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VIA EMAIL ONLY

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Board of Environmental Safety
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RE: Emergency Rulemaking for Hazardous Waste Facility Permit Appeal Process

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

The Clean Air Coalition of North Whittier and Avocado Heights (CAC) submits these comments on the Draft Notice of Emergency Rulemaking for Hazardous Waste Facility Permit Appeal Process (Draft Appeals Rule).¹ CAC is a collection of volunteers committed to defending the environment and quality of life in their communities.

Unfortunately, CAC's communities are negatively impacted by a range of environmental assaults and the Quemetco facility, a secondary lead smelter permitted by DTSC, is a significant concern.² According to CalEnviroScreen, the more than 2,000 people who live in the census tract that contains Quemetco experience a 100% pollution burden,³ which "represents the potential exposures to pollutants and the adverse

¹ Bd. Of Env't Safety, [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process (Feb. 10, 2023).

² Caleigh Wells, *Residents fume as nearby factory pollutes illegally for years*, KRCW (Feb. 15, 2023), <https://perma.cc/YC2G-T58V>.

³ Dep't of Toxic Substances Control, EnviroStor, Ecobat Res. Cal. Inc. CalEnviroScreen (Oct. 20, 2021), https://www.envirostor.dtsc.ca.gov/public/hwmp_profile_report?global_id=CAD066233966.

environmental conditions caused by pollution.”⁴ The census tracts surrounding Quemetco also have similarly high pollution burden rankings.

CAC has participated in DTSC’s appeals process as part of its effort to ensure that Quemetco and DTSC act in accordance with the rules that govern the DTSC permitting process. Thus, these comments about the Draft Appeals Rule are grounded in the lived experiences residents have gathered as participants in DTSC’s permitting, enforcement, and appeals processes.⁵

Equally unfortunate, the Draft Appeals Rule neither establishes mechanisms that allow the Board to provide transformative oversight of DTSC staff’s permitting practices, nor does it facilitate community engagement and building of trust in this agency’s decision-making. This Draft Appeals Rule does not embrace the Board’s opportunity to build practices of transparency and accountability into DTSC permitting decisions in accordance with this Board’s statutory direction and values.

CAC respectfully requests that the Board take action to develop an appeals process that challenges the status quo of how DTSC engages with frontline communities who live with the impacts of its decisions by adopting rules that reduce—rather than increase—barriers for community engagement in the appeals process. If, however, the Board is unwilling to challenge the status quo, we request that you, at least, do not make community efforts more difficult than they were before this regulation was adopted.

I. The Proposed Regulation is Not In Line with the Board’s Articulated Goals or Its Responsibility Under the Statute

The statute which created the Board established that, among other principles, “board members shall represent the general public interest.”⁶ In line with this requirement the Board adopted an Operating Plan that declared that the Board “will serve its core mission” in three key ways: (1) “building a culture of **transparency**;” (2) “driving

⁴ Cal. Off. of Env’t Health Hazard Assessment, CalEnviroScreen 4.0 Indicator Maps., <https://experience.arcgis.com/experience/ed5953d89038431dbf4f22ab9abfe40d/page/Indicators/?views=Pollution-Burden>.

⁵ CAC, Appeal of Approval of Temporary Authorization Request for Quemetco (May 27, 2021) (attached as Ex. 2); *see also* CAC, Appeal of Feb. 23, 2022, Class 2 Permit Modification Request for Quemetco, Inc. (Mar. 28, 2022) (attached as Ex. 9).

⁶ 20 Cal. Code Regs. § 25125(j)(2)(B).

accountability;” and (3) “rebuilding **trust.**”⁷ The Board applied these ideals to its work by declaring that through its public engagement efforts, the Board would “drive radical transparency on matters related to DTSC”⁸ and that through its permitting efforts, it would “analyze and drive decisions on permit appeals.”⁹ In this way, the Board set appropriately high goals that acknowledged the challenges DTSC faces.¹⁰

Radical transparency demands opening up, rather than closing down, avenues to review DTSC’s decisionmaking. And driving decisions on permit appeals does not—and cannot—mean building processes that eliminate or constrain the ability of frontline communities to seek review of DTSC’s permitting decisions. Nonetheless, the Draft Appeals Rule adopts procedures that constrain transparency, do not advance accountability, and do not rebuild trust between DTSC and community members.

A. The Board’s rejection of the regular rulemaking process in favor of the constrained emergency rulemaking process is deeply troubling.

This Board has asserted time and again that it is committed to transparency and engagement by communities. For this reason, it is particularly shocking that it has decided to use emergency rather than standard rulemaking processes to adopt the Draft Appeals Rule.

California’s rulemaking processes are established by the Administrative Procedure Act (APA). The APA is “designed to provide the public with a meaningful opportunity to participate in the adoption of regulations or rules that have the force of law by California state agencies.”¹¹ There are two types of rulemaking processes: standard and emergency. Among the most significant differences between the standard and emergency rulemaking processes is the curtailment of public process to allow quicker adoption of rules. Using the emergency process for “expediency, convenience, best

⁷ Bd. of Env’t Safety, BES Operating Plan version 4.0, at 1 (2023) (emphasis in original).

⁸ *Id.* at 2.

⁹ *Id.* at 3.

¹⁰ *See, e.g.*, Committee on Budget and Fiscal Review, Third Reading Analysis of S.B. 158 (2021–2022 Reg. Sess.), as amended June 25, 2021, at 2 (attached as Ex. 4) (“The Legislature has seen many bills over the last several years that deal with changes or reforms to DTSC; while the Governor and the Director of DTSC change, the problems seem to continue.”)

¹¹ Off. of Admin. Law, Rulemaking Process, <https://perma.cc/A5R2-VB6Bb>.

interest, general public need, or speculation” is generally rejected, since the extraordinary act of limiting public oversight when making rules that govern the people’s affairs should be used only to address circumstances that call for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.¹² When an agency does promulgate an emergency rule, it must establish its authority to do so, as well as describe both the details of the emergency and the need for immediate action to address the emergency.¹³

The Board points to Health and Safety Code section 25125.4—adopted as part of SB158¹⁴—as its authority to adopt the Draft Appeals Rule using the emergency rulemaking process.¹⁵ The Board fails to acknowledge, however, that the statutory language says the Board “may” use the emergency rulemaking process. Having the “*authority*” to do a particular thing is not the same as having an *obligation* to do a particular thing.

While the Board held a series of public workshops between August and January to discuss a handful of high-level concepts related to the appeals process, the first draft of the proposed regulation was not released until December. Since then, the proposal has shifted multiple times. The February 10, 2023, version of the Draft Appeals Rule was significantly different from the version that came before. And the Board intends to provide an updated Draft Appeals Rule on March 13, 2023, and will accept only oral comments—likely only three minutes each—on the Draft Appeals Rule it intends to adopt during its March 23, 2023, Board meeting during which it may—or may not—make additional changes to the Rule. As a result, even though the Board discussed the Draft Proposed Rule over the course of months, the public will have only the five-day

¹² 8 Cal. Code Regs. § 11346.1(b)(2).

¹³ *W. Growers Ass’n v. Occupational Safety & Health Standards Bd.*, 73 Cal. App. 5th 916 (2021); see also *Doe v. Wilson*, 57 Cal. App. 4th 296 (1997) and *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 194 (Ct. App. 1971).

¹⁴ S.B. 158, Ch. 73 § 25125.4(b) (“a regulation adopted pursuant to this article may be adopted as an emergency regulation ... and for purposes [the APA], the adoption of regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, and safety, and general welfare.”) <https://perma.cc/UJ6H-FW6N>.

¹⁵ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 1.

comment period allowed in the Emergency Rulemaking process to review and comment on the final adopted Appeals Rule (which may be as few as three working days, depending on when the Appeals Rule is posted for review). If the Board followed the Standard Rulemaking process instead, the public would have a 45-day comment period.

Importantly, the Draft Appeals Rule does not present specific facts detailing a serious risk of harm if the Board's regulations are not implemented on an emergency basis. Rather, the finding of emergency section describes the *authority* for emergency rulemaking, with no specific facts that describe *the need* for the emergency rulemaking.¹⁶ The Draft Appeals Rule must establish specific facts as to why this regulation is necessary to achieve "the immediate preservation of the public peace, health, and safety, and general welfare"¹⁷ to comply with its statutory obligation under the APA.

While the Board's work is urgent, it is not an emergency that justifies limiting true, informed public participation and forfeiting the opportunity both to build trust with impacted communities and forgoing the opportunity to develop an appeals process in partnership with the community. The only reason the Board has provided for why it has decided to so severely constrain public comment on the Draft Appeals Rule is that it has the authority to do so. This is not radical transparency.

B. Radical Transparency does not "defer" to the status quo.

The Draft Appeals Rule rejects the public's observation that the current "clearly erroneous" standard of review is too deferential to DTSC.¹⁸ Instead, the Rule keeps that standard in line with the desires of industry representatives.¹⁹ The Draft Appeals Rule justifies this decision by arguing that the Board "feels that the complex nature of permitting decisions supports a standard of review that affords appropriate deference

¹⁶ *Id.*

¹⁷ See *W. Growers Ass'n*, 73 Cal. App. 5th 916, at 932.

¹⁸ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 8 (Feb. 10, 2023).

¹⁹ *Id.* ("Industry representatives opposed a change to the standard of review, and argued that applying an independent review standard would entail an increased administrative burden on the Board and could draw out the time for the Board to decide appeals.")

to the Permitting Division, as in the current regulation.”²⁰ This choice, too, stands in stark contrast to the ideal of radical transparency. Here, the Board is choosing to embrace DTSC’s failed status quo of insulated decision-making over embracing the hard work of holding the agency to a higher standard of transparency.

C. The plain language of the statute does not allow the Board to pick and choose which aspects of hazardous waste facility permit decisions it will “hear and decide”.

The February 10, 2023, Draft Appeals Rule proposes—for the first time—to exclude from review “decisions made by the Department’s Permitting Division pursuant to other statutes, including but not limited to the California Environmental Quality Act.”²¹ Instead, the Board would “limit” appeals to decisions made “pursuant to chapter 6.5 of division 20 of the Health and Safety Code.” This proposal not only conflicts with the plain language of the statute, but also ignores the impact this decision has on community members.

Under the statute, the Board “shall hear and decide appeals of hazardous waste facility permit decisions.”²² The language of the statute does not allow the Board to establish “limits on the scope of appeals”²³, by refusing to hear appeals from some permitting decisions but not others; nor does the language allow the Board to refuse to hear appeals from some portions of the permitting decisions made by DTSC staff but not others.

The Board seeks to justify its refusal to hear appeals related to the California Environmental Quality Act (CEQA) as “continu[ing] the historical practice of the permit appeals team under the existing regulations.”²⁴ This is problematic because the purpose of the Board is to change historical practices of lack of transparency and accountability in DTSC’s permitting decisions, which has caused the community to have a deep lack of trust in the agency. DTSC staff’s preference that their decisions are not scrutinized by

²⁰ *Id* at 8.

²¹ *Id.* at 14-15.

²² Cal. Health & Safety Code § 25125.2(b)(2).

²³ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 4.

²⁴ *Id.*

the public is not a reasonable justification for the Board to constrain the scope of its oversight.

During the January 26, 2023, Board meeting, Board members made it clear that their choice to refuse to hear appeals of the CEQA-related portion of permitting decisions was driven by perceived capacity limitations of the Board.²⁵ As it rejects the law and embraces DTSC's status quo, the Board elevates its perceived capacity limitations while ignoring the capacity limitations of frontline communities. Community leaders do not have the luxury of simply refusing to understand CEQA or the dizzying collection of issues related to their efforts to have a voice in decisions that impact them, their families, and their neighbors. Rather than turning away from the critically important question of how DTSC staff analyzes the environmental impacts of its permitting decisions, this Board should follow the lead of frontline communities: figure it out as if your life depends on it.

In its problematic construction of the Board's obligations under the law, the Draft Appeals Rule establishes a scheme under which communities are forced to separate their appeals into two separate parts—one before the Board to challenge the permitting decision and the other in court to challenge the CEQA decision that is part of the permitting decision. This is problematic because each piece impacts the other. For example, the permitting decision is not final until completion of the permit appeal process. Furthermore, the Board may act to remand or set aside the permitting decision, and that new permitting decision will likely be subject to a new CEQA analysis. Also, it is possible that a court would set aside the permitting decision based upon an improper CEQA decision—either during or after the Board's appeals process.²⁶

²⁵ Bd. Of Env't Safety, Board Meeting at 25:05, YouTube (Jan. 26, 2023), <https://youtu.be/5hMwDwz01gg?t=1505> (“We don't feel as a subcommittee at this point that we have the current capacity to deal fully with CEQA on appeal. It would take a different organizational structure. It would take a different investment. With the staffing and budget that we have received as a new organization we are not in the position to become a wholesale CEQA-like entity.”)

²⁶ This approach also raises novel questions of law such as whether a decision that has been appealed to the lead agency is final for the purposes of seeking review of the accompanying CEQA determination.

Mandating two separate appeals requirements for the same permitting decision serves to complicate community engagement in the appeals process more than is reasonably necessary under either the statutory language or the Board's purported goals of radical transparency, enhancing transparency, and building trust between DTSC and the community.

II. In Both the Adoption Process and Substantive Choices, the Proposed Regulation Marginalizes Communities and Centers the Regulated Community

Environmental justice demands both procedural and substantive justice as neither alone can dismantle the systemic harms frontline communities are forced to address. Here, the proposed regulation fails to meet the demands of either.

A. Attempting to turn the Board into a court is likely to introduce more problems than it solves at the expense of the core goals and values of the Board.

The Draft Appeals Rule proposes processes and procedures that mimic those of the U.S. Environmental Protection Agency's Environmental Appeals Board (EAB).²⁷ The EAB, however, was created specifically to undertake adjudicatory proceedings and is comprised of environmental appeal judges with extensive litigation experience and eight experienced attorneys that serve as counsel to the EAB to support its judicial proceedings.²⁸ This Board, however, was created primarily to provide oversight, transparency, and a locus of trust-building between DTSC and frontline communities. If the legislature sought to create a judicial structure for hearing these appeals, it could have simply transferred the authority to hear appeals from DTSC staff to the Office of Administrative Hearings²⁹, which is better situated to undertake proceedings equivalent

²⁷ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 11 (“[title 40] section 124.19 was used as a model for the drafting of the proposed regulatory actions as well as a companion set of appeals procedures, which the Board intends to adopt as a standing order to provide further standards for the administration of appeals.”); *see also*, U.S. EPA, *About the Environmental Appeals Board* (Aug. 1, 2022), <https://perma.cc/H6WU-LEWW>

²⁸ *See*, U.S. EPA, *EAB Frequently Asked Questions: Who are the Counsel to the Board?* (Mar. 1, 2013), <https://perma.cc/HAC8-ZRLQ>

²⁹ Office of Administrative Hearings, *About the Office of Administrative Hearings* (“The Office of Administrative Hearings (OAH) is a quasi-judicial tribunal that hears administrative disputes. Established by the California Legislature in 1945, OAH provides independent

to those of the EAB. We urge the Board to take this opportunity to construct an appeals process that aligns with the capacities of its members and the gravity of its values. Mimicking the EAB does neither.

B. Requiring the community to post a bond is inappropriate.

Currently, DTSC's permitting decisions become effective 30 days after issuance to allow for a timely appeal of the decision.³⁰ If "any person" files a timely appeal, the contested action is stayed until the appeal is resolved by a final decision of the appeals officer.

The February 23, 2023, version of the Draft Appeals Rule "adds [a] new subsection" that limits the stay to 180 days. Thereafter, frontline communities would have to both "demonstrate that extending the stay is in the public interest" and could be required to post a bond in an amount vaguely defined as "sufficient to avoid prejudice to the applicant or permittee" to secure an extension of the stay.³¹ The Draft Appeals Rule specifically declares that the bonding requirement applies only "if the appellant is not the applicant."³² Establishing a bonding requirement for community members to participate in an administrative appeal of a permitting decision is shocking, punitive, and arbitrary. The bonding requirement is shocking because it effectively strips community members of the protective effect of the stay after 180 days, even though the Board has acknowledged that the appeals process requires a minimum of 285 days for completion.³³ The bonding requirement is punitive because even after the community demonstrates that extending the stay is in the public interest³⁴, they still must post a bond. The bonding requirement is arbitrary both because the applicant does not have a

Administrative Law Judges (ALJs) to conduct hearings for over 1,500 State and local government agencies. OAH provides both adjudication and alternative dispute resolution services.")

³⁰ 22 Cal. Code Regs. § 66271.14(b).

³¹ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 3; *see also*, Bd. Of Env't Safety, [Draft] Proposed Revisions, § 66271.15(b) Stays of Permit Decisions (Feb. 10, 2023), <https://perma.cc/J2U4-JETM>.

³² *Id.*

³³ *See* Proposed Appeal Process Timing (attached as Ex. 10). Note that if, for example, DTSC staff take longer than 30 days to submit the administrative record, or the Board Meeting schedule does not align with the appeals briefing schedule the process could take even longer.

³⁴ *Id.*

similar bonding requirement, which assumes there is no prejudice to frontline community members or the people of California when the applicant appeals a permitting decision, and because the 180-day cutoff for the stay is not supported by any factual basis. The Board should remove both the obligation for community members to make such a showing and to post a bond during the pendency of the appeals process.

C. The proposed contraints on Class 2 and temporary authorizations are not justified and a step backward for DTSC permitting transparency

The Draft Appeals Rule proposes an “expedited process” for hearing appeals to permittee’s Class 2 permit modifications requests and for temporary authorizations for permit modification. The proposed “expedited process” allows only 30 days for an appeal and constrains the appeal submission to a “brief statement” no longer than three pages. DTSCs Permitting staff will then file a “brief” responding statement.³⁵ The Board will either grant or deny the appeal based on these “brief statements” at a public hearing.³⁶

The Draft Appeals Rule explains:

Because decisions on requests for temporary authorizations and class 2 modifications are intended to allow the permittee to make a timely response to changes in circumstances, this rulemaking proposes an abbreviated procedure for hearing and deciding appeals of those decisions.³⁷

The explanation excludes important context for decisions DTSC makes in accordance with regulations for Permit Modification at the Request of the Permittee.³⁸ The regulation DTSC adopted is analogous to regulations adopted by the U.S. Environmental Protection Agency. For that reason, U.S. EPA’s preamble language is useful for understanding DTSC’s regulation where the language adopted by both agencies overlaps. The U.S. EPA and DTSC each adopted the analogous regulations to establish a scheme for orderly, periodic modifications to permits. EPA observed that

³⁵ *Id.* The proposed regulatory language is unclear if staff is bound by the same page limits.

³⁶ Bd. Of Env’t Safety, [Draft] Proposed Revisions, § 66271.18(a)(2) Appeal of Decisions to Grant, Issue, Modify, or Deny Permits (Feb. 10, 2023), <https://perma.cc/X65X-L5NB>.

³⁷ [Draft] Notice of Emergency Rulemaking: Hazardous Waste Facility Permit Appeal Process, *supra* note 1, at 5.

³⁸ 22 Cal. Code Regs. § 66270.42.

since permits are issued for ten years, “permits must be viewed as living documents that can be modified to allow facilities to make technological improvements, comply with new environmental standards, respond to changing waste streams, and generally improve waste management practices.”³⁹ Prior to U.S. EPA’s revision, regulations for permit modifications were “unnecessarily restrictive and seriously hamper[ed] the implementation of the permitting program” because every change required engaging in a full permitting process.⁴⁰ For this reason, the creation of temporary authorization and Class 1, Class 2, and Class 3 permit modification at the request of the permittee was to make the permitting process more timely than following the ten-year cycle of permit reissuance and requiring a full permitting process for even the most routine permit modifications.⁴¹ In January 2022, DTSC’s Permit Appeals Officer granted CAC’s appeal of Quemetco’s request for a temporary authorization and rejected a contrary understanding of this regulation as set forth by DTSC’s permitting staff and Quemetco.⁴²

Here, the expedited permitting process established by the regulations addressed EPA’s concern. Further, significant permitting delays are caused by DTSC’s permitting staff. For example, in what appears to be DTSC’s last available Permitting Workload Analysis, DTSC reported that it had “reduced the time to make permit decisions from 4.5 years to 2.5 years” and hoped that by 2024–25, it would make “90 percent of permit decisions within [2 years].”⁴³ The Board should not—and cannot—address DTSC’s permitting delays by constraining the public’s ability to appeal DTSC’s permitting

³⁹ Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912-01, 37,913 (Sept. 28, 1988) (revising 40 CFR. § 270.42).

⁴⁰ *Id.* at 37,912.

⁴¹ See a fuller review of the history and intent of 22 CCR 66270.42 in the Opening Brief filed In the Matter of Quemetco, Inc., submitted by the Clean Air Coalition of North Whittier and Avocado Heights at 4-9 (Oct. 14, 2021) (attached as Ex. 3).

⁴² *In the Matter of Quemetco, Inc.*, No. PAT-FY21/22-001 (DTSC, Jan. 26, 2022) at 6–9 (attached as Ex. 5) (order granting Appeal Comment 1 and denying Appeal Comment 2 of the Petition for Review).

⁴³ Dept. of Toxic Substances, Workload Analysis for FY 2018-19 Key Findings at 2 (Oct. 26, 2020) (attached as Ex. 1); *See also*, Dept. of Toxic Substances, *A Path Forward for DTSC: Investing in a safe and healthy California for all* at 5, <https://perma.cc/7H2Q-F29B> (“DTSC used Fiscal Year (FY) 2018-19 workload information in its analysis of its resources and service levels for core programs.”)

decisions. To put it another way, the Board should not punish the public for DTSC's permitting delays.

Further, the Draft Appeals Rule proposes to prohibit appeals to Class 1 permit decisions based upon the assertion that these are "very minor permit decisions."⁴⁴ While this is often true, it is not always true. For example, in February 2022, Quemetco sought a Class 1 permit modification to increase its lead smelting operation throughput by 150 tons per day.⁴⁵ CAC opposed approval of Quemetco's request.⁴⁶ Fortunately, DTSC's permitting staff denied Quemetco's request.⁴⁷ If, however, DTSC staff had approved Quemetco's inappropriate request, the community should be able to appeal that decision to the Board because an important purpose of the appeals process is ensuring accountability and oversight in DTSC's permitting decisions.

III. Some Portions of the Draft Appeals Rule Require Further Clarification

The Draft Appeals Rule introduces three practical considerations that should be addressed by the Board.

A. Decision making authority granted to the Board Chair and Vice Chair.

In a number of instances, the Draft Appeals Rule and its accompanying documents assign certain decision-making duties to "the Board Chair and Vice Chair." For example, proposed section 66271.15(a) establishes a 180-day stay "which may be extended by the Board Chair and Vice Chair." Does this mean that both the Board Chair and Vice Chair must concur with the proposed action on the stay extension, or can either the Board Chair or the Vice Chair make the determination? What happens if the two members do not agree on which action should be taken?

⁴⁴ Draft Appeals Rule at 4.

⁴⁵ Letter from to Carl Raycroft, Quemetco Vice President of Environmental, Health & Safety Compliance to Sam Coe, DTSC Senior Environmental Scientist (Feb. 23, 2022) (attached as Ex. 6).

⁴⁶ Letter from Clean Air Coalition to Sam Coe (Mar. 14, 2022) (attached as Ex. 7).

⁴⁷ Letter from Sam Coe, DTSC Senior Environmental Scientist, to Carl Raycroft, Quemetco Vice President of Environmental, Health & Safety Compliance (Mar. 21, 2022) (attached as Ex. 8).

B. ADA compliance by members of the public appearing before the Board.

The Draft Standing Order 23-02 requires parties in the appeals hearing to provide slides 10 days in advance of the hearing and directs that the presentations must comply with the Americans with Disabilities Act (ADA). These requirements may place an undue burden upon members of the public appearing before the Board. The Board should remove the 10-day advance requirement because it unnecessarily constrains the time parties have to prepare for the hearing without any corresponding benefit to the Board or public. To facilitate the Board's ADA compliance efforts and to minimize confusion, the Board should provide specific requirements for presentations instead of the generalized requirement currently in the Draft Appeals Rule, and also allow parties to submit materials in advance of the hearing so that the Board can ensure ADA accessibility rather than placing this requirement solely on communities.

C. Development of and citation to the administrative record.

The Draft Appeals Rule specifies that a statement of reasons submitted to initiate an appeal must "demonstrate" that issues raised on appeal were previously raised during DTSC's review of the permitting decision. The Rule requires the demonstration "be supported by citations to the final permit record described in Section 66271.17."⁴⁸ What is the difference between the record described in Section 66271.17 and the "complete administrative record" that staff will prepare after an appeal is accepted for review? In our experience, staff does not compile an administrative record before finalizing the permit decision. Will this practice change going forward? If so, how will appellants access the record? CAC recommends that the Board strike the requirement to cite to the record when submitting the statement of reasons, and replace it with a statement from the appellant that the issues were raised during the permit process. Appellants can support that statement during briefing, once the complete administrative record is available.

⁴⁸ [Draft] Proposed Revisions, § 66271.18(4) Appeal of Decisions to Grant, Issue, Modify, or Deny Permits (Feb. 10, 2023), <https://perma.cc/X65X-L5NB>.

IV. CONCLUSION

The Board's Draft Appeals Rule does not embody its obligations under the law nor does it reflect its values. We urge you to continue your effort to adopt an appeals process that is fair and drives radical transparency of DTSC's permitting decisions.

Respectfully Submitted,

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