



VIA ELECTRONIC SUBMISSION: BEInfo@bes.dtsc.ca.gov

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Jeanne Rizzo, Chair
Alexis Strauss Hacker, Vice Chair
Lizette Ruiz, Member
Sushma Dhulipala Bhatia, Member
Georgette Gómez, Member
Board of Environmental Safety
CalEPA Headquarters Building
1001 I Street
Sacramento, CA 95814-2828

RE: Development of the Board of Environmental Safety’s Permit Appeal Process

Dear Chair Rizzo and Members Strauss Hacker, Ruiz, Dhulipala Bhatia, & Gómez:

On behalf of the signatories to this letter, we again appreciate the opportunity to provide further input as the Board of Environmental Safety (Board) works to develop and adopt rules governing its handling of permit appeals. Signatories to this letter represent members of the regulated community, including owners and operators of hazardous waste facilities permitted by the Department of Toxic Substances Control (DTSC), that will be subject to the appeals process you ultimately adopt.

We greatly appreciate the time Board members Alexis Strauss Hacker and Lizette Ruiz and General Counsel Greg Forrest spent meeting with various industry representatives earlier this month to discuss the Board’s development of rules governing its handling of permit appeals. We found the discussion incredibly helpful, and, as discussed with them during the meeting, wish to follow-up with some written recommendations below, which we believe align with the Board’s goal of improving the handling of permitting appeals, consistent with the statutory mandates established by the Legislature and Governor through the enactment of Senate Bill (SB) 158 (Chapter 73, Statutes of 2021).

I. Standard of Review

66271.18(a)(3) provides three bases upon which an appeal can be made:

- i. a finding of fact or conclusion of law which is erroneous;

- ii. an abuse of discretion concerning an exercise of discretion or an important policy consideration which the Board should, in its discretion, review; or
- iii. a failure to proceed in a manner that is required by law or regulation.

Through discussions that occurred during the various workshops, we understand that the Board would like to establish rules giving less deference to DTSC than what existed in the previous standard, while, at the same time, not placing itself in the position of conducting *de novo* review of DTSC's permitting decisions. As previously discussed during our recent meeting, we have concerns that the "erroneous" standard in "i" and the "failure to proceed in a manner that is required by law or regulation" standard in "ii" could be interpreted as requiring *de novo* review.

To address any unintended consequences that might arise from the current draft language, we would suggest that additional language be included to clarify that the Board's review will give deference to DTSC's permitting determinations. For example, the Bay Area Air Quality Management District's Hearing Board Rules Article 3.6: Standard of Review¹ provide some helpful language that could be adopted as part of this section:

The traditional legal presumption is one of the correctness of a regulatory agency's action. California Evidence Code Section 664 ("It is presumed that official duty has been regularly performed.")The Board may not readily substitute its judgment for that of the District's expertise. The Board's role is to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO and whether the APCO followed proper and appropriate procedures and guidelines. The burden of proof in an appeal is on the party challenging the APCO's action or finding. California Evidence Code Section 660.

The scope of the Hearing Board's review is deference to the District's determination with the burden on the Appellant(s) to show the District's action was erroneous. Specifically, it is the Board's task to determine whether the agency's interpretation of its duty was reasonable and if its performance of that duty was regularly performed.

As such, we would suggest that 66271(a)(3) be revised as follows:

- i. a finding of fact or conclusion of law which is erroneous (*including a failure to proceed in a manner that is required by law or regulation*); or
- ii. an abuse of discretion concerning an exercise of discretion or an important policy consideration which the Board should, in its discretion, review.
- ~~iii. a failure to proceed in a manner that is required by law or regulation.~~

For purposes of subsection (a)(3)(i), the Board shall give deference to DTSC's judgment and expertise in reaching permitting determinations. DTSC's permitting determinations are erroneous only where such determinations are not reasonable, or not consistent with other similar actions taken by DTSC.

II. Time to Completion of Appeal

Among the key concerns the Legislature identified in creating the Board through SB 158 were the inefficiencies and delays embedded in DTSC's decades old permitting process. For example, California's Health and Safety Code, Section 25200(c)(1)(C)(iii) establishes a three-year time limit for DTSC to reach a decision on permit renewal applications. As such, the Legislature provided clear statutory direction to the Board in Health and Safety Code, Section 25125.2(b)(7)(A) to "[...] improve

¹ [See BAAQMD's Hearing Board Rules, effective June 2011, Page 11](#)

the efficiency of the permitting process, [and] the relationship between the efficiency of the process and the time needed to review permit applications and reach permit decisions [..]”

As currently proposed, the Board’s permit appeals process would take at least 340 days from the date of DTSC’s issuance of its permitting decision to the rendering by the Board of a final decision on any appeal(s). With time extensions allowed by the proposed rules, this lengthy time frame could very well double, with permit appeals realistically taking at least two years to reach resolution.

We certainly appreciate the Board’s efforts to grapple with the need to both: (1) create an efficient appeals process to reach timely final permit decisions, and (2) create an appeal process that allows for public participation and protects parties’ due process rights. That said however, we think there are a number of reasonable modifications that could be made to the Board’s current draft of its proposed rules, which will shorten the appeal process time-line without materially impacting parties’ ability to fully participate in this appeals process:

1. Elimination of Duplicative Briefing by Petitioner

The current proposed rules require a prospective petitioner to file both a petition (due 60-days after DTSC’s permitting decision) followed by a moving brief (estimated to be due around 195 days after DTSC’s permitting decisions). Based on our experience with these types of appeals, the petition and moving brief typically repeat the same arguments. Therefore, we believe that significant time could be saved by reducing a petitioner’s briefing requirement to a single petition.

2. Acceleration of Administrative Record Preparation

The current proposed rules do not require the submittal of the administrative record until 30 days after the Board’s acceptance of the petition (meaning that the administrative record would not be submitted to the Board until at least 145 days after DTSC’s permit decision). We believe this delay in the compiling of the administrative record adds significant time to the overall timeline for processing these appeals. Current regulations require DTSC to have the administrative record compiled on the date of DTSC’s final permit decision [*see* [22 CCR 66271.17\(c\)](#)]. Given this, we believe that the proposed rules should be revised to require the submittal of the administrative record to the Board within five days of the Board’s receipt of a Form 2301 initiating the appeal. Doing so will eliminate nearly all of the delay created by the certification of the administrative record in the current draft of the proposed rules.

3. Granting of Time Extensions

The extent to which the Board is proposing rules with established deadlines is a welcome improvement to this appeals process. However, there are a number of places where extensions are either expressly referenced (e.g., 66271.18(2), which allows up to a 60-day extension to file a petition with a showing of good cause), or the door is left open for extensions of time to be requested (e.g., Standing Order 23-01(7)). We understand that the Board’s intent here is to 1) make requests for time extensions *the exception* and not a form of relief that is routinely granted; and 2) the rules should be clear that all extensions requests require a showing of circumstances outside of the control of petitioner that would justify additional time be granted.

Along this same line, we believe that the “good cause” standard proposed in 66271.18(a)(2) should be revised to reflect this same showing. We also believe that the maximum extension for additional time of 30 days (providing for 60 days total to file a petition) is more than sufficient. In contrast, providing up to 90 days to file a petition (a whole four months after DTSC has issued

its final permitting decision), creates the potential for significant (and unnecessary) delay in this appeal process.

4. Timing of Reply Brief

The Proposed Form of Initial Order suggests a briefing schedule with 30 days for petitioner to file a reply brief, the same amount of time provided for the opposition brief. This is an excessive amount of time for a reply—most courts allow less than 10 days to file replies, with replies frequently being due less than 5 days after an opposition. We would suggest, given the limited scope of issues to be addressed in a reply brief, that 10 days is more than sufficient to prepare this filing.

5. One Size Fits All

As written, the proposed rules subject all appeals of DTSC permitting decisions to the same timing requirements. However, in reality DTSC renders permitting decisions on a variety of permit types, including 1) temporary authorizations required to implement some action more expeditiously; 2) relatively simple permit modifications; and 3) the issuance of full permits for complex hazardous waste facilities. We believe that, at a minimum, the rules should acknowledge that in the case of appeals of temporary authorizations and permit modifications, the Board should evaluate and consider imposing a more expedited schedule upon the filing of a Form 2301.

III. Other Items Of Note

The following are other important items in the Board's current proposed regulations, which we believe should be addressed in the final rulemaking:

- Given the considerable amount of time permit appeals are projected to take under the currently proposed rules, we believe it is critical that the Board adopt rules, which allow the Board to lift stays of DTSC's permit decisions during an appeal. As the Board is likely aware, DTSC's previous appeals process rules automatically stayed the effectiveness of the department's permitting decision during the processing of the appeal, including situations in which the permitting decision involved an environmental improvement at a facility. In instances where a temporary authorization or permit modification involving an environmental improvement project is appealed, we strongly believe that the rules that the Board adopts should provide the Board the discretion to lift this stay, absent a showing by the petitioner and supported by substantial evidence, that the project poses a significant risk to human health or the environment.
- 66271.14(a)(4) currently requires that a petition cites to the administrative record. If, as discussed above, the administrative record will be certified prior to this filing, there is no update required. However, if the petition is submitted *prior* to the compilation of the administrative record (as is envisioned in the current proposed rule), then this provision should be revised to require citations to specific evidence.
- 66271(a)(6) allows any person who failed to file comments with DTSC, or failed to testify at a public hearing on the draft permit, to file a petition, as specified, with the Board, but otherwise limits the petition "to disputing conditions in the final permit conditions that did not appear in the draft permit *or otherwise raising issues that could not have been raised (emphasis ours)* during public review of the draft permit." This phrase is very ambiguous and appears to provide an opening for prospective petitioners who did not file comments or testify at a public hearing on

the draft permit to then raise all sorts of issues having no bearing whatsoever to the permit or permit conditions -- thereby further delaying a final appeals decision pending before the Board. As such, we suggest this phrase be stricken from 66271(a)(6).

- 66271.14(a)(8) allows the Board to hear appeals that should otherwise be dismissed upon a finding of “good cause.” In practice, allowing appeals to proceed that do not meet the minimum procedural standards is uncommon—in fact, we are unaware of any similar authority granted to a similar administrative review body. These minimal procedural requirements are in place to ensure that the Board hears meritorious appeals, and that there is no reason to deviate from the standard practice of dismissing appeals that lack merit. As such, we suggest that this section be eliminated. Alternatively, we understand that this authority is only intended to be exercised in exceptional circumstance. We therefore would suggest that rather than simply requiring a showing of “good cause”, the rules be revised to require a showing of *extraordinary circumstances* warranting the Board proceeding with such appeals.
- Draft Standing Order 23-01(8) allows for the appellant/petitioner to file a motion seeking dismissal of their own appeal. We believe that due process and fairness support the broadening of this section to specify that *any party to the appeal* can file a motion seeking dismissal.
- Draft Standing Order 23-10(12) addresses appeals pending before the Board at the time this new appeal process is adopted. It is unclear why these appeals would be re-started, with 60 days allowed to file a simple form initiating a new appeal. These appeals have been delayed for many months already, and re-starting the clock, along with an additional 60-day delay, leads to even further delay. We believe that allowing these appeals to proceed forward as is, with the Board issuing an initial order based on the previously filed petition, would allow these already delayed appeals to reach resolution in a more expeditious manner.
- BES’ proposed Form 2301 does not require any substantive discussion supporting the basis of the appeal. Given that the mere filing of this appeal will automatically stay the effectiveness of DTSC’s permitting decision (a severe remedy, particularly when DTSC’s permitting action involves an environmental improvement project), we believe that a brief statement of the factual and legal basis of the appeal should be required. Requiring this additional information will allow appeals that clearly lack merit to be identified (and presumably dismissed) earlier in the process, thereby avoiding delayed stays due to the initiating of an unmeritorious appeal.

With all the above, in mind, we wish to express our appreciation for your continued solicitation from us for feedback, and we look forward to continued engagement with you all and with other interested stakeholders as the Board further deliberates on the final language for consideration on the permit appeals process. Thank you.

Sincerely,

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