October 25, 2013

To: State Department of Toxic Substances Control

From: Greenaction for Health and Environmental Justice

Re: Comments in Opposition to Draft Permit for Expansion of Chemical Waste Management Kettleman Hills Hazardous Waste Facility

Greenaction for Health and Environmental Justice submits these comments on the Department of Toxic Substances Control Draft Permit for the Chemical Waste Management (CWM) Kettleman Hills Hazardous Waste Facility on behalf of our members and constituents in Kettleman City, Avenal and other communities impacted by the operation of the CWM facility.

These comments will demonstrate that DTSC must deny Chemical Waste Management's application to expand the violation-plagued hazardous waste facility in the suffering, overly burdened and at-risk low-income, Latino and Spanish-speaking community of Kettleman City.

Kettleman City residents have suffered enough from pollution and environmental racism and injustice, and the health problems likely caused by pollution continue. The proposed expansion of hazardous waste landfills at the Chemical Waste Management Kettleman Hills Facility would add significant risks to the already over-burdened community of Kettleman City.

As a state agency mandated to protect public health and the environment, ensure compliance with the law including permits, and required to comply with and uphold civil rights laws and environmental justice policies and mandates, DTSC must deny new permits to Chemical Waste Management.

As set forth below, the analysis and documents justifying the issuance of the permit are based on faulty assumptions and findings, violate legal requirements, and moreover, reflect bad policy and set damaging precedent for DTSC's permitting program. The project applicant's past compliance history and the project impacts on nearby residents are so significant that they justify, and require, a permit denial.ch

I. The Chemical Waste Management Kettleman Hills Facility, the Community and Environment:

The Chemical Waste Management (CWM) facility is located approximately 3.5 miles southwest of Kettleman City. Diesel trucks carrying hazardous wastes and PCBs to the facility travel just yards from residential areas and near the Kettleman City School. According to the U.S. Census, some 96% of Kettleman City's population is Hispanic or Latino, and the per capita income of that population is $15,081. People living in the communities surrounding near the facility are already living with

significant respiratory health problems as the Central Valley, including Kings County, has worse air quality than any other region in the Nation. Kings County is in extreme nonattainment of current 8-hour and 1-hour ozone standards, and is in non-attainment of 24-hour and annual average fine particulate matter (PM 2.5) standards. Drinking water in the town is contaminated with benzene and arsenic.

Latinos and other people of color have a much greater exposure to environmental hazards – including air pollution, pesticide poisoning, lead poisoning, groundwater contamination and proximity to toxic waste facilities – than any other sector of our population. This holds true for Kettleman City residents, who must drink contaminated water, breathe air that is well over state and federal health-based standards, and live and work in an environment with numerous stationary and mobile pollution sources including the Chemical Waste Management hazardous waste, PCB and solid waste landfill, widespread pesticide use, massive diesel traffic on Interstate 5 and Highway 41, diesel truck transfer stations and idling hot spots, old oilfield contamination, current fracking and oilfield operations and a former PG&E toxic site.

At the same, Latinos nationwide and in Kettleman City have the least resources to cope with this exposure, having less occupational and residential mobility, less access to health care, fewer financial resources, and less political power than almost any other sector of U.S. society. DTSC proposes to allow the continued and massively expanded dumping of toxic waste despite the disproportionate impact this will have on Kettleman City residents.

CWM proposes to expand its hazardous waste landfill B-18 both vertically and laterally– the expansion would increase the footprint of the landfill from 53 acres to 67 acres, and would increase the volume of the landfill from 9.7 million cubic yards to 15.6 million cubic yards. CWM plans to add another hazardous waste landfill (B-20) at the site once the B-18 expansion is complete.

CWM's facility is already the largest hazardous waste facility in the West. The community has experienced elevated rates of birth defects in recent years, and agencies have repeatedly fined the facility for chronic and serious violations of hazardous waste laws and regulations. For example, the U.S. Environmental Protection Agency ("EPA") and DTSC records show that over the years, CWM has repeatedly failed to report toxic spills, improperly disposed of PCBs and other hazardous waste, and failed to conduct required monitoring. CWM has demonstrated a pattern and practice of chronic and repeated violations at KHF, some spanning a period of several years.

If DTSC allows KHF to expand, it is almost guaranteed that CWM will continue to violate environmental laws and permits, and will negatively impact a low-income, community of color who the state admits is highly vulnerable to pollution and whose health is already heavily burdened by proximity to the landfill and other environmental pollution.

II. Applicable Laws Provide Legal Basis for Permit Denial– RCRA, CEQA, Title VI of the United States Civil Rights Act and California Government Code 11135:

A. CEQA and RCRA:

DTSC's permit decision is in part governed by the California Environmental Quality Act (CEQA) and the Resource, Conservation and Recovery Act (RCRA).

CEQA and RCRA give DTSC the authority to deny the permit due to the chronic violations and environmental and human health threats posed by this proposed expansion.

RCRA is supposed to provide protection of human health and the natural environment from the potential hazards of waste disposal and ensure the management of waste in an environmentally sound manner.

The California Environmental Quality Act requires state and local agencies within California to follow a protocol of analysis and public disclosure of environmental impacts of proposed projects and adopt all feasible measures to mitigate those impacts. CEQA makes environmental protection a mandatory part of every California state and local agency's decision making process. CEQA gives DTSC the authority to deny the permit due to the chronic violations and environmental and human health threats posed by this proposed expansion. Unfortunately and improperly, DTSC has made a mockery of CEQA by relying in significant part on an EIR prepared pursuant to CEQA through an illegal, blatantly racist and discriminatory process, and by failing to conduct a thorough and comprehensive of all potential impacts.

B. California Government Code 11135 and Title VI of the United States Civil Rights Act of 1964:

In addition to RCRA and CEQA, as a recipient of substantial state and federal funding, DTSC's permit decision must comply with and not violate state and federal civil rights laws, as the communities most directly and disproportionately affected by the DTSC decision are primarily Spanish-speaking and Latino, populations protected under California Government Code 11135 and Title VI of the United States Civil Rights Act of 1964.

As these comments and the public record make clear, the issuance of a permit would have a clear, discriminatory, negative and disparate impact on Latinos and Spanish-speakers, a protected class of people under our state's and nation's civil rights laws. In fact, even Kings County's racist EIR process had no choice but to admit and conclude that the proposed expansion of the landfill would have a negative and significant impact that could not be mitigated.

In addition, the defective public process for the DTSC comment period, the use of flawed and defective environmental studies to justify the permit issuance, the failure to conduct the promised and vitally important Cumulative Impact analysis, and the significant reliance on a boldly racist Environmental Impact Report process clearly resulted in a violation of state and federal civil rights laws.

III. DTSC/Cal EPA's Proposed Approval of the CWM KHF Expansion Violates State and Federal Civil Rights Laws:

The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, must conduct its programs, policies, and activities that substantially affect human health or

the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state. Pub. Res. Code § 71110.

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin under any program or activity that receives federal financial assistance.

California Government Code, section 11135 prohibits discrimination on the basis of race, color or national origin under any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. According to the California Code of Regulations, it is a discriminatory practice for an agency in carrying out any program or activity "to make or permit selections of sites or locations of facilities: that have the purpose or effect of excluding persons from, denying them benefits of, or otherwise subjecting them to discrimination under any program or activity." 22 CCR § 98101(j)(1) (emphasis added).

DTSC must issue a permit before any toxic waste disposal facility can operate in California. Health & Safety Code § 25200. DTSC has issued permits to the three operating Class I toxic waste dumps in California, near Buttonwillow, Kettleman City and Westmoreland. All three of the host communities have the same demographics: overwhelmingly high percentages of Latino residents, of residents of Mexican descent, of farm workers, or poor families, and of people who primarily or only speak Spanish. See 2010 U.S. Census. Overall, Latinos comprise 32 percent of the state's population, but Latino communities bear 100 percent of the risk and impact of hosting toxic waste dumps.

Additionally, a review of California commercial offsite hazardous waste facilities indicates that out of 55 total permitted facilities, DTSC approved 54 in areas with above average poverty rates or non-white populations.

The 1984 Cerrell Report, commissioned by the California Waste Management Board and funded with taxpayer dollars, set forth criteria and factors that encourages the siting of polluting facilities in low-income, Latino communities. That report implicitly advised companies and governmental entities to site waste facilities in small, poor, rural, Catholic communities with low education levels whose residents were engaged in extractive industries—a description that fits Kettleman City and the two other communities that host hazardous waste facilities in the State. The Cerrell Report explains that these communities are the least likely to oppose undesirable waste projects. The Report cautions that "[m]iddle and higher-socioeconomic strata neighborhoods should not fall at least within the one-mile and five-mile radii of the proposed site."

DTSC's practice of permitting hazardous waste landfills solely in low-income, Latino communities has a disproportionate impact and violates State and Federal civil rights laws. DTSC is well aware of the discriminatory impact of hazardous waste siting, yet continues to issue permits - even to chronic violators of permits like CWM - and exercises lax enforcement against violations.

A. DTSC's Approval of the KHF Expansion Would Violate California Government Code Section 11135.

California Government Code, section 11135 prohibits discrimination under any program or activity that receives any financial assistance from the state. An agency violates section 11135 if it receives state funding and takes an action that results in a significantly adverse or disproportionate impact on minorities. Unlike intentional discrimination claims, proving disparate-impact discrimination does not require a showing of discriminatory intent. To make a showing of disproportionate impact, statistical evidence of a kind and degree showing that the practice in question has negatively impacted minorities to a greater degree than non-minorities is sufficient.

DTSC is a state agency, and therefore receives state funding for all of it programs, including its permitting program. DTSC is the permitting authority for hazardous waste landfills in California. An operator cannot build a hazardous waste landfill or receive hazardous waste without a RCRA hazardous waste permit, issued by DTSC. Therefore, if DTSC approves the KHF expansion, it is directly responsible for the facility's impacts on nearby residents.

The facility has, and an expansion would have, a disproportionate and adverse impact on nearby residents. As acknowledged by the EIR, the project would have significant and unavoidable impacts. The project's significant and unavoidable air quality impacts would impact nearby residents to a greater degree than other populations.

In addition, the expansion would add 400 trucks transporting hazardous waste near or through Kettleman City each day. The 400 diesel trucks would add to the significant air quality burdens in the area and will exacerbate the extremely high levels of asthma in Kettleman City. Residents would be at greater risk of toxic exposures than other areas of the State due to accidental hazardous waste releases from the trucks or the disposal site. The close proximity of the hazardous waste landfill and constant threat of accidental toxic releases negatively impacts residents' mental health and sense of safety and well-being. The close proximity of the hazardous waste landfill and the presence of trucks constantly carrying hazardous waste through town would negatively impact property values in the town.

These impacts would disproportionately affect Latinos. According to the 2010 U.S. Census, Kettleman City is 96 percent Hispanic or Latino; Kings County is 52 percent Hispanic or Latino; and California is 38 percent Hispanic or Latino. "The basis for a successful disparate impact claim involves a comparison between two groups — those affected and those unaffected by the facially neutral policy." Tsom- banidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003). In determining disparity, it is usually appropriate to measure the racial proportionality of the allegedly affected populations against the population of the agency's decision making jurisdiction. DTSC is a state agency and has decision-making jurisdiction over the entire state. To determine disparate impact, one need only compare the impacted community (96 percent Latino) with the rest of the State (38 percent Latino). Using this Census data, it is readily apparent that DTSC's approval of the KHF expansion would have a disparate and prohibited impact based on race when compared to the rest of the state.

DTSC's overall permitting of hazardous waste landfills also has a disparate impact on the basis of race. DTSC has permitted three hazardous waste landfills in California; one in Kettleman City, one in Buttonwillow, CA, and one in Westmoreland, CA. Buttonwillow is 78 percent Hispanic or Latino. And Westmoreland is 87 percent Hispanic or Latino. The population of the three communities together is 87 percent Latino. Comparing this Census data with statewide data, demonstrates that DTSC's approval of hazardous waste landfills in California disproportionately impacts Latino residents.

Finally, DTSC's overall permitting of hazardous waste management units also has a disparate impact based on race. DTSC permits 55 commercial offsite hazardous waste facilities. These facilities are also predominantly permitted near areas with high Latino populations. Collectively, these communities have 76% more minority residents when compared to the rest of the state.

B. DTSC's Approval of the KHF Expansion Would Violate California Regulations:

1. DTSC Perpetuates King County's Discrimination

Decision-making about siting and regulating hazardous waste facilities is an integrated process, involving the facility operator, local, state, and federal agencies, including DTSC. DTSC, if it approves the KHF expansion, will perpetuate the disproportionate siting of hazardous waste facilities in low-income, Latino communities in California.

California law establishes that an agency is liable for perpetuating discrimination perpetrated by others. According to Title 22, Section 98101 of the California Code of Regulations, "[i]t is a discriminatory practice for a recipient, in carrying out any program or activity directly . . . on the basis of ethnic group identification . . . to utilize criteria or methods of administration that: perpetuate discrimination by another recipient on the basis of ethnic group identification. . ." 22 CCR § 98101(i)(3).

Kings County is a recipient of State funds. Here, DTSC perpetuates the discriminatory action of Kings County in citing the KHF expansion. Kings County issued a land use permit to Chemical Waste Management in an area where the facility will have a disproportionate impact on Latino residents. Kings County used a process that discriminated against its Latino residents. Most Kettleman City residents' first language is Spanish, and a high percentage of residents are monolingual Spanish speakers. In spite of Kettleman City residents' continued request and demand for documents in Spanish, the County provided documents in an English-only format. Kings County excluded Latino Kettleman City residents from the Local Advisory Committee considering the Kettleman Hills expansion. Kings County did not provide equal time for Spanish speakers to testify at the public hearing as English speakers. Kings County contracted with a large police and security force that had the effect of intimidating local residents and preventing them from participating in the decision-making process.

DTSC relies on Kings County's discriminatory process to make its own decision on the hazardous waste permit. DTSC explicitly relies on Kings County's EIR that was the product of this discriminatory process. DTSC's decision to issue the permit is contingent and dependent on King's County's environmental review process.

To avoid perpetuating Kings County's discriminatory conduct DTSC must 1) prepare its own environmental impact report using a process that does not discriminate against Latino residents; and 2) deny the permit for this particular location because of its disproportionate impacts on Latino residents. Only by denying this permit can DTSC prevent the disproportionate impact of Kings County's decision.

2. DTSC Discriminates Against Kettleman City Residents By Permitting the Selection of the Site of the KHF Expansion:

According to the California Code of Regulations, it is a discriminatory practice for an agency in carrying out any program or activity "to make or permit selections of sites or locations of facilities: that have the purpose or effect of excluding persons from, denying them benefits of, or otherwise subjecting them to discrimination under any program or activity." 22 CCR § 98101(j)(1) (emphasis added).

Here, DTSC did not itself select the KHF expansion site, but permitted the selection of a site that will subject Latino residents to discrimination on the basis of race and national origin. Under California regulation, this makes DTSC liable for the discrimination.

C. DTSC's Violations of the California Health & Safety Code Has Led to Pervasive Patterns of Discriminatory Siting Statewide:

DTSC is directly responsible for providing statewide planning for hazardous waste facility site identification. According to Section 25170 of the California Health & Safety Code, "The department, in performing its duties under this chapter, shall . . . [p]rovide statewide planning for hazardous waste facility site identification and assessment. . ." Health & Safety Code § 25170. The legislature also specifically requires that DTSC prepare and adopt a state hazardous waste management plan to serve as a comprehensive planning document for the state. The state hazardous waste management plan requires DTSC to identify "areas or regions of the state where new or expanded capacity to manage hazardous waste are needed and the types of facilities that should be sited and constructed." Health & Safety Code § 25135.9. The plan requires "a statement of goals, objectives, and policies currently in effect, or in the process of development, for the siting of hazardous waste facilities." Id.

The California legislature expressed its intent that the hazardous waste management plans prepared by or with assistance from DTSC "serve as the primary planning document for hazardous waste management at the local level; that the plans be integrated with other local land use planning activities to ensure that suitable locations are available for needed hazardous waste facilities; that land uses adjacent to, or near, hazardous waste facilities, or proposed sites for these facilities, are compatible with their operation." Health & Safety Code § 25135.

The legislature required DTSC to approve the first plan by 1991, with revisions at least every three years thereafter. Health & Safety Code § 25135(b). However, DTSC has yet to complete any of the required statewide planning documents. Because DTSC has failed to comply with its statutory mandates in the Health & Safety Code, the State has no guidelines, standards, or plans that would

prevent waste disposal companies from targeting of low-income and minority communities for the most undesirable toxic waste facilities, a practice that is well documented.

DTSC is the only agency that is tasked with statewide management of hazardous waste disposal and has an obligation to prevent the disproportionate impacts of hazardous waste facility approval across the state through its general authority as well as the specific plans required by the Health & Safety Code. By failing to develop the required planning documents or using its general authority to prevent the targeting of Latino, communities, DTSC has contributed to the widespread discrimination against Latinos in hazardous waste facility siting decisions.

D. DTSC's Approval of the KHF Expansion Would Violate Title VI of the United States Civil Rights Act of 1964:

Title VI prohibits discrimination by recipients of federal funding. Section 601 provides that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A claim under Section 601 requires a showing of discriminatory intent. However, circumstantial evidence of impact may prove intent. The Ninth Circuit has held that evidence of "gross statistical disparities" may be used to satisfy the intent requirement of a Title VI claim where the evidence "tends to show that some invidious or discriminatory purpose underlies the policy." Though statistical evidence of discriminatory impact alone does not prove intent to discriminate, it, along with supporting circumstantial evidence, may be "considered in determining whether there is evidence of intent or purpose to discriminate."

Here, there is sufficient circumstantial evidence to infer discriminatory intent. This evidence includes:

- The vast racial disparities in where DTSC approves hazardous waste facilities in California.

- The Cerrell Report, commissioned by California, which provided private companies and governmental entities with criteria to determine which communities would be least likely to oppose undesirable land uses. The criteria described low-income, rural, Latino communities.

- DTSC has, in fact, permitted 100% of the State's hazardous waste landfills in low-income, rural, Latino communities.

- DTSC's preparation of a draft approval despite acknowledging that Kettleman City is in the top 10% of most vulnerable communities in California, factoring in demographic data and pollution sources.

- DTSC's acknowledgment that is does not have any standardized criteria to determine when it is appropriate to deny a hazardous waste facility permit.

- DTSC's preparation of a draft approval for the KHF prior to reviewing and implementing a report that it commissioned to critique its permitting program.

- DTSC's failure to prepare required statewide hazardous waste planning that would determine appropriate siting criteria.

- DTSC's oft repeated concerns that policies designed to prevent disproportionate siting decisions in California would lead to hazardous waste being disposed of out of state. This indicates that the agency believes that the only politically viable locations for a hazardous waste landfill are in areas with high minority populations.

- DTSC's significant reliance in the permit decision on Kings County's racially discriminatory permit process that top DTSC and Cal EPA officials themselves have denounced as unacceptable.

In total, circumstantial evidence sufficiently demonstrates that DTSC has acted in the belief that permitting hazardous waste landfills is most feasible in low-income Latino communities; that California requires additional hazardous waste capacity; and that it must approve hazardous waste landfills in Latino communities in order to meet California's hazardous waste capacity needs. This meets the standard for intentional discrimination.

E. DTSC's Approval of the KHF Expansion Would Violate the Equal Protection Clause:

The Equal Protection Clause of the Fourteenth Amendment provides the primary constitutional cause of action available to remedy inequities. The constitutional prohibition on disparate treatment in this context prevents government actors from allocating environmental benefits and burdens on racial grounds. To prove a violation, plaintiffs must show that persons who are similarly situated are being treated differently (i.e., a disparate impact) and must also provide evidence of intent to effectuate the discriminatory practice.

DTSC's proposed approval of the KHF expansion and its larger pattern of issuing permits to hazardous waste facilities that target Latino communities violate the Equal Protection Clause.

IV. DTSC Improperly Relies on the State's Scientifically Flawed "Environmental Exposure" Study to Incorrectly Conclude that Chemical Waste Management Facility Could Not Have Caused the Birth Defects Plaguing Kettleman City:

Possibly the most important document being used by the DTSC and other agencies to justify a massive expansion of the landfill and a dramatic increase in pollution associated with an expansion is the Environmental Exposure Study conducted by California EPA and many of its agencies.

This state study was conducted by reluctant agencies with a historical and well-documented bias in favor of Chemical Waste Management, and was done only after the Governor ordered an investigation of the birth defects and pollution impacting Kettleman City. State agencies had earlier refused to investigate the birth defects until ordered to do so.

The controversial exposure study concluded that the emissions from the Chemical Waste Management hazardous waste landfill likely could not have caused the birth defects. We assert that the evidence clearly proves that the State study's conclusion was without basis in fact or science.

A. State Study Was Flawed and Misleading, and Compared Apples to Oranges:

The state's study was flawed and misleading and used improper evaluation methods to reach its conclusion.

The clear and unequivocal fact – ignored by the state agencies that did the study - is that actual operating conditions, monitoring and emissions at the Chem Waste landfill facility were dramatically different between the times the birth defects spiked in 2007 and when the testing and exposure study were conducted in 2010.

Despite this enormous discrepancy in disposal operations, the state improperly and unscientifically equated emissions when the facility operated at full capacity with emissions when it was operating at less than 5% capacity.

1. CWM was in full scale operation in 2007:

When the birth defects and infant deaths spiked in 2007, hazardous waste disposal operations at the Chem Waste landfill were at 100% normal levels and PCB dumping had soared:

- Hundreds of diesel truck trips going to and from the landfill were taking place daily
- Emissions from the full scale landfill operations were not being independently monitored on a daily or regular basis
- Chem Waste was producing faulty or unreliable laboratory results, as documented later by USEPA (and was the subject of enforcement action)
- Chem Waste had numerous other violations including illegal disposal of wastes and failure to conduct some of the required monitoring
- Shipments and disposal of PCBs, a banned substance that is a known reproductive toxin, had skyrocketed, probably due to the increased shipments from the PG&E Hunters Point power plant in San Francisco that was being demolished
- The PCB monitor had been turned off prior to the huge increase PCB disposal

2. CWM Operations Were Dramatically Reduced and at Less Than 5% of Capacity in 2010:

When the state conducted its environmental exposure study in early 2010, hazardous waste operations at the Kettleman Hills landfill were only about 5% of normal, down by over 95% when compared to 2007 when the birth defects problem erupted:

- The state's environmental exposure study negligently or intentionally failed to note the crucial fact that hazardous waste and PCB disposal activities at the landfill were at or near 100% of normal operations when the number of babies born with birth defects erupted in 2007, compared to less than 5% of normal operations when the testing and study took place in 2010.

- In a July 26, 2013 email from Wayne Lorentzen of DTSC to Bradley Angel of Greenaction, Mr. Lorentzen stated "… the Kettleman Hills hazardous waste landfill (B-18) had less than 5% of permitted capacity remaining in January 2010 by our estimates." This email is attached and incorporated into these comments as Exhibit A.
- It is clear that a landfill experiencing more than a 95% decrease in waste disposal transport and disposal activity would have dramatically less emissions than when it was operating at full capacity and normal operations.
- When the study took place in 2010, Chem Waste knew they were being monitored and watched closely by government, the media and the public, so they may have been more careful than usual during their operations – in contrast to their decades of well documented permit violations.

3. State Study Was Biased Towards Chem Waste:

This flawed study was done by state agencies biased in favor of Chemical Waste Management, as evidenced by the refusal of state agencies to investigate the birth defects and infant deaths until ordered by the Governor to "investigate", and their decades of public statements defending the company's landfill operations at the same time that years of chronic and repeat violations were taking place.

It is a documented fact that the California Department of Public Health intentionally understated and withheld the true number of known birth defects, including in a presentation to the Kings County Board of Supervisors, until challenged with the true, accurate number by Greenaction and the Kettleman City community group El Pueblo Para el Aire y Agua Limpia/People for Clean Air and Water.

Another example of the state's pro-Chem Waste bias regarding this study, as we discuss elsewhere in these comments, is that DTSC and California EPA never even had a compilation of Chemical Waste Management's extensive and troubling compliance/violation history or provided one to the public until challenged by Greenaction on their failure to disclose this vital information.

In addition, the state agencies never accounted for or evaluated the numerous violations committed by CWM in the state's evaluation of potential environmental impacts from the facility operation.

In conclusion, the state study was completely flawed and essentially compared apples to oranges and misled the public. The state study never acknowledged or mentioned the issues raised above, resulting in an enormous failure to consider crucial and relevant facts in reaching a conclusion.

While we agree that as of today no firm cause of the birth defects and infant deaths has been found, the state study did not prove that Chem Waste's activities could not have caused these terrible health problems and deaths and it is improper to rule Chem Waste out as a cause or contributor to the past or present profound health problems. The Kettleman City birth defect study did rule out genetics and lifestyle activities as possible causes, thus leaving pollution as the likely cause of the high number of birth defects.

V. State Is Breaking Its Promise to Reduce Pollution in Kettleman City:

At the conclusion of the state's inadequate and flawed investigation into the birth defects plaguing Kettleman City, state officials publicly announced a promise to the people of Kettleman City: the state would supposedly work to reduce pollution impacting Kettleman City.

It is a clear and unequivocal fact, admitted by Kings County and the State DTSC/Cal EPA, that approval of permits to expand the violation-plagued Chemical Waste Management hazardous waste and PCB landfill would increase pollution in the overburdened community of Kettleman City.

This broken promise is yet another example of the bias of state agencies who are willing to increase pollution in a community where they promised to reduce pollution, a community that the State itself admitted and documented is among the most vulnerable and at-risk communities in the state of California.

VI. Discovery of New Childhood Leukemia and Many Adult Cancers, and other Ongoing Health Problems Affecting Residents:

Kettleman City residents have long suspected elevated levels of birth defects, infant deaths, cancer and other environmental health issues in the community may be tied to pollution sources such as the Kettleman Hills Facility. This concern was highlighted when residents, their community group El Pueblo and Greenaction discovered a large and unexplained number of birth defects and infant deaths.

Unfortunately, and wrongly, no government agency has ever conducted a comprehensive health survey in the town to determine the extent of health problems or to confirm or refute the belief that pollution may be causing high rates of illnesses and infant deaths.

Now, new information is now emerging that seems to confirm the existence of higher than expected cancers and other health problems in the community. DTSC should be aware of these problems and consider them prior to making a decision on the permit, as the new information appears to confirm once again that Kettleman City residents are suffering, vulnerable and at-risk and thus should not be exposed to a dramatic increase in hazardous waste transportation and disposal.

DTSC's approval of an expansion of the landfill would expose residents to decades of increased toxic pollution including breathing the emissions from hundreds of toxic waste trucks every day.

The State Department of Public Health continued to be ignorant of new cases of childhood cancer and has been oblivious and uninvolved in trying to determine the extent of unusual rates of cancer and miscarriages reported by residents. In addition, the state apparently dismissed reports of excessive rates of anemia by relying on "information" provided by Kings County, a county whose officials have been notorious for downplaying the birth defect/infant death problem and who are cheerleaders for more pollution in the county.

In the last few weeks, Greenaction joined with residents and their community group El Pueblo, and the Center on Race, Poverty and the Environment, and asked residents questions about health problems. This questionnaire was in response to alarming reports of large numbers of cancer cases on a single street in Kettleman City.

In the last week we have also learned of a one year old baby who was apparently born with leukemia. This is not the first child in recent years with leukemia, a troubling development. Last November, a two year old died from leukemia. Adding insult to injury, the California Department of Public Health outraged residents by announcing there were no new cases of childhood cancer at the very same time this child was stricken.

It would be completely irresponsible – and the breaking of a specific promise - for the state to approve a massive increase in pollution that would result from expanding the landfill in a community suffering profound illnesses that may be caused by the one or many of the pollution sources in and next to Kettleman City.

VII. State Should Have Investigated and Evaluated the Potential Impacts of Proposed Landfill Expansion and Construction Activities on Increasing Exposure to Valley Fever:

In August 2013, the issue of Valley Fever once again received prominent media and government attention when state prison officials decided to transfer vulnerable and at-risk inmates out of Avenal State Prison due to ongoing illnesses and deaths linked to exposure to Valley Fever. Avenal is just a few miles from Kettleman City and is also adjacent to Chem Waste.

The fungus that causes Valley Fever is in the soil of Avenal, Kettleman City and throughout the area.

When the fungus spores are sent airborne by the wind or other activities such as digging in the soil (as would occur with expansion of the Chem Waste hazardous waste and PCB landfill), people exposed to Valley Fever can get very sick, be stricken with permanent disabilities, and even die. People with weakened immune systems are particularly susceptible.

The DTSC should have evaluated, and must evaluate, the potential impacts of proposed landfill expansion and the associated large scale construction activities that would occur on disturbing soil with the fungus that causes Valley Fever.

As the construction and operational activities associated with the proposed landfill expansion would disturb the soil and likely result in an increase in the airborne fungus associated with Valley Fever, it would be irresponsible to approve the expansion that almost certainly would cause more Valley Fever among residents already suffering a wide range of serious health problems. In fact, prisoners incarcerated in Avenal are also close to the CWM facility and the permit decision should consider the potential impact of landfill expansion construction on inmates who are already experiencing severe health impacts from Valley Fever.

It is a sad commentary, and a huge flaw in the DTSC permit analysis, that the state seems to care more about the impact of Valley Fever on the health of prisoners than on the people of Kettleman City and Avenal whose happen to live next to a giant hazardous waste landfill run by a giant corporation with friends in high places.

Both prisoners and residents have a right not to be exposed to Valley Fever.

VIII. Kings County's EIR Concluded that Expansion of the Landfill Would Have Significant, Negative and Unavoidable Impacts that Cannot Be Mitigated:

The DTSC/Cal EPA would violate its environmental justice and civil rights mandates and the public promise made by state officials to reduce pollution in Kettleman City by approving an expansion, as even the biased Kings County Environmental Impact Report found that the proposed dump expansion would have significant, negative and unavoidable impacts that could not be mitigated. As a result of their finding of such a significant negative impact that could not be mitigated, the county had to adopt a Statement of Overriding Consideration – a statement itself flawed and inaccurate.

Even if all feasible mitigation measures are imposed, the EIR concluded that the landfill expansion would significantly increase ozone, fine particulate matter (PM 2.5), course particulate matter (PM 10) emissions, result in a significant and unavoidable increased cancer risk at the facility boundary, significantly increase traffic impacts, and contribute to cumulatively considerable and significant greenhouse gas emissions.

Adding insult to injury, only about 3% of the hazardous waste disposed of at the facility is generated in Kings County, more concrete proof that the approval of a landfill expansion would disproportionately and negatively impact the Latino residents of Kettleman City, in violation of state and federal civil rights laws that DTSC is required to comply with.

DTSC should reject the permit to expand due to the clear fact that this proposed project would have a significant, negative and unavoidable impact that cannot be mitigated, as even the pro-Chem Waste Kings County EIR process determined.

IX. DTSC is improperly and illegally relying in significant part on a flawed EIR prepared by King County that was approved through blatantly racially discriminatory hearing rules and the use of police dogs, police intimidation and police violence:

The DTSC Draft Permit decision improperly relies heavily and significantly on the flawed and racially discriminatory process used by Kings County to produce the "Environmental Impact Report" for the proposed hazardous waste facility expansion.

It is a matter of public record, as documented in the transcript of the Kings County Planning Commission "hearing," that Kings County used blatantly and racially discriminatory rules, procedures and actions that violated the public's right to participate in the permit process. These violations were startling, on their face racially discriminatory and intentional, and of a nature that resembled the Jim Crow-style systemic racism used in the Deep South and elsewhere to deny African Americans the right to vote and exercise their democratic rights.

A. Specifically, Kings County rammed through the defective EIR in order to approve a Conditional Use Permit for Chem Waste using the following racially discriminatory and unjust procedures, rules and actions:

- The "hearings" were marred by the large multi-agency police presence and the placement of police dogs in front of the hearing room, specifically designed to attempt to intimidate opponents of the hazardous waste landfill;

- Spanish speaking Kettleman City residents were given half the time to testify as English speakers brought in from out of town by Chem Waste to pack the hearing;

- When residents and advocates objected at the start of the hearing, residents and Greenaction's Executive Director were threatened by county officials with removal by the police;

- When Ramon Mares, a Spanish-speaking Kettleman City resident and grandfather who is also a United States citizen, objected to the racist testimony rules, he was assaulted by numerous police officers and dragged out of the hearing and barred from testifying or attending the rest of the so-called public hearing;

- Police also knocked Mary Lou Mares, a grandmother with health problems, to the ground;

- Hundreds of Waste Management workers who had never worked at the landfill were shipped in to the first hearing held by Kings County on the EIR to pack the room, take up valuable public hearing time, make comments that were not relevant to the decision – and these workers had an intimidating effect on residents;

- Kings County refused to translate any of the permit documents into Spanish, making it virtually impossible for most residents to understand or comment on the proposed EIR;

- The EIR hearings were held in Hanford, not Kettleman City, making it difficult for the people most affected by the EIR and permit decision to attend and participate due to the distance needed to travel to the hearing and the fact that working people with families would be hard pressed to get home from work, feed their families and travel all the way to Hanford in time for the hearing.

B. Top DTSC and Cal EPA officials agree Kings County's procedures were "unacceptable" but DTSC still relies on the Kings County study:

In a meeting with dozens of community and environmental justice advocates in front of the California EPA building on October 9, 2013, DTSC Deputy Director of Enforcement Brian Johnson stated that Kings County's use of racially discriminatory public comment processes that gave Spanish-speaking residents half the time to testify as English speakers was "unacceptable." We completely agree with Mr. Johnson of DTSC.

At the same meeting, California Environmental Protection Agency Assistant Secretary for Environmental Justice and Tribal Affairs Arsenio Mataka – the state's top official responsible for

environmental justice policy – stated that in response to these concerns, a new state law was passed requiring that non-English speakers be given the same time to testify as English speakers.

C. DTSC is thus improperly relying in significant part on the Kings County EIR that was produced with what DTSC admits was an "unacceptable" process and a process that is now prohibited by state law:

Despite the new state law prohibiting the very type of racially discriminatory procedures used by Kings County, and despite DTSC Deputy Director Johnson's public denunciation of Kings County's discriminatory procedures in the EIR process, the DTSC's draft permit decision relies significantly on that very study that was produced by racially discriminatory rules and police intimidation that made a mockery of the public's right to meaningful participation in the process.

As DTSC is required to provide meaningful opportunities for public participation to the affected public regardless of the color of their skin or the language they speak, and as DTSC is subject to state and federal civil rights laws, the DTSC must not rely in any way, large or small, on the Kings County EIR that was approved with a process that was explicitly, blatantly and illegally discriminatory and unjust.

X. DTSC's "Environmental Justice Review" Document Fails to Analyze Environmental Justice Issues and Promotes Environmental Injustice:

One of the DTSC permit documents used to justify its draft decision to approve the proposed landfill expansion is entitled "Environmental Justice Review."

DTSC claims it "…prepared this Environmental Justice Review to identify and address environmental justice concerns related to the Kettleman Hills Facility operated by Chemical Waste Management, Inc. (Applicant). The Environmental Justice Review also assesses the potential harmful offsite impacts from the facility as well as existing environmental burdens on the people in the community. Finally, this document reviews authoritative and voluntary actions taken by DTSC, local government, federal government, and the Applicant to address impacts on the people in the community from the facility or from the multiple impacts of other activities. This review is informed by the policies set forth in Government Code section 11135, Public Resources Code sections 71110-71113, California Environmental Protection Agency (Cal/EPA) Environmental Justice Action Plan (2004), and DTSC's own policies for environmental justice."

However, DTSC's so-called "Environmental Justice Review" is in reality a document that promotes environmental racism due to inaccurate analysis, the omission of key information that should have been analyzed, and the unethical and inappropriate use of certain information.

Specific inaccuracies and defects in DTSC's "Environmental Justice Review" include:

- This review failed to identify or address environmental justice concerns related to the Kettleman Hills Facility, and in fact no concerns were addressed by DTSC;

- Contrary to DTSC's claim, this review does not include an assessment of Cumulative Impacts, and the assessment of "potential harmful offsite impacts from the facility as well as existing

environmental burdens on the people in the community" that DTSC claims is in the review is simply not in this document;

- Even if the information about assessing harmful impacts was in this review, a real Cumulative Impact Assessment and analysis would include the toxic waste facility, other existing environmental hazards, proposed environmental hazards and existing and recent health and environmental quality information – this DTSC "Environmental Justice Review" failed to analyze these issues cumulatively if at all;

- It was completely improper, and a biased attempt to justify dumping more hazardous waste and PCBs on Kettleman City, for this document to review "…authoritative and voluntary actions taken by DTSC, local government, federal government, and the Applicant to address impacts on the people in the community from the facility or from the multiple impacts of other activities."

  These voluntary actions are irrelevant to a permit decision that should be based on facts and the law, not on a giant corporation using its vast wealth to greenwash their polluting operations and attempt to win the support of residents;

- A major flaw is that DTSC cites various incentive programs and the US Environmental Protection Agency Environmental Justice Small Grant that was given to Greenaction to reduce diesel pollution from illegal truck idling in Kettleman City - and DTSC mentions this grant as grounds to support granting Chem Waste its permit. This is unacceptable. As the State says it wants to provide more funding for highly impacted communities to remediate past disparities based on the CalEnviroScreen tool, this cannot be used as grounds to permit additional disproportionate impacts. The goal of the tool and of those who participated in its creation is to reduce impacts in these highly impacted communities;

- DTSC's claim that "To address the issue of air pollution, the Applicant has agreed to an enforceable plan to reduce diesel truck emissions …" is absurd and Orwellian, as the DTSC is proposing to allow a **massive increase** in diesel truck traffic and diesel emissions;

  If the expansion is approved, diesel truck trips carrying hazardous waste will increase from the current level of approximately one per day to about 400 per day. Using cleaner, but not clean, diesel vehicles will in no way "address the issue of air pollution" as DTSC claims and will not result in cleaner air and less diesel emissions;

  The only way to truly reduce diesel emissions is to reject the expansion, and make sure that there are not 399 more diesel truck trips per day more than are currently occurring.

- DTSC's claim that they are addressing the long-standing issue of water quality and the lack of a safe drinking water supply for Kettleman City residents is also absurd, as DTSC knows very

well that the people of Kettleman City drink, bathe and wash in toxic contaminated water every day and have done so for decades;

- In the section on "Public policy basis for environmental justice consideration in the permitting process," DTSC writes that "Environmental justice is defined in California law (Government Code, section 65040.12) as "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws and policies."

  DTSC is absolutely correct that there is a public policy and legal basis for environmental justice consideration in the permitting process, but the draft decision to permit a massive expansion of a violation plagued hazardous waste facility in an overburdened, vulnerable and suffering community whose residents have faced Jim Crow-style racism in the permitting process for this project is a clear violation of environmental justice and civil rights;

- The discussion of air quality in this "review" focuses on air monitoring requirements, but fails to mention anywhere the undeniable and well-documented fact that CWM has violated some of its permit requirements on monitoring, including for years at a time. Essentially the DTSC details a wishful thinking, make-believe world where CWM complies with its permit and does all the required monitoring and reporting;

- The "review" mentions US EPA's Air Emission Study on KHF Ponds, which despite being based on a one day (November 12, 2010) inspection , allegedly indicated "… that the Kettleman Hills Facility did not appear to be a significant source of the measured compounds at the time of inspection." The use of a one day inspection to conclude that the facility was not a significant source of measured compounds at the time of inspection is not a representative sample to make any conclusions;

- The DTSC "review" cites the " US EPA KHF PCB Congener Study", yet this study allowed a toxic polluter with a serious record of violations, including failing to report spills and failing to conduct some of the required monitoring, to conduct most of the testing;

- DTSC's "review" cites the "Cal EPA Kettleman City Community Exposure Assessment" ordered by Governor Arnold Schwarzenegger in January 2010 which directed Cal EPA to assess possible environmental contaminants in the air, groundwater and soil that may have contributed to the increase in birth defects in the Kettleman City community since 2007.

  We discuss the enormous scientific and technical flaws with this study elsewhere in these comments, but once again DTSC failed to point out that the pollution and waste disposal activities at the landfill were reduced by over 95% at the time the study took place compared to the full operations taking place several years earlier when the spike in birth defects took place;

- DTSC's "review" cites the state's birth defect study, but omits key information including the clear fact that the state knowingly and intentionally understated and withheld the true number of birth defects. DTSC's "review" also failed to mention the state agencies had refused to investigate until the Governor ordered an investigation in the wake of major national news coverage;

- DTSC's "review" correctly states that "Environmental justice requires not only fairness in the distribution of environmental and public health burdens and benefits, but also access to government's process for making decisions affecting environment and public health."

  However, DTSC violated this very clear mandate and requirement in many ways, most blatantly in relying in significant part on Kings County's EIR that was approved using Jim-Crow style racism including police intimidation and racially discriminatory hearing rules.

  As DTSC has publicly acknowledged that Kings County's actions were unacceptable, DTSC improperly is using that EIR to partly justify its draft permit decision;

- DTSC's review correctly discusses and provides information on the findings of the state's own CalEnviroScreen cumulative impacts tool and study, which concluded that "The population characteristics indicators show that residents may be more vulnerable to the effects of pollution." As an expansion of the landfill would clearly result in more pollution and thus more of an impact on an already vulnerable community, the state should use the information in CalEnviroScreen to reject, not approve, the permit;

- It is an outrage that the DTSC included in its so-called "Environmental Justice Review" actions proposed to be taken by a giant corporation that has repeatedly violated its permits to essentially buy off and sway public opinion. These include paying for a walking track, soccer field lighting, pavilion, and parking lot at the Kettleman City Elementary School. Children's ability to participate in sports should not be dependent on money from a company that dumps hazardous wastes and PCBs next to their town and has a terrible compliance history;

- DTSC's mention of funds that may be provided by Chem Waste to help pay off the water service debts of the Kettleman City Community Services District is improper, as many now believe that the only way Kettleman City will get a new and safe water supply is if the dump expands. This is an unethical way to garner support for a toxic waste landfill, essentially sending a message to residents that if you want clean water for your family and babies, you must allow more toxic waste to be disposed of in your town.

XI. DTSC Proposed Approval of Toxic Dump Expansion Ignores Cal EPA's CalEnviroScreen Cumulative Impact Methodology Which Proves Kettleman City Residents Are Highly Vulnerable and At-Risk From Additional Pollution:

In April of 2013, the California Environmental Protection Agency, along with the Office of Environmental Health Hazard Assessment, released a science-based tool (California Communities Environmental Health Screening Tool, the "CalEnviroScreen") for evaluating multiple pollutants and stressors in communities for use by its boards, departments, and office. The tool shows which areas of the state have higher pollution burdens and vulnerabilities than other areas. The tool uses environmental, health, demographic and socioeconomic data to create a screening score for communities across the state.

Contradicting the findings, and purpose, of CalEnviroScreen, DTSC is proposing to approve a massive expansion of a problem-plagued hazardous waste landfill in a community that the state's own CalEnviroScreen methodology found is one of the most at-risk and vulnerable communities in the state.

The DTSC's "Environmental Justice Review" (pages 18-19) states the following about the findings of CalEnviroScreen regarding Kettleman City (emphasis added):

> "CalEnviroScreen identifies which portions of the state have higher pollution burdens and vulnerabilities than other areas. It examines indicators related to exposures, environmental effects, sensitive populations, and socioeconomic factors. ***The Kettleman City census zip code is identified as in the top 10% highest scoring census zip codes in the state based on these indicators, which indicates a comparatively high level of pollution burden and vulnerability.***
>
> For the purposes of this analysis, we compared Kettleman City to two neighboring communities, Lemoore and San Miguel, examining the raw data identified by CalEnviroScreen for their respective pollution burden and population characteristics indicators. The table on the next page provides CalEnviroScreen data for the Kettleman City zip code, a nearby zip code in Kings County, and a nearby zip code in a community to the southwest of Kettleman City. The indicators show how residents of Kettleman City compare to the other communities across the 18 CalEnviroScreen indicators.
>
> ***The pollution burden indicators show that residents of Kettleman City may experience comparatively higher impacts.*** Although some indicators are not present or show lower burdens, other indicators show high burdens. The ozone indicator shows that the portion of the daily maximum 8 hour ozone concentration over the federal standard is about 0.11. The average PM2.5 air pollution is 14.1 and exceeds US EPA's standard for ambient PM2.5 concentration. Use of pesticides filtered for hazard and volatility in the area is much higher than the two comparison zip codes, with 3,706.2 pounds reported. In addition, hazard-weighted pounds of chemicals from toxic releases are 39,120,229. Unlike the two comparison zip codes, CalEnviroscreen does not identify impacts from cleanup sites or groundwater threats for the Kettleman City zip code.
>
> ***The population characteristics indicators show that residents may be more vulnerable to the effects of pollution.*** The educational attainment indicator shows that 57.2% of the population has less than a high school education. This percentage is significantly higher than the two comparison zip codes.

The linguistic isolation indicator measures the percentage of households where no one speaks English "very well," and identifies 23.6% of households in Kettleman City as in this category. This percentage is also significantly higher than the two other comparison zip codes. Kettleman City is also high on the tool's measure of poverty, with 39.8% of the population living below twice the federal poverty level. The percent low birth weight in Kettleman City, 6.03%, is comparable to the two comparison zip codes. Finally, CalEnviroScreen identifies 96.27% of the population of Kettleman City as non-white or Hispanic/Latino, significantly higher than the two comparison zip codes.

The data from CalEnviroScreen are useful for understanding the multiple pollution sources present in the Kettleman City census zip code. They are also valuable in understanding how the zip code compares to other zip codes in the state. Finally, they provide a way to assess the community's relative vulnerability to those pollution sources, particularly in light of emerging scientific research indicating that the relationship between pollutant exposure, stress, and health outcomes can vary based on the race and ethnicity of the population."

We incorporate into our comments the chart starting on page 19 of DTSC's "Environmental Justice Review" documenting population characteristics and pollution burdens in Kettleman City.

XII. DTSC Improperly Failed to Consider or Evaluate Cumulative Impacts to Assess True Impacts of Proposed Expansion of the Hazardous Waste Facility:

DTSC's Environmental Justice policy states that DTSC will "minimize potential cumulative impacts from facilities and sites on community health and the environment by significantly reducing exposure risks from individual sites." Even though DTSC acknowledges that Kettleman City residents face a cumulative risk from multiple pollution sources, it does little to identify the nature of those impacts or address them.

As discussed in more detail below, DTSC's entire cumulative impact analysis consists of listing new or proposed projects that have emerged since Kings County certified its EIR for the project and summarizing any existing CEQA documentation for the new projects. DTSC did not analyze the combined impact of multiple environmental stressors in the area, and certainly did not minimize potential cumulative impacts by significantly reducing exposure risks from individual sites.

DTSC is well aware of the widespread concern over cumulative impacts in Kettleman City. In fact, during her confirmation hearing, members of the legislature explicitly asked DTSC Director Debbie Raphael to explain how she planned to address cumulative impacts. The Director responded that "we need to take additional information into account, look at what other facilities have been cited around the Kettleman community, look at the issue of birth defects, look at pesticide exposures, to try to have an idea of what - - paint a picture of the reality of the situation for the residents of Kettleman, and how does the facility play into that. And that's part of the additional work that we are working on right now."

Despite Director Raphael's explicit promise to conduct a cumulative impact study, and despite CalEnviroScreen's identification of Kettleman City as a very at-risk and burdened community, DTSC failed to conduct a cumulative impact analysis for their permit decision.

DTSC's alleged cumulative impact analysis is a far cry from what the Director promised the legislature and fails to evaluate the cumulative impacts at all. The analysis did not "look at the issue of birth defects," did not "look at pesticide exposures," and did not "paint a picture of the reality of the situation for the residents of Kettleman and how does the facility play into that."

Outside the CEQA context, Cal/EPA defines cumulative impacts to mean exposures, public health or environmental effects from the combined emissions and discharges, in a geographic area, including environmental pollution from all sources, whether single or multi-media, routinely, accidentally, or otherwise released. Impacts will take into account sensitive populations and socioeconomic factors, where applicable and to the extent data are available.

DTSC prepared an Environmental Justice Review "to identify and address environmental justice concerns related to the Kettleman Hills Facility. . ." EJ Review at 4. The document "review[ed] authoritative and voluntary actions taken by DTSC, local government, federal government, and the Applicant to address impacts on the people in the community from the facility or from multiple impacts of other activities." Id. DTSC "acknowledges the multiple environmental pollution burdens borne by the Kettleman City community, and the presence of poverty, language barriers and other factors which tend to make those people vulnerable to the impacts of pollution." EJ Review at 4. However, DTSC does not address the cumulative impacts associated with its permit decision. Rather DTSC describes residents' concerns and summarizes ongoing activities by itself and other agencies that are completely independent of and unrelated to the facility and the ultimate decision.

For example, DTSC lists 1) agreements made by the company pursuant to the Tanner Act process, 2) EPA's prevention of pesticide exposure project to educate local residents; 3) EPA's Diesel Truck Emissions grant to Greenaction for Health and Environmental Justice; and 4) plans for a new drinking water source. Many other cited actions are merely inconclusive studies with no associated pollution reductions. All these activities would have occurred even without DTSC's approval of the proposed facility. Yet DTSC relies upon these activities in an attempt to mitigate the significant cumulative impacts from the proposed KHF expansion.

DTSC risks stifling improvements and positive programs for vulnerable areas if it relies upon them as justification for permitting undesirable land uses. DTSC must address cumulative impacts from the KHF expansion by significantly reducing exposure risks from that individual site, not by reliance on the positive steps that are already being taken in the community. Where, as here, cumulative impacts are so severe, the only way to acceptably reduce the cumulative risk presented by the KHF expansion is to deny the permit.

During the DTSC phone briefing on July 2, 2013 about their draft permit decision, Director Raphael stated that the promised cumulative impact study was actually part of the DTSC's permit document entitled "Environmental Justice Analysis." However, a comprehensive cumulative impact analysis is not in that document or in any other permit document.

The permit documents do contain a listing of many of the multiple pollution sources impacting Kettleman City, but this list is incomplete and completely fails to evaluate the combined cumulative impact of all these existing and proposed pollution sources on a community the state itself admits is highly vulnerable. A list of pollution sources is not a cumulative impact analysis.

The permit documents do include valuable and highly relevant information compiled by Cal EPA in their cumulative impacts analytical tool and methodology, the CalEnviroScren, and this model and tool resulted in the state ranking Kettleman City in the top 10% of the most vulnerable and at-risk communities in the state to pollution.

DTSC is thus making a mockery of CalEnviroScreen by approving a massive increase in pollution at the same time acknowledging that this community is highly vulnerable and after promising to reduce pollution impacting this suffering town.

The failure to conduct a comprehensive cumulative impact study of the potential impacts of expanding the toxic waste landfill combined with existing and other proposed pollution sources in this community already suffering high rates of serious health problems has resulted in inadequate analysis of the potential and real impacts of the proposed expansion.

XIII. DTSC Erred in Refusing to Conduct Biomonitoring of Residents:

Despite repeated and public requests from residents including mothers who had babies with birth defects, the state erred by refusing to conduct biomonitoring of residents to determine the extent of toxic contaminants in their body. This testing could possibly have identified possible links between certain types of pollutants coming from specific pollution sources and health problems being experienced by mothers, babies, kids and other residents.

According to the California Department of Public Health, "Biomonitoring is the measurement of chemicals (or their metabolites) in a person's body fluids or tissues, such as blood or urine. It tells us the amount of the chemical that actually gets into people from all sources (for example, from air, soil, water, dust, and food) combined. Because of this, biomonitoring can provide useful information on how much exposure to toxic chemicals a person has had."

Because of the multiple pollution sources, it is important for Kettleman City residents to know how much exposure they have compared to other areas of the state. Even if the biomonitoring was unable to pinpoint a single source, the information about cumulative impacts from living near so many pollution sources in important, especially in the face of DTSC's proposed decision to approve yet another pollution source.

Residents have long requested that the State conduct biomonitoring to help determine whether unexpected chemicals are in their bodies, yet these requests have been repeatedly rejected or ignored.

At her confirmation hearing, Senator Alquist questioned DTSC Director Debbie Raphael specifically about her commitment to conduct biomonitoring in Kettleman City. The following dialogue occurred during the Senate confirmation hearing for Debbie Raphael:

Ms. Raphael: . . . You are correct in saying biomonitoring has not been offered to the residents of Kettleman. What I will commit to and am excited to do is to go deeper into the why on that and to work with the Department of Public health to ask the question: Is this an appropriate place for biomonitoring? If not, why not? Let's talk to the community members, bring them into the conversation to get a realistic view of what could biomonitoring – how could it help: what kind of information could it give to the community members that they don't already have. The idea of finding out what's in their bodies, can we link it to anything in the environment, are the chemicals that they're being exposed to even - - sorry- - contained in their bodies, that some of the pesticides won't be picked up in biomonitoring, is what I want to say.

Senator Alquist: Would you commit to, in the next three months, asking these questions?

Ms. Raphael: I will.

Senator Alquist: And at that point, putting out a statement after you evaluate the answers to those questions, stating either specifically why biomonitoring would not be a good thing to use in Kettleman City, or why it would be to implement the process.

Ms. Raphael: Yes. I would…I'm committing to do what you say.

However, DTSC has not put out a formal statement on whether biomonitoring would be a good thing to use in Kettleman City. DTSC has not talked to the community members to get a realistic view of how biomonitoring could help provide residents with information that they do not already have.

XIV. Permit Must Be Denied Due to CWM's Dismal and Well-Documented Compliance History of Chronic, Repeat and Serious Violations:

DTSC admits in their so-called "Environmental Justice Review" permit document that "it is DTSC's responsibility to ensure the facility does not pose a health risk to the community, and operates within the requirements of its hazardous waste permit."

It is a matter of public record, and an undeniable fact, that Chem Waste has frequently been in repeat, chronic and often ongoing violation of its hazardous waste permit often for years at a time. It is a mockery of reality for DTSC to pretend that somehow all of a sudden Chem Waste will operate within the requirements of its permit.

DTSC and other agencies must reject the proposed permit due to the fact that Chemical Waste Management has a long track record of serious, repeat and chronic violations of their permits regarding handling and disposal of hazardous wastes and PCBs at the Kettleman Hills Facility.

In the last few years alone, Chem Waste has been cited for violations including years of illegal disposal of hazardous wastes and PCBs, years of failing to conduct some of the required monitoring, failing to report 72 spills of hazardous waste over a four year period, and faulty laboratory results.

These chronic violations clearly are grounds for a permit denial, yet the state's decision to issue a draft permit sends a message to polluters that they can violate their permit dozens of times as Chem Waste has, yet still get new permits.

A. DTSC Should Deny the Permit Based on Chemical Waste Management's Repeating or Recurring Pattern of Violations and Noncompliance:

The KHF expansion project takes place against a backdrop of repeated environmental violations and fines for failure to meet basic operating standards. Agencies have fined Chemical Waste Management millions of dollars for violations at KHF since it was built, and continue to issue fines to the company as recently as this year.

Chemical Waste Management has been fined repeatedly for violations at KHF. In 1984, EPA fined Chemical Waste Management $2.5 million for a total of 130 violations. Among other incidents, Chemical Waste Management was charged with allowing leaks from the dump to contaminate local water supplies. In 1985, EPA and Chemical Waste Management's parent company, Waste Management, Inc., agreed to a consent decree involving $4 million in fines for failing to adequately monitor ground water and for mishandling hazardous waste, including PCBs, at the Kettleman Hills dump. In 2005, EPA and Chemical Waste Management entered into a consent decree for extensive monitoring violations. The California Department of Health Services fined Chemical Waste Management $363,000 for eleven administrative and operational violations at the Kettleman dump.

Agencies have consistently and continually levied violations and fines against Chemical Waste Management. For example, on April 8, 2010, EPA issued Chemical Waste Management a letter outlining that the company was engaged in improper disposal and improper handling of highly toxic materials. And, on May 27, 2010, EPA Region IX issued a Notice of Violation to Waste Management stating that, "the data quality control system at the KHF Laboratory is not adequate to ensure reliable analytical results," and "should not be used for decision making." On March 2013, DTSC fined Chemical Waste Management $311,194 for 72 violations for failing to report hazardous waste spills on its property during a four year period between 2008 and 2012.

Health & Safety Code, Section 25186 authorizes DTSC to deny or revoke a permit based on violations of or noncompliance with environmental protection statutes and regulations, if the violation or noncompliance shows a repeating or recurring pattern or may pose a threat to public health or safety of the environment. Moreover, Title 22 of the California Code of Regulation, Section 66270.43 authorizes DTSC to revoke or deny a permit for noncompliance by the applicant with any condition of the permit.

In response to a question about whether Chemical Waste Management's enforcement record was taken into account in the draft permit modification decision, DTSC explained that "DTSC carefully reviewed the facility's entire enforcement record, dating back to 1983 and concluded that none of the violations threatened public health or the environment." DTSC FAQ. By considering only whether violations threatened health and the environment, DTSC applies the wrong standard. Pursuant to Health & Safety Code Section 25186, DTSC must consider whether violations of or noncompliance with environmental protection statutes and regulations shows a repeating or recurring pattern. This

consideration is in addition to and separate from its consideration of whether the violations pose a threat to public health or safety of the environment.

We also challenge DTSC's claim that none of the violations threatened public health or the environment. For example, DTSC was unaware of CWM's failure to report 72 spills spanning a four year period – and unaware of the spills – until they discovered the violations after the fact. In reality, DTSC has absolutely no independent, verifiable evidence to assert these spills and the failures to report them (as required by CWM's permit) did not threaten public health. These incidents very likely could have posed a serious health threat to company workers or even to school kids that CWM tries to bring on picnics to the hazardous waste facility.

In addition, it is absurd for DTSC to claim that the failures to conduct required monitoring, or relying on unreliable laboratory testing, or illegally disposing of hazardous wastes and PCBs do not in any way threaten public health.

In a separate document, DTSC provides a different answer to how the agency considered the compliance history of the KHF. DTSC explains that its enforcement review "concluded that the facility is not a serial violator as there have been long stretches of time without violations." This is factually incorrect as Chemical Waste Management has not gone any substantial period of time without violating statutes, regulations or its permits, as demonstrated above. Additionally, DTSC's interpretation of its authority is contrary to the plain language of the statute, and constitutes the setting of an underground regulation without first complying with the California Administrative Procedure Act. According to DTSC's new interpretation of what constitutes a pattern or practice of violations, an applicant would have to violate statutes, regulations or permits at consistent time intervals for the entire life of the project. This is an arbitrary interpretation of what constitutes a repeating or recurring pattern of noncompliance, renders Health & Safety Code Section 25186 virtually meaningless, and sets up very dangerous precedent for other facilities across the state.

By any reasonable measure, Chemical Waste Management's violations and noncompliance show a repeating or recurring pattern. By sheer number: DTSC and other agencies have issued hundreds of violations against KHF. By timeframe: the violations span 30 years. By consistency: KHF has operated for 30 years; in 24 of those years, it has been found in violation of statutes, regulations or its permits at least once. By continuity: the facility has continued to violate statutes, regulations, and its permits even as it seeks this expansion. In fact, some of the facility's largest fines have been issued within the last two years, after it filed its permit application with DTSC.

Compliance histories as compiled by DTSC and USEPA are attached to and incorporated into these comments as Exhibits B, C, D and E. The November 8, 2012 email from US EPA to Greenaction with RCRA and TSCA compliance/violation histories (attached and incorporated into these comments) confirms that their compilation is incomplete, but they clearly show an ongoing and chronic pattern of violations that justify a permit denial.

B. DTSC Should Deny the Permit Based on Chemical Waste Management's Violations of its Permit:

DTSC ignores other regulatory authority that allows it to deny a permit based on noncompliance by the applicant with any condition of a permit. See 22 CCR § 66270.43. DTSC has previously considered what types of violations are sufficiently significant so as to support a permit denial. Examples include:

(a) failure to install an adequate environmental monitoring system;

(b) failure to construct the facility properly, for example, inadequate containment systems; inadequate run-on/run-off collection systems; systems that do not meet seismic and precipitation design standards; or use of construction materials that are incompatible with waste being handles; and

(c) failure to manage waste handles at the facility properly, e.g., failure to comply with waste analysis requirement; failure to maintain adequate security; improper handling of incompatible reactive or ignitable wastes; or spillage of wastes onto soil.

Agencies have issued violations against Chemical Waste Management that would fall under each of these categories:

a. Monitoring violations

EPA and DTSC have issued violations to Chemical Waste Management for failure to implement a groundwater monitoring program and failure to implement an unsaturated zone monitoring program. EPA has issued a violation for failure to perform monthly monitoring of lysimeters for presence of liquids. The regional water quality control board has issued a number of violations for failing to monitor groundwater. The San Joaquin Air Quality Management District issued violations for failing to conduct required monthly monitoring.

b. Inadequate construction

The facility had one of the largest ever failures of a hazardous waste liner. A landslide occurred on one of the site's slopes and tore out part of the liner system. This resulted in a displacement of over a million cubic yards of hazardous waste. Subsequent analysis suggests that the landslide resulting from design and construction issues.

c. Waste mismanagement

DTSC and EPA have issued numerous violations to Chemical Waste Management for failing to adequately treat waste prior to placement in the landfill, impermissibly land disposing prohibited waste, failing to maintain and operate facility to minimize releases, and improper disposal. For example, during a series of 2010 inspections, EPA investigators found that Chemical Waste Management improperly managed PCBs at the facility. Further analysis revealed spills next to the facility's PCB Storage and Flushing Building. Samples taken by EPA and Chemical Waste Management in and around the building detected PCBs at elevated levels ranging from 2.1 parts per million (ppm) up to 440 ppm. These levels are above the regulatory limit of 1 ppm and, in soil, demonstrate that PCBs were improperly disposed of in violation of federal law.

C. DTSC Failed to Adequately Consider Chemical Waste Management's Compliance History Pursuant to CEQA:

The consideration of a facility proponents' environmental record is expressly mandated by the California Supreme Court in Lauren Heights Improvement Ass'n v. Regents of the University of California, 47 Cal.3d 376, 420. Because an EIR cannot be meaningfully considered in a vacuum devoid of reality, a project proponent's prior environmental record is properly a subject of close consideration in determining the sufficiency of the proponent's promises in an EIR.

Consideration must also be given to measures the proponent proposes to take in the future not just the measures it took or failed to take in the past. In balancing a proponent's prior shortcomings and its promises for future action, an environmental impact report should consider relevant factors including: the length, number, and severity of prior environmental errors and the harm caused; whether the errors were intentional, negligent, or unavoidable; whether the proponent's environmental record has improved or declined; whether he has attempted in good faith to correct prior problems; and whether the proposed activity will be regulated and monitored by a public entity.

Based on the five-prong test set forth in Laurel Heights, Chemical Waste Management cannot be trusted to properly perform the activities, mitigation measures, closure and post closure monitoring proposed in the EIR and addendum.

D. DTSC Did Not Conduct a Comprehensive Compliance Review:

DTSC reports that TSCA/PCB records from before 1998 are not available. Since DTSC must review compliance history as part of its permit decision process and its CEQA review, the missing records are inexcusable. DTSC does not explain why these records are unavailable. However, DTSC must take considerable efforts to find and review these records. Until DTSC does an exhaustive and multi-agency search for these records, comprehensive review of the applicant's compliance history is not possible.

E. Permit Approval Despite CWM's Extensive Track Record of Violations Would Be Dangerous and Ominous Policy Precedent for Other Polluters:

If DTSC approves a final permit despite CWM's extensive, chronic, repeat and serious violations, it will give the green light to other industries that they too can repeatedly violate their permit and still get new permits. This would be an unacceptable precedent and set terrible policy that would threaten the health and environment of all Californians, especially the low-income and people of color who disproportionately live near polluting industries including hazardous waste facilities.

XV. Proposed Expansion Meets Other Criteria for Permit Denial:

A. Misrepresentation of Relevant Facts:

DTSC guidance outlines criteria the agency should use to determine whether to deny a permit. One criteria is "the permittee's misrepresentation of any relevant facts at any time."

The permit expressly states that the failure to submit any information required in connection with the Permit, or falsification and/or misrepresentation of any submitted information, is grounds for revocation of this Permit. Permit, citing 22 CCR § 66270.43; see also Health & Safety Code § 25186(d) (Grounds for denial include "[a]ny misrepresentation or omission of . . . information subsequently reported to the department."). Chemical Waste Management's recent citation for intentionally withholding information about 72 spills at the site over a four year period is grounds for a permit denial.

On February 7, 2010, the New York Times had a major story about the birth defect and hazardous waste issues in Kettleman City. The story included the following and referenced a claim made by Kit Cole, a Chemical Waste Management spokesperson:

"Ms. Cole said that the Kettleman Hills facility was safe and that a vast majority of the waste handled was run-of-the-mill garbage from municipalities. Only 60 acres was devoted to the most dangerous material, she said, including hazardous chemicals and byproducts from manufacturing and agriculture, which are stabilized in cement blocks before they are buried." (emphasis added).

Greenaction promptly emailed the DTSC about this claim made by Chem Waste that they stabilized the hazardous waste in cement. We asked DTSC if the claim was accurate, as we knew it to be false. It unfortunately and unacceptably took DTSC two months to respond to our inquiry, but on April 6, 2010 we received a response from Nathan Schumacher, DTSC Public Participation Specialist. His response on behalf of DTSC confirmed that the statement attributed to Chem Waste in the New York Times was not true. He wrote the following:

"No, Waste Management does not encase all its waste in cement. However, to minimize mobility of the waste, Waste Management does stabilize or solidify some waste before burying it in the landfill. According to our data, the amount of hazardous waste stabilized or solidified was 7% of the total placed in the hazardous waste landfill."

This email from DTSC is attached and incorporated into these comments as Exhibit F.

B. Permitted Activity Would Endanger Public Health and Cannot Be Adequately Regulated:

Another criteria for permit denial is "[a] determination that the permitted activity endangers human health or the environment and cannot be adequately regulated under a permit." This evaluation includes not only the potential for releases of hazardous wastes at significant levels, but also other environmental impacts as well. The guidance document explains that significant impacts not directly associated with releases of wastes from a facility can be identified through the EIR process. According to DTSC, after all feasible mitigation measures have been imposed, the project will significantly increase ozone, course particulate matter ("PM10") and fine particulate matter ("PM2.5") emissions, result in a significant and unavoidable cancer risk at the KHF property boundary, significantly increase traffic impacts, and contribute to cumulatively considerable and significant greenhouse gas emissions.

Massive diesel truck traffic would also have a severe impact. Kettleman City is heavily impacted by vehicular traffic because of its location at the intersection of two freeways, including Interstate 5, its

proximity to a large transfer station, and its location in one of the most contaminated air basins in the U.S. Asthma rates are extremely high. Yet, the facility proposes to add an additional 400 trucks per day. This increase in vehicular traffic will endanger human health and cannot be adequately regulated under a permit.

XVI. Inadequate Mitigation Measures:

In an attempt to justify the improper and defective draft permit and attempt to pacify community concerns about massive diesel truck emissions, DTSC's proposed permit would phase in over a few years a requirement that diesel trucks going to and from the Chem Waste facility comply with cleaner vehicle standards. In the interim, hundreds of dirty and outdated diesel vehicles would go to and from the facility every day, exposing residents to dramatically increased diesel pollution. In fact, trucks older than 2010 would be allowed to continue going to the KHF facility until 2018, exposing residents to extensive toxic diesel emissions from tens of thousands of older dirtier trucks for at least four more years.

It is thus clear that the proposed requirements would be virtually meaningless in reducing pollution and in fact are being used to justify what certainly would be a massive increase in diesel truck traffic, diesel emissions and toxic emissions from the hazardous waste and PCB landfill.

1. If DTSC approves the permits for expansion, the number of trucks carrying hazardous waste to the facility will increase from the current level of approximately one truck per day to approximately 400 per day. This is a shocking and unacceptable increase in truck traffic, diesel emissions and emissions from hazardous waste disposal due to the increase in emissions in an area that the state's CalEnviroScreen concluded is one of the most vulnerable and at-risk communities in the state.

2. A permit expansion that allows the massive increase in diesel pollution would in and of itself violate the state's public commitment to reduce pollution and not increase it in Kettleman City.

3. Even the EIR prepared by Kings County (an entity that is blatantly pro-Chem Waste and benefits financially from toxic dumping in Kettleman City) acknowledged that the proposed expansion would result in significant negative impacts that could not be mitigated including an increase in traffic.

4. Even newer diesel vehicles emit dangerous toxic and criteria pollutants.

5. Diesel trucks emit dangerous and unnecessary levels of pollution that can contribute to asthma, cancer, and other health problems, as well as to air pollution and climate change.

6. There is no basis to believe that Chemical Waste Management will comply with this requirement due to their many and chronic violations of many permit conditions that often continue for years at a time – and DTSC erred in assuming Chem Waste would comply with this or any other permit condition due the well-documented violation history at the facility.

7. There will be no meaningful enforcement by regulatory agencies or law enforcement of these requirements due to lack of capacity.

8. There will be no meaningful enforcement by regulatory agencies due to the well-documented failure of DTSC and other regulatory agencies to properly enforce permit conditions and the agency's failure to assess maximum or substantial fines against Chem Waste even for serious and chronic violations as evidenced by the minimal fines levied for failing to report 72 spills of hazardous waste (fines were approximately 25% of what could have been levied).

9. This increase in emissions of harmful pollutants and the traffic increase would negatively and disproportionately impacts the people of color and Spanish speaking residents of Kettleman City, in violation of state and federal civil rights laws.

XVII. Independent Review of DTSC's Permitting Processes:

In the face of mounting criticism of DTSC's permit and regulatory actions, the Director of the Department of Toxic Substances Control, Debbie Raphael, released an open letter on February 15, 2013 announcing that the agency had "launched a comprehensive review of its permit process." The letter explains that "[d]uring the past two years, stakeholder feedback and our own internal observations have demonstrated that there is room for improvement in the process of permitting hazardous waste treatment, storage, and disposal facilities."

One of the stated reasons for the review was that "the department does not have clear guidelines for when to deny a permit." The purpose of the review was to provide recommendations for process improvements including standardized processes, clear decision-making criteria and corresponding performance standards. The recommendations and findings were due to be released by June 30, 2013.

On October 8, 2013, the department formally released the report. The report notes many areas of deficiency including there being no clear and objective criteria for making denial/revocation decisions that are based on valid standards of performance and threats. The study recommends that DTSC develop policy to determine what factors to use to support a decision to continue with permitting versus those to use to support a denial or revocation action.

However, DTSC is proposing to move forward with a permit decision on the KHF expansion despite knowing that it does not have clear criteria in place to use and before having any opportunity to develop the criteria recommended in its own consultant's report. It is irresponsible for the agency to move forward with permitting such a controversial permit in such an overburdened community at the same time it has recognized the absence of clear criteria on when to deny the permit and is actively seeking ways to improve their permit process.

This permit decision will impact nearby residents for generations to come and needs to be done right. If DTSC approves the expansion permit without taking the time to implement recommended changes to the permit process, the agency will have acknowledged that the permit is the result of a flawed process, made without the benefit of any clear guidelines on when to deny a permit. Kettleman City

residents deserve a deliberate process with clear and objective criteria for permit approval or denial. Without such criteria, the process is subject to the whims of individual staff and political persuasion. Kettleman City residents should not suffer because of the incompetency of the agency.

We incorporate DTSC's permit review into our comments:
http://dtsc.ca.gov/HazardousWaste/upload/DTSCPermitReviewProcessFinalReport.pdf

XVIII. DTSC Erred in Failing to Prepare a Supplemental or Subsequent EIR:

Any time a discretionary approval is required by a responsible agency for a project for which an EIR has already been adopted, the agency must determine if a subsequent or supplemental EIR is required. The agency must prepare a subsequent or supplemental EIR if changes are required to make a previous EIR adequate.

A responsible agency must prepare a subsequent or supplemental EIR when (1) substantial changes are proposed in the project that will require major revisions of the EIR, (2) substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions in the EIR, or (3) new information of substantial importance to the project that was not known and could not have been known at the time the EIR was certified as complete becomes available. Pub. Res Code § 21166; 14 CCR § 15162.

Addendums are only to be used when none of the conditions requiring a supplemental or subsequent EIR is present, but minor corrections or changes to the previous EIR are necessary. An addendum must document and support with substantial evidence the agency's determination that a subsequent or supplemental EIR is not required. 14 CCR § 15164(e).

DTSC did not prepare a subsequent or supplemental EIR for the proposed project. Rather, DTSC elected to prepare a 77-page Addendum that identified changes to the proposed project and listed recently approved projects in the area which may contribute to increased cumulative impacts.

The Addendum did not consider new impacts associated with project changes, multiple changed circumstances, and substantial new information not previously available. Nor did the Addendum support its finding that a supplemental or subsequent EIR was unnecessary with substantial evidence in the record.

DTSC erred in failing to prepare a subsequent or supplemental EIR because:

(1) the applicant is proposing changes to the project that will lead to increased impacts;

(2) circumstances under which the project will be undertaken have changed significantly; and

(3) new information of substantial importance, which was not known at the time of EIR certification, has become available. See Pub. Res. Code § 21166; 14 CCR § 15162.

A. New Information Which Was Not Known and Could Not Have Been Known at the Time of EIR Certification Is Now Available.

CEQA requires a responsible agency to prepare a subsequent or supplemental EIR if "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. Res. Code § 21166(c).

Since the time Kings County certified the EIR:

* USEPA has updated health protective air quality standards;

* The California Office of Environmental Health Hazard Assessment released a screening tool that identified Kettleman City as being in the top ten percent of California communities most disproportionately burdened by multiple sources of pollution;

Kings County did not have or consider this information when preparing its EIR for the project. This new information suggests that the project may have additional or more severe impacts than the County analyzed in the EIR. The new information triggers the need for a supplemental or subsequent EIR.

1. EPA's Approval of a New Standard for Short-Term Nitrogen Dioxide Emissions Is Significant New Information:

New information has become available since Kings County certified the Supplemental EIR indicating that the project will likely have a significant and unavoidable impact on public health due to short-term exposure to nitrogen dioxide emissions. On February 9, 2010, after Kings County certified the Supplemental EIR for the project, EPA established a new primary National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO2) based on a 1-hour averaging time (1-hour NO2 NAAQS). The rule became effective April 12, 2010. 75 Fed. Reg. 6474 (Feb. 9, 2010). EPA lowered the primary NO2 NAAQS in response to studies showing increases in respiratory symptoms and hospital visits related to short-term exposure to high levels of NO2. Id. EPA found that the existing NAAQS did not sufficiently protect public health, especially in light of high incidences of near roadway exposure to NO2. Id.

Exposure to nitrogen dioxide, a by-product of fossil fuel combustion, is associated with children's hospital admissions, emergency department visits, and aggravation of asthma, including symptoms, medication use, and lung function. Persons with preexisting respiratory disease, children, and older adults may be more susceptible to the effects of NO2 exposure. Individuals in sensitive groups may be affected by lower levels of NO2 than the general population or experience a greater impact with the same level of exposure. In addition to intrinsically susceptible groups, people living and working near roadways may be at increased vulnerability due to higher exposures.

King County's EIR relied upon EPA's now-outdated 1-hour NO2 NAAQS to determine the project's air quality impacts on nearby residents. EPA's finding that this standard was not sufficiently protective of public health and its adoption of a lower 1-hour NO2 NAAQS is important new information that was not available at the time of EIR certification. DTSC must determine whether

NO2 emissions associated with the project will have a significant impact on public health in light of EPA's approval of new 1-hour NO2 NAAQS.

2. Evidence Collected During EPA's Analysis of the Avenal Power Plant Is Significant New Information:

On May 5, 2011, EPA issued a Prevention of Significant Deterioration Permit for the Avenal Energy Project, a new 600 megawatt natural gas-fired power plant proposed in Avenal, just 12 miles from Kettleman City and KHF. Despite numerous attempts, the applicant for the Avenal Energy Project was unable to satisfy EPA that the power plant would not cause an exceedance of the new-health based 1-hour NO2 NAAQS. Rather than delay the project any further, EPA made the unprecedented decision to grandfather the facility from the agency's new 1-hour NO2 NAAQS. This decision is currently being challenged in the Ninth Circuit Court of Appeals. However, evidence EPA gathered for the Avenal Energy Project PSD permit is relevant to determine KHF's cumulative impact from short-term NO2 emissions. This information was not available at the time of Kings County's EIR certification. Therefore, DTSC must now include and analyze this information as part of a supplemental or subsequent EIR.

Based on evidence in the Avenal Energy Project record, Kings County residents would be subject to NO2 exposures near or over the NAAQS limit, even without the KHF expansion. In its analysis for Avenal Energy Project's Prevention of Significant Deterioration (PSD) permit, the EPA reported background NO2 levels of 50 parts per billion (ppb) in Hanford and 61 ppb in Visalia, where the two closest monitoring stations are located. EPA concluded that operational emissions from the Avenal Power Project would add an additional 44 ppb to the maximum one-hour NO2 impact. Avenal Energy Project, Supplemental Statement of Basis at 27. Therefore, without the KHF expansion, background NO2 levels in the area after the power plant is constructed would be between 91 and 102 ppb, nearly exceeding or exceeding the 1-hour NO2 NAAQS.

Evidence from the Avenal Energy Project record also indicates that background NO2 levels in Hanford and Visalia under-represent emissions in Kettleman City. EPA explains that "NO2 concentrations on or near major roads are appreciably higher than those measured at monitors in the current network . . . . and near-roadway concentrations have been measured to be approximately 30 to 100% higher than those measured away from major roads." Supplemental Statement of Basis at 19.

Kettleman City is directly adjacent to Interstate 5, one of the State's main commerce freeways, averaging 35,400 vehicles per day. Given EPA's own data, Kettleman City should have background levels of NO2 of at least 65 ppb (30 percent greater than Hanford's 50 ppb background level) and could have background levels in Kettleman City as high as 130 ppb (100 percent greater than Visalia's 65 ppb). In Kettleman City, these background levels are exacerbated by the near roadway impacts from Interstate 5 and Highway 41, and impacts from the planned Avenal Energy Project. The expansion of KHF, with its addition of 400 trucks per day, will subject Kettleman City residents to unhealthy levels of NO2.

Finally, the Avenal Energy Project record contained an analysis the local San Joaquin Valley Air Pollution Control District prepared for the Avenal Energy Project's compliance with the State's 1-hour

NO2 standard. The air district concluded that the project's cumulative total impact for 1-hour N02 (maximum facility impact and background) is 327.2 µg/m3 or 179 ppb. This emission level, while complying with California's air quality standards, is well above the federal 1-hour NO2 NAAQS of 100 ppb. EPA Response Letter at 5, 14. The KHF expansion would increase emissions even more, subjecting Kettleman City residents to unsafe levels of NO2.

This additional information triggers the need for DTSC to prepare a subsequent or supplemental EIR because it is new information, not available at the time of EIR certification, and indicates that the KHF expansion project would have more severe impacts than previously disclosed.

3. The CalEnviroScreen Identifies Significant New Information on the Vulnerability of Kettleman City Residents:

As discussed above, in April of 2013, the California Environmental Protection Agency, along with the Office of Environmental Health Hazard Assessment, released a science-based tool for evaluating multiple pollutants and stressors in communities for use by its boards, departments, and office. The tool shows which portions of the state have higher pollution burdens and vulnerabilities than other areas. The tool uses environmental, health, demographic and socioeconomic data to create a screening score for communities across the state. According to the Cal/EPA Secretary, an area with a high score would be expected to experience much higher impacts than areas with low scores. The Secretary also explained that "knowing which areas of the state have higher relative environmental burdens will not only help with efforts to increase compliance with environmental laws in disproportionately impacted areas, but also will provide Cal/EPA and its boards, departments, and office with additional insights on the potential implications of their activities and decisions." California Communities Environmental Health Screening Tool, Version 1.1 September 2013 Update (hereafter "CalEnviroScreen v.1.1") at ii.

According to the CalEnviroScreen, the zip code containing Kettleman City is ranked in the top 10 percent of communities in California over-burdened by pollution from multiple sources and most vulnerable to its effects, taking into account their socioeconomic characteristics and underlying health status. CalEnviroScreen v.1.1 at 105.

Though DTSC references the CalEnviroScreen results in its Environmental Justice Review, the agency does not address, analyze, or include the new information in its CEQA analysis to determine what impact the KHF expansion will have on Kettleman City given the communities' existing pollution burden and its extreme vulnerability to pollution. Though the CalEnviroScreen is not intended as a stand-alone substitute for the cumulative impact analysis required by CEQA, there is nothing that prevents DTSC, as a department of Cal/EPA, from considering information contained in the CalEnviroScreen about the community's high vulnerability to pollution as part of its CEQA analysis.

B. Substantial Changes in the Circumstances Under Which the Project Is Undertaken Require Additional CEQA Analysis:

An agency making a discretionary decision on whether to carry out or approve a project must consider any substantial change in circumstances that occurs after preparation of the EIR if the changed

circumstances could lead to new or more severe significant impacts. Pub. Res. Code § 21166; 14 CCR § 15162(a)(2).

1. The Recent Valley Fever Epidemic in Kings County Is a Changed Circumstance That May Lead to New or More Severe Impacts from the KHF Expansion:

Valley fever is caused by a soil fungus that is inhaled into the lungs. The fungus grows in the soil. The fungus can become airborne when the ground is broken and the dirt and dust spread into the air. Experts say people who work in dusty fields or construction sites are most at risk, as are certain ethnic groups and those with weak immune systems. Newcomers and visitors passing through the region may also be more susceptible.

The valley fever fungus grows particularly well in the alkali soils on the San Joaquin Valley's west side. The fever has hit Kings County particularly hard in recent years, with incidence dramatically increasing in 2010 and 2011, after EIR certification. Valley fever cases in Kings County rose sharply in 2010, and remain at record level highs. Most valley fever cases in Kings County occur in Kettleman City and Avenal. For example, although Kettleman City and Avenal represent only 12% of the County population, from 2007-2010 they accounted for 67% of the reported cases.

The SEIR, prepared prior to the recent sharp increase in valley fever, did not consider the project's construction related impacts on valley fever. Expansion related construction will disturb soils and increase airborne dust. Construction workers, nearby residents, and travelers stopping in the heavily used Kettleman City truck stop area are all at risk from any activity that increases dust and airborne soil spores. The recent spike in valley fever cases near KHF is a changed circumstance pursuant to Public Resource Code, Section 21166 that necessitates additional CEQA review.

2. CWM KHF Currently Receives Far Fewer than the 400 Trucks Estimated in the EIR:

DTSC bases its calculation of current project impacts on the faulty assumption that the facility accepts the maximum of 400 truckloads of waste per day (or 7,200 cubic yards per day). This assumption vastly overstates the amount of waste that is presently accepted by the facility. Currently, CWM's facility accepts no more than 10 trucks per week or just over one truck per day. Even at its peak, the facility accepted about 100 trucks of hazardous waste each day.

In considering project impacts, DTSC assumed that the facility would continue to accept 400 truckloads of waste per day after the expansion. By artificially and incorrectly assuming that the facility currently accepts the maximum peak amount of 400 truckloads per day and that it will continue to accept this amount of waste after expansion, the DTSC obscures and understates the effects of expansion on the facility's emissions profile by a factor of hundreds.

DTSC's method of assessment makes it appear as if the expansion will not result in any significant increase in emissions, which is not the case. Residents will be impacted by far more emissions than they currently experience. DTSC must revise its analysis of emissions in order to accurately reflect the current state of emissions at the facility, and to accurately reflect the significant environmental and public health effects of expanding the CWM facility. The drastic reduction in the number of truckloads of waste received at the facility is a changed circumstance that requires a substantial

revision of the EIR to accurately reflect the environmental impacts of vastly increasing the number of trucks travelling to the facility.

3. The Addition of Pollution from Related Projects Is a Changed Circumstance that May Lead to New or More Severe Cumulative Impacts than Previously Analyzed:

CEQA requires DTSC to discuss and reasonably analyze the project and related projects' cumulative effects on the environment. CEQA Guidelines § 15130(a). A cumulative impact "is a change in the environment that would result from the incremental impact of the project [under consideration] when added to other closely related past, present, and reasonably foreseeable probable future projects." Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 117, citing 14 CCR § 15355. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b). A cumulative impact analysis must include (1) an identification or summary of related past, present, and probable future projects; (2) a summary of the related projects' expected environmental effects, and (3) a reasonable analysis of the related projects' cumulative impacts. CEQA Guidelines § 15130(b).

While DTSC listed some of the additional projects proposed or approved in the area, the agency did not adequately assess the cumulative impacts from these related projects. CEQA requires that DTSC consider the combined effect of related projects in the vicinity. CEQA Guidelines § 15355 (defining cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts,") (emphasis added); see also Resources Agency, 103 Cal.App.4th at 120 (to make a significance finding, the analysis must determine whether a proposed Project's incremental contribution is cumulatively considerable in light of the existing environment) (emphasis added.).

DTSC violated CEQA, therefore, when it merely listed and summarized related projects, rather than assessing their combined cumulative impacts with the KHF expansion project. Cumulative impacts may be significant whether or not each individual project has significant impacts.

i. FedEx Transfer Facility

DTSC acknowledges that the new FedEx transfer facility will increase the number of diesel trucks in the area. The facility will receive up to 212 trucks per day and up to 125 additional employee vehicle trips. DTSC argues that some of these trips would not be new truck trips because they were previously associated with another, much smaller, Kettleman City facility. However, DTSC does not disclose how many of the trucks will consist of new truck trips to Kettleman City. This information is critical to understand how the transfer facility will contribute to cumulative impacts from the KHF expansion.

DTSC concludes that the transfer facility "does not change the Final SEIR findings or conclusions" because the project does not increase the number of trucks travelling through Kettleman City. Instead, trucks will turn from SR-41 onto 25th Avenue to the facility which is 1.5 miles from the residential part of town. What DTSC does not mention is that the turnoff from SR-41 to 25th Avenue is right at the boundary of the residential area and that all the trucks traveling to the facility will pass within a couple hundred yards of the town's residents.

Studies conclude that traffic pollution causes asthma attacks in children, and may cause a wide range of other effects including: the onset of childhood asthma, impaired lung function, premature death and death from cardiovascular diseases, and cardiovascular morbidity. The area most affected, the studies concluded, was roughly 0.2 mile to 0.3 mile (300 to 500 meters) from a busy road. Therefore, transfer facility trucks travelling right past town will increase cumulative impacts to Kettleman City residents. DTSC's contentions to the contrary are not supported by evidence in the record.

DTSC also states that the transfer station will not increase air quality impacts from these diesel trucks because these trucks would travel past Kettleman City on the I-5 even without the project. However, as discussed above, the project now brings the diesel trucks within a few hundred yards from residents. DTSC has not considered this potential cumulative impact.

DTSC asserts that the air quality impacts from the facility were included as part of the Investigation of Birth Defects and Community Exposures in Kettleman City (December 2010). However, the transfer facility was not built, or even approved at that time. DTSC is simply incorrect in its assertions that the impacts from diesel emissions were previously analyzed. DTSC actually referred to a prior analysis of a smaller overnight facility. This analysis is simply not relevant to assess the impacts of the much larger FedEx transfer facility. DTSC must consider the cumulative air quality and safety impacts from the transfer facility because its truck traffic impacts will exacerbate air quality and traffic impacts from the KHF expansion.

Finally, DTSC argues that the (non-CEQA) traffic study for the transfer station included the KHF expansion in its cumulative impact analysis. This confirms rather than negates the need for DTSC to prepare and consider a similar analysis as part of its KHF expansion permit decision.

ii. Oil and Gas Projects

DTSC listed a number of oil and gas projects involving fracking near Kettleman City. However, DTSC's analysis consisted of listing the Division of Oil, Gas and Geothermal Resource's (DOGGR) findings as part of each Initial Study/Negative Declaration. DTSC did not consider the cumulative impacts of the fracking projects, much less the combined impact of all related projects with the KHF expansion as required by CEQA.

For example, DTSC reported that the Initial Study/Negative Declaration for the Jaguar wells found that construction would result in short term, less than significant air quality impacts. However, except for providing the example of particulate matter emissions, DTSC does not disclose what air quality impacts the project would have, and failed to assess the impacts in combination with the KHF expansion and other existing and proposed projects. Since "cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time" (14 CCR § 15355(b)), DTSC must do more than identify the projects' individual impacts. Rather, DTSC must assess project impacts in combination with other related sources.

Since the oil and gas projects would likely contribute to air quality, greenhouse gases, water quality and supply, hazardous materials, and biological resources impacts, DTSC must consider their combined impact with the KHF expansion project and other related projects.

DTSC acknowledges that if a well is determined to be economically viable, it will be completed as a producing well. However, DTSC failed to consider cumulative impacts associated with producing wells, but instead assumes that every single well would prove to be unproductive and capped. CEQA requires that a cumulative impact analysis include impacts from probable future projects. 14 CCR § 15065(a)(3). DTSC should look at well–established data on the percentage of exploration wells that are typically completed as producing wells to determine their likely cumulative impact. DTSC cannot rely on its belief that DOGGR may evaluate individual production wells in the future to avoid analyzing impacts. DTSC has an independent obligation to consider cumulative impacts from probable future projects such as production wells before approving the KHF expansion permit.

DTSC fails to consider cumulative impacts associated with nine oil and gas wells owned by Innex California Inc. DTSC does not consider the cumulative impact from these wells because DOGGR did not require environmental review for the wells for various reasons. However, the previous lack of environmental review does not insulate DTSC from its independent duty to assess the cumulative impact of the KHF expansion with these related projects.

DTSC also fails to consider the Zodiac Energy LLC Processing Facility in determining whether the KHF expansion has cumulatively significant impacts in combination with related projects. DTSC did not consider the Zodiac Processing facility a related project because the applicant requested that the processing of its application be put on hold. However, the applicant has not withdrawn its application. The County has already initiated the CEQA process through an Initial Study/Mitigated Negative Declaration which found areas of potentially significant impacts. Once the environmental review process for a project is underway, an agency should consider it as a probable future project for purposes of a cumulative impact analysis under CEQA. San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal.App.3d 61.

DTSC must provide a summary of expected cumulative environmental effects and a reasonable analysis of the cumulative impacts of the relevant projects. 14 CCR § 15130(b)(4)-(5). This discussion must be more than simply describing related projects and coming to a conclusion "devoid of any reasoned analysis." Whitman v. Board of Supervisors (1979) 88 Cal.App.3d 397, 411. For fracking oil and gas wells, DTSC should specifically consider potentially cumulative air quality impacts, water quality and supply, hazardous materials, greenhouse gas emissions, and habitat loss along with impacts from the KHF expansion and other related projects.

C. DTSC Proposes to Approve Changes to Project Which Would Increase the Project's Impacts.

The applicant is proposing a phased build-out of the B-18 landfill to provide for earlier use of a portion of the B-18 Landfill expansion while construction of the remaining portion of the liner system and landfill is completed. The phased approach will create impacts not previously analyzed as part of the EIR.

The phased approach will allow the applicant to submit a certification report for a 3.5 acre area. Once DTSC and other agencies approve this small area, the applicant will begin placement of waste at the B-18 landfill. Pursuant to this new design, construction-related impacts and operation-related impacts

will overlap to a greater degree than analyzed in the EIR. Diesel emissions from construction equipment and diesel emissions from trucks disposing of hazardous waste at the site will cumulatively impact air quality and the health of nearby residents. These increased diesel emissions will have a greater impact on the environmental and nearby residents than previously analyzed in the EIR.

By phasing the placement of the liner, CWM places the liner integrity at risk. This phased liner construction will lead to additional seams or other places of weakness. An examination of the best available landfill liners concluded that brand-new state of the art liners can be expected to leak at the rate of about 20 gallons per acre per day even if installed with optimal quality-control procedures. This rate of leakage is caused by pinholes during manufacture and holes created when seams are welded together during landfill construction. The more seams in a liner, the greater chance for liner seepage or failure. DTSC did not consider this potential impact in the addendum.

D. DTSC'S CEQA Findings Are Clearly Erroneous:

As described in the CEQA Guidelines, "[a] Responsible Agency complies with CEQA by considering the EIR … prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved." Pursuant to CEQA Guidelines section 15096(h), a Responsible Agency "shall make the findings required by Section 15091 for each significant effect of the project and shall make the findings in Section 15093 [Statement of Overriding Considerations] if necessary." If the responsible agency believes that the final EIR is not adequate for use by the responsible agency, it may prepare a subsequent EIR under Section 15162. Id.

Here, DTSC decided not to prepare a Supplemental EIR, relied on the inadequate analysis and racially discriminatory process in the County's EIR, and issued independent findings that are clearly erroneous and not supported by the record.

1. DTSC's Findings Are Based on an Improper Baseline:

The project baseline should normally be the existing physical condition in the affected area. CEQA Guidelines §§ 15125(a), 15126.2. Establishing a baseline at the beginning of the CEQA process is a fundamental requirement so that an agency may evaluate changes in context and analyze impacts. Richmond, supra, 184 Cal.App.4th at 89. The EIR baseline should, therefore, reflect the current level of operations at the existing B-18 landfill. Today, this baseline would be a facility receiving about one truckload a day of hazardous waste.

DTSC does not analyze impacts using existing conditions as it baseline. Instead it relies on the clearly erroneous baseline set by the County in its EIR. The County's baseline was inadequate even for its own analysis because it did not reflect normal operating conditions at the B-18 landfill when the CEQA analysis first commenced. The County set its baseline at peak level of operations. This peak level was generated using data from only 16 days over a five-year period (2001-2005) when the facility received over 380 loads. Using this arbitrary methodology, the County set its baseline at 400 daily truckloads of hazardous waste.

Even when the CEQA Analysis commenced in 2005, the existing B-18 landfill received approximately 180 daily truckloads. See EPA draft Environmental Justice Review ("Each business day,

approximately 250 trucks containing waste travel to KHF from various directions. Of the 250 trucks, approximately 180 trucks contain hazardous waste."). Even at its peak, the facility accepted 575,000 tons of hazardous waste annually, which averages out to just 100 trucks each day.

By establishing a baseline based on historic "peak" daily conditions rather than actual conditions at the time CEQA review commenced, the County's EIR failed to disclose and analyze the project's true impacts on noise, air quality, global climate change, traffic, and public health. Based on the faulty baseline, the County's EIR erroneously concludes that "the proposed project would not result in an increase in the existing number of daily truck round trips to and from KHF." Assuming there is no increase in daily truck-trips, the County then concluded that the proposed project would not result in additional truck-related noise impacts; increases in existing traffic; or net increases in global GHG emissions. Using the same rationale, the County's EIR states that "emissions from the proposed Project operations would represent a continuation of the emissions from the existing disposal of hazardous waste and designated waste at KHF."

In reality, the expansion will add at least 220 truck-trips per day over conditions when the CEQA review first commenced and 399 trucks over current conditions at the facility.

By relying on an artificially elevated baseline, DTSC avoids disclosing and mitigating the potential impacts from virtually all truck traffic and hazardous waste shipments to KHF. DTSC erred in failing to assess project impacts based on current existing conditions to accurately determine the project's effects on health and the environment.

2. DTSC's Statement of Overriding Considerations Is Clearly Erroneous and Cannot Support Project Approval:

When an agency approves a project with significant environmental effects that will not be avoided or substantially lessened, it must adopt a statement that, because of the project's overriding benefits, it is approving the project despite its environmental harm. 14 CCR § 15043. The agency must set forth the reasons for its action based on the final EIR or other information in the record. Pub. Res. Code § 21081(b); 14 CCR § 15093(a). The statement of overriding consideration must be supported by substantial evidence in the record of the agency's proceedings. 14 CCR § 15093(b); see also Sierra Club v. Contra Costa County (1992) 10 Cal. App.4th 1212, 1223 (statement of overriding considerations should be treated like findings and therefore must be supported by substantial evidence.). A statement is legally inadequate if it does not accurately reflect the significant impacts disclosed by the EIR and mischaracterizes the relative benefits of the project. See Woodward Park Homeowners Ass'n v. City of Fresno (2007) 150 Cal. App. 4th 683, 717.

DTSC found that specific economic, legal, social, technological and other anticipated benefits of the Project outweigh the significant and unavoidable impacts to justify project approval. DTSC specifically relies upon six benefits to make this finding. Most of the stated benefits concern the need for added hazardous waste disposal capacity within the state. However, nowhere in the permitting process has DTSC provided a useful review or consideration of the needed state capacity for hazardous waste disposal in California. State law required DTSC to provide this analysis in a statewide hazardous waste management plan beginning in 1991 and updated every three years. See Health &

Safety Code § 25135.9. However, DTSC has never prepared the requisite analysis. Without this analysis, DTSC has no way of knowing whether the state needs additional hazardous waste disposal capacity and no way to support its finding of an overriding project benefit.

DTSC cites an increase in hazardous waste generation in California from 1997 through 2002 as the only evidence supporting its statement of overriding considerations. However, 10 year old data about increased hazardous waste generation is not evidence supporting DTSC argument that the state needs additional capacity today. DTSC does not disclose or analyze how much waste is currently generated and how much capacity remains at existing hazardous waste facilities in California. Without providing any information on the state's supply and demand for hazardous waste disposal options, DTSC has no evidence demonstrating that the project will achieve any of the stated benefits.

In fact, if DTSC meets its goals of reducing hazardous waste to less than 500,000 tons per year, the state may not need the additional 5 to 19 million cubic yards of capacity at Kettleman Hills. The expansion of landfill capacity will reduce the costs of disposal and actually act as a disincentive to reaching the state's 50% hazardous waste reduction goal. Rather than benefiting the state, the expansion will undermine statewide hazardous waste goals.

DTSC also explains that one of the project benefits is to receive hazardous waste generated by U.S. businesses with facilities in Mexico. However, DTSC also acknowledges that the facility only receives the equivalent of half a truckload of waste per year from Mexico. Existing facilities have sufficient capacity for this very small amount of waste. DTSC does not provide any evidence that demonstrates that the KHF expansion is needed to provide capacity for waste from Mexico.

Because DTSC has no support for its findings of overriding considerations, and is unable to demonstrate that the facility provides any benefit, DTSC should not approve the expansion permit.

3. DTSC Fails to Analyze Impacts From the Whole of the Project:

CEQA requires agencies to examine "the whole of an action, which has the potential for resulting in either a direct physical change to the environment, or a reasonably foreseeable indirect physical change in the environment." 14 CCR § 15378.

Chemical Waste Management is proposing to add capacity at its Kettleman Hills Facility by expanding the existing landfill (B-18) by 4.9 million cubic yards of landfill space and by adding a new landfill (B-20) with 14.2 million cubic yards of landfill space. DTSC's CEQA analysis considered only the first phase of the project, the expansion of the B-18 landfill. DTSC did not consider impacts from the new landfill. CEQA requires agencies to examine the "whole of an action" that can result in a direct or reasonably foreseeable indirect change in the environment. 14 CCR § 15378(a). Where a phased project is to be undertaken and where the total undertaking compromises a project with significant environmental effect, agencies must prepare a single analysis for the ultimate project. Id.

Though DTSC relies primarily on Kings County's SEIR for its analysis, once DTSC prepared an addendum, CEQA required the agency to look at the whole project rather than simply its first phase. This is especially the case here, where the agency considered whether newly approved or proposed

related projects would have a cumulative impact when combined with the KHF expansion project. By excluding the B-20 landfill from this determination, DTSC's analysis is incomplete.

4. DTSC Defers Analysis in the Guise of Mitigation:

The fact that DTSC is requiring a new monitoring station to collect data on air pollution travelling toward Kettleman City indicates that the existing monitors are currently insufficient to determine the air pollution risks in the community. The information that will be collected by the monitor should be reviewed and considered prior to issuing the permit, not as a mitigation measure.

In fact, CEQA prohibits deferring analysis under the guise of mitigation.

5. Health Risk Assessment:

The permit states "[t]o ensure that air emissions do not result in unacceptable risks to human health, the Permittee shall prepare a Health Risk Assessment (HRA) in accordance with the DTSC-approved ambient air monitoring program work plan."

The health risk assessment should not be a condition of the permit; rather DTSC must prepare and consider the health risk assessment prior to issuing the permit. The HRA needs to be completed prior to issuance of permit, not as mitigation.

XIX. Defective Public Notice and Invalid Public Comment Period - DTSC Failed and Refused to Provide the Legally Required Notice to Greenaction, Kettleman City residents and Your Mandatory Notice List for the Chemical Waste Management Kettleman Hills Facility:

DTSC is required to provide the public a meaningful opportunity to participate in this permit decision. DTSC claims that their extensions of the "public comment period" provided ample opportunity for people to comment.

Unfortunately, either through negligence, incompetence or intention to exclude meaningful participation, DTSC has committed serious violations of their public participation mandate, failed to provide the legal official notice to the public as required, and created a confusing public comment period that impeded and made difficult the public's right to participate in the process.

A. DTSC'S Initial Notice Defect:

DTSC publicly announced their draft permit decision on the proposed landfill expansion on July 2, 2013, yet Greenaction was not provided a copy of the public notice in a timely fashion despite the fact that we are on the DTSC's mandatory contact list.

On July 26, 2013, Greenaction's Executive Director emailed DTSC to inform them we never received notice, a violation of DTSC's public notification requirements. A copy of this email is attached as Exhibit G.

DTSC's problems and violations of their public notice requirement subsequently increased and continued, rendering the public comment period and public hearing invalid.

B. DTSC Failed to Notify Residents & Contact List Where to Submit Written Comments:

DTSC issued a "Community Notice" dated July 2013 and another one dated August 7, 2013. Neither of these notices provided to the public and DTSC's mandatory contact list informed the reader of where to submit written comments, an enormous defect in the notice. Copies of these notices are incorporated into our comments and attached as Exhibits H and I.

A proper and legal notice should inform the public of the mailing and email address where comments should be sent, but the DTSC notice failed to give any information whatsoever about where to submit written comments. As a result of this fatal defect in the notice, the public comment period and public hearing were not properly noticed and thus are invalid.

In addition, the information subsequently sent to your entire mailing list on how to submit written comments does not correct the defect in the "Community Notices" which failed to contain the required information about submitting written comments. Your failure to provide that information when the public comment period supposedly started on July 2, 2013 resulted in recipients losing one month of time in which to prepare written comments on this complicated, technical and multi-faceted permit issue.

C. DTSC Failed to Provide Official Legal Notice to Residents, Greenaction and Mandatory Contact List:

DTSC admitted it failed to send the official legal notice to Kettleman City residents, Greenaction and others on its mandatory public notification list.

We were further concerned to learn that the "Community Notices" were not the official legal notice that everyone on the mandatory contact list including residents should have received on July 2, 2013 when DTSC issued the draft permit decision. We learned this from a September 6, 2013 email from Patrice Bowen of DTSC, attached and incorporated into these comments as Exhibit J.

Ms. Bowen and DTSC defend the fact that the document entitled "Community Notice" we and others were sent lacked information on how to submit written comments by arguing that the official "legal notice" contained that information.

As a result, it is now clear, and confirmed, that the "Community Notice" DTSC sent to residents and everyone else on your mandatory contact list for official notices was not the official legal notice.

I have attended virtually every public hearing, meeting and workshop the state has had in the last 25 years regarding the Kettleman City hazardous waste facility, and the DTSC always told people that they would be put on the mandatory notification list for official notices if they signed up. I have been on the state's mandatory contact list for the Chemical Waste Management facility longer than almost everyone, yet did not receive the original DTSC notice and was not sent the official legal notice in a timely fashion.

As a result, DTSC is now breaking its promise, and legal responsibility, to provide the legal and timely notice of opportunities for public comment to those on its mandatory contact list, including the residents of Kettleman City.

In addition, the failure to provide the legal notice to all those you were required to send it to renders the "public hearing" held on September 18, 2013 invalid.

The failure to provide full, legal and timely notice to all that are entitled to it renders your entire comment period invalid, has had a discriminatory and disproportionate impact on people of color and Spanish-speakers, and constitutes a violation of state and federal civil rights laws.

The fact that Greenaction was subsequently provided the official notice does not remedy the original failure to provide the actual legal notice to us and others.

D. DTSC Initially Refused to Accept Residents' Written Comments at DTSC Office in Clovis:

When Maricela Mares Alatorre, a Kettleman City resident and member of El Pueblo and Greenaction, contacted DTSC in Clovis to arrange to deliver written comments from dozens of residents, she was told that would not qualify as submitting comments in the proper way. It was only after extensive effort that DTSC affirmed comments could be hand delivered to the Clovis office of DTSC. Residents should not have had to be so persistent in order to participate in what is supposed to be a public permit process.

XX. July 31, 2013 DTSC "Open House" Was Improperly Noticed, and was Biased in Favor of Chem Waste Due to Inaccurate and Misleading "Information" and Problematic Meeting Format:

A. Defective Notice for Open House:

As DTSC has now acknowledged, the agency failed to provide the legally required notice of the initial public comment period including the "open house" to all members of the public that they were required to provide notice to.

B. Meeting Format:

The format of the meeting was designed and/or had the effect of preventing attendees from hearing all the discussions, questions and answers regarding permit-related issues. This was not conducive to learning the issues or having a transparent process.

C. Misleading and Omitted "Information:"

The DTSC "Open House" was promoted by DTSC/Cal EPA as an opportunity for the public to learn more about the proposed approval of Chemical Waste Management's application for a major expansion of their hazardous waste landfill. Instead, members of the public attending the open house were given biased, one-sided, incomplete and misleading "information" by DTSC and several other agencies.

Despite the fact that the DTSC and other agencies present at the "open house" have taken repeated enforcement action against Chemical Waste Management, members of the public entering the meeting were surprised and outraged that there was not one mention, not one word, fact sheet, display or

document provided by any agency at the meeting informing the public about the numerous and chronic permit violations committed by the company.

Particularly disturbing and problematic was the DTSC's display board entitled "Enforcement" had no mention at all of even one violation.

The DTSC's failure to provide any information about violations on fact sheets or display boards is especially problematic as DTSC is well aware that the chronic violations committed by Chemical Waste Management are a major permit issue.

It was only after members of the public, including residents who are members of El Pueblo/People for Clean Air and Water of Kettleman City and Greenaction, objected to this blatantly biased omission by the DTSC and other agencies, that a DTSC staff member pulled some information about violations out of a file folder. There were no copies in Spanish, and there no copies even in English to provide to the attendees.

DTSC's failure to provide information on Chem Waste's troubled violation history demonstrates bias and the tainting of the permit process.

XXI. Four Overlapping Public Comment Periods Undermine Public's Ability to Fully Comment and Participate in the DTSC Permit Process:

Three state-related agencies (DTSC, the Regional Water Quality Control Board and the San Joaquin Valley Air Pollution Control District) are having overlapping comment periods on the proposed hazardous waste landfill expansion.

These overlapping comment periods made it literally impossible for residents and advocates, including Greenaction, to participate meaningfully and comprehensively in all three as is their right. Greenaction and others had to choose which draft permit approvals we would focus on the most, resulting in less time and effort being allocated to all three comment periods for very important agency permit decisions.

Each of the agency permit processes involve distinct laws, complex regulations and large technical documents, and to meaningfully participate in the process it takes time to read, research, evaluate and comment on these documents and the proposed permit actions.

As a result, the overlapping comment periods directly benefitted Chemical Waste Management at the expense of the affected community and their advocates who were unable to fully focus on any of the three draft approvals.

Also, the defects in many of the notices, the constantly changing public comment periods and the rescheduling and canceling of hearings by the agencies has resulted in widespread confusion among residents about what the agencies' public processes are and how they can participate.

In addition, another state agency, the California Energy Commission (CEC), held a public comment period and workshops on the proposed Hydrogen Energy California coal gasification and fertilizer plant at the very same time as the permit processes and so-called public hearing held by DTSC on the

toxic waste landfill issue in Kettleman City. The HECA project would cause significant pollution nearby in Kern County and increase pollution in the over-polluted San Joaquin Valley, thus requiring Greenaction and others to spend significant amounts of time reviewing and drafting comments on the HECA and CEC documents – and thus detracting from time we could spend on the Chem Waste/DTSC permit process.

Greenaction, residents and allies made our concerns about overlapping comment periods clear to state agencies and officials, but they continued with the overlapping periods and with the DTSC hearing taking place the same night as an important CEC workshop on HECA.

XXII. Conclusion:

As a state agency mandated to protect public health and the environment, ensure compliance with the law including permits, provide meaningful opportunities for public involvement, and required to comply with and uphold civil rights laws and environmental justice policies and mandates, DTSC's draft permit is defective and DTSC must rely on the extensive facts and deny new permits to Chemical Waste Management.

For environmental justice,

Bradley Angel
Executive Director
Greenaction for Health and Environmental Justice