



Tri-Valley CAREs, Livermore



Neighbors Against Phibro Tech



March 3, 2023

Department of Toxic Substances Control
Board of Environmental Safety

RE: Emergency Rulemaking for Hazardous Waste Facility Permit Appeal Process

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

The Board of Environmental Safety (Board) proposes to adopt regulations to change the hazardous waste facility permit appeal process. We write to urge you to rework the proposed draft changes to the Hazardous Waste Facility Permit Appeal Process (Draft Appeals Process) and to take immediate action to work with community leaders to craft and adopt an appeals process that challenges—rather than continues—the Department of Toxic Substances Control’s (DTSC) failed status quo for how it makes permitting decisions.

The Board promised communities that it would provide oversight and enhanced transparency over how DTSC does its work. Yet, the Board is choosing to adopt very consequential regulatory and policy direction without allowing communities adequate time to review and comment on the proposal. The Board should rework its Draft Appeals Process and then allow communities at least 45 days to review the full, final proposal. The current plan of providing a mere 5-days to review the final proposed Appeals Process both blocks engagement and hurts the Board's effort to build trust with impacted community members.

We are deeply concerned about the board's decision to point to "complexity" of permitting decisions, "administrative burden" on the board, and DTSC staff's "historical practice" of refusing to hear appeals related to assessment of the environmental impacts of its permitting decisions as reasons to "defer" to DTSC staff's permitting decisions during appeals. Particularly problematic is the Board's proposed decision to refuse to hear appeals of staff's permitting decisions under the California Environmental Quality Act—a law enacted to ensure that decision makers understand and consider the environmental impacts of their decisions. DTSC's refusal to see and address environmental impacts of its permitting decisions is among the top concerns communities have expressed for years. We are dismayed to find that the Board may choose to decline to use its authority to ensure communities' demands that environmental impacts of DTSCs permitting decisions be truly evaluated and addressed. The Board can not have it both ways: it cannot assert that it seeks to advance environmental justice, transparency, and trust while it builds an appeals process that continues DTSC's decision making in a manner that fails to consider environmental impacts of permitting decisions.

We are dismayed by the Board's proposals to construct—rather than dismantle--barriers to community efforts to be heard in DTSC's permitting decisions. The Board proposes to adopt a court based model for conducting its business including hearing appeals while failing to acknowledge that courts past and present tend to function as forums for exclusion rather than inclusion. For example, the Board proposes to model its appeals process on the approach used by the federal government for its administrative law judges. This can limit meaningful community engagement in the permitting appeals process. One of the most critical purposes of establishing the Board was to build accountability for DTSC and creating a bridge for impacted communities to be directly and meaningfully involved at the decision making table. A court-like process is not an adequate model to ensure voices of those most impacted are actually heard.

Even worse, the Board proposes to have the authority to require communities to post a bond to "avoid prejudice" to industry while an appeal is pending before the Board. Industry, on the other hand, has no bonding requirement to "avoid prejudice" to the community. Here, again, the proposed rule further marginalizes those with the most limited resources to engage in DTSC's permitting process while shielding the regulated entities from the impacts of DTSCs permitting decisions. Finally, the Board proposes to expedite and limit the appeals process for appealing "Class 2 permit modifications"—likely the most common permitting decisions made by DTSC. This Board is not a Court and should rethink how to create an appeals structure that encourages engagement by the community rather than simply embracing existing power dynamics that marginalize community voices. The bonding proposal feels like retaliation for community-driven appeals and the Board should remove it from the proposal. Class 2 permit modifications are too

significant to constrain the community's ability to be heard when appealing those decisions.

We appreciate the hard work that the Board is undertaking and look forward to a constructive partnership that results in an appeals process that meets the Board's goals to provide oversight and transparency for DTSC's permitting decisions.

In power,

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