



*Monterey Bay Air
Resources District*

Staff Report

Proposed Revisions to:

Regulation VI Procedure Before the Hearing Board

November 14, 2023

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Purpose

The purpose of this report is to summarize the proposed changes to the Monterey Bay Air Resources District's (MBARD) Hearing Board Regulation VI. The Hearing Board is a quasi-judicial panel authorized to provide relief from MBARD regulations under certain circumstances along with considering abatement orders or permit disputes. The Hearing Board is independent of MBARD's Board of Directors.

Authority

California Health and Safety (HSC) Code Section 40807 provides that a Hearing Board may adopt rules for the conduct of its hearings.

Proposed Changes

The proposed revision, while administrative in nature, would replace the existing regulation in its entirety with the following main changes:

- Update the regulation format to match MBARD's rule format;
- Remove references to actions which can occur in air districts with a population less than 750,000. Based on the more recent 2020 census data and data from the California Department of Finance, the population in Monterey, San Benito, and Santa Cruz counties exceeds 750,000;
- Reorder sections of the regulation for continuity and clarity;
- Add references to HSC sections applicable to the Hearing Board.

Affected Sources, Potential Fiscal Impacts, and Socioeconomic Impacts

The proposed regulatory action described herein is exempt from the requirements of HSC Section 40728.5 regarding socioeconomic impacts. The regulation revisions are administrative in nature to improve clarity, eliminate sections of the regulation which no longer apply, and HSC Section 40807 allows Hearing Boards to adopt rules for conduct of hearings. There are no additional costs associated with the regulation changes. The proposed regulatory action described herein will not significantly affect air quality or

Mission

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The mission of the Monterey Bay Air Resources District is to Protect Public and Environmental Health while balancing Economic and Air Quality Considerations.

emission limitations or increase emissions; therefore, MBARD is exempt from the requirement to conduct a socioeconomic analysis.

Alternative Analysis

There are no new control standards being proposed with the adoption of the revisions to the Hearing Board regulation. Therefore, the proposed regulatory action described herein is exempt from HSC Section 40727.2 which requires that a comparative alternative analysis of any new control standard be performed.

Fiscal Impact Upon MBARD

The proposed revisions to the Hearing Board regulation would have no fiscal impact upon MBARD. The fees associated with the Hearing Board are contained in a separate Rule 309 Hearing Board Fees.

California Environmental Quality Act

The proposed Hearing Board regulation revisions are exempt from the requirements of Public Resources Code Section 21000 et seq. under California Environmental Quality Act (CEQA) Guidelines, in California Code of Regulations Section 15061(b)(3). The revisions are administrative in nature and summarize the procedures to implement the HSC provisions applicable to Hearing Boards. Therefore, there is no impact on the environment.

Findings Required to Adopt, Amend, or Repeal Rules or Regulations

Before adopting, amending, or repealing a rule or regulation, the MBARD Board of Directors is required to make findings of necessity, authority, clarity, consistency, non-duplication, and reference based on upon information presented as part of the rulemaking process and relevant information presented at the hearing. Table 1 summarizes these findings along with an explanation to assist the Board of Directors in making these findings.

Table 1. Required Findings for Adopting, Amending, or Repealing a Rule or Regulation (HSC Section 40727)

Finding	Explanation
Necessity	The Hearing Board regulation needs to be updated to account for the increase in population above 750,000 which changes actions allowed by the Hearing Board.
Authority	-MBARD has the authority pursuant to HSC Section 40702 to adopt, amend or repeal rules and regulations. -HSC Section 40807 allows a hearing board to adopt rules for conduct of its hearings.
Clarity	The Hearing Board regulation has been updated to improve clarity so its meaning can be more easily understood by the persons directly affected by the regulation. The format

**Table 1. Required Findings for Adopting, Amending, or Repealing a Rule or Regulation
(HSC Section 40727)**

Finding	Explanation
	has also been updated to match other MBARD rules.
Consistency	The Hearing Board regulation is in harmony with, and does not conflict with or contradictory to, existing statutes, court decisions, or state regulations. The Hearing Board rules must conform as far as practicable to the rules for administration found in the California Administrative Procedure Act, Government Code Sections 11500-11528. The exception is the United States Environmental Protection Agency which does not recognize California’s variance process. Reference to this exception is included in the updated regulation.
Non-Duplication	The Hearing Board regulation does not impose the same requirements as existing state or federal regulations.
Reference	<p align="center">-MBARD has the authority pursuant to HSC Section 40702 to adopt, amend or repeal rules and regulations.</p> <p align="center">-HSC Section 40800 et seq. establishes provisions for Hearing Boards.</p>

Public Notice and Meeting Schedule

MBARD noticed the Board of Directors public hearing in local newspapers and on MBARD’s website. The following summarizes the public comment opportunities. All meetings will be held in-person with the option to participate by Zoom.

Written comments are also accepted and can be emailed to aclymo@mbard.org or mailed by December 11, 2023 to: MBARD, Amy Clymo, 24580 Silver Cloud Court, Monterey, CA, 93940.

Event	Date/Time/Location
Hearing Board Meeting	<p>December 8, 2023; 2:00 PM; Monterey Bay Air Resources District, Board Room, 3rd Floor, 24580 Silver Cloud Court, Monterey</p> <p>Zoom link for public access will be posted to MBARD’s website www.mbard.org, 72 hours before the meeting date.</p>

Event	Date/Time/Location
Board of Directors Public Hearing to Adopt Revised Regulation	December 20, 2023; 1:30 PM; Monterey Bay Air Resources District, Board Room, 3 rd Floor, 24580 Silver Cloud Court, Monterey Zoom link for public access will be posted to MBARD's website www.mbard.org, 72 hours before the meeting date.

Public Comments

No comments have been received as of the date of this report.

ATTACHMENTS
PROPOSED REGULATION VI
2002 VERSION OF REGULATION VI

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PROCEDURE BEFORE THE HEARING BOARD

(Adopted 02-05-2002; 06-19-2002 remove fees into Rule 309; Proposed 12-20-2023)

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PART 1 GENERAL

1.1 Purpose

The purpose of this regulation is to specify procedures that shall apply to all hearings before the Hearing Board of the Monterey Bay Air Resources District (MBARD).

1.2 Applicability

This regulation shall apply to all actions before the Hearing Board of MBARD. In case of a conflict, the applicable provisions of Division 26 of the California Health and Safety Code (H&S Code) shall control, including, but not limited, to Sections 40800-40865, 42302-42302.1, 42306-42309, 42350-42372, and 42450-42454.

1.3 Effective Date of Rule

This Regulation is effective December 20, 2023.

1.4 References

Other related or referenced MBARD rules or regulations include: Rule 101 (Definitions) and Rule 309 (Hearing Board Fees).

PART 2 DEFINITIONS

Except as defined below, the terms used in this Regulation are the same as defined in Rule 101 Definitions.

2.1 Abatement Order Petition

An order to any person found to be constructing or operating any article, machine, equipment, or other contrivance without a required or valid permit or in violation of Section 41700 or 41701 of the Health & Safety Code, or of any rule, regulation or permit adopted or administered by the Monterey Bay Air Resources District prohibiting or limiting the discharge of air contaminants into the air. [H&S Code Section 42450]

2.2 Air Pollution Control Officer (APCO)

The Air Pollution Control Officer of the Monterey Bay Air Resources District.

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2.3 Emergency Variance (less than 30 days)

Variance granted for good cause for a time period of less than 30 days. Can be granted without notice and hearing by the chair of the Hearing Board or any member of the Hearing Board. [H&S Code Section 42359.5]

2.4 Essential Public Service

Means a prison, detention facility, police or firefighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency. [H&S Code Section 42352(a)(2)]

2.5 Interim Authorization to Modify a Variance with Increments of Progress

An authorization granted to a person previously granted a variance which includes a schedule of increments of progress to continue operating when that schedule cannot be met and prior to a duly noticed public hearing to modify the schedule of increments. [H&S Code Section 42351.5]

2.6 Interim Variance

Variance granted for good cause for a time period of no more than 90 days for a source that has also submitted a petition for a short or long-term variance and wishes to continue operating pending the decision of the Hearing Board at a duly noticed public hearing. [H&S Code Section 42351]

2.7 Long-Term Variance (more than 90 days)

Variance granted for a period of more than 90 days. Also called a Regular variance. [H&S Code Section 40825]

2.8 Monterey Bay Air Resources District

MBARD or District or Air District.

2.9 Modification of a Schedule of Increments of Progress or Final Compliance Date

Petition before the Board to modify a schedule of increments of progress or a final compliance date in such a schedule. [H&S Code Section 42357]

2.10 Party

Party means the APCO, MBARD, the petitioner, the respondent, the complainant, appellant, intervener, and any person, other than an officer or an employee of MBARD

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in his or her official capacity, who has been allowed to appear in the proceeding, except that a member of the public providing public comment shall not be deemed a “party”.

2.11 Permit Revocation

Petition from the Air Pollution Control Officer to the Hearing Board to decide whether a permit should be revoked when the Air Pollution Control Officer finds that the permit holder is violating an applicable order, rule or regulation of the air district, or an applicable provision of the California Health & Safety Code. [H&S Code Section 42307]

2.12 Petition by an Aggrieved Party

Petition from a party who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in a permitting or Emission Reduction Credit action with the air district, requesting that the Hearing Board hold a hearing to determine whether that permit or Emission Reduction Credit was properly issued. [H&S Code Section 42302.1]

2.13 Petitioner

The party, such as, a person, company, APCO, or MBARD, who files an application/petition for a hearing with the Hearing Board.

2.14 Product Variance

Variance granted and attached to a particular product which does not comply with air district rules or regulations and the variance is necessary for the sale, supply, distribution or use of the product. [H&S Code Section 42365 and 42366]

2.15 Public Agency

Any state agency, board, or commission of any county, city and county, city, regional agency, public district, or other political subdivision. [H&S Code Section 42352(b)]

2.16 Rehearing of a Decision

A hearing before the Board at its discretion that occurs within 30 days of the effective date of a previous decision. [H&S Code Section 40821]

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2.17 Respondent

The party, such as, a person, company, APCO, or MBARD, against whom a petition is filed with the Hearing Board.

2.18 Review of Permit or Emission Reduction Credit Denial

A hearing before the Board requested by a source within ten (10) days of receiving the notice of permit or Emission Reduction Credit denial and requesting the Board to decide whether the permit was properly denied. [H&S Code Section 42302]

2.19 Review of Permit Suspension

A hearing before the Board requested by a permittee within ten (10) days of receipt of notice of suspension of a permit requesting the Board decide whether the permit was properly suspended. [H&S Code Section 42306]

2.20 Schedule of Increments of Progress

A statement of dates when various steps are to be taken to bring a source of air contaminants into compliance with emission standards. [H&S Code Section 39051]

2.21 Short-Term Variance (90 days or less)

Variance granted for a period of 90 days or less. [H&S Code Section 40826]

2.22 Variance

Temporary dispensation granted to sources from air district rules and regulations.

2.23 Variance Modification or Revocation

Petition filed by the Air Pollution Control Officer to the Hearing Board to determine whether a permit should be modified or revoked when the Air Pollution Control Officer determines that the holder of the permit is violating an applicable order, rule or regulation of the air district, or an applicable provision of the California Health & Safety Code. [H&S Code Section 42357]

PART 3 ADMINISTRATIVE REQUIREMENTS

3.1 Filing Petitions

A request for a hearing shall be initiated by filing a petition with the Clerk of the Hearing Board and payment of the fees as specified in Rule 309 Hearing Board Fees. Petitions

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filed with the Clerk of the Hearing Board may be transmitted electronically, and any such electronically transmitted petition shall have the same legal effect as an original paper form. MBARD or the Clerk of the Board shall serve a copy of any petitions received for permit action or abatement order on the permit holder or individual/business which is the real party in interest so they may have the opportunity to file a response.

3.2 General Contents of Petitions

Every petition shall include the following, in a format specified by MBARD and submitted to MBARD with the information required in this rule.

- 3.2.1 The name, mailing address, email address, and phone number of the petitioner, or other person authorized to receive service of the notices.
- 3.2.2 Whether the petitioner is an individual, partnership, corporation, or other entity, and names and addresses of partners, if a partnership, names and addresses of the officers, if a corporation, names and addresses of the persons in control, if other entity.
- 3.2.3 The type of business or activity involved in the application and the street address or location at which it is conducted.
- 3.2.4 A brief description of the article, machine, equipment, or other contrivance, if any, involved in the application, including the permit number if there is a permit to operate.
- 3.2.5 The type of petition being filed that is:

Variance Petitions

- 1. Short-term variance – less than 90 days [H&SC Section 40825]
- 2. Long-term (regular) variance – more than 90 days [H&SC Section 40826/42358]
- 3. Interim variance – [H&SC Section 40824 and 42351, in conjunction with a petition filed for a short-term/long-term variance]
- 4. Emergency variance [H&SC Section 42359.5]
- 5. Product variance [H&SC Section 42365 & 42366]
- 6. Variance revocation or modification [H&SC Section 42356]

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Permit Dispute Petitions

7. Review of permit or emission reduction credit denial [H&SC Section 42302]
8. Review of emission reduction credit denial [H&SC Section 40713]
9. Petition by an aggrieved party [H&SC Section 42302.1]
10. Review of permit suspension for failure to provide requested information per H&SC Section 42304 [H&SC Section 42306]
11. Petition to revoke a permit [H&SC Section 42307]

Rehearing or Abatement Order Petitions

12. Rehearing of a decision [H&SC Section 40821]
13. Petition for an order of abatement [H&SC Section 42451]
14. Defense of an interim abatement order [H&SC Section 42451.5]

- 3.2.6 Each petition shall be signed by either the petitioner or a designated agent on petitioner's behalf with a statement of their authority to sign.

3.3 Specific Contents of Petitions

In addition to the general petition requirements outlined in Section 3.2, petitions shall include the information below as required by the petition type.

3.3.1 Variance Petitions

For an interim or emergency variance, facts which support a determination by the Hearing Board that 'good cause' exists to hear a variance without notifying the public about the variance and providing the public with an opportunity to present evidence concerning the variance. [H&SC Section 42351(c) or 42359.5(b)]

In addition to the items listed in 3.2, petitions for short-term or long-term variances shall include:

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1. The time period requested for the variance.
2. The section, rule or order which will be violated if a variance is not granted.
3. The facts showing that compliance with the section, rule, or order will result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of lawful business.
4. The facts showing that the closing or taking will be without corresponding benefit in reducing air contaminants.
5. The consideration given to curtailing operations in lieu of obtaining a variance.
6. The final compliance date and increments of progress if the requested variance period exceeds one year, or if requested by the Air Pollution Control Officer.
7. The conditions associated with the individual increments of progress; including, but not limited to, increments of progress schedules, operating parameters, and reporting requirements.
8. An estimation of excess emissions and proposed actions which will reduce excess emissions to the maximum extent feasible during the variance period.
9. Procedures, methods, and equipment used to quantify emission levels from the source during the variance period, subject to approval and reporting requirements of the Air Pollution Control Officer.
10. Whether or not operations under such variance, if granted, will constitute a nuisance as specified in H&SC Section 41700.

3.3.2 Product Variance Petition

In addition to the items listed in 3.2, petitions for product variances shall include:

1. The facts showing the petitioner exercised due diligence in attempting to locate, research, or develop a product that is in compliance with the air districts rules and regulations.
2. A proposed written notice that must be furnished to any retailer, distributor, or purchaser of the product for the duration of the variance. The notice shall contain the following information:
 - a. That the product is being sold pursuant to a product variance granted by the Hearing Board.
 - b. The beginning and ending dates of the product variance.
 - c. Any conditions to be set forth in the product variance which might reduce excess emissions.

3.3.3 Permit or Emission Reduction Credit Action Petitions

In addition to the items listed in 3.2, petitions for permit or emission reduction credit actions shall include:

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1. The section, rule or order which is the basis for conditional approval, suspension, denial, or revocation; or which is alleged to have been violated or is the basis of the grievance.
2. Statement as to why the petition is being sought.
3. The facts illustrating the potential impact on the source, public, and aggrieved party if the action is sustained by the Hearing Board.
4. The Hearing Board action requested.

3.3.4 Rehearing Petition

In addition to the items listed in 3.2, petitions for rehearing shall include:

1. The original petition number and hearing date.
2. The reasons and additional facts which merit rehearing the petition.
3. The Hearing Board action requested.

3.3.5 Abatement Order Petition

In addition to the items listed in 3.2, petitions for abatement orders shall include:

1. The section, rule, or order which is alleged to have been violated.
2. A statement of the facts constituting the violation, or alleged violation, and a description of the potential impacts.
3. Permit status and history of the source sought to be abated.
4. The particular act or operation sought to be abated, together with petitions, if applicable.
5. Facts showing that abatement is necessary to prevent future violations.

3.4 Filing an Accusation for Permit Revocation or Order of Abatement

An accusation may be brought by the Air Pollution Control Officer, for permit revocation or order of abatement pursuant to H&SC Section 42307 or 42451; or on the motion of the MBARD Board of Directors or by the Hearing Board, on its own motion, pursuant to H&SC Section 42451; or on the motion of any person authorized by law.

3.4.1 Service of Accusation for Petition for Permit Revocation or Order of Abatement

Upon the filing of an accusation and petition for permit revocation or order of abatement, MBARD shall serve a copy on the respondent. MBARD may include with the accusation any information which it deems appropriate including a form entitled "Notice of Defense". The accusation and all accompanying information shall be served on respondent by certified mail with return receipt or by any other means allowed by civil

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actions in California. The service of accusation shall include language similar to the following:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the Hearing Board within 15 days after the accusation was personally served on you or mailed to you, the Hearing Board may proceed with a hearing upon the accusation without your presence, and may issue any order supported by substantial evidence. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to the Hearing Board to Monterey Bay Air Resources District, 24580 Silver Cloud Court, Monterey, California 93940. You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 of the Government Code in the possession, custody or control of the agency, you may contact MBARD at the above address.

3.4.2 Failure to File Notice of Defense

If the respondent to an accusation fails to file a notice of defense, affidavits and respondent's express admissions may be used as evidence without any notice thereof to respondent, and the Hearing Board may at a public hearing decide the matter or dismiss the action. Nothing herein shall be construed to deprive the party of the right to make a showing by way of mitigation.

3.4.3 Amendment of Accusation before Hearing

At any time before the matter is submitted for decision, the Hearing Board may file or permit the filing of an amended accusation. All parties shall be notified and if the amended accusation presents new evidence, the Hearing Board shall afford the respondent the reasonable opportunity to prepare its defense but it shall not be entitled to file further pleadings unless the Hearing Board so orders. Any such new charges shall be deemed controverted, and any objections to the amended accusation may be made orally and shall be noted in the record of the hearing.

3.5 Failure to Comply with Rules

No petition shall be accepted by the Hearing Board which does not comply with these rules relating to the filing, content, and service of petitions, unless the chairperson or any two members of the Hearing Board direct otherwise and confirm such direction in writing. Such direction need not be made at a meeting of the Hearing Board. The chairperson or any two members, without a meeting, may require the petitioner to state further facts or reframe a petition so as to disclose clearly the issues involved.

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3.6 Withdrawal of Petition

The petitioner may, by giving notice to the Hearing Board, withdraw their petition at any time prior to the time set for a hearing thereof, without a hearing or meeting of the Hearing Board. The Clerk of the Hearing Board shall notify all interested persons of such withdrawal.

3.7 Hearings

3.7.1 Place of Hearing

All hearings shall be held at a place designated by the Hearing Board and which is readily accessible to the public.

3.7.2 Preliminary Matters

Preliminary matters such as setting a date for hearing, granting continuances, approving petitions for filing, permitting amendments thereto and other preliminary matters not determinative of the merits of the case may be determined by the chairperson or any two members of the Hearing Board without a hearing or meeting of the Hearing Board and without notice.

3.7.3 Notice of Hearing

The Clerk of the Hearing Board shall give notice of the time and place of the hearing by email, mail, or personal delivery service to the petitioner, Air Pollution Control Officer, holder of the permit, and to any person entitled to notice pursuant to the timelines in H&SC Sections 40823, 40824, 40825, 40826, or 40827.

For an interim variance, the ‘reasonable notice’ requirement means at least 72 hours before the hearing.

The exception to the notice requirement is for an emergency variance. The chair of the Hearing Board or any other member of the Hearing Board may grant, without notice and hearing, an emergency variance to an applicant. [H&SC Section 42359.5(a)]

3.7.4 Recording of Hearings

Each hearing shall be electronically recorded by the Clerk of the Hearing Board. Any party to the hearing may arrange for a court reporter at the party’s expense. The recording will be retained for one year in accordance with H&SC Section 40828(b).

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3.7.5 Quorum

Three members of the Hearing Board shall constitute a quorum and no action shall be taken except in the presence of a quorum. [H&SC Section 40820]

The exception to quorum requirement is for an emergency variance. The chair of the Hearing Board or any other member of the Hearing Board may grant, without notice and hearing, an emergency variance to an applicant. [H&SC Section 42359.5(a)]

3.7.6 Failure to Appear

Where a party fails to appear for a hearing after notice of time and place has been given to all parties by the Hearing Board, the Hearing Board may upon its own motion decide the matter or dismiss the action.

3.7.7 Administration of Oaths and Sworn Testimony

Any witness, including interested members of the public who want to testify, must be sworn in before testifying. Any member of the Hearing Board, participating in the hearing, may administer oaths to swear in witnesses or interested members of the public. [H&SC Section 40829 and 40830]

3.7.8 Evidence

Oral evidence shall be taken only after administration of oaths to those persons providing testimony. The hearing need not be conducted according to technical rules relating to evidence and witnesses.

Each party shall have these rights:

1. To call and examine witnesses.
2. To introduce witnesses.
3. To cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.
4. To impeach any witness, regardless of which party first called them to testify.
5. To rebut the evidence against them.

If the respondent does not testify in their own behalf, they may be called and examined as if under cross examination.

The Hearing Board shall allow interested members of the public a reasonable opportunity to testify with regard to a matter under consideration. Interested persons may attend and submit oral or written statements at the hearing. Written statements should be submitted to the Clerk of the Hearing Board five days before

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the hearing. Statements need not conform to formal rules of evidence. The chairperson may impose reasonable limits on the duration of oral presentations.

3.7.9 Subpoena

As deemed necessary by the Hearing Board, any person relevant to a particular hearing may be examined by the Hearing Board. The chair of the Hearing Board may issue a subpoena in accordance with H&SC Sections 40840, 40841, and 40842.

3.7.10 Continuances

The Chair or any two members of the Hearing Board shall grant any continuance of 15 days or less, which is concurred by the petitioner, the Air Pollution Control Officer and by all other persons who are party to the action. This action may be taken without a meeting of the Hearing board and without prior notice. This does not preclude the Hearing Board from continuing a petition for a period longer than 15 days during or after the duly noticed hearing.

3.8 Short-Term and Long-Term Variance Findings

No short-term or long-term variance shall be granted unless the Hearing Board makes the following findings.

- 3.8.1 That the petitioner for a variance is, or will be, in violation of Section 40701 of the H&SC, or any rule regulation or order of MBARD.
- 3.8.2 That, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either: an arbitrary or unreasonable taking of property; or the practical closing or elimination of a lawful business. In making those findings where the petitioner is a public agency, the Hearing Board shall consider whether or not requiring immediate compliance would impose unreasonable burden upon an essential public service.
- 3.8.3 That the taking of property or closing a business per Section 3.8.2 would be without a corresponding benefit to air quality.
- 3.8.4 That the applicant has given consideration to curtailing operations in lieu of obtaining the variance.
- 3.8.5 During the period the variance is in effect, the petitioner will reduce excess emissions to the maximum extent feasible during the variance period.
- 3.8.6 The petitioner will monitor or otherwise quantify the emission levels from the source during the variance period and report these emission levels to MBARD pursuant to a schedule established by MBARD, if requested to do so by MBARD.

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3.8.7 Operation under the variance will not result in a nuisance in accordance with H&SC Section 41700.

3.8.8 Operation under the variance must result in expeditious return to compliance.

3.9 Product Variance Findings

No product variance shall be granted unless the Hearing Board makes the following findings.

3.9.1 That the petitioner for a variance is, or will be, in violation of Section 40701 of the H&SC, or any rule regulation or order of MBARD.

3.9.2 Due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either: an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business.

3.9.3 The closing or taking would be without a corresponding benefit to air quality.

3.9.4 The petitioner exercised due diligence in attempting to locate, research, or develop a product that is in compliance with MBARD rules and regulations.

3.9.5 During the period of the variance, the petitioner shall quantify any excess emissions to the maximum extent feasible and report the emission level to MBARD, if requested.

3.9.6 Verification that during the duration of the variance, the appropriate and approved notice shall be provided to any retailer, distributor, or purchaser of the product when located within MBARD's jurisdiction.

3.10 Abatement Order Findings

The Hearing Board may do the following:

3.10.1 Issue a preliminary determination, final determination, or vacate an interim abatement order as specified in H&SC Section 42451.5.

3.10.2 Issue an abatement order if the Hearing Board finds that any person is constructing or operating any article, machine, equipment, or other contrivance without a permit to operate required by MBARD Rule 200; is in violation of H&SC Section 41700 or 41701; or of any rule, regulation, or order prohibiting, or limiting the discharge of air contaminants into the atmosphere. [H&S Code Section 42451(a)]

3.10.3 Issue an abatement order in accordance with H&SC Section 42451(b) pursuant to the stipulation of the Air Pollution Control Officer and the person or persons

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accused of constructing or operating any article, machine, equipment, or other contrivance without a permit to operate required by MBARD Rule 200; is in violation of H&SC Section 41700 or 41701; or of any rule, regulation, or order prohibiting, or limiting the discharge of air contaminants into the atmosphere. The stipulation shall set forth terms and conditions and the Hearing Board shall include a written explanation of its action in the order for abatement.

3.11 Permit Revocation Findings

A permit may be revoked pursuant to H&SC Section 42309 if the Hearing Board makes the following findings.

- 3.11.1 The permittee has failed to correct any conditions required by the Air Pollution Control Officer.
- 3.11.2 A refusal of a permit would be justified.
- 3.11.3 Fraud or deceit was employed in obtaining the permit.
- 3.11.4 Any violation of Part 4 of Division 26 of the Health and Safety Code or any rule, regulation, or order of MBARD.

3.12 Other Remedies for Permit Dispute Petitions

After a hearing, if the Hearing Board does not revoke a permit per Section 3.11, the Hearing Board may any do of the following pursuant to H&SC Section 42309:

- 3.12.1 Grant a permit denied by the APCO.
- 3.12.2 Continue the suspension of a permit suspended by the APCO.
- 3.12.3 Remove the suspension of an existing permit invoked by the APCO pending the furnishing by the permittee of the information, analyses, plans, and specifications required pursuant to H&SC Section 42304.
- 3.12.4 Find no violations exist and reinstate the permit.

3.13 Permit or Emission Reduction Credit Denial Findings

In order to deny a permit or Emission Reduction Credit, the Hearing Board must find whether the permit or Emission Reduction Credit was properly issued per H&SC Section 42302.1.

3.14 Imposition of Additional Requirements and Discretion

- 3.14.1 Additional Requirements

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In making the required findings to grant a variance, the Hearing Board may prescribe requirements, other than those imposed by statute or by any rule, regulation, or order of the MBARD Board of Directors, not more onerous, applicable to plants and equipment operated by specified industry or business or specified activity, of to the operations of individual persons. [H&SC Section 42353]

3.14.2 Discretion

In prescribing requirements to grant a variance, the Hearing Board shall exercise a wide discretion in weighing the equities involved and the advantages to residents of the air district from the reduction of air contaminants and disadvantages to any otherwise lawful business, occupation, or activity involved, resulting from requiring compliance with such requirements. [H&SC Section 42354]

3.15 Decision and Order

No decision shall be made except in the presence of a quorum and upon affirmative vote by at least three members of the Hearing Board.

An exception is for an emergency variance which may be granted without notice and for ‘good cause’ by one Hearing Board member in accordance with H&SC Section 42359.5 for a time period of less than 30 days.

In general, the Hearing Board decision and order shall comply the following.

- 3.15.1 Tailored to the petitioner and type of action heard.
- 3.15.2 An effective time period with an initial effective date and final compliance date. [H&SC Section 42358]
- 3.15.3 The Hearing Board may also impose reporting requirements showing compliance with a schedule of increments of progress, or compliance with an emissions curtailment or reporting plan.
- 3.15.4 The order expressly states the United States Environmental Protection Agency (EPA) or federal law has no provisions for and does not recognize variances.
- 3.15.5 If required by the Hearing Board as a condition to grant a variance, that a bond be posted by the petitioner to assure performance of any construction, alteration, repair, or other work required by the terms and conditions of the variance. The bond may provide that, if failure to perform the required work by the agreed date, the bond shall be forfeited as provided by H&SC Section 42355.

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3.15.6 The Hearing Board decision shall be in writing, served, and filed within 30 days after signature by the Hearing Board and shall contain the following:

1. A brief statement of facts found by the Hearing Board to support the required findings.
2. The determination of the issues presented related to required findings.
3. The order of the Hearing Board pursuant to Section 3.14.

3.15.7 A copy shall be mailed, emailed, or delivered to the Air Pollution Control Officer, the petitioner, and to every person who has appeared as a party in person or by counsel at the hearing.

3.15.8 Decisions granting, modifying, or otherwise affecting a variance shall be submitted to the California Air Resources Board within 30 days after signature by the Hearing Board.

3.16 Effective Date of Decision

The decision shall become effective on the date of the affirmative vote of the Hearing Board unless otherwise specified.

3.17 Excess Emissions Fee

The party to whom a variance is granted shall pay an excess emissions fee as may be required by the Hearing Board based on the fee schedule in Rule 309 Hearing Board Fees.

3.18 Rehearing Decisions

3.18.1 The Hearing Board may rehear a decision if a party petitions for a rehearing within ten day after a copy of the decision has been mailed or emailed to said party pursuant to H&SC Section 40861.

3.18.2 The Hearing Board may, in its discretion, with not fewer than four members present, within 30 days of the effective date of the decision, rehear any matter pursuant to H&SC Section 40821.

3.18.3 If any member of the public contests a decision made by a single member of the Hearing Board, the application shall be reheard by the full Hearing Board within 10 days of the decision.

PART 4 OFFICERS OF THE HEARING BOARD AND DUTIES

4.1 Election of Officers

The Chair and Vice Chair shall be elected at the first Hearing Board meeting of each calendar year. Elections may be held more frequently for reasons such as, Chair or Vice

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Chair resigns from their position or three members of the Hearing Board request a new election.

4.2 Duties of the Chair

The Chair, and in the Chair's absence, the Vice Chair, shall have the following duties and authority:

1. Preside at each hearing.
2. Determine Preliminary Matters. (Section 3.7.2)
3. Grant Emergency Variances. (Section 3.7.3)
4. Grant requests for a continuance. (Section 3.7.10)
5. Sign written orders.
6. Any other duty or authority granted by the Hearing Board.

~~MONTEREY BAY UNIFIED AIR POLLUTION CONTROL DISTRICT~~

~~**REGULATION VI—HEARING BOARD RULES**~~

~~*(Adopted by the Hearing Board on February 5, 2002, and Revised on June 19, 2002 to remove fee requirements and incorporate them into District Rule 309).*~~

~~Part 1. General~~

~~1.1 Conformance with State Law~~

~~In accordance with Health and Safety Code Section 40807, these Rules shall, in so far as is practicable be interpreted to be consistent with the rules of administrative adjudication by state agencies in Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2, of the Government Code of the State of California.~~

~~1.2 Location of Office.~~

~~The office of the Hearing Board of the Monterey Bay Unified Air Pollution Control District and that of its Clerk is located at 24580 Silver Cloud Court, Monterey, CA 93940.~~

~~1.3 Tenses, Gender and Number.~~

~~For the purpose of these Rules, the present tense includes the past and future tenses, and the future the present; each gender includes the two other genders; and the singular includes the plural and the plural the singular.~~

~~1.4 Election of Officers~~

~~The Chairperson and Vice Chairperson shall be elected by the Hearing Board members at the first Hearing Board meeting of each calendar year.~~

~~1.5 Hearing Calendar and Case Docket~~

~~The Clerk shall maintain docket of applications and accusations filed and a calendar or applications or accusations set for hearing. Each application or accusation shall be assigned a separate case number. This docket and calendar shall be available for public inspection at the office of the Hearing Board Clerk. Copies of the docket and calendar may be obtained from the Clerk, upon payment of any required fee pursuant to District Rule 309 (Hearing Board Fees).~~

~~1.6 Case Records~~

~~1.6.1 Material which comprises the Hearing Board's record in the docket cases is available for study and review by the public and the District staff in the office of the Hearing Board Clerk during normal office hours. This material will not be available for review or other use outside the Hearing Board Clerk's office. Copies of records and exhibits may be obtained at the Clerk's office by paying the actual copying costs.~~

~~1.6.2 When transcripts are ordered by a party or 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.~~

~~1.6.3 The Hearing Board will not permit withdrawal of evidence so long as any issue concerned in the hearing is still pending a final decision either before the Hearing Board or before the courts of California. If after a final decision by the Hearing Board no further proceeding for review has been taken within the time prescribed by law, exhibits may be withdrawn at the request of the party which submitted them, or his counsel, and upon order of the Hearing Board.~~

~~Part 2. Emergency Variances~~

~~2.1 Notice and Hearing Requirement~~

~~Except as provided in Section 2.4 below, an Emergency Variance may be granted without notice and hearing or, at the discretion of the Hearing Board, a hearing may be held.~~

~~2.2 Effective Date~~

~~If an Emergency Variance is granted, it may become effective as early as the date and time of the initial written filing. An application is considered filed as of the time and date of its receipt by the Clerk of the Hearing Board.~~

~~2.3 Application~~

~~An Applicant may file for an Emergency Variance by filing a written notification to the Clerk of the Hearing Board. The filing shall explain in detail the grounds for the request, including such information as the foreseeability of the cause of the emergency, whether the Applicant has used good maintenance practices and whether the Applicant's violations are due to conditions beyond its reasonable control. This initial filing does not in itself constitute a variance and provides no assurance of protection from penalty action.~~

2.4 Hearing

~~2.4.1 When a written notification requesting an Emergency Variance has been received, the Clerk of the Hearing Board shall, as soon as is practicable, schedule a telephone conference call hearing on the application with one member of the Hearing Board.~~

~~2.4.2 The hearing board member conducting the hearing (Hearing Officer) will call the meeting to order, will obtain the names of persons participating in the hearing for the record and will swear in all persons wishing to provide testimony.~~

~~2.4.3 After receiving testimony and other evidence, the Hearing Officer may grant or deny the request at that time, may obtain further information orally or in writing from the Applicant or the Air Pollution Control Officer before acting on the request, or may defer the matter for later consideration by the full Hearing Board. Such hearing shall be held within seven (7) days.~~

~~2.4.4 If the Applicant is not a participant in the hearing, the Applicant will be notified orally by the Clerk of the decision on the request for Emergency Variance. If an Emergency Variance is granted, the Clerk will notify all other Hearing Board members as soon as possible but not more than 48 hours from the time of the decision.~~

~~2.4.5 If, within this 48 hour period, any Hearing Officer notifies the Clerk that he or she wishes to convene a hearing upon the Emergency Variance so granted, the Clerk, after consultation with the Chairman, shall schedule a hearing within seven days and shall notify all Hearing Board Members, the Applicant, and the District. The purpose of such hearing shall be to review the issuance of the Emergency Variance and to consider whether it should remain in effect as ordered, be modified, or be terminated. Any such modification or termination, however, shall not be retroactive.~~

2.5 Order

~~After an Emergency Variance is granted, denied, or set for hearing pursuant to Section 2.4 above, a written order shall be issued by the Hearing Board member so acting, and shall be served by the Clerk upon the Applicant and the District. Any subsequent orders by the Hearing Board shall likewise be issued in writing and served upon the parties.~~

PART 3. Short Term and Interim Variances

3.1 Notice and Hearing Requirement

~~A Short Term or Interim variance may be granted only after legally adequate notice and a hearing.~~

3.2 Effective Date

~~If a variance is subsequently granted, it may become effective as early as the date and time of the filing of the written application. An application is considered filed as of the time and date of its receipt by the Clerk of the Hearing Board.~~

3.3 Application and Fees

~~An Applicant may file for a Short Term or Interim Variance by filing an application with the Clerk and paying the fee as set forth in Rule 309. This initial filing does not in itself constitute a variance and provides no assurance of protection from penalty action.~~

3.4 Hearing

~~3.4.1 The Clerk of the Hearing Board thereafter shall schedule a telephone hearing on the application with one member of the Hearing Board (Hearing Officer).~~

~~3.4.2 The Hearing Officer will call the meeting to order, will obtain the names of persons participating in the hearing for the record and will swear in all persons wishing to provide testimony.~~

~~3.4.3 The Hearing Officer shall grant or deny the request at that time, shall obtain further information orally or in writing from the Applicant or the Air Pollution Control Officer before acting on the request, or shall defer the matter for later consideration by the Hearing Board, which shall be set to be heard within seven (7) days.~~

~~3.5 After a short term or interim variance is granted, denied, or set for hearing a written order shall be issued by the Hearing Board member so acting, and shall be served by the Clerk upon the Applicant and the District. Any subsequent orders by the Hearing Board shall likewise be issued in writing and served upon the parties.~~

PART 4. Long Term Variance, Abatement Orders, Permit Revocations or Permit Appeals

4.1 Filing of Applications

~~Applications for long term variances, permit appeals and accusations for abatement orders, permit revocations or permit appeals shall be filed with the Clerk. This initial filing does not in itself constitute a variance or other order and provides no assurance of protection from penalty action.~~

4.2 Scheduling of the Hearing

~~The Clerk of the Hearing Board thereafter shall schedule the matter for the next regularly scheduled Hearing Board meeting unless a special meeting of the Hearing Board is~~

~~noticed in compliance with the Brown Act.~~

4.3 Fees

~~All such applications shall include the appropriate fee as stated in Rule 309 at the time of filing.~~

4.4 Notice and Hearing Requirements

~~Such demands for relief may be granted only after legally adequate notice and a hearing.~~

4.5 Effective Date

~~If a variance is subsequently granted or a permit issued, it may become effective no earlier than the date and time of the initial written filing.~~

PART 5. Application procedures

~~For all matters other than emergency variances, the following application procedures shall apply.~~

5.1 Filing Fees:

~~Except for an emergency variance, any application submitted on any Hearing Board matter shall be accompanied by the filing fee as set forth in Rule 309.~~

5.2 Filing of Papers:

~~All papers filed with or submitted to the Hearing Board shall be directed to the Clerk. The Clerk of the Hearing Board shall file the original in the original case file. If conformed copies are requested by the party filing a document, then sufficient additional copies shall be furnished by him for this purpose. Papers presented in proper form, accompanied with the required number of copies, required fee, if any, shall be deemed filed on the day presented.~~

5.3 Form of Papers—Variance

~~Unless otherwise indicated in this rule, papers filed with the Hearing Board shall be on a form provided by the District or typewritten or printed upon paper 8 ½ x 11 inches in size and the impression shall be on one side of the paper only and double spaced. The heading for variance applications shall be as follows:~~

BEFORE THE HEARING BOARD
OF THE MONTEREY BAY UNIFIED AIR POLLUTION CONTROL DISTRICT
STATE OF CALIFORNIA

In the Matter of the _____)	Docket No. _____
Application of _____)	
_____)	APPLICATION
name) _____)	FOR VARIANCE
_____)	
_____)	

5.4 Contents of Application for Variance.

~~5.4.1 An application to the Hearing Board shall state the grounds for the application and the specific section(s) of the regulations of the District, as well as the specific dates, for which a variance is requested.~~

~~5.4.2 The applicant shall set forth a concise statement of the ultimate facts constituting the reasons for granting a variance. For any variance other than an Emergency Variance, the statement must include those facts which would support the making of the finding required under Health and Safety Code Section 42352. If a class action is contended, supporting facts therefor shall be alleged.~~

~~5.4.3 The application should state, to the extent possible, the number of emission points, the different nature, if any, of emission points and should include measured values or estimates of the quantity and nature of emissions and the degree of violation for the source(s) in question. It shall close with a prayer for a variance, which shall set forth the conditions or terms of the desired variance.~~

~~5.4.4 The application shall contain a description of the property affected which shall be sufficient for its identification.~~

~~5.4.5 The application shall include a statement of whether or not the applicant intends to file additional written material. Such additional material shall be filed no less than 10 days prior to a hearing on the matter. The District and any intervenor may file a response to any additional material not less than five days prior to hearing.~~

~~5.4.6 The application shall include the date by which final compliance is to be achieved.~~

~~5.4.7 The application for a long term variance with a final compliance date longer than one year from the effective date of the variance must contain a statement of the "increments of progress" proposed by applicant.~~

~~5.4.8 The application for variance shall include a statement of facts regarding the applicant's evaluation as to whether the granting of the requested variance will adversely~~

~~affect the attainment and maintenance of pertinent national or State ambient air quality standards.~~

~~5.4.9 Verification.~~

~~Unless the state, or a county, city, or district, or an officer of such in his official capacity is an applicant, the application shall be verified. The form of verification, executed within this State, may be substantially the following form:~~

~~I, the undersigned, do hereby declare under penalty of perjury that I have read the foregoing document; that I know its contents, and that it is true.~~

~~Dated at _____, on _____~~

~~Signature _____~~

~~5.5 Contents of Other Applications.~~

~~All other applications for Hearing Board relief shall conform to the provisions of Section 5.4 of this Part to the extent that such sections are applicable to the subject of such applications, and shall include the appropriate filing fee pursuant to Rule 309.~~

~~5.6 Application for Intervention.~~

~~5.6.1 Any person who claims that he has a special interest relating to a pending variance action, may file a written application for intervention in such variance proceeding.~~

~~5.6.2 The application shall be filed with the Clerk not later than five days before the hearing of the matter, which hearing may be continued to facilitate action on the intervention request.~~

~~5.6.3 The application shall be served by mail or in person upon the parties to the proceeding, and shall set forth the grounds and purpose of such intervention.~~

~~5.6.4 The Hearing Board shall allow the parties to the action an opportunity to respond in writing to the application, may convene a prehearing conference, and shall rule on any such application prior to commencement of hearings.~~

~~5.6.5 If the person seeking intervention claims a special interest relating to the pending variance action, and that person is so situated that the disposition of the action may, as a practical matter, impair or impede that person's ability to protect that interest, the Hearing Board may, upon timely application, permit that person to intervene.~~

~~5.6.6 In exercising its discretion as to whether to grant or deny such an application, the Hearing Board shall consider whether intervention would unduly delay or prejudice the adjudication of the rights of the parties.~~

~~5.6.7 Intervention shall not be permitted in any variance action which is or becomes consolidated with an abatement action relating to the same subject. Any person permitted to intervene in a proceeding shall have all the rights and responsibilities of any party to a variance action, and shall be referred to as "intervenor".~~

~~5.7 Amendment of Application~~

~~The Hearing Board may in its discretion, upon stipulation or ten days notice, permit the amendment of an application either before or after submission on such terms and conditions as it may determine to be proper. The Hearing Board may continue the hearing, or reopen the hearing if the case has been submitted, whenever an amendment to an application makes it necessary to do so.~~

~~5.8 Response to Applications.~~

~~The Hearing Board may require the Air Pollution Control Officer to file a response to any or all applications in such a manner as the Hearing Board may from time to time direct. Any such response shall be served on the applicant and any other parties.~~

~~5.9 Permit Revocations and Abatement Orders~~

~~A hearing on a complaint by the Air Pollution Control Officer or by the Hearing Board or by the District Board, filed pursuant to Health and Safety Code Sections 42307, 42450, 42451, or other applicable provisions, shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The allegations of the accusation may be on information and belief.~~

~~5.10 Service of Accusation: Form, Manner and Proof.~~

~~5.10.1 Upon the filing of the accusation the District shall serve a copy thereof on the respondent. The District may include with the accusation any information which it deems appropriate including a form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the Hearing Board, will acknowledge service of the accusation and constitute a Notice of Defense.~~

~~5.10.2 The copy of the accusation shall include or be accompanied by a statement that~~

~~respondent may request a hearing by filing a notice of defense within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing.~~

The statement to respondent shall be substantially in the following form:

~~"Unless a written request for a hearing signed by or on behalf of the person named as Respondent in the accompanying Accusation is delivered or mailed to the Hearing Board within 15 days after the accusation was personally served on you or mailed to you, the Hearing Board may proceed with a hearing upon the accusation without your presence, and may issue any order supported by substantial evidence. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a Notice of Defense as provided by Section 3.4 below to the Clerk of the Hearing Board at 24580 Silver Cloud Court, Monterey, California 93940. You may be represented by counsel at any or all stages of these proceedings if you wish.~~

~~If you desire the names and addresses of witnesses, or an opportunity to inspect and copy any public documents in the possession, custody or control of the District, you may contact the District Counsel, 24580 Silver Cloud Court, Monterey, California 93940.~~

~~5.10.3 The accusation and all accompanying information shall be served on respondent by certified mail, return receipt requested or by any other manner authorized in civil actions in California.~~

~~5.11 Notice of Defense. Waiver of Right to Hearing; Statement by Way of Mitigation.~~

~~5.11.1 Within 15 days after service upon him of an accusation, the respondent may file with the Hearing Board Clerk a notice of defense in which he may;~~

~~Request a hearing;~~

~~Object to the accusation upon the ground that it does not state acts or omissions upon which the Hearing Board may proceed~~

~~Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the occurrence(s) complained of or prepare his defense;~~

~~Admit the accusation in whole or in part; or~~

~~Present new matter by way of defense.~~

~~5.11.2 Within the time specified, respondent may file one or more notices of defense upon any or all of these grounds, but all such notices shall be filed within that period unless the Hearing Board in its discretion authorizes the filing of a later notice.~~

~~5.11.3 The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the Hearing Board may nevertheless hold a hearing upon the merits of the accusation without respondent's participation.~~

~~5.11.4 Unless objection is taken as provided Section 5.11.1, all objections to the form of the accusation shall be deemed waived.~~

~~5.11.5 The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.~~

~~5.11.6 Even if he does not file a notice of defense a respondent may file a statement by way of mitigation or file a request for variance.~~

~~5.12 Amendment of Accusation before Submission.~~

~~5.12.1 At any time before the matter is submitted for decision, the Hearing Board may file or permit the filing of an amended or supplemental accusation.~~

~~5.12.2 All parties shall be notified thereof.~~

~~5.12.3 If the amended or supplemental accusation presents new charges, the Hearing Board shall afford the respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file further pleadings unless the Hearing Board so orders.~~

~~5.12.4 Any such new charges shall be deemed controverted and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.~~

~~5.13 Amendment of Accusation after Submission.~~

~~5.13.1 The Hearing Board may order amendment of the accusation after submission of the case for decision.~~

~~5.13.2 Each party shall be given notice of the intended amendment and an opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown, the Hearing Board shall reopen the case to permit the introduction of additional evidence~~

~~5.14 Withdrawal of Abandonment of Application for Variance or Accusation.~~

~~5.14.1 At any time before the application for a variance is scheduled on calendar, the applicant may file in the office of the Hearing Board Clerk a written abandonment of the application, or the parties may file in the said office a stipulation for abandonment.~~

~~5.14.2 The filing of either document shall operate to dismiss the application.~~

~~5.14.3 After application for a variance has been scheduled on calendar, an application may be dismissed by the Hearing Board on written request of the applicant or stipulation of the parties filed with the Hearing Board~~

~~5.14.4 Requests for abandonment or withdrawal must be received by the Clerk of the Hearing Board 72 hours prior to the time set for the hearing excluding Sundays and holidays. For hearings which are set for a Monday, the request must be received by the Clerk of the Hearing Board prior to 3:00 p.m. of the preceding Thursday.~~

~~5.14.5 The Hearing Board may, either on its own motion or upon application of Counsel for the District, in the furtherance of justice and for good cause shown, order an accusation to be dismissed.~~

~~5.15 Failure to appear for Hearing or to File a Notice of Defense.~~

~~5.15.1 If the respondent to an accusation fails to file a notice of defense or to appear at the hearing, the Hearing Board may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without any notice thereof to respondent.~~

~~5.15.2 Where an applicant for a variance fails to appear for a hearing after notice of time and place has been given all parties, the Hearing Board may decide the matter upon the application and any briefs of the absent party, and any other evidence received, if any, or dismiss the application.~~

~~5.15.3 Nothing herein shall be construed to deprive the party of the right to make any showing by way of mitigation.~~

PART 6. Discovery

~~6.1 Depositions and Requests for Admission of Facts and of Genuineness of Documents.~~

~~For the purpose of discovery or for use as evidence in any proceedings, or for both purposes, and in addition to the methods of discovery provided in Chapter 5~~

~~(commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code, any party may conduct discovery as to any other party, including an employee or agent of a party, by any of the following methods:~~

~~Depositions upon oral examination; or~~

~~Written requests for admission of the genuineness of any relevant documents described in the request, or of the truth of any matters of fact set forth in the requests.~~

~~6.2 Procedures and Practice~~

~~Procedure and practice for taking of depositions, or for admission of facts, and of genuineness of documents shall follow, so far as compatible, Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code and the procedures and practice of the Code of Civil Procedure, Sections 2016 through 2021, and 2030, and 2036. The Hearing Board, in its discretion, may decide disputes between the parties concerning the availability or conduct of discovery and may set a schedule for discovery in any proceeding.~~

~~6.3 Subpoenas:~~

~~6.3.1 The Chairperson of the Hearing Board shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance of witnesses or production of documents at the hearing.~~

~~6.3.2 Compliance with the provisions of Section 1985 of the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena duces tecum.~~

~~6.3.3 After the hearing has commenced the Hearing Board may issue subpoenas and subpoenas duces tecum.~~

~~6.3.4 The process pursuant to 6.3.1 above shall be valid for all parts of the state and shall be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure.~~

~~6.3.5 No witness shall be obliged to attend at a place out of the county in which he resides unless the distance is less than 150 miles from his place of residence, except that the Hearing Board, upon affidavit of any party showing that the testimony of such witness is material and necessary, may endorse on the subpoena an order requiring the attendance of such witness.~~

~~6.3.6 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 amounts and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court.~~

~~6.3.7 Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residence as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of forty dollars (\$40) for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing.~~

~~6.3.8 Fees, mileage, and per diem shall be paid by the party at whose request the witness is subpoenaed.~~

~~PART 7. Hearings~~

~~7.1 Representation of 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. A party requesting relief in a Hearing Board proceeding must appear in person or by legal counsel or other qualified representative.~~

~~7.2 Conduct of hearings~~

~~7.2.1 Hearings on emergency variances may be heard by a single hearing board member at the discretion of the Hearing Board Chair.~~

~~7.2.2 Hearings on short term variances and interim variances may be heard by a single hearing board member at the discretion of the Hearing Board Chair and for so long as the population of the District is less than 750,000 persons.~~

~~7.2.3 Hearing on applications for long term variances, abatement orders, permit revocations and permit appeals as well as any matter which does not qualify for a hearing before one board member shall be heard by the full hearing board, sitting as a single body at the District Office or at such other place as the Hearing Board shall direct and as law may allow.~~

~~7.3 Hearing by Five Members or less:~~

~~7.3.1 The Hearing Board may hold a hearing en banc or with three or four of their number present.~~

~~7.3.2 The concurrence of three members shall be necessary for any decision.~~

~~7.3.3 A Hearing Board member who is unable to attend all the hearings in a matter may participate in the decision of the matter, provided such member has read the transcripts or heard a tape recording of the missed proceedings, or upon the stipulation of the parties.~~

~~7.4 Rehearing of Matter Decided by Less Than Five Members.~~

~~The Hearing Board with not less than four members being present, may, within 30 days rehear any matter which was decided by three members.~~

~~7.5 Disqualification of Hearing Board Members~~

~~7~~

~~7.5.1 A Hearing Board member shall disqualify himself and withdraw from any case in which, in his opinion, he cannot accord a fair and impartial hearing or consideration.~~

~~7.5.2 Any party may request the disqualification of any member by filing an affidavit before the submission of the case for decision stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue raised by the request shall be determined by the other members of the Hearing Board.~~

~~7.6 Quorum.~~

~~Three members of the Hearing Board shall constitute a quorum.~~

~~7.7 Continuances.~~

~~7.7.1 Authority for scheduling cases before the Hearing Board or continuing cases before the Hearing Board rests with the Chairperson of the Hearing Board or, in his absence, the Vice Chairperson.~~

~~7.7.2 Requests for continuance of cases scheduled before the Hearing Board must be received by the Clerk of the Hearing Board 72 hours prior to the time set for the hearing, excluding Sundays and Holidays. For hearings which are set for a Monday, the request must be received by the Clerk of the Hearing Board prior to 3:00 p.m. of the preceding Thursday.~~

~~7.7.3 It is the responsibility of the parties before the Hearing Board to notify the Clerk of the Hearing Board when they request continuance of a hearing.~~

~~7.7.4 Continuance requests made after the required 72 hour period will be ruled on by the Hearing Board during the scheduled hearing.~~

~~7.8 Prehearing Conferences.~~

~~7.8.1 For the purposes of expediting hearings, reducing expense and delay in Hearing Board procedures, eliminating excessive presentation of noncontroversial matters, defining disputed issues, deciding discovery questions, making evidentiary rulings which will streamline the conduct of hearings, or deciding any preliminary matter not determinative of the merits, the Hearing Board may conduct a prehearing conference.~~

~~7.8.2 Any party or any Hearing Board member may request a prehearing conference by submitting a written request prior to any hearing in the case to the Clerk.~~

~~7.8.3 The Chairman shall then instruct the Clerk to set a prehearing conference either just prior to a Hearing Board meeting at some other specified date and time and to give written notice of such setting to the parties and to all Hearing Board members.~~

~~7.9 Stipulations.~~

~~7.9.1 The parties to an action may stipulate to any matter which is in controversy, whether factual or an issue of law, either orally or in writing.~~

~~7.9.2 A stipulation is an agreement by the parties as to the existence of certain facts, the manner in which the law applies to the facts in the case, or the manner in which the controversy should be resolved.~~

~~7.9.3 While a stipulation expresses the agreement of the parties, it is not binding upon the Hearing Board, which can either issue a decision in accordance with the stipulation or take any other action which is warranted by the evidence. A stipulation as to factual matters, however, conclusively establishes facts stipulated to and removes such facts from issue.~~

~~7.9.4 The submission by the parties of any stipulation does not relieve the parties of the necessity to appear at any hearing, since a stipulation has no binding effect upon how the Hearing Board may proceed in any action.~~

~~7.10 Validity of Class Action.~~

~~As soon as practicable after the commencement of a proceeding brought as a class action, the Hearing Board shall determine whether it may properly be so maintained and may, if necessary, hold a hearing with respect to this determination prior to the initiation of hearings on the merits of the application.~~

~~7.11 Order of Proceedings.~~

~~The order of proceedings before the Hearing Board shall ordinarily be as follows. The~~

~~Hearing Board may in its discretion alter the order of proceedings as may be desirable to expedite the business of the board.~~

~~Announcement of pending matters;
Enter appearances;
Opening statement of moving party;
Opening statement of Intervenor(s);
Opening statement of responding party;
Evidence produced by moving party;
Evidence produced by intervenor(s);
Evidence produced by responding party;
Public testimony;
Rebuttal evidence produced by moving party;
Rebuttal evidence produced by intervenor(s);
Rebuttal evidence produced by responding party;
Closing argument of moving party;
Closing argument of intervenor(s);
Closing argument of responding party;
Rebuttal argument of moving party;
Matter decided, taken under submission or continued.~~

~~7.12 Oral Evidence.~~

~~Oral evidence shall be taken only on oath or affirmation. Each party shall have these rights; to call and examine witnesses; to introduce exhibits; to cross-examine 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 to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.~~

~~7.13 Affidavits.~~

~~7.13.1 At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with proper notice.~~

~~7.13.2 Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his 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 orally.~~

~~7.13.3 If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.~~

~~7.13.4 Notice shall be given substantially in the following form:~~

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

~~7.14 Rules of Evidence~~

~~7.14.1 The hearing need not be conducted according to technical rules relating to evidence and witnesses.~~

~~7.14.2 Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely 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.~~

~~7.14.3 Hearsay evidence may be used but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.~~

~~7.14.4 The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.~~

~~7.14.5 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 matter sought to be proved are otherwise established.~~

~~7.14.6 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 decision. Such testimony shall be relevant to the matter being heard, shall be under oath, and shall be subject to cross-examination and any appropriate evidentiary objections, the same as any other testimony.~~

~~7.15 Evidentiary Rulings.~~

~~Rulings upon evidentiary objections by either party or by any member of the Hearing Board shall be decided by majority vote of the Hearing Board.~~

~~7.16 Official Notice. Putting Noticed Matters upon Record. Manner of Refutation.~~

~~In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the Hearing Board's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, or appended thereto. Any such party shall be given a reasonable opportunity, on request, to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the Hearing Board.~~

~~7.17 Preparation and Filing of Record.~~

~~Proceedings of the Hearing Board shall be not recorded by a court reporter unless a party to the action so requests and pays the costs of such recording. Proceedings will not be transcribed unless a request for a transcription is made to the court reporter by a party to the proceedings or a member of the Hearing Board. In the event a transcript is desired by a party to the proceedings other than the District, the cost of this transcription shall be paid by said party.~~

~~PART 8. Orders and Rehearings~~

~~8.1 Orders of the Hearing Board.~~

~~All orders of the Hearing Board shall be in writing and shall contain the findings and conclusions upon which the Board's decision is based. The decision of the Hearing Board shall be effective upon filing with the Clerk, unless otherwise provided in the order.~~

~~8.2 Excess Emission Fees.~~

~~The applicant to whom a variance is granted shall pay an excess emission fee as may be fixed from time to time by the District Board and set forth in Rule 309.~~

~~8.3 Request for Rehearing: Time to File.~~

~~The Hearing Board may grant or deny a rehearing of a decision if a party petitions for a rehearing within ten days after a copy of the decision has been mailed to him.~~