



March 3, 2023

SENT VIA EMAIL

<https://bes.dtsc.ca.gov/comments>

Department of Toxic Substances Control
Board of Environmental Safety

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Georgette Gomez
Alexis Strauss Hacker
Lizette Ruiz

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Cynthia Medina
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Homeowner/Resident

Lydia Valdez
Homeowner/Resident

In Memoriam
Nick Blanco
Homeowner/Resident

Barbara Stockwell
Homeowner

Brenda Bibee
Board Member

RE: Emergency Rulemaking for Hazardous Waste Facility Permit Appeal Process

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

This is the promise made by Governor Newsom that remains unfulfilled. "The Board will increase DTSC's public transparency and accountability and give communities an opportunity to engage in new and meaningful ways on hazardous waste management."

The Del Amo Action Committee does not support the passage of the Draft Permit Appeal Regulation and the draft regulation on public hearings associated with this regulation. The Draft Regulation is a significant disappointment. Ironically the regulation proposed comes with conditions that make the previous permit appeal process more appealing. Examples are included in this correspondence.

The Board assumes that a permit appeal regulation can be separated from the DTSC permit process and has shown no interest in acknowledging that a problematic and lengthy permitting process and associated failure to adequately inform the public. There is a bigger picture

Our goal in submitting this correspondence is to offer arguments for non-approval of the Emergency Regulation

The Toxic Wastes and Race and Toxic Wastes and Race at Twenty reports are the landmark study and follow-up study that demonstrated a direct correlation between the placement of toxic waste facilities and communities of poverty and/or color. This first report was the ground breaking study from which the term "environmental racism" was coined. Today, legislation and court cases refer to this term when addressing environmental issues of race and discrimination.

It is ironic that twenty years after the original Toxic Wastes and Race report, many of our communities not only face the same problems they did back then, but now they face new ones because of government cutbacks in enforcement, weakening health protection, and dismantling the environmental justice regulatory apparatus. The new report, Toxic Wastes and Race at Twenty, again signals clear evidence of racism where toxic waste sites are located and the way government responds to toxic contamination emergencies in people of color communities.

We appreciate Los Angeles County Supervisor Hilda Solis's thoughtful letter commenting on several major topics anticipated for inclusion in the proposed rule. Her comments are reflective of comments received during Board meetings and workshops from several organizations and individuals.

HILDA L. SOLIS SUPERVISOR, FIRST DISTRICT Los Angeles County Board of Supervisor's letter provided comments on many aspects of the rule. She acknowledged that DTSC's web page should be more user friendly in her thoughtful comments in correspondence on the permit appeal process. -residents impacted by hazardous waste facilities face significant barriers to participation in administrative and legal processes due to social and environmental vulnerabilities (which she feels the current process does not accommodate) the Board should adopt processes that maximize impacted resident's ability to participate in the appeal process (to enable everyone to participate)-

The proposed regulation depends on an orderly and public permitting process with adequate information available to the public at the earliest stage of the process. It depends on effective notification of a draft permit and associated hearings. It depends on predictable information on the date a final permit will be issued. Concerns regarding the difficulty communities have participating in the permitting process were discussed in Board meetings and workshops. The proposed regulation fails to respond to any of these concerns. The regulations fail to address the DTSC's inadequacies in providing adequate basic information on the permit. Over many years elected officials and community organizations have recommended involving community members early in the initiation of the permit process. This has simply never happened.

The DTSC permitting process is a long process with facilities failing repeatedly to submit an adequate Part B application. It is possible that companies requiring an updated permit with anticipated stricter operating requirements will delay the process as long as possible. Their comments on the draft permit may cause delays in the issuance of a final permit. It is possible that companies may file a permit appeal to extend time frames and try again to reduce regulatory requirements.

Community organizations would understandably find it very difficult to follow this process, understand complicated technical information and meet short time frames required for permit appeals. Nothing in the draft rule even begins to address this reality. Provided below is a section of the Envirostor Data base supporting this argument.

The announcement of the draft Phibro Tech permit public comment period was posted on the DTSC web page in October 2022. No link to the draft permit was included in the notification. An effort to find the draft permit on the Envirostor data base was unsuccessful. In November

2022 another announcement indicated extension of the public comment period. The draft permit document is not in Envirostor.

According to the regulation an appeal can be filed only by individuals or organizations that filed comments on the draft permit and or testified at a public hearing on the draft permit. This condition reasonably relies on adequate notice of a public hearing. According to several speakers at the meetings and workshops the DTSC notification process is inadequate. DAAC attempted earnestly to find the draft permit for Phibro Tech. Envirostor includes a notice on the draft permit but no draft was found. If a permit appeal is filed alleging unacceptable conditions in the final permit that were not in the draft permit both permits must be available for review.

Since the permit appeal time frames are triggered by the issuance of a final permit it is essential that the public has adequate notification of the issuance of a final permit. This requires community members or the organizations that represent them to spend time to monitor the DTSC processing of the final permit fearing that the notification process is inadequate and time will be lost before they get the notification.

It is reasonable to assume that the companies receiving the permit will seek changes to the draft permit that reduce their regulatory requirements.

The Phibro Tech Chronology from Envirostor is provided below.

Showing receipt of Part B applications with Notices of Deficiencies NOD. One entry is labeled Draft Permit. The document found is a public notice/fact sheet, not the draft permit. The time frame included is from June 23, 2015 to December 16, 2022. In the public notice on the hearing the date for the hearing was in October 2022.

APPLICATION PART A		1/30/1996
RECEIVED		
<u>VIEW</u>	1ST NOTICE OF DEFICIENCY ISSUED	6/23/2015
<u>VIEW</u>	APPLICATION PART B RECEIVED	10/8/2015
	RESPONSE TO 1ST NOD RECEIVED	10/8/2015
	2ND NOTICE OF DEFICIENCY ISSUED	12/31/2020
<u>VIEW</u>	RESPONSE TO 2ND NOD RECEIVED	5/28/2021
	DRAFT CEQA	3/9/2022
<u>VIEW</u>	FINAL PART A & PART B RECEIVED	8/17/2022
	FINAL CEQA	8/18/2022
	PUBLIC COMMENT (BEGIN) ^[2]	8/19/2022
<u>VIEW</u>	DRAFT PERMIT DECISION	8/19/2022
<u>VIEW</u>	TECHNICAL COMPLETE LETTER	8/23/2022
	PUBLIC COMMENT (PUBLIC MEETING) (IF APPLICABLE) ^[3]	9/28/2022
	PUBLIC COMMENT (PUBLIC HEARING) (IF APPLICABLE) ^[3]	9/28/2022
	PUBLIC COMMENT (END) ^[4]	12/16/2022
	FINAL PERMIT DECISION	4/18/2023

Recently a tentative date for the final permit was added to the data base. It would be difficult to compare the draft permit with the final permit because the draft permit is not included in the documents.

An extended period may elapse before a final permit is issued. Because issuance of the final permit triggers permit appeal time frames this is important.

Transparency

The purpose of the Bagley-Keene Open Meeting Act is to ensure that public agencies conduct the people's business openly so that the public may observe and be informed. Every state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings is required to comply with the ACT.

The Board Chair has mentioned the restrictions the Act imposes on the Board.

At the January 2023 meeting Dawn Koepke, California Council for Environmental and Economic Policy spoke indicating she was representing a significant number of organizations in the regulated community including the organizations that sent a January 25, 2023 letter. This letter caused the delay in issuing the proposed regulation. Dawn Koepke thanked the Board members for several conversations and meetings the organizations had with Board members on the permit appeal process. Following her comments, the attorney representing the Board commented that they would have conversations with anyone requesting a meeting.

To our knowledge this offer had not been extended to any people or organizations previously. None of the participants in Board meetings or workshops were told that individuals or organizations could ask for a separate meeting with Board members. The acknowledgement of several meetings and conversations with representatives of the regulated community was not provided by members of the Board. Instead, a representative alleging that she represented a significant number of regulated community organizations and companies thanked the board for the meetings and conversations.

It would not be difficult to understand why community members could feel outnumbered and discouraged. Other participants in the process have little or no knowledge of what was discussed during the conversations and meetings.

DTSC Mailing Lists

Mailing lists are project specific and include individuals and organizations who have expressed an interest in the permit determination or site, and/or wish to be kept informed of DTSC's activities. Mailing lists are considered public record and may only be obtained through a written Public Records Act request. Project Managers should consider all mailing lists as public records, and coupons and sign-in sheets must contain a disclosure statement, which conveys this to anyone requesting to be placed on a mailing list. You should consider the possibility of collecting e-mail address for electronic mailings.

Unacceptable Language

Two sections of the proposed Emergency Regulation are not only offensive but are designed to intimidate individuals considering filing an appeal or commenting on a permit appeal in a public hearing. *“(2) Irrelevant testimony: The Board Chair may temporarily suspend any testimony that is not relevant to the subject of the hearing and advise the speaker to that effect. The Board Chair may stop taking further testimony from and vacate any remaining time allocated to a speaker who, after being so advised, continues to offer irrelevant testimony. This paragraph applies to presentations by speakers pursuant to paragraph (1) and public comments pursuant to paragraph (4) of this order.”*

This requirement is reflective of the prevailing attitude of the members of the Board drafting the regulation. It not only gives Board members the ability to stop testimony they judge to be irrelevant but it also enables Board members to dismiss written comments.

As an example of our direct experience the Del Amo Action Committee Board Chair, Florence Gharibian, attempted to comment on the need for the regulation to be reflective of the realities of the DTSC permitting process in the first permit appeal workshop. Alexis Strass Hacker stopped her midway in her comment calling her by her first name and telling her this was not the subject of the meeting.

(g) Board Authority. In exercising its duties and responsibilities under this section, the Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with section 66271.15, this section, or an order of the Board. 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, in an emergency or other exigency, the Board may relax or suspend the requirements prescribed by section 66271.15, this section, or an order of the Board. This paragraph is not intended to limit the Board's authority in any way.

Excerpts from comments received in workshops and Board meetings are provided below. The comments are from a Board document included in the regulatory materials on the regulation. These comments should be captured as spoken and not paraphrased.

Ingrid Brostrom, Assistant Director Center on Race, Poverty & the Environment

Residents impacted by hazardous waste facilities face significant barriers to participation in administrative and legal processes due to social and environmental vulnerabilities (which she feels the current process does not accommodate) A recurring pattern of violations -violations that may pose a threat to public health or environment -any non-compliance with a permit condition. DTSC website should be more community friendly. The BES website should include permit decisions that may be appealed.

Angela Johnson Meszaros, EarthJustice

The impacted community does not stop at the boundaries of a fence line community. Because these issues are statewide issues, the impacted community can be anyone in the state. The language currently available allowing any person to participate in the appeals process is on the right track as we're thinking how we move for Standing: Broader is better, the agency and the department will always have standing. Standing should be broad enough to encompass anyone who shows up to say, "I have an interest in this outcome and I would like to be heard."

Deborah Bayer, Richmond Shoreline Alliance

As community member, it is complicated. I've been doing this for years and I'm still unclear how DTSC administers CEQA. Expressed that public notice provided during permit application review process may not be adequate. In considering the potential grounds for appeal, what if an issue is raised in comments but not addressed? For example, what if the permitting decision refused to consider the latest science on sea level rise for a site? She would want another set of minds in the Board to take that up on appeal.

Florence Gharibian, Chair of the Del Amo Action Committee.

Very few members of the public know enough about permitting to meaningfully engage in the permit review process. A permit appeal from a company slated to receive a permit may be very different from a permit appeal from community members. In one version of the Board document this comment was characterized as “what Florence Gharibian thinks”. In another version of the document, the comment is edited to say, “Suggested that the time needed to file an appeal is different for the owner or operator of the facility than for the public.” Mrs. Gharibian did not say that.

Cynthia Babich, Del Amo Action Committee

People in the community presume that businesses activities meet applicable standards but get involved when they find out that the standards are not being followed. The goal should be to have greater community awareness.

Paraphrased and documented as: Expressed concerns of feeling disengaged by the way the process is rolling out. Advised that the Board should look into different ways to avoid health concerns by searching out locations that people are not living by to house hazardous waste facilities. Encourages the Board to consider having safer spaces for community to express their concerns.

Eric Nolan

Stated she has a background in environmental science and agrees with Cynthia and comments made in support of the community. Members of the community do not have expertise to know how to participate. The Board is in a perfect position to provide that assistance as a liaison to the community. The way that DTSC engages with the community during the permit process needs to be improved. Filing an appeal puts a great burden on the Board if DTSC’s permitting staff has had no opportunity to address the concerns first. It is important in the rulemaking to balance these concerns. Added that the before the final permit decision, certainly not a period of 5 to 10 years.

Julia Gates via email

DTSC needs to improve its process to let the public know about pending permit decisions and make information more available. DTSC’s permit decisions also take too long and DTSC does not regularly update members of the public with DTSC’s status in the review process. Finally, when the Board functions in an adjudicatory capacity, it must be neutral and unbiased (meaning it must have no conflict of interest, has not prejudged the specific facts of the case, and is free of prejudice against or in favor of any party).

Andrea Ventura, Clean Water Action

She supports the idea of distributing information to the public in a local library and using local media, particularly for issues that generate a lot of local interest. While it is important for the administrative record to be comprehensive, there is also a risk of overwhelming the public because there can be such a large number of documents that are quite lengthy. It would be helpful to include a synopsis to help the public understand what is most important. The Department should notify the applicant and each person who has submitted written comments or requested notice of the final permit decision.

Language in the rule that requires information from the DTSC permit documents that may or may not be available.

Standing to File: After filing a timely notice of appeal, and subject to paragraph (6) of subsection (a) of this section, only a person who filed comments on the draft permit or testified at a public hearing (if any) on the draft permit may file a petition pursuant to subparagraph (ii) of paragraph (3) of subsection (a) of this section.

Failure to Participate: Any person who failed to file comments with the Department's Permitting Division, or who failed to testify at a public hearing on the draft permit, may file a petition with the Board, but the petition shall be limited to matters that did not appear in the draft permit or issues that could not have been raised during public review of the draft permit.

Failure to Participate in Public Review: If you did not file comments on the draft permit or modification, or testify at a public hearing regarding the draft permit or modification, your appeal will be limited to matters that did not appear in the draft permit, issues that could not have been raised during public review of the draft permit, or changes to the modification that did not appear in the request for modification.

Permit process

In consideration of the DTSC's failure to update expired treatment, storage and disposal permits (TSDS) the failure of a facility to submit an adequate permit application often causes significant delays. A question to be considered is, why would a TSD want a new permit when they are operating with an old permit with less restrictive operating requirements? In my experience TSD's in general are not sitting at the edge of their chairs waiting for a new permit. TSD operators dread public review of their permit. An option of a permit appeal offers another opportunity for a delay in the issuance of a more restrictive and more costly new permit. Bringing in a neutral third party with somewhat limited knowledge of the permit process might cause another welcome delay.

Facilities may fear that community participation in the process can be particularly painful resulting in a Pandora Box of new problems and the possibility of even more restrictive requirements.

Course correction is necessary for this "Emergency Rulemaking for Hazardous Waste Facility Permit Appeal Process" as it has been presented to us by the Board. Environmental Justice Communities stand in solidarity and will continue to pursue our rights to be heard and treated with the respect we deserve.

**Florence Gharibian, Chair Del Amo Action Committee (DTSC Enforcement (1996-2011) Retired
Cynthia Babich, Director Del Amo Action Committee**