



Yana Garcia
Secretary for
Environmental Protection



P.O. Box 806 • 1001 "I" Street, Sacramento, California 95812-0806



Gavin Newsom
Governor

Jeanne Rizzo
Board Chair

Alexis Strauss-Hacker
Vice Chair

Sushma Bhatia
Member

Georgette Gomez
Member

Lizette Ruiz
Member

NOTICE OF PROPOSED EMERGENCY ACTION HAZARDOUS WASTE FACILITY PERMIT APPEAL PROCESS

22 CCR §§ 66271.14, 66271.15 & 66271.18

NOTICE IS HEREBY GIVEN that the Board of Environmental Safety (Board) proposes to adopt the emergency regulations described below to amend the procedures for appeals of decisions by the Department of Toxic Substances Control (DTSC) to grant, issue, modify, or deny hazardous waste facility permits and associated procedures.

COMMENT PERIOD

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the Board provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action. After submission of the proposed emergency action to OAL, OAL must allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

The Board intends to submit this proposed emergency action to OAL on April 17, 2023. The submitted action will appear on the list of "Emergency Regulations Under Review" on OAL's website at: https://oal.ca.gov/emergency_regulations/Emergency_Regulations_Under_Review/.

Comments must be submitted in writing directly to OAL:

OAL Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814
Fax Number: (916) 323-6826
staff@oal.ca.gov

A copy of the comment must also be submitted in writing to the Board at:

Board of Environmental Safety
P.O. Box 806
Sacramento, California 95812-0806
Fax Number: (916) 324-1808
info@bes.dtsc.ca.gov

SECTIONS AFFECTED

California Code of Regulations, title 22, division 4.5, chapter 21, article 1, sections 66271.14, 66271.15 and 66271.18.

STATUTORY FINDING OF EMERGENCY

Health and Safety Code section 25125.4 grants the Board the authority to adopt emergency regulations as may be necessary to allow the Board to carry out its powers. Health and Safety Code section 25125.4, subdivision (b), states, in part, that “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.” Section 25125.4, subdivision (b), also states that “an emergency regulation adopted by the board pursuant to this section shall be filed with, but not be repealed by, the Office of Administrative Law, and shall remain in effect until repealed by the board.”

All changes to the regulations encompassed by this emergency rulemaking are necessary to ensure that appeals of hazardous waste facility permits are adjudicated in a fair, open and effective manner, and to carry out the powers and duties of the Board of Environmental Safety. These changes were adopted by the Board at a public meeting on March 23, 2023. By law, this emergency action is deemed necessary for the immediate preservation of the public peace, health, safety and general welfare.

AUTHORITY & REFERENCE

This regulation implements, interprets, or makes specific the following statute:

- Health and Safety Code section 25125.2, subdivision (b)(2), grants the Board the authority to hear and decide appeals of hazardous waste facility permit decisions.
- Health and Safety Code Section 25125.4, subdivision (b), grants the Board the authority to adopt emergency regulations as may be necessary to enable the Board to carry into effect article 2.1 of chapter 6.5 of division 20 of the Health and Safety Code (commencing with section 25125).

INFORMATIVE DIGEST

Policy Statement Overview

The objective of this emergency rulemaking is to update the standards governing appeals of decisions by DTSC to grant, issue, modify, or deny hazardous waste facility permits in California Code of Regulations, title 22, division 4.5, chapter 21, article 1, section 66271.18, to make conforming changes in related regulations to identify the Board with respect to the effective date of final permit decisions in subsection (b) of section 66271.14, and to change the regulations governing the stay of final permit decisions pending appeal in section 66271.15.¹ These changes are necessary to carry out the Board’s authority to hear and decide appeals of hazardous waste facility permit decisions and to make clarifying changes in the regulations.

¹ All regulatory references are to California Code of Regulations, Title 22, unless noted.

With the adoption of article 2.1 of chapter 6.5 of division 20 of the Health and Safety Code (commencing with section 25125), authority to hear and decide appeals of hazardous waste facility permit decisions was transferred from a permit appeals team within DTSC to the Board. Stated broadly, the regulations are being amended to provide that final permit decisions do not take effect for 30 days and while an appeal is pending with the Board, to provide procedures for the filing of appeals with the Board, and to establish standards for the Board to hear and decide hazardous waste facility permit appeals, including an expedited process for the appeal of a decision to grant or deny a temporary authorization. With its enactment of Health and Safety Code section 25125.4, the legislature has deemed this to be an emergency.

Background

Between August and December 2022, the Board held a series of public workshops to gather comments from the public on the concepts inherent in the Board's permit appeals process and the standards that ought to apply to the administration of appeals. At its Board Meeting on August 25, 2022, the Board heard presentations from the Permitting Division of DTSC and the Senior Hazardous Substances Engineer who previously advised the permit appeals team. The Board received comments from the public on the permit appeals process at its board meetings in August, September, October, November, December and January.

The Board formed a subcommittee consisting of Vice Chair Alexis Strauss-Hacker and Board Member Lizette Ruiz to work with Board Counsel Gregory Forest to present information to the public and provide recommendations to the Board regarding potential changes to the standards governing permit appeals. The subcommittee presented information to the public on various aspects of the permit appeals process, and the legal standards that apply to the appeals decisions, at workshops held in Berkeley on September 28, via videoconference on October 20, and in Bakersfield on November 14.

The subcommittee presented its initial recommendations for changes to the substantive standards governing permit appeals at the board meeting in Bakersfield on November 15. The subcommittee released an initial draft of the proposed emergency regulation to the public on the Board's Internet website on December 1. To accompany the emergency regulation, the subcommittee proposes the adoption by the Board of a standing order establishing detailed appeal procedures, a standing order establishing rules for conducting public hearings, forms to be used to initiate appeals of permit decisions, and a sample initial order that would be used to accept or dismiss an appeal petition, in full or in part, and provide directions to the parties regarding briefing of issues and other steps in the appeal process. Copies of these companion administrative documents are available for review at the Board's Internet website at <https://bes.dtsc.ca.gov/proposed-regulations-2023/>.

The Board discussed preliminary drafts of proposed regulatory changes and companion administrative documents, and provided comments to the subcommittee, at its board meeting on December 12, 2022. Revisions to the proposed regulatory changes and the aforementioned companion regulatory documents were posted on the Board's website on December 22, 2022. The subcommittee received comments on these revised preliminary drafts in January and reported preliminary recommendations on a few key concepts at the board meeting on January 26, 2023. At this meeting, the subcommittee targeted February 10, 2023, for the release of revised drafts of the proposed regulatory changes and companion administrative documents, to be followed by a public comment period of 3 weeks ending on March 3, 2023.

The subcommittee received 7 comment letters during the public comment period. The subcommittee revised the drafts of the proposed regulatory changes and companion administrative documents and released new versions of those documents on March 13, 2023. This notice describes the effect of changes contemplated by those versions, which were amended and adopted by the Board at its meeting on March 23, 2023.

Effect of the Regulatory Action

This rulemaking will establish standards for the Board to administer appeals of hazardous waste facility permit decisions. Under the amended regulations, appeals of hazardous waste permit decisions will be heard and decided by the Board, consistent with Health and Safety Code section 25125.2, subdivision (b)(2). The rulemaking changes the way appeals of hazardous waste facility permit decisions are heard and decided in several ways. The following are key issues addressed by the rulemaking.

1. Effective Date of Final Permit Decisions

This rulemaking proposes a minor change to the regulation governing the effective date of final permit decisions in subsection (b) of section 66271.14. Currently, this regulation provides that a final permit decision becomes effective 30 days after service of notice of the decision, subject to three exceptions. The proposed amendment of subsection (b) of section 66271.14 would retain the three exceptions, but would clarify that the second exception applies to the filing of an appeal with the Board.

2. Automatic Stay of Permit Decisions

Existing section 66271.15 stays the effectiveness of a permit during the pendency of an appeal. In the version of the proposed amendments to that section that was released for public review on February 10, the subcommittee proposed to shorten the length of this stay to 180 days in subsection (a) of this section, and to add a procedure for the Board Chair and Vice Chair to grant extensions and require the posting of a bond under certain circumstances in a new subsection (b) of this section.

Commenters opposed the changes proposed to shorten the stay and to require a bond. In response to those concerns, the subcommittee proposes to make fewer changes to the existing regulation, including retaining the length of the stay to be conterminous with the pendency of an appeal.

The version of the proposed amendments to section 66271.15 that was released on February 10 also proposed to eliminate existing provisions in subsection (a) of section 66271.15, which provide for conditions of the permit that are not contested in the appeal to remain in effect, and which limit the effect of the stay to contested conditions and conditions that cannot be severed from those conditions. The subcommittee later proposed to retain those provisions of the existing regulation and added a procedure for the provisions of the permit that are affected by the stay to be specified in the initial order that is issued by the Board during the appeal process. Because appeals of temporary authorization decisions would be subject to an expedited appeal process (see paragraph 5, below) the rulemaking would provide for the permittee to be without the temporary authorization while the appeal is pending.

The rulemaking would eliminate existing subsection (b) of section 66271.15, which provides for the granting of a stay to avoid a conflict between permits. A similar provision, at the Code of

Federal Regulations, title 40, section 124.16, subsection (b), allows the federal Environmental Appeals Board to grant a stay to avoid conflicts between permits issued by EPA pursuant to different regulatory programs (Clean Air Act, Clean Water Act, etc.). Given that DTSC is only authorized to issue permits under the state's Hazardous Waste Control Law, the Board found no need to retain this procedure in state regulations and therefore proposes to remove it.

Two appeals were filed before the rulemaking and remain on hold with the underlying permit decisions remaining stayed. Because the rulemaking proposes to change the appeal process, new subsection (e) of section 66271.15 provides for existing stays to be terminated if the appeals are not refiled using the new appeal procedures.

3. Define Scope of Matters Subject to Appeal

The rulemaking proposes to define the scope of DTSC decisions that are subject to review in a manner that is consistent with article 2.1 of chapter 6.5 of division 20 of the Health and Safety Code (commencing with section 25125). As viewed by the subcommittee, the Board was established to serve certain limited purposes, as set forth in article 2.1. Accordingly, appeals encompass only certain decisions by DTSC, specifically those made pursuant to chapter 6.5 of division 20 of the Health and Safety Code. Decisions made pursuant to other statutes, particularly the California Environmental Quality Act (CEQA), at division 13 of the Public Resources Code, would be outside the scope of the appeals process as defined by the Board in this rulemaking. This extends the practice followed by the permit appeals team at DTSC under the existing regulations. Similarly, appeals to the Board would not include review of very minor permit decisions, known as class 1 modification decisions, nor would appeals include enforcement actions to suspend or revoke a permit pursuant to subdivision (a) of section 25186.1 and section 25186.2 of the Health and Safety Code. Instead, appeals would be limited to decisions by DTSC to grant, issue, modify or deny a permit pursuant to subdivision (b) of section 25186.1 of the Health and Safety Code and appeals of decisions to grant or deny temporary authorizations. These limits on the scope of appeals are set forth in new paragraph (1) of subsection (a) of section 66271.18 and continue the historical practice of the permit appeals team under the existing regulations.

4. Improved Procedure for Initiating Appeals

Appeals will be initiated by the filing of a simple form, which requires the appellant to provide only a minimum of information about the appellant and the underlying permit decision. A period of 30 days is provided for filing the form. The addition of subsection (a)(3) in the proposed rule implements a change that was suggested by an attorney who has represented appellants in past appeals and who complained that the former process did not allow enough time to prepare a petition. To initiate an appeal under the former process, an appellant was required to file a petition within 30 days of the final permit decision. Under the proposed rule, an appellant will be able to initiate an appeal merely by filing a simple form with significantly less effort. The appellant would then be allowed an additional 30 days to file a petition, or a total of 60 days from the date of notice of the final permit decision pursuant to subsection (a) of section 66271.14.

The rulemaking adds new subsection (h) of section 66271.18, which incorporates by reference two forms to be used for filing appeals pursuant to paragraphs (2) and (3) of subsection (a) of section 66271.18. These forms were issued by the Board on March 23, 2023 with the adoption of Standing Order 2301, which established rules of the administration of appeals.

5. Shorten Appeals of Temporary Authorization Decisions

By way of background, section 66270.42 provides for permittees to request modifications of an existing permit, which are classified as class 1, class 2, and class 3 modifications. Class 1 modifications are the most minor type of modifications, which allow the permittee to make routine changes to accommodate operational changes that “do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment.” (Section 66270.42, subsection (d)(2)(A).) Class 3 modifications entail substantial operational changes and alterations, and follow a public review process that is substantially similar to the review process for a draft permit.

Class 2 modifications are available for a narrow range of operational changes, including changes that allow the permittee to timely respond to three circumstances. (Section 66270.42, subsection (d)(2)(B).) First are common variations in the types and quantities of the wastes managed under the facility permit. Second are technological advancements. Third are changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit.

Occasionally, DTSC will demand that a permittee apply for a class 2 modification in response to a change in circumstances or as a corrective action. In these and other circumstances, the permittee can request a temporary authorization to install new equipment or implement the modification in an expedited fashion. A temporary authorization is available for a class 2 modification in the following five circumstances:

- a. to facilitate timely implementation of closure or corrective action activities;
- b. to allow treatment or storage in tanks, containers, or in containment buildings in accordance with chapter 18 of division 4.5 of title 22;
- c. to prevent disruption of ongoing waste management activities;
- d. to enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or
- e. to facilitate other changes to protect human health and the environment.

(Section 66270.42, subsection (d)(2)(B).)

Because decisions on requests for temporary authorizations are intended to allow the permittee to make a *timely* response to changes in circumstances, and because those decisions are made without the benefit of a public comment period, this rulemaking proposes an abbreviated procedure for hearing and deciding appeals of temporary authorization decisions in paragraph (2) of subsection (a) of section 66271.18. Under this procedure, the appellant would file a special appeal form, which would include a brief statement supporting the appeal. This would avoid the more extensive procedures related to filing a full petition and issuing an initial order. Instead, the DTSC Permitting Division would provide a brief response, and the appeal would be decided by the Board at a public hearing. This shortened process would only apply to the appeal of a decision to grant or deny a temporary authorization. In the version of the proposed amendments to section 66271.18 that was released in February, this expedited process would have applied to class 2 modifications in addition to temporary authorizations. The emergency rulemaking now proposes a reduced scope to this expedited process, which would be limited only to the appeal of a decision to approve or deny a temporary authorization. Appeals of decisions to approve or deny class 2 modifications would be subject to the standard appeal process.

6. Standing to File and Exhaustion of Administrative Remedies

The existing appeal regulation, like its federal counterpart, generally limits participation in the appeal process to “any person who filed comments ... or participated in the public hearing” on the draft permit. (Section 66271.18, subsection (a).) A person who did not file comments or participate in the hearing may appeal the decision, but “only to the extent of the changes from the draft permit to the final permit decision.” (*Ibid.*) These standing requirements serve important public purposes, including reinforcement of the need for the public to engage with DTSC during the public review process, providing a full and fair opportunity for the Permitting Division to respond to issues raised during the public review period, and conserving the limited resources available to analyze issues raised on appeal.

In addition to imposing a standing requirement as a limitation on the appeals process, the existing appeal regulation requires the appellant to demonstrate that “any issues being raised were raised during the public comment period (including any public hearing)” for the draft permit. (66271.18.) This requirement, commonly known as exhaustion of administrative remedies, serves similar purposes as the limitation on standing, further reinforces the role and importance of the public participation process for draft permits, and prevents the introduction of new issues during the appeal process. Under the version of the emergency rulemaking that was proposed by the subcommittee and released to the public on March 13, 2023, any person who did not participate in the public review of the draft permit would have been “limited to matters that appeared for the first time in the final permit or issues that could not have been raised during public review of the draft permit” pursuant to paragraph (6) of subsection (a) of section 66271.18.

In public comments received during the public comment period and at board meetings during the rulemaking process, many commenters advocated for the Board to relax the standing and exhaustion requirements, which appear in paragraphs (5) and (6) of subsection (a) of section 66271.18. At the Board’s public meeting on March 23, 2023, Board Member Georgette Gomez articulated a concern about the strict application of the standing and exhaustion requirements, which she felt would prevent certain individuals from participating in the appeal process who did not receive notice of the draft permit or otherwise had been unable to participate during public review of the draft permit.

A majority of the Board saw the need to allow for an individual to request that the Board relax the standing and exhaustion requirements to allow participation notwithstanding these restrictions on a case-by-case basis. In response to these concerns, the subcommittee proposed the addition of paragraph (7) of subsection (a) of section 66271.18, which provides a procedure for the Board to waive the standing and exhaustion limitations for good cause by a majority vote at a public meeting. The final version of the emergency rulemaking includes this exception to the strict application of the standing and exhaustion requirements of paragraphs (5) and (6) of subsection (a) of section 66271.18. In the final version of the rule, the Board can waive the application of those paragraphs, on a case-by-case basis, to allow an appeal to be filed by an individual who was not able to participate in public review of the draft permit. The final version of standard appeal Form BES 2301 that is included with the rulemaking provides instructions for filing an appeal, which includes the opportunity to check a box on the form to request that the Board waive the standing and exhaustion requirements if the person was unable to participate during the public review process.

7. Initial Determinations Would Be Made by the Board at a Public Meeting

In workshops, the subcommittee heard the same criticism of the previous appeal process voiced by community members and industry representatives alike. Both groups complained that appeals were decided by the permit appeals team without adequate transparency. Under that former process, the permit appeals officer would issue an initial order accepting or dismissing issues from the appeal without any opportunity for public review and comment. To address this, the rulemaking provides for the initial order to be issued by the Board at a public meeting in subsection (b) of section 66271.18. While a public meeting would not provide opportunities for expanded presentations (as at a public hearing), this procedure would require this initial phase of the appeal process to be made in public, giving interested parties the ability to comment, and providing an opportunity for the Board to weigh in as needed.

8. Administration of the Appeal by the Board Chair and Vice Chair

The rulemaking attempts to balance transparency with efficiency, by assigning the major steps in the appeal process to the entire Board, while delegating certain administrative powers to the Board Chair and Vice Chair, since these two board members can decide minor administrative matters without triggering the need for a noticed public meeting. Routine administrative issues, such as granting extensions of time and allowing variations from rules for briefing issues, would be decided in this manner.

9. Expanded Grounds for Deciding Appeals

The rulemaking proposes to change the legal bases for an appeal in response to public concerns. The existing regulation limits appeals to conditions in the permit. Members of the public have complained that this limitation prevents broader concerns from being raised on appeal, and recommended that the Board allow an appeal to dispute the decision to grant or deny the permit as a whole. In response to these complaints, the proposed rule expands the scope of issues that can be raised on appeal to include the decision to grant, modify or deny the permit, or the addition or omission of any condition in the permit, in paragraph (4) of subsection (a) of section 66271.18. By allowing appellants to raise a wider range of issues on appeal, the subcommittee intends to create an appeal process that more fully accommodates all issues, and expects that permitting decisions will more fully consider and respond to a wider range of public concerns in the future.

10. Reliance on the Final Permit Record and Administrative Record

As in the current version of the regulation, the rulemaking proposes that the issues raised in an appeal be described in a statement of reasons, which would be required to include citations to the same evidence considered by the DTSC Permitting Division when the final decision was made. Because the statement of reasons is prepared at an early stage of the appeal process, such evidence is found in the final permit record described in section 66271.17. The complete administrative record is prepared after the petition is reviewed by the Board and issues are accepted for review. Therefore, during briefing and at later points in the appeal process, the parties would cite to evidence in the administrative record. Allowing the petition to rely on the final permit record in section 66271.17, rather than delaying until preparation of the administrative record, would allow appeals to be heard in less time overall.

11. Each Appeal Will Be Decided by the Board at a Public Hearing

Under the former process, oral argument was only allowed at the discretion of the permit appeals team, which meant that appeal decisions did not uniformly involve public hearings. Pursuant to new subsection (c) of section 66271.18, the rulemaking changes this approach by requiring each appeal to be decided at a public hearing 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). Before reaching a decision on the merits, the Board would conduct an informal public hearing, which would provide expanded opportunities for the appellant(s), DTSC Permitting Division, parties who filed *amicus* briefs, and the permittee (if the permittee is not the appellant) to display slides and present arguments. Members of the public would also be allowed to comment, albeit subject to similar time restrictions as regular public meetings. Where an appeal involves a facility with significant public controversy, the public hearing could be held in meeting venue proximate to community members, which would further expand public participation in the appeal process.

12. Standard of Review

During its workshop in Berkeley on September 28, 2022, the subcommittee asked for public comments in response to the question of what standard of review the Board should apply when deciding appeals. At that workshop and in other comments, various members of the public criticized the prior appeals process as being too deferential to DTSC, and advocated for the Board to apply an independent or “de novo” standard of review of permitting decisions. Regulated businesses 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. The subcommittee considered these arguments and felt that the complex nature of permitting decisions supported a standard of review that afforded appropriate deference to the Permitting Division, as in the current regulation. The language in the current regulation, at subsection (a) of section 66271.18, which requires the appellant to demonstrate that a finding of fact or conclusion of law is “clearly erroneous,” mirrors the standard applied by Environmental Appeals Board pursuant to section 124.19 of Title 40 of the Federal Code of Regulations.

Granting deference to the DTSC Permitting Division and placing the burden on the appellant to demonstrate that a finding of fact or conclusion of law is clearly erroneous is consistent with the manner in which courts typically review permit decisions. Under state law, official acts are presumed to have been carried out correctly, pursuant to Evidence Code section 664. Therefore, when courts are called upon to review agency decisions, courts begin with the presumption that the decision is correct, and place the burden on the challenger to demonstrate clear error. Also, courts have long recognized that agencies have a highly specialized focus on particular laws, and deserve to have the decisions they make interpreting their own statutes afforded deference.

This was aptly explained by Professor Michael Asimow, an administrative law adviser to the California Law Revision Commission, whose work on judicial review of administrative decisions was quoted at length by former Supreme Court Justice Stanley Mosk in his concurring opinion in a lead case on administrative law, *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal. 4th 1, 20 (internal quotations and brackets removed):

deference is especially appropriate not only when an administrative agency has particular expertise, but also by virtue of its specialization in administering a statute, which gives that agency an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations. Moreover, deference is more appropriate when ... the agency is interpreting the statute it enforces rather than some other statute, the common law, the Constitution, or prior judicial precedents.

The subcommittee recognized the unique position of Permitting Division staff members as the only public officials entrusted with administering the state's hazardous waste permitting system, a complex and highly technical regulatory scheme. While the Board has now been granted authority to hear and decide permit appeals, and is building administrative capacity of its own, the Board recognized the efficiency inherent in affording appropriate deference to permitting decisions.

While the "clearly erroneous" and "abuse of discretion" standards have been preserved in the rulemaking, new subsection (c)(3) also adds "a procedural error, including but not limited to a failure to proceed in a manner that is required by law or regulation" as an additional basis for reversal. This was not previously identified specifically in the regulation and would expressly recognize that procedural errors committed during the permit review process are reviewable by the Board.

13. Disposition of the Appeal by the Board

The rulemaking adds specific standards for the Board to follow in issuing a final order to dispose of the appeal. If the petition is denied on the merits, the appeal is rejected, and the automatic stay is terminated. If the appeal is successful, the permitting decision is set aside, and subsection (d) identifies three possible outcomes. First, the DTSC Permitting Division may be directed simply to deny the permit, modification or temporary authorization. Second, the Board may give the DTSC Permitting Division specific instructions for changes or corrections and retain jurisdiction to review and consider those changes or corrections at a later meeting. This procedure would be available where only minor changes are needed, and would avoid the time and expense associated with repeating the permitting process anew. Third, where the Board finds that major changes are needed, it would remand the decision to the DTSC Permitting Division. In this case, the rulemaking clarifies that the Board would not hear the permit a subsequent time absent the filing of a subsequent appeal.

14. Existing Appeals

Two appeals were filed after the board members were appointed, which were placed on hold while the instant rulemaking was competed. The filing of those appeals triggered the automatic stay in existing section 66271.15, which remains in effect. Since the Board approved the rulemaking at its board meeting on March 23, 2023, the rulemaking is being submitted to Cal EPA and OAL with a requested effective date of May 1, 2023. Therefore, the rulemaking provides for appeals that were filed before May 1, 2023 to be dismissed on May 31, 2023 unless a new notice of appeal is filed on or before May 31, 2023 pursuant to either paragraph (2) of subsection (a) of section 66271.18 or subparagraph (i) of paragraph (3) of subsection (a) of section 66271.18. Similarly, pursuant to new subsection (e) of section 66271.15, the stays in

effect on May 1, 2023 shall terminate on May 31, 2023 unless notice of appeal is filed on or before May 31, 2023. This allows for the appellants in those appeals to refile their appeals to conform to the standards adopted by the rulemaking, but lifts the stays of those decisions if the appeals are not refiled.

15. Deletion of Inapplicable Provisions

The proposed rule deletes subsection (f) of section 66271.18, which is no longer applicable.

16. Board Authority

New subsection (g) of section 66271.18 describes the Board's inherent authority to maintain order through the appeal process, including imposing sanctions in the event of violations and suspending deadlines and other procedural requirements in the event of an emergency or exigency.

17. Companion Administrative Documents

At its board meeting on March 23, 2023, the Board adopted companion documents – two standing orders and two appeal forms – that provide additional standards addressing specific aspects of the appeal process. In these documents, the Board emphasizes the use of email for exchanging briefs and other documents, and requires DTSC to submit the administrative record in electronic format for posting on the Board's Internet website. By modernizing the appeal process in this fashion, the Board intends to balance transparency and efficiency, and respond to concerns of industry and community groups. The Board has also provided a sample version of an initial order, so that future appellants and the public can better understand how a future initial order would likely be structured.

Forms Incorporated by Reference

The Board has adopted new forms for purposes of filing appeals. Copies of the proposed forms are included with this notice and are available at the Board's Internet website at <https://bes.dtsc.ca.gov/proposed-regulations-2023/>.

Effect of the Proposed Regulatory Action

Updating sections 66271.14, 66271.15 and 66271.18 will carry into effect the change in the law that authorized the Board to hear and decide permit appeals. Since the board members were appointed, two permit appeals have been filed. These appeals have been on hold while the Board engaged in a public participation process to inform its emergency rulemaking. The proposed regulatory action will establish new standards for those appeals to be heard and decided by the Board. Final decisions on several hazardous waste facility permit renewal applications are anticipated in 2023, which may result in appeals being filed with the Board. This proposed emergency regulatory action will establish the standards by which such appeals will be heard and decided by the Board.

Related State Laws and Regulations

Existing state law governs the processing, granting, issuance, modification, or denial of applications for hazardous waste facility permits by DTSC (Health & Safety Code, division 20, chapter 6.5, article 9, section 25200, et seq.). Existing state regulations specify additional

standards governing the permitting process (California Code of Regulations, title 22, division 4.5, chapter 20, section 66270.1 et seq., and chapter 21, section 66271.1 et seq.).

In general, the existing regulations governing the permitting process use the term “Department” to refer to the decision-maker for various steps in the process. By replacing references to “Department” with “Board” in sections 66271.14, 66271.15 and 66271.18, the proposed regulatory action will substitute the Board for the permit appeals team within DTSC for purposes of administering, hearing, and deciding appeals. Additional changes, adding references to the “Board,” or replacing the term “Department” with “Board,” are not needed in other sections.

Comparable Federal Regulation or Statute

DTSC has received authorization from the federal government to administer hazardous waste permitting under the federal Resource Conservation and Recovery Act (RCRA) (United States Code, title 42, chapter 82, section 6901 et seq.). In states without such federal authorization, U.S. EPA grants, issues, modifies or denies hazardous waste facility permits. Federal regulations govern appeals of those decisions, at Code of Federal Regulations, title 40, section 124.19, which are heard and decided by the Environmental Appeals Board in Washington D.C.

Section 124.19 was used as a model for the drafting of the proposed regulatory action as well as a companion set of appeal procedures, which the Board intends to adopt as a standing order to provide further standards for the administration of appeals. Subsection (a) of section 66271.18 of the proposed regulatory action follows a similar structure as subsection (a) of section 124.19 of the federal regulations, which governs initiation of an appeal and establishes the deadline for filing, and the contents of, a petition. The proposed standing order would govern detailed matters, such as the length of briefs, the manner of filing briefs, service of briefs and motions, participation by amicus curiae, length of motions, and other similar administrative matters, which appear in subsections (d) thru (g) of section 124.19.

Because of the similarity of structure and substance between the federal regulation and the proposed regulatory action, the instant regulation will not be inconsistent or incompatible with applicable federal regulations.

FISCAL IMPACT TO STATE AGENCIES

The proposed regulatory action preserves and enhances the right to appeal decisions to grant, issue, modify or deny hazardous waste facility permits. By preserving and enhancing this right of appeal, and replacing the Department with the Board as decision-maker for appeals, the proposed regulatory action provides enhanced due process for appeals. Maintaining such due process is important for lawful administration of the State’s hazardous waste permitting process generally, and is necessary for the State to maintain federal authorization to administer RCRA. By preserving and enhancing that due process, the proposed regulatory action does not adversely affect any federally funded state agency or program. The Board estimates an annual fiscal impact to DTSC in the amount of \$300,000 per fiscal year for administration of hazardous waste permit appeals by the Board of Environmental Safety, which includes \$75,000 for the remaining 3 months of the current fiscal year. These estimated costs are within the Board’s current budget.

OTHER FINDINGS

Mandate on Local Agencies or School Districts: None

Document(s) Relied Upon: None

Reimbursable Cost to Any Local Agency or School District: None

Other Nondiscretionary Cost or Savings Imposed on Local Agencies: None

Cost or Savings in Federal Funding to the State: None

REGULATORY TEXT

Note: Proposed changes are illustrated with additions in underlining to show where the new text is being added. Proposed text for deletion (repeal) is shown in strikethrough.

Amend Title 22, division 4.5, chapter 21, article 1, section 66271.14 to read:

- (a) After the close of the public comment period under section 66271.9 on a draft permit, the Department shall issue a final permit decision (or a decision to deny a permit for the active life of a hazardous waste management facility or unit under section 66270.29). Final permit decisions shall be made and noticed in accordance with the provisions of Health and Safety Code section 25199.6 and chapter 4.5 (commencing with section 65920) of division 1 of Title 2 of the Government Code. The Department shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a permit. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, or revoke and reissue a permit.
- (b) A final permit decision (or a decision to deny a permit for the active life of a hazardous waste management facility or unit under section 66270.29) shall become effective 30 calendar days after the service of notice of the decision unless
 - (1) a later effective date is specified in the decision; or
 - (2) notice of an appeal is filed with the Board of Environmental Safety pursuant to subsection (a) of review is requested under section 66271.18; or
 - (3) ~~n~~No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

Authority: Health and Safety Code sections 25125.2 and 25125.4.

Amend Title 22, division 4.5, chapter 21, article 1, section 66271.15 to read:

- (a) Automatic Stay. If notice of an appeal is filed with the Board of Environmental Safety ("Board") pursuant to paragraph (3) of subsection (a) of Section 66271.18, Stays.
 - (1) ~~If a request for review of a permit is granted, the effect of the final contested permit decision conditions shall be stayed until the later of either the dismissal of a petition in full pursuant to subsection (b) of section 66271.18, or the denial of a petition on the merits pursuant to subsection (d) of section 66271.18, and shall not be subject to judicial review pending final Department action. If the permit involves a new facility, the applicant shall be without a permit for the proposed new facility while the stay remains in effect.~~
- (b) Effect of Stay. The effect of the stay imposed under subsection (a) of this section shall be limited to the issues that are accepted by the Board pursuant to subsection (b) of section 66271.18. (2) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed provisions of permits for existing facilities shall be identified by the Board in the initial order issued

~~pursuant to subsection (b) of section 66271.18. Department. All other provisions of the permit for the existing facility shall remain fully effective and enforceable.~~

(c) Temporary Authorizations. If notice of an appeal is filed with the Board pursuant to paragraph (2) of subsection (a) of section 66271.18, the permittee shall be without the temporary authorization until the appeal is decided by the Board pursuant to subsection (d) of section 66271.18.

~~(b) Stays based on cross-effects. A stay may be granted based on the grounds that an appeal to the Department under section 66271.18 of one permit may result in changes to another permit only when each of the permits involved has been appealed to the Department and the Department has accepted each appeal.~~

(d) Existing Permits. (e) Any facility or activity holding an existing permit shall:

- (1) comply with the conditions of that permit during any modification or revocation and reissuance proceeding under section 66271.4; and
- (2) to the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed.

(e) Existing Stays. Any stay in effect on May 1, 2023 shall terminate on May 31, 2023 unless notice of an appeal is filed with the Board pursuant to subsection (a) of section 66271.18 on or before May 31, 2023, in which case the stay shall be extended until the later of either the dismissal of a petition for review in full pursuant to subsection (b) of section 66271.18, or the denial of a petition on the merits pursuant to subsection (d) of section 66271.18.

Authority: Health and Safety Code sections 25125.2 and 25125.4.

Amend Title 22, division 4.5, chapter 21, article 1, section 66271.18 to read:

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

(a) Petitioning for review of ~~Within 30 days after a final~~ hazardous waste facility permit decision, ~~has been issued under section 66271.14,~~

(1) Matters Subject to Appeal. The Board of Environmental Safety ("Board") hears and decides appeals from decisions to grant, issue, modify or deny hazardous waste facility permits, except that class 1 permit modification decisions are not subject to appeal. Appeals are limited to decisions made by the Department's Permitting Division pursuant to chapter 6.5 of division 20 of the Health and Safety Code, and do not encompass decisions made by the Department's Permitting Division pursuant to other statutes, including but not limited to the California Environmental Quality Act at division 13 of the Public Resources Code.

(2) Appeals of Temporary Authorization Decisions – Expedited Process. Any person may appeal the decision to approve or deny a temporary authorization, by filing a notice of appeal using Special Appeal Form BES 2302 no later than 30 calendar days after notice of the decision pursuant to paragraph (1) of subsection (f) of

section 66270.42. The notice of appeal shall include a brief statement explaining why the appellant's appeal should be granted. Upon receipt of Special Appeal Form BES 2302, the Board Clerk shall request that the Department's Permitting Division file a brief statement responding to the notice of appeal no later than 30 days after receipt of the request. The appeal shall be decided by the Board at a hearing held pursuant to subsection (c) of this section without issuing an initial order pursuant to subsection (b) of this section. Paragraphs (3), (4), (5), and (6) of subsection (a) of this section are not applicable to appeals filed pursuant to this paragraph.

- (3) Initiating an Appeal; Timing. Except as provided in paragraph (2) of subsection (a) of this section, an appeal from a decision to grant, issue, modify or deny a hazardous waste facility permit shall be initiated by the filing of both of the following:
- (i) Standard Appeal Form BES 2301 no later than 30 calendar days after notice of the final permit decision pursuant to either subsection (a) of section 66271.14 or paragraph (1) of subsection (f) of section 66270.42; and
 - (ii) a petition meeting the requirements of paragraph (4) of subsection (a) of this section no later than 60 calendar days after notice of the final permit decision pursuant to either subsection (a) of section 66271.14 or paragraph (1) of subsection (f) of section 66270.42.
- (4) Petition; Statement of Reasons. The petition filed pursuant to subparagraph (ii) of paragraph (3) of subsection (a) of this section shall contain a statement of reasons raising one or more issues with the decision to grant, issue, modify or deny the permit, or with the inclusion or omission of any condition(s) in the permit. Except as provided in paragraphs (6) and (7) of subsection (a) of this section, the petition shall demonstrate that all issues raised in the statement of reasons relate to matters that appeared for the first time in the final permit, or were previously raised in comments or testimony provided to DTSC during public review of the draft permit or modification, which shall be supported by citations to the final permit record described in section 66271.17, including the document name and page number.
- (5) Standing to File. After filing a timely notice of appeal, and subject to paragraphs (6) and (7) of subsection (a) of this section, only a ~~any~~-person who filed comments on ~~the that~~ draft permit or participated in the 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. ~~the Department to review any condition of the permit decision.~~
- (6) Failure to Participate. Any person who failed to file comments with the Department's Permitting Division, or failed to participate in the public hearing (if any) on the draft permit, may file a petition with the Board, which must contain a statement of reasons raising one or more of the issues listed in paragraph (3),

but the petition shall be limited to matters that appeared for the first time in the final permit or issues that could not have been raised during public review of the draft permit.

(7) Board Discretion to Accept Petitions. By majority vote at a public meeting and upon a showing of good cause, the Board in its discretion may waive the application of paragraphs (5) and (6) of subsection (a) of this section. for administrative review only to the extent of the changes from the draft to the final permit decision. Any person may petition the Department to review any condition of a temporary authorization under section 66270.42(f). The 30-day period within which a person may request review under this section begins with the service of notice of the Department's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

(1) a finding of fact or conclusion of law which is clearly erroneous, or

(2) an exercise of discretion or an important policy consideration which the Department should, in its discretion, review.

(b) Initial Order. At a noticed public meeting held no less than 30 calendar days The Department may also decide on its initiative to review any condition of any permit issued under this chapter. The Department shall act under this subsection within 30 days of the service date of notice of the Department's action. (c) Within a reasonable time following the filing of a the petition for review, pursuant to subparagraph (ii) of paragraph (3) of subsection (a) of this section, the Board Department shall determine whether the petition is supported by a statement of reasons meeting the requirements of either paragraphs (4) and (5) of subsection (a) of this section or paragraph (6) of subsection (a) of this section. Except as provided in paragraph (7) of subsection (a), the Board shall dismiss any petition that does not meet either of these requirements. The Board shall issue an initial order addressing the following:

(1) either accepting granting or dismissing denying the petition in full or in part.

(2) setting for review . Public notice of any grant of review by the Department under subsection (a) of this section shall be given as provided in section 66271.9. Public notice shall set forth a briefing schedule if any portion of the petition is accepted for review.

(3) consolidating proceedings if multiple appeals are filed. for the appeal and shall state that any interested person may file a written argument. Notice of denial of review shall be sent only to the person(s) requesting review.

(c) Decision on the Merits. The Board shall decide the issues raised in the petition and accepted for review at a public hearing conducted pursuant to article 10 of chapter 4.5 of division 3 of title 2 of the Government Code and rules established by the Board for the conduct of public hearings. The appellant shall bear the burden at the hearing to

establish that the Department's final permit decision is based upon one or more of the following:

- (1) a finding of fact or conclusion of law which is clearly erroneous; or
- (2) an abuse of discretion concerning an exercise of discretion or an important policy consideration within the Board's jurisdiction, which the Board should, in its discretion, review; or
- (3) a significant procedural error, including but not limited to a failure to proceed in a manner that is required by law or regulation.

(d) Final Order. If the Board concludes that the appellant has not satisfied its burden as set forth in subsection (c) of this section, it shall deny the petition and terminate the stay imposed under section 66271.15. If the Board concludes that the appellant has satisfied its burden as set forth in subsection (c) of this section, it shall grant the petition, and enter an order vacating and setting aside the final permit decision in full or in part and

- (1) directing the Department's Permitting Division to deny the permit; or
- (2) retaining jurisdiction over the matter and directing the Department's Permitting Division to address the issues sustained by the Board, which shall be reviewed and considered by the Board at a subsequent public meeting; or
- (3) directing the Department's Permitting Division to prepare a new draft permit in accordance with applicable laws and regulations, in which case the Department's subsequent final permit decision shall be subject to review by the Board upon the timely filing of an appeal in accordance with paragraph (3) of subsection (a) of this section.

~~(d) When a review has been initiated pursuant to subsection (a) or (b) of this section, the order denying review or the decision on the merits shall constitute the Department's final permit decision and shall be effective on the date of mailing of the order denying review or decision on the merits.~~

(e) Judicial Review. Following a decision to grant, issue, modify or deny a hazardous waste facility permit by the Department, the filing of an appeal with the Board pursuant to subsection (a), and either the dismissal of a petition in full pursuant to subsection (b), or the issuance of a final order pursuant to subsection (d), ~~(e)~~ A final permit decision on a petition to the Department under subsection (a) of this section is a prerequisite to seeking judicial review of the Department's final permit decision. Decisions of the Department's Permitting Division that are not subject to appeal to the Board pursuant to paragraph (1) of subsection (a) of this section shall be final for purposes of judicial review when decided by the Department's Permitting Division.

(f) Existing Appeals. Any appeal that was filed with the Board before May 1, 2023 shall be deemed dismissed by the Board unless a notice of appeal is filed with the Board pursuant to paragraph (2) of subsection (a) of this section, or subparagraph (i) of paragraph (3) of subsection (a) of this section on or before May 31, 2023. ~~If a permit~~

~~decision is pending on the date this section is amended to eliminate a hearing under the Administrative Procedure Act, this section shall be applied as follows:~~

~~(1) If a Statement of Issues or Accusation was issued prior to the effective date of the amendment, the proceeding shall continue under the regulation in effect when the Administrative Procedure Act proceeding was initiated.~~

~~(2) If a Statement of Issues or Accusation has not been issued prior to the effective date of the amendment, the proceeding shall be governed by the amended regulation.~~

(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.

(h) Notice of Appeal Forms. Standard Appeal Form BES 2301 (issued March 23, 2023) is the standard appeal form used to provide notice of an appeal pursuant to subparagraph (i) of paragraph (3) of subsection (a) of this section. Special Appeal Form BES 2302 (issued March 23, 2023) is the special appeal form used to provide notice of an appeal pursuant to paragraph (2) of subsection (a) of this section. Standard Appeal Form BES 2301 (3/23/23) and Special Appeal Form BES 2302 (3/23/23) are hereby incorporated by reference.

Authority: Health and Safety Code sections 25125.2 and 25125.4.

Add new forms for filing appeals issued by Order of the Board of Environmental Safety on March 23, 2023. Form BES 2301 and Form BES 2302 follow.

NOTICE OF APPEAL – STANDARD

Standard Appeal Form BES 2301 (3/23/23)

Directions: Any person wishing to dispute the Department of Toxic Substances Control's decision to grant, issue, modify, or deny a hazardous waste facility permit may appeal the Department's written decision by completing this form and seeking review of the decision by the Board of Environmental Safety in accordance with 22 CCR 66271.18.

Notice is given that the party below hereby appeals the hazardous waste facility permit decision of the Department as authorized by Health and Safety Code section 25125.2.

Appellant Name: _____

Email: _____

Address: _____

Represented by Legal Counsel (if any): _____

DTSC Case Number of Permit Decision Being Appealed (if known): _____

Date of Mailed Notice of Permit Decision Being Appealed: _____

Facility Name and Address: _____

This Appeal is filed by (select one of the following boxes):

- The facility owner or operator
- A member of the public

IMPORTANT NOTE – PLEASE READ CAREFULLY

This notice must be filed with the Board of Environmental Safety at 1001 I Street, 25th Floor, P.O. Box 806, Sacramento, CA, 95814-0806 or via email to appeals@bes.dtsc.ca.gov or using the website portal at bes.dtsc.ca.gov **no later than 30 days** after the date of the mailed notice of the final hazardous waste facility permit decision being appealed.

DO NOT USE THIS FORM if you are appealing the decision to grant or deny a temporary authorization. Instead, please use Special Appeal Form BES 2302.

NOTICE OF APPEAL – TEMPORARY AUTHORIZATIONSpecial Appeal Form BES 2302 (3/23/23)

Directions: Any person wishing to dispute the Department of Toxic Substances Control's decision to grant or deny a temporary authorization may appeal the Department's written decision by completing this form and seeking review of the decision by the Board of Environmental Safety in accordance with 22 CCR 66271.18.

Notice is given that the party below hereby appeals the decision by the Department to grant or deny a temporary authorization, as authorized by Health and Safety Code section 25125.2.

Appellant Name: _____

Email: _____

Address: _____

Represented by Legal Counsel (if any): _____

DTSC Case Number of Permit Decision Being Appealed (if known): _____

Date of Mailed Notice of Permit Decision Being Appealed: _____

Facility Name and Address: _____
_____**IMPORTANT NOTE – PLEASE READ CAREFULLY**

This notice must be filed with the Board of Environmental Safety at 1001 I Street, 25th Floor, P.O. Box 806, Sacramento, CA, 95814-0806 or via email to appeals@bes.dtsc.ca.gov or using the website portal at bes.dtsc.ca.gov **no later than 30 days** after the date of the mailed notice of the decision by DTSC to grant the class 2 modification and/or temporary authorization being appealed.

ONLY use this form if you are appealing the decision to grant or deny a temporary authorization. To appeal any other permit decision, please use Standard Appeal Form BES 2301.

