April 12, 2017

Dear Chairperson Kracov and Members of the Independent Review Panel:

On behalf of the Center on Race, Poverty & the Environment, I write to share our comments on the current draft of the Independent Review Panel’s Sixth Report to the Governor and the Legislature Pursuant to Health & Safety Code Section 57014(f) (“Report”). The Report relies heavily on information provided by the Department of Toxic Substances Control (DTSC) and overlooks several recommendations provided by CRPE and members of the People’s Senate based on our collective experience working to abate the negative impacts of living near contaminated sites.

The Report is undermined by the Panel’s repeated insistence on largely ignoring specific sites which, when analyzed together, indicate many widespread and systemic issues with DTSC’s site-mitigation program.1 These include inadequate and untimely investigations and site characterization; inequalities in clean-up standards; non-compliance with remedial action plans; failure to adequately factor community acceptance in selecting remedies; lack of communication and partnership with impacted communities; and undue influence of the responsible parties.

I request that the panel review the prior reports provided by the People’s Senate; acknowledge, validate and address communities’ experiences and concerns with DTSC’s site mitigation programs; and provide additional and more robust recommendations to improve the agency’s performance. I outline below our specific comments on the content of the report and specific recommendations for your consideration.

I. The Report’s Statements Regarding the Overarching “Success” of DTSC’s Clean-Up Activities Are Unfounded.

The IRP declares, without supporting evidence, that the “vast majority of toxic substance cleanups are successful.” (Report at 9.) Since the IRP has not outlined benchmarks of success for site remediation, this conclusion is unfounded. Moreover, in instances where there is little public participation in DTSC’s cleanup activities, it is difficult to measure the accuracy of

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1 CRPE acknowledges and appreciates that the Report does identify three specific sites, including Agricultural Park, Santa Susana Field Laboratory, and Exide. However, CRPE continues to request that the IRP conduct a more comprehensive analysis of People’s Senate sites to identify patterns of deficiencies across communities.
DTSC’s own conclusions regarding the “success” of its remediation efforts. A more accurate statement could be: “The vast majority of toxic substance cleanups do not generate controversy.”

The successful remediation examples provided in the IRP’s report are sites with little to no public involvement. (See Report at 11.) Envirostor indicates that DTSC provided only two community notices over 11 years of remediation activities for the Porsche Experience Driving Center in Carson and only two community notices over 19 years for the Bay Street redevelopment project in Emeryville. A better indicator of success would be sites where DTSC involved and worked with the community on a remediation site and adequately addressed public concerns.

Finally, the IRP’s statement on page 11 that “[i]t is not easy for a government agency and a community to have a productive dialogue about health and environmental risks when the latter is directly impacted by those risks, and worries exist about community health…” reflect a mistaken belief that DTSC’s remediation obligations and community concerns are at odds. This is simply not the case. DTSC’s primary responsibility is to “protect California’s people and environment from harmful effects of toxic substances by restoring contaminated resources…” and its vision is that “communities are confident that we protect them from toxic harm.” DTSC should be able to have a productive conversation with communities impacted by the toxins that DTSC is tasked with remediating. If, as appears to be the case, DTSC can present few examples of successfully partnering with and addressing a community’s concerns regarding its remediation activities, this should be identified as an area of concern in the IRP report.

II. DTSC Does Not Timely Evaluate and Investigate Potential Hazardous Waste Threats

In 2006, DTSC received information from the local water district about possible TCE and PCE water and soil contamination in Delano, CA. In the subsequent decade, during which DTSC undertook multiple “investigations,” DTSC did not alert the community about the potential contamination, which by that time had seeped into the indoor air at dangerous levels in multiple businesses. DTSC ultimately issued a Proposition 65 notice indicating a significant and immediate cancer threat to the community ten years after first suspecting contamination.

The IRP report does not address the long time-periods between discovery, evaluation, site characterization, and remedy selection. The IRP report does not address the community’s right to information about suspected contamination and the importance of informing community about potential risks pending a remedial action. The IRP benchmarks do not request any information on the time periods between discovery and evaluation or investigation.

DTSC’s failure to communicate risk to impacted communities pending its investigation threatens the health of residents. The long time-periods between discovery and the undertaking of remedial activities exacerbate that threat. The IRP should address these deficiencies in its report.

III. DTSC Does Not Adequately Engage and Communicate with Impacted Communities After the Selection of a Remedial Action Plan

As acknowledged in the IRP’s report, remedial actions are generally lengthy and require some public participation at the outset. However, once DTSC adopts a remedial action plan,
there is little opportunity for community participation and communication. The IRP also acknowledges that any public participation activities performed during the design and installation of a selected remedy are completely optional. (Report at 6.) This means that communities are left in the dark for years or even decades about the status of the site, the efficacy of the remedy, and the continuing threat to public health.

After the adoption of a remedial action plan in Shafter, CA, in 2008, residents repeatedly requested updates from DTSC about the status of the cleanup and monitoring results. Despite these repeated requests, DTSC has not, to date, returned to the community to provide updated information.

CRPE supports the IRP’s recommendation to develop procedures to give all stakeholders the opportunity to discuss and contribute to the planning and implementation of site mitigation plans throughout the project period. However, CRPE requests additional commitments to inform impacted communities about the status and efficacy of remedial actions, including providing monitoring data to interested parties.

IV. DTSC Follows No Formal Procedure to Alter Remedial Action Plans After Their Approval

Despite the formal nature of adopting a remedial action plan, including a public hearing and opportunities to provide public comment, once DTSC adopts a remedial action plan, DTSC can negotiate with the responsible party to alter the plan with no public notice or formal proceeding.

For example, the project manager for the Shafter Brown & Bryant site unilaterally entered into an oral agreement with the responsible party to cease the groundwater monitoring activities required in a remedial action plan. The community’s primary concern was the potential migration of contamination into the town’s water supply. By the time community residents became aware that DTSC has ceased requiring groundwater monitoring activities, the monitoring wells had run dry, and DTSC no longer had the ability to evaluate whether the contamination posed a threat to the City’s drinking water.

It is unclear at this time whether the project manager violated any policies or regulations in orally suspending activities required by the remedial action plan. However, the matter has been raised to multiple staff in leadership positions at DTSC and there has been no follow-up or resolution of the issue.

The IRP should recommend that any action to alter a remedial action plan should follow a set process and allow for community input.

V. DTSC Does Not Sufficiently Consider Community Acceptance in Selecting its Remedy

DTSC must address community acceptance “to the extent adequate information is available at the time.” (Remedial Action Plan Policy at 11.) However, it is prioritized last among the nine factors used to evaluate alternatives for cleaning up a hazardous substance release. (Id. at 38.) Community acceptance should be a key factor in selecting a remedy rather than an afterthought. Remedies involving soil contamination are especially controversial with
communities across California taking strong stances on the benefits and costs of soil removal versus soil remediation. This has led to the break-down of many potential partnerships between DTSC and communities. DTSC’s devaluing of community acceptance in its selection of remedy is detrimental to rebuilding community trust and being responsive to different community needs.

The IRP report notes that DTSC has embarked upon an initiative to reduce remedy selection time by agreeing to conceptual site models and clean-up goals early in the remedy selection and dispensing with the “time-consuming corrective measures study.” CRPE is concerned that this initiative may eliminate or further reduce the consideration of community acceptance in remedy selections. While reducing the time for adopting a remedial action plan is important, it should not be done without involving the community in the selection process.

VI. The IRP Report Ignores Many Areas of Community Concerns with DTSC’s Clean-Up Program

Advocates and residents impacted by DTSC have detailed numerous problems in DTSC’s clean-up programs. The IRP report does not address many of these concerns. The community concerns previously presented to the IRP include:

- Clean-ups lack standardized criteria and are largely based on the funding available from responsible parties.
- Site characterization largely left to responsible parties.
- Communities subject to different clean-up standards and goals.
- Cumulative impacts not considered in determining level of site remediation required.
- Clean-ups are piecemealed.

VII. The IRP Should Include Additional Recommendations to Address Community Concerns in its Report

The IRP should consider adding the following recommendations to its report:

- Adopt and publish standards for site remediation and site characterization. Standards should consider cumulative impacts and community vulnerability.
- Track and publish in a user-friendly format clean-up goals and background levels for each remediation site to allow for easy comparison and analysis.
- Adopt policy and practice to conduct simultaneous cross-media testing where contamination suspected. Include all media in remedial action plans.
- Provide neutral third-party testing as selected by a committee that includes a majority representation of impacted residents. Testing to be funding by polluter.

VIII. The IRP Should Include Additional Data Requests in its Report

The IRP should consider adding the following data requests to its report:
- Amount of time between discovery of suspected contamination and site characterization.
- Amount of time between site characterization and commencement of remedial activities.
- Total amount of time for site clean-up.
- Amount of money spent on remediation by site, with CalEnviroScreen overlay.

We rely on the IRP as the only current mechanism to provide oversight over the Department of Toxic Substances Control as this agency has consistently failed to protect California’s most vulnerable communities and has been plagued by a long history of mismanagement and poor policies. We will continue to provide information to the IRP to inform its recommendations and provide concrete examples of how DTSC impacts the lives of residents neighboring toxic sites. We hope that these examples inform the IRP’s report and recommendations and, ultimately, reduce toxic threats to those at highest risk from toxic exposures. Thank you for your consideration of the issues raised in this letter.

Sincerely,

Ingrid Brostrom,
Senior Attorney