



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

September 28, 2022

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 appreciate the opportunity to provide input as the Board of Environmental Safety (Board) works to develop and adopt rules governing its handling of permit appeals. We look forward to further engaging in the rulemaking process through the upcoming workshops. 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. As such, we offer the following comments and recommendations based on our collective extensive experience obtaining permits to lawfully operate in California.

First of all, we strongly believe that the appeals process that DTSC has used for decades, while by no means perfect, still provides a solid framework for the Board to further refine and improve upon, subject to stakeholder input. Moreover, this appeals process is largely identical to the appeals process currently used by the US Environmental Protection Agency and virtually every state in the nation for their respective permitted facilities. As such, we think the DTSC’s permit process is a good template for the Board to begin from, rather than starting from scratch.

Second, we wish to note that while we strongly disagree with several of the recommendations recently put forth by stakeholders, at the Board’s August public meeting on this issue, we believe there exist some areas of agreement between the signatories of this letter and the environmental

justice community on some of their recommendations for how the Board can further strengthen the appeals process moving forward, such as:

- **Increase Transparency** – DTSC’s prior appeals process lacked transparency, with decision-making occurring behind closed doors. Consistent with the mandate in Senate Bill (SB) 158 (Chapter 73, Statutes of 2021), we urge the Board to adopt rules that provide for transparent decision making through open hearings and rules that ensure the protection of all parties’ due process rights. In contrast, DTSC’s prior appeals process, in which appeals were decided entirely on written submissions and with no access to the appeals officer, created a process lacking any meaningful transparency, which led to decisions based on incorrect assumptions that could have been avoided through a more transparent and open appeals process. Creating a process with opportunities for more robust engagement with Board staff who are processing the appeals and Board Members who are deciding the appeals will provide a significant improvement and lead to more effective and defensible appeal decisions. All of this said, it should be noted that the Legislature was particularly focused in its support of SB 158 on ensuring DTSC has sufficient resources and clear timeline expectations for addressing permit renewals, including curing a backlog of permits. In this regard, the Board’s appeals process should ensure it does not run counter to this important focus and overarching goal.
- **Improve Engagement** – DTSC’s prior appeals process also suffered from a lack of communication between parties to the appeal and the appeals officer, thereby resulting in decisions that were often based on incorrect factual assumptions and similar avoidable errors. The new appeals process should encourage engagement with Board staff processing the appeals and Board members ultimately deciding the appeals.

Third, following robust discussions with industry representatives that have decades of extensive involvement in the permit appeals process, we strongly believe that it is critical for the Board to include the following reforms in the permit appeals process it ultimately adopts:

- **Establish and Maintain an Expedient Appeal Process** – DTSC’s prior appeals process lacks any meaningful deadlines, which meant that appeals often took many months (if not years) to conclude. While we believe such delays are frequently exploited to delay permit decisions, these delays significantly hamper the effectiveness of DTSC’s permitting function and the ability of facilities to modify operations, even in instances where the modifications would enhance protection of human health, public safety, and the environment.
- **Seek Early Resolution of Meritless Appeals** – Similarly, DTSC’s prior appeals process did not provide for a meaningful process for expeditiously resolving meritless appeals, which resulted in these appeals frequently requiring a full briefing and resulted in permitting actions left stayed for months (or longer). We strongly believe, that including a procedure for seeking early dismissal of meritless appeals will improve the efficiency of the permitting process by enabling the Board to focus its time and efforts on meritorious appeals.
- **Clarify Impact of Appeal on Permit Decision** – DTSC’s prior process was interpreted to require the stay of the appealed permit decision pending a final decision on the appeal – regardless of whether the appeal had any merit or was based on sound science and

engineering principles. Similarly, an appeal taking issue with a procedural or technical aspect of DTSC's permitting decision would stay a permit decision even where the environmental benefit of the permit decision was unchallenged. In instances where an appellant makes a showing of significant harm, were the permitting decision to go into effect, we believe that a stay may be warranted. However, automatic stays lead to perverse outcomes that can significantly hamper DTSC's permitting function and the ability for facilities to service the hazardous waste management needs of California.

- **Encourage Informal Resolution of Appeals** – Permitting appeals frequently arise as part of long-standing disagreements between facility owner/operators and members of the surrounding communities that oppose the presence of these facilities in their communities. DTSC's previous appeals process did little to mitigate these larger disputes – primarily due to the lack of transparency and engagement as discussed above. The Board's appeals process should encourage engagement and provide avenues for discussions that promote informal resolution of appeals through such engagement, to better address these larger disputes.
- **Ensure Appeals Decisions are Based on the Evidence and Sound Science** – Permitted hazardous waste facilities in California are critical to ensure that the state responsibly manages its own generated hazardous waste. As such, DTSC's permitting authority is central to the state's oversight of the critical role played by permitted hazardous waste facilities. Given the high stakes at issue in permit appeals, it is imperative that the appeals process that the Board adopts ensures that permit appeals are decided based on thorough reviews of the evidence and the science.

Fourth, as the Board develops rules governing this appeals process, it is critical that the mandates articulated in SB 158 guide this rulemaking process. The expressed language of SB 158 makes clear that increasing the efficiency of DTSC's permitting process was a priority to the Legislature in creating the Board.¹ The changes recommended above all are consistent with this mandate.

Fifth, in preparation for the upcoming workshops, the Board has posed four questions to stakeholders:

1. What is a timely appeal?
2. Who has standing to appeal?
3. What are the grounds for an appeal?
4. What is the standard of review?

Each of these issues were briefly discussed during a stakeholder presentation during the August Board meeting whereby it was proposed the Board (1) extend the time for appeal; (2) expand standing to any member of the public; (3) broaden the grounds for appeal; and (4) expand the level of review the Board would be required to conduct in appeals through the application of a *de novo* standard. Each of these recommendations would, we are confident, significantly slow

¹ See e.g. Health and Safety Code (HSC) section 25125.2(b)(7) (mandating that the Board develop goals to "improve the efficiency of the permitting process"; HSC section 25200(c)(1)(C)(iii) (requiring decisions on permit applications within three years); and HSC section 25200.25(a) (requiring DTSC to report to the Board when timely permitting decisions have not been reached); and HCC section 25200.27(b) (granting the Board with authority to mandate schedules for permit decisions).

down the Board's processing of appeals, and, ultimately, the efficiency of DTSC's permitting function, in direct conflict with SB 158.

We believe that the appropriate answer to each of these questions are found in the current appeal regulations as administered by DTSC. These regulations have been in wide use for years and proven to strike the correct balance between a robust appeal process and the need for efficient permitting decisions, thereby providing a foundation for an efficient appeals process that meets the mandate in SB 158.

In conclusion, the Board's appeals process must provide an avenue for all stakeholders to find common and acceptable grounds for the permitted facility to operate in accordance with California law. We therefore urge the Board to craft rules in the appeals process that encourage engagement between all sides to the dispute, with efforts to informally resolve disputes over permitting decisions based on California law, sound science and engineering principles, and legitimate needs of the surrounding communities.

With all the above, in mind, we look forward to continued engagement with you all and with other interested stakeholders as the Board further deliberates and begins to develop the framework and specific language for consideration in the permit appeals process. Thank you.

Sincerely,



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