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The Department of Toxic Substances Control (“DTSC”) is committed to ensuring that it complies with all applicable civil rights laws when making decisions, including the upcoming decision on the hazardous waste permit renewal application for the Kettleman Hills Facility (“KHF”) and the accompanying public participation process. In a 2016 settlement agreement with community organizations, DTSC expressly agreed to “consider ... [w]hether the decision on the permit application and processes undertaken in relation to the permit decision are consistent with applicable civil rights laws.”

To help meet its commitment and ensure that DTSC complies with all applicable civil rights laws, DTSC has hired the law firm Altshuler Berzon LLP to advise DTSC and provide independent expert guidance and analysis with respect to DTSC’s compliance with civil rights laws during the Kettleman Hills Facility process and decision. As part of that analysis, Altshuler Berzon has provided the report that accompanies this memo, which DTSC is releasing to the public. DTSC always considers civil rights obligations and strives for equity in its actions, permitting and otherwise. It is taking the extra step of making this analysis available for the KHF permitting decision in the interest of transparency and in light of the settlement agreement.

In the 2016 agreement, DTSC also agreed to bolster its civil rights compliance, including by considering existing community vulnerabilities when making its KHF permitting decision; analyzing improved air quality controls; supporting additional environmental monitoring and enforcement; supporting efforts to develop public health assessments and programs; and adopting civil rights and language access policies.

DTSC has also undertaken public engagement efforts regarding the KHF application and process, including regularly meeting with stakeholders, holding a public workshop in Spanish and English, providing email notices and updates, and releasing its draft Environmental Document Analysis in Spanish and English for public review and comment. DTSC is committed to carrying out its responsibilities with respect to the KHF permit renewal decision in a nondiscriminatory manner, and to providing continued meaningful opportunities for public input as the process continues.

DTSC has closely reviewed the attached independent report by Altshuler Berzon and is committed to following its guidance and recommendations to ensure that DTSC fully complies with civil rights law in relation to the pending Kettleman Hills Facility permit renewal decision and public process.

To: Office of Legal Counsel, Department of Toxic Substances Control (“DTSC”)
From: Altshuler Berzon LLP
Re: Kettleman CRA
Date: September 11, 2023

I. INTRODUCTION

The Kettleman Hills Facility (“KHF”) is a commercial hazardous waste treatment, storage, and disposal facility owned and operated by Waste Management, Inc. through its subsidiary Chemical Waste Management, Inc. (“CWM”). KHF is located in Kings County, California, approximately three miles from the nearest community of Kettleman City, whose population is more than 98% Hispanic or Latino.

The Department of Toxic Substances Control (“DTSC”) is a state agency that oversees the permitting of hazardous waste facilities in California. In 2014, DTSC approved CWM’s permit modification authorizing the expansion of the KHF hazardous waste landfill. Kettleman City community organizations filed a Title VI Complaint with the U.S. Environmental Protection Agency (“EPA”) Office of Civil Rights (now External Civil Rights Compliance Office) against DTSC and the California Environmental Protection Agency (“CalEPA”), alleging that DTSC’s decision was intentionally discriminatory and had an unlawful disparate impact on Latinos, and that the permitting process intentionally discriminated against Latinos and Spanish-speaking individuals. The parties entered into a Settlement Agreement in 2016, in which DTSC and CalEPA expressed their commitment, among other things, “to carry[] out their responsibilities in a nondiscriminatory manner,” “to provide meaningful opportunities for public input, including language access and community education,” and “to work together” with the community organization signatories “to increase opportunities to assist vulnerable communities.”

As part of the Settlement Agreement, DSTC agreed to “consider,” in deciding whether to issue or deny CWM’s permit renewal application submitted in February 2013, “[w]hether the decision on the permit application and processes undertaken in relation to the permit decision are consistent with applicable civil rights laws.” To help satisfy this requirement, DTSC hired Altshuler Berzon LLP to assist it in analyzing DTSC’s compliance with applicable civil rights laws in deciding whether to grant the KHF permit renewal application, and if so, on what terms. This report is based on our analysis of the current state of the law, our informational interviews of DTSC staff in the permitting and administrative services divisions regarding the permitting process and DTSC policies, and our independent and thorough review of documents provided at our request by DTSC relevant to the processes, policies, history, and current facts regarding the KHF permit renewal application, including but not limited to: relevant DTSC policies, plans, and manuals; CWM’s applications for the facility, as revised; DTSC’s notices of deficiency regarding the applications; health risk assessments and summaries of monitoring results for the facility; prior California Environmental Quality Act (“CEQA”) documents; public comments; and samples of DTSC’s public participation documents.

This report provides a high-level analysis of whether DTSC’s substantive decision and decision-making process with respect to the KHF permit renewal application are in compliance with relevant civil rights laws, based on currently available information and the current state of the law. This report does not purport to evaluate the scientific validity of the information provided by DTSC. Furthermore, DTSC’s application review process is ongoing, including its

CalEnviroScreen analysis and its public participation processes. Thus, this report addresses DTSC’s compliance with civil rights law to date, while acknowledging that there are additional steps in the permit renewal decision and civil rights evaluation processes to be performed. It is our opinion that DTSC’s actions thus far with respect to the KHF permit renewal application are consistent with applicable civil rights laws. A final determination on civil rights compliance will depend on the ultimate permit renewal decision and factors on which it is based, and on the public participation process.

II. BACKGROUND

A. The Kettleman Hills Facility

KHF is a commercial hazardous waste treatment, storage, and disposal facility located in rural western Kings County, California, southwest of the Interstate 5 and State Route 41 intersection. KHF contains several active, inactive, and closed hazardous waste management units as well as non-hazardous solid waste landfills and other facilities for processing waste. KHF has been used to store hazardous waste since 1975; the current owner, CWM, acquired KHF in 1979. In July 2020, the EPA issued KHF a renewed and modified permit under the Toxic Substances Control Act (“TSCA”) that allows the facility to store, treat, and dispose of polychlorinated biphenyls (“PCBs”). KHF is one of only two currently operating hazardous waste landfills in California and is the only landfill in the state that processes PCBs.

CWM submitted an application to DTSC for renewal of its Hazardous Waste Facility Permit for the Kettleman Hills Facility on February 13, 2013. If approved, the permit would be issued for up to a 10-year period, with continued authorization if the facility meets certain submittal requirements. CWM’s proposed operations include its current operations, plus some additional activities, including adding a waste shredder and temporary storage in the Final Stabilization Unit building; adding outdoor storage and bulking/repackaging of PCB waste in the PCB Flushing and Storage Unit; and adding a solids/liquids building for offsite and onsite treatment and/or disposal to the Drum Storage Unit.¹

CWM’s permit application is proceeding through DTSC’s technical review, during which DTSC has issued four Notices of Deficiency, and CWM submitted several revised applications in response. CWM submitted the eighth and most recent version dated April 13, 2023.

B. Kettleman City

Kettleman City, located approximately at the intersection of I-5 and SR-41, is about 3.5 miles northeast of KHF and is the closest community to the KHF facility. Kettleman City’s population of approximately 1,242 is more than 97% Hispanic or Latino.² Approximately 100% of the residents speak Spanish; 95% of residents speak English less than “very well.”³ The population of Avenal, the next closest city, is approximately 84% Hispanic or Latino, and about

¹ In 2020, EPA renewed CWM’s federal permit to store, treat, and dispose of PCBs, including the additional PCB operations proposed in CWM’s DTSC permit application.

² See U.S. Census Data, 2020 Decennial Census, Table P9 for Kettleman City, <https://data.census.gov/cedsci/table?q=Kettleman%20City%20CDP,%20California%20Race%20and%20Ethnicity> (last accessed Aug. 30, 2023).

³ See U.S. Census Data, 2021 ACS 5-Year Estimates Table C16001 for Kettleman City, <https://data.census.gov/table?q=Kettleman+City+CDP,+California&tid=ACSDT5Y2021.C16001> (accessed Aug. 30, 2023).

33% of its Hispanic or Latino residents speak English less than “very well.”⁴ The population of Kings County (in which Kettleman City and Avenal are located) is approximately 57% Hispanic or Latino, and the population of California is approximately 40% Hispanic or Latino.⁵

According to CalEnviroScreen, Kettleman City faces a higher pollution burden than 92% of California, including high ozone, particulate matter, and pesticide levels.⁶ Compared to the rest of California, Kettleman City also faces higher socioeconomic and health burdens, including low education, linguistic isolation, and poverty, and a higher incidence and risk of asthma, low birth weight, and cardiovascular disease. EPA’s environmental justice and mapping tool, EJScreen, identifies similar pollution, socioeconomic, and health burdens on Kettleman City.⁷

III. OVERVIEW OF LEGAL STANDARDS⁸

DTSC has an obligation under both federal and state law to ensure that it not discriminate on the basis of race, color, or national origin (which the U.S. Supreme Court has interpreted to include discrimination on the basis of English proficiency). Specifically, Title VI of the Civil Rights Act, 42 U.S.C. §2000d *et seq.*, and EPA’s Title VI implementing regulations, 40 C.F.R. Part 7 (40 C.F.R. §7.10 *et seq.*), prohibit recipients of federal financial assistance from discriminating on the basis of race, color, or national origin (a “protected characteristic”) in their programs or activities. As a recipient of EPA funding, DTSC is subject to Title VI and EPA’s Title VI implementing regulations. California Government Code §11135 similarly prohibits any state agency, including DTSC, from discriminating on the basis of race, color, ancestry, national origin, or ethnic group identification.⁹

Both Title VI and California Government Code §11135 prohibit two different forms of discrimination: *intentional discrimination* (sometimes referred to as “disparate treatment”) and

⁴ See U.S. Census Data, 2020 Decennial Census, Table P2 for Avenal, <https://data.census.gov/cedsci/table?text=P2&g=0600000US0603190170&tid=DECENNIALPL2020.P2> (last accessed Aug. 30, 2023); U.S. Census Data, 2021 ACS 5-Year Estimates Table C16001 for Avenal, <https://data.census.gov/table?q=Avenal+CCD,+Kings+County,+California&g=060XX00US0603190170&tid=ACS DT5Y2021.C16001> (last accessed Aug. 30, 2023).

⁵ See U.S. Census Data, Quick Facts, California and Kings County, California, <https://www.census.gov/quickfacts/fact/table/CA.kingscountycalifornia.US/PST045221> (last accessed Aug. 30, 2023).

⁶ See <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40> (reviewing the Kettleman City zip code). CalEnviroScreen is a mapping tool prepared by the California Office of Environmental Health Hazard Assessment (“OEHHA”) that helps identify California communities that are most affected by many sources of pollution, and locations where people are often especially vulnerable to pollution’s effects. See About Cal Enviro Screen, OEHHA, <https://oehha.ca.gov/calenviroscreen/about-calenviroscreen>

⁷ See <https://ejscreen.epa.gov/mapper/> (reviewing Kettleman City).

⁸ This report is based on the state of the law as of August 2023, but it should be noted that application of civil rights standards to environmental permitting is a rapidly developing area of the law.

⁹ California Government Code §11135 also prohibits discrimination on the basis of sex, religion, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. DTSC also has an obligation to comply with several other nondiscrimination requirements, including but not limited to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (prohibiting discrimination against persons with disabilities under federally-assisted programs or activities), the Age Discrimination Act of 1975, 42 U.S.C. §12131 *et seq.* (prohibiting age discrimination under federally-assisted programs), and Section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92–500 (prohibiting sex-based discrimination under programs or activities receiving federal assistance under the Clean Water Act). Analysis of those requirements is beyond the scope of this report, which focuses on DTSC’s race and national origin nondiscrimination obligations.

disparate impact discrimination. Intentional discrimination occurs when an agency’s action is motivated by an intent to discriminate on the basis of a protected characteristic, such as race, color, or national origin. Disparate impact discrimination occurs when an agency’s action, although not intentionally discriminatory, causes a disproportionate, adverse impact on a protected class of individuals, which is not justified by a “substantial legitimate justification,” or which could be avoided or minimized through comparably effective alternatives.

Title VI and Government Code §11135’s prohibition on intentional and disparate impact discrimination applies to both DTSC’s *substantive decisions* and its *decision-making process*. Thus, in deciding whether to grant or deny the KHF permit renewal application, DTSC must ensure that both its substantive decision and its decision-making process are not intentionally discriminatory and do not have an unlawful disparate and adverse impact on a protected group.

To assist agencies in ensuring nondiscrimination in their decision-making processes, EPA has published guidance on nondiscriminatory public involvement processes for permitting agencies (“Public Involvement Guidance”) and on the provision of language services to limited-English proficient (“LEP”) persons (“LEP Guidance”). EPA has also issued a Procedural Safeguards Checklist (“EPA Checklist” or “Checklist”) that summarizes the “non-discrimination obligations and best practices” set forth in the two guidances. In addition, DTSC also must comply with California’s Dymally-Alatorre Bilingual Services Act (California Government Code §7290 *et seq.*), which imposes additional procedural requirements for providing language services to LEP individuals.

Pursuant to Sections IV.B and IV.C of the Settlement Agreement, DTSC has also issued a “Title VI and California Civil Rights Policy” and a “Language Access Policy,” both of which are available on DTSC’s website in English and Spanish.¹⁰ DTSC sought and received public comments on prior versions of these documents.

IV. ANALYSIS

A. Substantive Decision on KHF Permit Renewal Application

Title VI, EPA’s Title VI implementing regulations, and California Government Code §11135 prohibit both *intentional* and *disparate impact* discrimination on the basis of race, color, or national origin. DTSC therefore must ensure that its substantive decision whether or not to renew the KHF permit (1) is made without discriminatory intent against a protected class (here, Latinos or LEP Spanish speakers) and (2) does not have an unlawful disparate adverse impact on a protected class.

1. Intentional Discrimination

A permit renewal decision would violate civil rights laws if discriminatory intent were a “motivating factor” in the decision.¹¹ Discriminatory intent can be proven through direct evidence or circumstantial evidence based on the “totality of the relevant facts.”¹² Relevant factors include, but are not limited to, evidence of the decision’s discriminatory impact; the historical background of the decision and other similar decisions; the sequence of events leading to the decision;

¹⁰ See <https://dtsc.ca.gov/get-involved/civil-rights-language-access/>.

¹¹ See *Vill. of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977).

¹² See *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1242 (9th Cir. 2021) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

departures from the agency's normal procedures or substantive conclusions; and a pattern of actions that impose greater harm on protected classes.¹³

We did not find any direct evidence of discriminatory intent or animus against Latinos or LEP Spanish speakers in our staff interviews or in our review of DTSC's policies and procedures and documents related to the KHF permit renewal application.

It is also our opinion that the totality of relevant facts available thus far does not support an inference of discriminatory intent. Although a decision to renew the permit could have a disparate impact on Latinos (see discussion below), DTSC's analyses show that any direct adverse impact is likely to be small, and it is our understanding that DTSC is thoroughly considering the availability of alternatives, including additional permit conditions, to mitigate any disparate adverse impacts. Furthermore, although the CEQA documents for the decision will include the environmental impact report from the 2009 Kings County CEQA process, which has been the subject of civil rights complaints,¹⁴ DTSC has made good faith efforts to engage the public in its current KHF permit renewal consideration process (see discussion below), and it has stated it intends to ensure a robust and inclusive public participation process with respect to the KHF permit renewal decision. As discussed below, it is our understanding that DTSC intends to implement our recommendations regarding its upcoming public participation process to ensure that all participants receive equal treatment and an equal opportunity to have their comments on the draft permit decision heard and considered. Such actions, if undertaken as planned, would demonstrate the agency's good faith and are consistent with our initial assessment of no discriminatory intent.

2. Disparate Impact

Even if discriminatory intent is absent, a permit renewal decision may still violate civil rights laws if it would have a disproportionate "adverse impact" on Latinos. To establish a potential claim of disparate impact, the agency's permit decision must (1) cause (2) sufficiently significant adverse impacts that are (3) disproportionately borne by a protected class. Whether an adverse impact is sufficiently significant to be unlawful is a fact-specific inquiry that takes into account the nature, size, and likelihood of the impact, including any mitigation measures that are employed.¹⁵

If a permit renewal decision would *not* cause a sufficiently disproportionate and adverse impact on Latinos, then there is no unlawful disparate impact. If a permit renewal decision *would*

¹³ These factors derive from a U.S. Supreme Court case, *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), and its progeny and are often referred to as the "Arlington Heights factors." See, e.g., *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 522-23 (9th Cir. 2011); *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cty. Texas*, 6 F.4th 633, 639-40 (5th Cir. 2021); EPA, External Civil Rights Compliance Office Compliance Toolkit, Chapter 1 (Jan. 18, 2017), available at https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf ("EPA Toolkit"), pp. 4-5.

¹⁴ During the prior Kings County CEQA process, there were reports and complaints that police and their dogs were used to intimidate Latino residents from participating in hearings, and hearings and documents were only provided in English. DTSC has determined that, under the CEQA regulations, it will prepare a CEQA addendum to the prior environmental report that addresses any new effects or operations. See DTSC Environmental Document Analysis (Feb. 2022) at 77. DTSC's 2022 Environmental Document Analysis sets forth DTSC's analysis of the neutral CEQA regulations and DTSC's conclusion that applicable regulations and caselaw do not permit DTSC to prepare a new environmental impact report. We did not find any indication or evidence that this determination was motivated by discriminatory intent or animus.

¹⁵ See EPA Toolkit at 8, n.41.

cause a sufficiently disproportionate and adverse impact (cumulative or otherwise), it may still be lawful so long as there is (1) a “substantial legitimate justification” for renewing the permit¹⁶ and (2) the absence of any alternatives that would be comparably effective in achieving the substantial legitimate justification while having less disproportionate (or less adverse) impacts.

Due to KHF’s proximity to Kettleman City, whose population is more than 97% Hispanic or Latino (compared to 57% in Kings County and 40% in California), it seems highly likely that any adverse impacts resulting from renewal of the KHF permit would be borne disproportionately by Hispanic or Latino residents.

However, DTSC’s scientific analyses (which we have not independently evaluated) conclude that the *direct* adverse impacts on air and water quality and on human health resulting from renewal of the KHF permit would be relatively small, and therefore may not be sufficiently adverse to be unlawful when considered on their own.¹⁷

Specifically, with respect to water quality, DTSC has found that renewal of the KHF permit would not have any adverse effects on water quality. The 2009 Environmental Impact Report (“EIR”) found that, due to geology, and according to monitoring results, the groundwater under KHF is hydrologically isolated from regional groundwater resources and thus does not affect groundwater in Kettleman City. There is also already a groundwater and soil/gas monitoring program at KHF, as required by DTSC, which includes 46 groundwater monitoring wells and eight soil-gas wells that are tested quarterly, with quarterly reports provided to DTSC and made available on the State Water Board’s website. Although the monitoring program has detected volatile organic compounds in both the groundwater and unsaturated zones near some of the former, unlined surface impoundments and landfills, those releases are from KHF’s former, now-closed landfills and impoundments and will remain regardless of whether the KHF permit is renewed or not. In any event, DTSC has already required that the KHF permit renewal application include an updated soil-gas monitoring plan to proactively monitor any soil vapor impacts from those releases; the permit renewal application proposes to add five new groundwater wells and 30 soil-gas wells to the existing monitoring program.

With respect to air quality, KHF also has an ambient air monitoring program that tests for PCBs, reactive organic gases (“ROGs”), carbonyls, pesticides, metals, and large particulate matter (PM10). Ambient air samples are collected at four monitoring stations around the facility property line for a 24-hour period every 12 days and for a month-long period every three months. The samples are analyzed by a third-party lab, and quarterly reports are provided to DTSC and EPA. The monitoring results are then used to calculate an annual “Health Risk Assessment,” which assesses health impacts from the calculated exposures against benchmark risk levels set by DTSC and other environmental agencies. The KHF Health Risk Assessments based on monitoring data from 2017 through 2021 found no health risk to Kettleman City residents resulting from KHF operations. Specifically, they found that the cancer risk to Kettleman City residents from the detected levels of monitored air contaminants (i.e., the incremental probability of an individual developing cancer over a lifetime of the estimated daily exposures) was less than one in one

¹⁶ A substantial legitimate justification would exist if renewing the permit were “necessary to meeting a goal that was legitimate, important, and integral to [DTSC’s] institutional mission.” EPA Toolkit at 9 & n.49 (quoting *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993)).

¹⁷ EPA has stated that it may consider both health and non-health harms in evaluating the impact of an agency decision, though it notes that “[h]istorically, EPA has focused primarily on those impacts that could fall under [the agency’s] authority.” EPA Toolkit at 15, n.59.

million, which is below even the lowest limit of EPA’s cancer risk benchmark range (one to 100 in one million).

That is not to say that renewal of the KHF permit would have no adverse impact on air quality whatsoever, but the adverse impacts from existing operations are already being mitigated by conditions in the existing permit, and we understand those or similar conditions would be continued in any renewed permit, if one were issued. DTSC’s Environmental Document Analysis preliminarily found that renewal of the KHF permit would not cause a substantial increase in those impacts,¹⁸ and we understand DTSC is also considering potential additional permit conditions to further mitigate those impacts. For example, the 2009 EIR found that KHF long-term operations would significantly contribute to an air basin already in nonattainment for some ambient air quality standards, and therefore imposed mitigation measures to reduce those impacts.¹⁹ Likewise, DTSC estimates that there may be potential health risks associated with diesel emissions from offsite trucks bringing hazardous waste to KHF, but there is already an existing permit condition requiring CWM to prohibit entry to any truck that does not meet the 2010 diesel engine standards set by the California Air Resources Board (CARB), and we understand DTSC is analyzing the impacts further and considering whether to impose additional permit conditions to further mitigate the impacts from diesel emissions. Any direct adverse impacts resulting from the permit renewal are therefore likely to be relatively small.

In addition to evaluating the direct impacts of a potential KHF permit, DTSC is also currently preparing an analysis (which we have not yet reviewed) based on CalEnviroScreen pursuant to Section III.B.1 of the Settlement Agreement.²⁰ EPA has indicated that in assessing adverse impact for purposes of Title VI, an agency should consider not only the direct impacts of the permitting decision itself but also the cumulative impacts to the community, including environmental burdens from other sources and existing health conditions in the community that are not caused by the permitting decision. However, EPA has not yet issued any regulations, decisions, or formal guidance addressing precisely how agencies are to assess adverse impacts in light of other cumulative burdens on a community, or how cumulative impacts should be weighed in a civil rights analysis when the direct adverse impacts caused by an agency’s decision are relatively small but the cumulative impacts, when considered in light of preexisting burdens *not* caused by the agency’s decision, are significant. EPA has stated that it will issue formal guidance regarding cumulative impacts analyses and Title VI civil rights compliance on September 30, 2023. Despite the absence of formal EPA guidance at this time, we understand that DTSC is proactively preparing a report pursuant to Section III.B.1 of the Settlement Agreement that will consider the impact of the permitting decision with respect to “Kettleman City’s vulnerability as identified by CalEnviroScreen indicators for such vulnerability, including pollution levels, income, health, linguistic isolation and language access needs.”

Accordingly, although the direct impacts from a potential renewal of the KHF permit likely would not be sufficiently adverse to be unlawful when considered on their own, it is difficult at this point to say whether renewal of the KHF permit would cause a disparate and sufficiently

¹⁸ See DTSC Environmental Document Analysis (Feb. 2022) at 22-27.

¹⁹ The San Joaquin Valley Air Basin, where KHF is located, is recognized as one of the most polluted air basins in California and in the United States, and the 2009 EIR found that the impacts of KHF long-term operations were significant under the CEQA standards for nitrogen oxides (NOx), ROGs, and particulate matter PM10 and PM2.5 due to their contributions to an air basin already in nonattainment.

²⁰ This report does not purport to evaluate DTSC’s compliance with this provision of the Settlement Agreement.

significant adverse impact on Latinos to potentially violate civil rights laws when considering its cumulative impacts. If renewing the KHF permit would cause a disparate and sufficiently significant adverse impact, a potential permit renewal would still be consistent with civil rights laws if there were a substantial legitimate justification for the renewal and no comparably effective, less discriminatory alternatives exist. A substantial legitimate justification exists if an action is necessary to meet a goal that is legitimate, important, and integral to DTSC’s institutional mission. Potential alternatives can include proactive mitigation measures that would further mitigate any disparate impacts or risks caused by the agency’s action. We understand that DTSC intends to have us review and offer our legal opinion as to whether any potential substantial legitimate justification or assessment of available alternatives that DTSC considers complies with civil rights laws, before DTSC renders a final decision on the KHF permit renewal application.

B. KHF Permit Renewal Process

Title VI (and EPA’s implementing guidelines), Government Code §11135, and the Dymally-Alatorre Bilingual Services Act require DTSC to ensure that its permitting procedures are nondiscriminatory and afford limited-English proficient persons meaningful access to the agency’s processes and services. The requirements under the Dymally-Alatorre Bilingual Services Act are largely subsumed within Title VI’s language access requirements.²¹

1. DTSC’s Public Engagement on the KHF Permit Renewal to Date

Though DTSC has not yet issued a draft decision on the KHF permit renewal and therefore the formal public participation process has not yet occurred, DTSC has sought to solicit community perspectives and keep the community informed in the decision-making process along the way. In 2017, DTSC conducted community interviews with residents of Kettleman City and Avenal to assess community issues and concerns and receive input on how to involve the community in the permit renewal decision. The interviews were conducted in English or Spanish, as appropriate. In November 2017, DTSC held a public workshop in Kettleman City about the general permit process, the notices of deficiency that DTSC had issued to date, and future opportunities for public engagement. The meeting was conducted in Spanish, with English translations available over headsets.

In May 2019, DTSC released for public review and comment the agency’s draft Environmental Document Analysis (“EDA”). DTSC provided notice of the public comment period by a “Community Update” that was available online, emailed to the listserv of people who had opted in to receiving communications regarding KHF (which members of the public can opt in to through DTSC’s website), and mailed to a mailing list of all post office addresses in Kettleman City. The Community Update and email were provided in both English and Spanish; the draft EDA was made available online and at local libraries in both English and Spanish. The comment period was 45 days long. DTSC asked local stakeholders (and specifically the signatories to the Settlement Agreement) for their input on DTSC’s plan for the public meeting and public notice regarding the EDA and responded to their emailed questions about the EDA. DTSC made edits to

²¹ The Dymally-Alatorre Bilingual Services Act also requires state agencies to conduct a biennial survey to assess any document translation or bilingual staffing deficiencies. DTSC participated in this survey in 2020 and 2022. DTSC is also in compliance with the Act’s requirement to develop and publish online “forms and processes for submitting complaints” of alleged violations of the Act. *See* Gov’t Code §§7299.3, 7299.4(b)(15).

the final EDA intended to address the commenters' concerns, and the final EDA will also be made available in both English and Spanish.

Over the past few years, DTSC has periodically provided email updates to the KHF listserv on agency processes related to the permit application, including alerts regarding notices of deficiency issued on the permit, opportunities to submit comments on DTSC's draft civil rights and language access policies and implementation plan, and announcements of the annual facility meetings regarding monitoring and HRA results. DTSC has also periodically held meetings with stakeholders, including with representatives of the signatories to the Settlement Agreement, to discuss topics relating to the KHF permit application and process. DTSC personnel have also responded directly to emails from the signatories' representatives. In 2019, DTSC personnel staffed a booth at the Kings County Safety Fair, in which they provided information to the public about the KHF permit application.

Pursuant to the terms of the facility's current permit, CWM hosts an annual public meeting to present information on the prior year's air and groundwater monitoring and HRA results and the facility's emergency response plans. DTSC personnel have attended those meetings. The public notices of those meetings have been provided both in English and in Spanish, and the meetings have included PowerPoint slides that are translated into Spanish. Written summaries of the monitoring results are prepared by a third-party lab that tests the samples from the facility, and those summaries are provided at the meeting in both English and Spanish. The monitoring reports are made available along with the other Kettleman City permitting documents on DTSC's Envirostor website.

2. DTSC's Planned Future Public Participation Process

EPA's Public Involvement Guidance, LEP Guidance, and Procedural Safeguards Checklist prescribe best practices to help agencies ensure that their public participation processes are "available to all persons regardless of race, color, [or] national origin" (among other protected characteristics) and that "limited-English proficient individuals can meaningfully participate."²² We have reviewed DTSC's public participation regulations and Public Participation Manual, and they are generally consistent with the prescribed practices set forth in EPA's guidance documents, and therefore should be followed to ensure a nondiscriminatory public participation process for the KHF permit renewal decision. In Appendix A and below, we provide recommendations for how some of those key prescribed processes can be best implemented in the specific KHF context to ensure an inclusive, accessible, and nondiscriminatory public process.

For example, the EPA Public Involvement Guidance and EPA Checklist provide that DTSC should "[e]nsure that the factors used to determine the appropriate time, place, location, duration, and security at public meetings are developed and applied in a non-discriminatory manner." DTSC's Public Participation Manual provides some guidance on selecting the date, time, and location of public meetings and hearings, including "consider[ing] the best time for meetings for that community." In the context of the KHF permit renewal process, we recommend that DTSC specifically consider and ensure that: (1) the meeting times and dates do not conflict with work or school requirements for the community; (2) the meeting location is accessible via public transportation; (3) the meetings are scheduled for a sufficient length of time to enable all anticipated participants the opportunity to provide their full comments, taking into account the

²² See EPA Checklist at 4, 5.

need for interpreters to take breaks from interpreting, and schedule multiple meetings if necessary to accommodate all participants; (4) if any security is used, it is provided pursuant to a neutral policy regarding security; and (5) DTSC seeks and obtains public and/or stakeholder input on convenient dates, times, and locations for the meetings.

The EPA Public Involvement Guidance and EPA Checklist also recommend that DTSC “[d]evelop, publicize and implement written public participation procedures” including specific steps for ensuring “effective public participation that is accessible to all persons.” While DTSC’s Public Participation Plan for the KHF permit renewal is still being finalized, we reviewed the Public Participation Plan DTSC made in 2013 regarding the KHF permit modification. The 2013 Public Participation Plan properly addressed the vast majority of the topics required by EPA’s Public Involvement Guidance, including an overview of DTSC’s plan for addressing Kettleman City’s public participation needs, a description of the community, a contact list of relevant DTSC staff, a list of past and present community concerns, a detailed plan of intended public outreach, a list of local media contacts, and the location of the information repositories. However, it omitted a few important topics, including a contingency plan for unexpected events, locations where public meetings will be held, and contact information for translators or interpreters. The new public participation plan should include this information as well. We also recommend that DTSC involve the Kettleman City community and other affected groups in the development of the new Public Participation Plan, as recommended by the EPA, and that DTSC make its Public Participation Plan available to the public on DTSC’s website in both Spanish and English, and in hard copies at the relevant information repositories.

With respect to language access, DTSC must take reasonable steps to provide Spanish-speaking persons meaningful access to the public participation process, including translating vital documents and providing real-time Spanish interpretation services at any public hearings or meetings in Kettleman City relating to the KHF permit decision. In addition to interpretation services at public hearings, DTSC should make available, and provide the contact information for, one or more bilingual agency contact persons who can respond to LEP persons’ inquiries regarding the KHF permitting and public participation processes at times outside of the public hearings.²³

Though many of these recommended “best practices” may not be strictly necessary for compliance with civil rights laws, it is our understanding that DTSC intends to implement all of them. We have seen no evidence that DTSC’s public participation process will be discriminatory or deny LEP individuals meaningful access.

V. CONCLUSION

In compliance with the 2016 Settlement Agreement, DTSC has, to date, “consider[ed] ... [w]hether the decision on the [KHF] permit application and processes undertaken in relation to the permit decision are consistent with applicable civil rights laws.” Based on our review and analysis of currently available information and the current state of the law, it is our opinion that DTSC’s actions thus far with respect to the KHF permit renewal application are consistent with applicable civil rights laws. A final determination on DTSC’s compliance will depend on future developments, including the results of DTSC’s CalEnviroScreen analysis, EPA’s forthcoming guidance on cumulative impacts analysis and Title VI compliance, how DTSC implements its

²³ With respect to EPA’s general procedural safeguard requirements, DTSC is generally in compliance except for a few technical deficiencies that can easily (and DTSC has stated will) be cured, such as posting the name (and not just the title) of DTSC’s designated nondiscrimination coordinator online.

public participation process, and DTSC's ultimate decision on the KHF permit renewal application.

APPENDIX A: RECOMMENDED BEST PRACTICES FOR THE KETTLEMAN HILLS FACILITY PERMIT RENEWAL PUBLIC PARTICIPATION PROCESS

We recommend that DTSC implement the following best practices in the specific context of the KHF permit renewal process to help ensure that the public participation process is nondiscriminatory and affords LEP Spanish speakers meaningful access.

* ***Ensure meaningful and nondiscriminatory access to public hearings and meetings.*** For example, DTSC should ensure the dates and times of public hearings and meetings do not conflict with work or school requirements for the community; the location is accessible via public transportation; the meeting length is sufficient to allow all anticipated participants to provide their full comments, including translation; and any security used is provided pursuant to a neutral policy regarding security.

* ***Develop, publicize, and implement a public participation plan for the KHF permit renewal process.*** DTSC should ensure that its public participation plan for the KHF permit renewal process includes, among other things: an overview of DTSC’s plan for addressing Kettleman City’s public participation needs; a description of the community; a contact list of relevant DTSC staff; a list of past and present community concerns; a detailed plan of intended public outreach; a list of local media contacts, including Spanish media; the location of the information repositories; a contingency plan for unexpected events; locations where public meetings will be held; and contact information for translators or interpreters. DTSC should publicize the public participation plan and make it available in both English and Spanish on its website and in hard copies at the project’s information repositories.

* ***Involve the public early and often throughout the permitting process.*** DTSC has already involved the public in the permit decision process in many ways and should continue to do so. For example, we recommend that DTSC: disseminate public fact sheets and public notices regarding the KHF permit decision; provide community updates about the permit decision process and hold community workshops or other public meetings in advance of the public comment period; solicit public and stakeholder feedback on its public participation procedures for the KHF permit renewal decision; consider providing a comment period longer than the required 45 days; and make its responses to comments available to the public through its website.

* ***Ensure effective public notices.*** In addition to following DTSC’s own Public Participation Manual and regulations for providing public notices, we recommend that DTSC go above and beyond to provide clear and effective public notice of the KHF permit renewal process and decision. For example, we recommend DTSC notify communities multiple times prior to any public hearing, highlight deadlines listed in public notices, and indicate whether interpretation services will be provided at the meeting or hearing.

* ***Ensure meaningful language access services.*** We recommend that DTSC provide Spanish translations of all vital documents related to the KHF permit renewal decision including, for example, the final 2022 Environmental Document Analysis and CEQA Addendum, the final public participation plan, fact sheets, public notices, DTSC’s CalEnviroScreen analysis, the draft and final permit decisions, and DTSC’s general responses to public comments. DTSC should also provide real-time Spanish interpretation services at any public hearings or meetings in Kettleman City relating to the KHF permit decision and should provide the contact information for bilingual agency contacts who can assist LEP persons outside of public hearings.

We understand DTSC will implement all of these recommended processes, either pursuant to its standard procedures or specifically in the context of the KHF permit renewal process.