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ADDENDUM

NOTICE OF PROPOSED EMERGENCY ACTION

HAZARDOUS WASTE FACILITY PERMIT APPEAL PROCESS

REPEAL 22 CCR §§ 66271.15 & 66271.18

ADD NEW ARTICLE 4, CHAPTER 21, TITLE 22 CCR §§ 66271.71 & 66271.72

This Addendum makes clarifying revisions to the Notice of Proposed Emergency Action (“Notice”) for the Emergency Rulemaking of the Board of Environmental Safety (“Board”).

The Emergency Rulemaking enacts new 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 by adding new Sections 66271.71 and 66271.72 in new article 4 of chapter 21 of title 22 of the California Code of Regulations. The Emergency Rulemaking also repeals Sections 66271.15 and 66271.18 of article 1 of chapter 21 of title 22, which governed the former appeals process within the DTSC that was transferred to the Board by the enactment of SB 158 in 2021, which added Section 25125.2 of the Health and Safety Code.

SECTIONS AFFECTED

California Code of Regulations, title 22, division 4.5, chapter 21, article 1, sections 66271.15 and 66271.18 are repealed. New sections 66271.71 and 66271.72 in new article 4 of chapter 21 of division 4.5 of title 22 are added.

INFORMATIVE DIGEST

Effect of the Regulatory Action

Changes in Section Numbering

The Notice referred to amendments to the existing regulations governing final permit decisions (Section 66271.14), stays of permit decisions pending appeal (Section 66271.15), and permit appeal procedures (Section 66271.18). In light of its permanent nature, to make the regulations

easier for the public to understand, and because the Board anticipates that additional rulemaking may be necessary in the future, the Emergency Rulemaking proposes to add new article 4 in chapter 21 of division 4.5 of title 22. The Emergency Rulemaking does not propose changes to existing section 66271.14 because that section addresses final permit decisions and is administered by DTSC. The Board anticipates that DTSC will submit a non-substantive rulemaking in the future to amend cross-references to the repealed sections. The Emergency Rulemaking proposes to add new sections 66271.71 and 66271.72 in new article 4 in chapter 21 in division 4.5 in title 22, which replace sections 66271.15 and 66271.18.

All references to Section 66271.15 in the Notice are hereby changed to refer to new Section 66271.71 and all references to Section 66271.18 in the Notice are hereby changed to refer to new Section 66271.72.

Administration of the Appeal

In an effort to assist the public and stakeholders to better understand the anticipated day-to-day functioning of the permit appeals process envisioned by the Board, the Notice discussed a possible role that could be performed by the Board Chair and Vice Chair to assist staff in the administration of appeals. To avoid confusion, this Addendum addresses a specific point in the Notice to clarify that a specific delegation of authority to the Board Chair and Vice Chair for such a purpose is not provided in the Emergency Rulemaking, but could be specified in a future rulemaking that adds further, specific procedures for the Board's permit appeals process. To be clear, the only roles assigned to board members by the Emergency Rulemaking are the actions specified in subsections (b) and (c) of section 66271.72 regarding conduct at a public meeting and public hearing, respectively.

Decision on the Merits

The Notice explained that the Board intends to decide each appeal on the merits at a public hearing held pursuant to article 10 of chapter 4.5 of division 3 of title 2 of the Government Code, in the Administrative Procedures Act (APA). In the future, the Board may offer guidance for the public regarding the conduct of such hearings under the APA and related laws such as the Bagley-Keene Open Meeting Act. The Emergency Rulemaking includes a non-substantive clarifying change by deleting the reference to "rules established by the Board" in subsection (c) of Section 66271.72, to avoid possible confusion regarding the regulatory and legal standards applicable to the conduct of appeal hearings. The Emergency Rulemaking also includes a non-substantive change to clarify that the "issues raised in the petition and accepted for review" are accepted "pursuant to subsection (b)" of Section 66271.72.

Disposition of the Appeal by the Board

In explaining the function of the remand procedure in subsection (d) of Section 66271.72, the Notice provided examples of possible outcomes where the Board could exercise its authority under paragraphs (1), (2) and (3) of subsection (d). These include directing DTSC to deny the permit/modification, retaining jurisdiction over an appeal, or remanding a permit back to DTSC for further proceedings. The examples of the potential application of these provisions in remand scenarios in the Notice are merely illustrative and are not intended to have regulatory effect.

Board Authority

The Notice described a proposed new subsection (g) of section 66271.18 which would have described the Board's inherent authority to maintain order through the appeal process. Since specific regulatory provisions are not necessary to implement this inherent authority, this addendum clarifies that that paragraph is not included in this Emergency Rulemaking.

Forms Incorporated by Reference

The following forms are incorporated by reference: (1) Standard Appeal Form BES 2301 (3/23/23) and (2) Special Appeal Form BES 2302 (3/23/23).