

VICTOR M. GORDO  
City Council  
COUNCILMEMBER  
District 5



GENE MASUDA  
City Council  
COUNCILMEMBER  
District 4

August 14, 2019

Dear Mayor,

As you know, on March 8, 2019 the California Department of Toxic Substances Control (DTSC) released for public comment the draft Removal Action Workplan (DRAW) for partial cleanup and development of the toxic-waste site at 3202 East Foothill Boulevard. This DRAW release was critically important to the city because it was part of DTSC's only request for public comments and only public meeting on the Foothill project and because the city is the lead agency for this project.

As lead agency, the city must "independently review and analyze any report or declaration" about the project, "circulate draft documents that reflect its independent judgment" § 21082.1.(c), and "consider specific economic, legal, social, technological, or other benefits...or negative impacts...[that] shall be based on substantial evidence in light of the whole record § 21082.4. "Compliance or noncompliance by a responsible agency [DTSC]...shall not limit the authority of...the lead agency [the city of Pasadena], to approve, condition, or deny projects" § 21081.6.(c).

Based on the review of the DRAW that Alta Environmental did for the city, on May 13, 2019 the city formally made 13 additional requests of the DTSC. In its May 13, 2019 letter, the city asked the DTSC that, prior to DRAW approval, 13 specific "comments be addressed" in its DRAW evaluation (Pasadena, 2019, p. 2). Again, the DTSC failed to give meaningful responses to most of the city's 13 requests for stronger analyses and public-health protections in the DRAW. In particular, the city's requests 3, 4, and 7, respectively, point to information that shows the need for stronger analysis and possibly new site testing:

- vapor-intrusion contamination of a large medical/urgent-care facility that abuts the east side of the toxic site, though offsite contaminant migration has never been assessed (City Request 3),
- 2019 toxic-site screening levels and cleanup goals that are thousands of times more protective than the outmoded, decades-old materials/tests used by the developer (City Request 4), and
- 2019 information about DTSC regulatory failure that necessitates third-party oversight of site management and cleanup (Request 6).

It concerns us that in the middle of the City Council's summer break, on August 5, 2019, the DTSC approved the DRAW. One day later, the DTSC filed a Notice of Determination claiming that the Pasadena toxic-waste-site project would have no significant effect on the environment (CA DTSC, NOD, 2019). California law requires that "an action or proceeding alleging [either] that a public agency has improperly determined whether a project may have a significant effect on the environment" (§ 21167 (b)) or " that another act or omission of a public agency does not comply with this division shall be commenced within 30 days from the date of the filing of the notice [of determination]" (§ 21167 (e)). California law thus dictates that the City Council has 30 days from August 6, 2019, to file an action alleging that the CA DTSC either has improperly determined that this project will not have a significant effect on the environment or has omitted important considerations in its determination.

Because, in our view, the DTSC has not responded adequately to the city's attempts to protect its residents and to provide full information about this project to us, we believe the city council should be provided an opportunity to fully review and consider the DTSC's response to the city's comments and approved DRAW The residents of our city deserve our trust and our protection. As the DTSC (Response, p. v) makes clear:

"Since the City is the CEQA lead agency for the whole transit priority project, decisions on the CEQA document rest with the City."

We are requesting that the City Council carefully review the DTSC's response to our comments and schedule for discussion (and potential action) at an upcoming City Council meeting prior to the 30 day deadline. We now have less than 30 days to protect our residents and to ensure their trust that this project will be fully analyzed before it begins.

Sincerely,



Victor M. Gordo  
Councilmember  
District 5



Gene Masuda  
Councilmember  
District 4

cc: Pasadena City Council  
Steve Mermell, City Manager  
Mark Jomsky, City Clerk  
Michele Bagneris, City Attorney  
All Public Commenters from May 13, 2019 City Council Meeting

## ADDENDUM

### The City's 13 Formal Requests to Strengthen the DRAW

**Request 1.** The city requested a “DTSC-approved sampling plan” for RDX and TNT, and also “the use of third-party oversight, on behalf of the city,” especially in “the DRAW’s soil-management plan” (Pasadena, 2019, pp. 2-3). Although DTSC responded that “the developer is developing a work plan to sample for RDX and TNT” and PFAS (DTSC, Response, pp. 8, 191), DTSC made a nonresponsive reply to the city’s request. It said “there is no regulatory requirement for a third-party monitor, and therefore DTSC cannot impose this requirement” on the developer (DTSC, Response, p. 64).

However, as “lead agency,” the city can impose whatever requirements it needs to protect its residents, including third-party oversight of a toxic cleanup in its own city. This oversight is especially needed because of new information—released on February 27, 2019, seven months after the city council approved the project in July 2018. This new information is that the Joint CA Senate and Assembly Legislative Oversight Committee on DTSC concluded in 2019 that despite 7 years of “internal and external efforts to improve DTSC,” DTSC continues to have “an inadequate and unresponsive regulatory program.” The state oversight committee said DTSC is plagued with “glaring failings in....mishandling...enforcement;” “delayed site remediation;” “failed public participation and transparency activities,” including “not properly enforcing state and federal law;” “likely using outdated technologies, practices, and safeguards” and “potentially releasing hazardous wastes into the environment” (CA Senate/Assembly, Oversight, 2019, pp. 9,7,4,5).

**Request 2.** The city requested “clarification of mitigation measures” for TPH “following confirmation sampling” (Pasadena, 2019, p. 2), but instead of giving details of all post-confirmation mitigation measures, the DTSC requested no additions to the DRAW and made a nonresponsive reply to the city. This reply consisted of only one sentence that merely repeated facts from the RAW: “TPHs cleanup levels are provided in the proposed RAW...” (DTSC, Response, p. 63).

However, the city’s and Alta Environmental’s request for clarification of “mitigation measures” is critical because site confirmation testing covers only the (far-less-than-one-percent of) surface soils where suspected hot spots that were excavated; no confirmation sampling will be done on 99.5 percent of the site surface that are not suspected hot spots (Ninyo and Moore, RAW, p. 45, 63, 71). Yet, as the city and Alta Environmental request, clarification of site mitigation after confirmation testing is critically necessary because confirmation testing covers only the 12 tiny suspected hot spots, although the developer’s own data show that these tiny hot spots do not contain 80-95 percent of the onsite locations with the highest excess TPHs, VOCs, PAHs, and heavy metals (Ninyo and Moore, Remedial Investigation (RI), Appendix D, respectively, Table 7, 3, 9, 12). Thus, the onsite locations that most need confirmation testing won’t get it, and therefore site cleanup will be inadequate.

**Request 3.** The city questioned 2 points in its third request. First, it questioned “mass grading of an area with known elevated...VOCs in soil vapor,” that is, “moving VOC-impacted soil to other parts of the property.” Second, it questioned “that the source of the VOCs” will not have “been adequately removed” (Pasadena, 2019, p. 3).

In response to the city's first charge in request 3 (challenging grading and moving contaminated soils from the north to the south part of the site), DTSC responded with a false claim: "The soil intended for mass grading is to be taken from the northern section of the site, which is considered to be clean soil" (DTSC, Response, p. 63). The soil in the northern part of the site is not "clean" regarding VOCs, as DTSC says, because the developer's own data tables show that 87 percent of the site's highest/not-allowed levels of carcinogenic VOCs are not in hot spots/drains (which will be removed). In fact, the developer's own tables show that 96 percent of the high levels of carcinogenic VOC (that aren't in hot spots) are from the northern part of the site---which thus is not clean). Moreover, the northern part of the site could not be clean, as the developer again admits that carcinogenic "VOCs were detected in soil gas throughout the site in all areas and at [all] depths"---and are the site's main or highest "risk drivers," whose dangerous "concentrations... are relatively uniform across the site" Thus there is no clean "northern" part of the site (Ninyo and Moore, Remedial Investigation (RI), p. 28 and RI, Appendix D, Table 3).

In response to the city's second charge in request 3 (that the "source" of the VOCs won't be removed), the DTSC gave no reply whatsoever. The DTSC completely ignored the city's request. Yet Alta Environmental and the city are right. If contaminant "sources" aren't removed, pollution will continue virtually forever, land-use controls will be needed virtually forever, property values will be harmed virtually forever, and people will be at risk virtually forever.

Moreover (see discussion of city comment 5 below), because the site VOC "sources" won't be removed and have not been characterized, either by giving 3-D coordinate dimensions or by tracing VOC-migration routes offsite, there is great potential for offsite harm, especially at the Kaiser Permanente Medical and Urgent-Care Facility that abuts the entire East site of the toxic site.

**Request 4.** The city requested information "about the general use and benefit of LUCs [land-use controls]" and the potential for "exposure to any contaminated soils" (Pasadena, 2019, p. 3) but DTSC made a non-responsive reply to the city's request, a response that merely repeated what was already in the RAW, but provided no discussion of the use and benefit of LUCs at the site. DTSC said: "The implementation of land use covenants (LUCs)...imposes appropriate limitations on land use to ensure that the site remains safe for its intended use. The cleanup goals as listed in the proposed RAW are protective of future residents" (DTSC, Response, p. 63).

However, if the cleanup goals were truly protective of future residents, as DTSC claims, there would be no need for LUCs to protect against carcinogenic VOCs. Instead, LUCs are needed because the developer's cleanup goals for carcinogenic VOCs---listed in the RAW (p. 37) and repeated by the DTSC in its response (pp. 15-16)---are far less protective than used in California today. For example, for trichloroethene or TCE (that causes cancer, child birth defects, and low IQ), the developer's cleanup goal is **5213 times less safe than the most protective toxic-site cleanup levels, used in 2019 in the state of California** (CAL-EPA, 2019). There is no reason that the city must use less safe cleanup goals than the state of California requires, and thus to be forced to use land-use controls, especially because the developer admits that full cleanup of the site is "technologically feasible" (Ninyo and Moore, RAW, p. 51).

The developer's failure to use the current, most protective toxic-site cleanup goals is partly a result of new 2019 information that was released after the July 2018 approval of the SCEA. This new information is that in 2019 both CA DTSC and the CA Water Board introduced new, much more protective site-screening lev-

els for toxic sites, based on updated toxicity findings. However, the CEQA process must be re-opened because the site RAW neither used these new 2019 screening levels (which also are typically used for site-cleanup levels), nor did site tests capable of accommodating these new screening levels---given that the old (2007 and earlier) site tests had weak detection limits, incapable of meeting the new 2019 screening levels. Hence the CEQA process needs to be re-opened, so that new testing can be done using the latest screening levels that are thousands of times more protective than those used by the developer's consultants.

**Request 5.** The city requested "incorporating additional language to the DRAW" because "groundwater and deeper soils...have not been fully investigated and characterized" (Pasadena, 2019, p. 3), but in response, the DTSC made a nonresponsive reply. This nonresponsive reply from DTSC merely re-stated what was already in the DRAW: "The groundwater well installation workplan will be developed as part of the cleanup activities. The Prospective Purchaser Agreement, a legal agreement between DTSC and PGL [the local LLC name of the developer Trammell Crow], established that groundwater investigation will be initiated by PGL" (DTSC, Response, p. 64).

However, because the DTSC did not discuss and remedy the problem that the site has never been fully characterized (as the city and Alta Environmental point out in this comment), DTSC has not addressed 3 crucial site-characterization problems in the RAW.

First, although full site characterization has not been done, both US EPA and CAL-EPA require full site characterization as a necessary condition for site cleanup. They both say that site characterization, at a minimum, requires (a) doing "representative sampling" for all site contaminants in all media, including soil, soil vapor, and groundwater; (b) determining "the three-dimensional distribution of each source" of each contaminant, and (c) determining "the distance over which [contaminant] releases have migrated"---none of which has been fully accomplished at the Pasadena site (US EPA, Guidance on Site Characterization, 1989, pp. 3-28; 2-10, 2-11, 2-12; 1-6; CA DTSC, Vapor Intrusion Guidance, 2011).

Second, because full site characterization has not been done, therefore no one knows either (b) above, 3-D contaminant-"source" distribution or (c) above, offsite contaminant migration. Yet because the developer's Remedial Investigation shows extraordinarily high levels of soil VOCs within only feet of the large Kaiser Permanente medical and urgent-care facility (that abuts the entire east side of the toxic site, it is clear that full site characterization (including assessing offsite, subsurface, contaminant migration under Kaiser Permanente) must be done before any site development.

Third, because full site characterization has not been done, the site RAW has not followed the CA DTSC guidance on vapor intrusion. This guidance clearly says that "uses of adjacent properties should be determined in order to evaluate potential exposure associated with offsite migration of subsurface contamination [through vapor intrusion and]....Public outreach should begin as soon as volatile chemicals are detected in the subsurface at locations near or adjacent to existing or proposed buildings [like the Kaiser Permanente medical facility]" (CA DTSC, Vapor Intrusion Guidance, 2011, pp. 4-5).

**Request 6.** The city requested "the use of third-party oversight, on behalf of the city," especially in the DRAW's soil-management plan (Pasadena, 2019, p. 3), but DTSC made a nonresponsive reply to the city's

request. This nonresponsive DTSC reply was that “there is no regulatory requirement for a third-party monitor, and therefore DTSC cannot impose this requirement” on the developer (DTSC, Response, p. 64).

However, as “lead agency,” the city can impose whatever requirements it needs to protect its residents, including third-party oversight of a toxic cleanup in its own city. (See the discussion of Request 1 above, indicating that third-party oversight is especially needed because of new information. This new information is that in late February 2019, the state oversight committee confirmed that DTSC has failed as a regulator and cannot always be relied upon to protect citizens from toxic wastes---a fact that strengthens the city’s request for third-party oversight.)

**Request 7.** The city requested “that groundwater testing...be done prior to construction...to ensure that the project does not preclude future groundwater cleanup efforts” (Pasadena, 2019, p. 3), but in response, DTSC made another nonresponsive reply. DTSC’s nonresponsive reply merely repeated what was in the RAW and claimed: “DTSC determines that the planned groundwater investigation is technically applicable for the site” (DTSC, Response, p. 64).

However, the city’s and Alta Environmental’s request for pre-construction groundwater testing is correct and absolutely necessary. Adhering to DTSC’s 2011 Vapor Intrusion Guidance requires mitigating VOC soil and groundwater sources and vapor intrusion prior to occupancy and demonstrating this fact through quantitative uncertainty analysis (DTSC, VIG, 2011, pp. 37 and also 17, 23, 24, 36, 40-41). Hence, the RAW---that rejects pre-construction groundwater testing and remediation---is contrary to the 2011 DTSC Vapor Intrusion Guidance.

US and CAL-EPA mandate that site soils cannot be remediated without prior groundwater testing. That’s why US EPA “technical guidelines” require testing groundwater, so as to locate soil-contaminant sources and their migration patterns; otherwise US EPA says “complete... remediation of... sources” is impossible (US EPA, 2015, pp. xv, 107, 146-147). Groundwater must be tested, prior to construction, so that any soil “sources” of toxins (that are contaminating groundwater) can be removed, prior to construction. Soil sources of groundwater contamination cannot be removed, once buildings are on the site, as DTSC admits (DTSC, Response, p. 53). If not, site land-use controls would have to be virtually permanent, because the soil-contaminant “sources” would continue pollution.

**Request 8.** The city requested “full analysis and documentation to support the claim of technical impracticability of meeting the [project site’s] unrestricted-use scenario, and an explanation as to why this DRAW is relying on land-use-restricting covenants when unrestricted use of the property is the goal” (Pasadena, 2019, p. 3). However, in response, DTSC made another nonresponsive reply. DTSC’s nonresponsive reply was that “DTSC will review site confirmation sampling and post-removal action soil gas survey results and will make the determination whether additional action is required with a site-specific human health risk assessment” (DTSC, Response, p. 64).

Instead, DTSC needs to tell the city why the DRAW uses weak cleanup goals and therefore relies on land-use controls. The city deserves an answer to this question because the developer admits that full cleanup is “technologically feasible” but not “practicably feasible” because it is more expensive and because the developer wants to finish any needed cleanup in only 3 months (Ninyo and Moore, RAW, pp. 51-52, 75).

**Request 9.** The city requested “an explanation as to why a RAW,” instead of a RAP, is being used for the site (Pasadena, 2019, p. 3). DTSC responded that “under state law, a remedial action plan is required for project that is estimated to be over \$2 million; typically considered to be more complex. This removal project is estimated to be \$1.913 million, therefore a removal action workplan was developed” (DTSC, Response, p. 64).

However, the developer’s own documents show that even partial “cleanup” could cost \$2.2 million (eg, Ninyo and Moore, RAW, p. 52).

**Request 10.** The city requested “an explanation” of “whether the proposed slurry cap” for the site “is a mitigation measure or a land-use-restricting covenant” (Pasadena, 2019, p. 3), but again the DTSC gives the city a nonresponsive reply. DTSC’s nonresponsive reply merely restates facts about slurry caps and LUCs and does not give any explanation. DTSC says “A slurry cap is a remedial method because it prevents further exposure of contaminants.....” (DTSC, Response, p. 64).

However, the RAW (Ninyo and Moore, p. 46) says quite clearly that “if a slurry cap is placed on the site, a land use covenant (LUC) will be required,” and DTSC does not address this fact in its response. Moreover, if a slurry cap is placed on the site---instead of cleaning up deeper soil that has been shown to be contaminated--- and then buildings are put on top of the soil, it will be impossible to later remove these soil- and water-contaminant “sources,” as DTSC admits (DTSC, Response, p. 53), and these “sources” could continue to pollute soil and groundwater, forcing site LUCs to be permanent.

Because DTSC failed to answer this and other city requests for information about site LUCs, the net consequences of site LUCs could be overwhelmingly negative. The health costs, economic-development costs to the city, and stigmas costs of site LUCs could be extensive. As a result, LUCs could transfer many site liabilities to future Pasadena taxpayers.

**Request 11.** The city requested “an analysis of the adequacy of controls, land-use covenants, for all proposed future uses” (Pasadena, 2019, p. 4), but again the DTSC gives the city a nonresponsive reply. DTSC’s nonresponsive reply merely restates facts about LUCs and does not give any analysis. DTSC says “a land use covenant is a legal agreement between DTSC and the property owner that runs with the land. It is binding....” DTSC, Response, p. 64).

Because DTSC failed to answer this and other city requests for information about site LUCs, see request 10 above for discussion of the net negative consequences of site LUCs.

**Request 12.** The city requested an analysis of “the life-cycle costs of any proposed land-use covenant” (Pasadena, 2019, p. 4), but again the DTSC gives the city a partially nonresponsive reply. DTSC’s nonresponsive reply merely states an opinion---without any analysis or economic documentation--- that “Life-cycle cost of LUC is considered to be minimal” (DTSC, Response, p. 64).

Because DTSC failed to answer this and other city requests for information about site LUCs, see request 10 above for discussion of the net negative consequences of site LUCs.

**Request 13.** The city requested an analysis of “the difference in property values of an unrestricted site compared to a site with land use restricting covenants” (Pasadena, 2019, p. 4), but DTSC did not answer the question. Instead DTSC replied that “DTSC does not perform calculation of property value based on whether a land use covenant is needed for the site. This is not an environmental issue and is not germane to the DTSC’s approval of the RAW” DTSC, Response, p. 64).

However, DTSC’s response is questionable because CEQA law clearly says that “in describing and evaluating a project in an environmental review document...the lead agency [the city] may consider specific economic, legal, social, technological, or other benefits...and the negative impacts.... Any benefits or negative impacts considered...shall be based on substantial evidence in light of the whole record. §21082.4.

Thus, the city is completely within its rights to ask DTSC to force the developer to analyze and calculate the potential economic gains or losses to the city, as a result of LUCs. After all, the developer is using LUCs, mainly because it is cheaper for him than full cleanup ( Ninyo and Moore, RAW, pp. 51-52, 75), so the city has a right to know what costs, if any, will be imposed on the city and on taxpayers because of the developer’s desire to use LUCs.