

CHAPTER 6

Toxics

See Pg...101



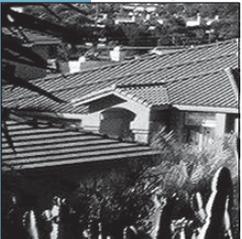
See Pg...102



See Pg...103



See Pg...106



Toxic Substances, CEQA, and the Choices We Make <i>Ed Lowrey</i>	101
Common Sources of Toxics in California <i>PCLF Staff</i>	102
Toxics at Hercules Bayfront Boulevard <i>Richard Drury</i>	103
Labor and the Environment <i>Aram Hodess</i>	103, Sidebar
Dow Chemical Plant Expansion <i>Will Rostov & Catherine Engberg</i>	105
Pesticides Discovered in the Soil at Site of Future San Diego Homes <i>Kevin K. Johnson & Jared P. Hanson</i>	106

Toxic Substances, CEQA, and the Choices We Make

By Ed Lowrey

Toxic substances surround us. They are in the products we use, the air we breathe, the food and water we drink, and the land upon which we live and work. They get there as intended additives to products, as waste leaching from those products when they are disposed, or as waste byproducts of industrial and other processes.

It is not hard to understand why CEQA review is warranted and generally accepted for a new factory that will subject us to toxic exposures. Similarly, few would quibble with CEQA review of a facility proposal where hazardous waste is proposed to be treated or stored.

Less accepted, and less common, is the application of CEQA to the cleanup of a site polluted with toxic wastes. After all, a cleanup can only enhance public health and safety, so why subject an environmentally beneficial project to the burden of CEQA review? Based on this logic, the use of categorical exemptions, and indeed, the com-

plete absence of any CEQA review, is commonplace in the site cleanup universe.



Choices made during the cleanup of sites polluted with toxic wastes often subject those who will live and work in those sites to real and calculated risks.

Nevertheless, it is in site cleanups where far-reaching and long-lasting choices are made that cry out for CEQA analysis. These choices

often foreclose other options and subject those who will live and work in a “cleaned up” site to real and calculated risks. A cleanup is rarely a process of returning a site to a pristine state. Rather than going to the expense of removing all

contamination, we engage in a cost-benefit analysis, wherein a site is cleaned to an “intended use,” where we select a level of contamination that remains which is considered appropriate for that intended use.

Generally, the level of remaining contamination is based on risk to those who will use the site. Toxicologists perform a risk analysis based on the identity of known contaminants, the pathways of exposure to humans, the duration of expected exposure to the likely user, and the effects that exposure will have on people

who will live and work at the site. We then select an “acceptable risk.” In most cases, the controlling risk is cancer, and an “acceptable risk”

can vary from one cancer death per ten thousand people to one death in a million.

Site cleanups require the sort of far-reaching and long-lasting choices that cry out for CEQA analysis.

In some cases, the fact that treatment will occur can create its own health and environmental risks. For example, trucks transporting contaminated soil expose those in the neighborhood to diesel fumes, noise, and direct contact with

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inadequately tarped loads of contaminated soil. Or the choice of the particular treatment may create the risk. Thermal treatment systems can vent low levels of toxins to the air, thereby subjecting nearby residents to some additional risk even though a clean site may be the end result. It is not hard to imagine other examples.

The point is that by creating, releasing, and ultimately treating hazardous substances, we present ourselves with far-reaching risks and choices. Only CEQA, or another truly equivalent process,

can provide the level of public input and environmental inquiry that will hold business and government accountable in a manner that will protect the public and the environment from the short and long term hazards of toxic substances.

Ed Lowry served as the California Director of Toxic Substances Control from 1999 to 2004.



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Common Sources of Toxics in California



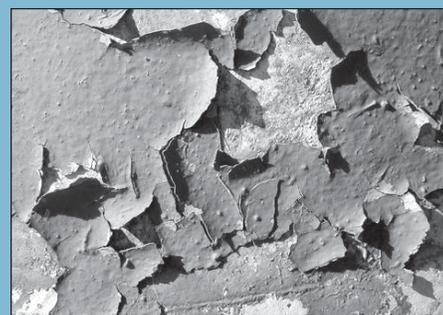
Oil Refineries



Agricultural Pesticides



Electronic Waste



Lead Based Paints in Homes Built Before 1978

Silicon Valley Toxics Coalition



Labor & the Environment

By Aram Hodess

In 1992, developers proposed a 900 unit residential development in Franklin Canyon, an undeveloped scenic area in Hercules, California. Ignoring overwhelming opposition from the community, environmental and labor groups concerned about the projects impacts on traffic, open space, endangered species, critical habitat and local area working standards, the Hercules City Council unanimously approved the project.

Community, environmental, and labor groups, including Plumbers and Steamfitters Local 159, responded by sponsoring a successful referendum overturning the approval. This success opened a lot of eyes.

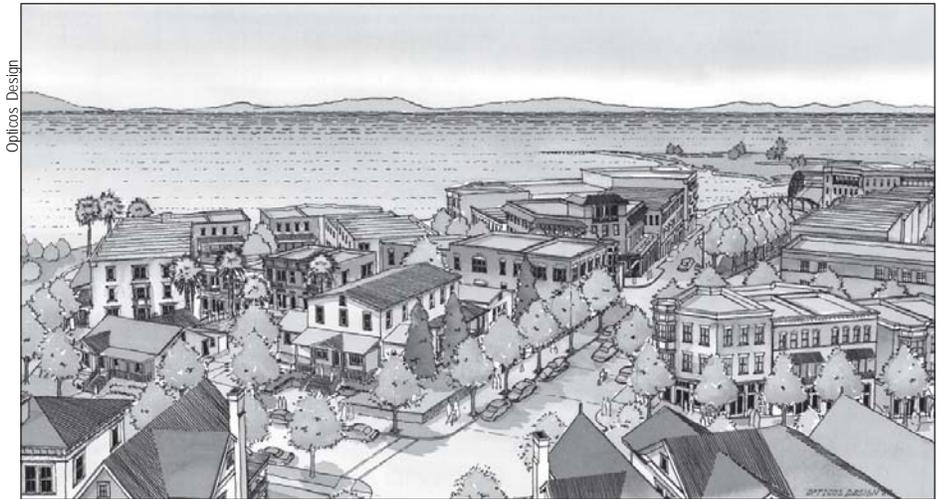
For years, the interests of working people and environmentalists have been portrayed as being in essential conflict. Developers and industry have not hesitated to capitalize and encourage the idea that this supposed “conflict” is irresolvable. Frankly, both Labor and environmentalists have contributed to this perception, with labor appearing often more interested in job creation and environmentalists appearing more interested in protecting and increasing open

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Toxics at Hercules Bayfront Boulevard

By Richard Drury

In early 2003, the Bixby Company proposed to build a mixed-use commercial/residential development on a formerly contaminated bayfront site in the City of Hercules. The site had been heavily contaminated with lead and other chemicals by the long-defunct gun-powder manufacturer, the Hercules Powder Company.



The City of Hercules extends along the San Pablo Bay, just thirty minutes northeast of downtown San Francisco. Today, many of its abandoned brownfield sites are being converted to housing. CEQA has ensured adequate clean-up of toxic materials before construction.

The proposed project appeared to be very beneficial. It would provide a mixed-use “transit village” with up to 123 units, including 39 units of affordable housing, with future access to an Amtrak station and possible ferry service to San Francisco. However, some nearby residents were concerned about the adequacy of the clean-up that had been conducted on the site.

The City of Hercules circulated a Negative Declaration pursuant to CEQA, concluding that the project would not have any significant impacts, other than impacts that were already considered and mitigated through prior CEQA documents prepared for the area.

However, the eight-year-old EIR relied upon by the City was prepared before substantial development projects occurred in the area, including the construction of over 800 residential units on an adjacent property, a Home Depot, and other commercial developments. The old EIR made no consideration of these major projects at all. Clearly, the projects would have cumulative impacts on traffic, air quality, and storm water run-off. In addition, the old EIR did not adequately consider the toxic chemical contamination on the Bayfront site.



Lead standards had become more than twice as stringent since the original cleanup at the proposed Hercules Transit Village site. In addition, the eight-year-old EIR did not account for major development projects on adjacent properties.

Extensive legal and expert comments were filed raising concerns about the adequacy of the clean-up. In particular, the experts raised concerns that lead standards had become more than twice as stringent since the site clean-up plan was developed ten years earlier, and that further soil testing was required to determine whether or not residual contamination remained on the site above the new clean-up levels.

After attending several hearings before the Hercules Planning Commission and City Council, the City, the developer, the local residents, and the unions were able to reach an agreement to resolve the issues raised in the CEQA process. This agreement allowed the project to proceed while ensuring that the contamination issues were resolved at the development.

The developer agreed to binding permit conditions to be imposed by the City requiring extensive soil sampling on the site for all of the chemicals of concern. The soil sampling will be conducted by an independent third-party consultant. If the sampling reveals any significant levels of contamination, the developer agrees to implement any and all further site remediation required by the Department of Toxic Substances Control (DTSC).

As part of the agreement, DTSC agreed to review the soil sampling results. As a result of this settlement, the Hercules transit village will be built in a manner that ensures that future residents and construction workers will not be exposed to toxic chemicals.

Richard Drury is an attorney with Adams Broadwell Joseph & Cardozo. Mr. Drury's firm represented the unions and local residents in their 2003 CEQA action.

Local residents, together with Plumbers and Steamfitters Local 159, International Brotherhood of Electrical Workers Local 302, and Sheet Metal Workers Local 104, retained legal representation and technical experts to analyze the project's impacts on air, traffic, water quality, and soil contamination.



Now that contamination issues have been addressed, construction has begun on the Hercules Transit Village. Each home meets design guidelines to blend-in with Hercules' historic buildings.

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space. The 1992 referendum and subsequent experiences taught me that our interests often intersect. By coordinating our efforts, we can encourage good development decisions, benefiting the quality of life of our members, the physical environment, and the communities in which we live.

We understand that environmental advocacy is not limited to the protection of endangered species and open space; working people and poor communities are the most impacted by industrial pollution and poor workplace practices. For example, neither construction workers who work on a project nor the eventual residents of a project should be exposed to toxic chemicals that have contaminated the project soil.

Our coordinated efforts with the community and environmentalists reflect a longer-term view of our self-interest. We've seen how traffic, congestion and overburdened infrastructure can frustrate residents to the point of adopting "no-growth" initiatives. The formation of coalitions with community and environmentalist groups can discourage reckless development proposals. Well-designed projects earn community buy-in and do not sow the seeds for harsh, community sponsored restrictions on development. Our members' livelihoods depend on it, and the entire community benefits from it.

Aram Hodess is the Business Manager of Plumbers and Steamfitters Local 159.

Dow Chemical Plant Expansion

By Will Rostov and Catherine Engberg

In December 2001, the City of Pittsburg approved the construction of a new Dow Chemical pesticide plant without requiring an Environmental Impact Report (EIR). Dow proposed to build the plant at its Pittsburg, California chemical complex, which according to Dow's website is "the largest integrated chemical manufacturing complex of its kind on the west coast." The proposed plant would replace an existing plant that was to be shut down upon project completion. The new plant would triple Dow's production of the toxic pesticide sulfuryl fluoride (SF) to 18 million pounds per year.

The planning commission approved the new plant and found the approval exempt from CEQA, citing the "replacement or reconstruction" exemption. Communities for a Better Environment (CBE) appealed the exemption to the City Council. Four months later, the City issued a *Notice of Intent to Adopt a Mitigated Negative Declaration* and noticed a public hearing before the City Council.

At the hearing and in a lengthy comment letter, CBE argued that the construction of a new pesticide plant required the preparation of an EIR. CBE's lead scientist raised serious concerns about the dramatic increase in use of hydrofluoric acid (HF) and chlorine, two of the constituents of SF. Both chemicals can be deadly on human contact, and HF in particular is one of the most dangerous chemicals known to science. A staff scientist from the

Pesticide Action Network North America (PANNA) raised issues regarding the hazards of SF. A third expert analyzed air quality impacts.

Despite clear evidence of potential hazards to workers and community members from increased SF production, and despite corresponding air pollution, noise, traffic,

The agreement required Dow to fund two additional projects in the amount of \$500,000 each. These projects will benefit public health and the environment in the region, and farm worker safety in California.

and other cumulative impacts, the City Council approved the project. Further, they disregarded city code provisions requiring a conditional use permit for the plant expansion.

CBE and PANNA sued the City for both failing to prepare an EIR under CEQA and for failing to require a conditional use permit under its Municipal Code. The City and Dow quickly came to the negotiating table. Following extensive settlement negotiations, mediated by State Senator Tom Torlakson of Contra Costa County, the parties reached a creative settlement agreement and entered into a consent judgment in July 2003.

The settlement required Dow to hire an independent consultant, agreed to by all parties, to analyze in detail the air quality and hazard impacts of the project, and to develop mandatory mitigation measures for these impacts. The consultant proposed

over thirty new measures, designed to reduce emissions and minimize accidental releases during plant operation, which Dow has agreed to incorporate into its final project design. In addition, Dow consented to a 25 percent reduction of certain air emissions from 2001 levels by the end of 2006.

The settlement also required increased public disclosure of Dow's internal SF monitoring studies, performed to determine the health and environmental effects of the pesticide. Dow will provide a number of these studies to the Department of

Pesticide Regulation and to the general public for use in setting appropriate health standards.

The City of Pittsburg agreed to retain outside CEQA counsel to train City planning staff on the CEQA process and to establish a list of qualified CEQA consultants.

Finally, the agreement required Dow to fund two additional environmental projects in the amount of \$500,000 each, for a total of \$1,000,000. To be administered by the nonprofit San Francisco and East Bay Community Foundations, these projects will benefit public health and the environment in the Pittsburg/Antioch area, and farm worker safety in California.

Will Rostov is Staff Attorney with Communities for a Better Environment.

Catherine Engberg, an associate attorney at Shute Mihaly & Weinberger, represented PANNA in this case.

Pesticides Discovered in the Soil at Site of Future San Diego Homes

By Kevin K. Johnson and Jared P. Hanson

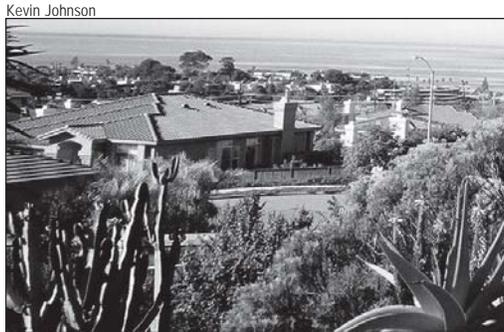
One of the more unique and most important features of CEQA is its ability to require project applicants and lead agencies to take a meaningful second look at the methods used by consultants in evaluating possible environmental impacts. In the case of a proposed forty unit subdivision on land used for decades for greenhouse operations, the future residents ended up with a big win from a public health standpoint.

The City of Encinitas, in North County San Diego, is called the “Flower Capital of the World” based on a rich history of greenhouse and field agriculture. When a respected flower grower decided to sell his land for development the buyer/builder faced a friendly reception at City Hall. The initial studies on the project resulted in a staff recommendation that the applicant proceed by way of a Negative Declaration.

The project site was immediately west of and adjacent to Quail Botanical Gardens, a twenty-seven acre public park known for its rare and endangered plant species. The park is visited annually by approximately 120,000 visitors from around the U.S. and the world.

When initially approached about the proposed subdivision, representatives of the Quail Botanical Gardens Foundation requested that consideration be given to a number of potential impacts, including the

spectacular ocean views from the Gardens. The Foundation even offered to take any excess dirt from the planned cut and fill operation on the property.



View from Quail Botanical Gardens. Families in these homes would have been exposed to toxic chemicals on a daily basis if not for CEQA.

As the project then proceeded through the Negative Declaration process a number of concerns came into focus, including view and noise impacts, impacts on the park’s indigenous wildlife, and concerns that the dirt from the property might be contaminated.

Thanks to CEQA, forty families living next to Quail Botanical Gardens can garden, dig, and play in yards free of DDT and other toxic compounds.

A close review of the limited soil study revealed that the soil samples were not taken in a random manner. One area, where chemicals like DDT and Toxaphene were mixed for decades, was not even sampled.

It was noted in public testimony that greenhouses in particular had historically used large quantities of chemicals now known to be toxic to the environment and public health.

The applicant and its soils consultant insisted to the City Council that the sampling methodology was trustworthy. In spite of a variety of impacts that the Foundation and the public felt were not being adequately mitigated, and in spite of calls for a full Environmental Impact Report (EIR), the Council approved the forty unit subdivision.

The Foundation and concerned community members took the City to court. In 1994, the Fourth Appellate District Court of Appeal reversed the Superior Court’s decision and ordered the City to perform a full EIR. (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597.)

Subsequent, random soil testing resulted in the finding that the levels of toxic chemicals in the ground constituted unacceptable risks to human health. The applicant was directed by the City to remove the contaminated soils before it began construction of single family homes.

Today, thanks to CEQA, forty families live in the subdivision next to Quail Botanical Gardens where they can garden, dig, and play in yards free from silent exposure to DDT and other toxic compounds.

Kevin K. Johnson and Jared P. Hanson are attorneys at Johnson & Hanson, LLP. The firm represented Quail Botanical Gardens Foundation, Inc. in this case.

