

Permit Appeals Process Comment – December 29, 2022

The Board should amend 66270.10 to define the Board of Environmental Safety.

The Board should amend proposed 66271.18 (a)(1-6) as follows:

66271.18 Appeal of Decisions to Grant, Issue, Modify, or Deny Permits.

(a) Petitioning for review of a final hazardous waste facility permit decision.

(1) Initiating an Appeal. An appeal from a decision to grant, issue, modify or deny a hazardous waste facility permit shall commence upon the filing of a notice of appeal to the Board of Environmental Safety for such purpose no later than 30 calendar days after notice of the final permit decision.

(A) The notice of appeal must contain the following information:

(i) Appellant's name and address;

(ii) The name and address of the party, if any, whose permit decision is the subject of the appeal; and

(iii) The specific grounds for appeal.

(2) Within five working days of the filing of a notice of appeal with the Board of Environmental Safety, the Executive Officer shall:

(A) Post a notice and brief description of the appeal on its website;

(B) Mail to the permit applicant whose permit is the subject of the appeal and the Department, a copy of the notice and a brief description, with a copy of the appeal documents filed with the Board of Environmental Safety;

(C) Mail copies of the appeal to each member of the Board of Environmental Safety; and

(D) Mail notice to the appellant.

(3) The Department shall submit to the Board of Environmental Safety, no later than 10 days after receiving notice of an appeal pursuant to (a)(2), the administrative record, including a table of contents of documents contained therein and a brief chronology of events and actions relevant to the permit decision. The record shall be certified by the Department as being "full and complete." The administrative record shall be submitted to the Board of Environmental Safety in electronic format and in compliance with state and federal requirements. The administrative record shall be posted to the Board of Environmental Safety website.

(4) (A) Within sixty calendar days of the posting of the notice of appeal in (a)(2) the appellant shall file a Petition with the Board of Environmental Safety. For good cause shown, the Executive Officer, in consultation with the Board Chair and Vice Chair, may extend the time to file a petition by not more than an additional 60 calendar days. The petition must demonstrate that each challenge to the permit decision is based on:

(i) A finding of fact is not based on substantial evidence,

(ii) A conclusion of law is erroneous, or

(iii) An exercise of discretion or an important policy consideration that the Board of Environmental Safety should, in its discretion, review.

(B) Appellant must demonstrate, by providing specific citation or other appropriate reference to the administrative record (e.g., by including the document name and page number), that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by section 66271.12. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in section 66271.12. Additionally, if the petition raises an issue that the Department addressed in the response to comments document issued pursuant to section 66271.16, then appellant must provide a citation to the relevant comment and response and explain why the Department's response to the comment was erroneous or otherwise warrants review.

(5) Response(s) to a petition for review.

(A) The Department must file a response to the petition within 30 days after the service of a petition.

(B) A permit applicant who did not file a petition but who wishes to participate in the appeal process must file a notice of appearance and a response to the petition. Such documents must be filed by the deadlines provided in subsection (5)(A) of this section, as appropriate.

(6) Standing to File. Any aggrieved person who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in the action before the department may file a petition after filing a timely notice of appeal.

(b) Initial Order. Within a reasonable time following the filing of the petition for review, the Board of Environmental Safety shall issue an order either granting or denying the petition for review. The Board of Environmental Safety shall dismiss any appeal that is not supported by a petition meeting the requirements set forth in subsection (a) of this section. The order of the

Board of Environmental Safety shall set forth a briefing schedule for the appeal and shall state that any interested person may file a written argument.

(c) Participation by amicus curiae. Any interested person may file an amicus brief in any appeal pending before the Board of Environmental Safety. The deadline for filing such brief shall be set forth in the briefing schedule.

(d) Supplemental Evidence

(1) Parties may request that the Board of Environmental Safety consider evidence not previously provided to the Department. That party shall provide a statement that additional evidence is available that was not presented to the Department or that evidence was improperly excluded by the Department.

(A) The request to present additional evidence and all supporting arguments shall be provided at the time the petition is filed, or as soon as the evidence becomes available thereafter.

(B) The request to present additional evidence shall include a detailed statement of the nature of the evidence and of the facts to be proved. If the evidence was not presented to the Department, the person requesting consideration of the evidence shall provide a detailed explanation of the reasons why the evidence could not previously have been submitted. If the person presenting the evidence contends that the evidence was improperly excluded, the request shall include a specific statement of the manner in which the evidence was improperly excluded.

(C) If the Board of Environmental Safety, in its discretion, approves a request to present additional evidence, the proponent must submit the evidence in writing and must also provide it to the petitioner, the permit applicant (if not the petitioner) and the Department. The Board of Environmental Safety may prescribe a time limit for submission of the additional evidence.

(2) The petitioner may request that the Board of Environmental Safety conduct a hearing to consider testimony, other evidence, and argument. Such request shall be supported by a summary of contentions to be addressed or evidence to be introduced and a showing of why the contentions or evidence have not been previously or adequately presented. A request to conduct a hearing shall be submitted at the time the petition is filed or as soon as possible thereafter.

(e) Oral argument. The Board of Environmental Safety may on its own initiative or at its discretion in response to a request by one or more of the parties hold a hearing for the purpose of oral argument or receipt of additional evidence or both. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument should be permitted.

(1) If a hearing is held, the Board of Environmental Safety shall give reasonable notice of the time and place and of the issues to be considered to the petitioner, the permit applicant (if not the petitioner), the Department, any interested persons who have filed a response to the petition pursuant to subsection (f) and such other persons as the Board of Environmental Safety deems appropriate.

(2) If a hearing is held, the Board of Environmental Safety in its discretion may require that all interested parties intending to participate shall submit to the Board of Environmental Safety in writing the name of each witness who will appear, together with a statement of the qualifications of each expert witness, the subject of the proposed testimony, and the estimated time required by the witness to present their direct testimony. The Board of Environmental Safety may also require that copies of proposed exhibits be supplied to all parties and to the Board of Environmental Safety.

(3) The Board of Environmental Safety may, by order, establish additional procedures governing any oral argument before the Board of Environmental Safety.

(f) Board of Environmental Safety authority. In exercising its duties and responsibilities under this section, the Board of Environmental Safety may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this section including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with this part or an order of the Board of Environmental Safety. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding. Additionally, for good cause, the Board of Environmental Safety may relax or suspend the filing requirements prescribed by this section or Board of Environmental Safety order.

(g) Judicial Review. Once an appeal is commenced, the dismissal of a petition for review in its entirety, or a final decision on the merits, is a prerequisite to seeking judicial review of the Department's final permit decision.

(1) For purposes of judicial review, final agency action occurs when agency review procedures under this section are exhausted and the Department subsequently issues a final permit decision under this subsection. A final permit decision must be issued by the Department:

(A) When the Board of Environmental Safety issues notice to the parties that the petition for review has been denied;

(B) When the Board of Environmental Safety issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(C) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board of Environmental Safety issues a remand order

specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.