



BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

HEARING BOARD RULES

JULY 30, 2024

375 BEALE STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94105

HEARING BOARD RULES

These Rules are effective as of July 30, 2024

HEARING BOARD BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Valerie J. Armento, Esq. (Chair)
Barbara Toole O'Neil, MS, QEP, Ch.E. (Vice-Chair)
Peter Y. Chiu, M.D., P.E.
Amelia Timbers
Rajiv Dabir, P.E.

TABLE OF CONTENTS

RULE 1: HEARING BOARD	page
1.1 General.....	1
1.2 Election of Officers.....	1
1.3 Duties of the Chair.....	1
1.4 Rule Adoption.....	2
1.5 Authority.....	2
1.6 Limitations.....	3
RULE 2: DEFINITIONS.....	3
RULE 3: FILING REQUIREMENTS	
3.1 Filing and Fees.....	6
3.2 Fee Waiver.....	7
RULE 4: SERVICE REQUIREMENTS	
4.1 Petitions for Variances and Appeals.....	8
4.2 Petitions for Orders for Abatement.....	9
4.3 Petitions for Revocation of Permit.....	9
4.4 Electronic Service by Hearing Board Order.....	9
4.5 All Other Filings.....	9
4.6 Proof of Service.....	9
RULE 5: FILE DOCKET, HEARING CALENDAR, ADMINISTRATIVE RECORD	
5.1 Docket.....	9
5.2 Hearing Calendar.....	9
5.3 Administrative Record.....	9
5.4 Public Review.....	10
RULE 6: NOTICE REQUIREMENTS	
6.1 Public Notice of Hearings (General).....	10
6.2 Public Notice of Variance Hearings.....	11
RULE 7: VARIANCES	
7.1 Petitions.....	11
7.2 Beyond Reasonable Control.....	13

7.3	Arbitrary or Unreasonable Taking.....	13
7.4	Burden of Proof.....	13
7.5	Prohibited Variances.....	13
7.6	Essential Public Service Considerations.....	14
7.7	Small Business Considerations.....	14
7.8	Variance Conditions.....	15
7.9	Bond Requirement.....	15
7.10	Notification.....	15
7.11	Emergency Variances.....	15
7.12	Interim Variances.....	16
7.13	Short Variances.....	17
7.14	Regular Variances.....	17
7.15	Group Variances.....	17
7.16	Product Variances.....	18
7.17	Excess Emission Fees.....	19
7.18	Variance Modification.....	19
7.19	Extension of Short Variance.....	19
7.20	Extension of Regular Variance.....	20

RULE 8: PERMIT AND EMISSION REDUCTION CREDIT APPEALS

8.1	Permit Appeals.....	20
8.2	Emission Reduction Credit Appeals.....	21
8.3	Petition.....	21
8.4	Burden of Proof.....	21
8.5	Answer.....	22
8.6	Standard of Review.....	22
8.7	Order.....	22

RULE 9: PERMIT SUSPENSIONS AND REVOCATIONS

9.1	Suspension.....	22
9.2	Revocation.....	22

RULE: 10: ORDERS FOR ABATEMENT

10.1	Authority.....	23
10.2	Filing Requirements.....	23
10.3	Petition.....	23
10.4	Service of Petition.....	23
10.5	Answer.....	24
10.6	Hearing Date.....	24
10.7	Amendment of Petition.....	24

10.8	Order for Abatement.....	25
10.9	Conditional Order for Abatement.....	25
10.10	Stipulated Order for Abatement.....	25
10.11	Interim Order for Abatement.....	26
10.12	Form of an Order for Abatement.....	27
10.13	Order for Abatement Conditions.....	27
10.14	Cross-Applications.....	28
10.15	Duration of Order for Abatement.....	28
10.16	Filing Fees.....	28

RULE 11: PLEADINGS

11.1	Answers.....	28
11.2	Amendments.....	28
11.3	Briefs.....	29
11.4	Page Limits.....	29
11.5	Verification.....	29

RULE 12: PREHEARING CONFERENCES AND DISCOVERY

12.1	Prehearing Conferences.....	30
12.2	Discovery.....	31

RULE 13: SUBPOENAS AND EVIDENCE

13.1	Subpoenas.....	31
13.2	Rules of Evidence.....	32
13.3	Evidence.....	32
13.4	Protective Orders.....	36

RULE 14: CONSENT CALENDAR

14.1	Consent Calendar.....	37
14.2	Petitioner Requirements.....	37
14.3	Hearing Board Requirements.....	38

RULE 15: PROCEDURE

15.1	Time and Place of Hearings.....	38
15.2	Notice of Hearings.....	39
15.3	Attendance at Hearings.....	39
15.4	Representation by Counsel.....	39
15.5	Official Record.....	40

15.6	Order of Proceedings.....	40
15.7	Reopening.....	40
15.8	Withdrawal or Dismissal of Cases.....	41
15.9	Hearing Board Member Planned Absence.....	41
15.10	Participation by Previously Absent Hearing Board Member.....	41
15.11	Disqualification of Hearing Board Members.....	42
15.12	Requests for Rehearing.....	42
15.13	Continuances.....	42
15.14	Ex Parte Communications.....	43
15.15	Prohibition of Megaphones and Signs.....	44
15.16	Evening or Weekend Hearings.....	44
15.17	Conduct at Hearings.....	44

RULE 16: MOTIONS

16.1	Motion to Dismiss.....	44
16.2	Motion for Summary Judgment.....	44
16.3	Motion for Default Judgment.....	44
16.4	Motion to Strike.....	45
16.5	Motion to Disqualify.....	45
16.6	Memorandum of Points and Authorities.....	45
16.7	Burden of Proof.....	45
16.8	Filing of Moving and Supporting Papers.....	45

RULE 17: ORDERS

17.1	Quorum.....	46
17.2	Findings and Decisions.....	46
17.3	Minute Orders.....	47
17.4	Effective Date of Decision.....	47
17.5	Clerical Errors.....	47
17.6	Service.....	47

RULE 18: SANCTIONS

18.1	Removal.....	47
18.2	Misdemeanor Liability.....	47
18.3	Contempt.....	47

RULE 19: Language Assistance

19.1	Language of Record.....	48
19.2	Translation Services.....	48

**HEARING BOARD RULES
BAY AREA AIR QUALITY MANAGEMENT DISTRICT**

RULE 1. HEARING BOARD

1.1 General. The Hearing Board for the Bay Area Air Quality Management District is established and constituted pursuant to Health and Safety Code section 40800 et seq.

1.2 Election of Officers. The Chair and Vice Chair of the Hearing Board will be elected by June 30 of each year during a public meeting. A special election may be held more frequently if one of the following occurs prior to June 30 of each year:

- (a) A change in Hearing Board members;
- (b) The Chair or Vice Chair elect to resign their position, or their term expires; or
- (c) A quorum of the Hearing Board requests a new election.

1.3 Duties of the Chair. The Chair, and in the Chair's absence, the Vice Chair, has the authority to do any act necessary to ensure the orderly running of the Hearing Board's proceedings, including, but not limited:

- 1. Setting the calendar.
- 2. Presiding over each hearing.
- 3. Ruling on objections and admissibility of evidence, except that any such evidentiary rulings may be overruled by a majority vote of the Hearing Board.
- 4. Ruling on Parties' submissions, including motions, requests for a continuance, substitution of counsel, and amendments to filings (variances, stipulated agreements, etc.).
- 5. Issuing subpoenas upon the request of any Party or the Hearing Board.
- 6. Assigning orders to be written.
- 7. Signing written orders.
- 8. Issuing protective orders.
- 9. Holding prehearing conferences.
- 10. Deciding the schedule for motions, responses and rule on requests for filed hearings.

11. Any other duty or authority granted by the Hearing Board.

1.4 Rule Adoption. The Hearing Board may adopt rules for the conduct of itself and its hearings, consistent with State law. The rules will be liberally construed to effectuate the work of the Hearing Board.

(a) These Hearing Board rules are intended to supplement the statutory and regulatory provisions in State law that govern the Hearing Board's authority and conduct of hearings, including California Health and Safety Code sections 40800-40865, 42302-42302.1, 42306-42309, 42350-42372 and 42450-42454; Gov. Code sections 11500 et seq; and Code of Civil Procedure section 170.1

(b) No action of the Hearing Board will be reversed because of any defect, error, irregularity or omission arising under these rules unless the Party complaining can show that a different result would have been probable if the defect, error, irregularity, or omission had not occurred.

1.5 Authority. A quorum of the Hearing Board has the authority to do the following:

(a) Issue or deny variances and modify existing variances in accordance with Health and Safety Code section 42350 et seq.;

(b) Grant a permit denied by the APCO (Air Pollution Control Officer) or uphold the permit denial;

(c) Modify conditions imposed on a permit by the APCO pursuant to an Appeal filed by the permit holder asserting that the permit was not properly issued;

(d) Continue the suspension of a permit suspended by the APCO;

(e) Remove a permit suspension imposed by the APCO pending the furnishing of information, analyses, plans and specifications by the permit holder;

(f) Find that no violation exists and reinstate an existing permit that was revoked pursuant to a revocation hearing;

(g) Revoke an existing permit if it finds any of the following:

(1) The permittee has failed to correct ongoing violations identified by the APCO;

(2) Fraud or deceit was employed in the obtaining of the permit;

(3) Any violation of a District rule, regulation or order; or

(4) Revocation of the permit would be justified. The Hearing Board may consider the following to make this determination:

(i) Whether the permit holder received prior warnings from the APCO prior to the permit revocation petition being filed;

(ii) Whether the permit holder was acting in good faith prior to and

during the period of violation;

(iii) Whether the emissions associated with the violations that serve as the basis for permit revocation cause an unreasonable health risk in the impacted community.

(h) Grant or deny Appeals from Emission Reduction Credit determinations;

(i) Issue or deny Orders for Abatement.

1.6 Limitations. The Hearing Board's authority under Section 1.5 does not extend to:

(a) Modifying the law or regulations, including those adopted by the Board of Directors of the Air District;

(b) Permanently exempting a business from complying with a regulation;

(c) Reviewing a Notice of Violation in any way, or making civil penalty assessments;

(d) Reviewing California Environmental Quality Act (CEQA) issues;

(e) Imposing zoning or siting requirements; or

(f) Reviewing or adjudicating any matter not expressly authorized by the Health and Safety Code, other statutory authority, or case law.

RULE 2. DEFINITIONS

2.1 The following definitions apply:

Air District. The Bay Area Air Quality Management District, as defined in Health and Safety Code section 40200. Also referred to as the BAAQMD.

APCO. The Air Pollution Control Officer of the Bay Area Air Quality Management District, or his or her designee. Also referred to as the Executive Officer.

Appeal. A formal written request for review of a final decision of the Air Pollution Control Officer that the Hearing Board is authorized to hear, filed with the Hearing Board within the timelines provided by law.

Appear. When a Party has filed a petition, response, or another document, or physically appeared on behalf of a Party before the Hearing Board, submitting to the Hearing Board's jurisdiction. This does not include testifying on behalf of a Party or as a member of the public before the Hearing Board during public comment.

Appellant. The Party who files an Appeal to the Hearing Board. Also referred to as a

Petitioner.

Breakdown. A breakdown of air pollution abatement equipment or operating equipment provided such emissions do not interfere with the attainment or maintenance of any national or California ambient air quality standard and that the persons or entities responsible for such emissions comply with the administrative requirements of Regulation 1, Section 1-431 and 432.

Business Day. Any day, Monday through Friday, from 8:00 am Pacific time until 5:00 pm Pacific time, except holidays observed by the District. If a deadline falls on a Saturday, Sunday, or holiday observed by the District, the deadline will be the next Business Day.

Clerk. The duly appointed Clerk of the Hearing Board of the Bay Area Air Quality Management District, or his or her designee.

Conditional Order of Abatement. An order issued by the Hearing Board for good cause after an evidentiary hearing that requires a Party to undertake specified conditions for an explicit period of time to bring the Party into compliance with District regulations.

Conflict of Interest. When the personal financial interests of a Hearing Board Member interfere with a Hearing Board Member's ability to act objectively and be impartial in a matter before the Hearing Board.

Consent Calendar. A procedure for expediting the presentation of evidence at hearings where the petitioner and the Respondent have stipulated the facts, or an uncontested agenda item. Except for the foregoing, a consent calendar proceeding must comply with all statutory requirements and the requirements set forth in these rules.

Declaration. A written statement made and submitted by a witness under penalty of perjury.

District Counsel's Office. The legal office of the Bay Area Air Quality Management District. The District Counsel's Office represents the APCO at all Hearing Board proceedings.

Emergency. An event that occurs at a facility that the facility could not reasonably foresee or prevent and did not cause or contribute to, and which prevents the facility from being able to meet District requirements.

Emergency Variance. An order issued by the Hearing Board for good cause, due to an emergency, and with a duration of 30 days or less.

Emission Reduction Credit (ERC). A credit which a facility generates for reducing emissions and which was banked in accordance with District Regulation 2, Rule 4.

Ex Parte Communication. A communication between an interested person and a member of the Hearing Board concerning any matter pending before the Hearing Board without the knowledge, presence, or consent of all Parties involved in the matter.

Group Variance. A proceeding brought by one or more persons, firms, or corporations on behalf of themselves and others for permission to continue operating when it cannot comply with District requirements and where the relief sought by each individual petitioner in the group is based on issues of law and fact common to each petitioner.

Hearing Board. The Hearing Board of the District, constituted in accordance with Health and Safety Code sections 40200 et seq.

Interim Variance. An order granting a petition for a Variance issued by the Hearing Board for good cause, with a duration of no more than 90 days, pending the decision of the Hearing Board on a short or regular variance petition.

Language Assistance. Oral interpretation or written translation of a Hearing Board document, filing, or proceeding provided to a Party or witness who requests such interpretation or translation because they have limited English proficiency and need it to meaningfully participate in the proceeding.

Order of Abatement. An order issued by the Hearing Board for good cause after an evidentiary hearing that requires a Party to take specific actions, as specified in the order, with regard to the Party's operations or shut down until the Party can comply with District regulations.

Party. The APCO, petitioner, Respondent, intervenor and any person who appears in the proceeding.

Petition. A written request filed with the Clerk's Office for a hearing to apply for a variance or to Appeal an action taken on a permit issued by the Air District.

Petitioner. The Party who filed the initial document asking the Hearing Board to take a certain action.

Preliminary Imminent and Substantial Endangerment (ISE) Determination. A determination by the Hearing Board after an evidentiary hearing that there is substantial evidence that an imminent and substantial endangerment to the public health or welfare, or the environment, currently exists such that the Hearing Board need not vacate an Interim Order for Abatement the APCO issued pursuant to Health and Safety Code Section 42451.5.

Preponderance of the Evidence. The standard that each claim or allegation is more likely than not true, or there is a greater than 50% chance that it is true, based on all the evidence presented to the Hearing Board.

Product Variance. An order issued by the Hearing Board for good cause after an evidentiary hearing to allow the sale, supply, distribution or use of a product that does not comply with District regulations.

Quorum. At least three duly appointed members of the Hearing Board.

Real Party in Interest: A person or permitted entity entitled under the law to enforce the right at issue before the Hearing Board, such as the holder of the permit being Appealed.

Regular Variance: An order or series of orders issued by the Hearing Board for good cause after an evidentiary hearing granting a petition for a Variance, with a duration of more than 90 days.

Respondent. The Party against which an action is brought in front of the Hearing Board.

Short Variance. An order or series of orders issued by the Hearing Board for good cause after an evidentiary hearing granting a petition for a Variance with a duration of 90 or fewer days.

Small Business. For purposes of these rules, small business has the same meaning as defined by the Small Business Administration, except that no stationary source that is a major pollution source is a small business.

Stipulated Order of Abatement. An order issued by the Hearing Board for good cause after an evidentiary hearing that allows a Party to operate subject to terms and conditions agreed upon by the Parties in advance of the hearing until the Party can comply with District requirements.

Submission of the matter. When the Parties complete their briefings and argument, and the matter is left to the Hearing Board to decide.

Tolling Agreement. A written agreement between the Parties suspending the statutory deadline for filing a matter before the Hearing Board for a specified period of time.

Variance. Permission granted by the Hearing Board to a regulated entity to operate in violation of a District regulation without penalty for a prescribed period of time.

RULE 3. FILING REQUIREMENTS

3.1 Filing and Fees.

(a) All filings, including Petitions, motions and other pleadings, and documentary evidence, must be filed with the Hearing Board in an electronic format approved by the

Clerk.

(b) All filings, including Petitions, motions and other pleadings, and documentary evidence, must be filed with the Hearing Board by either:

- (1) Sending them via electronic mail to the Clerk, or
- (2) Filing in-person at the Clerk's Office in District headquarters during regular business hours, located at 375 Beale Street, Suite 600, San Francisco, California 94105. Filings made in person must be double-sided, on standard 8.5 x 11" paper. Filings made in-person must include the original and five copies.

(c) All documents, whether submitted in person or electronically, will be deemed "filed" as date-stamped by the Clerk. Documents submitted outside of regular business hours will be received and date-stamped by the Clerk on the next business day.

(d) A Petition submitted in either an electronic format or in person will be deemed filed only if it is accompanied by the required filing fee, set forth in District Regulation 3, Schedule A, or a completed fee waiver request, except that an Emergency Variance Petition may be filed without immediate payment of the filing fee. A Petition for Emergency Variance may be dismissed or rejected by the Hearing Board if the required filing fee is not paid within four days of the initial filing date of the Emergency Variance Petition. If the proceeding is subject to additional fees, as determined by the Hearing Board, the Clerk must notify the Petitioner via any method likely to reach the Petitioner. The Petitioner must pay the fees requested within the timeframe specified by the Hearing Board, or the Hearing Board may dismiss the Petition.

(e) Documents filed electronically may be signed with an electronic signature. Parties other than the APCO or counsel for the respondent, filing documents with an electronic signature must verify the validity of the electronic signature at the beginning of the first hearing at which the document will be used.

3.2 Fee Waiver.

(a) If a Petitioner is unable to pay filing fees because of financial hardship or other good cause, as determined by the Hearing Board, the Petitioner may file a fee waiver request with the Hearing Board along with Petitioner's initial filing. The fee waiver request must include, at a minimum, a detailed description of why the petitioner should not be required to pay the filing or other fees, with supporting evidence such as bank statements, tax returns or a court order of bankruptcy,

(b) A petitioner may pay the filing fees with the petition and also file a request for fee waiver. Payment of fees will not prejudice consideration of the fee waiver request. If the request is ultimately approved by the Hearing Board, fees will be refunded.

(c) If the request for a fee waiver is based on financial hardship, the Petitioner should also attach to the fee waiver request Petitioner's prior two years of filed tax returns or an independently audited financial statement to substantiate the request for fee waiver.

Tax returns and other financial documents submitted in hard copy will be returned to the petitioner after the Hearing Board makes a determination on the waiver request.

(d) The Hearing Board will decide the fee waiver request on the first day of a scheduled hearing prior to any other items or motions being heard in the case, with the exception of motions for disqualifications.

(e) The Hearing Board will grant the fee waiver request if it finds, based on the evidence in the fee waiver request, financial hardship or good cause exists. To determine whether financial hardship or good cause exists, the Hearing Board will consider the totality of circumstances surrounding the fee waiver request including:

- (1) Petitioner's income and assets and whether a financial hardship exists, and is clearly unreasonable for the petitioner;
- (2) Whether the nature of the proceedings is such that a hearing is necessary to prevent the taking of the livelihood of the Petitioner;
and
- (3) Any other substantiated facts which demonstrate that the fees should be waived based on law, equity, or in the interests of justice.

(d) If the Hearing Board grants the fee waiver request, the hearing may continue. If the Hearing Board denies the fee waiver request, then the Clerk will state the fees required and payment of the fees will be required in any Order issued by the Hearing Board at the conclusion of the hearing.

RULE 4. SERVICE REQUIREMENTS

4.1 Petitions for Variances and Appeals

(a) Service on the APCO must be made through the District Counsel's Office. Service via electronic mail is deemed complete upon sending. Service via United States first class mail is deemed complete on the fifth calendar day after mailing. The Party serving the APCO must complete and file with the Clerk a proof of service.

(b) The Petitioner for a Variance or Appeal must serve the Petition on all other Parties, including real Parties in interest, either via electronic mail or in the manner specified for service of a summons in Code of Civil Procedure Section 415.10 et seq. This may be accomplished as follows:

(c) Electronic service is deemed complete at the time recorded as sent. Filing electronically is deemed consent to accept all subsequent filings electronically.

(d) Service by personal delivery is deemed complete at time of delivery.

(e) Service by publication is deemed complete on the last day of publication. A court order is not required for publication, but the Hearing Board must find that the Party

to be served cannot with reasonable diligence be served by one of the methods specified above.

4.2 Petitions for Orders for Abatement: Service of a Petition for an Order for Abatement must be made in accordance with Hearing Board Rule 10.4.

4.3 Petitions for Revocation of Permit: The Petitioner must serve a Petition for revocation of a permit on all other Parties in the manner specified for service of a summons under Code of Civil Procedure Section 415.10 et seq, as specified in Rule 4.1(b).

4.4 Electronic Service by Hearing Board Order: The Hearing Board may require service of filings subsequent to the initial Petition or Appeal by electronic mail or other electronic means, with the agreement of the Parties.

4.5 All Other Filings. The Party filing any document other than those addressed in Rules 4.1 through 4.4 with the Hearing Board must serve a copy of that document on all other Parties via electronic mail or other agreed-upon method before filing the document with the Hearing Board.

4.6 Proof of Service: Service must be made by a non-Party to the proceeding. The person serving a document must complete and sign a proof of service stating the names of persons served, the date and manner of service, and the address at which service was made. The proof of service must be appended to and filed with the Hearing Board with the document served, except that proof of service of a Petition or Appeal may be filed after filing the petition. A hearing may not be scheduled, and the Hearing Board will not render any decision, until a proof of service is filed.

RULE 5. FILE DOCKET, HEARING CALENDAR, ADMINISTRATIVE RECORD

5.1 Docket. The Clerk will maintain a chronological docket of all actions taken in a Hearing Board matter, which will be the official record of the case. The docket will contain:

- (a) A case number assigned to the matter;
- (b) The date of each filing;
- (c) The type of document filed; and
- (d) The name of the filing Party.

5.2 Hearing Calendar. The Clerk will maintain a calendar of matters scheduled for hearing. A copy of the calendar is available online at www.baagmd.gov and may be obtained from the Clerk. The calendar is available for public inspection at the office of the Hearing Board in District headquarters during regular office hours.

5.3 Administrative Record. The administrative record consists of all documents and evidence considered by the Hearing Board in reaching a decision on a matter. The administrative record contains, but is not limited to:

- (a) All pleadings, briefs and memoranda filed in the matter;
- (b) All motions filed in the matter
- (c) Documents accepted into evidence;
- (d) Demonstrative evidence accepted into evidence;
- (e) All Hearing Board orders issued in the matter; and
- (f) All written transcripts of the hearings.

5.4 Public Review. The docket and the administrative record are available for public and District staff review during regular office hours. Records of the Hearing Board do not necessarily include records of the District. The original administrative record materials must remain within the Clerk's office or under its custody and control. Copies of records may be obtained at the Clerk's office upon payment of the cost pursuant to the California Public Records Act, Government Code Section 7920.000 et seq. Materials which are determined to be confidential will be noted in the case file and kept in the District Counsel's Office to preserve their confidentiality.

(a) All the materials in the administrative record constitute the entire record for purposes of any judicial review of the case.

(b) The official record of the hearing is an audio recording. If a Party wants a written transcript of a hearing, it may:

- (1) Request that the Clerk have the audio recordings transcribed. The Party making the request will bear the costs of transcription, unless otherwise agreed by the Parties.
- (2) Request that the Clerk retain a court reporter for the hearing. The Party making the request must provide notice to the Clerk at least 10 days prior to the date of the scheduled hearing. The requesting Party will bear the costs of the reporter and copies of transcripts, unless otherwise agreed by the Parties. The Clerk must be paid fees for the court reporter within 5 days of the Clerk's request. A copy of the transcript must be provided to the Clerk at no cost to the Hearing Board.
- (3) Directly retain a court reporter and provide the Clerk with notice at least three business days prior to the date of the hearing. The Party retaining the court reporter will bear all costs, unless otherwise agreed by the Parties. A copy of the transcript must be provided to the Clerk at no cost.

(c) Audio recordings and transcripts of hearings will be retained by the Clerk of the Hearing Board for a period consistent with District and Health and Safety Code records retention policies.

RULE 6. NOTICE REQUIREMENTS

6.1 Public Notice of Hearings (General). Except as otherwise provided in Rule 6.2, the Clerk will publish notice of a public hearing in accordance with law and will serve

notice of hearing on the Parties at least 14 calendar days prior to the scheduled hearing.

6.2 Public Notice of Variance Hearings.

(a) Emergency variances: May be issued without public hearing or notice. The public or a Party may request a hearing on a Petition for an Emergency Variance at any time.

(b) Interim variances: May be issued only after the Clerk serves reasonable notice of the time and place of the hearing on the APCO and the petitioner.

(c) Short variances: May be issued only after the Clerk serves notice of the time and place of the hearing on the Parties, the California Air Resources Board (CARB), the United States Environmental Protection Agency (EPA), and publish notice of the hearing to the public at least 10 days prior to the scheduled hearing.

(d) Regular variances: May be issued only after the Clerk serves notice on the Parties, CARB, EPA, and publishes notice of the hearing to the public at least 30 days prior to the scheduled hearing. The Clerk must publish the notice in at least one newspaper of general circulation in the District and send the notice to every person who requests notice not less than 10 days prior to the scheduled hearing. Each notice issued by the Clerk must include the time and place of the hearing and such other information as may be necessary to apprise people of the nature and purpose of the hearing, and, for notice to the public, such information as is required by law.

RULE 7. VARIANCES

7.1 Petitions. Petitions for a variance must contain, at a minimum, the following:

(a) The type of variance sought: emergency; interim; short; regular; group; or product;

(b) The District regulations from which the petitioner is seeking a variance, including the specific sections and subsections of the regulations;

(c) A concise statement of the facts supporting the request for a variance. These should address the statutory findings the Hearing Board must make in order to grant a variance, which are:

- (1) There is or will be a violation of a District regulation or order;
- (2) Due to conditions beyond the reasonable control of the petitioner, requiring immediate compliance would result in either an arbitrary or unreasonable taking of property, or result in the practical closing and elimination of a lawful business;
- (3) The closing or taking would be without a corresponding benefit in reducing air contaminants;

- (4) The petitioner has given consideration to curtailing operations of the source in lieu of obtaining a variance;
- (5) During the period the variance is in effect, the petitioner will reduce excess emissions to the maximum extent feasible;
- (6) During the period the variance is in effect, the petitioner will monitor or otherwise quantify emission levels from the source, if requested to do so by the District, and report these emission levels to the District as scheduled by the District;

(d) The location of the property at which the violation(s) are or will be occurring, including the complete street address or, if the facility does not have a street address, an assessor parcel number, and the name of the property owner;

(e) A copy of the permit, or portion of a facility permit, related to the operation and/or equipment that is the subject of the variance application;

(f) A description of the type and amount of air pollutant emissions from the operation or equipment that is the subject of the variance request, including a calculation of the worst-case excess emissions that may occur during the period for which a variance is requested;

(g) A description of the steps the Petitioner will take to achieve compliance with District regulations. These steps should specify increments of progress towards reaching a final compliance date. Increments of progress may include dates by which control equipment is purchased, installed and operated; dates by which processes at the facility will be changed to ensure future compliance; and dates by which permit applications will be submitted. Any variance with a term longer than one year must include enforceable increments of progress;

(h) Proposed conditions under which the petitioner will operate during the variance period to reduce emissions to the maximum extent feasible;

(i) Whether the Petitioner or, to its knowledge, the District has received any complaints from the public about its operations, particularly with respect to odor and dust emanating from the property;

(j) Whether the petitioner has received any Notices of Violation from the District concerning its operations within the past 12 months, and whether these Notices of Violation were related to the equipment or operation that is the subject of the variance application;

(k) The starting and ending dates of the requested variance;

(l) Signature under the penalty of perjury of the Petitioner or authorized agent. In the case of a group variance, the signature of the representative authorized by the group.

A form petition is available as a courtesy on the District's website at www.baaqmd.gov/rules-and-compliance/variances. It is Petitioner's responsibility to make sure that its Petition includes all the elements required in Rule 7.1, and Petitioner cannot rely on the form petition to satisfy Rule 7.1.

7.2 Beyond Reasonable Control. When making the finding set forth in Rule 7.1(c)(2) that conditions exist which are beyond the reasonable control of the petitioner, the Hearing Board will consider:

(a) The extent to which the petitioner took actions to comply or seek a variance, which were timely and reasonable under the circumstances, and

(b) Actions taken by the petitioner since the adoption of the District regulation or order from which the variance is sought.

7.3 Arbitrary or Unreasonable Taking. When making the finding set forth in Rule 7.1(c)(2) that requiring compliance would result in either an arbitrary or unreasonable taking of property or the practical closing and elimination of a lawful business, the Hearing Board will consider whether an unreasonable burden would be imposed on the petitioner if immediate compliance is required.

7.4 Burden of Proof. The Petitioner for a Variance bears the burden of proving, by at least a preponderance of the evidence, the required statutory findings in Rule 7.1(c)(1)-(6).

7.5 Prohibited Variances.

(a) The Hearing Board may not grant a variance or abatement order that has the effect of a variance from any regulation setting forth requirements for a permit or authority to construct, build, erect, alter, or replace established by the District by regulation pursuant to Health and Safety Code section 42300.

(b) The Hearing Board may not grant a variance or abatement order that has the effect of a variance to a Title V source from the requirement for a permit to operate or use.

(c) The Hearing Board may not grant a variance from any District emission cap trading program emission cap requirement.

(d) The Hearing Board may not grant a variance if the granting of the variance will result in a violation of Health and Safety Code Section 41700, the prohibition against public nuisance.

(e) No variance may be granted from an Airborne Toxic Control Measure (ATCM) or other state or federal law requirement separate from a District requirement.

7.6 Essential Public Service Considerations.

(a) To make the six findings required for the granting of a variance where the Petitioner is a public agency, the Hearing Board will consider whether denying a Petition for a Variance would impose an unreasonable burden on an essential public service. An essential public service includes the following, if owned and operated by a public agency, as defined in Health and Safety Code section 42352, subdivision (b):

- (1) Prison or detention facility;
- (2) Police or fire fighting facility;
- (3) School;
- (4) Health care facility;
- (5) Landfill gas control or processing facility;
- (6) Sewage treatment works; and
- (7) Water delivery operation.

(b) To determine whether denying the variance would impose an unreasonable burden, the Hearing Board will consider the following:

- (1) The cost of requiring immediate compliance with District regulations;
- (2) The impact on agency resources, particularly whether the agency would have to divert resources from other critical functions; and
- (3) The impact that any excess emissions associated with the variance would have on the impacted community.

7.7 Small Business Considerations. To determine whether the Petitioner has met its burden of proof where the Petitioner is a Small Business that emits 10 tons or less per year of air contaminants, the Hearing Board will consider the following, in addition to any other relevant factors:

(a) In determining whether conditions exist which are beyond the reasonable control of the Petitioner, the extent to which the Petitioner took timely action, since the adoption of the District regulation or order from which the variance is sought, to comply or seek a variance, considering any claimed ignorance of the requirement from which the variance is sought;

(b) In determining whether conditions exist which are beyond the reasonable control of the Petitioner, the extent to which the Petitioner took reasonable actions, since the adoption of the District regulation or order from which the variance is sought, under the circumstances to comply, considering the Petitioner's financial and other relevant capabilities to comply; and

(c) In determining whether or not requiring compliance would result in either an arbitrary or unreasonable taking of property or the practical closing and elimination of a lawful business, whether requiring Petitioner's immediate compliance with the District

regulation or order from which a variance is sought would be an unreasonable burden on Petitioner, considering the impact on the petitioner's business and the benefit to the environment which would result if the Petitioner were to be required to comply immediately.

7.8 Variance Conditions.

(a) The Hearing Board may prescribe requirements, other than those imposed by statute or regulation, including but not limited to operating conditions and emission limits, tailored to the petitioner's business and not more onerous than requirements applicable to similar plants and equipment.

(b) The Hearing Board has wide discretion in weighing the equities involved and the advantages to the impacted community from the reduction of air contaminants and the disadvantages to the petitioner resulting from requiring compliance.

(c) A condition to monitor and report emissions will specify how the emissions must be calculated, how often measurements must be taken, to whom the data should be reported, and how often the reports must be submitted.

7.9 Bond Requirement. The Hearing Board may require that a bond be posted, payable to the BAAQMD, to ensure performance of any construction, alteration, repair, or other work required by the variance.

7.10 Notification. Written Findings and Decision to grant or deny a variance must be submitted to the California Air Resources Board within 30 days of the decision.

7.11 Emergency Variances

(a) A petitioner may request an emergency variance by filing a petition in person or electronically. The initial request does not in itself constitute a variance and provides no assurance of protection from penalty action. However, if a variance is subsequently granted, it may become effective at the Hearing Board member's discretion as early as the date and time of the application.

(b) Upon receiving the request, the Clerk will promptly notify the APCO of the request. The APCO will respond to the Clerk within two business days, stating the District's recommendation on the request based on a good cause standard.

(c) Upon receiving the APCO's response, the Clerk will provide the petition and response to an individual member of the Hearing Board, selected on a rotational basis. The Hearing Board member who receives the request and response will grant or deny the application, obtain further information from the Parties, or set the matter for hearing before the full Hearing Board.

(d) May be issued by a single member of the Hearing Board without notice. An

alternate member of the Hearing Board is not authorized to hear a petition for an emergency variance.

(e) Whether granted by a single member or after a hearing by the full Hearing Board, an emergency variance may only be issued when good cause has been demonstrated by the petitioner.

- (1) At the time of making the request for an emergency variance, the petitioner should explain in detail the grounds for the request, including the foreseeability of the cause of the emergency and whether the petitioner has used good operation and maintenance practices.
- (2) The petitioner should identify how the failure or malfunction was discovered and the date it first occurred; if required testing was done and what the test results were; applicable permit conditions; and any excess emissions associated with the subject equipment.

(f) Must not remain in effect for more than 30 days.

(g) If the request for an emergency variance is granted by the individual member, the petitioner and the APCO will be informed by the Clerk. A written order granting the emergency variance must be issued under such terms and conditions as the Hearing Board member deems warranted, provided that the filing fee was paid. A petitioner for an emergency variance is required to pay the appropriate filing fee whether the variance is granted. Failure to submit the filing fee by the end of the fourth full business day following the initial request will render the emergency variance null and void and may constitute a violation of District Regulation 3 (Fees).

(h) If a petition for emergency variance is denied, a petitioner may submit a petition for a different type of variance. The Hearing Board may deem the petition for variance filed as of the date the request for emergency variance was initially requested. The petition for variance must be delivered to the Clerk by the end of the fourth business day following notification of the denial of the emergency variance.

7.12 Interim Variances

(a) A Petition for an interim variance must include an application for a short or regular variance. An interim variance cannot be granted to avoid the notice requirements for a short or regular variance.

(b) May be issued without notice for a period of not more than 90 days beyond the date it is granted or when a short or regular variance is granted, whichever is earlier.

(c) May be granted only by a quorum of the Hearing Board.

(d) May be granted only when good cause has been demonstrated by the

petitioner and when the petitioner provides sufficient evidence to support the statutory findings set forth in Rule 7.1(c)(1)-(6).

(e) May be granted retroactively to the date of the application, but not before.

7.13 Short Variances

(a) A variance or series of variances which extend no more than 90 days.

(b) May be granted only by a quorum of the Hearing Board with 10 days' notice.

(c) May be granted only when the petitioner provides sufficient evidence to support the statutory findings set forth in Rule 7.1(c)(1)-(6).

(d) May not be granted retroactively.

7.14 Regular Variances

(a) Extends longer than 90 days.

(b) May be granted only by a quorum of the Hearing Board upon 30 days' notice.

(c) May be granted only when the petitioner provides sufficient evidence to support the statutory findings set forth in Rule 7.1(c)(1)-(6).

(d) If the variance period is longer than one year, the order must include enforceable increments of progress that demonstrate how the petitioner will achieve final compliance with District rules.

(e) May not be granted retroactively.

7.15 Group Variances

(a) May be sought when the variance relief sought by each individual petitioner in a group is based on common issues of law and fact.

(b) Must meet notice requirements consistent with the duration of the variance being sought, either 10 days for a short variance or 30 days for a regular variance. An emergency variance may not be granted for a group variance.

(c) Petition must be accompanied by written declarations, signed under penalty of perjury, from each member of the group setting forth sufficient evidence to support

the findings in Rule 7.1(c)(1)-(6). No person will be included in the group without the submission of the declaration. Counsel for the APCO must stipulate to the admissibility of each declaration.

(d) The declarations must agree on the designation of an authorized group representative and agree to be bound by the decisions of the Hearing Board.

(e) If the APCO or any member of the Hearing Board objects to the inclusion of a particular petitioner(s) in the group, that petitioner will be removed from the group. The Hearing Board will continue the removed application to the next available date for an individual hearing.

(f) The Hearing Board must schedule a prehearing conference at least seven days before the scheduled hearing for a group variance.

(g) Petitioners must file a final copy of the declarations, proposed conditions, and proposed findings of fact and law with the Hearing Board at least five business days before the scheduled full hearing.

(h) Witnesses may present testimony on behalf of the groups at the hearing. It is not necessary for each individual petitioner to present testimony.

7.16 Product Variances

(a) May be sought by a manufacturer when a variance must attach to a product which does not currently comply with District regulations, as opposed to an individual petitioner to protect buyers, sellers and users of the product.

(b) Must meet notice requirements consistent with the duration of the variance being sought, either 10 days for a short variance or 30 days for a regular variance. An emergency variance may not be granted for a product variance.

(c) Petitioner must provide sufficient evidence to support the following findings:

- (1) The manufacture, distribution, offering for sale, sale, application, soliciting the application, or use of the product, is or will be in violation of a regulation or order of the District;
- (2) Due to circumstances beyond the reasonable control of the petitioner, requiring immediate compliance would result in either an arbitrary or unreasonable taking of property or the practical closing and elimination of a lawful business;
- (3) The taking or closing would be without a corresponding benefit in reducing air contaminants;
- (4) The petitioner exercised due diligence in attempting to locate, research, or develop a product that is in compliance with District regulations;

- (5) During the period that the product variance is in effect, the petitioner will quantify any excess emissions to the maximum extent feasible and report the emission levels to the District upon request;

(d) If the variance is granted subject to conditions on the use of the product, the petitioner will provide a written notice to any retailer, distributor, and purchaser of the product located within the District within 10 days. The written notice must include the following:

- (1) That the product is being sold pursuant to variance;
- (2) The beginning and end date of the variance;
- (3) Any other conditions imposed by the Hearing Board as set forth in the variance.

7.17 Excess Emission Fees. The petitioner must verify excess emissions at the hearing or, in the case of an emergency variance, prior to final adjudication. Excess emissions will be recited in the final Order. If the petitioner cannot estimate excess emissions, the District will provide the best estimates. Fees for excess emissions will be assessed and invoiced by the District.

7.18 Variance Modification. The petitioner may submit a request to the Hearing Board to modify or change the conditions of a granted variance.

(a) The Hearing Board may modify or revoke its Order granting the variance. The Hearing Board will consider all such requests at a regular hearing or on the consent calendar.

(b) The Hearing Board may review and for good cause, such as a change in the availability of materials, equipment, or adequate technology, modify a schedule of increments of progress or a final compliance date.

(c) If a person granted a variance with a schedule of increments of progress files for a modification of the schedule and is unable to notify the Clerk sufficiently in advance to allow for a publicly noticed hearing, the Hearing Board may grant no more than one interim authorization valid for not more than 30 days to that person to continue operation pending the hearing on the modification application.

7.19 Extension of Short Variances. The petitioner may submit an application to extend a short variance period up to a total of 90 days. If the petitioner needs more than 90 days, including the time granted in the original short variance, the petitioner must file a new application for a regular variance. A 10-day notice is required to extend a short variance. All the findings necessary for the granting of a variance must be made at the hearing on the extension.

7.20 Extension of Regular Variances. The petitioner may submit an application to extend a regular variance provided that the filing is made more than 30 days prior to the final compliance date in the original variance. A 30-day notice is required to extend a regular variance. If the requested extension will result in a variance extending longer than one year, it must include enforceable increments of progress designed to get the petitioner into final compliance with District regulations as expeditiously as possible. All the findings necessary for the granting of a variance must be made at the hearing on the extension.

RULE 8. PERMIT AND EMISSION REDUCTION CREDIT APPEALS

8.1 Permit Appeals

(a) A permit applicant may Appeal a denial of the permit to the Hearing Board for an order reversing the APCO's decision.

(b) A permit applicant who is dissatisfied with the permit issued by the APCO, including but not limited to operating conditions or Best Available Control Technology (BACT) determinations, may Appeal to the Hearing Board for an order modifying or reversing the APCO's decision.

(c) A permit applicant whose permit is denied or not renewed, or whose permit is issued with additional conditions designed to ensure compliance because the applicant has a history of violations, may Appeal to the Hearing Board for an order modifying or reversing the APCO's decision.

(d) Any aggrieved person who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in the action before the District, may request that the Hearing Board hold a public hearing to determine whether the permit was properly issued.

(e) The following applies to all permit Appeals:

- (1) The Appeal must be filed within 30 days after receipt of the APCO's decision on the permit application. The 30-day limitation may be extended by the Parties through the execution of a Tolling Agreement approved by the Chair or designee.
- (2) The Hearing Board will provide 10 days' public notice prior to holding a hearing on whether the permit was properly denied or improperly issued.
- (3) The hearing must commence within 30 days of filing of the petition for appeal unless waived by any of the Parties. If the 30-day limitation is waived by the Parties, the Chair or designee will schedule regular prehearing conferences to confirm that progress is being made towards resolution of the contested issues or towards a hearing on the matter.

8.2 Emissions Reduction Credit Appeals

(a) If the APCO refuses to register, certify or otherwise approve an application for a reduction in the emission of air contaminants, the applicant may request the Hearing Board to hold a hearing with 30 days public notice on whether the application was properly refused.

(b) The applicant must file the Appeal within 30 days after receipt of the notice of refusal.

(c) The hearing must commence within 60 days of the filing of the petition for Appeal.

8.3 Petition.

(a) All documents filed with or submitted to the Hearing Board must be submitted to the Clerk and comply with Rule 4.1.

(b) Petitions should include:

- (1) A copy of the permit or permit application;
- (2) The decision of the APCO;
- (3) A map showing the location of the subject property;
- (4) A line diagram of the process, where applicable; and
- (5) Other supporting documents the appellant wishes the Hearing Board to consider.

8.4 Burden of Proof. The burden is on the Party challenging the APCO's action or finding to show that the action was erroneous.

(a) If a permit applicant is challenging the denial of a permit, the appellant must provide evidence to support a finding by the Hearing Board that the permit was denied improperly.

(b) If a permit applicant is challenging the imposition of permit conditions, the appellant must provide evidence to support a finding by the Hearing Board that the conditions were improperly issued.

(c) If a permit is denied because the applicant has a history of violations, the Hearing Board will set aside the denial under either of the following conditions:

(1) The applicant proves that either:

- (A) The emissions violations forming the basis for the denial were the result of circumstances beyond the reasonable control of the applicant and could not have been prevented by the exercise of

reasonable care; or
(B) The denial is not an appropriate action given the severity of the violations, or is not supported by the applicant's overall compliance history; or

(2) The violation(s) has been corrected in a timely fashion or reasonable progress is being made.

(d) If an applicant for emissions reduction credits is challenging the APCO's decision, the appellant must provide evidence to support a finding by the Hearing Board that the emission reduction credits were improperly denied.

8.5 Answer. The Hearing Board may require the APCO to file an answer to Appeals or the APCO may elect to do so. The Clerk will serve a filed answer on the applicant and any other Parties who have appeared in the case.

8.6 Standard of Review. In all Appeals, the Hearing Board operates similarly to an appellate court reviewing administrative agency action. The Hearing Board may not substitute its judgment for that of the APCO or District staff. The Board's role is to determine whether the APCO's interpretation of the applicable legal requirements is fair and reasonable and consistent with other actions of the APCO. The Hearing Board will follow all applicable case law establishing the appropriate legal standard of review in regulatory Appeals.

8.7 Order. Upon determination that the APCO erred in the issuance, denial, or imposition of permit conditions, or erred in the denial of emission reduction credits, the Hearing Board may reverse, allow, or modify the decision of the APCO. Where the Hearing Board finds the APCO acted in error, the Hearing Board may uphold the decision if the Board finds the error to be harmless. If necessary, further hearings may be held to consider the remedy. In all cases, the Hearing Board will issue a written Order which identifies the evidence it relied on and the Hearing Board's reasoning in making its decision.

RULE 9. PERMIT SUSPENSIONS AND REVOCATIONS

9.1 Suspension. If a permit has been suspended by the APCO because the permittee willfully failed to furnish information, analyses, plans, or specifications requested by the APCO, the permittee may petition for a hearing on whether the permit was properly suspended within 10 days after receipt of notice that the permit has been suspended.

9.2 Revocation. The APCO may petition for a hearing to determine whether a permit should be revoked if the District finds that the permittee is violating any applicable order, regulation, or statutory requirement. The hearing must be held within 30 days unless time is waived by the Parties.

RULE 10. ORDERS FOR ABATEMENT

10.1 Authority. An order for abatement may be initiated on the petition of the APCO; on the motion of the District Board of Directors, or by the Hearing Board on its own motion.

10.2 Filing Requirements. All documents submitted to the Clerk must comply with Rule 3.1.

10.3 Petition. A petition for an order for abatement is filed by the APCO.

(a) The petition must specify the nature of the relief sought as one of the following:

- (1) A contested order of abatement requiring the shutdown of all or part of the Respondent's operations pending compliance with state law or District regulations;
- (2) A conditional order of abatement allowing the Respondent to continue to operate subject to certain conditions pending final compliance with state law or District regulations; or
- (3) A stipulated order of abatement allowing the Respondent to operate subject to terms and conditions agreed upon by the Parties.

(b) The petition must set forth in ordinary and concise language the acts or omissions with which the Respondent is charged, including but not limited to the following:

- (1) The name, address, and telephone number of the Respondent.
- (2) The type of business or activity involved and the street address at which it is conducted.
- (3) A brief description of the article, machine, equipment, or other contrivance, if any, involved in the violative emission.
- (4) The section or rule which is alleged to have been violated, together with a brief statement of the facts constituting such alleged violation.
- (5) The permit status of the Respondent.

(c) At the discretion of the APCO, a proposed Order may be attached to the petition.

10.4 Service of Petition.

(a) If the case is initiated by the APCO, the District will serve the petition on the Respondent.

(b) If the case is initiated by the Hearing Board or the Board of Directors, the Clerk will serve the petition on the Respondent.

(c) Service on the Respondent may be made in person or by mail, or, with consent of the Parties, electronically.

(d) Service may be proved by written acknowledgment of the person served or by the affidavit of the person making the service.

10.5 Answer.

(a) Within 15 days after service of the petition, the Respondent must file an answer in which Respondent may, as appropriate:

- (1) Object to the petition consistent with the criteria set forth in Rule 11.1; and
- (2) Present its defenses or other facts pertinent to a disposition of the case by the Hearing Board.

(b) The answer must be in writing signed by or on behalf of the Respondent and include Respondent's mailing address. The answer should be verified as specified in Rule 11.4.

(c) If the Respondent fails to file an answer within 15 days, the Hearing Board may, in its sole discretion, deem any or all of the facts of the case as set forth in the petition admitted by the Respondent.

(d) Respondent need not file an answer if the Order for Abatement is designated as Stipulated at the time the Petition is filed.

10.6 Hearing Date. When the time for filing of the answer has expired, the Hearing Board will set a date, with 10 days public notice, for a hearing on the order for abatement.

10.7 Amendment of Petition.

(a) At any time before the matter is submitted for decision, the Hearing Board may file or permit the filing of an amended petition consistent with Rule 3.1.

- (1) If the amended petition alleges violations not contained in the original petition, a new 10-day public notice will be provided before the hearing on the order for abatement commences or resumes.
- (2) If the amended petition presents new charges, whether or not additional violations are alleged, the Hearing Board will give the Respondent reasonable opportunity to prepare its defense against the new charges. A new answer is required but need only address the new allegations raised by the APCO or Hearing Board in the amended petition.
- (3) The petition may be amended at any time before submission of the

case to reflect a change in the nature of the proceedings, such as amending a contested or conditional order for abatement to a stipulated order for abatement.

10.8 Order for Abatement. The Hearing Board may grant the order for abatement, for good cause after a public hearing, upon a finding of good cause. To support good cause, an Order for Abatement may not be granted unless the Hearing Board finds that:

(a) The Respondent is in violation of Section 41700 or 41401 of the Health and Safety Code, or of any Air District regulation.

(b) The Order for Abatement will not constitute the taking of property without due process of law.

(c) If the Order for Abatement results in the closing or elimination of an otherwise lawful business, such closing would not be without a corresponding benefit in reducing air contaminants.

10.9 Conditional Order for Abatement.

(a) The order for abatement may be conditional and require the Respondent to refrain from a particular act unless certain conditions are met.

(b) Whenever possible, the APCO will indicate on the petition that the order sought is a conditional order for abatement.

(c) The APCO should submit proposed conditions in the form of a proposed order, either upon filing of the petition or any time prior to submitting the matter to the Hearing Board for a decision.

(d) The order for abatement will not have the effect of permitting a variance unless all the conditions for a variance are met, including limitation of time.

(e) A conditional order for abatement will be issued for good cause after a public hearing.

10.10 Stipulated Order for Abatement.

(a) At any time prior to submission of the case to the Hearing Board for a decision, the Parties may stipulate to the terms and conditions of an order for abatement.

(b) Whenever possible, the APCO will indicate on the petition that the order sought is a stipulated order for abatement.

(c) The Hearing Board may issue an order for abatement upon the terms and conditions set forth in a stipulated agreement reached by the Parties.

- (1) The stipulated order for abatement will not have the effect of permitting a variance unless all the conditions for a variance are met, including limitation of time.
- (2) The Hearing Board may issue the stipulated order for abatement without making a finding that the Respondent violated state law or District regulations.

(d) A stipulated order for abatement will be issued for good cause after a public hearing. The Hearing Board may expedite the hearing process as it deems appropriate by waiving the need for witness testimony and presentation of evidence. Public testimony will be allowed pursuant to Rule 13.3(d).

10.11 Interim Order for Abatement.

(a) The APCO may issue an interim order for abatement pending a hearing based on a finding that there is imminent and substantial endangerment (ISE) to the public health or welfare or to the environment, caused by Respondent's construction or operation of any equipment without a required permit, or by violating any state law or District regulations prohibiting or limiting the emission of air contaminants.

(b) Upon receipt by the APCO of an answer to the interim order for abatement, the Hearing Board will set a hearing within three business days.

- (1) The hearing will be held and completed as soon as possible, but not later than 30 days after receipt of the answer.
- (2) If the hearing is not completed within 30 days, the interim order for abatement will be rescinded unless the hearing has already commenced, and the Hearing Board has made a Preliminary ISE Determination.
- (3) The Hearing Board will take these time constraints into consideration and may rely on them as a basis for denial, if a Party requests a continuance of the hearing.

(c) The APCO should include a request for a Preliminary ISE Determination in the petition for order for abatement. If a petition already has been filed, the APCO may amend the petition to include a request for a Preliminary ISE Determination. The request must include:

- (1) A brief description of the basis for a Preliminary ISE Determination in the petition as originally filed or as amended.
- (2) A copy of the notice to Respondent of the grounds on which the order was issued and the procedures by which Respondent may challenge the order.
- (3) A certification that the APCO made reasonable efforts to meet and confer with the Respondent regarding the ISE findings and made a good faith effort to agree on a stipulated interim order.

(d) When the APCO makes a request for a Preliminary ISE Determination, the hearing will be bifurcated. The APCO must present evidence that an ISE still exists. Respondent may present evidence that an ISE no longer exists.

- (1) The Hearing Board will make a Preliminary ISE Determination if it finds that there is substantial evidence that an ISE to the public health or welfare, of the environment, still exists.
- (2) The Chair may place reasonable limits on testimony on the issue of a Preliminary ISE Determination to ensure that both sides are heard and a decision is made within the 30-day time period.

(e) No matter what the Hearing Board decides on the request for a Preliminary ISE Determination or the dismissal of an interim order for abatement, it will then conduct a hearing on the merits of the petition for order for abatement.

(f) An interim order for abatement will remain in effect until the Hearing Board has made a final determination of the merits, which will be as soon as possible, but not later than 14 days after the completion of the hearing. If the determination is not made within this period, the interim order for abatement will no longer be in effect.

(g) Respondent may file a motion to demonstrate an ISE no longer exists at any time after a hearing on the regular order for abatement has commenced. The motion must be based on evidence not presented at the Preliminary ISE Determination hearing.

(h) The Hearing Board will vacate an interim order for abatement at any time after the hearing has commenced if it finds that an ISE to the public health or welfare, or the environment, does not exist or no longer exists. This does not preclude the APCO from continuing to seek an order for abatement in the same case.

10.12 Form of an Order for Abatement. All orders for abatement must be framed in the manner of a writ of injunction requiring the Respondent to refrain from a particular act. An Order for Abatement may require a complete shutdown of all or part of a facility found to be operating in ongoing violation of a District regulation.

10.13 Order for Abatement Conditions. The Hearing Board may impose conditions it deems proper and necessary on any order for abatement.

(a) If the Hearing Board imposes new conditions, or modifies existing conditions, on a stipulated order for abatement, the Parties must stipulate to the conditions as presented by the Hearing Board or the matter must be treated as a contested order for abatement.

(b) The Respondent or APCO may file an application to modify the conditions of an order of abatement, including the final compliance date. The Hearing Board may consider the application at a regular hearing or on the Consent Calendar with 10 days public notice.

10.14 Cross-Applications. If an application for a short or regular variance and request for an order for abatement are both filed on the same subject matter, hearings on such applications will be set for the same date unless the District or the variance petitioner shows that a hearing on the same date would impose an undue hardship and the Chair concurs.

10.15 Duration of Order for Abatement. In the Findings and Decision, the Hearing Board will specify the period that it retains jurisdiction over the order of abatement.

10.16 Filing Fees. Applications by the Respondent to modify or terminate the period or conditions of an order for abatement must be accompanied by the filing fee set forth in District Regulation 3, Schedule A. A financial hardship waiver may be applied for, pursuant to Rule 3.2.

RULE 11. PLEADINGS

11.1 Answers.

(a) Any person served with a petition for an order for abatement, or the APCO in the case of an Appeal, must file an answer which should include, but is not limited to:

- (1) Objection to the jurisdiction of the Hearing Board.
- (2) Objection to the form of the petition asserting that it is so indefinite or uncertain that they cannot identify the circumstances upon which the claim for relief is based.
- (3) Presentation of a defense or response.
- (4) Admission of facts, in whole or in part, asserted in the petition.
- (5) A denial of facts, in whole or in part, asserted in the petition.
- (6) Presentation of new matters which the Hearing Board should consider in hearing the Petition.
- (7) Response to the relief sought in the petition, in whole or in part.

(b) Answers to the Petition must be in writing, signed by or on behalf of the Respondent, and must include the Respondent's mailing address. The answer must be filed and served at least five business days prior to the hearing, unless a different time schedule is established at a prehearing conference or unless the petition is served less than five business days prior to the hearing, in which case the answer must be filed as soon as possible before the hearing.

11.2 Amendments.

(a) **Orders for Abatement.** At any time before a matter is submitted for decision, the Hearing Board may allow the ACPO to amend a Petition for an order for abatement. If the amendment alleges new violations, the hearing will be continued until a new public notice is completed. If the Respondent asserts that time is needed to respond to the

amendment, the Chair may continue and/or reopen the matter if determined by the Chair to be necessary.

(b) **Variations and Appeals.** The Hearing Board may in its discretion, upon stipulation or public notice, allow the amendment of an application for variance or Appeal before submission of the case on such terms and conditions as the Hearing Board determines 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 for variance or Appeal makes it necessary to do so.

11.3 Briefs.

(a) **Opening Briefs.** Parties may file an opening brief, which may contain but not be limited to:

- (1) A statement of the case, setting forth concisely the nature of the action.
- (2) The relief sought.
- (3) A summary of the material facts.
- (4) Any new matters which the Hearing Board should consider in hearing the petition. (5) Points and authorities.

(b) The moving Party's opening brief must be filed and served at least 10 business days prior to the hearing. The Respondent's opening brief must be filed five business days prior to the hearing and all reply papers at least two business days before the time scheduled for the hearing, unless the Chair determines otherwise upon request.

(c) **Closing Briefs.** The Parties may file a closing brief after the submission of all the evidence. Closing briefs may be submitted only if a schedule for such submission is established by the Chair.

11.4 Page Limits. The following page limits apply unless otherwise ordered by the Chair or designated member of the Hearing Board:

- | | |
|---------------------|----------|
| (a) Opening briefs: | 25 pages |
| (b) Responses: | 15 pages |
| (c) Replies: | 5 pages |
| (d) Closing briefs: | 25 pages |

11.5 Verification. Unless the state, or a county, city or district thereof, or an officer of such in their official capacity is a petitioner or complainant or a Party, the application, complaint or paper must be verified. The form of verification, executed within California, may be in substantially the following form:

I, the undersigned, do hereby declare under penalty of perjury, under the laws of the State of California, that I have read the foregoing document, that I know its contents, and that it is true.
Dated at _____, on _____
_____(signature)

RULE 12. PREHEARING CONFERENCES AND DISCOVERY

12.1 Prehearing Conferences. A prehearing conference will be scheduled as soon as practicable after the filing of a Petition for an Appeal or Order for Abatement, except for a Stipulated Order for Abatement. A prehearing conference may be scheduled upon the request of any Party or the Chair in all other matters. Prehearing conferences are not subject to the Brown Act meeting provisions provided they are attended by less than a quorum of the Hearing Board.

(a) The purpose of the prehearing conference is to discuss any issues relevant to the proceedings, including but not limited to the possibility of settlement prior to a hearing, briefs, witnesses, subpoenas, exhibits, discovery matters, legal issues and the length of time needed to complete the proceeding.

(b) No substantive issues pertinent to the outcome of the matter may be discussed or decided at the prehearing conference.

(c) The prehearing conference will be held by the Chair or a designated member, and attended, in person or electronically, by representatives for the Petitioner and the Respondent.

(1) A written order may be issued by the Chair or designated member setting forth any decisions made regarding the subjects addressed at the prehearing conference, including due dates for the filing of pleadings and production of documents.

(2) The order may be amended or clarified, if necessary, as follows:

(a) If the Parties stipulate to an amendment or clarification, by email request to the Clerk. The email will be forwarded to the Chair who will issue a new order pursuant to the Parties' request if appropriate;

(b) If one Party seeks an amendment or clarification without a stipulation by the other Party, by filing a Motion to Amend the prehearing conference order. The Chair or member who held the prehearing conference will grant or deny the Motion, as appropriate.

(d) There is no public notice requirement for a prehearing conference held by only one Board Member. The conference will be recorded by a court reporter or by electronic recording.

12.2 Discovery.

(a) Discovery is generally limited to subpoenas issued by the Hearing Board.

(b) When a matter is contested, witness lists will be exchanged no less than five days before a scheduled hearing unless otherwise ordered by the Chair pursuant to a prehearing conference. The witness list must contain the name and title of the witness and a brief description of their testimony. Each Party reserves the right to call additional witnesses, not on their witness lists, to testify for purposes of rebuttal or impeachment.

RULE 13. SUBPOENAS AND EVIDENCE

13.1 Subpoenas.

(a) The Chair may issue subpoenas for attendance of witnesses at the hearing. The subpoena may require such witnesses to produce all books, papers and documents in the possession, or under the control, of such witnesses which are relevant to the hearing.

(b) Any Party seeking a subpoena must give the opposing Party at least 24 hours' notice in writing, by phone, or electronically, prior to requesting the subpoena.

(c) If a Party objects to the issuance of a subpoena, the opposing Party must notify the Clerk of its opposition and may request that a hearing be scheduled on the matter. The Clerk will notify both Parties of the date, time, and location of the hearing.

(d) The Party seeking the subpoena must submit a proposed form of subpoena and a declaration under penalty of perjury that establishes the following:

- (1) The information sought is relevant to the subject matter involved;
and
- (2) The information is not privileged; and
- (3) Complying with the subpoena will not impose an undue burden.

(e) Subpoenas will be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure. Service of the subpoena must be made at least 10 days before the time required for attendance, unless a shorter time is specified in the subpoena.

(f) Any person receiving a subpoena from the Hearing Board must appear before the Hearing Board at the time and place specified in the subpoena to be examined as a witness and/or to produce all books, papers, and documents in their possession, or under their control, which are specified in the subpoena. If such person fails to comply with the subpoena, the Hearing Board may hold the witness in contempt and refer the matter to Superior Court for further action.

(g) Any person receiving a subpoena who resides outside the geographical boundaries of the District is not obliged to appear unless the subpoena is accompanied by an affidavit of the requesting Party. The affidavit must show that the testimony or records of the subpoenaed witness is material and necessary.

(h) All subpoenaed witnesses, other than the Parties, officers or employees of the state or any political subdivision thereof, will receive fees, and all witnesses appearing pursuant to subpoena, except the Parties, will receive mileage in the same amount and under the same circumstances as prescribed for witnesses in civil actions in a Superior Court.

(i) Witness fees must be paid by the Party requesting the subpoena.

13.2 Rules of Evidence.

(a) Hearings will not be conducted according to technical rules relating to evidence and witnesses except for rules relating to privilege as set forth in California Evidence Code Section 930, et seq. Any relevant evidence will be admitted, even if the evidence would not generally be admissible in court, provided it has the quality and reliability worthy of consideration by reasonable people in the conduct of serious affairs.

(b) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but will not be sufficient by itself to support a finding unless it would be admissible over objection in a civil action, or unless the District Counsel's Office and the petitioner or Respondent stipulate that it may be used for that purpose.

(c) Irrelevant and unduly repetitious evidence will be excluded from the record. The Hearing Board, in its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, or confuse the issues or where matters sought to be proved are otherwise established.

(d) The Chair has the discretion to allow leading questions or short narrative testimony from witnesses when necessary for clarity or because of time constraints. While leading questions may be allowed, attorneys may not use questions as an opportunity to provide their own narratives.

13.3 Evidence.

(a) **Testimony.** Oral evidence will be taken only on oath or affirmation. The Chair will administer the oath at the commencement of each hearing. If a witness is not present when the oath is administered, the oath or affirmation will be required prior to their testimony. Each witness should affirm, at the request of the Chair or their counsel, that they have taken the oath prior to testifying. Each Party will have the following rights:

- (1) To call and examine witnesses;
- (2) To introduce exhibits;

- (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 that witness to testify; and
- (5) To rebut the evidence.

(b) **Remote Testimony.** Testimony may be given remotely provided that the witness takes an oath or affirmation and can be clearly seen and heard by the Parties and the Hearing Board.

(c) **Expert Testimony.** Examination of an expert witness is subject to generally accepted rules of evidence, including the ability to respond to hypotheticals and provide opinions. A witness may be presented as an expert provided that:

- (1) The Parties stipulate the witness is an expert for purposes of the testimony being offered; or
- (2) The Party calling the witness establishes on the record the witness possesses knowledge, skill, experience, training, or education in the specific matters for which the testimony is being offered.

(d) **Objections to Testimony.** The Chair will rule on objections made to questions asked of witnesses.

(e) **Declarations.**

- (1) Any Party that proposes to introduce a declaration into evidence must provide a copy of the declaration to all other Parties together with a notice as provided below.
- (2) Unless another Party, within seven days after the declaration is provided, delivers to the proponent a request to cross-examine the declarant, the right to cross-examine the declarant is waived and the declaration, if introduced in evidence, will be given the same effect as if the declarant had testified in person.
- (3) If an opportunity to cross-examine a declarant is not provided by the Hearing Board after being duly requested, the declaration may be introduced in evidence, but will be given only the same effect as other hearsay evidence.
- (4) The notice referred to above must be substantially in the following form:

The accompanying declaration of (name of declarant) will be introduced as evidence at the hearing in (title of proceeding). (Name of declarant) will not be called to testify in person and you will not be entitled to question the declarant unless you notify (name of proponent or attorney) at (address) that you wish to cross-examine. To be effective, your request

must be mailed or delivered to (name of proponent or attorney) on or before (a date seven days after the date of providing the declaration to the opposing Party).

(f) **Public Testimony.** The Hearing Board will consider public testimony in making its determination, provided, however, that the testimony and evidence is relevant and material to the matter being heard by the Hearing Board.

(1) Members of the public will be provided a reasonable opportunity to testify about any matter under consideration by the Hearing Board. Public testimony may be provided in person or remotely.

(A) Members of the public are not required to identify themselves on the record; however, if they do not, the Hearing Board may not rely on their testimony to support a finding;

(B) Members of the public are not required to testify under oath; however, if they do not, the Hearing Board will not give significant weight to their testimony.

(2) Members of the public may submit written testimony and documentary evidence, including email, prior to and including the date of the hearing. If the written testimony or documentary evidence is presented and summarized by the author at the hearing, it will be moved into evidence by the Chair. Otherwise, the exhibit will be marked as a Public Exhibit, but not considered as evidence in the matter.

(3) Parties will be given an opportunity to examine those members of the public who elect to identify themselves on the record and take the oath before offering their testimony.

(g) **Limitation on Time for Public Testimony.** The Chair may limit as appropriate the time that individual members of the public may speak before the Board on any matter.

(1) If the Chair has imposed time limits on public testimony, additional time may be granted to any individual, with the consent of a majority of the Hearing Board.

(2) The Chair may grant additional time to members of the public representing a group or organization, or to a public official or their representative.

(3) The Chair may impose reasonable limits on the total aggregate time for public testimony. In the event total time for public testimony is limited, the Chair will call individuals in the order in which they requested to speak, with the exception that public officials, and representatives of community groups and organizations will be given the opportunity to speak first.

(4) The Chair will ensure that a fair opportunity to testify is given to all

speakers, regardless of their position on the matter being considered. Total time for public testimony may not be limited in a way that precludes such a fair opportunity.

(h) Exhibits.

- (1) Exhibits should be submitted electronically to the Clerk no less than 72 hours prior to the scheduled hearing. If the electronic document exceeds 15 pages in length, the submitting Party should highlight or otherwise identify the pages that are pertinent to the case.
 - (A) If electronic delivery is not available to the submitting Party, a hard copy must be filed with the Clerk. If the hard copy exceeds 15 pages in length, the submitting Party should provide the cover sheet and only the pages of the document that are pertinent to the case as the exhibit. In that event, the entire document must be made available to other parties, the Hearing Board or any member of the public upon request.
 - (B) Parties should confer in advance to prevent the filing of duplicative exhibits, such as operating permits.
 - (C) If necessary, exhibits may be submitted to the Clerk on the day of the scheduled hearing.
 - (D) The Clerk will mark the exhibits at the time they are filed.
- (2) The Clerk will distribute a conformed copy of each exhibit to each Hearing Board member and to other Parties within 24 hours after filing. Exhibits produced on the day of the hearing must be provided to the Clerk upon arrival for distribution to Hearing Board members and other Parties. Copies will be made available for inspection by any member of the public in attendance.
- (3) Exhibits may include product samples or large-scale diagrams, schematics, and photographs. These may be produced on the day of the hearing and used for demonstrative purposes only. Demonstrative evidence is not made part of the administrative record.
- (4) Documents intended to be made part of the administrative record must be moved into evidence.

(i) Official Notice.

- (1) The Hearing Board may take official notice of any generally accepted technical or scientific matter within the Hearing Board members' special fields, or of any fact which may be judicially noticed by the courts in the State of California.
- (2) A Party seeking to have a matter officially noticed by the Hearing Board must file and serve a Request for Official Notice at least five

days before the hearing, if possible. This requirement may be waived by the Parties.

(3) The Request for Official Notice should include the following:

- (A) The materials which will be presented to the Board, or in the alternative, an electronic link to the materials to be noticed, provided the moving Party will provide copies of the materials at the hearing;
- (B) A brief statement of how the materials relate to an issue before the Hearing Board.

(4) Any Party may oppose a Request for Official Notice by providing evidence that the materials do not meet the standards for taking official notice.

(5) The Hearing Board will decide whether to accept materials to be entered into evidence by official notice. All evidence taken by official notice will be noted as such in the record.

13.4 Protective Orders.

(a) A Party may file a motion for a protective order if:

- (1) Certain evidence is confidential;
- (2) An order is required to protect any person or organization from unwarranted annoyance, embarrassment, oppression, undue burden or expense; or
- (3) Requested discovery is excessive.

(b) The moving Party must file a certification that the Party has conferred or attempted to confer with other affected Parties in a good faith effort to resolve the dispute without an action by the Hearing Board.

(c) The Hearing Board will grant a protective order upon a finding of good cause. The order will include one or more of the following:

- (1) The requested discovery will not be taken;
- (2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) The scope of discovery must be narrowed as specified by the Hearing Board;
- (4) Trade secret or other confidential research, development, or commercial information must not be disclosed or be disclosed only in a designated way.

(d) If the motion for a protective order is denied in whole or in part, the Hearing

Board may still impose reasonable limits on discovery.

RULE 14. CONSENT CALENDAR

14.1 Consent Calendar. The Hearing Board may grant or extend a variance, issue or extend an order for abatement, or decide an Appeal on a Consent Calendar without appearances by the Parties.

14.2 Petitioner Requirements

(a) Petitioner must obtain the agreement of the Respondent that the case should be placed on the Consent Calendar.

(b) If the Respondent concurs, Petitioner must file the following documents:

- (1) A final copy of a stipulation, signed by both the petitioner and Respondent. The stipulation must include, but is not limited to, the following:
 - (A) An agreement between the Parties to have the matter placed on the consent calendar and the date on which the matter will be heard.
 - (B) An agreement between the Parties that the declarations be admitted into evidence.
 - (C) A proposed order, including any proposed conditions and/or increments of progress. An electronic copy of the proposed order, in a format acceptable to the Clerk, must be filed with the stipulation.
 - (D) In a variance proceeding, confirmation that the APCO does not oppose the granting of the variance. If the District cannot take this position, the Hearing Board will not hear the matter on the Consent Calendar.
 - (E) Confirmation that the Parties agree to incorporate any prior evidence and testimony that has been given in earlier proceedings.
 - (F) Confirmation that operation under the order is not expected to result in a violation of Health and Safety Code Section 41700 (nuisance).
- (2) Witness declarations must be signed under penalty of perjury and must include, but are not limited to, the following:
 - (A) The information necessary to make the required findings for the order being requested.
 - (B) An estimate of the excess emissions, if any, including both the type of pollutant(s) and the estimated amount.

(C) A statement that operation under the order is not expected to result in a violation of Health and Safety Code Section 41700 (nuisance).

(3) Proposed findings and decision; and

(c) All the required documents must be filed with the Hearing Board no less than five business days prior to the scheduled hearing.

14.3 Hearing Board Requirements

(a) The Hearing Board will call and act upon Consent Calendar matters first on its calendar.

(b) The Hearing Board will receive any public testimony on a Consent Calendar matter before proceeding with deliberation.

(c) The Hearing Board's proceedings on a Consent Calendar matter must in all respects conform to the requirements set forth in the California Health and Safety Code, the District regulations and these rules, except that the Hearing Board will base its ruling on the declarations and other documents submitted by the Parties and on any public testimony received at the scheduled hearing.

(d) The Hearing Board will remove a matter from the Consent Calendar upon the written or oral request of the Respondent or the Petitioner, or any Hearing Board member. In that event, the matter will be heard later on that agenda or on the next available hearing date while fully complying with notice requirements for the type of matter at issue. If a public member requests the removal of a matter from the Consent Calendar, the Hearing Board will consider the reasons for the request and vote on the request prior to proceeding with the Consent Calendar.

(e) The Hearing Board will not include any matter on the Consent Calendar that involves emissions of toxics, undue harm to public health, or any other potential nuisance.

(f) The Hearing Board will have copies of the documents submitted by the Parties and considered by the Hearing Board in deciding the case available for public review in the Clerk's office during regular business hours.

RULE 15. PROCEDURE

15.1 Time and Place of Hearings.

(a) All hearings are held at District headquarters, beginning at 9:30 a.m. or a time otherwise determined by the Hearing Board.

(b) The Hearing Board may move the hearing to an alternative site in the Bay Area upon the request of a Party, a member of the public, or a member of the Hearing Board.

(c) All hearings must be held in a location readily accessible to the public.

15.2 Notice of Hearings.

(a) The Clerk will mail or deliver a notice of hearing to any persons entitled to notice under Health and Safety Code Section 40823 et seq. These include, but are not limited to, the petitioner for variance, petitioner for Appeal, the APCO, and the holder of a permit at issue.

(b) The notice of hearing will include the following information:

- (1) Location, date and time of the scheduled hearing;
- (2) The nature of the proceeding;
- (3) The District regulations at issue;
- (4) The right to counsel or other representation, to present evidence and cross-examine witnesses; and
- (5) The right to request a subpoena to compel witnesses and produce documents.

15.3 Attendance at Hearing.

(a) A Party requesting relief in a Hearing Board proceeding must appear in person or by legal counsel or other authorized representative in any hearing scheduled on the matter unless the case is being heard on the Consent Calendar in accordance with Rule 14, or unless otherwise decided by the Hearing Board. If the petitioning Party fails to attend the hearing, the Hearing Board will dismiss the case without prejudice.

(b) If the responding Party fails to attend the hearing, and the petitioning Party has provided proof of service, the Hearing Board may rule on the petition in the Respondent's absence.

(c) Hearing Board members must participate in Hearing Board hearings consistent with the provisions of the Ralph M. Brown Act, Government Code Section 54950 et seq.

15.4 Representation by Counsel.

(a) A Party in any Hearing Board proceeding may be represented by legal counsel, but this is not mandatory.

(b) If a Party elects to proceed without legal counsel, such Party may not seek a rehearing based on lack of legal representation. If a Party elects to proceed without legal counsel, such Party is held to the same legal standards as if the Party were represented by counsel.

15.5 Official Record. All hearings will be recorded. The audio recording constitutes the official record of the hearing.

15.6 Order of Proceedings. The Chair may alter the order of proceedings to expedite the business of the Board. Parties have the discretion to waive opening statements, cross-examination of witnesses, and closing statements. Under ordinary circumstances the order of proceedings is;

- (a) Announcement of pending matters;
- (b) Appearances of Parties;
- (c) All witnesses and potential witnesses are sworn in;
- (d) Fee waiver determination, if requested;
- (e) Small business determination, if appropriate (variance hearings only);
- (f) Moving Party's opening statement;
- (g) Responding Party's opening statement, unless Respondent prefers to delay opening statement until commencement of Respondent's case;
- (h) Moving Party's presentation of witnesses and introduction of evidence, with time allowed for cross-examination of each witness and questions by Board;
- (i) Responding Party's presentation of witnesses and introduction of evidence, with time allowed for cross-examination of each witness and questions by Board;
- (j) Moving Party's rebuttal, if any;
- (k) Responding Party's surrebuttal, if any;
- (l) Public testimony;
- (m) Moving Party's closing argument;
- (n) Responding Party's closing argument;
- (o) Case submitted to the Hearing Board
- (p) Hearing Board deliberates in public and renders its decision.

15.7 Reopening. After the case is submitted to the Hearing Board for deliberation and decision, it may be reopened for any and all matters, including further comments by counsel, only upon request and the concurrence of a quorum.

15.8 Withdrawal or Dismissal of Cases.

(a) **Withdrawal.** At any time before the commencement of a hearing, the Petitioner may withdraw the case from consideration by the Hearing Board.

- (1) Petitioner must notify the APCO prior to withdrawing the case. Notice may be by mail, phone, or electronic means.
- (2) The case will be terminated upon notice to the Clerk that the matter has been withdrawn.
- (3) If the case is withdrawn less than 72 hours before the scheduled hearing, the petitioner may be charged for all Hearing Board costs related to the scheduled hearing. This provision does not apply to the APCO.

(b) Dismissal.

- (1) After a hearing has commenced, a Party may move to dismiss the action in accordance with Rule 16.1
- (2) The Hearing Board may, on its own motion, in the furtherance of justice and for good cause, order an action dismissed.

15.9 Hearing Board Member Planned Absence. A Hearing Board member who plans to be absent will, as soon as practicable, notify the Clerk in writing of the dates of the planned absence.

(a) If a member who has previously notified the Clerk of a planned absence has a change of plans, that member must notify the Clerk of that change as soon as possible.

(b) If a member changes a planned absence and fails to notify the Clerk, the Alternate Member who agreed to substitute for the Regular Member may, at their sole discretion, sit for the Regular Member during the previously planned absence.

15.10 Participation by Previously Absent Hearing Board Members.

(a) A Hearing Board member who is unable to attend all of a hearing in a matter may participate in a continued hearing or in the decision of the matter, provided such member has read the transcripts or listened to an audio recording of the missed proceedings, or upon the stipulation of all Parties.

(b) If an alternate member of the Hearing Board participated in a prior hearing in place of the Regular Member, the Chair may authorize the Alternate Member to continue to sit on any continued hearing in the same case. When there are other matters on that day's calendar, the Alternate Member will sit for the continued hearing, and the Regular Member will hear all other matters.

15.11 Disqualification of Hearing Board Members.

(a) Hearing Board members are public officials and may not take part in any governmental decision in which they have a disqualifying conflict of interest. A Hearing Board member must disqualify themselves and withdraw from any case if they cannot provide a fair and impartial hearing or consideration. A Hearing Board member must avoid even the appearance of bias.

(b) A Party may request the disqualification of any member by filing a declaration or testifying prior to the taking of evidence in the case, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded.

(c) A Party may request the disqualification of any member after the case has commenced, provided it can demonstrate that, despite exercising due diligence, the Party did not know the grounds for disqualification.

(d) The other members of the Hearing Board will decide if disqualification is necessary and appropriate in accordance with Rule 16.5. Alternatively, the Hearing Board member who is the subject of the request may voluntarily withdraw.

(e) A request for disqualification may also be made upon filing a motion to rehear so long as the grounds for disqualification were previously unknown to the Party making the request and could not have reasonably been discovered earlier.

15.12 Requests for Rehearing.

(a) A Party may petition for a rehearing of a decision within 10 days after a copy of the decision has been mailed to or served on the Party.

(b) The petition must be in writing, must be served on the opposing Party, and must state the reasons and grounds for rehearing.

(c) A rehearing will be held based on only new evidence that did not exist or was not otherwise available to be considered at the time of the initial hearing.

(d) A petition for rehearing will be heard as soon as possible after public notice.

15.13 Continuances.

(a) The Chair has the authority to continue scheduled hearings to another date.

(b) The Hearing Board may continue a hearing on its own motion.

(c) A request for a continuance of a scheduled matter must be received by the Clerk no less than four business days prior to the scheduled hearing. If the request is filed with less notice, good cause must be shown why it could not have been filed four

business days prior to the hearing. The Clerk will promptly notify all other Parties and the Chair of the request for a continuance.

(d) If the continuance is granted, the Clerk will notify the other members of the Hearing Board and other Parties involved in the case of the change in schedule.

(e) A Party's first request for a continuance of 15 days or less, concurred in by all Parties to the action, will be granted.

(f) Any subsequent request for a continuance will be granted only if the request is reasonable and good cause is shown for the delay. The following will be considered in making a determination of reasonableness:

- (1) The length of the alleged violation;
- (2) The nature and extent of excess emissions;
- (3) The proximity of the source to sensitive receptors;
- (4) The availability of witnesses, if pertinent to the request;
- (5) The availability of counsel; and
- (6) Any other compelling reason(s) in favor of or opposition to continuance.

(g) A request for a continuance for the sole purpose of avoiding or delaying a hearing will not be considered reasonable and will defeat a finding of good cause to continue the hearing.

15.14 Ex Parte Communications.

(a) No person may make or knowingly cause to be made any ex parte communication.

(b) The prohibition applies to all communications, whether oral or written, and whether made directly to a Hearing Board member or through an intermediary, including the Clerk.

(c) The prohibition applies even if the communication is made in good faith and is not intended to influence the Hearing Board's decision.

(d) The prohibition does not apply to communications that are made in the presence of all Parties, or to communications that are made on the record.

(e) Any person who violates the prohibition against ex parte communications may be subject to sanctions, including but not limited to dismissal of the Party's case or an adverse ruling on the issue that is the subject of the prohibited communication.

15.15 Prohibition of Megaphones and Signs. No megaphones, bullhorns, placards, signs or posters, may be brought into the room in which a Hearing Board proceeding is being conducted on the day of the hearing. Charts, graphs or other graphic devices to be used in conjunction with testimony may be brought into the room.

15.16 Evening or Weekend Hearing. To schedule a hearing on a day and at a time more convenient to the public on issues of strong community concern, a hearing may be scheduled on an evening or weekend, if necessary. Hearing Board members will be contacted in advance to schedule such a hearing and are expected to provide a prompt response as to their availability.

15.17 Conduct at Hearings. The Hearing Board welcomes comments, including criticism, about the policies, procedures, acts or omissions of the Board. Speakers must not use threatening, profane, or abusive language which disrupts, disturbs, or otherwise impedes the orderly conduct of a proceeding. The District is committed to maintaining a workplace free of unlawful harassment and is mindful that District staff regularly attend Board meetings. Discriminatory statements or conduct that would potentially violate the Fair Employment and Housing Act – i.e., statements or conduct that is hostile, intimidating, oppressive, or abusive – is per se disruptive to a meeting and will not be tolerated.

RULE 16. MOTIONS

16.1 Motions to Dismiss.

(a) **Motion to Dismiss for Lack of Jurisdiction.** Any Party may make a motion to dismiss for lack of jurisdiction. If feasible, the motion should be made prior to the commencement of the presentation of evidence.

(b) **Motion to Dismiss for Lack of Clarity.** Prior to the taking of any evidence, the Respondent may make a motion to dismiss based on uncertainty, ambiguity, or unintelligibility of the application or accusation. The Hearing Board may dismiss the application or accusation or may order a recess in the proceedings to allow the nonmoving Party time to amend the pleading.

(c) **Motion to Dismiss for Lack of Proof.** Any Party or a Hearing Board member may make a motion to dismiss for lack of proof after the moving Party has completed their presentation of evidence.

16.2. Motion for Summary Judgment. Any Party or a Hearing Board member may make a motion for summary judgment. Summary judgment is granted only when the facts can be decided without needing to go to a hearing because the opposing Party would lose due to lack of evidence. If it is unclear that there is no more factual evidence, then summary judgment must be denied.

16.3 Motion for Default Judgment. A Party or any member of the Hearing Board may

move for a default judgment against an opposing Party who fails to appear at a public hearing, or, in the matter of a Petition for an Order for Abatement, who fails to file a timely Answer.

16.4 Motion to Strike. A motion to dismiss or strike may be made regarding the whole or any part of an application or Petition.

16.5 Motion to Disqualify.

(a) A Party may move to disqualify a member of the Hearing Board prior to the taking of evidence in the case stating with specificity the grounds on which it is claimed that the Hearing Board member cannot provide a fair and impartial hearing of the matter.

(b) A Party may move to disqualify a member of the Hearing Board prior to the submission of the case only if the grounds for disqualification could not have been reasonably discovered earlier.

(c) A Party may move to disqualify a member of the Hearing Board as part of a motion to rehear a case only if the grounds for disqualification could not have been reasonably discovered earlier.

(d) If the member who is the subject of the motion does not voluntarily withdraw, the motion to disqualify will be decided by the other members of the Hearing Board and granted if supported by the three remaining Hearing Board members.

16.6 Memorandum of Points and Authorities.

(a) A Party may serve and file a memorandum of points and authorities in connection with any motion before the Hearing Board.

(b) A memorandum of points and authorities should contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, textbooks, and other authorities cited in support of the position advanced.

(c) A memorandum of points and authorities may be supported by affidavits, documents or other evidence.

16.7 Burden of Proof. The moving Party bears the burden of proof on a motion and will be given the opportunity first to present its argument and evidence in support of the motion.

16.8 Filing Moving and Supporting Papers. Unless the Chair decides otherwise:

(a) All moving and supporting papers must be filed and served at least 10 business days before the scheduled hearing;

(b) All papers opposing the motion must be filed no less than five business days before the scheduled hearing; and

(c) All reply papers must be filed no less than three business days before the scheduled hearing.

RULE 17. ORDERS

17.1 Quorum. Except in the case of emergency variances, or other authorized single-member hearings, three members of the Hearing Board constitutes a quorum. The affirmative vote of a majority of the members of the Hearing Board in the presence of a quorum is necessary for a decision by the Hearing Board.

17.2 Findings and Decisions. All Findings and Decisions of the Hearing Board will be in writing and contain the reasons for the Board's decision.

(a) Findings and Decisions will be articulated by the Hearing Board on the record.

(b) Findings and Decisions granting a variance must explicitly address all six findings required by Health and Safety Code section 42352 as well as the implicit findings that the variance will not cause a public nuisance and that the variance conditions ensure an expeditious return to compliance with District regulations.

(c) The Hearing Board may order either Party to prepare a draft of the Findings and Decision.

(1) The Party must submit the Findings and Decision in the format required by the Hearing Board.

(2) The Party preparing the draft order will share it with the other Party on a timetable determined at the hearing. If the Party directed to submit fails to submit a proposed order within the time period specified, then the other Party may prepare the draft order. In that event, the Clerk will not accept for filing any response or objections to the proposed order from the Party originally directed to submit it unless otherwise directed by the Hearing Board.

(3) Failure to provide a draft order after being directed to do so by the Hearing Board constitutes grounds for consideration of sanctions or the imposition of administrative civil penalties under Health and Safety Code section 42402.5.

(d) The Hearing Board has the right to modify any draft order.

(e) The Findings and Decision may be issued upon one signature of the Hearing Board.

(f) Separate dissenting or concurring opinions of individual Hearing Board members will be appended to the Findings and Decision and will be part of the official case record.

17.3 Minute Orders. The Clerk will prepare a Minute Order if requested by any Party or the Hearing Board.

(a) The minute order will include the following:

- (1) The names of the Hearing Board members present;
- (2) The names of each Party and representative;
- (3) A list of witnesses and exhibits;
- (4) The decision of the Hearing Board, and the votes by members.

(b) The minute order or a true copy thereof signed by a Board member will become a part of the official case file. The Clerk will mail the minute order to the Parties.

17.4 Effective Date of Decision. The decision of the Hearing Board becomes effective upon the filing of the Findings and Decision unless otherwise ordered by the Hearing Board.

17.5 Clerical Errors. The Hearing Board may correct clerical errors in its orders without further hearings and issue the amended order.

17.6 Service. All orders of the Hearing Board, including Findings and Decisions, will be filed and served by the Clerk within 30 days of the date of the hearing.

(a) The Parties may agree to accept service electronically, otherwise service will be accomplished via first class mail.

(b) The Hearing Board may grant an extension to the 30-day deadline.

(c) The Clerk will mail a copy of variance orders to the State Air Resources Board within 30 days after the granting or denial of a variance, unless an extension has been granted.

RULE 18. SANCTIONS

18.1 Removal. In accordance with Government Code Section 54957.9, any meeting that is willfully interrupted by any person so as to render the orderly conduct of such meeting unfeasible, the Chair may order the disruptive person removed from the hearing room, or muted if participating remotely, and continue the hearing. Any person who violates Rule 15.17 is subject to removal from the hearing room or muting pursuant to this section.

18.2 Misdemeanor Liability. In accordance with California Penal Code Section 403, every person who, without authority of law, willfully disturbs or breaks up any hearing is guilty of a misdemeanor.

18.3 Contempt. In accordance with the California Administrative Procedures Act, Government Code Sections 11455.10 and 11455.20, any person who disobeys or resists a lawful order of the Hearing Board, disrupts a hearing, or acts, or refuses to act in any other manner that is sanctionable under Section 11455.10 may be subject to contempt

sanctions. Upon authorization by the Hearing Board, the Chair, in accordance with Section 11455.20, may certify the facts that justify the contempt sanction for the Superior Court. In addition, pursuant to Government Code Section 11455.30, upon authorization by the Hearing Board, the Chair may order a Party, the Party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney fees, incurred by another Party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

RULE 19. LANGUAGE ASSISTANCE

19.1 Language of Record. In accordance with Government Code Sections 11435.05-11435.65, the Hearing Board proceedings will be conducted in English.

19.2 Translation Services. If a Party or the Party's witness does not proficiently speak or understand English and requires translation services, such notice must be given to the Clerk no less than four business days in advance of the scheduled hearing.

(a) A qualified interpreter may be provided by either the Party requesting translation services or the APCO.

- (1) The interpreter must take an oath or affirmation attesting that they will accurately translate all statements by the Party or witness.
- (2) The interpreter must be proficient in translating for the Party or witness.
- (3) The interpreter must not have had any involvement in the issues of the case prior to the hearing.

(b) The cost of translation services must be paid by the Party who made the request for translation services unless the APCO agrees to incur the cost or the Chair orders otherwise. The Chair's decision to direct payment will be based upon an equitable consideration of all the circumstances in each case, such as the ability of the Party in need of translation services to pay.

(c) If a translator is used in a hearing, the Chair may determine whether to accept the translator. If the interpreter is unacceptable to the Chair, the hearing will be continued until translation services by an acceptable interpreter can be provided.

(d) Any rules of confidentiality that apply in the proceeding apply to the interpreter and any translation services provided.