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BOARD OF ENVIRONMENTAL SAFETY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

Hazardous Waste Facility Permit Appeal
in the Matter of:

Permit Applicant: Lighting Resources, LLC

Permitted Facility: Lighting Resources, LLC
805 East Francis Street
Ontario, California 91761

Permit Number: 2021/22-HWM-11

EPA ID No. CAR 000 156 125

Docket No. FY22/23-01

**APPELLANT LIGHTING RESOURCES
LLC'S BRIEF IN SUPPORT OF
PETITION FOR REVIEW OF
HAZARDOUS WASTE FACILITY
PERMIT FOR LIGHTING
RESOURCES, LLC**

TABLE OF CONTENTS

I.	INTRODUCTION	4
II.	SUMMARY OF FACILITY OPERATIONS	5
III.	HISTORY OF FACILITY’S PERMIT RENEWAL.....	6
IV.	STANDARD OF REVIEW & ISSUES ACCEPTED FOR APPEAL.....	8
	A. Issues 2-5, 16, 19-21: Permit Must Reflect Changes to the Baghouse System.....	8
	1. LRL Installed the Updated System to Satisfy the Enforcement Division.....	9
	2. The Department Was Aware of the Baghouse System Upgrade Prior to Issuing the Draft Permit	9
	3. The Permit Should Be Revised to Reflect the Current Operations	11
	B. Issue 6: Respirators Should Only Be Required in Accordance with California Occupational Safety & Health Requirements	14
	C. Issue 8: Expanded Aisle Space Should Only Be Required for Building Access & Egress Points	15
	D. Issues 9, 11, 12, and 31: Intact Spent Fluorescent Lamps Should Not Be Required to Be Managed as Hazardous Waste	16
	1. Universal Waste Regulations Do Not Require Intact Spent Fluorescent Lamps to be Managed as Hazardous Waste.....	16
	2. The Department Has Not Required Similar Facilities to Manage Incoming Lamps as Hazardous Waste	199
	E. Issue 24: Requiring Department Approval for <i>Any</i> Change is an Abuse of Discretion	20
	F. Issue 27: Collecting “All” Rainwater is Impossible	22
	G. Issue 30: Communicating Transportation Routes Must Be Reasonable and Achievable.....	23
V.	CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Dynamex Operations W. v. Superior Court</i> , 4 Cal. 5th 903 (2018)	21
---	----

Statutes

Cal. Code of Civ. Proc. § 1094.5(b).....	8
Cal. Lab. Code § 2750.3.....	21

Other Authorities

8 Cal. Code of Regs. § 5155	10, 11
14 Cal. Code of Regs. § 15051(b)(1)	18
22 Cal. Code of Regs. § 66261.9(a)	14
22 Cal. Code of Regs. § 66263.18(b).....	3
22 Cal. Code of Regs. § 66264.35	13
22 Cal. Code of Regs. § 66270.32(b)(1)-(2)	18, 20, 21
22 Cal. Code of Regs. § 66270.41	8
22 Cal. Code of Regs. § 66270.72(c)	5
22 Cal. Code of Regs. § 66273.60(b).....	14, 15

1 **I. INTRODUCTION**

2
3 This appeal arises from the Series A Standardized Hazardous Waste Facility Permit (the
4 “Permit”) dated June 30, 2022, issued by the Department of Toxic Substances Control (“DTSC”
5 or the “Department”) to Lighting Resources, LLC (“LRL”) for its facility located at 805 East
6 Francis Street in Ontario, California (the “Facility”). The Facility is a universal waste destination
7 facility that primarily processes spent, linear, mercury-containing fluorescent lamps to recover
8 phosphor powder, glass, and metal end-caps.

9 LRL has safely operated the Facility since 1996, and its initial permit was renewed in
10 2007 with no changes. LRL subsequently applied to renew its permit in October 2016. At the
11 time it initiated the permit renewal process, LRL anticipated significant investment at the Facility,
12 including a new building to house a new Balcan lamp processing machine. The planned changes
13 would necessitate new hazardous waste units in the Permit. However, in the nearly five years
14 between the time LRL submitted its renewal application and the time the draft permit was issued
15 in May 2021, the Facility’s operations – including LRL’s plans for the new Balcan machine and
16 building – had changed significantly. LRL had informed the Department’s permitting staff of
17 plans to install a new baghouse system at the behest of the Department’s enforcement division
18 and under South Coast Air Quality Management District (“SCAQMD”) oversight. Those
19 changes (which were subsequently implemented) were not reflected in the draft permit. LRL also
20 submitted extensive comments on the draft permit which identified inaccuracies throughout the
21 draft permit, including submitting comments regarding LRL’s decision to abandon its plan to
22 construct a new building and install a new Balcan machine. The Department made few revisions
23 in response and did not constructively engage or communicate with LRL. The Permit was
24 eventually issued on June 30, 2022 – nearly six years after LRL first applied for renewal and over
25 two years since LRL had submitted a revised permit application in March 2020, which had
26 identified and incorporated upgrades to the Facility’s baghouse system.

27 LRL appeals the terms of the Permit which, as issued, do not accurately reflect current or
28 planned operations at the Facility. The Permit contains a significant amount of language that is

1 plainly inapplicable, creating confusion and resulting in additional costs (including costs
2 associated with numerous necessary permit modifications). Additionally, some Permit conditions
3 include requirements for which compliance is impossible or that impose obligations on the
4 Facility that are more onerous than those imposed on other similarly-situated facilities. In each
5 case, the Permit conditions involve findings of fact and conclusions of law that are clearly
6 erroneous and/or reflect an abuse of discretion. Such Permit conditions are also generally not
7 necessary to ensure compliance with law or protect human health and the environment.

8 **II. SUMMARY OF FACILITY OPERATIONS**

9 LRL has operated its facility in Ontario, California since 1996. The Facility primarily
10 conducts universal waste lamp recycling operations, including the processing of linear fluorescent
11 lamps, as well as the consolidation, containerization, and transportation of other non-linear lamps
12 to another facility for processing. As described in the Permit, the Facility also accepts other types
13 of universal waste, such as universal waste batteries and electronic devices, which it sorts,
14 accumulates, and repackages as necessary for transport to another facility. Administrative Record
15 (“AR”) 37 at DTSC02307. The Facility does not currently process any wastes other than linear
16 lamps. LRL is also a registered hazardous waste transporter that “collects, and transports spent
17 fluorescent lamps, spent HID lamps, other spent mercury-containing lamps, mercury-containing
18 instruments (e.g., manometers) and intact, non-leaking, lighting ballasts containing poly-
19 chlorinated biphenyls (PCBs) to the Facility. The collection of mercury-containing instruments is
20 incidental to the facility’s primary operation of lamp recycling.” *Id.* at DTSC02308.

21 The Facility processes straight fluorescent lamps in the Lamp Machine, which is further
22 described in Unit 5 of the Permit. *See* AR 37 at DTSC02322. Lamps are manually fed into the
23 Lamp Machine where they are crushed between a set of breaker bars and a slotted anvil. The
24 machine and system are under vacuum pressure (i.e., negative pressure) that prevents phosphor
25 dust and mercury from escaping. Phosphor powder is deposited in two 55-gallon drums inside
26 the building, while aluminum end caps, glass, and residual mercury-containing phosphor powder
27 are deposited in collection containers outside the warehouse. AR 37 at DTSC02308. The glass
28

1 and end caps are shipped as non-hazardous material for recycling or landfill disposal. Mercury-
2 containing powder is shipped as hazardous waste, and it is sent for further recycling at LRL's
3 facility in Indiana. AR 19 at DTSC01498. The Facility processes an average of 50 tons of
4 straight lamps per year, which is below its permitted capacity. AR 37 at DTSC02323.

5 Since beginning its operations in 1996, the Facility has been an exemplary facility with a
6 good compliance record. The Facility has an "Acceptable" compliance tier assignment pursuant
7 to the Department's Violation Scoring Procedure ("VSP") program, with a Facility VSP score of
8 3.38.¹ Declaration of Ira J. Klein ("Klein Decl."), Ex. 4. LRL also values a cooperative
9 relationship with the Department; in response to concerns identified by DTSC's enforcement
10 division, the Facility invested significant resources to improve the baghouse system. *See, e.g.,*
11 Klein Decl., Ex. 4. (committing to improving the baghouse system); AR 33 at DTSC02145 (costs
12 of baghouse system exceeded \$200,000).

13 **III. HISTORY OF FACILITY'S PERMIT RENEWAL**

14 A standardized permit was first issued to the Facility on June 24, 1996. The initial permit
15 contained six permitted units: the Lamp Machine (which processes manually-fed straight lamps);
16 the HID glove boxes (manual disassembly and recovery of mercury-containing powder from HID
17 lamps); the lamp storage area; the HID storage area; a hazardous waste storage area; and a trailer
18 storage area. The permit was renewed in 2007 with no modifications made. Klein Decl., Ex. 3.

19 LRL notified the Department of its intent to apply for permit renewal in 2016. AR 2 at
20 DTSC00004. At the time, LRL anticipated adding a new building to house a new Balcan
21 machine, which would eventually replace the current Lamp Machine. LRL informed the
22 Department that the renewal would be for the Facility "as currently operating with an overlay of
23 the addition of the building and new machine. Although the basics of the permit will be the same
24 as the previous permit, all aspects that relate to new machine and building will be added as
25

26 ¹ Nearly all the "points" accumulated by the Facility are associated with an inspection that
27 occurred in September 2013. Following an inspection in November 2014, the Facility was
28 assessed a score of "2" for an alleged violation of the 10-day transfer exemption in 22 Cal. Code
of Regs. § 66263.18(b). The Facility has accumulated zero (0) VSP points across the subsequent
five inspections. Klein Decl., Ex. 4.

1 additional information.” *Id.*

2 LRL submitted its initial application on October 23, 2016, with a second application
3 submitted on December 29, 2016 in response to a notice of administrative incompleteness. AR 4;
4 AR 7. The Department determined that the application was administratively complete on
5 February 22, 2017. AR 8. Over 18 months later, on October 12, 2018, the Department issued its
6 first Notice of Deficiency (“NOD”). AR 10. The first NOD required extensive revisions of the
7 application, and the Department advised LRL that it would process the application as a new
8 permit, rather than a renewal. AR 11. Subsequently, LRL filed its response to the NOD on
9 February 15, 2019. AR 15. A second NOD was issued over a year later, on March 5, 2020. AR
10 18. LRL timely filed a response to second NOD on March 30, 2020. AR 19.

11 Over a year after submittal of LRL’s response to the NOD, the Department issued its
12 “technical completeness determination” on May 11, 2021. AR 27. In the transmittal letter, the
13 Department conveyed that, rather than working with LRL to address certain deficiencies or revise
14 the permit application to update certain information, it instead elected to include certain permit
15 conditions and proceed to issue the draft permit. AR 27 at DTSC02054. DTSC issued the draft
16 permit and opened a public comment period on May 17, 2021. AR 23, AR 28, AR 29. Only four
17 entities commented on the draft permit: LRL, one community member supporting issuance of the
18 Permit, the South Coast Air Quality Management District (“SCAQMD”), and the Ontario-
19 Montclair School District (“School District”). AR 33.

20 LRL’s comments on the draft permit were extensive and raised several concerns. *See Id.*
21 at DTSC02143-DTSC02246. LRL had previously informed the Department that, in response to
22 concerns raised by the enforcement division, it had invested significant resources in installing a
23 new baghouse system under the oversight of the SCAQMD. *See, e.g.,* AR 33 at DTSC02145; AR
24 19 at DTSC01924-DTSC01937. Furthermore, the draft permit was inaccurate given that, aside
25 from the baghouse system, LRL had abandoned its plans to construct a new building and install
26 the proposed Balcan machine. *Id.* at DTSC02143-DTSC02246. Approximately one year later
27 (and nearly six years after LRL filed its initial application), and with no communication with LRL
28

1 to discuss changes at the Facility, the Department issued the Permit on June 30, 2022, with an
2 effective date of July 30, 2022. AR 37. LRL subsequently filed its appeal on July 28, 2022.

3 **IV. STANDARD OF REVIEW & ISSUES ACCEPTED FOR APPEAL**

4 The Board of Environmental Safety (“BES”) accepted several issues for review. *Initial*
5 *Order for the Appeal of Final Permit Decision Issued for Lighting Resources, LLC*, Docket No.
6 FY22/23 – 01. The BES is required to decide the issues raised in LRL’s petition by determining
7 whether the Department’s final permit decision was based on: (1) a finding of fact or conclusion
8 of law which is clearly erroneous; or (2) an abuse of discretion concerning an exercise of
9 discretion or an important policy consideration within the Board’s jurisdiction; or (3) a significant
10 procedural error. 22 Cal. Code of Regs. § 66270.72(c). An “abuse of discretion” is established
11 where the agency “has not proceeded in the manner required by law, the order or decision is not
12 supported by the findings, or the findings are not supported by the evidence.” *See, e.g.*, Cal. Code
13 of Civ. Proc. § 1094.5(b). LRL submits that each of the issues accepted for review involve
14 findings of fact and conclusions of law that are clearly erroneous and/or reflect an abuse of the
15 Department’s discretion. The conditions in the Permit also raise important policy considerations
16 that must be reviewed.

17 A. Issues 2-5, 16, 19-21: Permit Must Reflect Changes to the Baghouse System

18 The BES collectively accepted Issues 2-5, 16, and 19-21 for review. As acknowledged by
19 BES, the issues are “related to the replacement of the air system (baghouse) and dependent
20 system components specific to Unit 5 and Unit 6.” *Initial Order for the Appeal of Final Permit*
21 *Decision Issued for Lighting Resources, LLC*, Docket No. FY22/23 – 01 at p. 3.

22 The Permit, as currently written, does not accurately reflect the equipment that is now in
23 place at the Facility. LRL, at the behest of the Department’s enforcement division and under the
24 oversight of the South Coast Air Quality Management District (“SCAQMD”), has invested
25 significant resources – over \$200,000 – to install and update the air system at the Facility. AR 33
26 at DTSC02145. The Permit is thus based on erroneous findings of fact and represents an abuse of
27 the Department’s discretion. As a result, numerous portions of the Permit are inaccurate and
28

1 require revision.

2 1. *LRL Installed the Updated System to Satisfy the Enforcement Division*

3
4 LRL initiated improvements to the air system² in response to comments made by the
5 Department's enforcement division following an inspection. On June 6, 2019, the Department's
6 enforcement division identified white powder on the floor of the Lamp Machine area. As a result,
7 the Department alleged a violation for failure to maintain and operate the facility to minimize the
8 possibility of a release of hazardous waste or hazardous waste constituents which could threaten
9 human health or the environment. Klein Decl., Ex. 2.

10 Although LRL disputed the allegations and the Department did not initiate enforcement
11 action, LRL nevertheless voluntarily entered into an informal agreement with the Department to
12 retain the services of a licensed engineer to design a new system for the existing Lamp Machine
13 that would "further minimize" the release or potential release of white powder and nuisance dust
14 from the Lamp Machine. *Id.* As documented in the Department's inspection report, LRL
15 committed to "submit a design by an engineer that is capable to prevent or minimize any powders
16 from the operation of the crushing machine...." *Id.* at Ex. 2 at p. 7. The Department further
17 documented LRL's commitment in a January 24, 2020 letter. *Id.* at p. 1. In its correspondence,
18 the Department acknowledged that LRL "previously proposed to install a 'Baghouse System' for
19 the existing lamp machine" and that if LRL "chooses such a corrective action or any other
20 alternative, Lighting Resources shall obtain any required Air Permit as necessary from the
21 California Air Quality Control Board and/or to obtain DTSC Permitting Division's approval of
22 any installation of new system...". *Id.* The enforcement division suggested – but did not require
23 – the Permitting Division's involvement in the air system upgrade.

24 2. *The Department Was Aware of the Baghouse System Upgrade Prior to*
25 *Issuing the Draft Permit*

26
27 In order to improve its performance and be responsive to the enforcement division's

28 ² For purposes of this brief, upgrades to the system are alternately called the "air system,"
"baghouse," or "baghouse system" with no distinction between the terms.

1 concerns, LRL moved forward with the proposed baghouse system under regulatory oversight.
2 LRL obtained all necessary permits from SCAQMD for the equipment. Klein Decl., Exs. 5-8.
3 The initial permits from SCAQMD were issued on August 14, 2020. *Id.* LRL also included
4 information regarding the proposed baghouse system in its permit application. In Section 2.10 of
5 LRL's response to the Second NOD, LRL states that the:

7 Filter Room is to be upgraded in the coming months. This change is part of the
8 South Coast Air Quality Management District Permit. An application has been
9 filed. Upon receipt of the approved application, Lighting Resources will provide
10 the documents to DTSC as an addition to the facility permits in Part A. The
11 equipment to be installed is listed in Part B, Appendix C.
12

13 AR 19 at DTSC01565; *see also id.* at DTSC01592 (discussing upgrades to be
14 implemented in the second quarter of 2020, noting that the lamp treatment "method has not
15 changed but the equipment is being improved to be more effective"). Appendix C includes the
16 description of the baghouse system, with a quoted cost of \$188,745 plus tax and freight.
17 DTSC01924-DTSC01937.

18 The Department, in its response to comments, claims that it had "not received updated
19 information" regarding the changes at the facility. *See, e.g.,* AR 40 at DTSC02412, DTSC02416,
20 DTSC02417, DTSC02431. However, LRL provided ample notice to the Permitting Division in
21 its March 2020 application and in September 2019 email correspondence. *See* AR 43 at
22 DTSC02498. Further, the Department had directly interacted with, and received copies of the
23 SCAQMD permits for the baghouse system from, the SCAQMD in December 2020. AR 43 at
24 DTSC02514 (correspondence between P. Blum, DTSC and H. Fong, SCAQMD regarding
25 permits for two new dust collectors). Put simply, the Department had sufficient information and
26 notice of LRL's intent to install the baghouse system, but it failed to incorporate those changes
27 into the Permit or discuss the issue further with LRL.
28

1 To the degree that the Department believes a permit modification was required for the
2 baghouse system, it could have initiated one. 22 Cal. Code of Regs. § 66270.41; *see also* Klein
3 Decl., Ex. 3 at p. 9, Part III, Sec. 4(b) (2007 permit condition granting the Department the ability
4 to initiate a permit modification when the Department deems it necessary to do so). That is
5 especially the case given that LRL conveyed to the Department its understanding that a permit
6 modification was not necessary to accommodate the new baghouse system. *See* AR 43 at
7 DTSC02498 (stating that LRL was “expecting the changes to be in the SCAQMD permit rather
8 than the DTSC permit as it is all about the filter system” but inquiring as to whether any change
9 would be “to the renewal rather than a modification of the 2007 permit”). LRL further informed
10 the Department regarding the baghouse system update and associated changes to Facility
11 operations (e.g., disconnecting the HID glove boxes) in its response to comments. *See, e.g.*, AR
12 33 at DTSC02156. The Department thus had the opportunity to either modify the existing 2007
13 permit or incorporate the changes into the current Permit prior to issuance. In the absence of
14 clear direction from the Department and in light of the ongoing renewal process, LRL reasonably
15 concluded that modifying the 2007 permit was not required and expected the Permit to reflect the
16 current operations. That is especially the case given that the 2007 permit only describes the
17 vacuum system generally. *See* Klein Decl., Ex. 3 at p. 6 (“The entire system is under a slight
18 vacuum which keeps the lamp disassembly process under a negative pressure and prevents
19 phosphor dust and mercury vapor from escaping and contaminating the surrounding
20 atmosphere”); p. 10 (“...a vacuum pulls air over the entire body of the machine, which captures
21 airborne mercury-containing phosphor powder and sends the powder through a three-part filter
22 system...”). Because the Lamp Machine remained under negative pressure after the new
23 baghouse system was installed, the upgrade did not represent a change that necessitated a permit
24 modification, especially considering that LRL had previously informed the Department.

25
26 3. *The Permit Should Be Revised to Reflect the Current Operations*

27 LRL invested significant resources – over \$200,000 – to upgrade the air system in
28 response to the Department’s enforcement staff’s concerns regarding phosphor powder and

1 nuisance dust. AR 33 at DTSC02145. LRL informed the Department about its plan and obtained
2 all required permits from the SCAQMD. The Department had obtained copies of the SCAQMD
3 permits and LRL's permit application to SCAQMD and had discussed the issues with SCAQMD
4 staff. LRL also provided significant comments to the Department on the draft permit, specifically
5 identifying changes to the Facility and its operations that should be incorporated into the Permit.

6 Accordingly, failing to incorporate the new baghouse system into the Permit, or even to
7 engage further with LRL to discuss needed revisions to the Permit or permit application, has
8 resulted in a Permit decision that is based on findings of fact that are clearly erroneous, i.e., it
9 misstates the nature of the air system at the Facility, as well as some Facility operations. Further,
10 failing to incorporate the new baghouse system into the Permit represents an abuse of discretion,
11 as the Department has operated in an arbitrary and capricious manner by neglecting to update the
12 Permit to incorporate the new baghouse system. Including a description of Facility equipment
13 and operations that is factually inaccurate creates confusion, raises potential enforcement
14 concerns, and requires LRL to post financial assurance for closure for activities and permitted
15 units that are not, and will not be, in operation. *See, e.g.*, AR 31 at DTSC02138 (identifying
16 closure cost estimates for proposed new units, which will not be activated). It is also apparent
17 that several Permit conditions are based on the prior system.

18 As a result, significant revisions to the Permit are necessary. Issues 2, 3, and 16 identify
19 language in the Permit that should be updated to reflect the new baghouse system that provides
20 the required negative pressure for the Facility's lamp processing operations. Issues 4, 20, and 21
21 identify portions of the Permit – including the entirety of Unit 6 – that discuss the HID Glove
22 Box. As identified in LRL's comments, the HID Glove Box is not connected to the new
23 baghouse system, the machine has been decommissioned, and all non-linear, multipurpose lamps
24 that were formerly processed in the HID Glove Box are accumulated, sorted, and shipped to the
25 LRL facility in Arizona. AR 33 at DTSC02156. As a result, the HID Glove Box (i.e., Unit 6)
26 should not be included in the Permit. It is imperative that the Permit be revised to reflect the
27 current equipment and processes at the Facility in order to properly identify compliance
28

1 obligations, minimize confusion and enforcement risk, and allow for a revised closure cost
2 estimate. Failing to do so results in a permit that is based on erroneous findings of fact.

3 Issue 5 relates to mercury vapor monitoring required by the Permit. Special Condition
4 No. 1 for Unit 5 requires mercury vapor monitoring to be conducted every two hours during
5 operation. AR 37 at DTSC02323-DTSC02324. The new baghouse system is far more efficient
6 such that monitoring every two hours is unnecessary and is overly burdensome. LRL provided
7 mercury vapor monitoring logs to the Department in its response to comments, demonstrating that
8 mercury vapor readings are far below the 8-hour time-weighted average (“TWA”) exposure
9 threshold of 0.025 mg/m³ and are nowhere near the one-time “ceiling” threshold of 0.1 mg/m³ set
10 forth in occupational safety and health regulations. *See* 8 Cal. Code of Regulations § 5155; AR
11 33 at DTSC02200-DTSC02203. Because the new baghouse system is more efficient than the
12 prior vacuum filter system and the Facility’s monitoring data demonstrates that the baghouse
13 system ensures that the Lamp Machine is operating effectively far below exposure limits,
14 including the same requirement to monitor every two hours is onerous and represents an abuse of
15 discretion.³ The permit condition should be revised to require monitoring once per day.

16 Issue 19 relates to Special Condition No. 1(b), which requires replacement of the activated
17 carbon filter media when vent stack emissions are observed to exceed 0.003 mg/m³ on at least one
18 occasion per day for at least three working days. AR 37 at DTSC02324. Given the new
19 baghouse system, merely changing the activated carbon filter media is not the appropriate
20 solution for ensuring that stack emissions remain below a certain threshold. As a result, the
21 permit condition is based on an erroneous finding of fact. Instead, the permit condition should be
22 revised to reflect the correct method for resolving exceedances of the emissions threshold, which
23 would include assessment, troubleshooting, and repair of the system, as necessary.

24 //

25 //

26
27 ³ Additionally, the Department does not imposing such requirements similarly across the
28 regulated community. The hazardous waste facility permit for LRL’s competitor, AERC, only
requires air monitoring once each day. Klein Decl. at Ex. X (AERC permit).

1 B. Issue 6: Respirators Should Only Be Required in Accordance with California
2 Occupational Safety & Health Requirements
3

4 Issue 6 pertains to Special Condition No. 1(a) for Unit 5 in the Permit, which was
5 significantly revised by the Department from the draft to final Permit. The special condition in
6 the Permit now directs that “[a]ll personnel present in the processing room of the building where
7 the lamp machine is located while Unit 5 is being operated to process the mercury containing
8 lamps shall wear personal protective equipment (PPE) including a respirator with filters rated for
9 mercury vapor and mercury containing particulates.” AR 37 at DTSC02324. By comparison, the
10 language in the draft permit only required personal protective equipment in areas where the
11 Facility had not demonstrated that potential exposures were below the permissible exposure limit
12 (“PEL”) of 0.025 mg/m³, expressed as an eight-hour time-weighted average, in accordance with
13 Section 5155 of Title 8 of the California Code of Regulations. AR 28 at DTSC02080.

14 The revised condition now requires employees to wear a respirator when in Unit 5 without
15 regard to the PEL or other applicable requirements for respiratory protection promulgated and
16 enforced by the California Division of Occupational Safety and Health (“DOSH”). Such a
17 requirement obligates the Facility and its employees to implement measures that go beyond what
18 is otherwise required by health and safety regulations. That is especially the case given that the
19 requirement applies to *all employees present* in the processing room, not just those employees
20 operating the machine or working in Unit 5. As a result, LRL would be obligated to provide
21 respirator fit testing, medical evaluations, and other measures for those employees who may
22 simply be passing through Unit 5.

23 Moreover, the Department apparently divined the need to impose more stringent
24 requirements for the use of respirators from LRL’s comments on the draft permit that were
25 focused on the frequency of required mercury vapor testing. *See* AR 40 at DTSC02429-02430.
26 LRL had requested that the vapor monitoring requirement be adjusted given that the historical
27 data demonstrates that mercury vapor levels are far below the PEL. *Id.* While LRL’s comment
28 acknowledges that it requires those employees processing lamps to wear a respirator (AR 33 at

1 DTSC02200), such a statement does not provide justification for the Department to mandate that
2 *all* personnel present (even if merely passing through) in the lamp processing room must wear a
3 respirator without regard to the PEL. Nor should it obligate LRL to undertake fit testing and
4 medical evaluations of employees that would not otherwise be subject to DOSH's respiratory
5 protection requirements.

6 The Department, in its response to comments, fails to justify the revised condition, merely
7 stating that the change was "to better reflect PPE requirements at the facility." AR 40 at
8 DTSC02430. Although LRL may elect to implement health and safety requirements at the
9 Facility that go above and beyond what is required by law and regulation, it should not be
10 obligated to do so by the Permit. The Department's revision to Special Condition No. 1(a) for
11 Unit 5 thus represents an abuse of discretion. That is especially the case given that it imposes
12 additional obligations on the Facility that are beyond what law and regulation require. Special
13 Condition No. 1(a) should be revised such that it requires PPE in accordance with the health and
14 safety regulations set by the agency that regulates occupational safety and health, i.e., DOSH, as
15 set forth in the draft permit

16 C. Issue 8: Expanded Aisle Space Should Only Be Required for Building Access &
17 Egress Points

18 Issue 8 pertains to Special Condition No. 2 for Unit 2 in the Permit, which was
19 significantly revised by the Department from the draft to final Permit. The special condition in
20 the Permit now directs that "[s]ufficient aisle space, at least 30", shall be maintained in each
21 trailer, and between rows of universal wastes stored on pallets outside of the trailers, to allow for
22 movement of emergency equipment and personnel. The Permittee shall maintain a distance of
23 four (4) feet of aisle space between the building and any containers or pallets at all times to allow
24 for emergency access and egress to and from all entrances of the building." AR 37 at
25 DTSC02316. By comparison, the language in the draft permit only required sufficient aisle space
26 in each trailer. AR 28 at DTSC02072. The Department added significant new language requiring
27 aisle space throughout the Facility, with significantly more space in the area of the Facility
28

1 located between the building and pallets or containers.

2 The revised permit condition, as written, appears to require four feet of aisle space across
3 the entire length of the building without regard to the location of building entrances and egress
4 points. Requiring four feet of space along the entire length of the building is unnecessary and not
5 supported by the requirements of Section 66264.35, which only requires aisle space sufficient “to
6 allow the unobstructed movement of personnel, fire protection equipment, spill control
7 equipment, and decontamination equipment to any area of facility operation in an emergency.”
8 22 Cal. Code of Regs. § 66264.35. LRL acknowledges the need to provide sufficient space for
9 emergency access. However, the Department fails to explain or justify the need for expanding the
10 aisle space requirements in such an extensive fashion. A Permit condition that requires that
11 building access and egress points remain accessible is sensible. Any further expansion represents
12 an abuse of discretion by the Department and/or a condition based on an erroneous conclusion of
13 law.

14 D. Issues 9, 11, 12, and 31: Intact Spent Fluorescent Lamps Should Not Be Required
15 to Be Managed as Hazardous Waste
16

17 The BES collectively accepted Issues 9, 11, 12, and 31 for review. As acknowledged by
18 BES, the issues relate to “DTSC’s policy on requiring spent fluorescent lamps to be treated as
19 hazardous waste pursuant to subsection (b) of 66261.9.” The issues to be decided on appeal are:
20 (1) whether DTSC’s policy is applicable to the Permittee; and (2) whether DTSC applies this
21 policy uniformly across similar facilities. *Initial Order for the Appeal of Final Permit Decision*
22 *Issued for Lighting Resources, LLC*, Docket No. FY22/23 – 01 at p. 4.

23 1. *Universal Waste Regulations Do Not Require Intact Spent Fluorescent*
24 *Lamps to be Managed as Hazardous Waste*

25 The Department has included conditions in the Permit that require spent fluorescent
26 and/or spent HID lamps to be managed as hazardous waste, as opposed to universal waste, upon
27 acceptance at the Facility. Special conditions 3, 5, and 6 for Unit 2 define the lamps as hazardous
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1 waste, limit the *storage* of the lamps to the trailers within Unit 2, and requires that the trailers
2 storing such materials be decontaminated prior to removal from Unit 2. AR 37 at DTSC02316.
3 By considering spent fluorescent and spent HID lamps to be hazardous waste (as opposed to
4 universal waste) prior to processing, the Department obligates the Facility to comply with the full
5 scope of hazardous waste requirements even though the universal waste regulations do not
6 mandate such obligations prior to *processing* the lamps.
7

8 In general, universal wastes, including universal waste lamps and M0003 wastes, are
9 exempt from hazardous waste management requirements, except as specified in chapter 23 of
10 division 4.5 of Title 22 of the California Code of Regulations. 22 Cal. Code of Regs. §
11 66261.9(a). Upon arrival at a “destination facility,” universal wastes must be “managed as
12 hazardous wastes” unless “specified otherwise in section 66273.60...”. *Id.* at § 66261.9(b); *see*
13 *also* § 66273.9 (defining a “destination facility” as a facility that manages “a particular category
14 of universal waste pursuant to section 66273.60”); Klein Decl., Ex. 9 at p. 7 (reference to section
15 66273.60 added to definition of “destination facility” to “clarify that certain universal waste
16 management activities may be conducted...pursuant to applicable requirements of chapter 23,
17 instead of the more stringent [hazardous waste] requirements”).

18 Section 66273.60 permits a destination facility to perform certain management activities,
19 including those management activities identified in section 66273.33(b)(3), “pursuant to the
20 reduced requirements specified in this chapter for universal waste handlers.” 22 Cal. Code of
21 Regs. § 66273.60(b). In the Final Statement of Reasons (“FSOR”) for the universal waste
22 regulations, the Department explains that section 66273.60(b) is meant to “allow certain universal
23 waste management activities for universal waste...to be conducted at destination facilities. These
24 universal waste management activities are: sorting batteries by type...removing lamps from a
25 product or structure (provided the lamp is removed in such a way to prevent breakage), and
26 managing electronic devices...”. Klein Decl., Ex. 9 at 15. The Department clarified that “*any*
27 *other management activity* related to universal wastes...would require that these destination
28 facilities conduct *those activities* in accordance with applicable requirements of chapters 14, 15,

1 16, 18, 20, and 22 of this division.” *Id.* at 16 (emphasis supplied). In short, section 66273.60
2 permits certain universal waste management activities, including the removal of lamps, to be
3 lawfully performed at a destination facility pursuant to the universal waste regulations and
4 *without resort to the more stringent hazardous waste requirements.*

5 The universal waste regulations specifically allow certain universal waste management
6 activities, including those for universal waste lamps identified in section 66273.33(b)(3), to be
7 performed in accordance with the less stringent universal waste regulations. Because LRL
8 removes lamps from structures and containers, such activities may be performed pursuant to the
9 less stringent universal waste regulations. Storage of such materials as universal (as opposed to
10 hazardous) waste comports with the regulation; requiring storage as hazardous waste would
11 eviscerate the flexibility provided by Section 66273.60(b). Once the lamps are sent for
12 processing, the full complement of hazardous waste requirements applies.

13 The Department’s policy of requiring LRL to manage all spent fluorescent and HID lamps
14 stored in Unit 2 as hazardous waste is based on an erroneous conclusion of law and imposes
15 obligations beyond those set forth in the chapter 23. The Department, in promulgating the permit
16 conditions, including with respect to Special Conditions 3, 5, and 6, erroneously concludes that
17 the spent lamps must be managed as hazardous waste upon arrival at the Facility. The
18 Department gives short shrift to section 66273.60, which permits more lenient requirements for
19 universal waste. *See, e.g.*, AR 40 at DTSC02425 (concluding that decontamination of trailers is
20 required because the discarded lamps are considered hazardous waste and without giving effect to
21 section 66273.60). The Department has also abused its discretion, acting in an arbitrary and
22 capricious by failing to consider the applicability of more lenient requirements provided in
23 regulation. Because the Department has made its determinations and crafted permit conditions
24 based on an erroneous conclusion of law and in abuse of its discretion, the Permit should be
25 revised.

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2 2. *The Department Has Not Required Similar Facilities to Manage Incoming*
3 *Lamps as Hazardous Waste*

4 Not only does the Department impose more stringent hazardous waste management
5 requirements on spent fluorescent and HID lamps than required by regulation, it does not do so
6 consistently at other permitted facilities. It is critical for competition and notions of fair play that
7 the Department create a level playing field among hazardous waste facilities. Imposing onerous
8 restrictions on one facility, but not another, raises serious questions regarding the exercise of the
9 Department’s authority and oversight over the hazardous waste facility permit program.

10 As described above, the Department has included certain language and conditions in the
11 Permit which define spent fluorescent and HID lamps as hazardous waste at the Facility. AR 37
12 at DTSC02316. The Permit also prohibits the Facility from storing lamps outside of trailers and
13 requires that trailers be decontaminated prior to leaving the Facility. *Id.* Neither obligation
14 would be imposed if the lamps were managed as universal waste.

15 No such obligation is imposed on LRL’s competitor, AERC Recycling Solutions
16 (“AERC”). AERC holds a Standardized Hazardous Waste Facility Permit for its facility located
17 at 30677 Huntwood Avenue in Hayward, California. The permit for the AERC facility was
18 issued on October 21, 2020. AERC accepts universal waste lamps for storage and treatment.
19 Klein Decl., Ex. 1 at 5. Like the Facility, AERC stores and processes universal waste lamps to
20 separate glass and metal from phosphor and mercury. *Id.* Also like the Facility, AERC stores
21 other types of universal wastes but does not process them onsite. *Id.*

22 Unlike for LRL, AERC’s permit contains no language suggesting that spent lamps
23 accepted there must be managed as hazardous waste instead of universal waste. Indeed, at the
24 AERC facility, Storage Area #1 is used to store “containerized intact or broken/crushed spent
25 fluorescent lamps awaiting treatment along with *other* universal wastes to be transferred to
26 destination facilities.” *Id.* at 10 (emphasis supplied). Similar language is used for Storage Area
27 #2. *Id.* at 12. By using the word “other” in the description of the types of waste stored, the
28 AERC permit confirms that the Department considers that AERC’s lamps are a subset of the

1 larger group of universal waste stored by the facility. Similar language is *not* included in the
2 Permit for LRL. Additionally, the AERC permit does not include any special conditions that
3 obligate decontamination of containers used to store lamps. *See Id.* at 11, 13, 15-18 (special
4 conditions).

5 LRL and AERC perform the same activities: they both process spent fluorescent lamps to
6 recover phosphor powder, end-caps, and glass. Each facility also stores other types of universal
7 wastes, but does not process them at their respective facilities. Despite the similarity between the
8 activities at the two facilities, the Department has promulgated two different sets of requirements:
9 LRL's Permit considers all spent fluorescent lamps to be hazardous waste and obligates the
10 Facility to manage them accordingly, while AERC's permit clearly includes such lamps within
11 the subset of universal waste. The AERC permit does not impose the same management and
12 decontamination requirements on AERC, as the Permit does on LRL and the Facility.

13 The Department has thus abused its discretion, having acted in an arbitrary and capricious
14 manner with respect to the requirements included in the Permit. As a result, the Permit should be
15 revised to ensure that LRL is not obligated to undertake more onerous obligations than its
16 competitor.

17 E. Issue 24: Requiring Department Approval for *Any* Change is an Abuse of
18 Discretion

19 Issue 24 pertains to Special Condition No. 1 in Part V of the Permit, which was not
20 contained in the draft permit. The newly-added special condition states that the "Permittee shall
21 not make any changes to the existing building, construct any new building or expansion of the
22 existing building prior to processing a permit modification with DTSC and receiving approval of
23 a permit modification allowing for construction of the proposed building." AR 37 at
24 DTSC02338. The special condition is expansive, unrelated to the hazardous waste operations at
25 the Facility, and represents an abuse of discretion by the Department. Furthermore, no similar
26 condition is contained in AERC's permit. *See Klein Decl.*, Ex. 1.

27 In Special Condition No. 1, the Department assigns to itself authority over *any* change to
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1 the existing building, the construction of *any* new building, or the expansion of the existing
2 building without a permit modification. The special condition is not constrained, limited, or tied
3 to the Facility’s hazardous waste operations or portions of the Facility involved in such
4 operations. In fact, it is so broad as to cover any conceivable change to the existing building, no
5 matter how minor. Simply painting the building, repairing plumbing, or undertaking other
6 maintenance and improvement work would be subject to DTSC’s oversight and approval. So too,
7 any new building or expansion of the existing building would come under DTSC’s purview, even
8 if such changes do not involve, and have no impact on, the existing Facility’s hazardous waste
9 operations.

10 Hazardous waste facility permits must include “permit conditions necessary to achieve
11 compliance with statutes and regulations” as well as those “necessary to protect human health and
12 the environment.” 22 Cal. Code of Regs. § 66270.32(b)(1)-(2). This newly-added special
13 condition is not tied to compliance with any particular statute or regulation, nor is it calculated to
14 ensure that human health and the environment are protected. The Department appears to have
15 added this condition in response to a comment from the School District which expressed concern
16 over the City of Ontario’s determination that a CEQA study was not required. AR 40 at
17 DTSC02439. Notwithstanding the fact that LRL no longer plans on constructing a new building,
18 it is the City, which is responsible for approving applicable land use and building permits, and not
19 DTSC, that acts as the lead agency under CEQA. *See* 14 Cal. Code of Regs. § 15051(b)(1)
20 (specifying that the lead agency “will normally be the agency with general governmental powers,
21 such as a city or county, rather than an agency with a single or limited purpose...”). Furthermore,
22 the Department has provided no justification for why such an expansive permit condition – a
23 permit condition that would deprive LRL of control over its Facility and assign it to the
24 Department for purposes of overseeing, controlling, and approving *any* building changes or
25 construction activity at the Facility – is necessary for ensuring compliance with CEQA, even if
26 that were the Department’s responsibility. The permit condition is not tailored to ensure CEQA
27 compliance in any event. As a result, including such a condition is an abuse of the Department’s
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1 discretion, appears to be arbitrary and capricious, and raises policy considerations regarding the
2 scope of the Department's authority over permittees. Special Condition No. 1 in Part V should
3 therefore be removed.

4 F. Issue 27: Collecting "All" Rainwater is Impossible

5 Issue 27 pertains to Special Condition No. 16 in Part V of the Permit. The special
6 condition states that the "Permittee shall collect all rainwater and wash water accumulated within
7 the authorized units and determine whether it is hazardous waste. If it is hazardous waste, the
8 Permittee shall manage it accordingly." LRL cannot comply with this permit condition because it
9 is impossible to collect and hold *all* rainwater from the Facility; a single drop leaving the Facility
10 would be a permit violation. Furthermore, no similar condition is contained in AERC's permit.

11 The Permit identifies a number of Units, only one of which is located outdoors. Unit 2,
12 which is the Universal Waste Storage Area #2, is an outdoor paved area with dimensions of
13 approximately 144'6" x 91'8", which consists of over 13,000 square feet. AR 37 at DTSC02315.
14 Unit 2 is limited to container storage. Universal waste lamps are stored in cardboard boxes,
15 buckets, fiber drums and/or steel drums or other types of closed containers on pallets. *Id.*
16 Universal waste batteries and universal waste electronic devices may also be stored and handled
17 in Unit 2 in appropriate containers. *Id.* Only universal waste may be stored outside of the trailers
18 in Unit 2. *Id.* at DTSC02316. Because Unit 2 is limited to the storage of universal waste, other
19 containment standards applicable to hazardous waste do not apply. Hazardous waste processing
20 operations do not occur in Unit 2 and, in the event of any incidental breakage or spill, the Facility
21 promptly responds in accordance with law, regulations, and the terms of the Permit. AR 19 at
22 DTSC01553. Because all universal waste in Unit 2 is contained, there is little risk of hazardous
23 waste constituents being released from Unit 2.

24 Unit 2, and the Facility in general, is not constructed to contain every drop of rainwater.
25 Creating a containment system that is capable of capturing all storm water from across the
26 Facility is prohibitively expensive. The Facility already complies with applicable requirements
27 related to storm water. The Facility is subject to the Industrial General Permit for storm water
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1 discharges and has filed its Notice of Intent (“NOI”) accordingly. *See* AR 19 at DTSC01496,
2 DTSC01776. The Facility also participates in the Stormwater Multiple Application and Report
3 Tracking System (“SMARTS”), and dutifully obtains storm water samples after a rain event and
4 reports them in SMARTS. *Id.* at DTSC01553.

5
6 Additionally, the Facility already operates to ensure that rain events do not pose hazards
7 with respect to stormwater. The lamp processing activities take place inside the warehouse
8 building, and any material received at the facility is contained in boxes or drums. Incidental
9 breakage is swept as soon practicable. *Id.* Furthermore, the Facility is obligated to cover material
10 stored outside (including in Unit 2) with a tarp or place it under a canopy in the event of rain. AR
11 37 at DTSC02431; AR 19 at DTSC01553. Because the Facility properly covers materials stored
12 outside, it effectively limits any potential release as part of a storm event. The Facility’s storm
13 water sampling to date, which identifies *no* exceedances or storm water that exceeds a hazardous
14 waste threshold, demonstrates that a requirement to contain *all* rainwater is not necessary to
15 ensure compliance with statutes and regulations, nor is it necessary to protect human health and
16 the environment. 22 Cal. Code of Regs. § 66270.32(b)(1)-(2). Thus, requiring that all storm
17 water be captured onsite prior to testing and discharge is an abuse of discretion. As a result, the
18 special condition should be removed from the Permit.

19 G. Issue 30: Communicating Transportation Routes Must Be Reasonable and
20 Achievable

21 Issue 30 pertains to Special Condition No. 29 in Part V of the Permit, which was not
22 contained in the draft permit. The newly-added special condition states that the “Permittee shall
23 notify truck drivers transporting universal waste or hazardous waste to or from the Facility that
24 *Permittee’s* preferred route is to avoid transportation along the section of Francis St. between
25 Euclid Ave. and Campus Ave. past Sultana Elementary School.” AR 37 at DTSC02341
26 (emphasis supplied). The special condition was added in response to a comment from the School
27 District expressing concern regarding transportation along Francis Street. AR 40 at DTSC02437-
28 38.

1 The newly-added permit condition is expansive, creates compliance obligations for which
2 it may be impossible to comply, and potentially creates expansive liabilities for LRL.
3 Transporters that carry universal waste to and from the Facility are not necessarily controlled by
4 LRL, and many are independent contractors. Thus, at root, it is difficult for LRL to ensure that it
5 notifies every driver of a “preferred route.” More importantly, the requirement to instruct drivers
6 as to a preferred route can potentially create liability for LRL. By directing drivers which route to
7 take, LRL may be unwittingly exercising “control and direction” for purposes of California labor
8 law such that independent contractors become employees. *See Dynamex Operations W. v.*
9 *Superior Court*, 4 Cal. 5th 903 (2018) (establishing the “ABC test” for purposes of determining
10 “employee” or “independent contractor” status); Cal. Lab. Code § 2750.3 (codifying *Dynamex*).
11 Adding a permit condition that would give rise to such liability is beyond the scope of DTSC’s
12 authority and is an abuse of discretion. The Department, by its own admission, notes that
13 regulating hazardous waste transporters as part of the Permit is beyond its scope. *See* AR 40 at
14 DTSC02438 (“Further, the DTSC permitting division and the hazardous waste facility permit do
15 not normally regulate the activities of the hazardous waste transporters. Hazardous waste
16 transporters are regulated separately from the hazardous waste facility permit”).

17 The permit condition is not “necessary to achieve compliance with statutes and
18 regulations” nor is it “necessary to protect human health and the environment.” 22 Cal. Code of
19 Regs. § 66270.32(b)(1)-(2). As the Department identified in its response to comments,
20 commercial transport vehicles are “authorized by the United States Department of Transportation
21 (DOT) and the City of Ontario to travel on Francis Street between Euclid Ave and Archibaldi
22 Avenue...”. AR 40 at DTSC02438. Transporters are required to have a valid registration issued
23 by DTSC, and transporters must comply with a variety of statutes and regulations independent of
24 the Permit, including those contained in the California Vehicle Code, California Highway Patrol
25 regulations, the California State Fire Marshal Regulations, and the United States Department of
26 Transportation, among others. *Id.* Because transporters are separately governed by other statutes
27 and regulations – and are not subject to the Permit – it is an abuse of discretion to impose
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1 obligations on LRL with respect to the route of travel. The special condition is expansive,
2 unrelated to the hazardous waste operations at the Facility, and represents an abuse of discretion
3 by the Department such that it should be removed from the Permit. LRL would accept a
4 reasonable permit condition that required the Facility to provide signage identifying the *School*
5 *District's* (as opposed to LRL's) preferred route of travel.

6 **V. CONCLUSION**

7 LRL is understandably disappointed and frustrated that, after nearly six years in the permit
8 renewal process, the Department issued the Permit only to find that it does not reflect the
9 Facility's current or planned operations, contains obviously inapplicable language that creates
10 confusion and results in additional costs, and imposes permit conditions for which compliance is
11 impossible or that are more onerous for the Facility than for other regulated facilities. LRL
12 submits that each of the issues identified above involve findings of fact and conclusions of law
13 that are clearly erroneous and/or reflect an abuse of the Department's discretion. The Permit also
14 raises important policy considerations for review, including with respect to the scope of the
15 Department's authority and how the Department regulates similarly situated facilities. LRL
16 respectfully requests that the BES:

17 (1) find that the Department's final permit decision was based on (a) a finding of fact or
18 conclusion of law which is clearly erroneous; and/or (b) an abuse of discretion concerning an
19 exercise of discretion or an important policy consideration; and

20 (2) direct the Department to revise the Permit accordingly.
21

22 DATED: July 31, 2023

COX, CASTLE & NICHOLSON LLP

24 By: 

25 Peter H. Weiner
26 Ira J. Klein
27 Attorneys for Appellant
28 Lighting Resources, LLC

PROOF OF SERVICE AND CERTIFICATION

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2029 Century Park East, Suite 2100, Los Angeles, California 90067-3284.

☐ (FOR MESSENGER) My business address is _____.

On July 31, 2023, I served the foregoing document(s) described as **APPELLANT LIGHTING RESOURCES LLC'S BRIEF IN SUPPORT OF PETITION FOR REVIEW OF HAZARDOUS WASTE FACILITY PERMIT FOR LIGHTING RESOURCES, LLC** on ALL INTERESTED PARTIES in this action by placing " the original y a true copy thereof enclosed in a sealed envelope (except when served via fax or e-mail) addressed as follows:

Please see attached Service List.

On the above date:

☐ (BY ☐ U.S. MAIL/BY ☐ EXPRESS MAIL) The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

☐ (BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) - On July 31, 2023 at Los Angeles, California, I served the above-referenced document by electronic mail to the e-mail address of the addressee(s) pursuant to Rule 2.251 of the California Rules of Court. The transmission was complete and without error and I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ (BY PERSONAL DELIVERY) By causing a true copy of the within document(s) to be personally hand-delivered to the office(s) of the addressee(s) set forth above, on the date set forth above.

☐ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 2023, at Los Angeles, California.



Negar Nourmohamadi

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