



## BOE-G-01-Filing Appeals and Petitions for Declaratory Order with TDEC-081420

DISCLAIMER: This document is guidance only and does not create legal rights or obligations. Agency decisions in any particular case will be made applying applicable laws and regulations to the specific facts.

### 1) EFFECTIVE DATE: AUGUST 14, 2020

### 2) SIGNATURES:

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Gregory T. Young,  
Deputy Commissioner

.. (Aug 13, 2020 12:45 CDT)

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Drafter: Stephanie A. Durman,  
Senior Associate Counsel

Emily Urban (Aug 13, 2020 13:06 CDT)

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Reviewer: Emily H. Urban,  
Deputy General Counsel

### 3) GUIDANCE:

This guidance document does not constitute legal advice. OGC attorneys do not provide legal advice to members of the general public. Non-attorneys considering filing an appeal or a petition for declaratory order (PDO) with the Tennessee Department of Environment and Conservation are encouraged to consult a private attorney.

Statutory appeal rights apply to many actions of the Tennessee Department of Environment and Conservation, including rights to appeal permits, enforcement orders, and certain other final determinations. In addition, the Uniform Administrative Procedures Act and Department rules allow the filing of PDOs in some situations. *See* Tenn. Code Ann. § 4-5-223 (allowing affected persons to file a PDOs as to to the validity or applicability of a statute or rule). This guidance provides information about best practices for how to file such appeals and PDOs.



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All appeals and PDOs should be filed with the Department. In many cases, the reviewing agency is a board associated with the Department, but these boards do not have their own staffing or the ability to receive appeals directly. Appeals should not be filed directly with the Secretary of State's Administrative Procedures Division (APD). Appeals can be filed as noted on the formal action and PDOs can be filed by mail or delivery to the Department, c/o the Office of General Counsel, at 312 Rosa L. Parks Avenue, 2<sup>nd</sup> Floor, Nashville, TN 37243. In the alternative, appeals and PDOs can be filed by electronic mail at [TDEC.Appeals@tn.gov](mailto:TDEC.Appeals@tn.gov). Persons filing an appeal or PDO by electronic mail do not need to send a paper copy or copy other Department personnel on the electronic mail message.

All appeals must be filed in compliance with applicable statutory deadlines. With some exceptions (*see, e.g.*, Tenn. Comp. R. & Regs 0400-40-03-.06(4)(d) (establishing a 30-day limit)), PDOs do not generally have filing deadlines. The Department does not have the discretion to extend an appeal deadline established by statute or rule. When the Department issues a permit or order, it typically identifies the appeal deadline in that document (*e.g.*, not later than 30 days from receipt of service, 30 days from public notice of permit issuance, etc.).

The Department will not challenge the timeliness of an otherwise appropriately filed appeal if it is received by electronic mail before midnight on the date the appeal is due or if a paper copy is received by the Department during office hours (not later than 4:30 p.m.) on that date. If a statutory appeal deadline falls on a weekend or a legal holiday the Department will not challenge the timeliness of an appeal filed on the next day that is not a weekend or a legal holiday. *See* Tenn. Comp. R. & Regs. 1360-04-01-.04(1).

Nearly all Department appeals initiate a contested case proceeding that culminates in a contested case hearing. PDOs initiate a contested case proceeding, but will only result in a contested case hearing if the applicable board or the commissioner chooses to convene a contested case hearing and issue a declaratory order. Tenn. Code Ann. § 4-5-223(a)(1). Such hearings are legal proceedings in the nature of a trial. *See* Tenn. Code Ann. §§ 4-5-301 to -325; Tenn. Comp. R. & Regs. Chapter 1360-04-01. Individuals may represent themselves or be represented by an attorney licensed to practice law in Tennessee. No one may represent another person in a contested case proceeding unless they are an attorney licensed to practice law in Tennessee. Governments and artificial persons (corporations, limited partnerships, limited liability companies, etc.) may only pursue a contested case hearing through an attorney



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licensed to practice law in Tennessee. *Tennessee Environmental Council, Inc. v. Tennessee Water Quality Control Board*, 254 S.W.3d 396 (Tenn. 2008).

Attorneys should be aware that the Department is represented by counsel concerning all orders, permit appeals, PDOs, and other appeals. If you are an attorney and have any questions concerning an order, please contact the Department attorney who signed the order. If you are an attorney and have a question about any other matter concerning a potential appeal or PDO, please contact the Office of General Counsel at 615-532-0131 or contact a Department attorney directly. If you are not an attorney, you may contact the division staff person identified in the determination, or – if you are not represented by an attorney, the Office of General Counsel.

The Department does not require any particular format for an appeal petition: it will accept legible hand-written letters, electronic mail, and formal petitions. The content of the appeal is more important than the form. Appeal petitions should:

- identify the permit, order, or other decision being appealed using the specific document number if applicable;
- identify the name of the appealing party and provide contact information for that person or, if represented by counsel, for that person's attorney;
- specify the provisions of the permit, order, or final determination that are being appealed;
- specify each claim for relief, including the legal and factual bases for each claim;
- for petitions for declaratory order and third-party permit appeals, indicate how the alleged violation injures a legally-protected right of the party appealing.
- for third-party permit appeals, allege that the person appealing participated in the public comment period and that the issue(s) raised in the appeal was presented to the Department during the public comment period;
- identify the requested relief; and
- provide any other information required by statute or rule.

Some attorneys choose to provide a formal answer to each allegation when appealing an enforcement order. While this is helpful, and certainly allowed, it is not required.



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The format and content of PDOs are similar. Instead of identifying a permit or order, a PDO should identify the statute or rule at issue. If challenging the applicability of a statute or rule, the PDO should explain the key facts. Also, for a PDO, the petitioner does not need to show that the petitioner participated in a comment period, but instead needs to explain how the petitioner is an affected person.

The Department understands that not all appeals and PDOs are filed by attorneys, or by people who are otherwise knowledgeable about the law. The Department will not ignore an appeal or PDO simply because it lacks any of the above-listed provisions, so long as the document clearly indicates an intent to appeal a specific action or seek a declaratory order and provides sufficient and accurate contact information.

Once the Department receives an appeal or PDO, it will notify the filer that the appeal or PDO has been received. The Department will assign an attorney. If it is an appeal, that attorney will docket the case with APD, and reach out to the filer to determine whether an informal settlement is possible. If it is a PDO submitted to a board, the attorney will place it on the agenda of the applicable board so the board can determine whether to convene a contested case hearing, and will notify the petitioner of the date of that board meeting.<sup>1</sup>

If the Department believes a an appeal is not timely, fails to state a claim upon which relief can be granted, has been improperly filed by a non-attorney, or is otherwise insufficient, it may docket the case with APD and file any appropriate motion(s), including but not limited to a motion for a more definite statement or a motion to dismiss.

Once APD assigns an administrative law judge to a contested case, that judge will direct the course of proceedings through scheduling conferences, orders, and other means. After a case has been docketed with APD, additional filings must be directed to APD rather than the Department.

<b>Revision Number</b>	<b>Date</b>	<b>Brief Summary of Change</b>
0	August 14, 2020	Initial Issuance

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<sup>1</sup> If the board decides not to convene a contested case hearing for a PDO, then the petitioner may apply for a declaratory judgment as provide in Tennessee Code Annotated section 4-5-225. Tenn. Code Ann. § 4-5-223(a)(2).