



March 24, 2022

**VIA: ELECTRONIC MAIL ONLY**  
(cob@aqmd.gov)

Chair William Benoit and Governing Board Members  
South Coast Air Quality Management District  
21865 Copley Drive  
Diamond Bar, California 91765-4178

**Re: Concerns About South Coast AQMD Lack of Petroleum Refinery Accountability**

- **Lax Air District Enforcement Against Major Refinery Polluters**
- **Lapsed Rulemaking Timelines for Rules 1173 and 1176**
- **Flawed Variance Procedures**

Dear Chairman Benoit and Governing Board Members:

The undersigned organizations urge the Governing Board to take critical steps to restore the Air District's role in holding major refineries accountable for unlawful emissions. For years, petroleum refineries have been emitting carcinogenic VOCs into vulnerable communities while escaping necessary enforcement actions under Rules 1173 and 1176. The Air District has fallen short of its own regulatory timeline for strengthening these rules, and as a result, lax oversight and a broken variance process have left communities at the mercy of these major polluters. The Governing Board should act to reverse the declining public trust in the Air District.

Rules 1173 and 1176 are meant to protect communities from fugitive emissions of cancer-causing VOCs. The Air District itself recognized these rules need to be updated, but has not followed through on its own timeline for updating these critical rules. The Air District's Community Emissions Reduction Plan (CERP) for some of the region's most overpolluted communities indicated that rule development meetings would begin in the "second half of 2020" — almost *two years* ago.<sup>1</sup> As communities wait for these

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<sup>1</sup> South Coast Air Quality Management District, *Final CERP for Wilmington, Carson, West Long Beach* at 5e-8 (Sept. 2019), <https://www.aqmd.gov/docs/default-source/ab-617-ab-134/steering-committees/wilmington/cerp/final-cerp-wcwlb.pdf>.

rules to be updated, they continue to suffer the consequences of ineffectual rules long overdue for revamping.

Unfortunately, problems created by outdated rules are exacerbated by the Air District's lack of consistent enforcement under the existing requirements. Despite receiving information in 2019 about violations of Rules 1173 and 1176, the Air District has failed to initiate enforcement action to hold refineries accountable and deter violations.<sup>2</sup> Major polluters like Phillips 66 with a long history of notices of violation, including noncompliance with Rules 1173 and 1176, continue to operate with impunity. Meanwhile, community members continue to suffer from the Air District's failure to take prompt action to hold these polluters accountable.

The harm caused by these refinery emissions is worsened by serious flaws in the variance procedures at the Hearing Board. We prepared a whitepaper that outlines the harmful shortcomings in the procedures used to issue variances.<sup>3</sup> These defective procedures reproduce existing environmental injustice and inequity: *ninety-nine percent* of excess emissions authorized by variances were released in areas where over fifty percent of residents are people of color. The Hearing Board insists that it lacks authority to act, but the Governing Board has the ability and duty to protect public health and ensure compliance with the law by addressing these defects.<sup>4</sup>

The concerns highlighted in this letter are a few among many other refinery-related issues that require the Governing Board's attention and action. To address the concerns outlined in this letter, we respectfully urge the Governing Board to consider the findings of the attached whitepaper and to take the following action:

- 1) Direct Air District staff to commence working group meetings for Rules 1173 and 1176 for much-needed updates and set a firm timeline to finalize these rules.
- 2) Direct Air District staff to propose amendments to the rules and guidance materials concerning Hearing Board procedures to accomplish the following:
  - i. Require variance applicants to submit an application for alternative operating conditions with any variance requests involving federally-approved rules.

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<sup>2</sup> East Yard Communities for Environmental Justice, *60-Day Notice of Intent to File Clean Air Act Citizen Suit Regarding Violations at the Phillips 66 Wilmington and Carson Refineries* (Apr. 29, 2020).

<sup>3</sup> Earthjustice, *Variances at the South Coast Air District* (2021), Attached as Exhibit A.

<sup>4</sup> SCAQMD Hearing Board, *Response to Earthjustice's White Paper on Variances* (Dec. 22, 2021), Attached as Exhibit B.

- ii. Include procedures and forms requiring a variance applicant to show that the variance would not result in a violation of Health & Safety Code Section 41700, which prohibits discharges causing certain injuries to the public.
  - iii. Consider cumulative impacts in variance decisions, including the location of facilities seeking variances in relationship to communities identified as overburdened in a Community Emissions Reduction Plan under AB617.
- 3) Direct Air District staff to provide a status update concerning outstanding notices of violation of Rules 1173 and 1176, including any enforcement actions against Phillips 66.

Respectfully submitted,

Kartik Raj	Julia May	Jan Victor Andasan
Byron Chan	Alison Hahm	Whitney Amaya
Oscar Espino-Padron	<b>COMMUNITIES FOR A</b>	<b>EAST YARD COMMUNITIES FOR</b>
Lisa Fuhrmann <sup>5</sup>	<b>BETTER ENVIRONMENT</b>	<b>ENVIRONMENTAL JUSTICE</b>
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<sup>5</sup> Contributed to the research and/or factual portions of this document and did not provide legal services or analysis.

# EXHIBIT A

*Earthjustice White Paper regarding Variances at the  
South Coast Air District (2021)*

## VARIANCES AT THE SOUTH COAST AIR DISTRICT

Polluting facilities in Southern California can petition the South Coast Air Quality Management District's Hearing Board to receive a variance to allow them to continue operating even when they are not in compliance with applicable rules and regulations. Earthjustice's review of ten years of variance data shows that there are serious shortcomings in the implementation of the variance program. These shortcomings result in additional harms to the already overburdened environmental justice communities that live and work near many of these polluting facilities, such as petroleum refineries and powerplants.

To address these shortcomings, the South Coast Air Quality Management District must implement several reforms, including:

- (a) Require facilities to submit applications for alternative operating conditions with their variance requests;
- (b) Amend existing rules, procedures, and forms to comply with the Health and Safety Code; and
- (c) Incorporate a greater focus on the health impacts to community members when issuing variances.

### I. BACKGROUND

The South Coast Air Quality Management District ("Air District" or "SCAQMD") is a regional state agency responsible for regulating stationary sources of air pollution.<sup>1</sup> The Air District implements both the federal Clean Air Act and the California Clean Air Act in the South Coast Air Basin ("Basin").<sup>2</sup> The Basin includes all of Orange County, and the urban portions of Los Angeles, Riverside, and San Bernardino counties.<sup>3</sup>

The Air District has a 5-member quasi-judicial Hearing Board that is authorized to issue variances to companies.<sup>4</sup> These variances allow petroleum refineries and other stationary sources of pollution to continue operating in violation "of any rule, regulation, or order" when "conditions beyond the reasonable control" of the source make compliance unfeasible.<sup>5</sup>

To obtain a variance, a stationary source must submit a petition to the Hearing Board and appear at a hearing. At the hearing, both the stationary source and the Air District, represented by the Office of the General Counsel, present evidence through witnesses under oath.<sup>6</sup> The public also has "an opportunity to testify" and the Hearing Board "shall consider that testimony in making its decision."<sup>7</sup>

The Hearing Board has the authority to provide several types of variances:

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<sup>1</sup> Health & Saf. Code § 40000.

<sup>2</sup> Health & Saf. Code §§ 40402(h), 40460, 42400.4.

<sup>3</sup> Health & Saf. Code § 40410.

<sup>4</sup> SCAQMD, *Hearing Board* (last visited Feb. 10, 2021), <http://www.aqmd.gov/nav/about/hearing-board>.

<sup>5</sup> Health & Saf. Code, § 42352.

<sup>6</sup> SCAQMD, *About Variances* (last visited Feb. 10, 2021), <http://www.aqmd.gov/nav/about/hearing-board/about-variances/>.

<sup>7</sup> Health & Saf. Code, § 40828.

- Emergency variances “may be issued for good cause, including, but not limited to, a breakdown condition.” This type of variance does not require public notice and hearing.<sup>8</sup>
- Interim variances may be issued for a stationary source “to commence or continue operation pending the decision” on its variance petition.<sup>9</sup> This type of variance does not require a public notice period.
- Short-term variances may be issued “for a period of not more than 90 days” after public notice “10 days prior” to the variance petition hearing.<sup>10</sup>
- Regular variances may be issued for a period of more than 90 days after a hearing and 30-day public notice period.<sup>11</sup>

Prior to issuing a variance, the Hearing Board is required to consider a range of factors, including whether the stationary source “will reduce excess emissions to the maximum extent feasible.”<sup>12</sup> Moreover, if the Hearing Board grants a variance that will result in excess emissions, the stationary source must pay fees based on the weight, opacity, and type of emissions released during the variance term.<sup>13</sup>

## II. FAILURE TO OBTAIN ALTERNATIVE OPERATING CONDITIONS

SCAQMD variances do not provide cover from federal regulatory requirements. Thus, facilities that receive a variance from the Air District could still be subject to a citizen suit or an enforcement action from the U.S. Environmental Protection Agency (“EPA”). To protect themselves from federal enforcement actions, facilities can apply for an alternative operating condition (“AOC”). SCAQMD’s Rule 518.2 establishes the requisite procedures and criteria necessary for facilities to obtain approval of an AOC.<sup>14</sup> The process to apply for an AOC is similar to the Air District’s variance process. First, the facility submits the AOC form as a supplement to its variance petition form. Then the Hearing Board provides notice of the petition to the public 30 days before the hearing date and transmits a copy of the AOC to EPA for a 45-day review period. If the Hearing Board decides to grant the AOC, then the AOC is incorporated into the facility’s permit by reference.<sup>15</sup>

Applying for an AOC is not simply a means of shielding facilities from a citizen suit or enforcement action. AOCs are also important because many of the rules that a facility violates when variances are granted are State Implementation Plan-approved rules that are designed to assist the region in

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<sup>8</sup> Health & Saf. Code, § 42359.5.

<sup>9</sup> Health & Saf. Code, § 42351.

<sup>10</sup> Health & Saf. Code, § 40825.

<sup>11</sup> Health & Saf. Code, § 40826; *see also* SCAQMD, *About Variances* (last visited Feb. 10, 2021), <http://www.aqmd.gov/nav/about/hearing-board/about-variances>.

<sup>12</sup> Health & Saf. Code, § 42352; *see also* SCAQMD, *About Variances* (last visited Feb. 10, 2021), <http://www.aqmd.gov/nav/about/hearing-board/about-variances>.

<sup>13</sup> SCAQMD, *Excess Emission Forms and Instructions* (revised July 1, 2019), <https://www.aqmd.gov/docs/default-source/aqmd-forms/hearing-board/hb-eef-calculationD53D183EC895.pdf?sfvrsn=18>.

<sup>14</sup> SCAQMD, *Rule 518.2 Federal Alternative Operating Conditions*, <http://www.aqmd.gov/docs/default-source/rule-book/reg-v/rule-518-2.pdf>.

<sup>15</sup> SCAQMD, *Are Variances Available for Title V Facilities?, AOC Process Description* (last visited Feb. 10, 2021), <http://www.aqmd.gov/home/permits/title-v/alternative-operating-condition>.

meeting air quality standards and protecting public health and the environment.<sup>16</sup> Thus, facilities submitting a request for an AOC must be able to confirm that granting the AOC would not result in violations of certain EPA standards, such as the National Ambient Air Quality Standards (“NAAQS”), the New Source Performance Standards (“NSPS”), the National Emission Standards for Hazardous Air Pollutants (“NESHAP”), and others.<sup>17</sup>

The AOC process is also distinct from the variance process in regards to mitigation requirements. If approval of an AOC would result in excess emissions then the facility is required to “demonstrate mitigation to zero excess emissions.”<sup>18</sup> To do this, the facility must provide AOC credits or emissions reduction credits. The facility can also lower the amount of AOC credits it needs to obtain by “reducing emissions internally from a source other than the source which is in violation of an applicable requirement.”<sup>19</sup>

The AOC form – unlike the variance form, as discussed further in Section III – also includes a question asking the facility to explain “how operation under the AOC will not result in the source discharging such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or to the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.”<sup>20</sup> Thus, the AOC process provides the Hearing Board with additional information about the variance request and its impacts on nearby communities and regional air quality. This information is essential for the Air District to properly regulate facilities’ air emissions and ensure compliance with federal and state requirements.

Unfortunately, SCAQMD’s Hearing Board regularly grants variance petitions from various facilities despite the fact that these facilities fail to apply for and obtain AOCs. For instance, out of the 447 variance petitions submitted by major sources from 2009 to 2018, only 83 included an AOC or about 18% of the total (*see* Figure 1). Of these 83 variance petitions that included an AOC, one facility was responsible for submitting half of them. A similar pattern appears when analyzing variance petitions submitted by refineries. Over the same time period, petroleum refineries submitted 148 variance petitions with 90 granted, 52 withdrawn, and 6 denied (*see* Figure 2). Of these petitions, only 37 were accompanied with an AOC request (*see* Figure 3)—in fact, just one refinery submitted 21 of these AOCs.

There is nothing in the records showing that SCAQMD has requested facilities to comply with federal law and SCAQMD Rule 518.2 for AOCs. As the agency responsible for enforcing Clean Air Act requirements and State Implementation Plan-approved rules, SCAQMD has an obligation to ensure that facilities are requesting AOCs along with their variance requests.

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<sup>16</sup> *See, e.g.*, EPA, Basic Information about Air Quality SIPs (last updated Aug. 3, 2020), <https://www.epa.gov/sips/basic-information-air-quality-sips>; SCAQMD, National Ambient Air Quality Standards (NAAQS) and California Ambient Air Quality Standards (CAAQS) Attainment Status for South Coast Air Basin, <http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/naaqs-caaqs-feb2016.pdf>.

<sup>17</sup> SCAQMD, *Are Variances Available for Title V Facilities?*, AOC Supplemental Form at 2, 3 (questions 5, 6) (last visited Feb. 10, 2021), <http://www.aqmd.gov/home/permits/title-v/alternative-operating-condition>.

<sup>18</sup> SCAQMD, *Are Variances Available for Title V Facilities?*, AOC Process Description (last visited Feb. 10, 2021), <http://www.aqmd.gov/home/permits/title-v/alternative-operating-condition>.

<sup>19</sup> SCAQMD Rule 518.2(h)(2).

<sup>20</sup> SCAQMD, *Are Variances Available for Title V Facilities?*, AOC Supplemental Form at 2 (question 4) (last visited Feb. 10, 2021), <http://www.aqmd.gov/home/permits/title-v/alternative-operating-condition>.

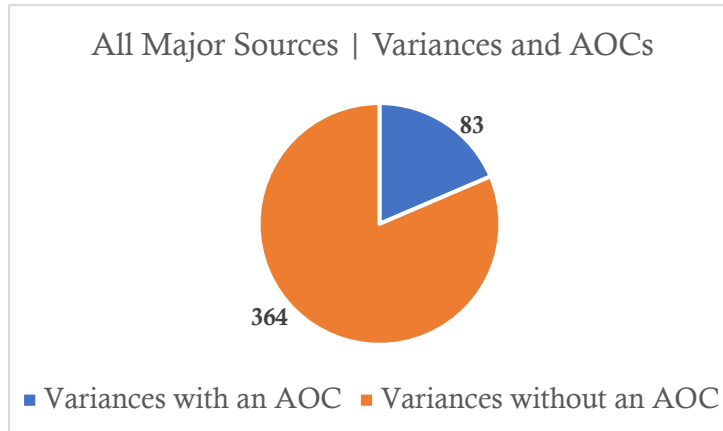


Figure 1

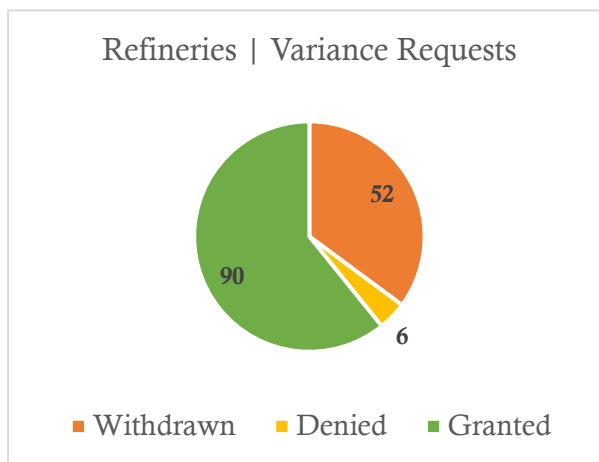


Figure 2

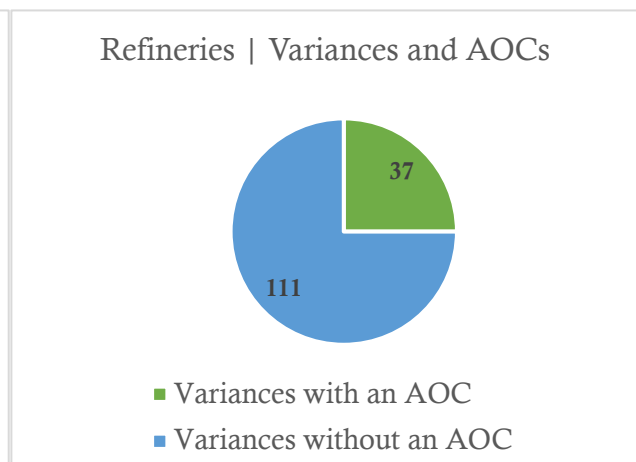


Figure 3

### III. FAILURE TO COMPLY WITH HEALTH AND SAFETY CODE REQUIREMENTS

Under Health and Safety Code Section 42353, the Air District cannot issue any variance that “will result in a violation of Section 41700.”<sup>21</sup> Section 41700 mandates that “a person shall not discharge ... air contaminants ... that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or the public, or that endanger the comfort, repose, health, or safety of any of those persons or public ....”<sup>22</sup> In other words, these sections require the Hearing Board to ensure that issued variances do not result in harm to the public. However, the Air District has not fully complied with and incorporated the requirements of Sections 42353 and 41700 into its variance approval process.

For starters, the Air District’s handbook on Hearing Board rules and procedures refers generally to the requirement in Health and Safety Code Section 41700 without explaining the various factors enumerated under Section 41700 (e.g., potential for injury, and health and safety concerns).<sup>23</sup>

<sup>21</sup> Health & Saf. Code, § 42353.

<sup>22</sup> Health & Saf. Code, § 41700.

<sup>23</sup> Rules and Procedures of the South Coast Air Quality Management District Hearing Board at 4-1, 4-2, 4-3 (last revised July 24, 2019), <http://www.aqmd.gov/docs/default-source/default-document-library/hearing-board/hbrules.pdf>.



Because the handbook is so vague and does not include an explanation of these factors, there is a risk that the Hearing Board will grant variance requests without subjecting them to an adequate level of scrutiny. Further, the handbook does not instruct the Hearing Board to consider and make findings regarding Section 41700 in its review of variance petitions. The handbook only instructs a witness to submit a declaration verifying that they do not expect the variance to result in a violation of Section 41700.<sup>24</sup> In our review of Hearing Board documents, however, we rarely found this declaration and we did not see evidence that the Hearing Board had requested it from any companies. The Hearing Board should ensure that these declarations are submitted and that they include strong evidentiary support for a company's statement that approval of its variance request will not result in a violation of Section 41700.

Also, the Air District's standard variance petition form (last revised February 22, 2011) fails to require that companies provide evidence and/or explain in detail whether operations under the variance would violate Section 41700.<sup>25</sup> Consequently, the applications received by the Hearing Board lack sufficient detail and evidence for the agency to determine whether the variance would violate Section 41700. Further, orders issued by the Hearing Board approving variance petitions fail to detail compliance with Sections 42353 and 41700.

These deficiencies prevent the Hearing Board from ensuring that issued variances do not result in harm to the public. Accordingly, the Air District must amend existing Hearing Board rules, procedures, and forms to ensure compliance with the protections mandated in Sections 42353 and 41700.

#### IV. IMPACTS ON COMMUNITIES

The deficiencies in the variance process result in real harms to community members who live near the facilities that are granted variance requests and are allowed to emit excess pollutants.

A review of data from 2015 to 2019, *see below*, shows that out of all of the variances granted by the Hearing Board, about 78% were in areas with minority populations over 50% within a 5-mile radius of the facility at issue. In these same areas, the Hearing Board approved the release of over 320,000 pounds of excess emissions or 99% of all releases authorized for variances during that period. In contrast, out of the total number of variances granted by the Hearing Board, only 22% were in areas with minority populations of 50% or less within a 5-mile radius of the facility. These variances resulted in the release of about 4,500 pounds of excess emissions or 1% of the total amount of excess emissions authorized for variances during that period.

City	Zip Code	No. of Variances Granted, 2015-2019	Total Excess Emissions (lbs.)	% Minority (within 5-mile radius of facility)
South Gate	90280	2	0	96%
Vernon	90058	1	663	96%
City of Industry	91746	1	0	92%
Carson	90810	9	263	90%

<sup>24</sup> *Id.*

<sup>25</sup> SCAQMD, *Petition for Variance*, <http://www.aqmd.gov/docs/default-source/aqmd-forms/hearing-board/hb-v-petition-variance6DEB39C3BF07.doc?sfvrsn=2>.

Downey	90241	2	0	90%
Paramount	90723	1	0	89%
Sylmar	91342	2	830	83%
Pomona	91789	2	2,074	83%
Colton	92324	1	0	82%
Ontario	91761	2	122,401	81%
Chino	91710	1	237	81%
Wilmington	90744	14	5,694	80%
Sun Valley	91352	4	97,817	80%
Pasadena	91105	5	42,617	77%
Stanton	90680	1	0	77%
Rancho Cucamonga	91739	1	0	75%
Chino	91708	1	2	74%
Redlands	92374	1	70	74%
Rancho Cucamonga	91730	1	52	73%
Sylmar	91342	8	1,275	72%
Perris	92570	3	817	72%
Torrance	90504	10	15,329	70%
Avalon	90704	2	0	70%
El Segundo	90245	23	4,138	64%
Anaheim	92806	1	0	63%
Brea	92821	1	337	61%
Irvine	92602	2	18,644	59%
Northridge	91326	2	0	58%
Playa Del Rey	90293	3	7,291	57%
Long Beach	90803	1	0	53%
Huntington Beach	92648	10	842	50%
Valencia	91355	1	0	50%
Chatsworth	91311	6	2,708	49%
Irvine	92617	3	360	47%
Burbank	91502	1	0	47%
Universal City	91608	5	0	45%
Yucaipa	92399	1	0	41%
Huntington Beach	92646	1	0	39%
Fountain Valley	92708	1	0	37%
San Clemente	92672	2	654	27%

Another example of the impact on communities can be seen in the variances granted to petroleum refineries in AB617 communities. AB617 communities, such as Wilmington, Carson, and West Long Beach, are the focus of the State's and SCAQMD's efforts to address pollution burdens in the

most environmentally impacted communities.<sup>26</sup> The largest number of petroleum refineries in the region are also located in these communities. From 2009 to 2018, there were 37 variance requests granted to refineries in AB617 communities that resulted in significant excess emissions – over 36,000 pounds – in these already overburdened areas, *see below*.

	CO (lbs.)	PM (lbs.)	ROG (lbs.)	SOx (lbs.)	NOx (lbs.)	H <sub>2</sub> S (lbs.)	VOC (lbs.)
<b>2009</b>							
<b>2010</b>	23						
<b>2011</b>	1,401.60	291.6	320.2	14248	351.9		
<b>2012</b>	3,907.40	368.6	665.4	255.7	717.7		
<b>2013</b>	2,660.70	147	429	819.69	463	6.3	
<b>2014</b>	3,763						4.62
<b>2015</b>	1,579.22	273		120.35			
<b>2016</b>							
<b>2017</b>	3,704						
<b>2018</b>							
<b>Total:</b>	<b>17,039</b>	<b>1,080</b>	<b>1,415</b>	<b>15,444</b>	<b>1,533</b>	<b>6.3</b>	<b>4.62</b>

Community members who live near petroleum refineries are already burdened by the toxic emissions these facilities regularly emit and should not be exposed to excess emissions from a facility’s permissive violation of Air District rules and regulations. Accordingly, it is critical that the Hearing Board comply with Health and Safety Code Sections 42353 and 41700 to evaluate meaningfully whether a variance will harm the public. Such an evaluation must incorporate considerations of potential health and safety impacts on surrounding communities from excess air emissions, including the cumulative effect of other approved variances in the region. Moreover, the Air District should limit the number of variances granted in AB617 communities that allow for excess emissions.

#### V. RECOMMENDATIONS

There are numerous areas for improvement in the variance request process that could help to provide over-burdened communities with a greater degree of protection. The Hearing Board must ensure that facilities are requesting AOCs along with their variance requests. The Air District must also strengthen its compliance with Health and Safety Code Sections 42353 and 41700 by, among other things, amending existing Hearing Board rules, procedures, and forms to ensure that variances do not result in “injury, detriment, nuisance, or annoyance” to surrounding communities. In addition, the Air District should incorporate considerations of potential health and safety impacts on surrounding communities from air emissions when issuing variances, including the cumulative effect of other approved variances in the region.

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<sup>26</sup> See, e.g., SCAQMD, AB 617 Community Air Initiatives, <http://www.aqmd.gov/nav/about/initiatives/community-efforts/environmental-justice/ab617-134>.

# EXHIBIT B

*SCAQMD Hearing Board's Response to Earthjustice's White Paper on Variances (Dec. 22, 2021)*



# South Coast Air Quality Management District Hearing Board

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December 22, 2021

Mr. Byron Chan  
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Earthjustice  
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## **RE: South Coast Air Quality Management District Hearing Board's Response to Earthjustice's White Paper on Variances**

Dear Mr. Chan:

Thank you for providing the White Paper regarding the South Coast Air Quality Management District Hearing Board's Variance Program. This letter responds to the White Paper, on behalf of the Hearing Board.

It is important to note, at the outset, that the South Coast Air Quality Management District ("District" or South Coast AQMD) Governing Board and the South Coast Air Quality Management District Hearing Board ("Hearing Board") are **two separate and distinct governmental entities, independent of each other. They have separate and distinct powers, duties and authorities, which are set forth in the California Health & Safety Code ("H&S Code")**. As the governing board of an air pollution control district, the Governing Board is tasked with developing and adopting rules and regulations to achieve and maintain state and federal ambient air quality standards, and responsible for establishing rules and regulations for the granting of variances by the Hearing Board. (See H&S Code, §§ 40001, 40500.).

The H&S Code, separately, establishes a Hearing Board for the South Coast Air Quality Management District, and sets forth its duties, powers, and authorities. (See H&S Code, §§ 40501, 40800.) Procedures before the Hearing Board are largely set forth in Regulation V, of the South Coast AQMD Rule Book. (See, e.g., South Coast AQMD Rule 515 [Findings and Decision].) **These rules can only be amended by the District, not the Hearing Board. Section 40807 of the H&S Code grants the Hearing Board a limited authority to adopt rules for the conduct of its own hearings.**

In responding to Earthjustice's White Paper, it is important for us to note that the majority of the Earthjustice's recommendations, concerns, request for actions, or change of policies, and/or procedures, are **not** within the scope of the Hearing Board's authority. As

such, the Hearing Board is unable to provide a substantive response to the majority of Earthjustice's White Paper or commit to taking any action.

## **BACKGROUND**

Earthjustice conducted a review, over a ten-year period, of variance data, from 2009, through 2018. As a result, Earthjustice believes there are shortcomings in the implementation of the Hearing Board's Variance Program, which in their opinion, is creating physical harm to the surrounding communities, especially the communities of color. As a result of Earthjustice's concerns, they (Earthjustice) made three recommendations.

In early August, of this year, Earthjustice sent a copy of the White Paper to the South Coast Air Quality Management District, Office of District Counsel. In late August, of this year, Earthjustice attended the South Coast Air Quality Management District Hearing Board's General Meeting. During the Public Comment period of that meeting, Byron Chan, Senior Associate Attorney in the Community Partnerships Program, for Earthjustice, stated that there were many deficiencies in the Hearing Board's Variance process and requested a meeting with the Hearing Board Chair. The Chair then requested a copy of the White Paper, with the assurance that the Hearing Board would review it and provide a response, as well as consideration for a possible meeting with Mr. Chan, to discuss the response. The following is the Hearing Board's response to Earthjustice's White Paper.

## **EARTHJUSTICE RECOMMENDATIONS**

**RECOMMENDATION #1: "The Hearing Board must ensure that facilities are requesting AOCs along with their variance requests."**

### **RESPONSE:**

South Coast AQMD Rule 518.2 currently "establishes the requisite procedures and criteria," by which a facility *may* apply to the Hearing Board for an AOC, (Alternate Operating Condition). However, the South Coast AQMD Rules **do not** make an application for an AOC mandatory, upon applying for a variance. **The Hearing Board does not have the authority to ensure that facilities request that form, along with the variance form requests.** It should also be noted that the **Hearing board does not have the authority to require any facility to have a District permit, or a Title V permit.**

**RECOMMENDATION #2: "The Air District must also strengthen its compliance with Health and Safety Code Sections 42353 and 41700, by, among other things, amending existing Hearing Board rules, procedures and forms, to ensure that variances do not result in injury, detriment, nuisance, or annoyance, to surrounding communities."**

### **RESPONSE:**

As Earthjustice appears to acknowledge, procedures before the Hearing Board are largely set forth in Regulation V of the South Coast AQMD Rule Book. (See, e.g., South

Coast AQMD Rule 515 [Findings and Decision].) **These rules can only be amended by the District, not the Hearing Board.**

There appears to be no record that a variance, or AOC, has ever resulted in a 41700 violation, or of a variance being revoked. If Earthjustice has any evidence to the contrary, showing any 41700 violations, the Hearing Board will be happy to take it under submission.

I know that I, as well as my fellow Hearing Board members, consider public testimony of great importance, especially in considering whether 41700, will be violated. Public testimony weighs heavily and is taken into account, when making decisions, regarding the cases before us. In fact, when we see that there is significant public interest in testifying on a particular case, we ask our staff to make all the arrangements necessary, including noticing, to hold the hearing in the community, if possible, to facilitate attendance. In addition, on more than one occasion we have held hearings on a weekend, to afford the working public a greater opportunity to attend and testify, before the Hearing Board.

**RECOMMENDATION #3: “In addition, the Air District should incorporate considerations of potential health and safety impacts on surrounding communities from air emissions, when issuing variances, including the cumulative effect of other approved variances in the region.”**

**RESPONSE:**

Potential health and safety impacts on surrounding communities from toxic air emissions **are** of the utmost importance, to the Hearing Board. I understand this concern very well. I left the Governing Board before I could complete the work on developing a rule that would consider detrimental, cumulative health effects on the surrounding communities, especially those communities of color. However, while the Hearing Board stands ready to incorporate and adjudicate any rule developed and adopted by the District, applicable to variances and AOCs, **it is not within the Hearing Board’s authority to independently develop, or apply such rules.**

We, the Hearing Board, appreciate Earthjustice giving us the opportunity to respond to their White Paper. Should Earthjustice have any additional questions, that fall within our jurisdiction and/or authority, please feel free to contact the South Coast AQMD Hearing Board.

Sincerely,



Cynthia Verdugo-Peralta  
Chairperson

South Coast Air Quality Management District Hearing Board