to take action on the matter was the absence of a legal and policy determination as to how to address the transport to, disposal of and treatment of non-RCRA hazardous waste on Indian country where the facility had not received a permit from DTSC or the tribe had not entered into a cooperative agreement with Cal/EPA pursuant to Article 8.6.

Recommendation: *The authority of DTSC with respect to the transport of non-RCRA hazardous waste and non-RCRA hazardous waste activities in Indian country must be clarified and communicated.*

Finding: The communication patterns within DTSC did not facilitate key Executive Staff elevating the issue to a level where those policy issues could be vetted and executive decisions made as to a course of action to implement.

Recommendation: *Improve DTSC internal communications by establishing regularly scheduled meetings of Executive Management, Program Managers and Chief Counsel for DTSC to relay and discuss important, sensitive and cross-program issues and promptly apprise the Director of these issues.*

Finding: Internal processes need improvement. The process involving site cleanup guidance documents did not incorporate guidance for project managers to verify the permitting status of facilities, including facilities on Indian country, proposed for disposal of hazardous waste from contaminated sites. In addition, the hazardous waste tracking system data was not reviewed on a schedule that would result in the identification of potential unauthorized or illegal treatment, storage, and disposal facilities and transporters in California.

Recommendation: *DTSC's site cleanup guidance documents should be updated on a regular basis to provide staff with guidance to verify the permitting status of facilities proposed for disposal of hazardous waste from contaminated sites and DTSC's authority with respect to non-RCRA hazardous waste activities on Indian country. DTSC guidance documents should incorporate requirements that would assure hazardous waste taken to a non-tribal facility in California is sent to a permitted or authorized facility under the provisions of the Health and Safety Code authorized to accept such waste. Staff should be assigned to routinely monitor the HWTS system to identify potential unauthorized or illegal hazardous waste treatment, storage, and disposal facilities and transporters in California.*

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