

# Board Meeting

September 29, 2022

Questions and Comments Regarding Permit Decisions and Appeals in General	
Name / Affiliation	Comment
Dawn Koepke, McHugh Koepke & Associates for California Council for Environmental and Economic Balance	<p><b>General Comments:</b> Stated the foundation, makeup and purpose of California Council for Environmental and Economic Balance (CCEEB). CCEEB was involved in SB 158. CCEEB indicated that industry had concerns about DTSC about transparency, timeliness, general responsiveness. Similar between stakeholders recognizing challenges at DTSC. More transparency and engagement is needed around the permitting process. Open to conversations about the length of time to submit an appeal after a permit is approved with a suggestion to have a limit on the length of time for an attempt to submit an appeal and a separate timeframe for finalizing the appeal submittal process.</p> <p>Highlighted the concerns over the backlog of permits as a key issue in the creation of SB 158 and the fact that many facilities were functioning under the terms of expired permits in a sort of limbo.</p> <p>Encouraged an expeditious process to reduce the amount of time that a facility is working under an expired permit. Provided the example of the Administrative Procedures Act provides a 45-day comment period for regulatory processes and open to considerations of up to 60 days that some agencies may use and in certain circumstances considering a request for an extension. Encouraged the Board to set some parameters for timeframes that the Board would need to respond and act.</p> <p><b>Standing:</b> Some participation in the initial permitting process where there are several opportunities to engage and open to topics of expanding this but cautions against it being so broad as to allow people from outside of the state. Community voice has a pathway but preventing outside entities (such as from another state) from delaying the process.</p>

	<p><b>Standards for review:</b> Expressed that current standards are sufficient with the discretionary option that might include whether stakeholder feedback was considered during the process and was sufficiently considered and perhaps further refining language around that standard to be clearer.</p> <p>Interested in working with the Board and other stakeholders in continued conversations about these topics.</p>
<p>Angela Johnson Meszaros, Earth Justice</p>	<p><b>General Comments:</b> Reminders of the directives in SB 158. Believes that the Board is fundamental to DTSC’s mission. Discussed the difference from equality and equity. Equity gives each participant what they need to participate. Posit that there may be barriers that can be taken down to increase equity. The appeals process and the permitting process are intertwined. Provided an example of a permitted facility she is working on where the permit appeals hearing was in 2001 and the permit decision was issued in 2005. Stated that all the questions from the workshop and this Board meeting are barriers to community participation and limit community engagement in the process. The facility and DTSC will always have “standing” in the process. Focus on building a process that is based around openness and inclusion.</p> <p><b>Timing:</b> More time is better. 30 days is inadequate. Reiterated the possibility of there being a notice to appeal where people are provided with a notice of the option to appeal. The appeal process should not be constrained because the process to come to a permit decision took too long. Speeding through the permit appeals process is inappropriate to shave off time from the entire permitting process. These constraints are on the community and more leeway is provided to the Board to act when they choose.</p> <p><b>Standing:</b> Broader is better, the agency and the department will always have standing. Standing should be broad enough to encompass anyone who shows up to say, “I have an interest in this outcome and I would like to be heard.”</p>

	<p><b>Issues:</b> Boarder is better. There is no other place to raise some of the issues within an appeal. The Board can and should take up concerns of underlying structures and the status quo. Less deference to the staff is better. Encourages the Board to not limit its own authority in the creation of the regulations.</p> <p>Encourages the Board to move beyond the status quo “decide, announce and defend” when developing these regulations.</p>
<p>Chuck White, Manatt</p>	<p>A letter was sent to the Board on behalf of businesses represented by Manatt. Suggested that the Board review all parts of existing regulations around DTSC permits appeals to determine which parts work and which don’t and obtain input from all parties. There needs to be increased transparency and increased engagement. Points out distrust between community and industry and DTSC because DTSC works closely with facilities throughout the permitting process. Encourages the Board to help DTSC to better communicate with all parties to improve engagement from the outset. Recommends the Board look at the merits of an appeal to determine if it is based on real or imagined harm. Encourages finding ways of informal resolution between the permitted facility and the surrounding community. There needs to be the capacity to manage hazardous waste within California with a minimum impact to communities. Reminds the Board to not forget this point.</p> <p><b>Timing:</b> 30 days is an appropriate timeframe to receive an appeal and extension for good reason could be allowed and the Board will need to determine whether to grant extensions to that timeframe. But that determination needs to be determined on sound science and sound engineering.</p> <p><b>Standing:</b> There needs to be direct cause and effect of impacts to parties filing appeals against facilities; it can’t just be everyone. Appeal should be denied if standing cannot be established.</p> <p><b>Grounds:</b> Need to be determined by errors or abuses made by DTSC. Repeating the entire permitting process in an appeal would be</p>

	<p>inappropriate. There needs to be some reliance on the expertise of DTSC.</p>
<p>Cynthia Babich, Del Amo Action Committee</p>	<p>Expressed frustration about the connectivity issues.</p> <p>Expressed wanting separate workshops where community and industry are separate. Concerned about intimidation from industry. The language projected at community and even the Board is condescending. Piecemealing the process is ineffective.</p>
<p>Robina Suwol, California Safe Schools</p>	<p>Supports the comments of Angela Johnson Meszaros.</p> <p>Supports enabling the chat for all meetings and appreciates staff for being responsive to concerns.</p>
<p>Deborah Bayer, Richmond Shoreline Alliance</p>	<p>Wanted to put her comment in the chat.</p> <p>Supports having joint workshops with industry and community activists to hear each other and understand each other better if both keep an open mind. Agrees that Californians are generating waste and we do need to determine appropriate ways of dealing with the waste.</p> <p>Expressed concerns of facilities working on expired permits caused by negligence of DTSC. Encourages the Board to dismiss the idea that community representatives are being obstructionists in the process when the facilities impact the health of the community.</p>
<p>Julia Gates via email</p>	<p>Jessica Swan, Ombudsman read allowed a comment received by email from Julia Gates:</p> <p>Dear Board of Environmental Safety Board members:</p> <p>Thank you for the opportunity to provide comments to the Board of Environmental Safety (Board) for consideration regarding the proposed permit appeal process as part of your Permit Appeal Workshop.</p> <p>The Board serves in an important oversight role to DTSC and is mandated to provide needed direction to DTSC regarding governance reforms and improve DTSC transparency and accountability. In</p>

addition, the Board is tasked with hearing appeals of DTSC's hazardous waste facility permit decisions. With this mandate, the Board should revisit and consider modifying DTSC's existing appeal regulations. Existing appeal regulations limit the appeal process and would improperly reduce the Board's oversight role.

Existing regulations require that an appeal be filed within 30 days of DTSC's final permit decision. While 30 days seems like a sufficient amount of time to appeal a permit decision, DTSC's permit documents and incorporated documents are often very long, require technical understanding, and are inaccessible to the public generally. DTSC needs to improve its process to let the public know about pending permit decisions and make information more available. DTSC's permit decisions also take too long and DTSC does not regularly update members of the public with DTSC's status in the review process.

Existing regulations also limit who has standing to appeal a permit to: any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review; and, any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the proposed draft permit.

The regulations require a technical understanding of the permit, permit process and how the permit changes during review. DTSC permit decisions often impact communities and a significant number of the permitted facilities are located in or near vulnerable communities. Impacted community members may not have technical understanding of the permit or permit process to appeal specific conditions of the draft permit, and DTSC's permit decisions generally under the criteria of the existing regulation. The Board should strongly consider a broader regulation and allow any person to appeal the permit decision.

*If the Board decides to limit who has standing to appeal, it should strongly consider allowing broad use of amicus briefs, such as allowing any interested person to file an amicus brief in any appeal pending before the Board.*

Regarding the standard of review, DTSC's existing regulation is unclear. The Board should have de novo review for findings of fact and law; but can retain review of DTSC's exercise of discretion and important policy considerations. Also, DTSC's existing regulations provide DTSC with the authority to include in permit conditions and deny permits based on enforcement factors, including compliance concerns and reoccurring violations. Under the topic of standard of review, the Board should consider how unadjudicated violations may be presented, challenged and substantiated in compliance with due process protections.

Finally, when the Board functions in an adjudicatory capacity, it must be neutral and unbiased (meaning it must have *no conflict of interest*, has *not prejudged* the specific facts of the case, and is *free of prejudice* against or in favor of any party). Board members should disclose any potential or perceived financial conflicts of interest in a facility or operation subject to a permit appeal and recuse themselves from decision making process. Board staff also provide an important role in advising the Board, and the same rules apply to them. Prior DTSC oversight boards retained independent staff, including an attorney from the Attorney General's Office to ensure that staff were appropriately separated and unbiased. The Board should make sure it avoids the appearance of unfairness and bias and make sure that staff are not in a position where they are reviewing their own prior advice or decisions or are impermissibly influenced by any of the parties in a permit appeal.

In exercising its duties and responsibilities, the Board must have the ability to do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of DTSC permit decisions. The Board

	<p>should revisit and evaluate DTSC’s current regulations to make sure they achieve these goals.</p> <p>Thank you for consideration of these comments,</p> <p>Julia Gates</p>
<p>Deborah Bayer, Richmond Shoreline Alliance</p>	<p>Concerned about the standard of a quarter mile DTSC uses for required outreach and engagement during the permit decision process. Commented that DTSC needs to improve the engagement to reach the community and without that improvement, standing include everyone. Questioned why hazardous waste permitted facilities are always in economically underserved communities and advised that issue needs to be addressed.</p>
<p>Cynthia Babich, Del Amo Action Committee</p>	<p>Expressed concerns of feeling disengaged by the way the process is rolling out. Advised that the Board should look into different ways to avoid health concerns by searching out locations that people are not living by to house hazardous waste facilities. Encourages the Board to consider having safer spaces for community to express their concerns.</p>