

REGULATION V - PROCEDURE BEFORE THE HEARING BOARD

Rule 5.1 General

- A. The provisions of Chapter 8, Part 3 and Chapter 4, Part 4, Division 26 of the State of California Health and Safety Code, are incorporated herein by this reference.
- B. This Regulation shall apply to all hearings before the Hearing Board. For the purposes of this Regulation, the Hearing Officer shall be the Chairman or any other member of the Hearing Board so designated by the Hearing Board. In addition to this Regulation, the Hearing Board has adopted Hearing Board procedures, which shall apply to all hearings before the Hearing Board.
- C. Request for a hearing shall be initiated by the filing of a petition with the Clerk of the Hearing Board, the payment to said Clerk of the fee provided in Rule 3.1, and service of the petition on the applicant or permittee, where petitioner is not the applicant or permittee. No fee shall be required for the filing of a petition by any public district or governmental agency.
- D. The Clerk of the Hearing Board shall not accept for filing any petition which does not comply with these rules relating to the form, filing, and service of petitions.
- E. The petitioner may withdraw his/her petition at any time before submission of the case to the Hearing Board. The Clerk of the Hearing Board shall notify all interested persons of such withdrawal.
- F. All hearings shall be held at the time and place designated by the Hearing Board.
- G. A record of all proceedings before the Hearing Board shall be made. The record shall be a written summary or taped recording of all the evidence, testimony and proceedings presented at the hearing, made by a person designated by the Hearing Board for that purpose. One copy of such transcript shall be forwarded to the Control Officer.
- H. Preliminary matters such as setting a date for hearing, granting continuances, approving petitions for filing, allowing amendments and other preliminary rulings not determinative of the merits of the case, may be made by the Chairman, or at a duly noticed special meeting of the Hearing Board, by any three members of the Hearing Board.
- I. The Hearing Board may take official notice of any matter which may be judicially noticed by the courts of this state.
- J. The decision shall become effective upon filing of the written decision with the Clerk of the Hearing Board unless a later effective date is otherwise specified by the Hearing Board.

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- K. Whenever the members of the Hearing Board conducting any hearing deem it necessary to examine any person as a witness at such hearing, the Chairman of the Hearing Board shall issue a subpoena, in proper form, commanding such person to appear before it at a time and place specified, to be examined as a witness. The subpoena may require such person to produce all books, papers, and documents in his/her possession or under his/her control to such hearing.

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Rule 5.2 Contents of Petitions

A. Every petition shall state:

1. The name, address and telephone number of the petitioner or other person authorized to receive service of notice.
2. Whether the petitioner is an individual, co-partnership, corporation, or other entity; names and addresses of partners, if a co-partnership; names and addresses of the persons in control if other entity.
3. The type of business or activity involved in the application and the street address at which it is conducted.
4. A brief description of the article, machine, equipment or other contrivance, if any involved in the application.
5. Whether the petitioner desires a hearing:
 - a. For a variance under Section 42350, Health and Safety Code.
 - b. For review of a permit denied by the Control Officer.
 - c. For review of a permit issued by the Control Officer.
 - d. To determine if a permit should be revoked.
 - e. To modify or revoke a variance previously granted.
 - f. For an abatement order.
 - g. For any other reason.

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Rule 5.3 Petition for Variances

In addition to the matters required by Rule 5.4, a Petition for Variance shall state briefly:

- A. The section, rule, or order complained of.
- B. The facts showing why compliance with the section, rule, or order is unreasonable.
- C. For what period of time the variance is sought and why.
- D. The damage or harm resulting, or which would result, to petitioners from compliance with such section, rule, or order.
- E. The requirements which petitioner can meet and the date when petitioner can comply with such requirements.
- F. The advantages and disadvantages to the residents of the district resulting from granting a variance.
- G. Whether or not operations under such variance, if granted, would constitute a nuisance.

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Rule 5.4 Notice of Hearing

- A. Notwithstanding any other provisions of these regulations, the Hearing Officer may issue, without notice and hearing, an emergency variance to an applicant.
- B. In the case of a hearing to consider an application for a variance or a series of variances to be in effect for a period of not more than ninety days, or an application for a modification of a schedule of increments of progress, or for an order of abatement: the Hearing Board shall serve notice of the time and place of a hearing to grant such a variance or modification upon the Control Officer, all the Northeast Plateau Air Basin Districts, ARB, the EPA, and upon the applicant or permittee, not less than ten days prior to such hearing.
- C. In the case of a hearing to consider an application for an interim variance: the Hearing Board shall serve reasonable notice of the time and place of the hearing on the Control Officer and upon the applicant.
- D. In the case of a hearing to consider an application for variance, other than a ninety-day variance, or an interim variance, or an application for a modification of a final compliance date in a variance previously granted, the notice requirements shall be as follows:
 - 1. The Hearing Board shall serve a notice of the time and place of a hearing to the Control Officer, all other districts in the Northeast Plateau Air Basin, the ARB, the EPA, upon the petitioner or permittee, and every person who requests such notice, not less than thirty days prior to such hearing.
 - 2. The Hearing Board shall also publish a notice of the hearing in at least one daily and one weekly newspaper of general circulation within the district at least fifteen (15) days prior to the hearing.
 - 3. The notice shall state the time and the place of the hearing, the time when, commencing not less than fifteen (15) days prior to the hearing, and the place where the application including any proposed conditions or schedule of increments of progress will be available for public inspection, and any other information that may be necessary to reasonably apprise individuals within the District of the nature and purpose of the meeting. The application and other required information (e.g., proposed conditions or schedule of compliance) shall be available not less than fifteen days prior to the hearing.
- E. In the case of a hearing appealing an Authority to Construct, Permit to Operate issuance, denial, suspension or conditions of approval, the notice requirement shall be as follows:

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1. The Hearing Board shall serve a notice of the time and place of the hearing upon the Control Officer, the ARB, the applicant or permittee affected, and the petitioner (if that party is not the applicant), and every person who requests such notice, at least ten days prior to such hearing.
2. The Hearing Board shall also publish a notice of the hearing in at least one daily and one weekly newspaper of general circulation within the district at least ten days prior to the hearing.
3. The notice shall state the time and place of the hearing and such other information as may be necessary to reasonably apprise individuals within the District of the nature and purpose of the meeting.

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Rule 5.5 Rules of Evidence and Procedure

- A. Oral evidence may be taken on oath of affirmation.
- B. Each party, as defined in Section II of the Hearing Board Procedures, shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witness on any matter relevant to the issues, and to rebut the evidence against him/her.
- C. The hearing need not be conducted according to technical rules relating to evidence and procedure. 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. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.

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Rule 5.6 Hearing and Decision

- A. All hearings shall be held by three or more members of the Hearing Board, and the concurrence of three members shall be necessary for a decision. Failure to achieve concurrence of at least three members of the Hearing Board shall result in retention of an underlying decision. The decision shall be in writing and shall contain a brief statement of facts found to be true, the determination of the issues presented, and the order of the Hearing Board. A copy of the decision shall be immediately filed with the Hearing Board Clerk and mailed or delivered to the Control Officer, the petitioner, ARB, and every person who has filed an answer or who has appeared as a party in person or by counsel at the hearing.
- B. After a hearing, the Hearing Board may do any of the following:
1. Grant a permit denied by the Control Officer.
 2. Continue the suspension of a permit suspended by the Control Officer.
 3. Remove the suspension of an existing permit invoked by the Control Officer pending the furnishing by the permittee of the information, analyses, plans, and specifications required.
 4. Find that no violation exists and reinstate an existing permit.
 5. Revoke an existing permit if it finds any of the following:
 - a. The permittee has failed to correct any condition required by the Control Officer.
 - b. A refusal of a permit would be justified.
 - c. Fraud or deceit was employed in the obtaining of the permit.
 - d. Any violation of this part, or of any order, rule, or regulation of the district.
 6. Grant a variance in accordance with the conditions as further specified in this rule.
- C. No variance shall be granted unless the Hearing Board makes all of the following findings:
1. That the petitioner for a variance is or will be in violation of a provision of the California Health and Safety Code or of any rule, regulation or order of the District.
 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 and elimination of a lawful business.
 3. That such closing or taking would be without a corresponding benefit in reducing air contaminants.
- D. Upon making the specific finding set forth in Rule 5.6.C., the Hearing Board shall prescribe requirements other than those imposed by statute or by any rule, regulation, or order of the District Board, not more onerous, applicable to plants and equipment operated by specified industry or business or for specified activity, or to the operations of individual person. However, no variance shall be granted if the operation under the variance will result in a violation of Rule 4.2.
- E. In prescribing other and different requirements, in accordance with Rule 5.6.D., the Hearing Board shall exercise a wide discretion in weighing the equities involved and the advantages to the residents of the District from the reduction of air contaminants and the disadvantages to any otherwise lawful

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business, occupation, or activity involved, resulting from requiring compliance with such requirements.

- F. The Hearing Board may require, as a condition of granting a variance, that a cash bond or a bond executed by two or more good and sufficient sureties or by a corporate surety, be posted by the party to whom the variance was granted to assure performance of any construction, alteration, repair or other work required by the terms and conditions of the variance. Such bonds may provide that, if the party granted the variance fails to perform such work by the agreed date, the cash bond shall be forfeited to the district having jurisdiction, or the corporate surety or sureties shall have the option of promptly remedying the variance default or paying to the district an amount, up to the amount specified in the bond, that is necessary to accomplish the work specified as a condition of the variance.
- G. The Hearing Board, in making any order permitting a variance, shall specify the time during which such order shall be effective, in no event, except as otherwise provided in Rule 5.6.H., to exceed one year, and shall set a final compliance date.
- H. A variance may be issued for a period exceeding one year if the variance includes a schedule of increments of progress specifying a final compliance date by which the emissions of air contaminants of a source for which the variance is granted will be brought into compliance with applicable emission standards.

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Rule 5.7 Emergency Variances

An emergency variance or series of variances shall be in effect until the hearing to consider a request by the applicant for a variance other than an emergency variance, but not to exceed thirty days.

- A. Upon receipt of a request for an emergency variance, the Control Officer shall contact the Hearing Officer to establish a time and place for consideration of the request. The Control Officer shall inform the applicant of such time and place.
- B. The applicant and Control Officer shall present testimony and evidence to the Hearing Officer. The burden of proof shall be on the applicant to demonstrate that a breakdown or other emergency situation exists.
- C. In order to consider the granting of an emergency variance for an extended breakdown situation, the Hearing Officer should determine the causes of the breakdown and that the equipment failure or malfunction:
 1. Is not the result of neglect or disregard of any air pollution control law or rule or regulation.
 2. Is not intentional or the result of negligence.
 3. Is not the result of improper maintenance.
- D. After consideration of the emergency variance request, the Hearing Officer may grant or deny an emergency variance. Within five working days following the granting of an emergency variance, a written order shall be issued confirming the decision, with appropriate findings.
- E. No emergency variance shall be granted unless the Hearing Officer determines that:
 1. The emergency variance request is caused by a breakdown condition or other emergency situation and may not be delayed until a properly noticed hearing.
 2. Granting of the emergency variance will not cause a public nuisance.
 3. Granting of the emergency variance will not create an immediate threat or hazard to public health or safety.
 4. Granting of the emergency variance will not interfere with the attainment or maintenance of any national ambient air quality standard.
 5. The requirements for a variance set forth in Rule 5.6.C. have been met.
- F. At any time after an emergency variance has been granted, the applicant or Control Officer may request the Hearing Officer to revise, revoke, or further condition the variance and issue an amended written order. All procedures shall be as designated for the original hearing.
- G. An emergency variance shall remain in effect only as long as necessary to correct the breakdown or emergency condition, but not to exceed the time period required for a properly noticed hearing to consider an interim or ninety-day variance in accordance with Rule 5.6.D., or thirty days, whichever is the shorter time period.

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- H. Within ten days after the date of expiration of an emergency variance, the applicant shall submit a written report to the Control Office including, but not limited to, the following details:
1. Duration of excessive emissions.
 2. Estimate of quantity of emissions.
 3. Statement of the cause of the occurrence.
 4. Corrective measures to be taken to prevent a recurrence.

Documentation of the breakdown condition may be required by the Control Officer.

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Rule 5.8 Interim Variance

Any person who has submitted an application for a variance and who desires to commence or continue operation pending the decision of the Hearing Board on the application, may submit an application for an interim variance. The Hearing Officer may hear the application for an interim variance. If any member of the public contests a decision made by any one member of the Hearing Board, the application shall be reheard by the full Hearing Board within ten days of this decision.

- A. An interim variance may be granted for good causes stated in the order Granting such a variance.
- B. The interim variance shall not be valid beyond the date of the decision of the Hearing Board on the application or for more than ninety days from the date of issuance of the interim variance, whichever comes first.
- C. The Hearing Board shall not grant any interim variance:
 - 1. After it has held a hearing in compliance with the requirements of Rule 5.4, or
 - 2. Which is being sought to avoid the notice of hearing requirement of Rule 5.4.

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Rule 5.9 Modification of Progress

If a person granted a variance with a schedule of increments of progress files an application for modification of the schedule and is unable to notify the Hearing Board sufficiently in advance to allow the Hearing Board to schedule a public hearing, the Hearing Board may grant a one-time interim authorization which is valid for not more than thirty days, to continue operation pending decision of the Hearing Board on the application.

- A. The Hearing Officer may hear such application.
- B. If a member of the public contests a decision made by one member of the Hearing Board, the application shall be reheard by the full Hearing Board within ten days of the decision.

The interim authorization shall not be granted for a requested extension of a final compliance date or where the original variance expressly required advance application for the modification of an increment of progress.

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Rule 5.10 Orders for Abatement

- A. The District Board or the Hearing Board may, after notice and a hearing, issue an Order for Abatement whenever it finds that any person is in violation of Section 41700 or 41701 of the California Health and Safety Code, or of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air. In holding such a hearing, the district board shall be vested with all the powers and duties of the Hearing Board.
- B. The order for abatement shall be framed in the manner of a writ of injunction requiring the respondent to refrain from a particular act. The order may be conditional and require a respondent to refrain from a particular act unless certain conditions are met. The order shall not have the effect of permitting a variance unless all the conditions for a variance, including limitation of time, are met.

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Rule 5.11 Appeal of Decision

- A. A party may petition for a rehearing of any decision by the Hearing Board within ten (10) days after a copy of the decision is mailed. A decision to grant a petition for rehearing is solely within the Hearing Board's discretion. Alternatively, the Hearing Board, with not fewer than four members present, may, in its discretion, within thirty (30) days of the effective date of the decision, rehear any matter.
- B. Judicial review may be had of a decision of the Hearing Board by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure section 1094.5. Except as otherwise provided in this rule, any such petition shall be filed within thirty days after the decision has been mailed. The right to petition shall not be affected by the failure to seek a rehearing before the Hearing Board.
- C. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the Hearing Board and shall be delivered to the petitioner within thirty days of the request. Payment of a fee not to exceed the cost of preparing such record must be made at the time of the request.
- D. Where the petitioner, within ten days after the last day on which a rehearing can be ordered, requests the Hearing Board to prepare all or any part of the record, the time within which a petition may be filed shall be extended five days after its delivery to him/her. The Hearing Board may file with the court the original of any document in the record in lieu of a copy thereof.
- E. In any proceeding pursuant to this rule, the court shall receive in evidence any order, rule, or regulation of the district board, any transcript of the proceedings before the Hearing Board, and such further evidence as the court, in its discretion, deems proper.

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