



RULES AND PROCEDURES OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD

Adopted June 11, 1997

Latest Revisions: January 10, 2018



Assistance to Small Businesses: In accordance with state law, the Executive Officer will provide assistance to small businesses in preparing and filing the petition for the hearing. The Executive Officer cannot provide an attorney to handle the petitioner's case before the Hearing Board.

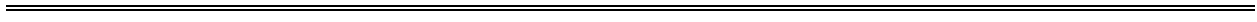


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RULE 1. DEFINITIONS

**(Adopted June 11, 1997)
(Amended May 13, 1998
(Amended August 11, 1999)**

- (a) "Appellant" means the party who appeals a decision of the Executive Officer and brings the matter before the Hearing Board.
- (b) "District Prosecutor's Office" means the District Prosecutor's Office of the South Coast Air Quality Management District. The District Prosecutor's Office represents the Executive Officer at all Hearing Board proceedings.
- (c) "Clerk" means the Clerk of the Board of the South Coast Air Quality Management District. This position serves both the Governing Board and the Hearing Board.
- (d) "Commenced" means when the Hearing Board has called a case and has sworn in the first witness.
- (e) "Consent Calendar" means a procedure for expediting the presentation of evidence at hearings where the petitioner and the respondent have stipulated to the matters specified in Rule 3(e). In all other respects, a consent calendar proceeding must comply with all standard requirements and the requirements set forth in these rules.
- (f) "District" means the South Coast Air Quality Management District.
- (g) "Executive Officer" means the Executive Officer of the South Coast Air Quality Management District.
- (h) "Hearing Board" means the Hearing Board of the South Coast Air Quality Management District.
- (i) "Moving Party" means the party who files a motion with the Hearing Board.
- (j) "Party" means those interested persons and companies, the Executive Officer, or their representatives, who have appeared or filed papers in connection with a case before the Hearing Board.
- (k) "Petitioner" means the party who petitioned the Hearing Board to initiate an action.

- (l) "Respondent" means the party who answers, or the party against whom an appeal is brought.
- (m) "Working Day" means any day, Tuesday through Friday, that the South Coast Air Quality Management District is open for regular business.

RULE 2. FILING AND SERVICE

**(Adopted June 11, 1997)
(Amended August 11, 1999)
(Amended April 8, 2009)**

(a) Filing of Papers with Hearing Board

- (1) All documents filed with or submitted to the Hearing Board shall consist of an original and eight (8) copies. If conformed copies are requested by the party filing a document, then sufficient additional copies shall be furnished by the party for this purpose. Papers presented in proper form, accompanied by the required number of copies, as well as the required fee, if any, shall be deemed filed at the time date-stamped by the Clerk of the Board. (See District Rule 303(a) for required filing fees.)
- (2) The clerk shall receive a petition for review of an action of the Executive Officer, even if the petitioner does not present the filing fee or the correct number of copies. If the petitioner submits the petition without the correct number of copies or without the proper filing fee, the clerk shall, in person or via facsimile or email, notify the petitioner in writing of the deficiencies and that the petitioner has seven calendar days from the date of the clerk's written notification to cure the deficiencies. If the petitioner cures the deficiencies within the prescribed seven calendar days, the petition shall be deemed filed on the date of original submission. If the clerk does not receive the curing documents and fees within the prescribed seven calendar days, the original submission shall not be deemed a filing of the petition.
- (3) If a rule allows a document to be filed via facsimile, the document shall be deemed filed at the time date stamped on the facsimile copy by the Clerk of the Board, provided that the original documents, the proper filing fee, and required copies are filed by close of business on the next District working day.

(b) Service of Petitions for Variances and Appeals

- (1) Unless otherwise specified in these rules, all petitions for variances and appeals from Executive Officer action shall be hand or mail filed with the Clerk of the Hearing Board and delivered to the District Prosecutor's Office during normal business hours. Service of documents in this manner is deemed complete at the time of delivery.
- (2) A petitioner filing a third party appeal shall file the petition and all papers with the Clerk of the Hearing Board and shall serve the petition and all papers on the real party in interest. Serving on the real party in interest shall be in the manner

specified for service of a summons under Code of Civil Procedure section 415.10 et seq. (see below). The petitioner shall provide proof of such service to the Clerk of the Board.

(c) Service of Petitions for Orders of Abatement or Revocation of Permit

The party (i.e., the Hearing Board or the District) filing a petition for an order of abatement or for revocation of a permit shall serve the petition on the respondent in the manner specified for service of a summons under Code of Civil Procedure section 415.10 et seq. as follows:

- (1) Service by personal delivery, pursuant to CCP Section 415.10, is deemed complete at the time of the delivery.
- (2) Substituted service followed by mailing, pursuant to CCP Section 415.20, is deemed complete on the 10th day after such mailing.
- (3) Service by mail and acknowledgment, pursuant to CCP Section 415.30, is deemed completed on the date a written acknowledgment of receipt is executed, if such acknowledgment thereafter is returned to the Chief Prosecutor's Office.
- (4) Service by publication, pursuant to CCP Section 415.50, is deemed complete on the last day of publication. A court order is not required for publication, but the Hearing Board must find that the party to be served cannot with reasonable diligence be served by one of the methods specified above.

(d) Service of Other Documents

- (1) Unless otherwise specified in these rules, answers, amendments, motions, briefs, supporting documents, and other documents filed with or submitted to the Hearing Board must be served on all other parties on the date that filing with the Hearing Board is due.
- (2) Service by personal delivery or by facsimile is deemed complete on the day of delivery or facsimile. Service by mail must accompany any service by facsimile.
- (3) Service by overnight courier is deemed complete on the business day following the day of delivery to the courier.
- (4) Service by mail is deemed complete on the fifth day following the day of mailing.

RULE 3. FORM OF FILINGS

**(Adopted June 11, 1997)
(Amended June 23, 1999)
(Amended August 11, 1999)**

(a) Form of Petitions

- (1) A petitioner shall complete and file current petition forms available in the Clerk of the Board's office, or
- (2) A petitioner may file a petition, which includes the required relevant information outlined in the petition forms and other relevant information. Such petition shall be on 8-1/2" x 11" numbered paper, double-spaced.

(b) Limitations on Pleadings and Briefs

All motions, pleadings and briefs filed with the Hearing Board shall be limited to no more than fifteen 8-1/2 x 11 inch, numbered pages, double spaced, excluding exhibits, unless otherwise authorized by the Hearing Board. The Chair of the Hearing Board, or other designated Board Member, may grant a request for additional pages, provided that such a request is filed and served upon the opposing parties at least 24 hours before the deadline for filing the motion, pleading or brief.

(c) Form of Petition for Ex Parte Variance

- (1) The petition must be signed under penalty of perjury by the petitioner or his or her authorized agent, attesting to the truth and correctness of its contents.
- (2) The petition must indicate whether the petitioner for an ex parte emergency variance requests a hearing by the full Board if the petition is denied.
- (3) The petition may be submitted by facsimile [See Rule 2(a)(2)].

(d) Group Variances

- (1) The Hearing Board shall accept for consideration a petition for a group variance when the variance relief sought by each individual petitioner in the group is based on issues of law and fact common to each petitioner.
- (2) The petition for a group variance shall include individual petitions or written declarations by each petitioner, setting forth sufficient evidence to support the findings which the Hearing Board is required to make pursuant to Health and Safety Code Section 42352. In accordance with Rule 8(b)(3) each declaration to be admissible must be stipulated to by the District Prosecutor's Office. The

declaration shall be signed under penalty of perjury and include consent to be represented by the named, authorized group representative and an agreement that the petitioner will be bound by the Hearing Board order. No person may be included in the group variance unless he or she has submitted an admissible declaration.

- (3) In accordance with Rule 7(1), the Hearing Board shall schedule a prehearing conference at least seven days before the scheduled hearing for a group variance.
- (4) Witnesses may present testimony on behalf of the groups at the hearing; however, it shall not be necessary for each individual petitioner to present testimony on his or her own behalf.
- (5) The Hearing Board shall comply with notice requirements as provided in the Health and Safety Code, including the identity of each petitioner in the group, and such other information as may be necessary to reasonably apprise the people in the District of the nature and purpose of the hearing.
- (6) The Hearing Board shall put on the record the facts they believe show that the group has common issues of law and fact.
- (7) The Hearing Board shall immediately remove a petition from the group variance upon the objection of the District or of any Hearing Board member and continue the removed petition to the next available date for an individual hearing. The District, any petitioner, or any Hearing Board member may make a motion to disallow use of the group variance procedure in a particular case or to remove a petition from the group variance and consider it individually. Such a motion shall be made and decided as far in advance of the group hearing as possible, but may be made at the hearing if necessary.

(e) Consent Calendar

- (1) Requirements for Petitioner
 - (A) Petitioner shall obtain the concurrence of the respondent that such matter should be placed on the consent calendar.
 - (B) Petitioner shall submit copies of the petition, witness declaration(s) signed under penalty of perjury, proposed findings and decision, a proposed order (including proposed conditions and/or increments of progress), and a proposed stipulation, to the respondent no later than six (6) working days before the hearing date. See Rule 1(13), above, for the definition of

“working day.” The respondent may waive the time deadline specified in this subsection, but the petitioner remains responsible for meeting the deadline specified in subsection (e)(1)(E).

- (C) The witness declaration(s), signed under penalty of perjury, must include the information necessary to make the required findings for the order being requested. In addition the witness declaration(s) must specify the estimated excess emissions, if any, include both the type of pollutant(s) and the estimated amount of the excess emissions. The declaration(s) must also include a statement that operation under the order is not expected to result in a violation of Health and Safety Code Section 41700 (nuisance).
- (D) The proposed stipulation shall include, at a minimum, the following (the parties may include additional information in the stipulation if they so choose):
 - (i) The stipulation must state that the parties agree to have the matter placed on the consent calendar and the date on which the matter will be heard.
 - (ii) The stipulation must list the declarations that the parties agree to have admitted into evidence.
 - (iii) The stipulation must state that the parties have agreed on the proposed findings and decision and a proposed order (including any proposed conditions and/or increments of progress). These documents must be submitted with the consent calendar documents.
 - (iv) In a variance proceeding, the stipulation must state that the District does not oppose (or supports) the granting of the variance. If the District cannot take this position, the Hearing Board will not hear the matter on the consent calendar.
 - (v) If there has been any prior evidence and testimony in the matter, the stipulation must state whether the parties agree to incorporate such prior evidence and testimony.
 - (vi) The stipulation must state that operation under the order is not expected to result in a violation of Health and Safety Code Section 41700 (nuisance).

(E) If the respondent concurs, petitioner shall file with the Hearing Board an original and eight copies of the following documents: a final copy of the stipulation, signed by both the petitioner and respondent; declaration(s); the proposed findings and decision; and a proposed order (including any proposed conditions and/or increments of progress). Petitioner shall provide hard copies of the proposed findings and decision and proposed order, as well as one copy of these documents on a computer disk. All of these documents shall be filed with the Hearing Board according to the following schedule:

- If the hearing is scheduled for a Tuesday, the documents shall be filed with the Hearing Board clerk by noon on the previous Wednesday.
- If the hearing is scheduled for a Wednesday, the documents shall be filed with the Hearing Board clerk by noon on the previous Thursday.
- If the hearing is scheduled for a Thursday, the documents shall be filed with the Hearing Board clerk by noon on the Tuesday immediately preceding the scheduled hearing date.

(2) Hearing Board Requirements

- (A) The Hearing Board shall call and hear consent calendar matters first on its calendar.
- (B) The Board shall receive any public testimony on a consent calendar matter before proceeding with the case.
- (C) The Hearing Board's proceedings on a consent calendar matter shall in all respects conform to the requirements set forth in the California Health and Safety Code, the District Rules and Regulations, and these rules, except that the Board shall base its ruling on the declarations and other documents submitted by the parties and on any public testimony received at the scheduled hearing.
- (D) At any time prior to the submission of the case, the Hearing Board shall immediately remove a matter from the consent calendar upon the written or oral request of the respondent or the petitioner, or any Board member, and shall hear the matter on the scheduled hearing date or shall assign the matter to the next available hearing date while fully complying with notice requirements for the type of order at issue. If, prior to the submission of the case, a member of the public requests the removal of a matter from the

consent calendar, the Board shall consider the reasons for the request and shall vote on the request prior to proceeding with the item on the consent calendar.

- (E) The Hearing Board shall not include any matter on the consent calendar if operation under the variance or order for abatement is expected to result in a violation of Health and Safety Code section 41700 (nuisance).
- (F) The Hearing Board shall have copies of the documents listed in subsection (e)(1)(E), above, available for public review upon the filing of the documents with the Hearing Board clerk [see filing deadlines in subsection (e)(1)(E)].

RULE 4. PLEADINGS

**(Adopted June 11, 1997)
(Amended January 8, 2014)**

(a) Responses

- (1) Any person served with a petition may file a response which may include, but is not limited to:
 - (A) Objection to the jurisdiction of the Hearing Board.
 - (B) Objection to the form of the petition in that it is so indefinite or uncertain that he or she cannot identify the circumstances upon which the claim for relief is based, or prepare a defense or response.
 - (C) Admission of the facts in the petition, in whole or in part.
 - (D) A notice of defense, including, but not limited to, a denial of facts asserted in the petition.
 - (E) Presentation of new matters which the Hearing Board should consider in hearing the petition.
 - (F) Discussion of whether the respondent approves of the relief sought in the petition, in whole or in part.
- (2) Responses to petitions shall be in writing, signed by or on behalf of the respondent, and shall state the respondent's mailing address. The response need not be verified or follow any particular form. The response must be filed and served at least five (5) working days prior to the hearing, unless a different time schedule is established at a pre-hearing conference or unless the petition is served less than five (5) working days prior to the hearing, in which case the answer must be filed as soon as possible before the hearing.
- (3) The District may, as soon as possible before the hearing, file a reply to any Request filed by a Respondent to modify an existing Stipulated Order for Abatement. The reply shall be in writing on the Hearing Board's official form, entitled "Reply to Respondent's Request for Modification of an Existing Stipulated Order For Abatement Before the Hearing Board of the South Coast Air Quality Management District," and signed by a District Counsel familiar with the matter.

(b) Amendments to Petitions

- (1) At any time before the matter is submitted for decision, the Hearing Board may permit a petitioner to amend its petition provided that such amendment does not require issuance of a new public notice, i.e., the change does not involve the air contaminant which is the subject of the petition, the company name, facility address, etc.
- (2) If the respondent asserts that time is needed to respond to the amendment, the Chair of the Hearing Board, or designated Member, may continue and/or reopen the matter if determined to be necessary.

(c) Cross-Petitions

If a petition for a short or regular variance and order for abatement are both filed on the same subject matter, hearings on such petition shall be set for the same date unless the District or the variance petitioner shows that a hearing on the same date would impose an undue hardship and the Chair of the Hearing Board, or designated member, concurs.

(d) Opening Briefs

- (1) The parties may file an opening brief, which may contain but shall not be limited to:
 - (A) A statement of the case, setting forth concisely the nature of the action.
 - (B) The relief sought.
 - (C) A summary of the material facts.
 - (D) Any new matters which the Hearing Board should consider in hearing the petition.
 - (E) Points and authorities.
- (2) The moving party's opening brief shall be filed and served at least 10 working days prior to the hearing. The respondent's opening brief shall be filed five (5) working days prior to the hearing and all reply papers at least two (2) working days before the time scheduled for the hearing, unless the Chair of the Hearing Board, or designated Member, determines otherwise upon request.

(e) Closing Briefs

The parties may file a closing brief after the submission of all the evidence. Closing briefs may be submitted only if a schedule for such submission is established by the Hearing Board.

RULE 5. MOTIONS

**(Adopted June 11, 1997)
(Amended April 10, 2014)**

(a) Motions to Dismiss

The following motions may be submitted to the Hearing Board in any matter.

- (1) Motion to Dismiss for Lack of Jurisdiction - Any party may make a motion to dismiss for lack of jurisdiction. If feasible, the motion should be made within sufficient time to enable it to be ruled upon prior to the commencement of the presentation of evidence.
- (2) Motion to Dismiss for Lack of Certainty - Prior to the taking of any evidence, the respondent may make a motion to dismiss for lack of certainty.
 - (A) This motion may be made by the respondent based on uncertainty, ambiguity, or unintelligibility of the petition.
 - (B) The motion may be made orally.
 - (C) The Hearing Board may dismiss the petition or may order a recess in the proceedings in order to allow the petitioner to amend the petition as necessary. [See Rule 4(b).]
- (3) Motion to Dismiss for Lack of Proof - Any party may make a motion to dismiss for lack of proof after the petitioner has completed his or her presentation of evidence. This motion may be made orally at the hearing.

(b) Memorandum of Points and Authorities

- (1) A party may serve and file a memorandum of points and authorities in connection with any motion before the Hearing Board.
- (2) A memorandum of points and authorities shall contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, textbooks, and other authorities cited in support of the position advanced.
- (3) A memorandum of points and authorities may be supported by affidavits, documents or other evidence.

(4) A copy of all legal authorities cited in support of the position advanced, other than District Rules and Regulations, shall be filed along with the memorandum of points and authorities.

(c) Filing Moving and Supporting Papers

All moving and supporting papers shall be filed and served at least 10 working days, all papers opposing the motion at least five (5) working days, and all reply papers at least two (2) working days before the time scheduled for the hearing, unless the Chair of the Hearing Board, or designated Board Member, determines otherwise upon request.

RULE 6. FINDINGS AND DECISION

**(Adopted June 11, 1997)
(Amended August 25, 2010)**

(a) Minute Orders

The Clerk shall cause to be prepared a minute order for each matter heard before the Hearing Board. The minute order shall be filed *following* the hearing and shall include the names of the members present, the names of each party and representative, the list of witnesses and exhibits, the decision of the Hearing Board, and the votes by members. In any matter for which findings are not prepared under Rule 6(d), below, the minute order shall also contain the reasons for the Board's decision. The minute order or a true copy thereof signed by a Board member shall form a part of the case file of the Hearing Board. The Clerk shall cause the decision to be facsimiled and mailed to the affected parties the same day it is filed.

(b) Effective Date of Decision

The decision of the Hearing Board shall become effective upon the concurring vote of three or more of its members.

(c) Board Preparation of Findings and Decisions

Formal written Findings and Decisions of the Hearing Board shall be prepared by the Hearing Board, unless the Hearing Board directs a party to prepare such findings and decision.

(d) Findings and Decisions

Findings and decisions shall be reduced to writing, served, and filed within 30 days after the final vote of the Hearing Board in the matter, and they shall contain a brief statement of facts found to be true, the determination of the issues presented, findings, and the order of the Hearing Board. A copy shall be mailed or delivered to the Executive Officer, the petitioner, and to every person who has filed pleadings or who has appeared as a party in person or by counsel at the hearing. A copy shall be mailed to the State Air Resources Board within 30 days of any order granting, modifying, or otherwise affecting a variance.

(e) Filing of Decision

A Minute Order or Findings and Decision of the Hearing Board is considered to have been filed with the Clerk upon the signing and dating by the appropriate Hearing Board member or members of such Order or Decision.

RULE 7. HEARING BOARD PROCEDURES

**(Adopted June 11, 1997)
(Amended June 23, 1999)
(Amended February 20, 2014)
(Amended February 18, 2016)
(Amended April 13, 2016)**

(a) Time and Place of Hearing

All hearings will be held at the South Coast Air Quality Management District Headquarters, beginning at 9:00 a.m. or a time otherwise determined by the Hearing Board. Upon its own request, request by a party, or upon a request by members of the public, the Hearing Board may move the hearing to an alternative site in the South Coast Air Quality Management District.

(b) Attendance at Hearing

A party who is petitioning for a variance, an order for abatement, or appealing from or responding to some action taken by the Executive Officer must appear in person or by legal counsel or other authorized representative in any hearing scheduled on the matter, unless the matter is being heard on the Hearing Board consent calendar [see Rule 3(e)].

- (1) If the petitioning party fails to attend the hearing, the Hearing Board shall dismiss the case without prejudice.
- (2) If the responding party fails to attend the hearing, and the petitioning party has provided the Hearing Board with proof of service on the respondent of the petition, the Hearing Board may rule on the petition in the respondent's absence.

(c) Representation by Legal Counsel

A party in any Hearing Board proceeding may be represented by legal counsel, but this is not mandatory. If a party elects to proceed without legal counsel, this does not entitle such party to a rehearing based on lack of legal representation. If a party elects to proceed without legal counsel, such party is held to the same legal standards as if the party were represented by counsel.

(d) Reopening

After the case is submitted, it may be reopened for any and all matters, including further comments by counsel, only upon request and the concurrence of three (3) Hearing Board members.

(e) Hearing Record

All proceedings of the Hearing Board shall be recorded by a court reporter or tape recorder. Any person requesting a transcript of the hearing shall pay the cost of such transcript. The parties to hearings and prehearing proceedings may be directed by the Hearing Board to pay the cost of transcripts necessary for the Hearing Board's determination of the matter, in such proportion as the Hearing Board may order.

(f) Withdrawal or Abandonment of Petition

At any time before or after a hearing is scheduled on calendar, the petitioner may file with the Clerk and serve on all parties written notice that the request for hearing is withdrawn. This notice may be by mail, e-mail, or facsimile and shall terminate the action.

(g) Quorum Requirements

- (1) Except as provided in Health and Safety Code Sections 40501.1, 40824(c), 40825(c), 42351.5 and 42359.5 (governing emergency, ex parte, interim, and short variances and modifications of variances), three (3) members of the Hearing Board shall constitute a quorum, and the concurrence of three (3) shall be necessary for a decision.
- (2) A Hearing Board member who is unable to attend all of the hearings in a matter may participate in the decision of the matter, provided such member has read the transcripts, heard a tape recording of the missed proceedings, or there is no objection from the parties after notice that the member was unable to review the previous hearing. Notwithstanding this provision, a party may object to the continued participation of such a Board member. [See (i) below.]

(h) Request for Rehearing: Time to File

- (1) The Hearing Board may rehear a decision if a party petitions for a rehearing no later than 10 days after a copy of the decision has been mailed to or served on the party.
- (2) A petition for rehearing must be in writing, must be served on the opposing party, and must state the reasons and grounds for rehearing. Petitioner should state in the petition if he or she desires to be heard.
- (3) If such a petition is timely filed and received before noon, it shall be placed on the agenda for a decision on rehearing at the next regular meeting of the Hearing Board. A decision to order a rehearing shall be made by the Hearing Board before

the adjournment of that regular meeting. If the Hearing Board does not act upon the petition before the final adjournment of that regular meeting, the petition shall be deemed denied on that date.

(i) Disqualification of Hearing Board Member

A Hearing Board member shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any member by filing an affidavit before the commencement of the first hearing on the case, unless a party seeking disqualification demonstrates that, despite exercising due diligence, he or she did not know prior to the first hearing on the case that grounds for disqualification existed. The issue raised by the request for disqualification shall be determined by the other members of the Hearing Board, except that such Hearing Board member may voluntarily withdraw.

(j) Continuances

A continuance is a postponement of a hearing to a later time.

- (1) A party's first request for a continuance of 15 days or less, concurred in by all parties to the action, shall be granted.
- (2) Any subsequent requests or any request for a continuance of more than 15 days and/or requests received with less than four working days notice shall only be granted by the Chairman or designated member of the Hearing Board if the request is reasonable and good cause is shown for the delay in providing notice. The following factors, to the extent each applies and for which information is available, shall be considered in making a determination of reasonableness: The length of the alleged violation; the nature and extent of excess emissions; the proximity of the source to sensitive receptors; the availability of witnesses, if pertinent to the request; the availability of counsel; and any other compelling reason(s) in favor of or opposition to continuance. A request for a continuance for the sole purpose of avoiding or delaying a hearing will not be considered reasonable.
- (3) A request for continuance to the Chairman or to the Board may be ex parte and without prior notice. Action of the Chairman or designated Board member may be without a meeting of the Hearing Board.
- (4) The Hearing Board may continue a hearing on its own motion.

(k) Notice of Hearing

The Clerk of the Hearing Board shall mail or deliver a notice of hearing to the petitioner, respondent, the Executive Officer, the holder of the permit or variance involved, if any, and to any person entitled to notice under Division 26, Health and Safety Code.

(l) Prehearing Conferences

- (1) Upon filing of a petition for an appeal, a variance or an order for abatement, a prehearing conference may be scheduled to take place no more than seven (7) days after the filing of the petition unless otherwise stipulated by the parties.
- (2) The purpose of the prehearing conference shall be to discuss any issues relevant to the proceedings, including witnesses, subpoenas, exhibits, discovery matters, legal issues and the length of time needed to complete the proceeding.
- (3) The prehearing conference shall be held by the Chair of the Hearing Board, or a designated member, and attended, in person or by telephone, by representatives for the petitioner and the respondent.
- (4) There is no public notice requirement for a prehearing conference held by only one Board Member. The conference will be recorded by a court reporter or by tape recorder.

(m) Prohibition of Megaphones and Signs

No megaphones, bullhorns, or placards, signs or posters, shall be brought into the Hearing Board room during or prior to a Hearing Board meeting on the day of the meeting. Upon authorization of the Hearing Board Chairman or his/her designee, charts, graphs or other graphic devices to be used in conjunction with testimony may be brought into the room.

(n) Limitation of Time for Public Testimony

The Chairman of the Hearing Board may limit as appropriate the time that individual members of the public may speak before the Board on any matter. If the Chairman has imposed time limits on public testimony, additional time may be granted to any individual, with the consent of a majority of the Hearing Board. The Chairman, at his or her discretion, may grant additional time to members of the public representing a group or organization. The Chairman may also limit the total aggregate time for public testimony. In the event total time for public testimony is limited, the Chairman shall call individuals in the order in which they requested to speak, with the exception that public officials shall be given the opportunity to speak first. The Chairman shall also ensure that a fair opportunity to testify is given to all speakers, regardless of their position on the matter

being considered. Total time for public testimony may not be limited in a way that precludes such a fair opportunity.

(o) Reasonable Notice for Evening or Weekend Hearings

- (1) Hearing Board Members must be available on occasional evenings and weekends in order to schedule hearings on days and times more convenient to the public on issues of strong community concern. Hearing Board Members shall receive reasonable notice of a hearing scheduled for a weekend or evening.
- (2) Whenever possible, attendance of Hearing Board Members at hearings in the evening or on a weekend will be confirmed at a time when the Hearing Board is in session. Reasonable notice shall be determined by the Chair or the Chair's designee. At minimum, reasonable notice shall include telephonic notification to the Hearing Board Members within two days after the hearing date and an alternate date have been proposed. It is the responsibility of Hearing Board Members to respond immediately as to their availability.

(p) Board Member Attendance at Continued Hearings

- (1) A Hearing Board Member may participate in a continued hearing in the same matter/case provided that he/she has prepared to participate by listening to all audio recordings of the prior hearing, reviewed all exhibits and other submissions of the hearing(s) from which he/she was absent.
- (2) If an Alternate Member participated in a prior hearing in a particular matter/case where the Regular Member was absent, the Chair or the Chair's designee may for good cause authorize the Alternate Member to continue to sit on the continued hearing in the same matter/case. When there are other matters on calendar for the same day of the continued hearing, the Alternate Member will sit for the continued hearing, and the Regular Member will hear all other matters.

(q) Board Member Planned Absence

- (1) A Regular Hearing Board Member who plans to be absent shall notify the Clerk of the Boards and the Chair of the days when he/she will be absent as soon as possible.
- (2) If a Regular Member who has previously notified the Clerk of the Boards and the Chair of a planned absence has a change of plans, that member shall notify the Clerk of the Boards of that change as soon as possible.

- (3) If a Regular Member who has previously notified the Clerk of the Boards of a planned absence has a change of plans and fails to notify the Clerk of the Boards two weeks prior to the planned absence and if the Alternate Member has agreed to sit for the Regular Member during that planned absence, the Alternate Member at his/her discretion shall sit for the Regular Member during that previously planned absence.

RULE 8. DISCOVERY AND EVIDENCE

(Adopted June 11, 1997)

(a) Subpoenas

- (1) The Chair of the Hearing Board may issue subpoenas at the request of any party for attendance of witnesses at the hearing. The subpoena may require such witnesses to produce all books, papers and documents in the possession, or under the control, of such witnesses which are material to the hearing.
- (2) Notice requirement - Any party seeking a subpoena shall give the opposing party at least 24 hours telephone or written notice prior to requesting the subpoena.
- (3) If a party objects to the issuance of a subpoena or subpoena duces tecum, the opposing party shall notify the Clerk of the Board of its opposition and may request that a hearing be scheduled on the matter. The Clerk of the Board shall notify both parties by telephone of the date time and location of the hearing.
- (4) In order for a subpoena to issue from the Hearing Board, a party must submit a proposed form of subpoena and a declaration under penalty of perjury that establishes the following:
 - (A) The information sought is relevant and material to the subject matter involved.
 - (B) The information is not privileged.
 - (C) Considering all circumstances, including the return on the subpoena, complying with the subpoena will not impose an undue burden.
- (5) Subpoenas shall be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure. Service of the subpoena shall be made at least 10 days before the time required for attendance, unless the Chair of the Hearing Board, or designated Member, specifies a shorter time in the subpoena. Any person receiving a subpoena signed by the Chair of the Hearing Board, or designated member, pursuant to Health and Safety Code Section 40840 shall appear before the Hearing Board at a time and place specified in the subpoena to be examined as a witness and/or to produce all books, papers and documents in his or her possession, or under his or her control, which are specified in the subpoena. However, if the person being subpoenaed resides outside the geographical boundaries of the District, the witness shall not be obliged to appear unless the subpoena is accompanied by an affidavit of the requesting party showing that the testimony or records of such witness is material and necessary, and the Chair of the

Hearing Board, or designated Member, has endorsed on the subpoena an order requiring the attendance of such witness.

- (6) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court, as provided in Government Code Sections 11510 and 68093.
- (7) Witness fees shall be paid by the party requesting the subpoena.

(b) Evidence

- (1) Oral evidence shall be taken only on oath or affirmation.
- (2) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his own behalf, he may be called and examined as if under cross-examination.
- (3) The hearing shall not be conducted according to technical rules relating to evidence and witnesses except for rules relating to privilege as set forth in California Evidence Code Section 930, et seq. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil action, or unless the District Prosecutor's Office and the petitioner or respondent so stipulate.
- (4) Irrelevant and unduly repetitious evidence shall be excluded. The Hearing Board, in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, or confuse the issues or where matters sought to be proved are otherwise established.

(c) Evidence Upon Affidavits

- (1) At least 10 days prior to hearing, or a continued hearing, any parties that propose to introduce an affidavit into evidence shall mail or deliver a copy of such affidavit to all other parties together with a notice as provided below. Unless another party, within seven (7) days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified in person. If an opportunity to cross-examine an affiant is not afforded after request thereof is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.
- (2) The notices referred to above shall be substantially in the following form:

*The accompanying affidavit of **(here insert name of affiant)** will be introduced as evidence at the hearing in **(here insert title of proceeding)**. **(Here insert name of person)** will not be called to testify in person and you will not be entitled to question the affiant unless you notify **(here insert name of proponent or attorney)** at **(here insert address)** that you wish to cross-examine. To be effective, your request must be mailed or delivered to **(here insert name of proponent or attorney)** on or before **(here insert a date seven (7) days after the date of mailing or delivering the affidavit to the opposing party)**.*

(d) Public Testimony

Pursuant to Health and Safety Code Section 40828(a), the Hearing Board shall allow interested members of the public a reasonable opportunity to testify with regard to the matter under consideration, and the Hearing Board shall consider such testimony in making its determination, provided, however, that such testimony and evidence shall be relevant and material to the matter being heard by the Hearing Board. The Chairman of the Hearing Board may impose reasonable limits on the duration of oral presentations.

(e) Official Notice

- (1) In reaching a decision, the Hearing Board may take official notice of any generally accepted technical or scientific matter within the Hearing Board's special field, or of any fact which may be judicially noticed by the courts in the State of California.

- (2) Unless waived by the parties, the party seeking to have a matter officially noticed must file and serve a Request for Official Notice no later than five (5) days before the hearing at which the matter is to be noticed, if feasible. The Request for Official Notice must include the materials which will be presented to the Board and a brief statement of the finding or opinion which it is proposed that the Board will develop from the materials. Any party opposing the request shall be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority.
- (3) Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto.

RULE 9. CASE FILE AND HEARING CALENDAR

(Adopted June 11, 1997)

(a) Case File

- (1) The Clerk of the Board shall maintain in the office of the Hearing Board a case file of all petitions for variance orders for abatements, and appeals. Each petition or case file shall be assigned an individual sequential number. Case files shall be available for public inspection at the principal office of the Hearing Board during office hours.
- (2) Material which comprises the Hearing Board's records in the case files is available for study and review by the public and the District staff in the office of the Hearing Board during normal office hours. This material will not be available for review or other use outside the Hearing Board Office. Copies of records and exhibits may be obtained at the Hearing Board Office by paying the actual cost of preparation. When transcripts are obtained for case files by the Hearing Board, the transcripts will be delivered to the Clerk of the Hearing Board and a copy of the transcript will be included in the case file. All records shall be retained at least two (2) years after a final decision either by the Hearing Board or by the courts of California, whichever comes later.
- (3) Materials which are determined to be confidential will be noted in the case file and kept in the District Prosecutor's Office to preserve their confidentiality.

(b) Calendar

The Clerk shall cause to be maintained a calendar of all matters scheduled before the Hearing Board, which calendar shall be available for public inspection at the office of the Hearing Board. Copies of the calendar may be obtained on request of the Clerk, and upon payment of the required fee.

RULE 10. OFFICERS OF THE HEARING BOARD (Adopted June 11, 1997)

(a) Election of Officers

The Chair and Vice Chair of the Hearing Board will be elected annually during the first Hearing Board meeting in the month of July, with a one year term to begin immediately and continue until the next election.

RULE 11. INTERIM ORDERS FOR ABATEMENT (Adopted January 10, 2018)

(a) Request for Preliminary Determination of Imminent and Substantial Endangerment

- (1) Requests by the Executive Officer for a preliminary determination by the Board, pursuant to Health & Safety (“H&S”) Code 42451.5, that there is substantial evidence that an imminent and substantial endangerment to the public health or welfare, or the environment, still exists (hereinafter a “Preliminary ISE Determination”) shall be included in the petition for an order for abatement, filed pursuant to District Rule 803. Alternatively, if a petition has already been filed in the matter, the petition shall be amended to include such a request.
- (2) The Executive Officer shall include a brief description of the basis for a Preliminary ISE Determination in the petition for an order for abatement or amend the petition to include such information if a petition has already been filed in the matter.
- (3) The Executive Officer shall further file with the petition for an order for abatement any Notice of Defense received from a respondent pursuant to Health & Safety Code 42451.5(c). If a petition has already been filed in a matter, the petition shall be amended to include any such Notice of Defense.
- (4) The Executive Officer shall further request in the petition for an order for abatement, or in an amended petition if one has already been filed in the matter, the consolidation of the proceedings for the regular order for abatement and the request for a Preliminary ISE Determination.

(b) Procedure on a Request for a Preliminary ISE Determination

- (1) When a request for a Preliminary ISE Determination is made by the Executive Officer, the order for abatement proceeding shall be bifurcated. The Executive Officer shall commence the hearing by presenting its evidence that an ISE still exists.
- (2) At the conclusion of the Executive Officer’s presentation of evidence as to the continuing existence of an ISE, a Respondent may present evidence that an ISE no longer exists.
- (3) Regardless of the decision of the Hearing Board with regard to a finding of an ISE or the dismissal of the Interim Order for Abatement, the Board will immediately hold a hearing on the regular order for abatement, pursuant to District Rule 803.

(c) Expeditious Hearing on a Preliminary ISE Determination

- (1) The Chairperson shall, on a request by a party for a continuance prior to a Preliminary ISE Determination, consider as a significant factor, in addition to those factors normally considered pursuant Hearing Board Rule 7(j)(2), the need to make such a determination under H&S Code section 45451.5 within thirty (30) days of the receipt by the Executive Officer of a Notice of Defense.
- (2) The Chairperson may place reasonable limits on testimony on the issue of a Preliminary ISE Determination to ensure that both sides are heard and a decision is made within the 30-day timeframe under H&S Code section 42451.5.
- (3) Upon receipt of a request for a Preliminary ISE Determination, the hearing shall be held on the earliest feasible hearing date, as determined by the Chair, after expiration of the 10-day public notice period for an order for abatement.

(d) Motion to Demonstrate an ISE no Longer Exists

At any time after a hearing on the regular order for abatement has commenced, a Respondent may make a motion requesting a determination that an ISE no longer exists. The motion shall be based on evidence not presented at the Preliminary ISE Determination hearing.

APPENDIX 1– GOOD CAUSE GUIDELINES

The following guidelines and comments have been adopted by the Hearing Board to assist in the preparation and presentation of the good cause element of emergency and interim variance petitions

Emergency Variance

A. An emergency variance is appropriate in circumstances where:

- (1) Good cause exists to justify the holding of a hearing on an emergency variance petition in the absence of notice to the public; and
- (2) The six findings can be made, as required by Section 42352, Health and Safety Code.
- (3) The violation will be remedied during the period of the emergency variance or under further variance relief.

B. To demonstrate that “good cause” exists to justify the holding of a hearing on an emergency variance petition in the absence of notice to the public, a Petitioner must present persuasive evidence that:

- (1) Petitioner is in violation of Section 41701, or of any rule, regulation or order of the District, or that such violation is imminent.
- (2) The circumstances leading to the violation could not reasonably have been avoided by Petitioner, or anticipated in sufficient time to provide for public notice of the variance hearing.
- (3) Petitioner exercised diligence in petitioning for the emergency variance and scheduling the emergency variance hearing; “diligence in petitioning for the variance” shall mean that Petitioner filed a variance petition as soon as feasible after the time Petitioner knew or should have known that a variance would, more likely than not, be needed. Petitioners are urged to file a petition upon acquiring preliminary evidence of a likely violation, rather than waiting for absolute, certain evidence of violation.
- (4) A denial of the emergency variance will result in either:
 - (a) An increase in the emissions of air pollutants, an adverse impact to air quality, and/or an adverse impact on public health or welfare; or
 - (b) An unreasonable and unavoidable adverse impact to Petitioner.

Interim Variance

A. An interim variance is appropriate in circumstances where:

- (1) Good cause exists to justify the holding of a hearing on an interim variance petition in the absence of notice to the public;
- (2) The six findings can be made, as required by Section 42352, Health and Safety Code; and
- (3) Petitioner has also petitioned for a short or regular variance.

B. To demonstrate that “good cause” exists to justify the holding of a hearing on an interim variance petition in the absence of notice to the public, a Petitioner must present persuasive evidence that:

- (1) Petitioner is in violation of Section 41701, or of any rule, regulation or order of the District, or that such violation is imminent.
- (2) The circumstances leading to the violation could not reasonably have been avoided by Petitioner, or anticipated in sufficient time to provide for public notice of the variance hearing.
- (3) Petitioner exercised diligence in petitioning for the interim variance and scheduling the interim variance hearing; “diligence in petitioning for the variance” shall mean that Petitioner filed a variance petition as soon as feasible after the time Petitioner knew or should have known that a variance would, more likely than not, be needed.
- (4) A denial of the interim variance will result in either:
 - (a) An increase in the emissions of air pollutants, an adverse impact to air quality, and/or an adverse impact on public health or welfare; or
 - (b) An unreasonable and unavoidable adverse impact to Petitioner.

Emergency and Interim Variance Findings

To demonstrate that “good cause” exists to justify the holding of a hearing on an interim variance petition...

This provision retains the current Hearing Board policy of bifurcating hearings on emergency and interim variances, and limiting the initial “good cause” portion of the hearing to whether the hearing should go forward in the absence of public notice. In the second phase of the hearing, Petitioners will be required to present persuasive evidence addressing the six variance findings.

... diligence in petitioning for the varianceand scheduling the variance hearing.

The Hearing Board expects a Petitioner to file an emergency or interim variance petition as soon as is feasible after it is determined that a violation is occurring, or is likely to occur. The Hearing Board must assess the diligence exhibited by a Petitioner on a case-by-case, fact-specific basis. It is not possible to establish a bright-line definition. Petitioners who take days or weeks to conduct testing programs, attempt remedies, confer with vendors, consult experts, meet with attorneys, and so forth, prior to filing for the variance, are not usually considered to be exercising diligence for purposes of determining good cause.

At the time that an emergency or interim variance petition is filed, the Petitioner is only expected to provide the basic information for the variance findings – what equipment will be out of compliance, what rules will be violated, what pollutants will be emitted, what actions the Petitioner is taking or intends to take to address the violation. Since it is sometimes the case that the Petitioner does not yet know the cause of the event necessitating the variance, and/or the steps that will be required to bring them back into compliance, the Petitioner is only required to present the information that has been gathered by the date of the emergency or interim variance hearing. Complete evidence supporting the six findings, however, should be developed and presented by the time of the short or regular variance hearing.

Although the scheduling of a variance hearing must be coordinated with the Hearing Board’s agenda, it is expected that a Petitioner will cooperate to ensure that the hearing occurs on the earliest feasible date.

A denial of the variance will result...

The primary focus is the period of time between the good cause hearing on the emergency or interim variance and the earliest feasible date for a noticed hearing. If “good cause” cannot be established, the emergency or interim variance will be denied. Thus, in considering whether to deny the emergency or interim variance for lack of good cause, the Board will engage in the balancing test set forth in (B)(4) (a) and (b) for emergency variances and (B)(4) (a) and (b) for interim variances. The Board’s inquiry in these circumstances is more limited in scope than the “taking of property or closing of a business” finding of Section 42352(a)(2),

which addresses the impacts of granting or denying the variance. This good cause finding only addresses the impacts of delaying the hearing, presumably for a matter of days or weeks.

An increase in the emissions of air pollutants, adverse impact to air quality...

Evidence that the denial of an emergency or interim variance will result in an increase in emissions, or in any other type of detriment to ambient air quality, would contribute to a finding of good cause. This evidence would also have to demonstrate, however, that the granting of the emergency or interim variance would be part of an effective strategy to avoid those impacts.

... or an adverse impact on public health or welfare...

An adverse impact on health may be most clearly demonstrated by evidence that air pollutant emissions during the period prior to a scheduled hearing could significantly affect human health (e.g., by exceeding ambient air quality standards or exposure to toxics). Adverse impacts to welfare would include the types of effects usually associated with nuisances, but could also open a broader scope. For example, the Hearing Board has found good cause existed to hold a hearing in a case in which delay could have resulted in the limiting the availability to the public of a vital medical device for which the petitioner was the sole provider of an essential component.

An unreasonable and unavoidable adverse impact to Petitioner.

Potentially, adverse impacts could come in many shapes, for example unavoidable enforcement or safety concerns, but it is anticipated that they will most likely be economic in nature – if the variance petition is not heard, the Petitioner will lose revenue and/or contract(s) while awaiting a noticed hearing. It is also possible that economic impacts could befall employees, customers, vendors, and other parties associated with the Petitioner's enterprise. Petitioners will be expected to provide competent evidence on the scope and extent of such impacts.

To support a finding of good cause, evidence must demonstrate that any adverse impacts are not only predictable, but are also unreasonable. Inconvenience, delay, disruption of other plans, unexceptional financial fluctuations, failure of the Petitioner to anticipate the need for a variance at or prior to the date the contract bid was submitted, and similar impacts will not be considered adequate. Similarly, the Petitioner should present evidence that either the economic or other adverse effects claimed couldn't be avoided or mitigated by the actions of the Petitioner or others, such as vendors or customers.

As stated previously, the focus of this finding is the period between the hearing on the emergency or interim variance petition, and the earliest feasible date on which a publicly noticed hearing on the variance petition could be held.

Six Findings

A Petitioner for an interim or emergency variance will be expected to present persuasive evidence addressing each of the six findings required by Section 42352. The Hearing Board and Petitioners have recognized that the evidence available at an emergency or interim variance hearing may not be conclusive. At this early stage in dealing with an emergency situation, the Petitioner may have a strong indication of the cause of the violation, but recognize that further information may come to light as the violation is investigated and a remedy implemented. Nonetheless, to be consistent with the requirements of Section 42352 (a) ["No variance shall be granted unless the hearing board makes all of the following findings..."], the Hearing Board requires the Petitioner to present evidence directed toward each of the findings. Therefore, the evidence presented at the emergency or interim variance hearing should be as complete as possible. To the extent that the Petitioner is unable to present complete evidence regarding any required finding, the Petitioner should be prepared to explain, through testimony, what barriers to the acquisition of the necessary testimony have been encountered, what steps are being taken to complete the acquisition of data and analysis, and the reasons that the Petitioner believes that the evidence nonetheless supports the necessary findings.

Emergency Variance Findings

Petitioner is in violation...or such violation is imminent.

This provision would usually require that an emergency variance be limited to circumstances in which a Petitioner is currently in violation, or a violation is imminent, rather than when a violation is anticipated or foreseeable, but not imminent. Generally speaking, if there's no violation, there's no emergency. If a Petitioner anticipates a future violation, the Petitioner should seek a regular, short, or interim variance, where there is at least a limited public notice. Recognizing, however, that there may be limited circumstances in which a violation is both imminent and reasonably certain to occur, the Hearing Board may find good cause to proceed with the variance hearing under such circumstances.

... the violation could not reasonably have been anticipated or avoided by Petitioner...or anticipated in sufficient time to provide for public notice...

This language is intended to be stricter than the "beyond the reasonable control of the petitioner..." finding of Section 42352(a)(2). It reflects the understanding that an emergency variance is appropriate to address a sudden event, such as a breakdown. If a violation can be anticipated, then there is generally sufficient time for the Petitioner to anticipate the need for a variance, and to file a variance petition in time for a noticed hearing.

The violation will be remedied within the period of the emergency variance unless further variance relief is granted by the Hearing Board. An emergency variance is most appropriate where the cause of the violation is reasonably certain, the necessary remedial action has been

identified, and evidence is submitted at the emergency variance hearing that compliance is reasonably within thirty days. The Hearing Board recognizes that in some instances the petitioner expects to develop additional information after the conclusion of the emergency variance hearing and that this information may indicate that the necessary remedial actions will exceed thirty days. Since the emergency variance cannot, by statute, exceed thirty days, the petitioner in such an instance would be expected to petition for further variance relief to include any extended period of noncompliance. In cases, however, where at the time of the variance hearing, the remedial measures are undetermined, or the evidence indicates the period of noncompliance will exceed 30 days, or where a further hearing is expected in order to resolve the variance issues and conditions, the Petitioner should seek an interim variance, leading to a short or regular variance, rather than an emergency variance.

(e:hbforms:good cause guidelines)

APPENDIX 2– EXCESS EMISSIONS GUIDANCE

Definition of Excess Emissions

1. **The Hearing Board defines Excess Emissions as those emissions authorized by a variance that are in excess of what otherwise would be lawfully emitted. Excess emissions are the result of relief granted in the form of a variance in which the amount of emissions that would result from the variance exceeds the amount allowed by a rule, permit, or plan governing operations of the source.**

2. The pollutant(s), type and amount of excess emissions depend on the type of variance relief granted. Depending on the type of variance relief granted, excess emissions may result from:

A. Exceedances of emissions limits contained in a rule, permit, or plan; and

B. Deviations in operating parameters (such as hours of operation, temperature, throughput, VOC content, etc.) contained in a rule, permit, or plan, and that result in the production of emissions exceeding applicable emissions limits.

3. Some variances do not include relief from emissions limits in a rule, permit, or plan that would result in the production of excess emissions. In this case, no excess emissions result from the variance.

4. In some cases, it is not possible to estimate the amount of excess emissions prior to the variance period.

A. Examples of reasons include changes in operating parameters during the variance that cannot be predicted (such as production throughput rates in response to fluctuating demand), unpredictable exceedances (such as emissions spikes), or types of emissions that do not allow accurate estimates (such as from leaking underground structures).

B. In such a case, a finding that excess emissions are “to be determined” is made, designating the pollutant(s).

(i) Such a finding must be accompanied by an explanation of why it is not feasible to estimate the emissions at that point in the variance process. The actual amount of excess emissions is then estimated during the variance period as a condition of the variance.

(ii) If excess emissions are estimated in the Petition or during the hearing before the Board, a finding of “to be determined” must also be accompanied by a statement of (a) the nature and amount of such estimated excess emissions and (b) the party that made the estimation. For example, such a statement might read: “Petitioner estimates excess NOx emissions will be 10 lbs/day.” The purpose of this statement is to provide the public with additional information with which to assess the impact of the Board’s variances on their health and welfare.

C. In rare cases, the amount of excess emissions can’t be determined before, during, or after the variance period, due to a lack of appropriate calculation or physical measurement methods, in which case, a finding is made for the designated pollutant(s) that excess emissions cannot be estimated for that reason, including an explanation of why this is not feasible.

Reasons for Calculating Excess Emissions

1. Section 42352 of the California Health and Safety Code requires that the Hearing Board make six findings in order to grant a variance. At least three of the findings consider whether granting the variance will result in the production of emissions in excess of those that would otherwise result if the variance were not granted. Therefore, the Hearing Board is required to estimate the amount and type of excess emissions that will occur, as well as the time periods, duration, and other relevant emissions characteristics.

2. District Rule 303 requires the payment of fees based on the type and amount of excess emissions that are expected to occur as a result of the variance. This is not related to the requirement to make the six findings.

3. Title V of the Federal Clean Air Act does not recognize variances. Accordingly, EPA and the SCAQMD jointly crafted Rule 518.2, which allows the Hearing Board to adopt Alternative Operating Conditions (AOC) that act similar to variances, but pertain instead to the facility’s federal Title V permit. Rule 518.2 contains explicit provisions for calculating and, in some cases, offsetting excess emissions. The

calculation of excess emissions under Rule 518.2 differs from the calculation of variance excess emissions in several ways. These guidelines therefore apply solely to excess emissions from the granting of variances and do not apply to Rule 518.2 excess emissions.

4. The Hearing Board is not authorized to grant a variance from the RECLAIM emissions cap. Therefore, there can be no excess emissions relating to the requirement to remain under the RECLAIM emissions cap.

Mitigation of Excess Emissions

1. **The six findings are made based on the total amount of excess emissions, without regard to any reductions due to mitigation.**

2. However, the fifth finding requires that all excess emissions be mitigated “to the maximum extent feasible”.

3. Mitigation may be defined as the reduction of excess emissions using methods that are appropriate for the type and amount of excess emissions.

4. The feasibility of mitigating excess emissions depends on several factors that are unique to each case. In addition, mitigation measures must be

A. Technologically feasible

B. Available and affordable, based on the source operator or owner’s net income

C. Enforceable by the District; and

D. Directly relevant in terms of reducing the excess emissions resulting from the variance.

5. It is therefore necessary for the source owner or operator to undertake a thoughtful and complete analysis of ways to mitigate any excess emissions.

6. Mitigation is not required for variances that do not result in excess emissions.

**APPENDIX 3– “IMMINENT AND SUBSTANTIAL
ENDANGERMENT” GUIDELINES**

“IMMINENT AND SUBSTANTIAL ENDANGERMENT” GUIDELINES

Under Health & Safety (H&S) Code section 42451.5 the Hearing Board may be called upon to make a preliminary determination as to whether an “imminent and substantial endangerment to the public health or welfare, or the environment,” still exists so as to allow an interim Order for Abatement issued by the Executive Officer to stand pending the conclusion of a hearing for a regular Order for Abatement pursuant to H&S Code section 42451.

For the interim order to remain in effect past the allowable 30-day time limit, the Executive Officer must present “substantial evidence” that an “imminent and substantial endangerment to the public health or welfare, or the environment,” still exists in accordance with H&S Code 42451.5 (hereinafter a “Preliminary ISE Determination”).

A Preliminary ISE Determination shall be made on a case-by-case basis, depending on the evidence presented.

The following is meant only as guidance intended to ensure a consistent application of the standard from case to case.

“Substantial Evidence”

Has been defined in case law as evidence that is “reasonable in nature, credible and of solid value,” such that “a reasonable mind might accept it as adequate to support the conclusion.” *Western States Petroleum Association v. Superior Court*, 9 Cal. 3d 559, 577 (1995).

The Supreme Court has defined it as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

It has been further defined as “adequate evidence that is used to support an act or an omission has occurred.” *Black’s online Law Dictionary*.

“Imminent and Substantial Endangerment”

- (1) Actual injury need not have already occurred to be “imminent”. A *risk* of cancer or other illness in the future, no matter how distant, as a result of imminent exposure now is sufficient. An interim Order for Abatement may be preventative and issued in advance of any harm. *EPA Guidance for Section 303 of the Clean Air Act*.
- (2) No actual injury need ever occur. It may be threatened. Potential harm as well as actual harm fall under the term “endangerment.” *EPA Guidance for Section 303 of the Clean Air Act*.
- (3) The risk of harm cannot be completely speculative. *EPA Guidance for Section 303 of the Clean Air Act*.
- (4) For example: “Ordinarily, an odor may constitute a public nuisance in violation of Health and Safety Code Section 41700, but would not generally be considered an imminent and substantial endangerment to health unless it is associated with toxic or criteria pollutant emissions that do present an imminent and substantial endangerment ... However, if an odor causes symptoms that are very severe and ongoing due to continuing or frequent exposure, it may rise to the level of an imminent and substantial endangerment to public health, even if the [Executive Officer] is not aware of an accompanying exposure to a particular toxic air contaminant, as in the case of a gas leak.” *Letter filed in the Assembly Daily Journal by Assembly Member Cristina Garcia, the author of AB 1132*.