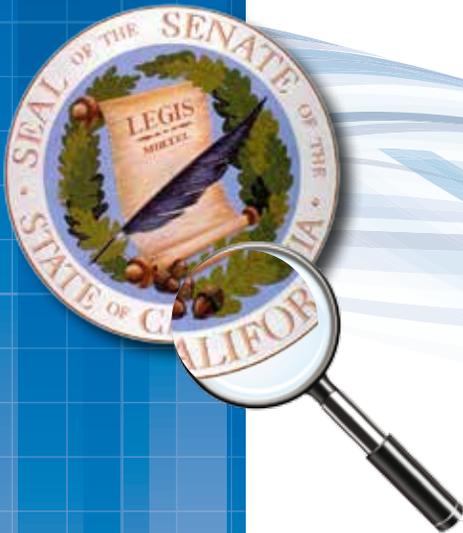


Fact Check:

Despite Failures by State's Toxics Regulator, Many Recent Criticisms are Unfounded

*A report prepared for Senator Kevin de León,
Senator Ellen Corbett and Senator Ricardo Lara*

July 14, 2014



Prepared by John Hill

California Senate Office of
Oversight and Outcomes

Randy Chinn
John Hill
Dorothy Korber
Jim Sweeney

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Introduction

On Feb. 21, 2013, a Santa Monica nonprofit called Consumer Watchdog released a 68-page report, *Golden Wasteland: Regulating Toxics or Toxic Regulation?* The report was a highly critical examination of the state Department of Toxic Substances Control by Consumer Watchdog, which describes itself as “dedicated to providing an effective voice for taxpayers and consumers in an era when special interests dominate public discourse, government and politics.” *Golden Wasteland* delved into an array of the department’s activities, including close looks at a number of cleanup sites.

The Department of Toxic Substances Control, or DTSC, summarizes its mission as protecting “California’s people and environment from harmful effects of toxic substances through the restoration of contaminated resources, enforcement, regulation and pollution prevention.” In the 2012-13 fiscal year, the department spent \$166 million and employed 870 workers, primarily to:

- Oversee cleanups
- Prevent toxic releases by those who generate, handle, transport, store or dispose of hazardous waste
- Sanction those who fail to handle hazardous waste properly
- Explore and promote ways to prevent pollution and encourage recycling

Consumer Watchdog’s wide-ranging report contended that DTSC consistently failed to achieve this mission. “The DTSC lets hazardous waste polluters operate on expired permits for years at a time, cuts repeated deals out of court with polluters, levies ineffective fines, fails to develop and refer cases for prosecution, and refuses to revoke the permits of serial violators of environmental laws,” according to a press release issued the day the report was published.

Golden Wasteland attracted media attention, including stories in newspapers and on television stations from the Bay Area to Los Angeles. Concerned about the allegations, three members of the California Senate asked the Senate Office of Oversight and Outcomes to review them. They

are Sen. Kevin DeLeón, D-Los Angeles, Sen. Ellen Corbett, D-Hayward, and Sen. Ricardo Lara, D-Bell Gardens.

Starting in July 2013, our office met with DTSC officials several times. We interviewed the author of *Golden Wasteland*, as well as sources who provided information used in the report. Many of those sources said they chose to remain anonymous to avoid retribution. As much as possible, we sought information from public documents, independent experts and interested parties to confirm or refute *Golden Wasteland's* allegations.

Golden Wasteland includes opinions and proposals in addition to factual assertions. Our review tried to distinguish between these categories, and checked only the latter. In some cases, the report quotes a source asserting a fact. If the report contained no contradictory information, we treated the source's allegation as if it had been made by the report. In general, we did not address allegations that focused on the actions of private parties or public entities other than DTSC. The exception was when these actions were intertwined with the activities of DTSC and essential to the critique of the department.

This report is broken into sections that mirror the organization of *Golden Wasteland*, beginning with the pages of *Golden Wasteland* being reviewed. Each section includes a short summary of the allegations contained in the report, our "bottom line" conclusion, and a longer discussion of how we came to that conclusion.

The review of *Golden Wasteland* afforded our office, and the Senate as a whole, an opportunity to examine a wide range of DTSC's activities. However, this report does not attempt to reach a definitive conclusion on the overall performance of DTSC, a complicated, multi-faceted organization involved at any given time in dozens of controversial issues, many of which we did not look into. Rather, the review focused on the issues raised by *Golden Wasteland*.

Likewise, we draw no overall conclusion about the Consumer Watchdog report. *Golden Wasteland* put a spotlight on issues that have received little or no outside scrutiny. In some cases, we were able to confirm its assertions. In many others, we found that the report was incorrect, misleading or lacking in context.

Lastly, while our report raises questions about some factual assertions regarding particular sites where DTSC has been involved, we in no way mean to minimize the harm done to communities by toxic contamination. Rather, this review focuses on the performance of DTSC in mitigating that harm.

Note: This report includes links to non-Senate Internet Web sites for purposes of reference citation only. The presence of a link does not constitute or imply any endorsement, sponsorship, or recommendation by the Senate of the content of any linked site. The Senate does not monitor, control, or fund any of the linked sites and is not responsible for their content. If a linked site solicits funds, this should not be construed to mean that the Senate is soliciting funds for that site.

DTSC is “falling down on the job” as evidenced by an increase in overall toxic releases (p.4)

ALLEGATIONS: DTSC is supposed to protect the environment from toxic substances but is instead “falling down on the job” as can be seen in a sweeping statistic: overall toxic releases. The U.S. EPA’s annual Toxics Release Inventory showed an increase in California in 2011 after steady declines for the prior three years. “While pollution released into the air fell statewide by 13 percent in 2011, releases to water and soil increased by 10 percent,” the report states.

BOTTOM LINE: *Golden Wasteland* assumes that DTSC is responsible for all toxic releases, including not just spills but recycling, on-site treatment and disposal in landfills. In fact, the increase between 2010 and 2011 can be more than accounted for by something beyond the department’s control – a spike in toxic releases at a federal military facility that trains units for the war in Afghanistan. Without that, overall toxic releases in California would have dropped for a fourth straight year. The results for 2012, which came out after *Golden Wasteland* was published, show another decrease.

DISCUSSION: Each year, the EPA releases its Toxics Release Inventory detailing releases to air, water and land. The report breaks the numbers down by state. The TRI, as it’s known, does not attempt to measure human exposure to toxins, just total volumes of chemicals.

The numbers do not represent only spills. In fact, much of the total can be attributed to controlled releases, such as disposal into a hazardous waste landfill, on-site treatment, or delivery to a recycling center, according to the EPA. Some of these releases are overseen by DTSC in that they occur at facilities that hold state hazardous waste permits. DTSC does have some responsibility for trying to reduce overall toxic releases by, for instance, encouraging “greener” products and processes. But to a large extent, the department has little direct influence over many toxic releases, which may reflect economic trends or practices in a particular industrial sector.

The increase in 2011 is a case in point. *Golden Wasteland* is correct that overall toxic releases increased in 2011 after three years of decreases. But a close look at the data by our office shows DTSC can hardly be held responsible. The increase in toxic releases between 2010 and ’11 is more than accounted for by releases at one site – the U.S. Marine Corps Chocolate Mountains Aerial Gunnery Range in Imperial County. Every Marine Corps unit deployed to Afghanistan comes through the base for training, said Maria Stewart, the range’s air quality program manager.

Munitions dropped in training runs are counted as toxic releases in the EPA's annual inventory. Between 2010 and 2011 – at a time of intensified activity in Afghanistan – toxic releases at the gunnery increased 3.7 million pounds. If not for that spike, releases to soil and water in California would have decreased 6 percent in 2011 instead of increasing more than 10 percent. Likewise, total releases in the state would have decreased 4.5 percent for a fourth straight year of declines. Indeed, in 2012, when activity at the aerial gunnery had returned to more normal levels, overall toxic releases in California declined 14 percent.

DTSC regulates the management of hazardous waste at military facilities, but not the creation of the waste through activities such as bombing runs. So *Golden Wasteland* is unjustified in citing the one-year increase in toxic releases as evidence of the department's failure. In addition, if DTSC were indeed completely responsible for total toxic releases, the department could brag about decreases in four of the last five years.

In response to our questions, Consumer Watchdog stated that DTSC has “eliminated” its source reduction program, meant to reduce overall toxic releases like those measured in the TRI. DTSC admits that the program is “dormant as the result of resource constraints and shifting priorities.” In 2012, the hazardous waste law was changed to allow DTSC to opt out of pollution prevention, pursuing it only if funding is available.

DTSC's collection of fines has dropped and compares unfavorably to the Air Resources Board (pps. 4-5)

ALLEGATIONS: DTSC collected much less in fines than the California Air Resources Board despite having “far greater responsibilities,” and the totals collected in recent years fell by half.

BOTTOM LINE: The report accurately cites statistics that show total fines collected by DTSC are lower than the Air Resources Board's total. And they did drop by half from 2007 to 2010. The contention that DTSC has far greater responsibilities, however, is highly debatable. DTSC argues that the comparison to ARB is unfair and cites reasons for the decline in total fines collected.

DISCUSSION: DTSC officials told the Senate Oversight Office that DTSC does not have “far greater responsibilities” than ARB. The department points out that ARB is responsible for all mobile source and greenhouse gas emissions in the state, including cars, trucks, buses, ships and trains, as well as many consumer products.

Indeed, if money and personnel are an indication, ARB is the one with

“far greater responsibilities.” In the 2012-13 fiscal year, for instance, ARB spent \$343 million and employed 1,273 workers. DTSC, by contrast, spent less than half that amount - \$166 million - and employed 870 workers. Some of ARB’s budget goes to local air quality management districts. Even when this amount is subtracted, ARB outspent DTSC by \$107 million, or 64 percent.

The report accurately cites figures showing that the Air Resources Board collects far more in fines than DTSC does and that DTSC’s numbers have dropped by half in recent years.

DTSC officials said it’s not fair to compare the two agencies because ARB has a “ticket” system allowing the board to impose administrative sanctions much like a police officer handing out speeding tickets. DTSC lacks such a system as the result of 1994 legislation that prohibits the department from assessing penalties for minor violations.

In addition, DTSC officials said, many ARB violations are “black and white,” such as a retailer selling spray paint with an illegally high level of volatile organic compounds, while DTSC enforcement cases tend to be more complex. In the cases it does pursue, DTSC tends to get much bigger settlements. “The numbers don’t align at all,” said Brian Johnson, deputy director of the hazardous waste program. “So it’s pretty much an apples-and-oranges kind of comparison.”

The numbers also are influenced by the types of cases DTSC is pursuing, officials said. In recent years, for instance, the department has gone after e-waste handlers, a type of case not likely to lead to big fines. DTSC also points out that it has contributed to civil actions led by local district attorneys against large retailers. Some of the fines from these cases have been in the tens of millions of dollars but are not reflected in DTSC’s enforcement statistics.

Consumer Watchdog, in a written response to our questions, said DTSC has not been as active in participating in such cases in recent years. DTSC, however, cited statistics that show six settlements between \$2.5 million and \$27.7 million from 2010 to 2013.

DTSC’s fines do not appear to be out of line with what’s levied by two other large states’ toxics agencies. DTSC collected about \$2 million in 2011, which adds up to about five cents per California resident. In Texas and New York, the next two biggest states by population, toxics agencies levy annual fines that amount to between three and four cents per resident, according to figures provided by officials in those states.

Many corrective action cases overseen by DTSC remain in limbo (p.5)

ALLEGATIONS: Of the 655 corrective actions that DTSC lists on its website, many have been handed off to other agencies and others “still appear to be in limbo.”

BOTTOM LINE: *Golden Wasteland* implies that cases referred to other agencies and those “in limbo” indicate that DTSC is failing to achieve its mission. DTSC counters that the law allows other agencies to be involved in cleanups. The department says that inactive cases have been found to pose no immediate threat and that it lacks the personnel to address all of them.

DISCUSSION: On its online database Envirostor, DTSC lists more than 600 “corrective actions” – sites that may require cleanup under the department’s legal authority. By the time the Senate Oversight Office reviewed the database, the number of corrective action sites was 656 – one more than the figure cited in *Golden Wasteland*.

Of this number, 245 were considered “active,” including those being cleaned up under the state’s authority as well as some managed under the federal Superfund program and a handful that are complete except for ongoing management, such as long-term groundwater pumping. Another 128 were considered complete. They were either found to require no further action or the cleanup work was certified as finished. DTSC referred another 89 to other agencies, mainly local governments and the State Water Resources Control Board.

The remaining 194 cases were classified as “inactive.”

“One could think of that as ‘limbo’ because we really haven’t spent that much time on them,” said Ray Leclerc, assistant deputy director of environmental restoration. “We’re not actively pursuing them.”

Why not? “We only have so much staff. We can’t be active on all of them,” Leclerc said. When potential cleanup cases come to the attention of DTSC, the department evaluates the potential threat to human health or the environment. Those cases become priorities. In addition, DTSC officials said they periodically reevaluate inactive cases for potential threats and elevate some to active status.

DTSC officials said they believe that the mixture of active and inactive cases is similar in other states. But the department has been told by the U.S. EPA that comparisons would be difficult because California is so

much larger and operates under more aggressive environmental laws.

An EPA official in San Francisco confirmed to the Senate Oversight Office that the mix of active and inactive cases in California is comparable to what would be found in other large states. The environmental engineer said she has reviewed cases on DTSC's database, Envirostor, and agrees with the state that inactive cases were properly ranked as low priority.

DTSC is not making referrals for civil and criminal cases and has gutted its law enforcement unit (p. 5)

ALLEGATION: The number of cases that DTSC refers for civil or criminal prosecution dropped from 55 in 2007 to just one in the 2012-13 fiscal year. The department has skimmed on its investigative unit, the Office of Criminal Investigations, in favor of other areas such as public relations. DTSC has only 10 investigators, with none at all for Southern California.

BOTTOM LINE: Criminal referrals to outside agencies did drop suddenly after 2007. DTSC says that's due in part to a spike in cases in 2007 from DTSC sting operations. However, that explanation is undermined by the fact that pre-2007 numbers were considerably higher than in recent years. The number of investigators in the Office of Criminal Investigations also has fallen. DTSC says the decrease can be explained in part by the fact that other government agencies offer more attractive pay and benefits for peace officers. Still, *Golden Wasteland's* primary assertion – that criminal investigations and referrals have not been a high priority for DTSC – is borne out by the numbers.

DISCUSSION: The Office of Criminal Investigations (OCI) gets first crack at complaints made to DTSC about environmental infractions. OCI prioritizes the most serious, and passes on those it does not investigate to others within DTSC or local governments. The office includes investigators who are sworn peace officers, environmental scientists who help with evidence, and support staff.

In 2007, OCI referred 58 cases to federal, state or local prosecutors, Reed Sato, DTSC's chief counsel, said in an interview. In 2008, it made eight referrals. In 2011 and 2012, it made only five each year. Sato said that DTSC did an unusual number of sting operations in 2007, which may explain part of the dramatic drop in referrals. The department targeted illegal hazardous waste operations and improper disposals at landfills.

But a review of the numbers shows that the spike does not entirely explain

the drop. From 2000 to 2006, before the sting operations, OCI averaged 32 referrals per year, five times the average annual number after 2007.

The decrease also can be attributed to loss of staff in Southern California, where most criminal enforcement activity takes place, Sato said. DTSC only recently assigned two investigators to Southern California. For some time, there had been none, as *Golden Wasteland* points out.

In May 2010, a total of 40 workers were assigned to OCI, including 19 investigators. Now, Sato said, there are 29, including 15 investigators, 11 scientists and three support staff. Part of this 30 percent decrease occurred because auditors of e-waste fraud were reassigned to CalRecycle, a different state department. But DTSC also has redirected OCI positions to other programs within the department – a reflection of its priorities.

In addition, DTSC says it has a hard time holding on to investigators. Other state agencies – such as the Department of Justice – pay more and offer better benefits, such as recruitment and retention bonuses of \$300 to \$400 a month, Sato said. Sometimes, investigators are recruited by others after DTSC has paid to put them through the police academy, he said.

DTSC management has been aware of the problem of recruiting peace officers for 24 years, said a DTSC scientist who spoke to the Senate Oversight Office on condition of anonymity for fear of retribution. But, despite repeated vows to fix the problem, nothing has happened, the scientist said. He pointed out the OCI has shrunk even as the overall department has maintained about the same number of workers, a reflection that prosecutions are a lower priority than some other DTSC programs.

The department says it is asking CalHR, the state's personnel operation, to allow it to offer recruitment and retention bonuses. In the meantime, DTSC points out that another of its operations – the Enforcement and Emergency Response Program – has taken up some of the slack in referrals to prosecuting agencies. The program made three civil and no criminal referrals in the 2007-08 fiscal year, but four years later made 11 civil and one criminal referrals.

DTSC and other agencies don't cooperate on multimedia investigations (p.13)

ALLEGATION: Laws direct CalEPA and DTSC to coordinate enforcement when pollution crosses environmental media to contaminate air, water and soil. But CalEPA ignores this mandate while boards and departments within the agency jealously guard their own turf.

BOTTOM LINE: CalEPA states that it complies with the requirement to operate a cross-media task force. DTSC officials concede that California's regulatory scheme divides authority by environmental media, but say that they do cooperate with other entities when necessary.

DISCUSSION: Government Code Section 12812.2(a) directs CalEPA to establish a cross-media unit to help boards and departments within the agency put together enforcement actions. The 1999 law also requires CalEPA each year to post on its website the status of efforts to implement the code section, which includes a number of other provisions on training and coordination.

CalEPA says it complied with the law through the formation of an enforcement steering committee. According to a 2007 memo establishing the committee by then-Secretary Linda Adams, one of its objectives is "enhancing cross program coordination." A list of the committee's goals includes, "share and/or develop industry sector or geographic enforcement priorities or initiatives that may be enhanced through multimedia participation or assistance." The steering committee meets monthly, but also relies on more frequent informal interactions between enforcement officials at different CalEPA boards, offices and departments. CalEPA says the steering committee has been involved in the formation of a task force on oil refineries and lawsuits against large retailers that were not handling their hazardous materials properly. CalEPA also has coordinated enforcement actions with other state entities outside the agency, such as the Department of Fish and Wildlife.

In an interview with the Senate Oversight Office, DTSC officials conceded that environmental enforcement can be balkanized, but said it was mostly a function of the Legislature setting up separate regulatory regimes for different environmental media – air, water and soil.

"There's no one agency that has authority across all regulatory programs," said Paul Kewin, chief of DTSC's Enforcement and Emergency Response Division. "But we do sometimes do multimedia investigations. If we have an investigation where we think we have to pull in the Water Board, we'll work with them."

DTSC has involved other environmental entities in its recent initiative to review metal recycling operations, Kewin said, and also in a multi-faceted enforcement case against battery recycler Exide Technologies in Vernon.

In response to our questions, Consumer Watchdog stated that cross-media enforcement has had no tangible results at facilities such as Exide and suggested that CalEPA would find it difficult to point to concrete

accomplishments from the formation of the cross-media task force.

DTSC employs too many people in public relations (p.17)

ALLEGATIONS: DTSC employs about 50 people to handle public relations while other operations such as enforcement go begging.

BOTTOM LINE: DTSC admits that the external affairs office, as of two or three years ago, was bloated and has since reduced it by 40 percent.

DISCUSSION: Jim Marxen, deputy director for communications, told the Senate Oversight Office that when he was named acting deputy director in 2010, the external affairs office included 52 people. About 20 of those were not in positions that would traditionally be considered PR. Rather, they were facilitators specializing in public outreach. Federal and state laws require DTSC to organize public participation for cleanup and other projects. Facilitators schedule and run meetings and the like. Still, Marxen said, the external affairs office “was a very large organization and it bothered me from the very beginning. ... I’d probably agree it was too big and needed to be cut.”

Before *Golden Wasteland’s* publication, Marxen said, DTSC started reducing the size of the external affairs office, reassigning positions to other operations. By July 2013, when he spoke to the Senate Oversight Office, Marxen said it was down to 31, including the 20 or so facilitators, four public information officers, graphic designers and website managers. Marxen said the smaller office is comparable to a similar operation at the Air Resources Board.

DTSC dropped the ball by failing to follow up an enforcement action against a National City company (pps. 17-18)

ALLEGATIONS: DTSC fined a National City company, Pacific Steel, \$235,000 after discovering piles of toxic debris in 2002. “Then the DTSC walked away,” the report states. Pacific Steel threw blue tarps over the piles of debris and forgot about them. Only when a TV news crew did an investigation in late 2011, “nearly a decade later,” was it revealed that no cleanup had been done. The report quotes the head of an environmental group saying that interagency cooperation was poor and DTSC simply didn’t “bother to check” if the company had done what was required.

BOTTOM LINE: DTSC did not “walk away” as suggested by the

report. It visited the site numerous times after issuing the fine and cited the company for several violations in 2010. Nor did Pacific Steel “forget” about the piles of contaminated soil. Rather, from 2005 until 2010, Pacific Steel was treating the soil to remove metal contaminants. When this process turned out to be much slower than anticipated, the company sought permits to ship the waste to its steel mill in Mexico, where it could be used in steel manufacturing. All of this occurred prior to a San Diego television report on Pacific Steel’s contaminated soil.

DISCUSSION: The eight-acre Pacific Steel site has been used for oil refining and storage, metal shredding and other industrial purposes since the early 1900s. In 2002, DTSC ordered Pacific Steel to come up with a new plan for disposing of stockpiles of contaminated soil that sat beneath auto shredder waste. In 2005, the company’s plan was approved by DTSC. It called for the company to cover the piles with tarps and control dust during treatment of the soils to remove contaminants.

In 2009, Pacific Steel informed DTSC that it had processed 10,800 tons of soil and scrap metal. Another 8,250 tons of excavated or partially processed soil remained to be treated, along with 13,000 tons yet to be excavated. Rather than continue with the 2005 work plan, which was going slower than expected, the company proposed to DTSC that it truck the soil to its Mexicali steel plant, where it would be used in steel-making.

In 2010, DTSC did a formal inspection of the site in response to a complaint and to verify the company’s compliance with the 2005 agreement. The inspection found that the company had dumped hazardous waste onto the soil, stored hazardous waste without a permit, failed to keep hazardous waste containers closed, and did not take steps to minimize hazardous waste releases.

That same month, Pacific Steel shipped waste considered hazardous under California law, but not federal law, to Arizona. The soil was generated during the processing approved as part of the 2005 work plan, according to correspondence between DTSC and the company.

In a 2010 letter, Pacific Steel wrote that DTSC had visited the site on “numerous occasions over the last 4 years.” Several months later, in July 2011, Pacific Steel informed the state that it expected to start transporting soil to Mexicali that month, and that the new strategy would get rid of piles of contaminated material more quickly and not leave any soil to be disposed of through other means.

Four months later, a San Diego television station aired a story about Pacific Steel.

According to *Golden Wasteland*, “it took a TV news crew’s investigation at the end of 2011, nearly a decade later, to uncover that no cleanup had been done.” In fact, as the documents cited above show, the company had been processing contaminated soil all along, although at a slower rate than expected.

While DTSC is certainly open to criticism for its handling of the cleanup, it is not accurate that DTSC “walked away” from Pacific Steel or that Pacific Steel’s “actual ‘solution’ was throwing blue tarps over the piles and forgetting about them.”

DTSC officials told our office that the original plan to recycle metals from the soil, approved by DTSC and other government overseers, turned out to be less effective than hoped. DTSC favored the solution because, if there’s no imminent danger, the department prefers contaminants to be treated on-site rather than transported. DTSC said that the tarps and windscreens protected surrounding neighborhoods. Although getting permits from the Mexican government took longer than hoped, 24,000 tons have now been removed. One pile remains. It contains soil considered hazardous by the federal government. Moving it requires review by the U.S. EPA, DTSC officials said.

In response to our questions, Consumer Watchdog wrote that it could “defend the conclusion that the DTSC walked away from follow-through on getting the cleanup accomplished in a timely manner because it has not been completed. ... The DTSC did not follow through on rigorously overseeing the enforcement of its cleanup orders at that site.”

DTSC refused to help a local agency or take the lead in the aftermath of 2012 Chevron fire (pps. 19-23)

ALLEGATIONS: When a fire erupted at the Chevron refinery in Richmond on Aug. 6, 2012, spewing a cloud of toxic smoke over the Bay Area, DTSC “staunchly resisted” calls from Contra Costa Health Services to step in. “Instead, the DTSC left Chevron to other local and state agencies like Contra Costa Health Services and the Bay Area Air Quality Management District that have been largely ineffectual in regulating Chevron.” DTSC refused to take charge in the Chevron fire despite getting involved in other cases involving airborne contaminants, including one against a metal recycler in Los Angeles.

DTSC is “obligated” to step in when incidents like the Chevron fire occur. It should have used its power to issue an imminent and substantial danger order, forced the refinery to upgrade pipes and prosecuted Chevron for allowing “hazardous particles” in the smoke to land in

areas not permitted for hazardous waste disposal. “The DTSC should make Chevron pay for this dangerous toxic emission,” this section of the report concludes. “But it has done none of these things.”

In addition, more than a decade ago, DTSC backed down from an initiative to profile all the state’s refineries – as a first step in taking the lead in regulating refineries – when the industry objected, citing post-9/11 security concerns.



The Chevron refinery is just across the freeway from homes in Point Richmond

BOTTOM LINE: DTSC, Contra Costa Health Services and the source relied upon by *Golden Wasteland* all say the county did not contact DTSC asking for help the day of the Chevron fire. They say the county would have had no reason to do so because DTSC is not an emergency responder in such cases. DTSC cites statutes and case law indicating uncontained gaseous emissions like the smoke from Chevron do not meet the definition of hazardous waste regulated by the department, barring the actions called for by *Golden Wasteland*. Instead, they say, such releases fall under air pollution control laws. It’s true that DTSC halted release of profiles of oil refineries after 9/11. But nothing in the record indicates that the profiles were a first step in DTSC taking the lead in regulating refineries.

DISCUSSION: *Golden Wasteland* quotes an unnamed Contra Costa County “hazardous waste officer” who said that the county health service “turned to the DTSC for help” on the day of the fire but that despite having “a lot of discussions” with the department, “they didn’t really volunteer anything. They said they might send a refinery inspector.”

Consumer Watchdog provided our office with the name of a Contra Costa Health Services employee who was quoted anonymously in the report about getting no help from DTSC. The Senate Oversight Office contacted the individual, now retired, who said he did not recall trying to get in touch with DTSC about the fire. Calling DTSC “would not make sense to me...,” he said. “I’m not sure why we would have asked them for

help. On that incident, we wouldn't have used their help.”

Both DTSC and Contra Costa Health Services say they know of no attempt by the county to enlist DTSC's help on the day of the fire – or in the aftermath.

Randy Sawyer, chief environmental health and hazardous materials officer for Contra Costa County, told the Senate Oversight Office that after *Golden Wasteland* was published, he asked the workers on duty that night if they had contacted DTSC. None said they had. There was no indication in records from that night of an attempt to get help from DTSC.

“I'm not sure why we would have contacted DTSC,” Sawyer said. “It's not our practice to get in touch with DTSC during incidents like this one” because DTSC is not an emergency responder in this type of incident. The health department would be more likely to ask for help from DTSC in a spill or other event that required immediate cleanup.

Sawyer took issue with the report's contention that “this county agency was out of its league with a disaster so large.” The county health service has responded to many refinery emergencies and other incidents involving hazardous waste, Sawyer said. “It's something we work with all the time,” he said.

California's regulatory system calls for 83 “Certified Unified Program Agencies,” including Contra Costa Health Service, to take the lead in regulating hazardous waste generators such as refineries. In the case of Chevron, DTSC's permit covers only the refinery's hazardous waste storage area, which was not involved in the fire, as well as a closed “land farm” where hazardous waste is being degraded naturally by microbes. The department inspects refineries, even those with no DTSC permit, because of the high profile of the industry. But in general, DTSC officials say, the Certified Unified Program Agencies, or CUPAs, are in charge and the state only steps in if needed.

“We have faith in our local partners, that they know what they're doing,” said Paul Kewin, chief of DTSC's enforcement division, “and that we don't need to duplicate effort by stepping in where they're used to working.”

Other agencies also are involved. Local air boards oversee emissions. CalOSHA regulates workplace safety at refineries and would be the agency most likely to demand that Chevron upgrade pipes, which *Golden Wasteland* says DTSC should have done. Indeed, when the California

Attorney General's office and the Contra Costa District Attorney settled a criminal case against Chevron over the fire, the oil company agreed to inspect its pipes in cooperation with CalOSHA.

Golden Wasteland contends that DTSC has an "obligation" to take the lead during incidents such as the Chevron fire. "These powers are not a matter of interpretation or debate," the report states.

DTSC officials told the Senate Oversight Office that the report's critique ignores legal constraints on the department's jurisdiction. They cited laws that prevent DTSC from taking the actions that *Golden Wasteland* demands.

For one, Chapter 6.8 of the Health & Safety Code, which gives the department its most extensive authority in ordering cleanups, specifically excludes petroleum products from its definition of hazardous substances.



Point Richmond residents' view of tanks on the edge of the Chevron refinery

In addition, both state and federal governments, in the creation of environmental oversight agencies, decided that air emissions such as those from the Chevron fire fall under air quality laws, not hazardous waste laws. Health & Safety Code 25124(a) defines waste as including only "contained gaseous" material – something in a pipeline, cylinder or tank rather than an ambient release.

"When people say, 'Gee, maybe DTSC should do something about an emission that goes to the air' – by the statute, that is not considered a waste over which we would have jurisdiction," Reed Sato, DTSC's chief counsel, told the Senate Oversight Office. "Those kinds of things, especially when it's toxic emissions to the air, are dealt with under the air quality statutes. So that's the jurisdiction of either the local AQMDs (Air Quality Management Districts) or the Air Resources Board."

Golden Wasteland suggests that these jurisdictional limitations could be overcome when particulates in air emissions accumulate on the ground.

Sato said that courts have not found this argument persuasive.

One recent case, *Center for Community Action & Environmental Justice et. al. v. Union Pacific Corporation*, was heard by the U.S. District Court for the Central District of California. The plaintiffs, three environmental groups, argued that diesel emissions from rail yards should be covered by the federal Resource Conservation and Recovery Act because particulate matter in diesel fuel could accumulate on the ground as solid particles. The court ruled that such an interpretation would stretch “the boundaries of the term to a point where it retains little meaning.” The court cited federal law that, like California’s, limits “hazardous waste” to gases held in containers. While this unpublished decision is not controlling in California or anywhere else, Sato said it shows how a state court might analyze the issue.

The idea of prosecuting Chevron for illegally depositing hazardous waste raises logistical as well as legal difficulties, Sato said.

“It is complicated to do some of these types of cases,” he said. “To say, for an aerial deposition case, you should prosecute somebody, without having had the whole set-up in terms of monitoring devices and things like that – pretty difficult. The air board, the AQMDs, do have those kinds of things. ... They would be the ones that people ordinarily expect” to take the lead in a prosecution.

Indeed, the Bay Area Air Quality Management District did evaluate the air from several monitoring stations during the Chevron fire, although these instruments are meant mostly to gauge long-term exposures rather than emergencies lasting only a few hours. Chevron is also required to operate three monitoring stations, said Eric Stevenson, the air quality district’s director of technical services. Stevenson said it is extremely difficult to measure the fallout from a refinery fire, because the byproducts of hydrocarbons are already so widespread in the environment. It’s hard to differentiate between background hydrocarbons and deposits from a fire. Doing so generally means measuring the contaminants while they’re still in the air rather than after they’ve fallen to the ground, where the extent of previous contamination is unknown. This puts such monitoring into the jurisdictions of the air quality management districts and the Air Resources Board rather than DTSC, he said.

Golden Wasteland points out that DTSC took part in the Los Angeles District Attorney’s prosecution of a metal recycler accused of releasing contaminants into the air. The report says this action “contradicts” the

department's refusal to regulate refineries such as Chevron's for releasing contaminants into the air.

SA Recycling settled the civil case in 2011, agreeing to pay substantial fines and put in new air pollution control equipment. As part of the case, DTSC commissioned a study that showed lead dust was accumulating in nearby neighborhoods. The report attributed the contaminants to SA Recycling's operations, a conclusion disputed by other researchers hired by the industry. The case against SA, however, did not rely on DTSC's testing or cite it in the factual allegations or causes of action.

The circumstances of the two cases differ, said Brian Johnson, deputy director for DTSC's hazardous waste program. The planned investigation of the metal recycler allowed enough time and logistical support to set up monitors to gather evidence that could be defended in court. But DTSC lacks the ability to conduct such monitoring during an emergency like the Chevron fire, Johnson said.

It is true, as *Golden Wasteland* asserts, that several different agencies regulate refineries, and that oversight can be fragmented. In response to the Chevron fire, Gov. Jerry Brown convened an interagency working group to recommend ways to plug regulatory gaps. The draft report, released in July 2013, calls for a permanent interagency task force within CalEPA, including DTSC. It makes several other recommendations, but in general, does not call for an expanded role for DTSC.

Golden Wasteland's demand that DTSC make Chevron pay for the damage from the fire ignores the fact that several other agencies were in the process of taking such actions (although some were not completed by the time the report was released.) CalOSHA levied its biggest proposed fine ever – \$963,000. (Chevron is appealing the fine before an administrative law judge.) Chevron agreed to pay another \$2 million in fines and restitution in a criminal case brought by state and local prosecutors, and another \$10 million for claims and medical treatment of residents. It also faces private lawsuits and one from the city of Richmond. In the criminal case, Chevron agreed to cover the costs of CalOSHA and the Bay Area Air Quality Management District. The case did not cite hazardous waste provisions of the law, which DTSC believes underscores the primacy of the air district's authority in such cases.

It is true, as *Golden Wasteland* contends, that officials stopped the public release of profiles of oil refineries and claimed that it was because of post-9/11 security concerns. But DTSC was not the only entity involved in the decision. And nothing in the record suggests that the refinery profiles

were the first step in having DTSC take over regulation of refineries, as *Golden Wasteland* states.

DTSC profiled the state's refineries under the provisions of Senate Bill 1916 of 1998. The legislation created a body called the California Source Reduction Advisory Committee, consisting of 12 public members and the executive directors of DTSC and other state environmental entities. The law required DTSC to establish model source reduction measures for two categories of hazardous waste generators. For one of those two categories, DTSC – in consultation with the newly formed committee – chose the petroleum refining industry. The first phase of the project involved DTSC creating profiles of the state's 17 largest refineries. They included data about the refineries' processes, efforts to reduce the use of hazardous materials, emissions, and compliance with environmental laws.

The profiles were completed in November 2001, according to a DTSC report released in 2002. In the wake of the 9/11 terrorist attacks, DTSC halted the public release of the profiles, containing more than 400 pages of data, because of security concerns, the report states. In February 2002, DTSC referred the profiles to the State Strategic Committee on Terrorism, a body that was created by then-Gov. Gray Davis after 9/11 to evaluate the state's terrorism readiness. As of the publication of the 2002 report, "it does not appear that the ... Committee on Terrorism will be able to render a decision in the near future." In March 2002, the advisory committee set up by SB 1916 told DTSC to discontinue the refinery project because of the uncertainty about whether the refinery profiles should be released. DTSC chose the semiconductor industry as a replacement.

A DTSC employee who spoke to the Senate Oversight Office on the condition of anonymity said that the refineries were opposed to the profiles even before 9/11 because they would paint a stark picture of which ones were failing to comply with environmental laws. The refineries used the terrorist attacks as leverage to pull the plug on the project, he said. The Western States Petroleum Association, which *Golden Wasteland* says objected to the profiles, failed to respond to questions from the Senate Oversight Office.

Neither SB 1916 – nor the reports done to comply with the law – suggest that the refinery profiles were the first step in DTSC taking the lead in regulating refineries, as *Golden Wasteland* alleges.

DTSC fails to deploy its mobile lab (p. 21)

ALLEGATION: DTSC should have used a federally-funded mobile lab in response to the Chevron fire. “At the very least, this could have been an opportunity for the DTSC to bring out its ‘Golden Galleon,’ a federally financed mobile environmental lab on wheels that is part of their ‘rapid response’ capability.” The lab is rarely deployed and DTSC may not even have anyone qualified to drive it.

BOTTOM LINE: DTSC does indeed have a mobile lab that it never uses. But the department says it would have been impractical to deploy the lab in response to the Chevron fire. DTSC obtained it in 2004 with a federal grant for responding to terrorist incidents after 9/11. It was found to be unworkable, DTSC says, both for terrorism response and hazardous waste cleanups and has been mothballed. The lab instruments were obsolete by the time of the Chevron fire, but even if they hadn’t been, they were never designed to track smoke plumes like those from the fire, the department said.

DISCUSSION: In 2004, DTSC got a U.S. Department of Homeland Security grant for about \$1 million to create a mobile lab able to detect biological and chemical agents that might be used in a terrorist attack. No state money was used.

The lab consists of a Ford F-550 with a “big box” on the back, comparable to the largest U-Haul, Bruce LaBelle, research scientist manager of DTSC’s Environmental Chemistry Lab, told the Senate Oversight Office. It includes benches, generators and scientific instruments. After testing the lab in emergency response drills, DTSC realized that it would require specialized training and staffing to operate effectively. With the state’s budget limping along, the department decided not to pursue it. DTSC tried using the lab at cleanup sites, but its instruments were not designed to detect substances such as metals often found in contaminated soil.

Ultimately, LaBelle said, “It’s easier to bring a sample to a laboratory than a laboratory to a sample.”

By 2009 or ’10 – years before the Chevron fire - the instruments in the lab were obsolete. DTSC decided against spending money to upgrade it at a time when the department didn’t have enough money for its regular labs. In any case, LaBelle said, it would have made little sense to deploy it to the fire. The lab is designed to test soil samples, wipes from walls or pieces of clothing.

“It’s not set up for putting a snorkel up in the air and looking for

migration of a large plume through a community,” he said. DTSC is now looking for other environmental operations that might have a use for the truck.

DTSC should have shut down an East Bay oil recycler with a history of violations (pps. 26-29)

ALLEGATIONS: DTSC has issued only “wrist-slap fines” totaling \$86,000 against Newark oil recycler Evergreen Oil despite the company being “a serial violator of environmental laws.” Industrial accidents and odors at Evergreen have plagued neighbors. Yet DTSC has abdicated its



The Evergreen Oil plant in Newark

responsibility to oversee the company, claiming that a leak of heat transfer fluid was not in its jurisdiction and that the violations at the plant were not serious enough to warrant revoking its hazardous waste permit.

The report quotes an unnamed private environmental attorney saying that the Legislature never intended for DTSC to allow serial violators like Evergreen to stay in business. “DTSC

has every right – indeed a duty – to shut down this serial environmental polluter,” the report states.

Evergreen also is a prime example of how DTSC negotiates sanctions with violators instead of imposing the legally mandated penalty, resulting in “paltry fines.” DTSC withholds from the public the amounts that the company could have been fined before they were negotiated down. DTSC does not even know the number of these negotiated administrative actions that it signs with any one company.

In addition, DTSC lacks the accounting expertise to determine if a company can afford to pay fines.

In another case, DTSC reduced a fine for a company called Abbott Vascular when then-Gov. Arnold Schwarzenegger’s chief of staff requested it so that the company would not have to report the fine to the

Securities and Exchange Commission.

BOTTOM LINE: It's true that DTSC had the legal authority to become more involved in the Evergreen case. But *Golden Wasteland* fails to mention that California's regulatory scheme calls for a local entity, a Consolidated Unified Program Agency, to take the lead in the section of the Evergreen plant where accidents occurred. DTSC says that violations in the section of the facility it regulates do not come close to warranting a permit revocation.

Our research found that, for better or worse, revoking a hazardous waste permit is rare not only in California but in other large states. Still, an outside consultant commissioned by DTSC recommended that the department come up with more objective criteria for revoking permits. Despite *Golden Wasteland's* criticism of DTSC for negotiating fines, the practice is common among prosecutors, environmental agencies in California and DTSC's counterparts in other large states and, according to DTSC, avoids dedicating scarce resources to court battles.

It's true that DTSC does not make public the fines that could have been levied before they were negotiated down. This is at odds with what's done in some other states. Contrary to the report's contention, DTSC's website contains a list of corrective action agreements by company. On the matter of Abbott Vascular, our office confirmed that, in an unusual move, DTSC headquarters took over the job of calculating the penalty amount and reduced it below \$100,000 after the company expressed concerns about having to report it to shareholders, though we could not ascertain that it was done at the behest of then-Gov. Schwarzenegger's office.

DISCUSSION: Evergreen recycled used oil at the Newark facility between 1984 and 2013. The plant has long been the source of complaints about odors in nearby neighborhoods. On March 29, 2011, a fire caused a hydrochloric acid tank to rupture. A hazardous materials team responded and a worker broke his arm. In July 2012, a failed gasket allowed superheated oil to be released, and 70 workers were evacuated. After the company went bankrupt, it was sold in September 2013 to a Massachusetts-based corporation called Clean Harbors, which plans to continue re-refining used oil.

Golden Wasteland contends that the case illustrates some of the most egregious shortcomings of DTSC: a willingness to negotiate fines instead of taking a hard line and a reluctance to assert its regulatory powers to yank a serial polluter's permit.

The facility has a DTSC permit for storing and treating hazardous waste

in an area separate from where used oil is re-refined. The two parts of the plant are connected by a pipeline. The department maintains that California's regulatory scheme gives the lead in regulating the re-refinery, where the accidents occurred, to the local agency in Alameda County.

That's because DTSC considers the re-refining facility to be a generator of hazardous wastes and a handler of hazardous materials. California law has established that the lead agency in overseeing companies that generate hazardous waste, as opposed to those that store or treat it, is the Certified Unified Program Agency, or CUPA. A CUPA is a local agency, often a county government, established by legislation enacted in 1993 to consolidate oversight of six environmental and public safety programs, including hazardous waste generation. When it comes to the handling of hazardous materials, as opposed to hazardous waste, DTSC believes that CUPAs have authority that DTSC lacks.

"In refineries in general, and this would be true of Chevron or the re-refining section of Evergreen or any other refinery, that's a hazardous materials process, and the authority for regulating that, the Legislature put that in the hands of the CUPAs, the local agencies," Paul Kewin, chief of DTSC's Enforcement and Emergency Response Division, said in an interview with the Senate Oversight Office.

In the case of Evergreen, the CUPA is the Alameda County Department of Environmental Health. The CUPA is empowered to fine hazardous waste generators or those that violate hazardous materials laws, refer cases to district attorneys or other prosecutors, or to revoke a facility's permit, in effect shutting it down.

"We are the lead on the generator," said Susan Hugo, the CUPA program manager. The Alameda CUPA thus far has not used its power to fine Evergreen. But the CUPA followed up after incidents at the refinery, asking for reports on subjects such as training and maintenance and requiring the facility to submit correction plans.

Even though CUPAs are designated in state law as the lead agency for hazardous waste generators, the state retains the authority to intervene.

"If they came to a point where their resources were taxed beyond their limit, or if the facility was resistant, there could have been an escalated response. ... We've never argued that we couldn't have (intervened) if we had to," said Rick Brausch, chief of DTSC's Policy and Program Support Division.

In general, though, DTSC says it relies on CUPAs, which provide 800

inspectors performing 120,000 inspections a year, including 40,000 of hazardous waste generators. DTSC, by contrast, has only 48 inspectors doing 400 inspections a year. “That’s a whole lot of boots on the ground and they can accomplish a whole lot,” Kewin said.

Golden Wasteland is correct in pointing out that DTSC could have stepped in, at least to address any violations of the re-refining facility’s generation of hazardous waste. But the report’s assertion that DTSC should have done so at Evergreen is a matter of opinion. And the report misleads by omitting any mention of the Alameda CUPA’s lead role in overseeing the re-refining part of the facility, making it seem to an uninitiated reader that DTSC was the obvious candidate to respond to problems at the facility.

In response to our questions, Consumer Watchdog said that it’s time to revisit the role of CUPAs. Consumer Watchdog questioned the qualifications of CUPA inspectors, and said that some have been found to be “absolutely terrible, yet no action is taken despite documented deficiencies.”

The report also does not detail the roles of several other agencies in regulating Evergreen. The report makes only one mention of the Bay Area Air Quality Management District, in a quote from a Newark resident who said that when she complains about odors to the air district, “nothing ever happens.” In fact, while we did not track that particular resident’s complaints, the Senate Oversight Office found that as the lead agency in responding to complaints about odors, the air district has fined Evergreen eight times since 2007, including four times for odor complaints. Two cases – one involving odors – are pending. The fines in these cases were small – a total of \$17,000.

The report makes no mention of CalOSHA, which oversees workplace safety. CalOSHA investigated Evergreen after the 2011 fire and fined the company \$22,000. Evergreen is also regulated by the Regional Water Quality Control Board and the Union Sanitary District, according to an Aug. 16, 2012 letter from DTSC director Debbie Raphael to Consumer Watchdog.

“These permits reflect the current statutory and regulatory structure in California which largely address each environmental media individually and in separate areas of law,” Raphael wrote.

But what about the section of Evergreen that has a permit from DTSC? *Golden Wasteland* cites numerous violations there and argues that they are enough to justify DTSC shutting down the facility. “Between 2006

and 2012, the DTSC signed seven consent orders – administration actions taken outside of court – with Evergreen and levied only wrist-slap fines” totaling “just \$86,000,” the report states.

It is true that DTSC signed seven consent orders during that time. DTSC told our office they added up to \$69,500, less than the figure cited in *Golden Wasteland*. The company paid another \$74,300 for violations at other facilities around the state, for a total of \$143,800.

Among the violations at the Newark facility were several cases of failing to repair cracks and gaps in “secondary containment” – the structures meant to contain spills from tanks or pipes. Others involved paperwork errors, such as failing to get the signature from a rail company that was transporting hazardous waste or to record the types of hazardous waste in trucks parked in a loading dock. The biggest single fine – \$23,000 – was for storing hazardous waste for more than the 10 days allowed by law and failing to update a list of workers qualified to function as emergency coordinators.

DTSC says the fines were appropriate considering the severity of the violations as determined by the department’s “penalty matrix” and a review by an internal panel for consistency with other fines levied against companies with hazardous waste permits.

Kewin said that none of the violations involved actual releases of hazardous chemicals to the environment. The problems with secondary containment structures could amount to “a hairline crack in the concrete that they haven’t sealed up.” In the case of Evergreen failing to get a signature from a rail transporter, “It was going on rail and it got to the right place.” But DTSC still imposed a fine of \$8,000.

The violations were “certainly not serious enough to even consider shutting the place down,” Kewin said. “The penalties are appropriate for the violations we found.”

A later section of *Golden Wasteland* quotes department insiders and a community activist describing DTSC’s reluctance to revoke permits. Over the past 25 years, 22 permits have been denied – roughly 10 percent of the total processed. One permit was suspended. In another case, DTSC ordered a facility to cease operations.

It’s true that DTSC has rarely denied or revoked permits. But it’s also the case that its cautious approach is not unusual among the largest states. The Senate Oversight Office contacted the hazardous waste regulators in the five most populous states after California – Texas, New York, Florida,

Illinois and Pennsylvania. All said it was unusual to deny or revoke permits.

Nationwide, “I think it’s very rare,” said Tom Killeen, chief of the Resource Conservation and Recovery Act (RCRA) permitting section for New York’s Department of Environmental Conservation. Killeen has served on national task forces that deal with hazardous waste permitting issues. “You really have to do something egregious to get someone to pull your permit. You will get that answer across the country.”

Killeen recalled only one instance three years ago, when New York issued a notice of intent to revoke the permit of a secondary lead smelter. The company agreed to rebuild a structure where batteries had been leaking. “We’ve used the authority as a lever to (get companies to) come into compliance,” he said.

In Florida, Tony Tripp, a professional engineer in the state’s hazardous waste permitting program, said he and his colleagues could not recall a single permit that had been denied or revoked. Illinois has revoked permits for operations that went bankrupt or were abandoned, but “we really haven’t shut down anyone who was operating,” said Jim Moore, manager of the RCRA unit in that state’s Bureau of Land.

The fact that other states’ hazardous waste regulators also are reluctant to deny or revoke permits does not necessarily justify California’s approach. But any shift to a more aggressive policy would have to balance the merits in terms of protecting human health and the environment against the value of the services that hazardous waste companies provide. The Evergreen Oil facility, for instance, is the only re-refiner of waste oil in California.

And while California law allows DTSC to revoke a permit for violations that show “a repeated or recurring pattern or may pose a threat to public health or safety of the environment,” the language is permissive – the department “may” revoke, not “shall.” If, as an unnamed environmental lawyer quoted in *Golden Wasteland* argues, the Legislature had “never intended” to let serial violators like Evergreen stay in business, it could have made such revocations mandatory.

In response to a question from our office, Consumer Watchdog said DTSC’s “discretion should be limited because of its own record. The DTSC has revoked precious few permits in the last decade while allowing companies to contaminate soil and water on its watch.”

Consumer Watchdog is not the only entity to find fault with DTSC’s

approach. A report commissioned by DTSC, released in October 2013, found that “the Department does not have clear and objective criteria for making denial/revocation decisions that are based on valid standards of operational performance and threat.” The study recommended a new classification system that would distinguish between violations that pose an immediate threat to human safety and those that do not, and take aggressive action on the most serious ones.

Even if DTSC didn’t shut down Evergreen, shouldn’t it have imposed the maximum possible fines instead of negotiating smaller amounts? One of *Golden Wasteland’s* recommendations is that DTSC “stop negotiating with companies on the size of fines and apply maximum existing penalties for non-compliance.”

DTSC readily admits that it negotiates most enforcement actions. But officials say there are compelling reasons for this practice. Companies have due process rights and if DTSC takes a hard line, violators can seek recourse before an administrative law judge and in Superior Court, tying up DTSC’s already stretched staff.

DTSC officials say they’re prepared to take that course when negotiations fail or a violator flouts the law. In one recent case, DTSC decided to go to court after the violator would not agree to pay more than 10 percent of the fine the department initially imposed. “It’s something we can and do accomplish,” said Brian Johnson, deputy director for the Hazardous Waste Management Program. “It comes at a tremendous cost, because then those two inspectors, three inspectors, are literally for months not in the field. They’re preparing for court.”

Kewin called it a balancing act. “To the extent we can negotiate good settlements, it’s a benefit to us and it’s a benefit to the facility,” he said. “They don’t have to pay as much to attorneys. What we’re looking at is, are we getting the compliance we need, and are we settling for a penalty that we think is appropriate for the violations we’re addressing?”

DTSC regulations, based on laws enacted by the Legislature, allow for the imposition of a fine of as much as \$25,000 a day, but also include a number of provisions that require the fine to be reduced based on variables such as the violator’s intent, compliance history, cooperation and ability to pay. Independent of these considerations, DTSC says that there are no statutory or regulatory constraints on its ability to reduce fines and other penalties.

DTSC officials said that negotiations may reveal new information that mitigates the violations. DTSC might cite a company for failing to have

a contingency plan, for instance, and then discover during discussions that the company did have something like a contingency plan but called it by a different name. Or the violator will document that an infraction occurred once instead of numerous times.

DTSC officials say they also are mindful of the fact that putting the case before judges can lead to unpredictable results.

According to Johnson, “You can get a lay judge who looks at the violations ... and says, ‘Is anybody dead? I don’t see this as a big deal. This is not imminent and substantial. This is not a big violation.’”

DTSC’s practice of negotiating most fines is open to debate. One former DTSC official, Charles McLaughlin, told the Senate Oversight Office that violators might exploit the department’s reluctance to go to court as leverage to get unfair reductions. (At the same time, McLaughlin agrees with his former colleagues that it’s a “tough decision” to spend resources in court that might have gone to field inspections or other work.)

But *Golden Wasteland* presents an incomplete picture by failing to mention DTSC’s position that the benefits of negotiating fines in most cases outweigh the cost of tying up scant resources in litigation.

The report also conveys the impression that DTSC is unusual in negotiating fines. DTSC officials counter that district attorneys, attorneys general, the EPA and other environmental regulators within California do the same thing.

The Senate Oversight Office, in its survey of other large states, asked about negotiating fines. Three said that it is standard practice. A fourth, Pennsylvania, said that it depends on the circumstances. (Texas did not reply to this question.)

In New York, for instance, only three cases in 10 years have gotten as far as an administrative law judge. Only one of those cases went to a state appellate court, said Killeen, chief of the RCRA permitting section. New York’s reasoning is much like California’s: Proving accusations in court can eat up staff time.

“It’s like a plea bargain,” Killeen said. “You’ve got to clear it off your plate.”

In Florida, “there’s usually a negotiation involved,” said Tripp of that state’s permitting section. Regulators “very rarely collect the fine that’s initially imposed.”

In Illinois, hazardous waste regulators refer enforcement actions to the state attorney general or the U.S. EPA, which often negotiates the size of the penalty with violators, said Moore, manager of the RCRA unit. “It’s not a matter of, here’s your fine. Pay up,” he said. “Most of the time, that number gets negotiated down.” Moore and other state officials said that the U.S. EPA routinely negotiates fines.

Kevin Beer, an environmental chemist for the Pennsylvania Department of Environmental Protection, said the decision to negotiate a fine depends on the circumstances of the case. He said lawyers from both sides commonly meet to discuss notices of violation. Whether the state reduces the fines depends on several factors, he said, such as whether the violation was a one-time occurrence or part of a pattern.

Golden Wasteland correctly points out that DTSC does not make public its negotiations with violators, so that “the public has no idea what the full fines should or could have been.” DTSC maintains that drafts of corrective orders written during the negotiation phase are exempt from public release under the California Public Records Act. DTSC officials cited the act’s exemption for documents that are part of a “deliberative process.” If a draft order is sent to a company outside of the negotiating process, they said, the department considers it a public document and retains it in the file.

Other states, looking at their own laws, have come to different conclusions. Florida, for instance, considers draft orders and the like to be public documents unless they are part of an ongoing legal proceeding, Tripp said. Pennsylvania and Texas also treat them as public. In New York and Illinois, by contrast, original penalty calculations are not publicly released.

DTSC disputes *Golden Wasteland’s* contention that the department does not know how many negotiated settlements it signs with any one company. Indeed, the DTSC website includes an alphabetized list of violators and the consent orders they have signed. A 2000 law requires enforcement orders to be posted on DTSC’s website for one year. The department has chosen to go beyond the requirement and leave them up for three years. In answers to our follow-up questions, Consumer Watchdog stated that “squeaky wheels” can get their names removed from the list. DTSC replied, “We do not remove them at the request of any party.”

Kewin said that posting settlements publicly serves DTSC’s interests. “What good would it do us to have some secret settlement somewhere? I

mean, part of what we're trying to do is use our settlements to drive other people into compliance.”

Likewise, the department disagrees with the report's assertion, based on unnamed sources from within DTSC, that it lacks the accounting expertise to evaluate whether a company can afford to pay a fine, a factor that, by law, it must consider. Consumer Watchdog, in response to our question, pointed out that none of the accounting positions in the department requires a CPA, which it believes to be necessary to deal with financially sophisticated private companies. DTSC countered that managerial positions require either a degree or a minimum level of course work in accounting.

On the matter of Abbott Vascular, DTSC fined the company, a maker of medical devices in Redwood City, \$90,000 for a variety of hazardous waste violations in July 2010.

Alex Baillie, who was in the DTSC section that negotiated penalties with violators, said that he and his colleagues proposed a fine of more than \$100,000. He recalled that Abbott was “not happy” with DTSC, and threatened to cancel plans for a second facility in California. The company was concerned that a settlement of greater than \$100,000 would have required it to notify shareholders, he said.

Both Baillie and Charles McLaughlin, his boss at the time, told our office that the negotiations were taken over by DTSC headquarters.

“For them to step in, I would say that was unusual,” said McLaughlin, who has since retired. He said headquarters took over because of his “obstinance” in applying regulatory guidelines. “I wasn't particularly happy about it, but that's the way it was.”

Both McLaughlin and Baillie, however, said they had no knowledge of any involvement from the governor's office. Abbott Vascular failed to respond to requests for comment, and DTSC said it could locate no records indicating which officials at headquarters made the decision to reduce the penalty or why.

Susan Kennedy, Schwarzenegger's chief of staff at the time, denied intervening on behalf of Abbott, as *Golden Wasteland* alleges. “I'm afraid I am unfamiliar with Abbott,” she wrote in an email. “I don't even know what it is. I don't recall ever weighing in on any fine involving DTSC – why would that even reach the governor's office?”

DTSC fails to get adequate assurances that companies can pay for cleanups (pps. 29-30)

ALLEGATIONS: When it issues permits, DTSC fails to demand assurances that a company has enough money set aside to pay for required cleanups. “Instead, companies get new permits and then routinely negotiate with the DTSC over the right fixes to save themselves money and delay action for as long as possible.” In a 2004 case, a DTSC cleanup specialist named Phil Chandler challenged the department over why it had not demanded financial assurance from Newark oil recycler Evergreen Oil when it issued a permit, as “required by statute.” DTSC also does not demand enough money to cover the costs of closing a facility, and sometimes fails to bill companies the costs it has incurred in cleanups. DTSC even fails to collect past-due fines, with a total of \$1.7 million owed to the department.

BOTTOM LINE: According to U.S. EPA officials interviewed by our office and a review of the legislative record, DTSC is not required to demand financial assurances when it issues permits. EPA officials say states have flexibility on the timing of financial assurances, although an EPA guidance encourages regulators to get them in place as early as possible. DTSC argues that it is difficult to get financial assurances until the state and the responsible party agree on a method for cleaning up. That’s because companies are likely to fight any attempt to impose the financial burden earlier than has been done in the past and earlier than other states do. DTSC says it uses sophisticated tools to estimate closure costs, but admits that, in some cases, the department arguably did not demand enough. The report is correct in asserting that DTSC has failed to bill companies for millions of dollars in cleanup costs. Three months after *Golden Wasteland* was released, DTSC announced that it had failed to collect \$184.5 million that the department had spent on cleanups over 26 years. *Golden Wasteland’s* assertion that the department was owed \$1.7 million in past-due fines appears to conflate two different categories, one of which is money owed in future payments that should not be characterized as past due. The true total was 42 percent lower.

DISCUSSION: “Financial assurances” have been part of federal environmental law since at least the 1980s. Congress intended to protect taxpayers from the costs of cleaning up contamination and closing hazardous waste facilities by having the companies demonstrate that they had the financial wherewithal to do it themselves. Financial assurances may take the form of trust funds, insurance policies, letters of credit, surety bonds or several other devices.

States such as California that operate their own hazardous waste programs

on behalf of the U.S. EPA are supposed to get financial assurances for cleanup work required by the hazardous waste permits they issue. The U.S. EPA, however, has never promulgated regulations stating exactly when states should require financial assurances for “corrective actions.” Instead, in 2003, the EPA issued a “guidance” outlining timing considerations and informing states of their considerable flexibility.

DTSC officials told the Senate Oversight Office they generally don’t require financial assurances for corrective action until a remedy has been chosen for dealing with contamination. This may be long after a permit is issued. The company that receives the permit is legally required to deal with any past contamination, even if it did not cause it. But it can take years to map the extent of contamination and to figure out the best way to address it. DTSC generally does not require financial assurance until the scope of the work is known and the cost can be estimated.

U.S. EPA officials told the Senate Oversight Office that they do not believe DTSC is barred by any federal law, regulation or guidance from seeking financial assurances prior to the selection of a cleanup remedy.

“We don’t think there’s anything that would preclude them,” said Peter Neves, RCRA cleanup team leader.

EPA officials and the 2003 EPA guidance say several factors can come into play in determining the timing of financial assurances. If the geology of a site is simple and well documented, for instance, it may be possible to demand financial assurance earlier. Regulators can demand financial assurance for studying the site, or for interim measures to prevent contamination from spreading. These may occur well before a final cleanup remedy is chosen. At big facilities with many units, it may be possible to get started on one unit while the others are still being studied.

The EPA’s 2003 guidance does not impose any mandates on the state as a regulation or statute would. But in general, “We’re encouraging folks to do it earlier just for the financial risk exposure,” said Bruce Kulpan, supervising attorney in the Office of Site Remediation Enforcement and Office of Enforcement and Compliance Assurance.

DTSC officials conceded that the EPA guidance gives them flexibility on timing. But as a practical matter, they said, companies would strenuously object to breaking from the established practice of requiring financial assurances only when a cleanup remedy is chosen. Many of the companies operate in other states that follow a policy similar to California’s and would balk if California imposed a more onerous standard, said Ray Leclerc, assistant deputy director in DTSC’s

Brownfields and Environmental Restoration Program.

For several years, Phil Chandler, the DTSC worker cited in *Golden Wasteland*, has as a private citizen challenged his own department over the issue of financial assurances. As the report states, Chandler believes that California law requires financial assurances to be secured by DTSC when a permit is issued. Chandler cites Health & Safety Code Section 25200.10(b), which states, “When corrective action cannot be completed prior to issuance of the permit, the permit shall contain schedules of compliance for corrective action and assurances of financial responsibility for completing the corrective action.” Chandler argues that the plain language of the statute demonstrates that the Legislature intended DTSC to get financial assurances when permits are issued, not when cleanup remedies are selected, possibly many years later.

Our review found no evidence that California law requires DTSC to demand financial assurance when it issues a permit. The law cited by Chandler – H&S Code Section 25200.10 – was enacted by the Legislature in 1988. At the time, the Department of Health Services, which regulated toxic waste facilities before the creation of DTSC, was seeking to bring California law into conformity with the federal Resource Conservation and Recovery Act so that the state could get the EPA’s permission to run its own hazardous waste program. The wording of the state law is almost identical to its federal counterpart. Nothing in the legislative record suggests that lawmakers or the Department of Health Services wanted to go beyond what the federal government required with regard to financial assurances. The record does not indicate that they even considered the issue. The federal law – with its almost identical wording – has been interpreted by the EPA as allowing flexibility in the timing of financial assurances.

In response to our questions, Consumer Watchdog stated that California should go beyond what the federal government requires, as it does in many other environmental laws and regulations. “Federal law establishes the absolute minimum that is acceptable and fully intends that states may promulgate law that is more stringent to meet their unique needs, as they see fit,” Consumer Watchdog wrote.

DTSC’s Leclerc said in an interview that the department is considering asking for financial assurances earlier in the process in some cases. The states of Michigan and Washington have passed laws that require financial assurances upfront. The amount is updated each year as cleanup costs become clearer. If California were to pass a similar law, it would give DTSC clear authority to demand financial assurances earlier.

“The fact that we don’t have enough money is a legitimate problem,” Leclerc said. “It’s certainly been on our radar screen to make this thing better.”

Golden Wasteland also contends that DTSC is underestimating a different type of financial assurance meant to cover the costs of closing a facility. DTSC says it uses well-known software tools to estimate closure costs. These programs generate conservative estimates and take into account variables such as zip codes that can influence the cost of closures. A 20 percent contingency is added. At the same time, the department admits that these calculations are “a tricky business” and that in some cases DTSC arguably underestimated the true costs. In addition, there are only a few people at DTSC who have the expertise needed to do financial assurance calculations.

In response to our questions, Consumer Watchdog provided an example of a case in which it said closing costs were underestimated – BKK landfill in West Covina. “They put up \$37 million for post closure, but the DTSC needed \$120 million,” Consumer Watchdog wrote.

Financial assurance for post-closure is yet another category - distinct from financial assurance for closure - meant to cover the costs of cleaning up a site long after the business has stopped operating. The BKK landfill shut down in the 1980s. In the 1990s, DTSC officials told our office, the department required the company to purchase a \$37 million insurance policy to cover post-closure costs. This amount was based on a negotiated settlement with the company rather than an estimate of what it would actually cost, said Marilee Hanson, senior staff counsel for the department. By 2004, DTSC estimated post-closure costs to be \$120 million. DTSC was in the process of issuing a permit that would include the requirement for financial assurances covering this amount when BKK ran out of money for the cleanup and the landfill became a state Superfund site. The state then turned to the entities that produced the waste that went to the landfill, and got them to run the cleanup under the terms of federal consent decrees. Those parties do not need to put up financial assurances because the consent decrees guarantee that they will meet their obligations, Hanson said. The state has spent about \$40 million on the site, and hopes to recover some of that. On the other hand, the state is also on the hook for more money, because entities such as CalTrans and DTSC were generators of waste deposited at BKK.

It’s a complicated issue, but according to Hanson, “It’s not like we were sitting here with a cost estimate over \$100 million and we said to this facility, ‘You only have to have financial assurances for \$37 million.’”

Golden Wasteland quotes an unnamed DTSC scientist saying that DTSC fails to bill companies “potentially to the tune of millions of dollars – because the DTSC is afraid of lawsuits from the industry it regulates.”

That scientist turned out to be right about the failure to bill. In May 2013, three months after *Golden Wasteland* was published, DTSC announced that it had spent about \$184.5 million on cleanups that it never collected from responsible parties over the previous 26 years. This included \$45 million that was billed to the responsible parties but never paid, \$37 million that was tied up in litigation, bankruptcy or other legal proceedings, and almost \$103 million that was never billed. DTSC has an obligation to clean up contamination, even when there is no clear responsible party, to protect human health and the environment. The department says it failed to bill for its costs or collect the money, despite warnings over many years, because it prioritized cleanups over pursuing responsible parties and lacked an effective system to evaluate whether costs could be recovered. The department vowed to create a new position just to oversee cost recovery and take other steps to address the problem. As of May 2014, DTSC reported that it had reduced the balance owed by \$22.3 million. This included not just cash payments but also write-offs and data corrections. DTSC referred 16 cases to the Attorney General’s Office, representing another \$47 million in unrecovered costs. The department says it also has revamped and standardized its collection processes and trained almost 400 employees.

Golden Wasteland states that even collecting “past-due” fines is a challenge for DTSC. The report alleges that internal records show a balance of \$1.7 million in administrative fines, civil or criminal penalties and cost reimbursements to DTSC for cleanup work it performed. The figure is from a spreadsheet, linked to a footnote of the report. In fact, the \$1.7 million includes \$772,442 owed to DTSC in future installment payments. DTSC told our office that it is inaccurate to characterize the money as “past-due.” The spreadsheet includes another column labeled “balance overdue” that does include late payments. DTSC sends demand letters, and if the payment still is not made, refers it to the department’s legal office for collection. The total in this column is \$993,378 – 42 percent lower than the figure cited in *Golden Wasteland*.

The state did flawed testing of birth defects near a hazardous waste dump in Kettleman City (pps. 31&41)

ALLEGATIONS: When evidence surfaced that Kettleman City, a few miles from one of the state’s three hazardous waste landfills, was experiencing a high number of birth defects and miscarriages, the state found nothing unusual about the rate. An activist alleges that the state

withheld the true number of birth defects. This activist also says that testing for possible environmental causes of the birth defects was done after dumping had slowed to a trickle at the Kettleman Hills Facility so that investigators did not detect conditions that might have led to the spike. Since then, the U.S. EPA has put DTSC on five years of probation for its poor communication with the public regarding the Kettleman Hills landfill. When the landfill applied to expand its capacity, DTSC failed to provide a chance for public comment. Residents and activists say that the community still suffers a high rate of birth defects, as well as miscarriages and childhood cancers. The Kettleman Hills Facility has been a chronic violator of environmental laws.

BOTTOM LINE: Contrary to *Golden Wasteland's* claim, the state did acknowledge that the number of birth defects from 2007 to 2009 was unusual. The Department of Public Health denies that it withheld the number of birth defects at a 2010 public hearing, saying it did not yet know the total number, needed to verify cases and did not want to jeopardize the privacy of families. While much of the environmental testing that was part of the birth defects investigation did occur after dumping had slowed, state regulators say that PCBs, the primary chemical of concern, persist in the soil so that measured levels would not have been affected. It's true that the U.S. EPA asked DTSC to submit five annual reports documenting public outreach. But *Golden Wasteland* fails to mention that the action stemmed from a case 16 years earlier that dealt primarily with a different hazardous waste landfill. Activists and community members have alleged many shortcomings in DTSC's public participation efforts, but the general statement that DTSC has failed to allow comment is untrue – the department has held several meetings and conducted a survey intended to encourage public comment. The state says that birth defects are returning to historic levels and that childhood cancer rates do not appear to be elevated in Kettleman City. It is true that the Kettleman Hills Facility has been cited and fined for several environmental violations, but DTSC says it does not meet the definition of a serial violator.

DISCUSSION: The Kettleman Hills Facility run by Chemical Waste Management, Inc. is one of only three hazardous waste landfills in California and the only one permitted to accept polychlorinated biphenyls (PCBs.) The 695-acre facility in Kings County is 3.5 miles southwest of Kettleman City, a community of about 1,500 near the intersection of Interstate 5 and State Highway 41. The landfill has reached its capacity and in May 2014 got DTSC to approve an expansion.

In 2008, community and environmental activists discovered a spate of children born with structural birth defects such as cleft palates or lips.

A total of 11 children were born with such defects between 2007 and March 31, 2010, higher than the historical rate. After an initial assessment by the state Department of Public Health – which runs a birth defects monitoring program – then-Gov. Arnold Schwarzenegger directed CalEPA and DPH to do a more thorough investigation of environmental factors that might have caused the birth defects, including chemicals from the Kettleman Hills hazardous waste facility. The study found that the birth defects reflected different underlying conditions, suggesting that they could not be traced to a single cause. It did not identify any environmental exposures that could explain the spike.

Golden Wasteland asserts that “The state determined there was nothing unusual about the rate of defects” and quotes an activist, Bradley Angel of Greenaction for Health & Environmental Justice in San Francisco, saying that the state withheld the true number of birth defects from the public. Angel told our office these statements refer to a presentation made by the Department of Public Health to the Kings County Board of Supervisors on Feb. 9, 2010. A fact sheet distributed by DPH at that meeting states that “the overall birth defects rate in Kettleman City for the time period monitored (1987-2008) was not higher than expected.” But it also states that “In 2008, four cases were identified in Kettleman City – one more than would be expected based on the historic pattern,” noting that data was still being collected for the years 2007 and 2008. In a PowerPoint slide presented at the meeting, DPH stated that the “number of birth defects in 2008 is higher than the historical pattern in Kettleman City.” While DPH’s presentation suggested that the increase may have resulted from normal variability, it is not true that the state determined there was nothing unusual about the birth defect rate. After that Kings County meeting, when DPH and other state entities had been ordered by Schwarzenegger to do a thorough assessment, DPH repeated several times that 11 birth defects in a three-and-a-half-year period represented an elevated rate.

In an interview with our office, Angel alleged that at the February 2010 Board of Supervisors meeting, DPH intentionally misrepresented the number of birth defects known at that time, stating that there had been five in an 18-month period when in fact there had been eight. In a written response to a question from the Senate Oversight Office, DPH stated that the 2010 meeting addressed the number of children born with defects in 2008 – a number that was not finalized until December 2009, since birth defects may not be apparent right away. DPH was aware that other children had been born with possible birth defects after 2008, but was reluctant to talk about a rate for 2009 because the numbers would not be finalized for almost another year. Releasing an artificially low rate could “create distrust in the community and raise fears that DPH was trying

to make things look better than they were,” the department wrote in response to our questions. The department stated that it also was wary of publicly identifying families with birth defects and needed to verify cases before formally entering them into the birth defects database. “There was no effort to misrepresent the numbers,” DPH wrote to our office. The department “explained its process and why cases might be known to the public but not yet incorporated into the BDMP (Birth Defects Monitoring Program) database.”

It is true, as *Golden Wasteland* contends, that the rate of dumping at the landfill had slowed considerably by the time state investigators did soil testing because the landfill was approaching its permitted capacity. But in an interview with the Senate Oversight Office, DTSC officials said that the decline in dumping should not have affected the soil results for PCBs, the chemical of greatest concern. “One of the problematic characteristics of them is that they’re very stable and they stick around in the environment for a long time,” said Brian Johnson, deputy director of the Hazardous Waste Management Program. “The fact that you dumped today and you test tomorrow...they’d still be there.”

In response to our questions, Consumer Watchdog wrote, “What the DTSC told you is incorrect. The rate of dumping does affect levels of PCBs in the environment at any given time, including outside the dump’s premises.”

Golden Wasteland does not address testing for PCBs and other contaminants in the air. However, Angel told our office that airborne pollution might have decreased by the time testing was done because dumping had slowed. According to the 2010 report issued by DPH and CalEPA, the wind at the Kettleman Hills Facility (KHF) blows away from Kettleman City all but 5 percent of the time. Computer modeling indicated that, when the wind does blow toward Kettleman City, emissions from the landfill would disperse. By the time they reached the town, they would be, at most, 10 percent of levels at the landfill.

When the Air Resources Board tested the air upwind and downwind of the facility, it found levels of measured chemicals similar to those found in Fresno, 54 miles north, as well as statewide. Because the rate of dumping had decreased by the time the testing was done in 2010, the ARB compared its results to logs from the company’s own air monitors from 2007 to 2009 – when the rate was more typical – and found no significant differences. “It is not likely that airborne contaminants measured in this study at KHF (the landfill) pose health risks to the residents of Kettleman City,” the ARB concluded.

In response to our questions, Consumer Watchdog wrote that the state should not have relied on the company's logs "given the fact that the company got busted for 'lax' operation of its lab and many other violations of environmental laws."

Pete Price, vice president of governmental and public affairs for Chemical Waste Management, wrote in an email that Consumer Watchdog has "taken a conspiratorial 'us against the world' view of Kettleman Hills and DTSC generally that I just do not believe is supported by even a skeptical view of the facts."

Golden Wasteland states that, since the birth defects controversy, "the DTSC has been on a five-year U.S. EPA probation for its poor communication with the public about" the Kettleman Hills Facility. (The report actually identifies the location of the facility as Mecca, southeast of Palm Springs, but Consumer Watchdog clarified to our office that it meant Kettleman Hills.)

In 1994, environmental groups filed a complaint with the U.S. EPA alleging that the state's three hazardous waste landfills violated the civil rights of mostly Latino communities nearby by exposing them to dangerous contamination. In 2012, the EPA rejected the complaint, but found shortcomings in DTSC's public outreach processes in the mid-1990s, especially with regard to the issuance of a permit in 1994 to a hazardous waste landfill near Westmoreland in Imperial County. In closing its investigation, the EPA noted that DTSC "is taking the necessary steps to ensure meaningful participation." But to assure that DTSC would live up to its commitments, the EPA asked DTSC to submit an annual report for five years - from 2012 through 2016 - detailing its public outreach activities. *Golden Wasteland* leaves out important context by failing to note that the EPA found that DTSC had improved its public outreach. Coming just after an allegation that the state withheld the true number of birth defects in Kettleman City, it suggests a pattern of disinformation. The two cases - separated by 16 years and 366 miles - are not directly related.

Golden Wasteland quotes activist Angel saying that "DTSC failed to provide an opportunity for comment," presumably regarding the landfill's attempt to expand. Angel's organization and others have submitted written criticisms of the public participation process for the Kettleman Hills Facility. They say that Kings County did not provide as much time for Spanish-speaking residents to speak at a public hearing and that DTSC did not translate all documents into Spanish, among other charges. DTSC said it is reviewing these comments as part of the formal proceeding on the landfill expansion, and so declined to comment. But

the department said that between November 2011 and September 2013, it conducted four public meetings, interviewed several dozen residents, surveyed the community and sent out notices and lists of frequently asked questions. The department says that, as of early 2014, it had received 905 comments from 5,446 people. Whether or not DTSC properly conducted all aspects of its public outreach process, it is not true that the department “failed to provide an opportunity for public comment.”

Golden Wasteland quotes activists saying that Kettleman City continues to suffer high rates of birth defects, miscarriages and childhood cancers. In 2012, the Department of Public Health issued an update to the birth defects study that found rates appeared to be dropping to their former levels. The rate of 1.79 birth defects per 100 live births in 2010 and 2011 was higher than the 0.7 for Kings County as a whole, but considerably lower than the spike of 8.51 in 2008 and 2009.

The state does not track the number of miscarriages. It does monitor cancer, however. In an interview with our office, Dr. Rick Kreutzer, chief of DPH’s Division of Environmental and Occupational Disease Control, said that adult cancer rates in the census tract that includes Kettleman City are normal. For children, the cancer rate is slightly higher than would be expected, he said. But the handful of additional cases could be explained by chance variability. “It was within the statistical range of what you would expect within a small population,” Kreutzer said. In addition, only one case within the large census tract occurred in Kettleman City. Mapping the cases does not show a pattern close to Kettleman City, Kreutzer said, nor a geographic distribution that would suggest the cases stemmed from a common environmental exposure.

Consumer Watchdog wrote in responses to our questions that residents in the small community know by word-of-mouth that the number of miscarriages is unusually high and that a doctor in nearby Avenal told a community activist that she found the number of miscarriages “alarming.”

Activist Angel is quoted in *Golden Wasteland* as saying that the Kettleman Hills Facility is a “chronic violator of environmental laws.” It is true that Chemical Waste Management has been cited and fined repeatedly by DTSC and by the U.S. EPA. In 1985, for instance, the company was fined more than \$2 million for operating unauthorized landfills and waste ponds, according to press accounts and the DTSC website. More recently, in 2010, the company agreed to pay \$600,000 to address shortcomings in its laboratory in addition to a \$400,000 fine. In 2013, after the state found that Chemical Waste Management had failed to report 72 spills of toxic materials, the company paid a \$311,000 fine. One DTSC official was quoted in a newspaper story saying that the unreported

spills were “consistent with a troubling pattern.”

At the same time, in approving a draft permit modification to the landfill, DTSC stated in a fact sheet in October 2013 that it had reviewed the entire enforcement record since 1983. “None of CWM’s violations, including a \$311,000 fine in March of 2013 for failing to report 72 small spills, has resulted in a threat to public health or the environment. The review concluded that the facility is not a serial violator as there have been long stretches of time without violations.”

DTSC allows companies to operate on expired permits (pps. 31-32)

ALLEGATIONS: DTSC is in the process of re-permitting 22 facilities whose permits expired from two to 15 years ago. The department enforces no limit on how long facilities can continue to operate on expired permits.

BOTTOM LINE: It’s true that the time it takes to renew a permit has been an ongoing problem at DTSC. A study released after *Golden Wasteland* was published found that the average was 4.3 years. The study recommends that the department add 35 positions to permit review and reduce the average to about two years.

DISCUSSION: DTSC’s hazardous waste permits, issued to more than 100 facilities, cover 10 years. Facilities must submit an application for a new permit 180 days before their old permits expire. Because DTSC typically takes much longer than 180 days to review an application for renewal – even a medium-sized plant takes two years – it’s almost inevitable that facilities will operate on expired permits.

Golden Wasteland is correct in stating that 22 facilities were operating on expired permits, from two to 15 years past the renewal date. Since the report was published, the number has increased to 35, said Rizgar Ghazi, division chief for permitting. In part, this is because a number of facilities that were issued permits around the same time are hitting the deadline.

DTSC points out that facilities operating on expired permits are still subject to the conditions of their old permits and hazardous waste regulations in general. But the department admits that allowing facilities to operate under expired permits delays their transition to better methods for containing and cleaning up hazardous waste.

“If there’s a better way to do what they’re doing at that site, we want them to do it,” said Brian Johnson, deputy director for the Hazardous Waste Management Program. “We want to hurry these things along as well.”

So why isn't it happening? DTSC hired CPS HR Consulting to find out. The report, released in October, 2013, found that permit renewals, on average, took 4.3 years. Delays in renewing permits were "due to a lack of standard process and a failure to include all processing requirements in a predictable, standard order that is shared with relevant permitting staff. A lack of sufficient staffing in the unit also contributes to lengthy processing times." The report recommends that DTSC increase the permit processing staff by 35 to make up for a dramatic decrease in personnel in 2008 and 2009. Otherwise, "the average processing time can be expected to increase," the report states.

The writers of the CPS HR Consulting report interviewed industry officials and lobbyists who said that they, too, want DTSC to issue permits in a "reasonable" time.

CPS HR Consulting contacted other states and found that Arizona takes longer to process permit renewals than California does, but that Alabama and Florida do it faster. This is consistent with our own survey of five other large states. These states allow facilities to operate on expired permits, but not for as long as California does. In Florida and Illinois, for instance, it's a matter of months, not years. In New York, one facility operated for nine years and another for eight years on expired permits. In Texas, only a handful of permit renewals have taken more than two years. DTSC says that their average of 4.3 years is in line with the national average of 4.4 years.

The CPS HR study concludes that California should aim to reduce the time it takes to process a renewal to about two years.

DTSC allowed a Santa Fe Springs company to operate on an expired permit for 16 years and flout environmental regulations (pps. 32-36)

ALLEGATIONS: The state allowed a Santa Fe Springs company called Phibro-Tech to operate for 16 years on an expired permit and is considering issuing a new permit that would allow the company to expand despite a history of environmental violations. In 1997, the EPA traced a carcinogen, hexavalent chromium, in the groundwater "directly back to Phibro-Tech" at concentrations nearly 3 million times the state public health goal. The company has failed to clean up groundwater, despite the proximity of a well used for drinking water and the possibility that contamination could find its way into the aquifer. The report quotes a DTSC geologist saying, "I would probably not drink the tap water and I would not trust DTSC to analyze it properly."

DTSC’s enforcement at Phibro-Tech has been “lethargic.” The company engaged in “Kafkaesque” stalling, pleaded that it couldn’t afford to pay for permit renewal and corrective action, and delayed the permitting process by requesting to add a new waste stream, oily water. DTSC allowed the company to switch its strategy for cleaning up hexavalent chromium



The Phibro-Tech facility in Santa Fe Springs

without performing a legally required CEQA review. This “consent order” simply “resets the clock” after 20 years of delay in groundwater cleanup and includes no requirement to monitor the aquifer to make sure drinking water wells are not contaminated.

DTSC is considering giving Phibro-Tech a new permit based on a flawed and out-of-date environmental review by the city of Santa Fe

Springs, which failed to order a full-scale Environmental Impact Report “required under the terms of CEQA” or an independent Health Risk Assessment. DTSC ceded control to the locals even though it’s required by law to conduct a CEQA evaluation on its own. Residents report high cancer rates and bad tap water. A resident says he has not seen quarterly reports the company is supposed to do on soil, water and air sampling. The report quotes a DTSC scientist saying, “Communities can squawk all they want, but what matters is the companies that write big checks, putting heat on the governor.”

BOTTOM LINE: It’s true that the Phibro-Tech site has been operating on an expired permit for more than 16 years. The long interval reflects complexities in the case and delays that have plagued DTSC’s permitting operations in general. The company never implemented an order for cleaning up groundwater, but a pilot study of a new cleanup strategy indicates that it is very effective. *Golden Wasteland* makes baseless assertions about the safety of Santa Fe Springs’ water, which has been tested and found to contain levels of hexavalent chromium far below the maximum contaminant level. It mischaracterizes DTSC’s responsibility for preparing an environmental study, and suggests without evidence that Phibro-Tech has gotten favorable treatment by making campaign contributions to elected officials.

DISCUSSION: The 4.8-acre Phibro-Tech site is in a heavily industrialized section of Santa Fe Springs, in southeast Los Angeles County, with homes as close as 800 feet to the northwest. The site has been used for the manufacture of inorganic chemicals since 1958, decades before Phibro-Tech bought it. According to a 1987 assessment done for the U.S. EPA, the facility “has a history of poor housekeeping practices,” with numerous instances of spills, leaking tanks, and improper disposal practices. In one such case, a surface impoundment leaked into the groundwater. Phibro-Tech bought the facility in 1984 and obtained an operating permit from the U.S. EPA and DTSC in 1991. The company treats hazardous waste and recyclable materials, mostly from electronics and aerospace businesses, to create new chemical products.

Golden Wasteland is correct that the company has been operating on an expired permit for 16 years. In fact, the total is now 18 years. Before the permit expired in July, 1996, Phibro-Tech submitted a renewal application as required by California law. Since then, the application has been revised and resubmitted, most recently in 2006 to allow the company to treat oily waste water.

DTSC says that Phibro-Tech is held to current regulatory and statutory standards despite its expired permit. Still, “We’re certainly not proud of those 16 years,” Paul Kewin, chief of DTSC’s Enforcement and Emergency Response Program, said in an interview with the Senate Oversight Office. DTSC officials say the Phibro-Tech case is complex because it involves a company that has sought to modify and eventually renew its permit while simultaneously cleaning up historic contamination and running day-to-day operations. DTSC says it is now coordinating permitting and enforcement actions and has mapped out a way to reach a determination on Phibro-Tech’s permit in 2014.

Phibro-Tech maintains that since 2010, when DTSC issued a draft permit for public comment, final action has been delayed primarily by vigorous opposition mounted by a law firm, Best Best & Krieger. The law firm says it represents members of the community but declines to identify them.

It is true, as *Golden Wasteland* states, that DTSC ordered fixes at the Phibro-Tech plant in 1999, 2000, 2003, 2007 and 2009, and that the state fined the company more than half a million dollars. Phibro-Tech points out that it disputed some of DTSC’s findings and that none of these alleged violations involved releases of harmful chemicals into the soil, water or air. A review of the consent orders shows that, while chemicals were not released to the soil, water or air, the company was cited in 2010 for failing to minimize releases of sludge containing hazardous concentrations of copper, chromium, nickel and zinc to an asphalt road.

Best Best & Krieger has called Phibro-Tech's violations "egregious" and argued that they would justify DTSC denying the company a new permit. In an interview with the Senate Oversight Office, DTSC officials said Phibro-Tech's violations do not justify shutting down the facility.

"We look at the total picture of the operation," assistant deputy director Kewin said. "Do they represent a threat to public health and safety and the environment? And we don't believe that they do."

The most serious allegation in this section of *Golden Wasteland* is that Phibro-Tech's failure to clean up a carcinogen called hexavalent chromium in the groundwater is threatening drinking water in the city of Santa Fe Springs and the unincorporated community of Los Nietos. The chemical gained national notoriety when activist Erin Brockovich took on Pacific Gas & Electric over groundwater contamination in Hinkley

As the report acknowledges, Phibro-Tech says that the hexavalent chromium contamination is from historic operations prior to the company purchasing the site. Phibro-Tech is nonetheless responsible for cleaning it up.

The report's contention that hexavalent chromium concentrations were 3 million times the state's public health goal of 0.02 parts per billion is technically correct. The public health goal is the level at which a chemical would pose no adverse health effects over a lifetime – for instance, someone drinking two liters of water every day for 70 years, according to the state Department of Public Health. Water exceeding public health goals is "frequently" deemed safe to drink, according to a Public Health fact sheet. In some cases, public health goals are far below what current technology could achieve. Public water systems are held to a different standard, the "maximum contaminant level," which takes into account the economic and technical feasibility of reaching the standard.

In August 2013, the Department of Public Health proposed regulations setting the maximum contaminant level for hexavalent chromium by itself at 10 parts per billion. The groundwater at the Phibro-Tech site was 5,900 times that proposed standard – still a lot, but much less than the "3 million times" figure cited in *Golden Wasteland*.

Consumer Watchdog, in response to a question from our office, defended using the public health goal, or PHG, as a standard rather than the maximum contaminant level. "The MCL is a politically-derived number to satisfy people who maintain they can't treat the water to the degree necessary to achieve the PHG, but still want the water to be legal to drink," the organization wrote.

By either standard, these hexavalent chromium concentrations are high. But it's important to note that they were found in groundwater, not drinking water subject to the standards.

Couldn't the groundwater contamination find its way into drinking water?

Golden Wasteland suggests that it could – or already has. The report quotes an unnamed DTSC geologist saying contaminated groundwater “could feed into” the drinking water, and that “we don't know if it's in the drinking water.” This same geologist states that Phibro-Tech “has not proved that hexavalent chromium is not in the drinking water” and that he would “probably not drink the tap water and I would not trust DTSC to analyze it properly.” The report quotes residents of the Santa Fe Springs area whose family members have died of cancer. One woman told Consumer Watchdog that the water in her bathroom began to smell and turn yellow, and left her skin feeling sticky.

These alarming assertions are contradicted by testing of drinking water and evidence about the location of the contamination.

Almost 90 percent of the drinking water in Santa Fe Springs comes from the Metropolitan Water District, whose surface water supplies from elsewhere would not be affected by groundwater contamination at Phibro-Tech. MWD's most recent tests show levels below one part per billion of hexavalent chromium, well below the maximum contaminant level of 10 ppb.

The remainder of the city's water comes from nearby Whittier and, until early 2014, a municipal well that's about 650 feet northeast of the Phibro-Tech plant. In 2010, water from that well was tested twice for hexavalent chromium, according to Frank Beach, the city's utility services director. The totals were 3.1 ppb and 2.9 ppb – above the public health goal, but well below the maximum contaminant level. In 2014, the municipal well was put on standby basis – limiting its use – because of concerns about volatile organic compounds from an unknown source, most likely a nearby Superfund site, Beach told our office.

But couldn't the slug of hexavalent chromium contamination find its way to the well?

Phibro-Tech says that's unlikely, citing studies showing that the shallow aquifer where the contamination was found is separated from the deeper drinking water aquifer by several impermeable layers of clay. Also, the drinking water well is “upstream” from the Phibro-Tech site.

Groundwater, like surface water, usually flows in one direction, albeit much more slowly.

Best Best & Krieger cites a 1995 U.S. EPA document that suggests that, while the aquifers are separated by a clay layer beneath most of the Phibro-Tech site, the two may come into contact in places, including the southwest corner of the plant. The law firm also has cited studies showing groundwater flow directions can be reversed by drought or increased pumping, and that some liquids do not always follow the hydraulic gradient.

“I think there’s still a possibility,” attorney Andre Monette said.

In interviews with the Senate Oversight Office, DTSC officials said it’s not impossible that contamination could find its way into the drinking water aquifer through a hole in the clay layer - an old well, for example. That’s why DTSC geologists check for leakages or pathways for migration. But the aquifer appears to be contained and very stable, said Rizgar Ghazi, division chief for permitting. “And these wells are clean,” he said. “They’re not drawing contaminated water at all.”

In response to a question from our office, Consumer Watchdog said “there are many reasons for not taking the risk of drinking the tap water in Santa Fe Springs,” and cited alleged contamination of Metropolitan Water District water with perchlorate as well as possible migration of contaminants from Phibro-Tech to San Gabriel basin wells prior to 1995. Yet, *Golden Wasteland* clearly implies that the water may be contaminated, not with MWD water, but with hexavalent chromium and other pollutants from the Phibro-Tech site.

In addition, before *Golden Wasteland* was published, Phibro-Tech embarked on a pilot test to use a new technique to remove hexavalent chromium from the groundwater. Since the report was published, results of the pilot test show that hexavalent chromium was dramatically reduced, in some places to below detection levels.

In 2006, the company proposed injecting a chemical – calcium polysulfide – into the contaminated groundwater. This marked a change from the original plan, which called for the company to pump out contaminated water, treat it, and release it to the local sanitation district, which Phibro-Tech never did. The calcium polysulfide process does not involve pumping. Instead, the injected chemical converts hexavalent chromium to the more benign form, trivalent chromium, and binds it to the soil. In 2012, after getting approval from the regional water quality control board, Phibro-Tech signed a corrective action consent order with

DTSC that included the pilot study of this new technique. The pilot test was initiated in the middle of 2012 and continued for a year. Both Phibro-Tech and DTSC report that the test, which was conducted in one of the most heavily contaminated spots on the site, was a success.

Golden Wasteland does mention the new treatment strategy, but only in the context of DTSC and Phibro-Tech failing to inform the public that it was switching to a new method for cleaning up the groundwater. It quotes the unnamed DTSC geologist saying that the lack of public input violated CEQA. The corrective action consent order the two parties signed in 2012 “simply resets the clock” after 20 years of delay, the report states.

It is true that DTSC did not seek public comment on the change in cleanup methods. The department said it was not required by CEQA to do so, because the consent agreement called only for a pilot study. The public will have a chance to comment before the treatment is applied throughout the site, they said.

DTSC’s action may have followed the letter of the law, but since the “pilot” study of groundwater treatment has already addressed much of the contamination, it seems at odds with the spirit of the law, which is to allow the public to comment on major changes in cleanup strategies.

Also, despite the apparent effectiveness of the new treatment, it’s still the case that Phibro-Tech for many years did not implement the original groundwater treatment. In 2002, DTSC ordered the company to pump and treat the contaminated water. But for reasons that DTSC could not fully explain to the Senate Oversight Office, Phibro-Tech did not install the pump-and-treat system. “It just kind of fell through the cracks,” Barbara Cook, assistant deputy director for the Brownfields and Environmental Restoration Program, said in an interview.

Both DTSC and Phibro-Tech say that the new technique of treating the water in place turned out to be better than the one the company never built.

In its responses to our questions, Consumer Watchdog wrote, “It’s wonderful if that treatment works. But timing is the issue. It doesn’t make up for years of doing nothing.”

Golden Wasteland asserts that DTSC is considering a new permit for Phibro-Tech “based on a flawed and now expired ‘negative declaration’ from the City of Santa Fe Springs – essentially rubberstamping Phibro-Tech’s plans as safe.” It states that DTSC should have done the

environmental study itself instead of relying on Santa Fe Springs, and quotes the department's own words in a fact sheet from 1998: "When DTSC is not the lead agency, it must still conduct a CEQA evaluation for its discretionary action before it issues a draft permit or permit denial."

It is true that the "negative declaration" – a finding under CEQA that there is no substantial evidence that a project will have a significant effect on the environment – was prepared by the city of Santa Fe Springs. *Golden Wasteland* quotes the 1998 fact sheet about DTSC being responsible for a CEQA evaluation even if it's not the lead agency. But it leaves out the next sentence: "In practice, DTSC may use and reference the local entity's documents to support the CEQA determination." DTSC has stated in public documents that it "reviewed and concurred" with the negative declaration of Santa Fe Springs. According to Phibro-Tech, DTSC participated thoroughly in drafting the document.

Since *Golden Wasteland* was published, DTSC has decided to do a new initial study, which could lead to another negative declaration, a mitigated negative declaration or a full-blown environmental impact report. The department also is doing a new health risk assessment.

The report quotes a community activist who said he has not seen Phibro-Tech quarterly reports on air, water and soil sampling. In fact, reports addressing soil and groundwater testing are available on the public database maintained by DTSC, Envirostor. Consumer Watchdog, in response to questions from our office, wrote that Envirostor records are incomplete and in need of overhaul so that an average person can use and understand them.

The section on Phibro-Tech concludes with a quote from an unidentified DTSC scientist: "Communities can squawk all they want, but what matters is the companies that write the big checks, putting heat on the governor."

The context of this quote, after a long section about the Phibro-Tech case, clearly implies that the company has influenced DTSC's behavior with campaign contributions. The company has employed lobbyists, and its parent company, Phibro Animal Health, has made contributions of \$1,825, mostly to the California Poultry Federation. But a search of the California Secretary of State website does not show any Phibro-Tech campaign contributions to governors or other state elected officials.

"There have been no overtures of intervention (from the administration) at all," said Brian Johnson, deputy director for the Hazardous Waste Management Program. "That, to me, is just hollow."

In response to our question, Consumer Watchdog wrote that, even if they don't make direct campaign contributions, companies such as Phibro-Tech influence government officials through the associations they support, such as the Chamber of Commerce.

DTSC sidestepped an environmental review for an oil recycling facility (p. 35)

ALLEGATIONS: DTSC “ignored a proper assessment of risks by skipping a legally mandated Environmental Impact Report” in issuing a permit to an oil-recycling facility called CleanTech in Irwindale, east of Los Angeles. The department mischaracterized the facility as “small-scale” to justify not doing an EIR when its true eventual capacity would be eight times greater than the definition of a “small-scale” site. Instead, DTSC issued the permit based on a “shoddy” initial environmental study ignoring, among other things, the proximity of a recreational dam. The case illustrates a “troubling pattern” of DTSC skipping in-depth environmental and health studies.

BOTTOM LINE: DTSC characterized the CleanTech facility as “small-scale” after adding a provision to the permit limiting the recycler to treating less than 1,000 tons per month, the definition of small facilities included in the California Health and Safety Code. The law states that only large facilities processing more than 1,000 tons a month are required to do EIRs. Opponents argued that since the capacity of the facility was clearly greater than that amount, CleanTech should perform an EIR. But it is inaccurate to flatly state, as *Golden Wasteland* does, that DTSC “skipped” a legally mandated EIR. Both DTSC and CleanTech’s owner say that if the facility had decided to recycle more than 1,000 tons a month, it would have applied for a new permit and done an EIR. As it happened, after challenges to DTSC’s issuance of the permit, CleanTech elected to apply for a large facility permit and is now performing an EIR.

DISCUSSION: California Health and Safety Code section 25205.1(d) defines a “large treatment facility” as one whose permit application specifies that it has the capacity to handle 1,000 tons or more a month, or, if not spelled out in the permit, actually treats that amount. DTSC added a special condition to CleanTech’s permit limiting the amount that the company could recycle to less than 1,000 tons a month. DTSC says that the permit condition allowed it to comply with CEQA by issuing a “negative declaration” rather than requiring the company to do a full-blown EIR. Based on an initial study, the declaration found no substantial evidence that the project would have a significant impact on the environment.

In December 2012, when DTSC received public comment on the proposed permit, several parties raised objections, arguing that the CleanTech facility was designed to process far more than 1,000 tons a month. One environmental consultant estimated it could do eight times as much. DTSC replied that the special condition in the permit would limit CleanTech to the amount that defines small facilities. If the company recycled more than that, it would be subject to civil penalties.

If CleanTech had changed its plan and wanted to process more than 1,000 tons a month, “we would have said, ‘Now, you’re being a much bigger facility,’” said Reed Sato, DTSC’s chief counsel. “Then we would have done the appropriate environmental review and, to be a larger facility, we would have required them to do an EIR.”

Bob Brown, owner of CleanTech, told the Senate Oversight Office that the facility planned to start out small. “You want to learn to walk before you run,” he said.

But Brown, too, expected that growing beyond the 1,000-ton-a-month threshold would have required a new permit.

For the *Golden Wasteland* report “to assume that we would grow larger, without an EIR, is a false statement without any merit,” Brown said.

DTSC stayed CleanTech’s permit in response to a challenge from a member of the public. With the prospect of years of legal proceedings, Brown said, he decided to apply for a large facility permit and perform an EIR. He said much of the work was already done in the initial study for the earlier permit.

DTSC failed to intervene in a subdivision where residents were sickened by toxic contamination (pps. 36-39)

ALLEGATIONS: Residents of the Autumnwood subdivision in the Riverside County town of Wildomar turned to DTSC for help in 2012 when several were sickened and two died from what they believed to be toxic contamination from the soil beneath their houses. One woman in her 30s died after gardening and was found to have three times the normal level of barium in her blood. Other residents reported breathing problems, pneumonia, nose bleeds, gastrointestinal problems and a gamut of other ailments. Some abandoned their homes. Yet when residents presented DTSC with chemical test results showing contamination, the department dragged its heels, saying the levels were not high enough to warrant action. DTSC continued to refuse the neighborhood’s pleas to

intervene and do its own testing even after the local air quality management district also found contaminants in indoor and outdoor air and the soil. The report quotes an Autumnwood resident saying that levels of uranium were 77 times higher than would typically be found in the western United States.

The report quotes an anonymous DTSC scientist saying there's "no doubt" that the fill used to grade the subdivision was "anything but clean." The scientist goes on to say that the case shows that even middle-class people get "the runaround" from DTSC, which refuses to test the soil even though it is squarely within the department's purview. The report concludes by asserting that the department could use \$26 million from its hazardous waste account to pay for the testing in Autumnwood.

BOTTOM LINE: After learning about possible contamination at Autumnwood, DTSC maintained for several months that chemical levels found there did not jeopardize human health. This conclusion was contradicted in September 2013 by two other state entities that analyzed the same data. DTSC did not explain to our office why its experts reached a different conclusion, which the department used to justify not stepping in. At the same time, experts outside DTSC agreed with the department that levels of contaminants in the soil at Autumnwood would not account for chemical levels found in indoor air or for the health effects suffered by residents. Because DTSC is limited by law to responding to releases to the environment, the department did not have clear grounds for intervening in Autumnwood, where the source of contamination was unknown. *Golden Wasteland* fails to mention that a coroner found that the Autumnwood resident died of pneumonia, not barium poisoning. The report seriously overstates the level of uranium found in soil samples. And in calling for the department to spend money from its Hazardous Waste Control Account to do sampling in Autumnwood, the report ignores legal constraints on how money from that fund may be used. Since the report was published, DTSC agreed to do further testing but found again that levels of contaminants in the soil and groundwater would not account for levels found indoors or the residents' health effects. Residents take issue with DTSC's methodology and interpretation of the results.



State officials and Autumnwood residents examine a dead tree in the subdivision that residents believe may indicate the presence of toxic contamination

DISCUSSION: The Autumnwood tract of 61 homes was built between 2004 and 2006. Months after moving in, some residents began suffering health problems that they believed were caused by chemicals in their houses. In 2012, they paid for an industrial hygienist and an environmental consultant to test for contaminants in indoor air and soil. Both consultants found a variety of volatile organic compounds and other chemicals. Also in 2012, residents sued the builder of the homes and several contractors, alleging that the contamination was caused by fill dirt used to grade the subdivision. In September 2012, the city of Wildomar became aware of the possible contamination and notified the Riverside County Department of Public Health, which in turn contacted DTSC.

In October 2012, a DTSC toxicologist who had reviewed the data collected by the residents' consultants wrote a memo concluding that contaminants were not getting into the houses through chemicals in the soil. Indoor sources of chemicals could be contributing to the levels, the toxicologist wrote. Concentrations of volatile organic compounds were similar to what's found in outdoor air and "in most cases" at or below federal and state health screening levels, according to the memo, and very unlikely to result in residents' symptoms. DTSC later wrote a letter to the county public health department saying the county should investigate.

As residents and elected officials continued to pressure DTSC to take charge, the South Coast Air Quality Management District agreed to sample indoor air and soil. The air district's tests in January 2013 found that samples from inside and outside three homes did not have higher levels of compounds than typically found. Some soil samples had elevated levels of compounds such as aluminum, sodium, phosphorous and sulfur, but the air board found that these concentrations should not cause health concerns. A second round of testing in February 2013 found that water samples inside and outside homes met federal drinking water standards and that soil samples reflected typical levels.

Golden Wasteland is certainly correct in asserting that Autumnwood residents believe they were sickened by contaminants in their homes, that they turned to DTSC for help and that DTSC, as of the time *Golden Wasteland* was published, had declined to step in.

It also is true that a 36-year-old resident named Fatima Ciccarelli died shortly after gardening and was found to have barium in her system almost three times higher than normal. However, the report fails to mention that the Riverside County coroner found that the cause of death was bronchopneumonia of unknown cause. Other significant conditions that contributed to the death were an earlier mitral valve replacement and a recent pregnancy. (In its footnotes, *Golden Wasteland* links to the

coroner's report that contains this information.) According to The Press-Enterprise newspaper, the coroner told Ciccarelli's husband that barium, though elevated, was not a factor in her death.

The report quotes a medical doctor who says that soil and air tests done by the South Coast Air Quality Management District show levels of barium well above what's considered safe by the state. Yet several months after the publication of *Golden Wasteland*, an expert at the Department of Public Health who reviewed that same sampling from Autumnwood concluded that barium levels in the soil were within background levels, while drinking water concentrations did not exceed federal and state standards. Because of uncertainty about how the sampling was conducted, she was unable to draw conclusions about barium in indoor air samples.

What about *Golden Wasteland's* contention that DTSC should have stepped in when some contaminants exceeded levels considered safe for humans?

In September 2013, more than six months after *Golden Wasteland* was published, the Department of Public Health and the Office of Environmental Health Hazard Assessment reviewed the sampling from Autumnwood, all of which was done prior to *Golden Wasteland's* release. The DPH expert found that at least two volatile organic compounds raised concerns – formaldehyde, found in many building materials, and 1,2-dichloroethane, used in plastic and PVC manufacturing and in furniture, wall coverings and cars. These chemicals exceeded U.S. EPA screening levels for residential air, which are based on potential cancer risks, as well as another U.S. EPA screening level for non-cancer health effects. The expert from OEHHA also found the levels of formaldehyde in three of four houses that were sampled to be high enough to cause acute health effects like those seen in the residents. Long-term exposure to contaminants found in the indoor air could pose a cancer risk, he found.

Yet, with the same data in hand, DTSC had repeatedly stated that the levels of volatile organic compounds found in sampling did not pose a threat to human health. While some concentrations exceeded screening levels, DTSC officials said, they were not high enough to account for the symptoms reported by residents. DTSC's senior toxicologist told The Press Enterprise in November 2012 that the department would be worried about health effects only if levels had been "more than a thousand times higher."

Department officials made similar statements in memos, statements to the press, and – in early July, before the outside experts reviewed the data – in an interview with our office. In response to follow-up questions from

our office, DTSC did not explain why its toxicologist and others within the department reached a conclusion at odds with their counterparts at other state entities.



State officials and Autumnwood residents discuss potential contamination in a house abandoned by its owners

At the same time, DTSC points out that contaminant levels in the soil at Autumnwood were not high enough to explain the concentrations found in indoor air. This is significant, because DTSC by federal law can only intervene when there has been a “release to the environment” – a spill, a leak or a disposal of hazardous material into the water, land or air. A 1993 directive

from the U.S. EPA spells out the circumstances that allow intervention. It states that a discharge of a hazardous substance that occurs inside and remains contained within a building does not qualify as a “release to the environment.”

The source of contaminants in Autumnwood had not been identified by the time this report was published. Residents suspect fill dirt to be the culprit, a view that is underscored by *Golden Wasteland*, which quotes an unidentified DTSC scientist saying the fill was “anything but clean.” Yet, the DPH and OEHHA experts who reviewed the sampling data in September 2013 agreed with DTSC that volatile organic compounds in the soil were below levels considered to cause health effects. Like DTSC, they concluded that the contaminants were unlikely to have found their way into the homes.

If contaminants from the soil were seeping into Autumnwood houses at levels that could cause harm, DTSC would clearly be the agency responsible for intervening. But if the source was within the home – from the building materials, for instance – DTSC’s ability to act would be constrained by the 1993 U.S. EPA directive.

Golden Wasteland quotes an Autumnwood resident saying that levels of uranium found in the soil were “77 times higher than you would find in the Western United States.” This is a serious overstatement of what the

sampling found. The South Coast Air Quality Management District took samples of a white material on top of the soil. In one of the two samples, uranium, a naturally occurring element, was detected at 77 percent higher than typical in the Western U.S. rather than 77 times higher. That level is less than two times the normal range. In another sample, uranium was only 4 percent higher than typical. Consumer Watchdog and the Autumnwood resident concede that the statement was incorrect.

Golden Wasteland's contention that DTSC should have paid for the testing at Autumnwood with a \$26 million surplus in its Hazardous Waste Control Account ignores constraints on the use of that money. The account is funded by fees from hazardous waste handlers regulated by DTSC. The money is intended to pay for DTSC's oversight of hazardous waste facilities, transporters and others. The department believes that any attempt to use these fees for other purposes – such as “orphan sites” with no clear responsible party like Autumnwood – would invite a lawsuit from the businesses that pay the fee to underwrite their own regulation.

DTSC does have an annual budget of \$10 million from another source – the Toxic Waste Management Account – to pay for sampling and cleaning up orphan sites. DTSC said that money is stretched thin, and that an intervention at Autumnwood would have meant less money for other orphan sites.

After *Golden Wasteland* was published, however, DTSC reversed course. The about-face occurred after DTSC director Debbie Raphael and other top officials visited the subdivision for the first time. According to an environmental activist who was present, Raphael said during a tour of Autumnwood houses that “something is going on here. I can feel it in my chest.” She later said, “We obviously aren't testing for the right things – we're missing something,” according to the activist, Penny Newman, who has acted as a liaison between the state and residents.

After reviewing the analyses of sampling data by DPH and OEHHA, DTSC agreed to do soil and groundwater sampling. The results, released in December 2013, found that metals and other contaminants in the soil were within background levels, that volatile organic compounds found in soil gas and shallow groundwater do not pose a hazard to indoor air, and that vapor intrusion – the migration of contaminants from soil to indoor air – was not occurring at Autumnwood. Any elevated levels inside the homes were not coming from the soil, soil gas or groundwater, DTSC contended. Some Autumnwood residents have found what they describe as significant shortcomings in DTSC's sampling and interpretation of the results and continue to ask for a more thorough examination.

DTSC caved in to industry in cathode ray tube glass regulations (pps. 45-46)

ALLEGATION: With no public input, DTSC “did exactly the wrong thing” by issuing emergency regulations that allow cathode ray tubes from old televisions and computers to be dumped in hazardous waste landfills rather than recycled. The report quotes a recycler of CRT glass saying that DTSC caved in to pressure from landfill owners looking to make money from CRT glass and recyclers who want to get rid of the glass cheaply. This recycler also says that unscrupulous handlers may simply dump CRT glass into unlined landfills. “So much for the DTSC protecting Californians’ health and environment,” the section of the report concludes.

BOTTOM LINE: It is not true that DTSC failed to get public input – the department held three public workshops before releasing the proposed regulations and then accepted public comment for five working days after the regulations were filed. While it’s true the rule was issued as an emergency regulation, the department was authorized by the Electronic Waste Recycling Act of 2003 to use that process and says that it needed to do so to deal with dangerous stockpiling of CRT glass. The regulations do allow CRT glass to be disposed of in hazardous waste landfills instead of recycled, as the report alleges, but only if the recycler notifies the state that it has exhausted other options. So far, DTSC says no waste handlers have done so. DTSC officials believe that new types of recycling will be cheaper than disposal and that most waste handlers will choose not to use landfills.

DISCUSSION: Before this new round of regulations, DTSC required CRT glass to be sent to businesses that could use it to make new cathode ray tubes or to smelters that specialized in extracting the lead. The system worked well because there was a healthy demand for recycled CRT glass for use in new electronics products.

With the advent of flat-screen technology – plasma, LED and LCD – the market for recycled CRTs collapsed. DTSC said it was aware of only one company in the world – in India – that continued to recycle the glass. DTSC officials say they became concerned that recyclers, unable to get rid of CRT glass without paying a high premium, would stockpile it. In 2012, two DTSC inspectors came upon a warehouse in Fresno packed to the rafters with the old tubes. According to The New York Times, the lead-laden dust in the warehouse was so thick that the inspectors had to leave.

“The whole purpose of doing these emergency regulations was to ensure

there was a safe and appropriate method and ... legally acceptable way to manage this waste,” said Karl Palmer, branch chief of DTSC’s Safer Products and Workplaces Program

Before introducing emergency regulations, DTSC held three public workshops – two in the fall of 2011, and one in February 2012. The department also accepted public comments during five working days after filing the regulations in October 2012, and says it held numerous meetings with stakeholders.

DTSC officials say the new regulations were designed to allow waste handlers to seek out new types of recycling technologies. Under the old rules, handlers who sent the glass to lead smelters or manufacturers of new CRT glass got waivers from hazardous waste permitting requirements. The new regulations kept those waivers intact, but also extended them to handlers who sent the CRT glass to operations using new technologies to recycle lead and glass for other purposes.

They also allow handlers to dispose of CRT glass in highly regulated hazardous waste landfills. The exception is glass from the front panel of the old tubes, which does not contain lead and can be disposed of in lined solid waste landfills, DTSC officials say. As of April 2014, no one had notified the state of intent to dispose of CRT glass or panel glass in landfills.

“The rationale,” said Andre Algazi in DTSC’s Safer Products and Workplaces Program, “is that we’d rather have it disposed of in a controlled, regulated way than potentially abandoned in a facility that wasn’t designed or operated to keep hazardous wastes secure.”

DTSC believes that when new types of recycling become viable, handlers will find them cheaper than disposing of CRT glass in a landfill. One recycler quoted in *Golden Wasteland* told our office that the state has not permitted innovative uses of panel glass, for instance as an ingredient in road beds. DTSC replied that this type of recycling is not allowed by California’s hazardous waste laws and regulations.

DTSC has bent to pressure from the metal recycling industry and failed to regulate “auto fluff” (pps. 46-48)

ALLEGATIONS: In the 1980s, DTSC classified the residue from automobile shredders as hazardous waste. But when the industry objected that it would cost too much to dispose of it in hazardous waste landfills, DTSC buckled and “changed the rules.” It issued seven of the big metal recycling companies letters allowing them to dispose of shredder waste

in municipal landfills if they treated it a certain way. The report quotes an unidentified DTSC scientist as saying, “They essentially told the big guys if you sprinkle Pixie Dust on this stuff, you’re golden.” The report continues, “the idea was to get the fluff out of sight and out of mind, not to regulate its toxic properties.”

Years later, in 2002, a DTSC scientist found that the treatments weren’t working. Chemicals in auto fluff were “leaching into landfills at hazardous waste levels.” The scientist recommended a reversal of the policy, effectively requiring the fluff to be treated as hazardous waste, but the department failed to react, even as car and appliance components became more toxic. The report quotes a community activist in Simi Valley who says DTSC has never proved that auto shredder waste is not harmful and has allowed the industry to “run amok at the taxpayers’ and environment’s expense.”

BOTTOM LINE: It is true that, for a decade, DTSC failed to act on evidence from one of its own scientists that treatment of metal shredder waste was not meeting regulatory thresholds. But *Golden Wasteland’s* characterization of that treatment process is incomplete. It involves a well-known chemical reaction meant to bind metals into a matrix to prevent them from spreading into the environment – more than sprinkling the waste with “pixie dust.” The report fails to mention that DTSC has embarked on a major study to identify the best way to treat shredder waste which could lead to new regulation of the industry.

DISCUSSION: Auto “fluff” – or “auto shredder residue,” as the industry prefers to call it – consists of what’s left over when ferrous and non-ferrous metals have been removed during the recycling process. The mélange includes foam, fabric, plastics, rubber, tires, glass, wood and small amounts of the remaining metals. Metal recyclers also typically handle large appliances, which contain their own array of substances.

From the 1950s until the early 1980s, fluff was not classified as hazardous in California. It was deposited in regular municipal landfills, or used as “cover” applied to the top of the landfill at the end of each day. But in 1984, a division of the Department of Health Services – the predecessor of DTSC – determined that shredder waste often surpassed California’s regulatory thresholds for some metals, most notably lead. California’s newly developed standards were stricter than those of the federal government or other states, which to this day do not consider shredder waste to be hazardous.

This move created a crisis of sorts for the shredder industry, which now faced the much more expensive prospect of disposing of fluff in landfills

certified to handle hazardous waste. It also posed a problem for the state. Overnight, auto fluff became one of the biggest streams of hazardous waste in California.

For some time, metal recyclers stockpiled waste on-site. Then, with the help of a UC Berkeley chemical engineer, the industry developed a treatment process to reduce the amount of metal that would leach out of shredder waste in landfills. The toxics division of the Department of Health Services determined that if recyclers used this process as a standard part of the recycling operation, shredder waste could be considered non-hazardous under California regulation.



A truck carrying “auto fluff” to be deposited at the Simi Valley Landfill

The toxics division was authorized to make that determination under what is now Title 22, Section 66260.200(f) of the California Code of Regulations, which allows the change of classification from hazardous to non-hazardous if waste “has mitigating physical or chemical characteristics which render it insignificant as a hazard to human health and safety.” Between 1986 and 1992, toxics regulators sent letters to seven California metal recyclers authorizing them to treat shredder waste as non-hazardous as long as they followed methods to reduce the solubility of metals. They’re called “f-letters” – a reference to the section of the regulation that authorizes the change in classification. In 1988, the state issued a policy that if shredder waste was treated “in-line” – that is, before it becomes a waste – it would not be regulated by the toxics division.

Golden Wasteland characterizes this series of events as DTSC changing the rules and “choosing to pretend” that shredder waste was not hazardous. Whether or not toxic regulators at the time made the right decision – and this is a matter of vigorous debate – these statements distort the record. The toxics division was authorized by regulation to change the classification and did so only after what it described at the time as extensive study. It was playing by the rules, not changing them. And it did not “pretend” that the waste was not hazardous. The record shows that officials acknowledged that shredder waste met California’s definition of

hazardous waste. But as spelled out in regulation, they determined that mitigating characteristics justified classifying it as non-hazardous.

Golden Wasteland describes the treatment that led the state to classify shredder waste as non-hazardous as coating it with “industrial lime.” The report includes a quote from an unidentified DTSC scientist: “They essentially told the big guys if you sprinkle Pixie Dust on this stuff, you’re golden.” The report continues, “The idea was to get fluff out of sight and out of mind, not to regulate its toxic properties.”

There has been debate and conflicting data about the efficacy of the treatment. But the process is not as superficial or illogical as the report suggests.

It does include the addition of industrial lime or cement products, but it also involves spraying shredder waste with a silicate solution. This creates a chemical reaction intended to bind metal contaminants into a matrix, making the metals less likely to seep into the environment. The process has a track record beyond treatment of shredder waste. The U.S. EPA has used a similar technique to stabilize contaminated soils, DTSC and industry officials told the Senate Oversight Office.

Golden Wasteland describes how, in 2002, a DTSC scientist named Peter Wood did a study that concluded that the metal recyclers’ “coating method” was failing to prevent lead and other metals from leaching into landfills “at hazardous waste levels.” It is true that Wood did a 2002 study concluding that, in the samples he took from three auto shredding operations, the treatment method was not meeting regulatory thresholds. Wood sent samples to a lab, which exposed them to acidic conditions that under California regulations are used to mimic what would happen in a landfill. The recycling industry has argued that the test is too aggressive, and says its own testing has shown that in less acidic conditions, the amount of “mobilized” metal has been below detection levels. Regardless, the test contained in California regulation is the standard that DTSC and the industry must meet.

After Wood submitted his report, DTSC went into “paralysis by analysis,” according to a DTSC scientist quoted in *Golden Wasteland*. The report states that industry lawyers and lobbyists “descended on” DTSC and the Legislature to prevent change.

It is true that the department did not follow Wood’s recommendations, which included rescinding the policy that allowed shredder waste to be handled as non-hazardous and requiring recyclers to get new authorizations. It is also true that shredder industry lobbyists reacted

strongly to an attempt in 2008 to follow Wood's recommendations. The report, however, leaves out DTSC's explanation for why it backed down in the face of industry opposition, and fails to mention that the department has embarked on a new initiative to review its shredder waste policy. Whether that initiative results in real change remains to be seen.

In 2008 – six years after Wood's report – DTSC sent letters to metal recyclers stating that testing had shown that the treatment process included in the department's earlier authorizations was not "sufficient to reduce the waste to a non-hazardous solid waste. Therefore, those letters and policy need to be repealed" effective Jan. 1, 2009. Over the next year, DTSC sent out four more letters granting the industry more time to present evidence. The last one, in September 2009, made the extension indefinite. "The current extension is contingent on continuing progress in the development of alternative management standards that are protective of human health and the environment," it stated.

What happened? As *Golden Wasteland* recounts, the industry waged an aggressive campaign to get DTSC to back off. In a lengthy letter to the department, Meg Rosegay, an attorney for metal recyclers, argued that the additional costs would drive companies out of business or force them to send shredder waste to states where it was not regulated as hazardous, contributing to greenhouse gas emissions. Shredder waste would increase shipments to hazardous waste landfills by 50 percent, straining capacity, Rosegay wrote. DTSC's action amounted to a regulatory change, the industry argued, and would have to go through the rule-making process. It also would have to undergo CEQA review. All this, Rosegay wrote, even though there was no evidence that shredder waste posed a threat to human health or the environment.

DTSC officials say they backed down because they were not convinced they could prevail in court. "They gave us voluminous responses to our efforts," said Rick Brausch, division chief of DTSC's Policy and Program Support Division. "They argued they were being denied due process, that we had no evidence of harm or failure of the current regulatory system. ... Our fear was to lose a case like that would put us back further than we are currently."

Some DTSC insiders and outside activists believe that DTSC has been too timid. They say the department has the power to reassert its jurisdiction over metal recyclers, especially in light of the 2002 study showing that the treatment was not consistently doing what it was supposed to.

Brausch and other DTSC officials say they need more data to make the

case for re-regulation of the industry. “Our strong suspicion is that the industry is not going to take that lightly,” Brausch said. “For us to be able to go down that path, we need the full support of the data.”

So the department asked the industry to outline a “treatability study” meant to determine whether the waste is amenable to treatment and, if so, what the optimum methods might be. The study also will give DTSC information about how the waste stream has changed over the years, Brausch said. The work plan, which will involve extensive sampling at shredder operations, was submitted to the department on Sept. 26, 2013. The schedule calls for a final report of the results to DTSC by Sept. 30, 2014. The department says it is examining issues beyond the waste that gets shipped to landfills. Are dust and runoff from shredder operations jeopardizing surrounding neighborhoods? One study – challenged by the industry – found that lead dust from a shredder was accumulating in a nearby residential area.

DTSC officials said they are confident that the study will answer the longstanding question of what to do with a waste stream that adds up to as much as 600,000 tons a year. “While it’s unfortunate it’s sort of been punted through the years, our obligation at this point is to resolve it,” said Brian Johnson, deputy director for the Hazardous Waste Management Program.

Given the department’s track record on this issue, the public and the Legislature would do well to monitor the outcome and make sure that DTSC follows through.

DTSC allowed illegal dumping to occur on Indian land near Mecca (pps. 48-50)

ALLEGATION: DTSC allowed hazardous waste to be transported to a soil recycling facility near the town of Mecca, on land owned by the Cabazon Band of Mission Indians. Los Angeles Unified School District and other government agencies and private companies illegally shipped 160,000 tons to the operation, run by Western Environmental, Inc. In December 2010, odors from the site sickened children at a nearby elementary school. DTSC gave Los Angeles Unified an exemption to allow it to send waste to the plant, and listed the facility on its website as a disposal site. Over the years, DTSC never clarified its regulatory authority over the site on Indian land and gave conflicting answers to those who asked if it was OK to dump there.

BOTTOM LINE: As the report notes, this section is based on newspaper reports and an internal audit commissioned by the department itself.

DTSC has admitted fault, and praised the reporting that brought the problem to light.

DISCUSSION: The Western Environmental plant began operations in 2004 after getting a permit from the Cabazon Band of Mission Indians to recycle contaminated soil. To accept waste classified as hazardous in California, the operation would have been required to enter into a cooperative agreement with the secretary of CalEPA. The tribe did discuss such a possibility with DTSC in 2005, but the negotiations broke off.

In the meantime, various entities shipped contaminated soil to the site, in violation of California law. The activity intensified around 2008, according to a report in *The Press-Enterprise*. In 2009 and 2010, some 163,000 tons classified by California as hazardous were dumped, most of it contaminated soil, the newspaper reported. *The Desert Sun* reported that 3,600 tons of untreated sewage was disposed of during those same two years.

“In a nutshell, the waste should not have gone to that facility,” Stewart Black, deputy director for Brownfields and Environmental Restoration, told *The Press-Enterprise*.

After *The Press-Enterprise* report in 2011, DTSC stopped shipments to the facility. An audit later commissioned by the department found that DTSC had given inconsistent responses to waste haulers and others asking whether the Western Environmental operation was able to accept California hazardous waste. It found that the department failed to deal with the issue of jurisdiction for seven years even though some within DTSC knew that hazardous waste was being shipped to the plant. DTSC also failed to note that its own system for tracking shipments of hazardous waste was showing the illegal transports. Even after a staff member noticed and alerted the DTSC legal office, the shipments were not halted.

In a May 2013 op-ed piece in *The Desert Sun*, Debbie Raphael, the DTSC director at the time, called the department’s conduct “inexcusable.” Raphael took office the same week that *The Press-Enterprise* published its investigation.

Since the shipments were stopped, DTSC has done sampling that indicates soil at the Western Environmental site does not meet the criteria for hazardous waste in either California or federal law, meaning that DTSC has no jurisdiction. The soil may be used for commercial purposes. DTSC found no serious threat to human health.

DTSC's system for tracking hazardous waste is a "disaster" (pps. 50-51)

ALLEGATIONS: A 2011 internal DTSC report says the system for tracking hazardous waste is "inadequate, understaffed and vulnerable." The system does not flag shipments to facilities not authorized to take them and suffers from an error rate of up to 40 percent. The system is so flawed that many fields are left blank. The department in the early 1990s stopped issuing penalties for shoddy paperwork and now does nothing when it gets information from the CHP that a hauler has violated traffic rules.

BOTTOM LINE: *Golden Wasteland* is correct that DTSC's tracking system is riddled with problems such as errors in manifests and blank fields in the hazardous waste tracking database.

DISCUSSION: At the heart of the department's Hazardous Waste Tracking System are manifests meant to track the names and identification numbers of generators, transporters, and facilities where the waste is heading. About 450,000 shipments are recorded on manifests each year, involving 1,000 different transporters and about 2 million tons of hazardous waste. The system has long been rife with problems, including DTSC's failure to catch the illegal shipments to Mecca mentioned previously. Sometimes data is entered erroneously, or fields are simply left blank.

In November 2013, the Los Angeles Times reported that, because of problems like these, DTSC lost track of 174,000 tons of hazardous material in the past five years, including lead, benzene and methyl ethyl ketone. In about 1 percent of manifests, material was shipped, but records do not show that it ended up where it was supposed to go. While DTSC said most of the hazardous material probably got to the intended destination, the Los Angeles Times documented cases in which it did not. DTSC did not dispute the newspaper's findings, but issued a statement from Director Debbie Raphael saying that the department relied on other methods in addition to manifest tracking to assure that waste ends up where it's supposed to go. DTSC says that, since 2006, the U.S. EPA has required the use of a paper manifest form that includes six copies, with a copy of the bottom copy going to the state. The department says that this form is often illegible. Changing to a more modern system will require federal action.

Golden Wasteland accurately states that an internal report by DTSC in 2011 found that the system was inadequate, understaffed and that the system did not flag shipments to improper facilities. The department

recently implemented a system that automatically flags unpermitted shipments.

Golden Wasteland correctly quotes the internal DTSC memo that said up to 40 percent of manifests contain errors. In interviews with the Senate Oversight Office, DTSC officials said the number of manifests with significant errors, such as blank fields that could hinder the department's ability to analyze data, is only 10 percent.

DTSC told our office that it does assess a \$20 fee when manifests are incorrect. But it is only able to correct about one-third of the 45,000 manifest errors per year because, the department says, it lacks the personnel. DTSC is proposing adding 3.5 positions in the 2014-15 budget to correct all manifest errors.

Cronyism is rampant at DTSC (pps. 54-55)

ALLEGATIONS: Cronyism “trumps qualifications” at the department. A 2012 report by the California Department of Human Resources “suggests that DTSC has a practice of putting people who aren’t fully qualified into jobs they don’t belong in.” The CalHR report found that “more than half of the jobs reviewed were not filled with properly qualified people.” The report quotes a “source intimately familiar with DTSC personnel practices” saying that the CalHR report suggests blatant favoritism to unqualified supervisors and managers, directed by high-level staff.

BOTTOM LINE: It’s true that CalHR did a very critical 2012 report of DTSC’s personnel practices and stripped the department temporarily of its delegated authority to hire for certain positions. But the report did not find evidence of “cronyism” or that individual workers were less than qualified. The audit examined whether classifications were properly placed in the organizational chart, not whether individuals in those positions were qualified.

DISCUSSION: The section of CalHR that conducted the review specializes in classification and compensation, not individual qualifications under the merit system. The distinction is important in the context of the allegations in *Golden Wasteland*. The CalHR report made no attempt to gauge whether individuals met the qualifications for their job classifications. Rather, it pointed out cases in which a classification, regardless of the person in it, was being used improperly.

For instance, the classification Staff Services Manager I is required by personnel rules to supervise three to five subordinates. Yet, the CalHR review found a case in which someone in that position was

supervising only two subordinates. In CalHR parlance, that position was “misallocated.” But that does not mean that the person who filled the Staff Services Manager I position was not qualified to hold that job. The review made no attempt to determine that.

CalHR found many such cases. It also found cases in which DTSC failed to get approval from CalHR to pay someone in a Career Executive Assignment more than the amount established in personnel guidelines. Again, the report is silent on the question of the individual’s qualifications and focuses instead on adherence to classification and compensation rules.

But how did DTSC make so many personnel mistakes?

In 2008, the department went through a major reorganization that changed employees’ duties and reporting relationships, said Andrew Collada, deputy director for administrative services. In ensuing years, DTSC – like most state operations – lost positions.

“It’s sort of a house of cards where, when you start taking cards away... it can fall apart,” Collada said.

In response to our questions, Consumer Watchdog stated that the audit and interviews suggested that “the root causes of the misallocation do also involve the qualifications and the selection practices that are part and parcel of a comprehensive allocation analysis.”

Regardless of the reasons, DTSC made a very high number of classification mistakes. Since *Golden Wasteland* was published, DTSC has improved its performance and, according to its stoplight-based classification system, is now on “yellow” status instead of “red” and subject to periodic reviews.

Boeing is getting favorable treatment at the Santa Susana lab with the help of former environmental officials (pps. 58-62)

ALLEGATIONS: DTSC has become “captive” to corporations such as Boeing through personal relationships with former state environmental officials who now work for industry. DTSC “dissolved” an interagency working group on the cleanup of the Santa Susana Field Laboratory that included members of the public in favor of a sham group backed by Boeing. DTSC removed its project director, who was pushing for full cleanup, in favor of an official more sympathetic to Boeing. Shortly after Jerry Brown became governor, the state stipulated that it would not

oppose Boeing's assertions of material facts in a lawsuit over the extent of cleanup at Santa Susana, which now prevents the state from defending a lab cleanup law.

BOTTOM LINE: The former environmental officials named in the report say they do not lobby for Boeing, and we could find no evidence that they do. Two say they represent Boeing as lawyers, not lobbyists. In the third case, the state Fair Political Practices Commission found no evidence that the official was lobbying for Boeing. On the larger question of their influence at DTSC, the former officials say they have been gone so long that any connections they had are no longer relevant. It's true that DTSC did not fund an interagency work group that previously had been underwritten by the U.S. EPA, but the department says that, as a matter of policy, it does not participate as a member in community groups. The founder of the new group supposedly backed by Boeing told our office that, while she spoke to the company about her intentions, she formed the group to allow a greater range of community voices and was not beholden to Boeing. DTSC denies that its new Santa Susana project director has changed policies to be more favorable to Boeing. The stipulation that the state signed in litigation with Boeing does not appear to have affected the outcome of the case.

DISCUSSION: The Santa Susana Field Laboratory, perched on a hilltop between the San Fernando Valley and Simi Valley about 30 miles northwest of downtown Los Angeles, started operations in 1947. It was the site of extensive testing of nuclear reactors and engines for missiles, spacecraft and rockets during the Cold War and for several years afterward. In 1959, a partial meltdown at one of the reactors spewed radioactive gases into the environment. Over the years, numerous accidents, spills and releases led to widespread contamination of groundwater, surface water and soil. While the lab was intended to be far enough removed from populations to minimize danger, neighborhoods eventually ringed the site. Some studies have found elevated rates of certain cancers close to the facility.

Boeing took over much of the facility when it purchased Rocketdyne in 1996 and became the responsible party for cleanup. In 2007, Boeing signed a consent order for its part of the cleanup of chemical contamination. That same year, the Legislature enacted Senate Bill 990, which gave DTSC the authority to oversee the remediation of radiological contamination. SB 990 also requires the site to be cleaned up to either agricultural or suburban residential standards, whichever is stricter.

The United States Department of Energy and NASA, which own small portions of the 2,850-acre property, signed agreements with the state to

achieve this cleanup goal. But Boeing sued to overturn the law, arguing that it was being held to a higher cleanup standard than DTSC applies in the rest of the state and that the California law preempted the federal government's authority to oversee matters related to nuclear safety. In 2011, a federal judge sided with Boeing. The ruling is being appealed.

Golden Wasteland quotes from a letter written to DTSC in September 2012 by members of an interagency work group that has overseen the cleanup and others decrying the influence of former state government insiders hired by Boeing: "Boeing has purchased very powerful lobbyists and public relations consultants, including Winston Hickox, Peter Weiner, Bob Hoffman" and others. *Golden Wasteland* goes on to detail the backgrounds of the "lobbyists and spin doctors Boeing has hired to resist cleanup." Hickox, Weiner and Hoffman all worked for state environmental agencies. Hickox, now at public affairs and lobbying firm California Strategies, was the secretary of CalEPA from 1999 to 2003. Hoffman was chief of staff to Hickox and, before that, chief counsel at DTSC. Weiner advised Gov. Jerry Brown on toxic substances control during Brown's first administration.

The passage states that Hickox, Hoffman and Weiner lobby and/or do public relations for Boeing. In a September 2013 press release, Consumer Watchdog states more explicitly that the three lobby for Boeing. "Mr. Hickox, along with former aides under Governor Jerry Brown in his first administration, have lobbied for Boeing and not disclosed it."

Consumer Watchdog stated in response to our questions that it used the term "lobbying" in the sense that it says the public and press understands it – someone hired to influence public officials on behalf of a client. Regardless of how the public and press may understand the term, California law defines lobbying more narrowly as trying to influence legislation or regulations.

Hickox, Hoffman and Weiner are registered as lobbyists but do not list Boeing as a client. In interviews, Hoffman and Weiner, who both work at the San Francisco law firm Paul Hastings, told the Senate Oversight Office that they serve as legal counsel for Boeing but do not lobby for the company. Weiner said he represents Boeing before the Los Angeles Regional Water Quality Control Board and DTSC, but "I have never tried to alter regulations or legislation, pro or con, with regard to the Boeing Company."

Hoffman said he represented Boeing in discussions regarding the implementation of the 2007 consent order and the SB 990 litigation. But he, too, said he has not met the definition of a lobbyist by trying to

influence legislation or regulation. Consumer Watchdog provided our office multiple instances of Hoffman and Weiner meeting with DTSC officials. Although it is impossible to tell what transpired at these meetings from the information provided, none of them appeared to clearly involve lobbying as opposed to legal representation.

Dan Hirsch, who has been in the middle of debates over the Santa Susana lab for decades as president of the non-profit nuclear policy organization Committee to Bridge the Gap, told the Senate Oversight Office that he believes the activities of Hickox, Weiner and Hoffman go beyond legal representation. He said that he has provided information to the Fair Political Practices Commission documenting what he sees as lobbying.

Gary Winuk, chief of the enforcement division at the FPPC, confirmed to our office that the FPPC is reviewing the cases of Weiner and Hoffman. But the commission has not launched a formal investigation.

Hickox was the subject of an investigation of unreported lobbying. The FPPC sanctioned him and two other partners of California Strategies for crossing the line between policy consulting and lobbying. Hickox was fined \$12,000 for trying to influence administrative actions before the Air Resources Board on behalf of a client, CE2 Carbon Capital.

However, the FPPC said it found no evidence that Hickox was lobbying for Boeing. “From my review of the materials we gathered, there was no evidence that he was lobbying on behalf of Boeing,” Winuk said. The information he looked at included material he received from Hirsch’s Committee to Bridge the Gap.

Golden Wasteland alleges more broadly that the former environmental officials are able to exert undue influence on DTSC’s decisions regarding Santa Susana and other cases.

Weiner told our office that he has not worked for state government since 1983. “I have much less access than Dan Hirsch has,” he said. Hoffman, who left in 1999, said that current management has little connection to that time. “There’s no ‘there’ there,” he said. “Any lawyer who was there in 1999, I was their boss. So what? Do you owe allegiance to a former supervisor?”

On the section of its website dedicated to the Santa Susana cleanup, DTSC addresses the question of its relationship with former employees. “As long as former DTSC and CalEPA employees comply with all legal limitations regarding their relationship with their former department, they

have a right to gainful legal employment and have a right to represent any client's interests before DTSC. ... Former DTSC and CalEPA employees representing outside interests before their former colleagues can create inaccurate perceptions. However, they do not and cannot have influence on department decisions.”

On another Santa Susana matter, *Golden Wasteland* cites allegations in the September 2012 letter that DTSC “dissolved” a long-standing interagency work group in favor of a fake grassroots group supported by Boeing.

It is true that DTSC ended government support for the interagency work group, which had been operating for two decades. In December 2008, the U.S. EPA said it would no longer fund the group and planned to end its oversight role because the state had taken the lead in the Santa Susana cleanup. That left it to DTSC to underwrite the \$60,000-a-year cost of running the group. In September 2012, DTSC announced that it would “continue operation” of the work group, but that it would relinquish its role as the leader and leave it to “the community” to run. According to Hirsch, as well as an article on the website *Enviroreporter*, DTSC director Debbie Raphael gave two different reasons for the move – that DTSC didn't participate in “membership groups” and that the department lacked the authority to support the group. Critics say that Raphael's explanations are undermined by DTSC's participation in similar groups. They say it's routine for the department to fund such public participation by billing the responsible parties.

DTSC, in response to our questions, said the department as a matter of policy does not participate as a member in any community groups, but it is willing to attend meetings as a non-member to provide information and answer questions. The exception is government-led groups such as technical review teams formed by the military for cleanup work.

The interagency work group is continuing to meet. But Hirsch said the lack of DTSC support has changed things for the worse. The department will attend only two of the four quarterly meetings, he said, and will only answer questions, not make presentations as it did in the past. While DTSC has said that it still “recognizes” the group, it's unclear what practical effect that has.

By contrast, DTSC has supported a different entity called a community advisory group, or CAG.

The rules for the creation of CAGs are spelled out in California Health and Safety Code 25358.7.1(a). The law provides that if DTSC receives

a petition “signed by at least 50 members of a community affected by a response action,” the department “shall” assist the petitioners in establishing the CAG. It states that DTSC and parties responsible for cleanups “may” participate in CAG meetings to provide information and technical expertise. But the existence of a CAG “shall not” affect the status of any advisory group formed before the enactment of the code section in 1999.

In response to questions from our office, DTSC said that it was required by the 1999 law to assist in the formation of the CAG when, in 2012, it received 50 signatures that it determined were valid. DTSC said it denied earlier petitions for a CAG because of questions about the number of valid signatures. “The law was designed to enhance public participation and doesn’t give DTSC much latitude for denial of a petition,” according to DTSC’s response.

In 2010, however, the department denied a CAG petition from residents near Santa Susana for reasons other than a lack of valid signatures. In a letter to Christina Walsh, a Chatsworth resident who petitioned DTSC to form the CAG, project director Rick Brausch wrote, “The community as a whole is split on the formation of this CAG, and having an additional group may amplify these divisions rather than facilitate meaningful communication. Having another group would also increase time demands on the state and community members who participate. As a result, DTSC has decided not to accept your petition at this time.”

In response to our questions, Consumer Watchdog stated that DTSC should not have approved the CAG because a community group already existed – the Interagency Workgroup. DTSC told our office that the two are not interchangeable because the work group, unlike the CAG, was not formed according to California law – it was originally supported by the U.S. EPA.

DTSC’s support of the CAG means that the department will participate in meetings and contribute two email meeting announcements. On its website, DTSC invited members of the public to apply to be members of the CAG. It raised \$5,000 from the responsible parties to pay for a facilitator to help get the group going and paid \$1,400 for newspaper ads. Perhaps most significantly in a community split by deep divisions over the Santa Susana cleanup, DTSC’s action gave an imprimatur to a group that is seen by some as an attempt by Boeing at “astroturfing” – setting up a fake grassroots organization that is really a front for corporate interests.

Is it true? Walsh, the woman behind the CAG, says it’s not. She said she wanted to form a new group to allow a wider range of voices from the

community. Boeing “did not manipulate anyone to form the CAG,” she said. Boeing says the same. “This was a community desire, not a Boeing movement,” said Kamara Sams, a company spokeswoman.

Critics say they find that hard to believe. The website Enviroreporter published emails between Boeing spokeswoman Sams and Walsh in 2009, before Walsh submitted her first petition for a CAG. In an August 27 email, Sams invited Walsh and a colleague to meet with Boeing’s site manager, Tom Gallacher. Three days later, Walsh emailed Gallacher, “We have been doing a lot of thinking and have requested a cag. We will need support on this, and I hope you still mean it when you said you would fund a cag. That takes a little load off the state.”

The emails are hardly a smoking gun proving that Boeing is behind the CAG. It’s not unusual for parties responsible for cleanups to underwrite community groups. About one-third of the 20 CAGs formed since 1999, when the CAG law went into effect, have received funding from responsible parties, DTSC told our office. Because of the “extremely controversial nature” of the Santa Susana cleanup, DTSC approached Boeing and the two other responsible parties, the Department of Energy and NASA, asking them to fund a facilitator to get the CAG started. All three agreed, at a total cost of about \$5,000. DTSC may ask for more money for an ongoing facilitator, said Dave Dassler, Boeing’s program director. Dassler said he and Sams attend the CAG meetings to answer questions.

While Walsh denies that Boeing engineered the creation of the CAG, she decided in January 2014 to resign because she feels that the group has become dominated by a vocal minority opposed to the current cleanup plan. The group includes at least two former Boeing employees, including the project manager at the Santa Susana Field Lab from 2002 until 2007.

“As to the question of the CAG being backed by Boeing – we don’t know ...,” DTSC wrote in response to questions from our office. “If we felt the CAG was indeed just a front for Boeing or any responsible party we would recommend ending our participation in the meetings.”

The September 2012 letter from interagency work group members and others also criticizes DTSC for replacing Rick Brausch as Santa Susana project director with Stewart Black. The letter, quoted in *Golden Wasteland*, contends that Brausch was a “consistent force pushing for full cleanup,” while Black is seen as more sympathetic to Boeing. (Black is not the project director for the Santa Susana cleanup. Rather, he is the supervisor of Ray Leclerc, who succeeded Brausch as project director.)

Hirsch, the nuclear activist, contends that Leclerc, Brausch's replacement, has consistently reversed his predecessor's positions on the cleanup. While DTSC had formerly said it would not allow averaging of radioactive "hot spots" with areas where contamination was not as great in determining cleanup levels, Hirsch said, Leclerc said the department would now allow it. Leclerc also declined to say whether the department still supports the Agreements on Consent signed with NASA and the Department of Energy, Hirsch said. DTSC responded that Leclerc has not taken any position on the radioactive "hot spots," and that DTSC continues to support the Agreements on Consent.

Golden Wasteland asserts that the state tied its own hands in litigation over SB 990, the 2007 bill that requires stringent cleanup at Santa Susana, leading a federal judge to rule for Boeing. This section relies on an account from Hirsch:

Lawyers for the state entered into a stipulation with Boeing in which the state committed itself not to oppose any asserted material fact that Boeing might put forward, he said. Boeing asserted that the law had no health basis and that it would bar Boeing from selling the land, or transferring it for 50,000 years. These arguments were false, said Hirsch. "The state had said so in earlier pleadings, earlier depositions." But now the state couldn't contest it. "The judge ruled for Boeing. Now there's an appeal the state can't win."

It is true that the state signed a stipulation not to contest all but two material facts for the purposes of a federal judge ruling on Boeing's motion for summary judgment. The stated reason for the stipulation, entered on Feb. 10, 2011, was to resolve a dispute between Boeing and the state over the company's effort to compel discovery from DTSC.

Golden Wasteland contends that the state committed itself to not opposing "any asserted material fact that Boeing might put forward." Yet the state did carve out two exceptions. One had to do with the extent of Boeing's commercial activity at the site independent of its contract work for the federal government. The other involved testimony from an expert witness. The state did not agree in the stipulation that it would not oppose any material fact Boeing might assert, as *Golden Wasteland* suggests, just the facts that had already been heard in court.

DTSC told our office that the Attorney General's Office, which represented the department, interpreted the stipulation as allowing the state to object to legal conclusions put forth by Boeing and to challenge mischaracterizations of fact. Indeed, a month after the stipulation, the

state did take issue with several of 114 “uncontroverted facts” submitted to the court by Boeing.

More importantly, *Golden Wasteland* misleads by suggesting that this stipulation determined the outcome. DTSC stated in response to our questions that the case was decided on the basis of constitutional questions rather than the facts that the state agreed not to contest. The record supports this contention. According to the ruling itself, “While the facts in this case are largely undisputed, to the extent any of the facts are disputed, they are not material to the disposition of this Motion.”

The judge ruled that the state had stepped into federal jurisdiction by claiming authority over radiological contamination, and that Boeing was protected by intergovernmental immunity as a federal contractor. It is true that the judge mentioned that it might take 50,000 years to decontaminate groundwater, one of the two facts that *Golden Wasteland* says the state was unable to contest because of the stipulation. This reference occurs in a section of the ruling describing the provisions of SB 990. The judge wrote that the law would prevent Boeing and the federal government from transferring the land until DTSC certified that it has been cleaned up to the SB 990 standards. Indeed, a year earlier – well before the controversial stipulation cited in *Golden Wasteland* – the state had admitted as much in a court filing. The federal judge also observed that the groundwater cleanup could take as long as 50,000 years. But this is hardly an assertion that DTSC could have successfully challenged absent the stipulation: A DTSC expert had cited that figure in a deposition. Even if it could have been proven as incorrect, nothing in the decision indicates that it was material to the outcome.

Golden Wasteland states that, because of the stipulation, DTSC was not able to challenge Boeing’s allegation that “the law had no health basis.” A month after the stipulation, as mentioned above, the state did contest several “uncontroverted facts” put forth by Boeing. But even though it felt free to take issue with some of Boeing’s assertions, the state did not dispute the company’s contention that the radiological standard being used for the cleanup prior to SB 990 “fully protects human health and the environment.” State experts had conceded that point in depositions. Likewise, the state did not dispute Boeing’s statement that, “DTSC’s witnesses have admitted that the pre-SB 990 approach to chemical cleanup was fully protective of human health and the environment.” The judge relied on testimony from the state’s own experts.

Even if the state had disputed these facts, the ruling did not hinge on the question of whether SB 990 had a health basis. The judge found that SB 990 violated the intergovernmental immunity doctrine by treating Boeing,

as a federal contractor, less favorably than other responsible parties by imposing a land-use assumption that bypassed the normal process DTSC would have used to determine the required level of cleanup.

Golden Wasteland suggests that the state signed the stipulation to sabotage its own legal case as a favor to Boeing. This implicit charge is undermined by the fact that the state has appealed the district court's decision.

Senate Office of Oversight and Outcomes

1020 N Street, Suite 560

Sacramento, CA 95814

Telephone: (916) 651-1518

Facsimile: (916) 414-3702

<http://www.sen.ca.gov/oversight>

Director Randy Chinn • randy.chinn@sen.ca.gov

Office Manager Monique Graham • monique.graham@sen.ca.gov

Principal Consultant John Hill • john.hill@sen.ca.gov

Principal Consultant Dorothy Korber • dorothy.korber@sen.ca.gov

Principal Consultant Jim Sweeney • jim.sweeney@sen.ca.gov

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