

**State of California
Office of Administrative Law**

In re:
Board of Environmental Safety, Department
of Toxic Substances Control

Regulatory Action:

Title 22, California Code of Regulations

APPROVED:

Adopt sections: 66271.71, 66271.72

Amend sections:

Repeal sections: 66271.15 [renumbered as
66271.71], 66271.18
[renumbered as 66271.72]

WITHDRAWN:

Adopt sections:

Amend sections: 66271.14

Repeal sections:

**NOTICE OF APPROVAL IN PART AND
WITHDRAWAL IN PART OF REGULATORY
ACTION**

Government Code Section 11349.3

OAL Matter Number: 2023-0419-01

OAL Matter Type: Emergency (E)

This deemed emergency action by the Board of Environmental Safety is a revision of the process for appealing the Department of Toxic Substances Control's decisions to grant, issue, modify or deny hazardous waste facility permits. These emergency regulations align with statutory changes made in Senate Bill 158 (Stats. 2021, c. 73) and will remain in effect until repealed by the Board of Environmental Safety, pursuant to Health and Safety Code section 25125.4.

OAL approves the sections listed as APPROVED above pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 5/1/2023.

The section listed as WITHDRAWN above were withdrawn from OAL review pursuant to Government Code section 11349.3(c).

Date: May 1, 2023



Thanh Huynh
Senior Attorney

For: Kenneth J. Pogue
Director

Original: Jeanne Rizzo, Chairperson
Copy: Meredith Williams, Director of
DTSC, and Gregory Forest

STD. 400 (REV. 01-2013)

EMERGENCY

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER 2023-0419-01E	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

ENDORSED - FILED
In the office of the Secretary of State
of the State of California

MAY 01 2023

3:16 PM

GH

OFFICE OF ADMIN. LAW
2023 APR 19 AM 8:33

AGENCY WITH RULEMAKING AUTHORITY
Board of Environmental Safety, Department of Toxic Substances Control

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Hazardous Waste Facility Permit Appeal Procedures	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 66271.71, 66271.72
	AMEND 66271.14, 66271.15 & 66271.18
TITLE(S) 22	REPEAL 66271.15 [renumbered as 66271.71], 66271.18 [renumbered as 66271.72]

5/1/2023 TH per agency request

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input checked="" type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input checked="" type="checkbox"/> Other (Specify) Health and Safety Code section 25125.4	

5/1/2023 TH per agency request

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
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5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input checked="" type="checkbox"/> Effective other (Specify) May 1, 2023

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify)			

7. CONTACT PERSON Gregory Forest	TELEPHONE NUMBER (279) 895-5154	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) Gregory.Forest@dtsc.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Swati Sharma</i>	DATE 4/18/23
TYPED NAME AND TITLE OF SIGNATORY Swati Sharma, Executive Officer	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

MAY 01 2023

Office of Administrative Law

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.

Repeal Title 22, division 4.5, chapter 21, article 1, section 66271.15.

~~66271.15 Stays of Contested Permit Conditions.~~

~~(a) Stays. (1) If a request for review of a permit is granted, the effect of the contested permit conditions shall be stayed 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.~~

~~(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 Department. All other provisions of the permit for the existing facility shall remain fully effective and enforceable.~~

~~(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.~~

~~(c) 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.~~

~~Authority cited: Sections 208, 25150 and 25159, Health and Safety Code.~~

~~Reference: Sections 25159 and 25159.5, Health and Safety Code; 40 CFR Section 124.16.~~

Repeal Title 22, division 4.5, chapter 21, article 1, section 66271.18.

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

~~(a) Within 30 days after a final permit decision [or a decision under section 66270.29 to deny a permit for the active life of a hazardous waste management facility or unit] has been issued under section 66271.14, any person who filed comments on that draft permit or participated in the public hearing may petition the Department to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition 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) 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 the petition for review, the Department shall issue an order either granting or denying the petition 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 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.~~

~~(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) 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 decision.~~

~~(f) 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.~~

~~Authority cited: Sections 25150, 25159 and 58012, Health and Safety Code.~~

~~Reference: Sections 25159.5, 25186, 25186.1 and 25200, Health and Safety Code; 40 CFR Section 124.19.~~

Add Title 22, division 4.5, chapter 21, article 4 to read:

Article 4. Board of Environmental Safety

Authority: Health and Safety Code section 25125.4.

Reference: Health and Safety Code sections 25125 - 25125.9.

Add Title 22, division 4.5, chapter 21, article 4, section 66271.71 to read:

66271.71 Stays of Permit Decisions Pending Appeal by the Board of Environmental Safety.

- (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 66271.72, the effect of the final permit decision shall be stayed until the later of either the dismissal of a petition in full pursuant to subsection (b) of section 66271.72, or the denial of a petition on the merits pursuant to subsection (d) of section 66271.72. 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 66271.72. 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 66271.72. 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 66271.72, the permittee shall be without the temporary authorization until the appeal is decided by the Board pursuant to subsection (d) of section 66271.72.
- (d) Existing Permits. 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 66271.72 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 66271.72, or the denial of a petition on the merits pursuant to subsection (d) of section 66271.72.

Authority: Health and Safety Code section 25125.4.

Reference: Health and Safety Code sections 25125 and 25125.2.

Add Title 22, division 4.5, chapter 21, article 4, section 66271.72 to read:

66271.72 Appeal of Decisions to Grant, Issue, Modify, or Deny Permits.

(a) Petitioning for review of a final hazardous waste facility permit decision.

- (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 person who filed comments on the 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.

(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.

(b) Initial Order. At a noticed public meeting held no less than 30 calendar days following the filing of a petition pursuant to subparagraph (ii) of paragraph (3) of subsection (a) of this section, the Board 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 or dismissing the petition in full or in part.

(2) setting forth a briefing schedule if any portion of the petition is accepted for review.

(3) consolidating proceedings if multiple appeals are filed.

(c) Decision on the Merits. The Board shall decide the issues raised in the petition and accepted for review pursuant to subsection (b) of this section at a public hearing conducted pursuant to article 10 of chapter 4.5 of division 3 of title 2 of the Government Code. 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 66271.71. 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.
- (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), 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.
- (g) 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 section 25125.4.

Reference: Health and Safety Code sections 25125 and 25125.2.

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 AUTHORIZATION

Special 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.

