EL CC Environmental Law Community Clinic
3122 Shattuck Avenue, Berkeley, CA 94705
phone 510/540-1134 fax 510/ 540-1170

8R-97-R9

June 5, 1997

Carol Browner, Administrator
United States Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

Dear Ms. Browner:

This is a complaint under Title VI of the Civil Rights Act of 1964 by the Chester Street Block Club Association (CSBCA), a grassroots community group whose members are African-American and Latino residents of West Oakland, California living adjacent to the construction of a major freeway, the Cypress Replacement Project. CSBCA alleges that the California Environmental Protection Agency, Department of Toxic Substances Control (DTSC), by approving the Removal Action Workplans (RAWs)[1] of California Department of Transportation (Caltrans) and Southern Pacific Transportation Company (SP) for the Cypress Site, and by its ongoing failure and refusal to require adequate remediation of toxic hazards at and near the site, has discriminated against nearby West Oakland residents on the basis of race, color, or national origin, and therefore, has violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and the Environmental Protection Agency's implementing regulations, 40 C.F.R. Part 7.

DTSC is a recipient of EPA assistance pursuant to 40 C.F.R. § 7.25.2 DTSC has continuously, by both action and inaction, discriminated against CSBCA and its members. Its refusal to require clean-up of toxic contamination, including but not limited to its approval of the RAWs of Caltrans and Southern Pacific on December 23, 1996 and its actions and failures to act since that date, violate its obligations under Title VI. This complaint is thus timely filed under 40 C.F.R. Part 7.120(b)(2).

DTSC has placed the proverbial last straw that has broken the back of the residents of this West Oakland community. DTSC's

---

1 California Health & Safety code §25356.1(c).

2 DTSC is subject to the nondiscrimination requirements of Title VI because it is a recipient of federal funds from U.S. EPA. U.S. EPA grants to DTSC for current projects total more than $1.7 million (Federal Grant ID #824433010).

6/10/97
T.C

recent careless approval of and failure to require adherence to the terms of the RAWs has precipitated the filing of this complaint. Among other things, DTSC accepted inept plans by Caltrans to allow contaminated soil and groundwater to remain during construction at the Cypress site, rather than conducting a comprehensive clean-up prior to construction, and has been deliberately indifferent in its monitoring of Caltrans' compliance with its RAW. Furthermore, DTSC has approved the SP RAW for work after the freeway construction, which proposes paving over the on-site contamination rather than cleaning it up.

Both the Caltrans and SP RAWs were submitted in response to DTSC's Imminent and Substantial Endangerment Order No. 93-94-018, which was issued to D.C. Metals on April 26, 1996 with the objective of protecting human health and the environment with respect to chemicals present in the soil and groundwater at the Cypress Site. Soil and groundwater contamination at the Cypress Site include heavy metals and many volatile organic compounds, including vinyl chloride, a known human carcinogen, oil, pesticides, arsenic, and lead. Even at very low levels of vinyl chloride exposure by inhalation, ingestion or absorption through the skin, this compound "poses an increased cancer risk to people, especially infants and children. . .[as well as] a reproductive risk to males." (U.S. EPA, DC *Metals Fact Sheet,* December 1996). Despite these dangers, Caltrans proposed and DTSC approved, installation of freeway footing pilings through the plume of vinyl chloride-contaminated groundwater.

DTSC involvement in the project goes beyond cursory approval of the Caltrans and SP RAWs. DTSC is also responsible for the establishment of policies for supervision of removal actions and responsible parties at hazardous substance release sites. (Health and Safety Code S25355.7) DTSC policies must "recognize the dangers to the public health and the environment posed by a release and the need to mitigate those dangers." (Health and Safety Code §25355.7(a)(4)).

DTSC has had the opportunity on various occasions set forth below to take actions which would result in an actual positive difference to the health and environment of this community and has instead chosen to do things that are clearly less effective and less protective.

These actions amount to environmental racism. DTSC has discriminated against the community surrounding the Cypress site on the basis of race, ethnicity, or national origin, in violation of Title VI of the Civil Rights Act of 1964. The community affected by DTSC's approval of the RAWs is a long-established, cohesive residential community, composed of both homeowners and renters immediately adjacent to the Cypress Site construction. Roughly 91 per cent of its members are people of color; African-Americans comprise the majority of the community.

DTSC's involvement at the Cypress site represents a breach of its duty to serve communities equally, regardless of the race,

ethnicity, or national origin of the community's members. DTSC is the guardian of the health of the residents living near the Cypress Site, and DTSC has shown total disregard for the impacts of the Cypress project on the lives of community members.

CSBCA urges that this complaint be promptly investigated and resolved by U.S. EPA. Caltrans is currently preparing a draft Removal Action Workplan for the construction of a park on land adjacent to the Cypress Site. CSBCA is concerned that, without timely intervention by EPA, DTSC will again allow inadequate clean-up that threatens the health of members of the community--particularly children who will use the park.

About the Comolainants

Complainant Chester Street Block Club Association (CSBCA) is an unincorporated association with a membership that includes homeowners and residents of this West Oakland community. CSBCA is a long-standing community group, and a member of the West Oakland-South Prescott Environmental Task Force ("the Task Force"). The Task Force was convened with the help of the U.S. EPA because the community residents were frustrated with the lack of responsiveness from the DTSC. CSBCA convened the Task Force to demand accountability from local and state agencies charged with regulatory oversight of the site. CSBCA is concerned primarily with the health and safety implications, as well as the other environmental and socio-economic impacts, of the Cypress Replacement Project on their community.

About the Communitv

The community is roughly bounded to the east by Mandela Parkway, to the south by 3rd Street, to the west by the rail corridor, and to the north by West Grand Avenue. Many members of the community grew up in the area; some families have been residents of the community for several generations. The community hosts many historic properties, and has a strong cultural life--integral components to the vitality of communities of color in the Bay Area.

Within one-half mile of the Cypress Site, there are four schools (Cole Elementary, Prescott Elementary, Pentecostal Elementary, and St. Patrick Elementary), a health center (West Oakland Health Center) and five day care centers (Cora's July Like Home Daycare, Chester Street Tot Lot, Lang's Daycare, Thurgood Marshall Family Resource Center, and St. Vincents Day Home). In addition, there are approximately 4,500 residents within this same one-half mile radius of the Cypress Site.

Over the years, the growing industrial presence in West Oakland has encroached upon this residential community. The community has responded by organizing and fighting the detrimental influences of toxic producers, yet it continues to be an

uphill battle to keep the community a safe and clean place to raise a family.

Multiple environmental hazards are present in the West Oakland community, including a sewage treatment plant, a federal Superfund site, and mass transit structures. Following the Loma Prieta earthquake of 1989, despite huge community opposition, this West Oakland residential neighborhood was targeted as the host of the new Cypress freeway, a heavily-travelled addition to the Bay Area's highway system. The emission by motor vehicles of carbon monoxide, ozone precursors, and particulates results in an increase in the risk of lung disease and cancer for the residents living in close proximity to the freeway.

It is in this context that DTSC approved the Caltrans and SP RAWs for the Cypress Replacement Project. Not only does the project itself represent a negative impact to the health of the residents, but DTSC approved a method of doing work before and after the project that is economically beneficial for Caltrans and SP, while it needlessly and arbitrarily jeopardizes the health and safety of the many families who are forced to live with a multitude of environmental hazards.

U.S. EPA itself expressed concern over the Caltrans RAW. In EPA's comments on the RAWs for the Cypress Site, it communicated its fear that the installation of the freeway pilings, as per the Caltrans RAW, might create a pathway for the migration of contaminants into deeper portions of the underlying aquifer. U.S. EPA also said that Caltrans' claim that "[r]ecent air monitoring (October 1995) found no detectable levels of vinyl chloride in the air above the Site...Thus, it appears that the air quality at the Site is not substantially different from levels observed in other Bay Area cities," was not adequately substantiated by the data. EPA attacked Caltrans' uncertain emissions and dispersion modeling, and general paucity of data. (U.S. EPA Region IX, *Comments on Removal Action Workplans*, September 6, 1996). Despite the raising of these concerns by EPA, DTSC approved the Caltrans RAW.

The SP PAW similarly disregarded the health and safety of the community surrounding the Cypress Site. SP proposed placing an asphalt cap over the on-site contamination after the freeway is constructed, and placing restrictions on the deed to the property to ensure that future users are aware of and may not disturb contamination left on the Site. SP concluded that remediation is neither economically feasible nor *necessary* to protect the health and safety of the surrounding community. DTSC went along with this conclusion, despite community concerns and documented problems of toxic contamination.

Given the seriousness of the toxic threat involved, as well as the history of seismic disturbance at the Cypress Site, nothing short of full clean-up is sufficient to protect the health and safety of the community. Anything short of full clean-up represents a violation of the community's civil rights.

DTSC's Discriminatory Course of Conduct

1. ***DTSC has ignored and condoned toxic contamination.***

DTSC has a ***long history*** of doing little to nothing to protect the health of this largely African-American and **Latino** community. DTSC has villfully ignored industries in the **area** which caused major contamination in soil. It ignored comments and suggestions made by the Task Force about the best way to clean up existing contamination. DTSC approved both the Caltrans and SP RAW for the Cypress Replacement Project, allowing the continued existence of and probable release of hazardous substances, including vinyl chloride. It has overlooked countless violations on the part of Caltrans in its implementation of the RAW. In so doing, it has turned its back on a community that is plagued by countless environmental hazards. DTSC's deliberate decision to accept little or no clean-up hurts this community much more than it would hurt communities faced with fewer hazards, if indeed DTSC would accept so little clean-up such communities.

U.S. EPA itself has **recognized** the seriousness of the toxic threat posed by the existence of vinyl chloride. On **December 2,** 1996, EPA began remediation of an adjacent site, **DC** Metals, as authorized under CERCLA, 42 U.S.C. **§9601.** ***et seq,*** due to the immediate threat to the public health and environment of the surrounding West **Oakland** community. (U.S. EPA, ***DC Metals Fact Sheet,*** December 1996). This adjacent clean-up by EPA points to both the practicality and the need for full remediation of the Cypress site. CSBCA believes the U.S. EPA action at DC Metals provides a unique opportunity for remediation of the entire vinyl chloride plume--an opportunity which DTSC has deliberately rejected in favor of plans that continue to expose the community, and especially members of CSBCA, to toxic hazards.

DTSC's disregard for the West **Oakland** community's health and safety extends well beyond the events of the last year. DTSC's inspectors (formerly the Department of Health Services) knew of vinyl chloride contamination in the 1980's and failed to take any action on remediation.

DTSC's gross indifference to the residents of West **Oakland** is also shown by its disregard for even keeping accurate records. Files relating to the existence of vinyl chloride contamination in West **Oakland,** compiled in 1988 and 1989, were declared "missing" by DTSC in the spring of **1996.**[3] No follow-up action was taken, and DTSC has no explanation for this aggressive inaction. Additionally, DTSC has no explanation as to why it took nearly 10 years to issue an Imminent and Substantial Endangerment Order (Docket No. I/SE 93-94-018, Health **&** Safety code **§25358.3(a)(1)),** for the vinyl chloride contamination in the neighborhood.

---

[3] DTSC has a history of "losing" documents pertaining to this site, including documents submitted by members of the public, such as the Clearwater Revival consulting organisation.

DTSC has also willfully segmented the multitude of projects dealing with the environmental hazards at and near the Cypress Site to avoid having to require and participate-in a comprehensive clean-up. By approving all these separate projects, DTSC is deliberately avoiding requirements to conduct a comprehensive clean-up.[4] There are currently 3 separate removal actions proposed for this polluted community in the last 6 months.' There is yet a fourth and more expensive Removal Action Workplan in the works, directed to a planned park next to the freeway.

This "piecemealing" of the clean-up of multiple hazards affecting the same locality and the same residents of color shows DTSC's deliberate effort to avoid implementing a comprehensive environmental remediation for the site. DTSC's apparent attitude of not wanting to be bothered to do its statutorily mandated job has a disproportionate adverse impact on this African-American and Latino community because of preexisting environmental and health insults that DTSC and other agencies have done nothing about for a long time--not only would DTSC not behave this way in

---

[4] California law distinguishes between Removal Actions and Remedial Actions. A removal action is an interim measure, defined as including:

> the cleanup or removal of released hazardous substances from the environment or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release.

Health & Safety Code § 25323.

> A remedial action, by contrast, consists of: those actions which are consistent with a permanent remedy, that are taken instead of, or in addition to, removal actions in the event of a release or a threatened release of a hazardous substance into the environment.

Health & Safety Code § 25322.

Despite the many documented environmental hazards in the area of the Cypress Site, no remedial action has been designated; instead, DTSC is approving a series of interim removal actions.

[5] Two of the RAWs, as discussed above, address what is usually referred to as the former Bobo's Junkyard property, located at 3rd and Mandela Street. SP owns this property; Caltrans has an easement for the construction and placement of freeway columns, footings, piles and aerial structures. The first RAW was prepared by Caltrans addressing Caltrans' plans to implement the use of an asphalt cap instead of excavating soil for the installation of the Bent 23CR structure. The second RAW was prepared for SP to address SP's plan to manage that same property in the future.

The third RAW addresses the creation of a soundwall for the new freeway, which is adjacent to the SP property.

a wealthier white area; even if it did, it is likeiy that the people in the community would not be at such a health risk from the results of DTSC's indifference to the actual clean-up.

2. ***DTSC has ignored and willfully disregarded the legitimate concerns and input of the community.***

DTSC's response to community concerns has been inadequate, and represents once again the discriminatory intent behind and impact of DTSC's activities on the community. As required by law, DTSC created a Cypress Freeway Reconstruction/Local Coalition Community Action Committee ("CAC") to assist in the decision-making process before RAW approval, yet it failed to provide the community with responsive avenues for voicing their concerns and ideas. Because of frustrations with the lack of responsiveness from the DTSC, the residents, with the help of U.S. EPA, created the Task Force specifically to deal with the problems in the vicinity. For example, DTSC complained that it received too many phone calls from concerned residents and directed the community to appoint a representative to place phone calls. Even then, the community was given a phone number to call only during business hours, even though the approved (though not observed) construction hours at the Cypress site run from 7 a.m. to 9 p.m.

DTSC has willfully ignored the advice and suggestions given by the CSBCA and the Task Force. DTSC, despite its protestations of seeking community involvement, has failed to take CSBCA or the Task Force seriously, and the RAWs were approved despite overwhelming resident opposition. DTSC representatives ceased coming to Task Force meetings altogether as soon as the RAWs were approved, even though approval only exacerbated community concerns. Even when agency representatives were present at the Task Force meetings, the representatives were unable, or unwilling, to answer questions asked by community residents. Moreover, the Task Force members, including CSBCA, had to struggle to get DTSC to agree to evening meetings, the only time most residents could attend.

DTSC announced its intention to approve the RAWs at the end of the Task Force meeting on Friday, December 20, 1997--the Friday before the holidays. By doing so at the end of the meeting just days before a major holiday, DTSC purposefully limited the ability of the community to respond to this major announcement. The DTSC official who made the announcement at the meeting immediately walked out of the meeting without addressing any community concerns. Worse yet, Caltrans started construction immediately after the approval for its RAW was issued and worked around the clock during the holidays.

3. ***DTSC refuses to protect the community from lead hazards.***

Not only is DTSC guilty of segmenting and willfully avoiding a comprehensive clean-up, but it has also ignored the ongoing threat of dangerous levels of lead exposure in the soil at the

site for a proposed freeway soundwall. In the Caltrans draft RAW for the soundwall, Caltrans has represented that 840 ppm of lead in soil is an extremely protective cleanup level for lead in soil. By contrast, the US EPA Region IX preliminary remediation goal is 400 ppm and the California-modified preliminary remediation goal is 130 ppm. Based on this comparison, it appears as though the Remedial Action Objective of 840 ppm is not very protective of human health.

This extremely unprotective cleanup level is an insult not just to all children in the area, but particularly to African-American children. African-American children living in poor urban environments bear the greatest risk of lead exposure. In a comprehensive study, non-Hispanic black children under the age of 10 were found to have blood lead levels of at least .10 umol/L (2ug/dL) higher than non-Hispanic white children. The mean blood lead level for non-Hispanic black children from low-income families living in large cities was 0.47 umol/L (9.7 ug/dL). For all children aged 1 to 5 years, the mean blood lead level was 0.18 umol/L (3.7 ug/dL) (Debra J. Brody, et al., "Blood Lead Levels in the US Population: Phase I of the Third National Health and Nutrition Examination Survey (NHANES III, 1988 to 1991)," 272 *Journal of the American Medical Association 278* (1994).

DTSC and Caltrans have an extremely short memory. Less than 5 years ago at Verdese Carter Park in East Oakland (a predominantly African American and Latino community), the residents discovered that their neighborhood park was formerly a battery factory contaminated with lead. Instead of cleaning up the lead properly, the City of Oakland had decided to cover the soil with asphalt to create a "park". Not surprisingly, the contaminants began oozing through cracks in the asphalt. Caltrans and DTSC have purposefully forgotten this very recent and very bad experience at the Verdese Carter Park, and are proposing to have the West Oakland community, including members of CSBCA and their children, repeat it.

4. *DTSC refuses to enforce even the inadequate provisions of the Caltrans RAW.*

DTSC's failure to respond to ongoing violations of the already inadequate terms of the RAWs is part and parcel of the discriminatory impact on the community as construction continues. Caltrans' violations have been numerous and severe. Their continuation represents DTSC's complete disregard for the health and well-being of the *community*. The violations include exceeding permissible construction hours, at times working 24 hours a day, as well as moving a "no dig zone" fence in direct violation of the Caltrans RAW. Although DTSC claims to have enhanced oversight, CSBCA has observed that DTSC is not fulfilling its statutory obligations. This failure to conduct proper oversight of activities at the Cypress Site results in a discriminatory impact on the community, and a violation of Title VI and its implementing regulations.

Additional violations have gone unchecked by DTSC. Caltrans' trucks are required to travel on approved routes, yet they continuously traverse the residential neighborhoods in the surrounding community. All of these activities have increased the dust and noise in the community. Community residents began experiencing bloody noses and respiratory problems in response to the construction-related dust levels well before DTSC's approval of the RAWs. Yet, DTSC's response to this community health problem amounted to a "request" that Caltrans increase dust control activities. While DTSC could require daily use of water trucks and sprinklers to mitigate the health and environmental damage caused by the dust, DTSC's response has been limited to periodic visits to the site by DTSC staff, making the enforcement of daily dust control impossible. Yet, DTSC is not even insisting on daily control, and seems satisfied by the haphazard implementation of dust control measures, at the expense of the residents' health.

Obliaations under Title VI

Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. §2000d.

DTSC, a recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by approving both the Caltrans and SP RAW for the Cypress Replacement Project, by condoning toxic contamination, by willfully disregarding the legitimate concerns and input of the community, by refusing to protect the community from lead hazards and by refusing to enforce even the inadequate provisions of the approved RAWs.

U.S. EPA must ensure that recipients of federal financial assistance are not subjecting people to discrimination. In particular, U.S. EPA's Title VI regulations provide that a U.S. EPA aid recipient "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. §7.35(b).

DTSC has approved RAWs by Caltrans and SP that allow for the continuation of toxic hazards in a residential community composed of people of color. It has inadequately supervised compliance with the approved RAWs and has been consistently unresponsive to community concerns. DTSC has rejected less discriminatory alternatives to the Caltrans and SP RAWs, such as clean-up in coordination with the EPA activity at DC Metals. DTSC has both the authority and the obligation to require full clean-up of the toxic hazards present at the Cypress Site, which it has not exercised.

The purpose and effect of DTSC's ignoring and condoning toxic contamination, ignoring and willfully disregarding the legitimate concerns and input of the community, refusing to protect the community from lead hazards, and refusing to enforce even the inadequate provisions of the Caltrans RAW, is clear: African-Americans and Latinos are forced to tolerate the continuing existence of industrial toxic hazards in their community. By approving the Caltrans and SP RAWs, DTSC has administered its program in such a way as to discriminate against people based on race, color, or national origin, in violation of Title VI and EPA's implementing regulations.

Coordination vith other Agencies

According to U.S. EPA regulations, EPA shall coordinate a Title VI investigation with another agency that has jurisdiction over the subject matter. 40 C.F.R. S7.125. A complaint under Title VI concerning Caltrans' efforts in the Cypress Replacement Project was filed with the United States Department of Transportation on June 5, 1997. EPA should coordinate its efforts with this agency.

Conclusion

By allowing for the continuation of toxic hazards in this West Oakland residential community, DTSC is contributing to the cycle of environmental injustice plaguing communities of color. DTSC both approved and is inadequately supervising implementation of Caltrans and SP RAWs which allow for the presence of life-threatening chemicals in a residential neighborhood. Moreover, this approval was in the face of intense community opposition.

CSBCA urges EPA to recognize the violation of the West Oakland community's civil rights by declaring DTSC's recent activities at the Cypress site a violation of Title VI of the Civil Rights Act of 1964, and the EPA's implementing regulations, and ordering a prompt remedy.

Remedy

U.S. EPA regulations authorize U.S. EPA to use any means to obtain compliance with Title VI that are authorized by law. (40 C.F.R. Part 7.130(a)). The regulations also require any recipient of EPA assistance that has previously discriminated to take affirmative action to remedy the effects of the discrimination. (40 C.F.R. Part 7.35(a)(7)). CSBCA therefore requests that U.S. EPA:

1. Promptly investigate this complaint;

2. Require, as a condition of continuing to provide federal financial assistance, that DTSC immediately review all past,

current, and proposed clean-up actions at and near the Cypress Site;

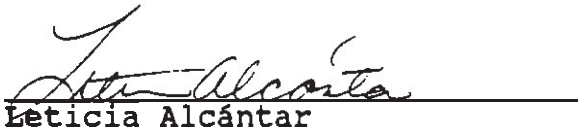
3. Require, as a condition of continuing to provide federal financial assistance, that DTSC develop a comprehensive remedial action proposal for the full clean-up of the contamination at and near the Cypress Site within 60 days;

4. Require, as a condition of continuing to provide federal financial assistance, that DTSC provide adequate financial and technical assistance to CSBCA and other groups in the West Oakland community to allow each group to participate in the preparation of the remedial action proposal and to comment on the proposal, once it has been prepared;

5. Provide CSBCA with copies of all correspondence between U.S. EPA and DTSC throughout the course of U.S. EPA's investigation and disposition of this complaint.

Respectfully submitted,

Environmental Law Community Clinic



Leticia Alcántar
Attorney for Chester Street Block Club Association
Ingrid Eberle
William Kim
Student Clinicians

cc: Rafael DeLeon
U.S. EPA Office of Civil Rights

Felicia Marcus, Regional Administrator
U.S. EPA Region IX

Rodney Slater, Secretary
U.S. Department of Transportation

Jesse Huff, Director
California Department of Toxic Substances Control

James van Loben Sels, Director
California Department of Transportation

Representative Ron Dellums

State Senator Barbara Lee

State Assembly Member Don Perata