



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

*Adopted June 11, 1997*

*Latest Revisions: July 24, 2019*



**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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<sup>1</sup> Please note that all terms which are defined terms in Rule 1 of these Hearing Board Rules will be identified throughout the rules with initial caps and in bold. For example: **District**.

**RULE 1. DEFINITIONS<sup>2</sup>**

**(Adopted June 11, 1997)  
(Amended May 13, 1998  
(Amended August 11, 1999)  
(Amended June 28, 2018)**

- (a) "**Appeal**" means an action requested to review a decision of the Executive Officer.
- (b) "**Appellant**" means the party who appeals a decision of the Executive Officer and brings the matter before the Hearing Board.
- (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 4. 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) "**General Counsel's Office**" means the General Counsel's Office of the South Coast Air Quality Management District. The General Counsel's Office represents the Executive Officer at all Hearing Board proceedings.
- (i) "**Hearing Board**" means the Hearing Board of the South Coast Air Quality Management District.
- (j) "**Moving Party**" means the party who files a motion with the Hearing Board.

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<sup>2</sup> Please note that all defined terms will be identified throughout the rules with initial caps and in bold. For example: **District**.

- (k) "**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.
- (l) "**Petitioner**" means the party who petitioned the Hearing Board to initiate an action.
- (m) "**Preliminary Imminent and Substantial Endangerment (ISE) Determination**" means a preliminary determination by the Board that there is substantial evidence that an imminent and substantial endangerment to the public health or welfare, or the environment, still exists to allow an Interim Order for Abatement imposed by the Executive Officer pursuant to Health & Safety Code section 42451.5 to stand.
- (n) "**Respondent**" means the party who answers, or the party against whom an appeal is brought.
- (o) "**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)  
(Amended June 28, 2018)**

(a) Filing of Papers with Hearing Board

(1) Method of filing:

(A) Petitions and other papers shall be submitted to the **Clerk** in person or via U.S. mail or any reliable commercial delivery service, together with the payment of the prescribed fee.

(B) Ex parte emergency Petitions may also be filed via email, facsimile or other electronic means.

(2) Number of copies: 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.

(3) Time and date of filing: Papers presented in proper form and accompanied by the required number of copies and required fee shall be deemed filed on the date and at the time date-stamped by the **Clerk**.

(A) A Petition for **Appeal** shall be deemed filed on the day it is received by the **Clerk** even if **Petitioner** fails to present the proper filing fee or the correct number of copies, as long as the filing deficiencies are cured within seven (7) calendar days of written notice from the **Clerk** indicating the deficiencies and stating that the **Petitioner** has seven calendar days to cure the indicated deficiencies. If **Petitioner** fails to cure the filing deficiencies within the seven (7) calendar-day period, the petition will not be deemed filed until the date the deficiencies are cured.

(B) If an ex parte emergency petition is filed with the **Clerk** via email, facsimile or other electronic means, pursuant to Rule 2(a)(1), the document shall be deemed filed on the date and at the time date stamped by the **Clerk** on the copy received via electronic means, provided that the original documents, the proper filing fee, and required copies are properly filed by close of business on the next **District Working Day**.

(4) Form of Petitions:

- (A) A **Petitioner** shall complete and file current petition forms, which are available in the **Clerk**'s office and on the **District**'s website at aqmd.gov, or
- (B) A **Petitioner** may file its own petition, which includes the required relevant information outlined in the current petition forms and other relevant information. Such petition shall be on 8 ½" x 11" numbered paper and double-spaced.
- (C) The petition must be signed under penalty of perjury by an individual **Petitioner** or a **Petitioner**'s authorized agent, attesting to the truth and correctness of its contents.
- (D) A **Petitioner** for an ex parte variance must also indicate by checking the appropriate box on the variance petition whether the **Petitioner** requests a hearing by the full **Hearing Board** if the ex parte petition is denied.

(5) Limitations on Pleadings and Briefs: All motions, pleadings and briefs filed with the **Hearing Board** shall be limited to no more than fifteen 8 ½" x 11", numbered pages, double-spaced, excluding exhibits, unless otherwise authorized by the **Hearing Board**. The Chair of the **Hearing Board**, or other designated **Hearing 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.

(b) Service of Petitions for Variance and Appeals

- (1) Service on **General Counsel** of petitions is deemed complete at the time eight (8) copies have been filed with the **Clerk** in accordance with Rule 2(a).
- (2) A **Petitioner** filing a third party **Appeal** 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 Rule 2(c) below). The **Petitioner** shall provide proof of such service to the **Clerk**.

(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 (CCP) 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 **General Counsel'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.
- (5) If agreed to by the **Respondent**, service may be by facsimile or other electronic means, including but not necessarily limited to email. A **Respondent** who consents to service of a petition by facsimile or other electronic means must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the **Clerk**.

(d) Service of Other Documents

- (1) Service Requirements: Once a docket is established for a petition, every subsequent document filed with the **Hearing Board** must be served on all other **Parties**. Service must be by first class U.S. mail, by any reliable commercial delivery service, or, if agreed to by the **Parties**, by facsimile or other electronic means, including but not necessarily limited to email. A **Party** who consents to service by facsimile or other electronic means must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the **Clerk**.

- (2) Electronic Service by **Hearing Board** Order: The **Hearing Board** may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.
- (3) Proof of Service: A certificate of service must be appended to each document filed, stating the names of persons served, the date and manner of service, as well as the electronic, mailing, or hand delivery address, or facsimile number, as appropriate.

**RULE 3. GROUP VARIANCES**

**(Amended June 23, 1999)**  
**(Amended August 11, 1999)**  
**(Amended June 28, 2018)**

- (a) A petition for a group variance may be filed with the **Clerk** when the variance relief sought by each individual **Petitioner** in the group is based on issues of law and fact common to each **Petitioner**.
- (b) The petition for a group variance shall be accompanied by written declarations from each **Petitioner**, setting forth sufficient evidence to support the individualized findings which the **Hearing Board** is required to make pursuant to Health and Safety Code Section 42352. Each declaration to be admissible must be stipulated to by the **General Counsel's Office** in accordance with Rule 9(b)(3) (hearsay evidence) or proper notice must be provided to **General Counsel's Office** in accordance with Rule 9(c)(1) (declarations). The declaration shall be signed under penalty of perjury and include consent to be represented by the agreed-upon 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.
- (c) In accordance with Rule 8(1), the **Hearing Board** shall schedule a prehearing conference at least seven (7) days before the scheduled hearing for a group variance.
- (d) Witnesses may present testimony on behalf of the group at the hearing; however, it shall not be necessary for each individual **Petitioner** to present testimony on his or her own behalf.
- (e) Notice to the public shall include the identity and location 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.
- (f) The **Hearing Board** shall put on the record the facts they believe show that the group has common issues of law and fact.
- (g) 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.

**RULE 4. CONSENT CALENDAR**

**(Amended June 23, 1999)  
(Amended August 11, 1999)  
(Amended June 28, 2018)**

(a) Requirements for Petitioner

- (1) **Petitioner** shall obtain the concurrence of the **Respondent** that such matter should be placed on the **Consent Calendar**.
- (2) 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**; witness declaration(s); the proposed findings and decision; and a proposed order (including any proposed conditions and/or increments of progress). **Petitioner** shall also provide an electronic copy of the proposed order in Microsoft Word format or in any other format authorized by the **Clerk**. 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 **Clerk** by noon on the previous Wednesday.
  - If the hearing is scheduled for a Wednesday, the documents shall be filed with the **Clerk** by noon on the previous Thursday.
  - If the hearing is scheduled for a Thursday, the documents shall be filed with the **Clerk** by noon on the Tuesday immediately preceding the scheduled hearing date.
- (3) 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, including 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 (H&S) Code Section 41700 (nuisance).
- (4) 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).
- (iv) In a variance proceeding, the stipulation must state that the **District** does not oppose 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 H&S Code Section 41700 (nuisance).

(b) Hearing Board Requirements

- (1) The **Hearing Board** shall call and hear **Consent Calendar** matters first on its calendar if a member of the public is present for the consent matter. Otherwise, the consent matter will be heard at the end of the day's calendar.
- (2) The **Hearing Board** shall receive any public testimony on a **Consent Calendar** matter before proceeding with deliberation.
- (3) 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 **Hearing 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.

- (4) 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 **Hearing 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 matter 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 **Hearing 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 H&S Code section 41700 (nuisance).

**RULE 5. 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 **General 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 Board 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 Board 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 ten (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 Board 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 6. MOTIONS**

**(Adopted June 11, 1997)  
(Amended April 10, 2014)  
(Amended June 28, 2018)  
(Amended July 24, 2019)**

- (a) Allowable Motions: **Parties** may make appropriate motions in any matter.
- (b) Timing of Motions: Motions should be made at the earliest feasible time to allow the **Hearing Board** to make a full and timely determination.
- (c) Burden of Proof: The **Moving Party** bears the burden of proof on a motion and shall be given the opportunity first to present its argument and evidence in support of the motion.
- (d) Motions to Dismiss or Strike: A motion to dismiss or strike may be made with regard to the whole or any part of a petition.
- (e) 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 declarations, 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.
- (f) Filing Moving and Supporting Papers

If the **Hearing Board** determines that briefing is required for a determination of a motion, including an responsive briefing, the **Hearing Board** shall set a briefing schedule and hearing date for the motion as expeditiously as possible. The Chair, or designated Board Member, may also set such a briefing schedule as part of a prehearing conference.

**RULE 7. FINDINGS AND DECISION**

**(Adopted June 11, 1997)  
(Amended August 25, 2010)  
(Amended June 28, 2018)**

(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 7(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 sent to the affected parties the same day it is filed via mail and facsimile, email or other electronic means.

(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 **Petitioner**, the **Respondent** 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 California 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 8. HEARING BOARD PROCEDURES**

(Adopted June 11, 1997)  
(Amended June 23, 1999)  
(Amended February 20, 2014)  
(Amended February 18, 2016)  
(Amended April 13, 2016)  
(Amended June 28, 2018)

(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 4].

- (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 for deliberation and decision, 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 an electronic recording. 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 other electronic means and shall terminate the action.

(g) Quorum Requirements

- (1) Except as provided in Health and Safety Code Section 42359.5 (governing ex parte emergency 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 the audio 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.

(h) Request for Rehearing

- (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 request for rehearing must be in writing, must be served on the opposing **Party**, and must state the reasons and grounds for rehearing. A request for rehearing shall be based on new evidence, meaning evidence that did not exist or was not otherwise available to be considered at the time of the initial hearing.
- (3) A petition for rehearing shall be heard as soon as possible after the required public notice period.

(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 **Hearing Board** member by filing a declaration 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 matter 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 in accordance with **District** Rules 514 and 815, as applicable.
- (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 Chair 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 Chair or to the **Hearing Board** may be ex parte and without prior notice. Action of the Chair 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** 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 at the request of either **Party** as soon as practicable at the discretion of the Chair.
- (2) The purpose of the prehearing conference shall be to discuss any issues relevant to the proceedings, including but not limited to witnesses, the location of the hearing, subpoenas, exhibits, discovery matters, legal issues and the length of time needed to complete the proceeding. No substantive issues determinative of the outcome of the matter shall be discussed or decided at the prehearing conference.
- (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 electronic recording.

(m) Prohibition of Megaphones and Signs

No megaphones, bullhorns, or placards, signs or posters, shall be brought into the **Hearing Board** room or other room in which a **Hearing Board** proceeding is being conducted during or prior to a **Hearing Board** hearing on the day of the hearing. Upon authorization of the **Hearing Board** Chair 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 Chair 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 Chair 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 Chair, at his or her discretion, may grant additional time to members of the public representing a group or organization. The Chair may also limit the total aggregate time for public testimony. In the event total time for public testimony is limited, the Chair 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 Chair 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) At the Chair's or the Chair's designee's discretion, a **Hearing Board** Member who has been absent from one or more hearing days in a continued hearing, 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(s) and reviewing 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, as soon as possible, notify the **Clerk** and the Chair in writing of the days when he/she will be absent.
- (2) If a Regular Member who has previously notified the **Clerk** and the Chair of a planned absence has a change of plans, that member shall notify the **Clerk** of that change as soon as possible.

- (3) If a Regular Member who has previously notified the **Clerk** of a planned absence has a change of plans and fails to notify the **Clerk** 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 9. DISCOVERY AND EVIDENCE**

**(Adopted June 11, 1997)  
(Amended June 28, 2018)**

(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) 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 its opposition and may request that a hearing be scheduled on the matter. The **Clerk** 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 Board Member, specifies a shorter time in the subpoena. Any person receiving a subpoena signed by the Chair of the **Hearing Board**, or designated Board 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 Board 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 its own behalf, the **Respondent**, an employee or representative 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 **General Counsel'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 Declaration

- (1) At least 10 days prior to hearing, or a continued hearing, any **Party** that proposes to introduce a declaration into evidence shall mail or deliver a copy of such declaration 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 a declarant, the right to cross-examine such declarant is waived and the declaration, if introduced in evidence, shall be given the same effect as if the declarant had testified in person. If an opportunity to cross-examine a declarant is not afforded after request thereof is made as herein provided, the declaration 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 declaration of (here insert name of declarant) 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 declarant 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 declaration 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 10. CASE FILE AND HEARING CALENDAR**

**(Adopted June 11, 1997)  
(Amended June 28, 2018)  
(Amended July 24, 2019)**

(a) Case File

- (1) The **Clerk** shall maintain in the office of the **Hearing Board** a case file of all petitions for variances, orders for abatements, and appeals. Each petition or case file shall be assigned an individual sequential number. All case file documents are maintained electronically and may be accessed by visiting the “Facility Information Detail” database, also referred to as “FIND”, on the **District**’s website at [www.aqmd.gov](http://www.aqmd.gov). Matters are searchable by case number, facility name or facility ID number.
- (2) For those unable to access the electronic records, a public viewing computer station is available in the **Clerk**’s Office to access and print case documents.
- (3) Materials which are determined to be confidential will be noted in the case file and kept in the **General Counsel’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 may be obtained by visiting the **Hearing Board** section of the District’s website at [www.aqmd.gov](http://www.aqmd.gov).

(c) Hearing Audio/Video

All hearings of the **Hearing Board** are webcast and can be viewed live or recorded on the **District**’s website at [www.aqmd.gov](http://www.aqmd.gov).

**RULE 11. 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 12. 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 Section 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 H&S Code Section 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 Chair 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 8(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 Chair 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 Imminent and Substantial Endangerment (ISE) no longer exists. The motion shall be based on evidence not presented at the **Preliminary ISE Determination** hearing.

# **APPENDIX 1– GOOD CAUSE GUIDELINES**

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*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 variance ....and 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**

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**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**

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## **“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 Section 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*.