

## **Master Response to Comment Document: DTSC Civil Rights and Language Access Policies**

This response document is intended to address the primary concerns raised in the public comments received on DTSC's draft Civil Rights Policy and draft Language Access Policy. DTSC reviewed and considered all the comments received and significantly revised the policies in response to these comments. Key language was changed in both policies that:

1. Explains the definition of unlawful discrimination to be fully inclusive of Title VI and CA Government Code Section 11135, and defines both intentional and disparate impact discrimination.
2. Emphasizes the department-wide applicability of the policies while providing clearer incorporation of language related to the Kettleman Settlement Agreement.
3. Clarifies who can file a civil rights complaint with DTSC to include individuals who witnessed or have knowledge of alleged discrimination based on someone's actual, or perceived, protected characteristic.
4. Makes clear that recipients of DTSC funding, such as grantees and contractors, are included within the scope of the policies.
5. Prohibits intimidation and hostile environments that prevent meaningful public participation, as well as practices which, in effect, inhibit full and equal access to DTSC's programs and services for Limited English Proficiency (LEP) individuals.

DTSC is also requiring a Civil Rights and Language Access Implementation Plan to provide clear and concrete actions the Department will take to ensure civil rights protections and equal language access in programs and services. Staff training, monitoring of activities, reporting, and compliance with the policies are addressed in the Implementation Plan.

The following sections are intended to summarize and provide responses to the primary questions and concerns from the public comments DTSC received ([available on DTSC's website](#)).

## I. Is DTSC complying with the Kettleman Settlement Agreement in the development of these policies?

The Kettleman Settlement Agreement between Greenaction for Health and Environmental Justice, *El Pueblo para el Aire y Agua Limpia*, the California Environmental Protection Agency, and the Department of Toxic Substances Control has been utilized to determine the contents of the draft language access and civil rights policies. DTSC has specifically incorporated all stipulated requirements from the agreement into the policy, and provided extensive consideration for all the other issues and concerns raised in the agreement.

## II. Is the definition of discrimination overly narrow and not fully inclusive of Title VI and GC 11135?

DTSC intends the Civil Rights Policy to be comprehensive and ensure that no unlawful discrimination occurs. In light of several comments noting that unlawful discrimination and denial of services based on discrimination were not addressed as discrete issues, DTSC has clarified the language throughout policies and the stated definitions to clearly identify that denial of services based on a protected characteristic, perceived protected characteristic or association with a person who has, or is perceived to have, a protected characteristic under Title VI and/or Government Code section 11135 will not be tolerated. The policy is also revised to clearly convey that in addition to a denial of services, unlawful discrimination is also prohibited under the policy.

## III. How is disparate impact discrimination addressed and incorporated in the policies?

DTSC has clarified in both the Civil Rights and Language Access policies that Section 11135 and Title VI impose prohibitions on both intentional discrimination and disparate impact discrimination. Definitions of both types of discrimination have been provided in these policies.

#### IV. Can there be greater clarity and incorporation on how cumulative impacts for local communities will be addressed?

DTSC utilizes CalEnviroScreen as an information tool to assist the department in assessing the potential impacts of a project and determining effective methods for addressing those impacts and improving public engagement in communities. CalEnviroScreen is a screening methodology that can be used to help identify California communities that are disproportionately burdened by multiple sources of pollution. Under the Health and Safety Code as well as CEQA regulations, screening methodologies alone do not meet the required threshold to deny a permit.

For permitting decisions and site mitigation projects, DTSC conducts environmental assessments as laid out in CEQA, which may include a community assessment to determine impacts on local communities, and an environmental cumulative impact analysis. Additionally, DTSC is developing a process for assessing cumulative impacts and community vulnerability assessment under SB 673.

#### V. Can there be a shift in DTSC's use of Statements of Overriding Considerations?

The California Environmental Quality Act (CEQA) outlines statements of overriding considerations as a decision tool available to agencies and entities performing CEQA assessments. DTSC possesses no authority to limit how a statement of overriding consideration can or cannot be utilized in the permit and site mitigation process.

#### VI. Can there be greater clarity on the circumstances of when another agency's Environmental Impact Report can and cannot be relied upon by DTSC?

Several commenters suggested that DTSC should adopt a policy whereby it declines to rely on environmental impact reports (EIRs) previously prepared and certified by other agencies when the processes adopted by those agencies may have violated the civil rights of residents, were conducted in a hostile environment, were not language accessible, or otherwise denied the public meaningful opportunities for public participation. DTSC appreciates the concerns noted by the commenters and understands the importance of the comment.

The circumstances under which DTSC may prepare a new EIR and under which DTSC must rely on a previously certified EIR are established by the Legislature in the Public Resources Code. (See Pub. Resources Code, §§ 21166, 21167.3.) If the original EIR was timely challenged and ultimately decertified by a court, then an agency may not reasonably rely on the document in lieu of preparing its own environmental analysis. (See *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1375–1376, 1384, 1387.) Barring such legal action and declaration by the courts, DTSC must presume as a matter of state law that the EIR was adequate at the time it was prepared and certified. (Pub. Resources Code, § 21166.2.) DTSC has no judicial authority to make its own determinations about the adequacy of such previously certified documents. However, DTSC does have authority under CEQA to review a previously certified EIR to determine whether subsequent analysis is warranted under Public Resources Code section 21166 and CEQA Guidelines section 15162. For the public's reference, Section 21166 is provided in full:

*When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:*

- 1. Substantial changes are proposed in the project which will require major revisions of the environmental impact report.*
- 2. Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report*
- 3. New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.*

(Pub. Resources Code, § 21166)

## VII. How will Native Nations and Tribal Cultural Resources be addressed and protected in these policies?

DTSC recognizes that Tribes have unique rights and that Tribal Cultural Resources require specific protections. DTSC shares commenters' opinions that this is a critical issue to Native Nations, or Native American Tribes, as described in the California Environmental Protection Agency's Tribal Consultation Policy. Members of Native American Tribes are included within the scope of DTSC's Civil Rights and Language Access policies. Additionally, consultation between government agencies and Native

American Tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. To more fully address Tribal concerns, DTSC is developing a separate policy in addition to the guidance provided under California Environmental Protection Agency's Tribal Consultation Policy.

### VIII. Will the definition of who the policies apply to be expanded to include all beneficiaries of funding from DTSC?

DTSC has revised and clarified the policy's language to include grantees and other funding recipients, in addition to employees and contractors, as a type of beneficiary that must follow funding requirements as outlined in Government Code section 11136.

### IX. How will the DTSC Civil Rights Complaint Process be clarified regarding who can file a claim and the process DTSC will follow?

DTSC intends for the Civil Rights Complaint process to provide members of the public an avenue to directly engage with DTSC to address any discrimination that may have occurred. DTSC also recognizes the importance of providing members of the public information on all their available avenues for any complaints they may have. Because of this, DTSC has included information on how to file a complaint with DTSC or the US EPA under a Title VI claim. Additional information has been added to the policy to also inform individuals about the Department and Fair Employment and Housing (DFEH) Civil Rights complaint process for complaints under Government Code Section 11135. DTSC will be revising the Civil Rights Policy to include the process and circumstances under which a civil right complaint filed with DTSC will be referred to DFEH, in the event that DTSC has reasonable cause to believe a civil rights violation occurred.

The comments DTSC received requested clarification on who can file a civil rights complaint within DTSC's Civil Rights Complaint process. Claims may be filed through DTSC's Civil Rights complaints process by any individual who feels they have been discriminated against based on an actual or perceived protected class characteristic, an individual's authorized representative, or an association with someone with an actual or perceived protected characteristic. Someone who witnesses or has knowledge of any discrimination may also file a complaint. The Civil Rights policy definition of a complainant and subsequent references in the policy will be updated to more clearly reflect this issue.

Several comments were made relating to clarifying nuanced language within the policies. Revisions incorporating these concerns, such as “ensuring federal *and state* civil rights requirements are met,” and “full access” to programs and activities will be made. Corresponding changes to the policies process will also be made to the DTSC complaint form to ensure consistency in the definitions and application of the policy.

## X. What remedy and appeals process will be available for complaints processed by DTSC’s Office of Civil Rights?

When DTSC has accepted a complaint for investigation, it will conduct a neutral and thorough investigation into the allegations. Upon completion of its investigation, DTSC will reach a determination on the merits of the complaint. DTSC will inform the Complainant in writing of its determination on the merits of the discrimination complaint.

If a complaint is substantiated by the Department, it will take appropriate corrective action that may include prohibiting discriminatory actions, disciplinary action, instituting additional preventative measures, and withdrawing DTSC funding from funding recipients. Furthermore, if DTSC has the reasonable belief that a contractor, grantee or local agency discriminated against an individual due to a protected characteristic, the complaint will be referred to DFEH in accordance with Government Code 11136.

If a Complainant disagrees with DTSC’s written determination on the merits of the discrimination complaint, they may appeal the department’s decision by filing a claim with DFEH. As referenced above, DFEH has a laid-out process for investigating claims of civil rights violations in the form of discrimination. Information on how to contact DFEH is included in the policy.

## XI. Will the DTSC Complaint form be clarified so it is easier for members of the public to distinguish what information is required and what information is requested if it is available?

DTSC recognizes that an individual who has encountered discrimination may not know the identity of who they interacted with or who engaged in the alleged discrimination. It is DTSC’s position that the identity of such individuals is not required for someone to file a complaint with the Office of Civil Rights, as stated on the complaint form. However, if

identifying information is available regarding specific individuals involved, the department requests that information be provided on the complaint form. Due to the receipt of several comments highlighting this issue, DTSC has clarified the language used in the policy and complaint form to convey which portions of the form are required for a complaint to be processed, and what information is requested in the event it is available. The complaint form instructions have also been revised to emphasize this message.

## XII. Does the Civil Rights Policy apply to all DTSC programs?

The scope of the Civil Rights Policy, as stated in the policy implementation section, is that the policy will apply department-wide to ensure civil rights protections. This will include all areas of operation such as, but not limited to, permit decisions, enforcement activities, rulemaking, and cleanup decisions.

## XIII. Did DTSC consider and incorporate all the comments it received during the comment period?

DTSC values all the feedback it has received from members of the public and interested organizations. We have reviewed all the comments received extensively and have incorporated suggestions, modified processes and clarified language in both policies to remove confusion and ensure these policies provide clearer guidance. In addition, the comments originally dated August 2, 2017, were resubmitted in the comment period for both policies. These comments have been reviewed and given the same thorough consideration as all other comments from the public.

## XIV. How will vital documents be identified and translation factors be considered in Language Access Policy?

DTSC recognizes the importance of determining what documents will be translated. The definition of Vital Documents and Information is intended to provide an overview definition for readers of the policy. Subsequently, this policy provides greater detail on how the determination of a document (in its entirety or portions of the document such as an executive summary) is vital and in need of translation. Even further detail regarding the internal process DTSC will use in making this determination will be available in the Civil Rights and Language Access Implementation Plan, including a process decision tree.

Concerns about the inclusion of cost as a factor for if a document is vital and will be translated has also been raised. DTSC has modeled its approach for identifying vital documents based on the US Environmental Protection Agency's "Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" (69 Fed. Reg. 25602-35613). These approaches discuss and outline the factors that should be considered and include cost as one of them. (*Id.*; Dymally-Alatorre Bilingual Services Act, Ca. Gov. Code, section 7290 et seq.; Government Code section 7299; Cal. Code Regs., tit.2, section 11162; 69 Fed. Reg. 25604, 607; Gov. Code section 7299.) The cost factor will only weigh into a translation decision if it has a prohibitive impact on DTSC as a whole, and is not constrained to any subgroups of specific programs or project budgets.