



July 14, 2015

President pro Tem Kevin de León, Chair
Senator Jean Fuller, Vice Chair
Senator Anthony Cannella
Senator Connie Levya
Senator Holly Mitchell
Senate Rules Committee

Via Electronic Mail & Facsimile (916-445-1830)

Re: Exide Technologies in Vernon, California

Dear Hon. Chair de León, Vice Chair Fuller, and Senators Cannella, Levya, and Mitchell:

Communities for a Better Environment, East Yard Communities for Environmental Justice, Monsignor John Moretta of Resurrection Catholic Church, and Maywood Mayor Eddie De La Riva, write on behalf of our respective community members to follow-up on a request for an independent investigation into the Department of Toxic Substances Control's (DTSC) handling of the matter concerning Exide Technologies' Vernon lead battery smelting facility.

We are environmental justice advocates and community leaders representing residents disproportionately affected by environmental burdens in the communities they live, work, and engage in. These include many of the thousands of families who have suffered Exide's Vernon battery smelter. We have worked over the last decade with community members and various governmental agencies to either clean-up or close down Exide's Vernon facility.

While the Exide facility is now closing pursuant to a non-prosecution agreement it entered into with the U.S. Attorney's Office, significant questions remain concerning the DTSC's failure over many years to carry out its legal mandate of enforcing environmental laws and regulations against Exide. Our members and other residents living near Exide have borne significant health burdens and other harms as a result of Exide's lawlessness. Exide did not act alone, however. The DTSC negotiated with Exide over decades, helping it stay in business, despite overwhelming evidence of Exide's inability to comply with hazardous waste laws, a pending federal criminal investigation, the SCAQMD's allegations that Exide knowingly, willfully, and intentionally violated environmental laws, and residents' tireless calls for justice. Even though the Department indicated that it began exploring denying Exide's permit application in February 2015, the fact remains that it historically refused to do so, even in light of Exide's egregious history of legal violations. The DTSC's history of entering into a chaotic patchwork of negotiated agreements

with Exide kept a chronic violator operational and endangered the public.

As detailed in the attached letter submitted to the Senate Environmental Quality Committee on March 12, 2015, the DTSC violated substantive and procedural requirements of the Health & Safety Code during its review of Exide's Part B Application, and time and time again failed to take necessary measures to protect the public's health. In addition to the issues outlined in the attached, a question that requires serious attention is why the Office of Criminal Investigations did not pursue an investigation of Exide, even though, based on information and belief, the Department at one point contemplated initiating a criminal investigation, but fell short of doing so. The Department's primary duty is to protect the health and safety of people and the environment, and residents of California have no choice but to depend on it to provide such protection. Rather than doing so, the Department negligently and recklessly enforced its duties, and denied impacted residents the vital and equal protections required by federal and environmental laws.

The DTSC's actions are a far cry from harmless errors that can now be overlooked based on the Vernon facility's closure. Rather, they continue to be a matter of great public concern and warrant an investigation into why and how this reprehensible situation was allowed to continue for decades. An independent investigation, in which answers are obtained *under oath*, will provide a complete account of the causes, nature, and extent of inadequacies and any potential wrongdoing in the Department. The residents surrounding Exide, who have been harmed by the lead, arsenic, and other toxics spewed over their heads for decades, deserve answers. Moreover, it is widely known that the DTSC is in critical need of vast reform, and an independent investigation will be an important step toward that effort, in that it will provide insight into Department policy and procedural deficiencies, as well as any mal- and/or misfeasance that may have occurred. Illuminating deficiencies that prevented an adequate response to Exide's numerous violations throughout its history in Vernon will be a valuable tool in preventing similar mishandling of hazardous waste facilities from occurring in the future.

The public deserves to know the truth about the Exide matter. An investigation and resulting record would be an important step in restoring the public's trust in the DTSC, both by acknowledging the dignity of the communities affected by Exide and increasing accountability within DTSC.

Accordingly, we respectfully urge you to initiate an independent investigation of the DTSC's handling of the Exide matter.

Sincerely,

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Arsenio Mataka, Cal/EPA Assistant Secretary for Environmental Justice and Tribal Affairs

Ana Mascareñas, Assistant Director for Environmental Justice

Senate Environmental Quality Committee

Assembly Committee on Environmental Safety & Toxic Materials

Attachment



March 12, 2015

Honorable Lois Wolk, Chair
Senate Budget and Fiscal Review Subcommittee #2
on Resources, Environmental Protection, Energy and
Transportation State Capitol, Room 5114
Sacramento, CA 95814

Honorable Bob Wieckowski, Chair
Senate Environmental Quality Committee
State Capitol, Room 3086
Sacramento, CA 95814

Re: Regulatory Failure of the Department of Toxic Substances Control

Dear Senator Lois Wolk and Senator Bob Wieckowski:

On behalf of Communities for a Better Environment (CBE) and our members throughout the State of California, we write to express our grave concerns regarding the Department of Toxic Substances Control's failure to carry out its legal mandate of enforcing federal and state environmental laws to protect the public and environment.

CBE is a California nonprofit environmental health and justice organization with offices in Oakland and Huntington Park. CBE has thousands of members throughout the State, many of whom live, work, or engage with environmental justice issues in the communities neighboring Exide's facility in the City of Vernon. CBE's organizational goals include protecting and enhancing the environment and public health by reducing air and water pollution and minimizing hazards in California's urban areas, including the area surrounding Exide. As such, CBE and its members have tirelessly advocated for Exide's closure for about a decade.

After many years of community outcry and suffering from severe health burdens, it was announced yesterday that Exide's Vernon facility ("Exide") will finally shutdown. Unfortunately, our members cannot thank the Department of Toxic Substances Control ("DTSC" or "Department") for this overdue event. Our members have long-held that Exide's conduct in spewing dangerous levels of lead, arsenic, benzene and other toxics over their heads for decades has been nothing short of criminal. We therefore have been astonished at the DTSC's refusal to deny Exide's pending Part B hazardous waste facility permit application in light of its egregious history of chronic violations of environmental laws. Thankfully, the United States Attorney's Office of the Central District of California did fulfill its law enforcement duties, and prepared to

file felony criminal charges against Exide. In order to avoid such criminal prosecution, Exide finally folded and agreed to close its Vernon facility.

While the impacted communities can both literally and figuratively begin to breathe easier with Exide's permanent closure, serious questions must be investigated concerning the DTSC's utter regulatory failure. Not only did the DTSC violate procedural requirements of the Health & Safety Code during its review and processing of Exide's Application ("the Application"), but it erred time and time again in its purported enforcement of regulatory requirements against Exide. The DTSC's actions are a far cry from harmless errors that can now be overlooked based on the Vernon facility's closure. Rather, its actions demonstrate a pattern of recklessness that directly endangered the public. Indeed, the State's regulatory failure created the reprehensible situation that our members and other community residents have been subjected to. The State denied impacted residents the vital and equal protections required by federal and environmental laws. The DTSC must therefore be held accountable together with Exide. Accordingly, although Exide will no longer pursue the pending application, this letter details the substantive and procedural requirements that governed the Department's actions, but which it continually violated.

I. The Regulatory Overview & Governing Policies.

The Resource Conservation and Recovery Act (RCRA) of 1976 holds the protection of public health and the environment as its primary goal. It assures that hazardous waste management practices are conducted in a manner protective of human health and the environment, and requires that hazardous waste be properly managed in order to avoid the releases and the need for corrective action at a future date. In 1982, the California Legislature declared that "it is in the best interest of the health and safety of the people of the State of California for the state to obtain and maintain authorization to administer a state hazardous waste program in lieu of the federal program[.]" The Legislature further declared that the Department of Toxic Substances Control (DTSC) shall have "those powers necessary to secure and maintain interim and final authorization of the state hazardous waste program" pursuant to RCRA. Health & Saf. Code §25101(d).

RCRA established a procedure to allow facilities that existed at the time of its enactment to operate pursuant to an interim status authorization until a final hazardous waste permit is issued. Exide's facility was initially granted interim status authorization in December 1981, and has for decades continued to operate under that interim authorization. Facilities operating under such status were and are required to abide by regulatory standards for the treatment, storage, and disposal of hazardous waste. In addition to ensuring that Exide complied with applicable regulatory requirements, the DTSC was also responsible for ensuring that the facility was "maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment." 22 CCR § 66265.31. The Department failed to enforce these requirements.

As a public agency, the DTSC also has the duty to consider Exide's disproportionate health and environmental impacts on the surrounding minority and low-income communities. The Southeast and East LA communities contain the largest Latino population in Los Angeles County, and are by far disproportionately impacted by environmental burdens. The Health & Safety Code, which the DTSC is charged with enforcing, explicitly mandates that "[t]he department shall prioritize an enforcement action . . . affecting communities that have been identified by the

California Environmental Protection Agency as being the most impacted environmental justice communities.” Health & Saf. Code § 25180.2. In enacting that mandate, California’s legislature found that the state “needs to provide the greatest level of attention and protection to those communities that are at the greatest risk from those impacts.” 2013 Cal.Legis.Serv. Ch. 598 (A.B. 1329). The Department failed to prioritize protecting the Southeast and East LA communities impacted by Exide’s facility. Rather, we respectfully hold that these communities were neglected because of their demographics, and believe that a much lower threshold (one conforming with the law) would have applied had the facility been located in a more affluent, White community, resulting in the facility’s closure years ago.¹

Rather than enforce federal and state hazardous waste management laws and comply with its environmental justice mandate, the DTSC instead created a chaotic patchwork of enforcement orders, stipulations, and light fines that permitted Exide to continue to operate while violating of our laws.

II. The Health and Safety Code Required Denial of Exide’s Part B Application For a Hazardous Waste Facility Permit or Revocation of the Interim Status Authorization.

A. General Requirements of a Part B Permit Application.

Exide was required by California’s Hazardous Waste Control laws to obtain a hazardous waste facility permit for its Vernon facility because it treated, stored, and disposed of hazardous waste at that location, 22 CCR §66270.1(c). The Part B Permit application is highly detailed and rigorous. The application “consists of the general [facility-specific] information[,]” and “specific information” showing Exide’s compliance with all applicable regulatory laws and standards for hazardous waste facilities. § 66270.14(a) (stating that an application includes “specific information requirements in sections 66270.14 through 66270.23 of the regulations”). “The Department shall not begin the processing of a [draft] permit until the applicant has fully complied with the application requirements[,]” nor “issue a permit before receiving a complete application for a permit[,]” § 66270.10(c). The application may not be deemed complete until the Department “determine[s] compliance with the chapter 14 standards,” § 66270.14(a), which “establish minimum standards [for] acceptable management of hazardous waste” for owners and operators of TSDFs. § 66264.1(a), (b).

B. The DTSC Could Not Reasonably Determine that Exide was in Compliance with Operational, Corrective Action, Closure, and Financial Assurance Requirements, and Therefore Had a Duty to Deem its Application Incomplete.

The DTSC must make compliance determinations in at least three general subjects in order to find Exide’s Part B application complete and begin processing a draft permit for the Vernon facility.

First, the Department was to determine Exide’s compliance with the “minimum standards [for] acceptable management of hazardous waste” for owners and operators of TSDFs, 22 CCR §

¹ Compare the history of Exide’s battery smelting operations in Vernon, California, with those in Frisco, Texas, and the communities’ respective demographics.

66264.1(a), (b), found in chapter 14 of the Environmental Health Standards for the Management of Hazardous Waste, 22 CCR § 66270.14(a).

Second, the Department was to determine that: (1) corrective action required by Exide is sufficient to remediate “all releases of hazardous waste” both at the facility’s site and “beyond [its] boundary where necessary to protect human health and safety or the environment[,] and (2) Exide provides “assurances of financial responsibility for completing [such] corrective action.” Health & Saf. Code § 25200.10(b).

Third, the Department was to determine that Exide’s closure plan²: (1) demonstrates that future closure of the facility will be done in a manner that “minimizes the need for further maintenance[,]” and “controls, minimizes or eliminates . . . post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated rainfall or run-off, or waste decomposition products to the ground or surface waters or to the atmosphere[,]” 22 CCR § 66264.111(a), (b); and (2) “establish[es] and demonstrate[s] . . . financial assurance for” such closure, § 66264.143.

As discussed below, the Department should have long ago issued a determination of incompleteness and denied Exide a permit because it could not make the required findings.

1. Exide has ongoing and recurring violations that precluded a determination of compliance with regulatory standards for acceptable management of hazardous waste.

Chapter 14 contains specific requirements concerning the use and management of containers, tank systems, surface impoundments, waste piles, drip pads, and air emissions. Exide’s record is replete with violations showing that it *has not* met, and is *currently not meeting*, many of those regulatory standards. Exide’s non-compliance record is overwhelming, and we will therefore not discuss the numerous violations issued throughout the years. It suffices to say that Exide was issued regulatory violations nearly every year since it acquired the Vernon facility, and also inherited a litany of prior violations.

In regard to Exide’s recent violations, in November 2014, the DTSC held that Exide remained noncompliant as to numerous violations issued in 2013 and 2014. Rather than exercise its law enforcement authority and deem Exide’s application to be incomplete based on existing violations, the DTSC elected to enter into yet another settlement agreement in order to “resolve” those pending disputes. On November 6, 2014, the DTSC and Exide Technologies announced a settlement agreement in which the parties resolved, among other things, summaries of violations “that remain[ed] outstanding.” *See* November 2014 Stipulation & Order (“Stipulation”) at 3.³

² Section 66270.14(b)(13) of Title 21 of the Code of Regulations provides that a Part B applicant must submit a closure plan.

³ The DTSC acted with less than good faith in publicly announcing that it issued an enforcement order and denying that the Stipulated Order is a settlement agreement. The Stipulation, unlike a regular enforcement order, however, required approval of the Bankruptcy Court, which it granted on November 20, 2014, and could have no legal effect otherwise. The plain language of the Stipulation explicitly states that the agreement is intended to resolve numerous outstanding disputes. *See* Stipulation at ¶ 2 (“This Stipulation and Order shall constitute settlement of various disputes addressed herein[.]”); *id.* at ¶¶ 2-28 (“Settled matters”). The Department’s persistent characterization of the Stipulation as an enforcement order and lack of transparency was disingenuous and misled the public.

In January 2015, the Department issued Exide eight violations of hazardous waste regulatory requirements. Several of those violations are similar, if not identical, to the “outstanding” violations that were folded into the Stipulation. Accordingly, there was no justification for the Department’s continued refusal to issue a notice of denial.

2. The Department Could Not Determine That Exide’s Corrective Action Plan & Financial Assurances Comply with Regulatory Requirements.

As explained below, the scope and extent of the corrective action plans required to remediate Exide’s hazardous waste releases remain unresolved, and therefore the sufficiency of the corrective action and corresponding financial assurances could not yet be determined. “[A]ny permit issued by the department [must] require[] corrective action for all releases of hazardous waste . . . [including] *beyond the facility boundary* where necessary to protect human health and safety or the environment[.]” Health & Saf. Code § 25200.10(b) (emphasis added); *see also* § 22 CCR 66264.101. “When [the] corrective action cannot be completed prior to issuance of the permit, the permit [must] contain schedules of compliance for corrective action and *assurances of financial responsibility* for completing [such] corrective action.” *Id.* (emphasis added).

- a. Remediation of residential properties is required to protect human health and safety.

The DTSC and South Coast Air Quality Management District (“SCAQMD”) have each independently found that hazardous waste releases from Exide’s Vernon facility have highly contaminated neighboring communities with lead and arsenic.

Soil sampling of surrounding residential properties, pursuant to the DTSC’s November 15, 2013 Off-Site Soil Sampling Work Plan, revealed high levels of lead in soil deposited from Exide’s facility. The DTSC’s recent report on soil testing indicates that at least 30% of properties tested thus far in the Initial Northern & Southern Assessment Areas (“N&S Assessment Areas”) contain a lead level of 1000 ppm, which qualifies as hazardous waste. Over 400 homes exist within the N&S Assessment Areas, and hundreds more fall outside those boundaries and remain unaccounted for, even though they are equally susceptible to such extreme contamination.

There is no known level of lead exposure that is considered safe; rather, the health risks from lead exposure are severe. Lead is deemed a carcinogenic toxic air contaminant. Chronic health effects include nervous and reproductive system disorders, neurological and respiratory damage, cognitive and behavioral changes, and hypertension. Exposure to lead can also potentially increase the risk of contracting cancer or result in other adverse health effects. Young children are especially susceptible to the effects of environmental lead because their bodies accumulate lead more readily than do those of adults, and because they are more vulnerable to certain biological effects of lead including learning disabilities, behavioral problems, and deficits in IQ. Accordingly, remediation of all residential properties impacted by Exide’s lead contamination is required to protect human health and safety.

Further, a 2013 Health Risk Assessment⁴ (“HRA”) found that Exide’s Vernon facility has emitted unusually high quantities of arsenic throughout at least the last several years. According to the SCAQMD, during some time in 2010, the arsenic emission levels rose to about 2.64 pounds of arsenic per day, and in 2011 rose to 3.288 pounds per day. *See People of the State of California v. Exide Technologies*, First Amended Complaint, filed August 7, 2014, at ¶¶ 32-39. When Exide ran its blast furnace at 80% of its permitted capacity, it was potentially emitting 5.59 pounds per day. *Id.* Further tests in 2011 also showed that Exide was controlling only about 27% of its arsenic emissions from its “hard lead system,” meaning that about 73% was escaping. *Id.* The HRA conducted by Exide disclosed that the cancer risk created for off-site works was more than 20 times the “acceptable risk” level. *Id.* at ¶ 53. The cancer burden created for residents as a result of Exide’s emissions was 20 times the “allowable” level. *Id.* at ¶ 52. The SCAQMD alleges that Exide knowingly, willfully, and intentionally emitted these unlawful levels of arsenic into environment of its surrounding communities. *Id.* at ¶¶ 93-95 & 98-10.

b. While a full and meaningful corrective action plan is required to remediate residential property contamination, the current remediation agreement reached between the DTSC and Exide is severely deficient.

The settlement agreement reached in November 2014 also resolved a dispute regarding the “scope [] and standards applicable to” necessary corrective action. *See* Stipulation at 2. The parties agreed to a residential corrective action plan that requires Exide to remediate pursuant to an Interim Measures Work Plan (“IMWP”). *See id.* at ¶ 11. The Stipulation limits the residential lead soil testing and remediation required by Exide to the initial N&S Assessment Area, however, leaving other residential properties impacted by Exide’s lead contamination in continued peril. Community members and advocates who previously invested a substantial amount of time and resources in engaging with the State through a series meetings and communications were never notified about the prospective terms of the Stipulation, and were instead altogether excluded from this determinative stage.⁵

The Stipulation and current residential corrective action plan contain numerous problematic terms regarding residential remediation, including, but not limited to, the following:

- The residential corrective action Exide is required to undertake, and which it agreed to fund to a certain amount, is limited to the N&S Assessment Area, which contains 216 property lots (containing over 400 homes),⁶ even though it is known that other surrounding homes and neighborhoods also suffer from Exide’s contamination. A determination regarding the sufficiency and adequacy of the scope of necessary residential remediation could not yet be made.

⁴ Revised Health Risk Assessment (HRA), prepared for Exide Technologies, Vernon, CA, by Environ, January 2013, Project Number 07-24850A.

⁵ On the other hand, “Exide and its professional and technical advisors along with representatives from the UNC and the Creditors’ Committee engaged in extensive discussions with the Department.” *In re Exide Technologies*, Case No. 13-11482, Debtor’s Motion For an Order Under Bankruptcy Code Sections 105 and 363 and Bankruptcy Rule 9019 Authorizing and Approving The Debtor’s Entry Into the 2014 Vernon Stipulation and Order With the California Department of Toxic Substances Control, at ¶ 25 (U.S. Bankruptcy Court for the Dist. Del., filed November 6, 2014)

⁶ The Northern Assessment Area encompasses portions of the unincorporated communities of Boyle Heights and East Los Angeles, and the Southern Assessment Area is located within the city of Maywood.

- The DTSC prematurely agreed to cap Exide’s financial liability for residential lead clean-up to \$9 million before knowing the extent and scope of lead contamination. Because residential soil testing in the N&S Assessment Areas and an extended area is still underway, a determination of total clean-up costs remains unknown and cannot be determined. Still, the DTSC agreed that “[a]ny adjustment to the scope of residential off-site corrective action as approved by the Department . . . shall not require Exide’s expenditures to exceed [\$9 million] during [a] five-year period. Stipulation at ¶ 9. The \$9 million financial assurance, then, appears arbitrary, since it is the maximum amount allotted to remediate 216 property lots or double that amount.

It was impermissible, then, for the DTSC, to find that “assurances of financial responsibility for completing [necessary] corrective action” have been provided by Exide. Health & Saf. Code § 25200.10(b); § 22 CCR 66264.101.

- DTSC granted Exide up to five years to complete the residential remediation in the N&A Assessment Areas, which is unreasonably long for residents who have been advised that their small children should not play outdoors in areas exposed to dirt, and of other warnings, until testing and remediation is complete.
- Nothing requires Exide to clean every home within the N&A Assessment Areas; rather, it ensures only that Exide will not have to clean beyond these homes. Further, many homes within the N&A Assessment Areas remain untested, as a result of what CBE has commented to be a problematic community notice and outreach process. For example, tenants are unable to provide authorization for soil testing, and are therefore dependent on decisions of landlords who may not be receiving sufficient information regarding lead hazards in order to meaningfully decide whether to test the soil on their properties. There, of course, is no incentive or requirement for Exide to make concerted efforts to ensure substantial communication with absent landlords. Instead, non-responsive landlords allow Exide to decrease its remediation costs and efforts.
- The Stipulation contains problematic and uncertain terms regarding the required level of remediation that Exide must undertake. The Stipulation provides that the “preliminary” clean-up goal for lead is currently based on a background level of 80 mg/kg. Exide is allowed, however, to present information indicating whether the 80 mg/kg level “is not representative of LA County,” and that the lead background level is higher. Stipulation at ¶ 12(d). The higher level presented by Exide will then be used to establish a revised criteria for determining the need for soil removal, meaning that Exide’s corrective action threshold may be significantly lowered. While the Department will determine the “Final Clean-Up Goal,” there is no process for comment from or participation of residents and advocates. These terms create great uncertainty regarding the extent of the clean-up for impacted residents.
- The Stipulation’s terms governing required additional testing and clean-up beyond the N&S Assessment Areas are vague and lack enforcement power. The Stipulation allows Exide five years to submit a “residential corrective measures *study*” to address “all” properties impacted by its operations that were not investigated or

remediated during the first five years. There is nothing stating (1) the scope of this additional study, (2) how additional remediation will be determined, (3) when the additional remediation will need to take place, or (4) how clean-up costs will be determined.

Based on the aforesaid reasons, the DTSC could not find that the residential corrective action plan or its financial assurances suffice, and should have deemed Exide's Part B Application incomplete.

c. While a full and meaningful corrective action plan is required to remediate contamination at the Vernon facility site, the agreement reached between the DTSC and Exide provides that the remediation plan and financial assurances will be decided in or after 2017.

The Stipulation provides that “[b]y December 31, 2016, or as extended by the Department, Exide shall submit to the Department an On-Site Corrective Measures Study.” Stipulation at ¶ 17. “Exide will prepare a detailed cost estimate for the remedy . . . for the Department’s review and approval once the Department approves a remedy for corrective measures.” *Id.* Such ambiguous promises of future corrective action cannot meet the mandate under the Health & Safety Code if we are to give meaningful effect to its requirements of adequate corrective action and assurances of financial responsibility. Unless Exide’s Part B Application contains a corrective action plan based on actual findings of the scope of required remediation with financial assurances for a known, reasonable cost estimate for such remediation, the DTSC should have deemed Exide’s application incomplete.

3. Exide’s Closure Plan & Financial Assurances Must Comply with Regulatory Requirements.

The Stipulation capped Exide’s financial assurance obligation for closure of the Vernon facility at \$38,660,000, and allows Exide to request a reduction of this amount for the Department’s consideration. The Department may not find that Exide’s closure plan and financial assurances are sufficient, however, unless the closure plan shows that the closure will happen in a manner that: (a) minimizes the need for further maintenance; (b) controls, minimizes or eliminates post-closure hazardous waste release, and (c) complies with all closure-related requirements. If the Department’s own closure cost-estimates show that the financial assurance secured in the Stipulation is insufficient, then the Department had further reason to deny Exide’s Part B Application.

In sum, the Department was required to either deny Exide its pending permit or revoke its interim status authorization based on its continued inability to complete its Part B application.

III. The Health & Safety Code Permits Denial of Exide’s Part B Application For a Hazardous Waste Facility Permit Based on its Pattern of Noncompliance With Environmental Regulatory Requirements.

The Department should have also exercised its authority to deny Exide’s hazardous waste facility permit based on the facility’s repeating or recurring pattern of noncompliance with hazardous waste laws. Section 25186 provides that “[t]he department may deny . . . any permit . .

. where the applicant . . . has engaged in” “a repeating or recurring pattern” of “violation[s] of, or noncompliance with . . . any federal or state statute or any requirement . . . relating to the generation, transportation, treatment, storage, recycling, disposal or handling of a hazardous waste[.]” Health & Saf. Code § 25186(a); *see also* 22 CCR § 66270.43(a). The Department may have also denied Exide’s permit based on “[a]ny violation of, or noncompliance with, any order issued by a state or local agency . . . relating to the generation, transportation, treatment, storage, recycling, disposal or handling of a hazardous waste[.]” Health & Saf. Code § 25186(c). Exide’s egregious history of violations of both environmental laws and DTSC-issued orders should have triggered denial under this section.

The voluminous record in this matter shows Exide’s overwhelming number of regulatory and enforcement order violations, evidencing its pattern of illegal conduct.

Since 1999, Exide’s Vernon facility has received countless violations of various environmental laws, rules and regulations. The majority of the violations specifically pertain to the handling and treatment of hazardous waste and maintaining effective systems and operating practices to ensure adequate air pollution control. Even only a sample of Exide’s violations show its serious failure to meet: lead and arsenic air emission standards; stormwater regulations by contaminating groundwater with lead sludge, affecting the Los Angeles River Watershed; proper handling, transport and storage of hazardous waste and hazardous waste containers standards; standards requiring a properly functioning, secure storm-water pipe system, an integral part of the facility’s hazardous waste management, and requirements ensuring structural integrity of the facility. Overall, Exide’s continued violations demonstrate an egregious pattern of violating some of RCRA’s most important hazardous waste management requirements and operating standards.

An exhaustive review of Exide’s chronic and recidivist violations are beyond the scope of this letter. Even a brief overview of the last several years, however, demonstrates Exide’s repeating or recurring pattern of noncompliance.

Between 2013 and 2014 alone, Exide was cited for over a dozen violations from the DTSC and the AQMD. These violations largely concerned Exide’s hazardous waste treatment and management system, and ranged from structural deficiencies in Exide’s smelting operations, to groundwater pipe perforations, and repeated detections of soil and groundwater contamination as well as its air emission levels far exceeding health protective thresholds and standards. Notably, such violations have been issued despite the fact that Exide remained inoperative.

Indeed, because Exide’s violations reached such an extreme level of danger to the surrounding communities, the DTSC took an unprecedented step by issuing an Order for Temporary Suspension of Exide’s Operations (Order) on April 24, 2013. The Order was based on the Department’s determination that Exide’s facility posed an imminent and substantial endangerment to the public and environment, as evidenced by the March 2013 HRA emissions data report. Rather than take immediate, good faith steps to cure its violations and address the imminent harm to the surrounding community, Exide immediately filed a request for a temporary restraining order (TRO) in the superior court seeking a stay of the Order. Ruling in Exide’s favor, the superior court ordered the DTSC to show cause as to why its Order should not be enjoined. Rather than defend its own determination and protect the communities facing the imminent and substantial danger, the Department elected to settle with Exide.

Almost immediately after Exide resumed a limited level of operations, it was issued a slew of new notices of additional violations, this time including violations of a number of air emission and air pollution control equipment requirements; violations of toxic air emissions level standards, and violations of RCRA's requirement that interim status facilities "be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment." 22 CCR § 66265.31.

In October 2013 the DTSC issued four Notices of Violation concerning Exide's hazardous waste management practices and waste treatment systems, based on the department's inspections of the premises on various occasions between August and October of that year. Those violations include:

- Storing waste in open containers in violation of Title 22, section 66265.173(a), in that on or about September 20 and 27, 2013, Exide stored hazardous waste in open containers without hazardous waste being added or removed from the containers.
- Failing to minimize the possibility of release of hazardous materials in violation of Title 22, section 66265.3, by maintaining leaking trailers onsite, as observed by the department on or about August 13, September 20 and 27, and October 4, 2013.
- Failing to transfer waste from leaking containers to sound containers in violation of Title 22, section 66265.171, in that on or about August 13, September 20 and 27, and October 4, 2013, Exide failed to transfer hazardous waste from a container that was not in good condition and leaking into a container that was in good condition or to manage the hazardous waste in some other way that complies with applicable requirements.
- Failing to inspect waste handling areas in violation of Title 22, sections 66265.15 and 66265.174, in that Exide failed to inspect all areas used for container storage or transfer, at least weekly, looking for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors.

Between 2014 and 2015 Exide has been cited, again for its continued violations of total enclosure and structural safety requirements. Specifically, on or about August 5, 2014, Exide was issued a notice of violation for failing to maintain an adequate leak detection system, and for failing to maintain a secondary containment system, capable of detecting failures in its hazardous waste operation and management at the facility. As discussed above, many of the violations issued by the DTSC to Exide in 2013 and 2014 continued through the end of 2014, and were included in the November 2014 Stipulation. Still, in January 2015, the DTSC issued an additional eight violations, including for the use of unauthorized tanks to treat contaminated sludge and inadequate safeguards against battery acid spills.

Exide's interminable unlawful conduct clearly demonstrated its inability to comply with all applicable regulatory laws, which was required to obtain a hazardous waste permit. Its apparent recurring pattern of noncompliance posed a serious threat to public health, safety and the environment, and behooved the DTSC to deny the permit on such grounds. Regrettably, it chose not to do so. *See* Health and Saf. Code § 25186; 22 CCR § 66270.43 (a).

IV. The Department Repeatedly Violated Procedural Requirements Mandated By The Health & Safety Code.

The Department's failure to regulate Exide and protect the public and environment from hazardous waste harms remarkably includes its own inability to abide by procedural requirements.⁷

- A. The Health & Safety Code and its implementing regulations impose time limits and procedures to prevent a Part B application from languishing, as did Exide's.

The Department violated procedural requirements in submitting and responding to the Notices of Deficiency it issued to Exide over years. Upon review of a Part B application, the Department must determine whether the application is complete. If the Department believes the application is incomplete, it must issue a "Notice of Deficiency," notifying the applicant regarding the portion of the application that is incomplete and providing the applicant with an opportunity to submit additional materials necessary to complete the application. 22 CCR § 66271.2(c)(2). The applicant must respond by the deadline indicated in the Notice, and "shall submit to the Department the materials necessary to make the application complete, as specified by the Department[.]" *Id.* "No later than 60 calendar days after receiving additional application materials, . . . the Department shall notify the applicant in writing whether the application with the additional materials is complete." *Id.* (emphasis added).

On June 17, 2014, the DTSC issued Exide a Third Notice of Deficiency. In response to Exide's request for an extension of time to respond, Exide set deadlines of August 2014 and September 5, 2014, by which Exide was required to submit additional materials necessary to complete its application. Based on information and belief, it appears that the Department failed to provide Exide the required notice in writing within 60 days of the latter deadline indicating whether the newly submitted information completed the application, or whether it remained incomplete.

When an applicant responds with "substantially incomplete or substantially unsatisfactory" information to a Third Notice of Deficiency, the Department "shall initiate proceedings to deny the permit application[.]" § 66271.2(e) (emphasis added). The Department issued this warning to Exide in the June 17, 2014 Third Notice of Deficiency. The record indicates that Exide's response to the Third Notice of Deficiency was substantially incomplete or substantially unsatisfactory, as evidenced by the November 20, 2014 Stipulation outlining serious pending disputes regarding the application. The Department did not initiate the required denial proceedings, however.

- B. The DTSC Was Likely Required to Make a Final Decision on the Vernon Facility's Hazardous Waste Permit Application by July 1993.

Section 25200.11(a) of the Health & Safety Code provides that:

On or before July 1, 1993, the department shall take final action on each application for a hazardous waste facilities permit to be issued pursuant to Section 25200 for an offsite hazardous waste facility which is not subject to

⁷ Section 66271.1(a) of Title 22 of the Code of Regulations provides: "This chapter contains the Department's procedures for issuing, modifying, revoking and reissuing, denying or revoking *all* hazardous waste facility 'permits.'"

the time limits specified in Section 25200.7 and which has been operating under a grant of interim status pursuant to Section 25200.5 prior to January 1, 1992, if the permit application was submitted to the department before January 1, 1992.

“For purposes of Sections 25200.11[,] ‘offsite facility’ means a facility that serves more than one generator of hazardous waste.” Health & Saf. Code § 25200.13. Based on the record, and according to DTSC staff, the Vernon facility qualifies as an offsite facility, and was therefore governed by § 25200.11. The facility also meets the other requirements of this section, since it both received granted interim status authorization and submitted its Part B application prior to January 1, 1992. Accordingly, the Department should be required to provide legal authority explaining why it was not required to comply with Section 25200.11(a) and make a final decision as to the Vernon facility in 1993.

V. Conclusion.

CBE’s members and other residents living near Exide have borne significant health burdens and other harms as a result of Exide’s lawlessness. Exide did not act alone, however. The DTSC continued to negotiate with Exide along a path toward granting of the permit, despite overwhelming evidence of Exide’s inability to comply with hazardous waste laws, a pending federal criminal investigation; the SCAQMD’s allegations that Exide knowingly, willfully, and intentionally violated environmental laws; and residents’ tireless calls for justice. The Department’s primary duty is to protect the health and safety of people and the environment, and residents of California have no choice but to depend on it to provide such protection. Rather than do so, the Department has enforced its duties in a negligent and reckless manner, placing industry and the State’s own financial interests before the public’s health and safety.

Based on foregoing, CBE respectfully requests a full investigation into the Department’s handling of the Exide matter in order to determine how the State can prevent such circumstances from ever happening again.

Sincerely,

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