Brooks, Sheena@DTSC

From: Julia Gates [redacted]
Sent: Wednesday, March 1, 2023 10:35 PM
To: BESinfo
Subject: Public Comment on proposed regulation

Jeanne Rizzo, Chair
Alexis Strauss Hacker, Vice Chair
Lizette Ruiz, Member
Sushma Dhulipala Bhatia, Member
Georgette Gómez, Member

Board of Environmental Safety,
1001 I Street, 25th Floor,
P.O. Box 806,
Sacramento, CA 95814.

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

As recognized by the Legislature and Governor, the Board serves an important oversight role to improve effectiveness, transparency and accountability of DTSC's actions. The Board is tasked with a long list of important duties; however, one of the more significant responsibilities will be to hear and decide permit appeals.

Despite the number of meetings and public comment opportunities, the Board's proposed regulations continue to be fatally flawed and fail to meet minimum standards set forth in the California Administrative Procedure Act. In addition, by looking to the prior DTSC appeal process as a model process, the proposed regulations continue to perpetuate past limitations and mistakes. The Legislature did not create the Board to continue the status quo. The Board should reevaluate whether many of the proposed regulations will improve the permit appeal process.

The Board should review its proposed regulations to ensure the appeal process operates pursuant to principles of fundamental fairness, due process of law, and the Board should conduct its review in a manner that is open, objective, impartial and free from undue influence. The regulations are an opportunity for the Board to reinforce these important principals; however, the current draft regulations don't do this. Finally, as part of these permit appeal regulations, the Board should also evaluate when and how it will communicate to the public, permit applicants, DTSC and other interested stakeholders about its process and review on specific permit appeals to not only ensure transparency but also encourage the opportunity for participation.

Please accept these comments on the Notice of Proposed Action/Draft Notice of Emergency Rulemaking and Draft Proposed Revisions to California Code of Regulations, title 22, Sections 66271.14, 66271.15, 66271.18 and revise the regulations accordingly before finalizing the proposed action.

Draft Proposed Revisions to Sections 66271.14(b),

- The proposed changes to regulation are unclear. Recommend keeping the subparts. Notice of Proposed Action/Draft Notice of Emergency Rulemaking does not explain why it is necessary for the Board to delete 66271.14 (b)(3).

- See later comments. If the Board does not include California Environmental Quality Act (CEQA) from the scope of its review, section 66271.14(b) should be revised to explain when a project is approved.

Draft Proposed Revisions to 66271.15(a) and (b),

- The Board should not adopt the proposed changes to this regulation. While DTSC has not made timely permit appeal decisions, the Board should evaluate whether 180 days is realistic for the Board to complete a permit appeal process given the proposed schedules and timelines outlined in the regulations. Board staff will need time to fully evaluate the issues raised in appeal and by unrealistically shortening the timeframe for their review and preparation of any proposed decision at a properly noticed Board hearing, the regulations are flawed. If the Board decides to unrealistically limit the time for its review, the regulations should also allow an opportunity for the Board to extend on its own decision.

Draft Proposed Revisions to 66271.18.

66271.18(a)(1):

- The proposed regulation should not define a term within the text of the regulation. The Board should define the term "The Board of Environmental Safety" in California Code of Regulations, title 22, section 66260.10, consistent with other terms used in regulation.

- The proposed regulation excludes determinations made under California Environmental Quality Act (CEQA) from the scope of its review. Notice of Proposed Action/Draft Notice of Emergency Rulemaking does not explain why that limitation is necessary for the proposed regulations and therefore fails to comply with the Government Code 11346.1(b)(2).

In addition, by excluding CEQA from being raised on appeal, the Board is disregarding important disclosures that are made to the public about any significant environmental effects of a proposed discretionary project. The CEQA process discloses to the public the agency decision making process utilized to approve discretionary projects and identifies potential damage to the environment from the project. CEQA process also serves to enhance public participation in the environmental review process through meetings, notice, public review, and hearings, which are important tools the Board should be encouraging.

Excluding CEQA from Board review will not prevent CEQA claims from being introduced at hearing or in front of the Board. The Board, although independent, is part of DTSC and DTSC must comply with CEQA before making a final discretionary approval of a project, which will be after resolution of any appeal. Public Resources Code section 21177 requires before any action filed under Section 21167, that the alleged grounds for noncompliance were presented to the public agency orally or in writing by any person. [A party must inform the public agency of an alleged CEQA violation before filing an action in court. (Pub. Res. Code, § 21177(a)(b); Don't Cell Our Parks v. City of San Diego (2018) 21 Cal.App.5th 338, 358.)] This often involves filing appeals to the highest decision maker. And CEQA encourages appellants to submit evidence to

lead agencies, including in an appeal. Under Public Resources Code Section 21167.6(e)(7) Appellants need only submit evidence to the lead public agency and it must be considered as part of the CEQA administrative record. Regardless of whether the Board takes up the CEQA argument, DTSC will need to include any CEQA arguments raised at the Board as part of its CEQA administrative record and if the issue is not heard by the Board, DTSC it will not have the benefit of providing a response and decision on the arguments as part of its records. Any documents in the agency's possession falling within the categories set forth in Public Resources Code Section 21167.6 (e) are required to be included in the administrative record.

If the Board decides to exclude CEQA review, the Board should explain more clearly why it is excluded and how appellants can satisfy the CEQA doctrine of exhaustion of administrative processes.

66271.18(a)(2):

- The proposed regulation impermissibly incorporated by reference a required form without complying with California Code of Regulation, title 1, section 20; or otherwise complied with Government Code section 11340.9(c). The Board should contact the Office of Administrative Law Reference Attorney to discuss how to remedy this defect.

- The proposed regulation allows for an expedited appeal of temporary authorizations and class 2 modifications. The Board should carefully evaluate whether a streamlined process of temporary authorizations is appropriate. There have been several appeals where industry misused the temporary authorization and permit modification classes to shortcut permit process and appeal time periods (e.g. Chemical Waste Management, Inc., Kettleman Hills – Temporary Authorization Appeal and Quemetco, Inc., Temporary Authorization Appeal).

66271.18(a)(3):

- The proposed regulation impermissibly incorporated by reference a required form without complying with California Code of Regulation, title 1, section 20; or otherwise complied with Government Code section 11340.9(c). The regulation should either be amended to reference the specific form or include the required elements of the form in regulation. The Board should contact the Office of Administrative Law Reference Attorney to discuss how to remedy this defect.

66271.18(a)(4):

- The proposed regulation continues to put the appellant at an unfair disadvantage and require the appellant to cite to the record it does not have access too. The proposed regulations do not require DTSC to provide the administrative record until **after** the petition has been accepted by the Board. There is no reason for this unfair delay. Under existing section 66271.17, DTSC is required to compile its administrative record with its final permit decision. The Board should require DTSC to make this record available to the public shortly thereafter the initial form is submitted to the Board. The Board should adopt a model similar to the US EPA Appeals Board and require production of the record before the appellant is required to cite to the record. DTSC is not required to provide the administrative record until after the petition is accepted by the Board.

- The proposed regulation text that describes what the appellant must demonstrate in the petition is unclear, and therefore unduly limits appeals. The Board should not adopt the proposed text.

66271.18(a)(5) and (6):

- The proposed regulation continues to impermissibly limit who has standing to appeal the permit decision. DTSC's permit decisions take too long to process, are poorly noticed, and DTSC does not engage in regular outreach to provide members of the public an opportunity to participate in the permit process. The Board should amend the proposed regulation to allow for broader standing, similar to requirements used by the Bay Area Air Quality Management District's Hearing Board and other Air District Hearing Boards:

> 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 filling a timely notice of appeal. (emphasis added)

The Board should consider adding the text "or otherwise participated in the action" to be more inclusive in who has standing to file an appeal. The Board should review 66271.12 and 66271.16 to make conforming changes to allow for more robust participation.

66271.18(c):

- The proposed regulation continues to apply a high standard of review, not found in other similar state authorities. According to the Notice of Proposed Action/Draft Notice of Emergency Rulemaking, the standard of review of "clearly erroneous" is consistent with the review in which courts review agency actions; however, this is not entirely correct.

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. (United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).) Appeals courts apply the clearly erroneous standard of review to a conclusion of fact made by a judge (not a jury). That means the court will only overturn the conclusion if the court finds it to be clearly wrong. The standard is higher than a "reasonableness" standard; meaning an appeals court will have to find a slightly greater degree of wrongness in the conclusion in order to overturn it.

However, the Board is not a court of law, and it is not an appeals court reviewing conclusions of facts made by judges. The Board should look to other state oversight boards for the correct standard of review, which apply a substantial evidence or reasonableness standard.

In support of the position that the standard of clearly erroneous is the correct standard of review, the Notice of Proposed Action/Draft Notice of Emergency Rulemaking cites to Evidence Code 664 for the conclusion that it supports a finding of clearly erroneous. However, as discussed by Hazardous waste Coalition Letter, citing the Bay Area Air Quality Management District's Hearing Board Rules Article 3.6: Standard of Review, the correct standard of review is not "clearly erroneous" but is "erroneous." The rule provides in relevant part:

> "…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." (BAAQMD's Hearing Board Rules, effective June 2011, Page 11, emphasis added).

The proposed regulation text confuses *erroneous* with *clearly erroneous*. The standard of clearly erroneous places a heavy burden on the appellant to prove a mistake has definitely been

committed. Given the transgressions of DTSC and the need for the Board, the Board should reevaluate the proposed standard of review and evaluate whether DTSC should be afforded such a high degree of deference.

In addition, the Board should evaluate whether the proposed regulation provides the correct standard to evaluate disputed facts or unsubstantiated enforcement violations. For example, in response to concerns raised by industry that DTSC's Violation Scoring Procedure failed to satisfy basic due process requirements, DTSC implied the permit appeal process would be the venue to challenge disputed facts or unsubstantiated violations (Final Statement of Reasons, R-2016-03, p. 13 "The VSP processes will not affect an owner or operator's existing due process right to challenge DTSC's permit decisions or enforcement actions"). The Board should look to the standard of review used by other Boards that make evidentiary rulings.

- The proposed regulation uses "public meeting" with "public hearing" interchangeably. (*see* 66271.18 (b), (c), (d)(2),) The permit appeals process should make it clear that the permit appeal will be at a public hearing in front of the Board.

- In addition, the proposed regulation 66271.18(c), says that the public hearing will be held in accordance with the procedures for "informal hearings" in article 10 of chapter 4.5 of the Administrative Procedures Act (commencing with Government Code section 11445.10) The Notice of Proposed Action/Draft Notice of Emergency Rulemaking does not justify why informal hearing process should be used by the Board. The Board should closely evaluate whether the hearing procedures should be informal hearings.

Government Code 11445.20 authorizes an agency to use information hearing procedures if in the circumstances its use <u>does not violate another statute or the federal or state Constitution</u>:

(a) <u>A proceeding where there is no disputed issue of material fact</u>.

(b) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:

(1) A monetary amount of not more than one thousand dollars ($1,000).
(2) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.
(3) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.
(4) A disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days. Nothing in this section precludes an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing.

(c) A proceeding where, by regulation, the agency has authorized use of an informal hearing.

(d) <u>A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution may require a hearing. (</u>Gov. Code, § 11445.20)

The Board should closely evaluate whether the informal public hearing procedures are appropriate given the potential for disputed material facts, unadjudicated enforcement violations, violation scoring

procedure challenges, permit denial procedures, due process claims and other cases of disputed material facts.

Related, the Notice of Proposed Action/Draft Notice of Emergency Rulemaking dismisses the need for evidentiary hearings, stating that would complicate the appeal process. (p.6) However, other state boards have a process allowing for evidentiary hearings and have figured out how to satisfy minimum due process requirements. The Board should review their requirements for guidance on how to structure similar requirements. If the Board chooses not to allow an evidentiary hearing, as discussed previously, given that DTSC has deferred due process requirements to the permit appeal hearing, the Board should explain how due process requirements will be met by the regulations. If an evidentiary hearing will not be provided, the Board should explain why it is not required under due process requirements.

66271.18(d):

- The proposed language is unclear as written and should be revised to be clear. The word "either" is used in the regulation to refer to three choices. The word either refers only to two of anything. Recommend breaking the language down in subparts to offer clarity.

66271.18(e):

- The proposed language is unclear as written. Recommend breaking the language down in subparts. The proposed regulation should also include procedures for Board decisions that are remanded to DTSC for further action.

Finally, the action is additionally flawed as follows:

- Government Code 11346.5, The Finding of Emergency fails to comply with Government Code 11346.5 (a)(2). The proposed regulation fails to identify the authority of the regulation.

- Government Code 11346.1(b)(2). The proposed regulations fail to identify the necessity of the regulation.

- Government Code11346.1(a)(3). The proposed regulation fails to include a complete informative digest.

- Government Code 11349.1, California Code of Regulations, title 1, section 14. The proposed regulations fail to identify the authority and reference.

The lack of transparency and accountability has contributed to an erosion of trust in DTSC's permit decisions. The Board should seek to enhance transparency and foster greater public confidence in DTSC's administering of its hazardous waste facility permitting program for the success of both DTSC and the Board. The Board should revise the regulations accordingly before finalizing the proposed action.

Thank you for your consideration of these comments,

Julia Gates