

STATEMENT OF PROCEEDINGS
SAN DIEGO COUNTY AIR POLLUTION CONTROL DISTRICT HEARING BOARD
Regular Meeting, Thursday, August 10, 2023
9:00 a.m.

ORDER OF BUSINESS

ROLL CALL

Members present: Alison Schlick, William Powers, Jose Gonzalez and Daniel Spencer

Members absent: Vilmarie Rodriguez

Staff present: Mary Mahoney, APCD Civil Actions Investigator; Dan Plotner, APCD Program Coordinator; Veera Tyagi, Senior Deputy County Counsel APCD; Emily Helms, Senior Deputy County Counsel APCD, and Mia Ruffier, APCD Clerk of the Hearing Board

SWORN OATH OF WITNESSES BY CLERK

All witnesses providing public testimony during the meeting were sworn-in by the Clerk of the APCD Hearing Board.

ADMINISTRATIVE ITEM:

A. Public Communication

No public testimony was provided to the Board.

B. Approval of Statement of Proceedings for July 13, 2023.

ACTION:

ON MOTION of Member Powers, seconded by Member Spencer, the Air Pollution Control District Hearing Board approved the Statement of Proceedings for the meeting of July 13, 2023.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez

C. Approval of Statement of Proceedings for July 13, 2023 Special Meeting.

ACTION:

ON MOTION of Member Spencer, seconded by Member Powers, the Air Pollution Control District Hearing Board approved the Statement of Proceedings for the meeting of July 13, 2023 Special Meeting.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez

D. Discussion and Consideration of Adoption: Revised Hearing Board Rules of Procedure.

ACTION:

ON MOTION of Member Powers, seconded by Member Spencer, the Air Pollution Control District Hearing Board accepted the discussed revisions and adopted the revised Hearing Board Rules of Procedure effective August 10, 2023, as amended.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez

PETITION(S) BEFORE THE BOARD:

N/A

ADJOURNMENT:

The APCD Hearing Board adjourned the August 10, 2023 meeting at 9:40 a.m.

ASSISTANCE FOR THE DISABLED:

Agendas and records are available in alternative formats upon request. Contact the APCD Hearing Board Clerk at 858-586-2600 with questions or to request a disability-related accommodation including sign language interpretation. To the extent reasonably possible, requests for accommodation or assistance should be submitted at least 72 hours in advance of the meeting so that arrangements may be made.

Pursuant to Government Code 54957.5, written materials distributed to the Hearing Board in connection with this agenda less than 72 hours before the meeting will be available to the public at the San Diego County Air Pollution Control District, 10124 Old Grove Road, San Diego, CA 92131.

The statements contained in this draft document are subject to change until they are approved in their final form by the Air Pollution Control District Hearing Board at a subsequent public meeting.

ADMINISTRATIVE ITEM:

A. Public Communication

ACTION:

No public testimony was provided to the Board.



MIA RUFFIER

Clerk of the San Diego County Air Pollution Control District Hearing Board

ADMINISTRATIVE ITEM:

B. Approval of Statement of Proceedings/Minutes for July 13, 2023.

ACTION:

ON MOTION of Member Powers, seconded by Member Spencer, the Air Pollution Control District Hearing Board approved the Statement of Proceedings for the meeting of July 13, 2023.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez



MIA RUFFIER

Clerk of the San Diego County Air Pollution Control District Hearing Board

ADMINISTRATIVE ITEM:

C. Approval of Statement of Proceedings for July 13, 2023 Special Meeting.

ACTION:

ON MOTION of Member Spencer, seconded by Member Powers, the Air Pollution Control District Hearing Board approved the Statement of Proceedings for the meeting of July 13, 2023 Special Meeting.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez



MIA RUFFIER

Clerk of the San Diego County Air Pollution Control District Hearing Board

ADMINISTRATIVE ITEM:

D. Discussion and Consideration of Adoption: Revised Hearing Board Rules of Procedure.

ACTION:

ON MOTION of Member Powers, seconded by Member Spencer, the Air Pollution Control District Hearing Board accepted the discussed revisions and adopted the revised Hearing Board Rules of Procedure effective August 10, 2023, as amended.

AYES: Schlick, Powers, Gonzalez, Spencer

ABSENT: Rodriguez



MIA RUFFIER

Clerk of the San Diego County Air Pollution Control District Hearing Board

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RULES OF PROCEDURE

Rule 1 - General

These rules are adopted pursuant to Health and Safety Code Section 40807. In the event of a conflict between these rules and the applicable provisions of the Health and Safety Code, the applicable provisions of the Health and Safety Code shall prevail.

These rules shall apply to all hearings before the Hearing Board of the Air Pollution Control District, which shall be held in the designated Hearing Room at 1600 Pacific Highway, San Diego, California, unless otherwise specified in the publicly noticed agenda. The meetings may be held via teleconference, from time to time, in accordance with applicable law.

Rule 2 - Definitions

(a) "Air Pollution Control Officer." Air Pollution Control Officer means the Air Pollution Control Officer of the APCD.

(b) "APCD." APCD means the San Diego County Air Pollution Control District.

(c) "APCD Rule." APCD Rule means a rule adopted by the Governing Board of the APCD.

(d) "Breakdown Condition." For purposes of Rule 17, Petition for Emergency Variance, a Breakdown Condition means an unforeseeable failure or malfunction of either (1) any air pollution control equipment or related operating equipment that causes a violation of any emission limitation or restriction prescribed by the APCD Rules and Regulations, or by State law, or (2) any in-stack continuous

monitoring equipment that: (a) is not the result of neglect or disregard of any air pollution control law or rule or regulation; (b) is not intentional or the result of negligence; (c) is not the result of improper maintenance; (d) does not constitute a nuisance; and (e) is not a recurrent breakdown of the same equipment.

(e) "Clerk of the Hearing Board." The Clerk of the Hearing Board provides administrative support to the Hearing Board in connection with Hearing Board proceedings.

(f) "Continuance." Continuance means a postponement of a hearing to a later time or date.

(g) "Day(s)." Day(s) shall mean calendar day(s) unless otherwise indicated.

(h) "Emergency Variance." A variance issued in accordance with Health and Safety Code Section 42359.5, which may be issued by the Chair or designee, without notice and a hearing. An Emergency Variance may not exceed 30 days.

(i) "Hearing Board." Hearing Board means the APCD Hearing Board.

(j) "Improper Maintenance." For purposes of Rule 17, Petition for Emergency Variance, improper maintenance means not performing normal, regular maintenance.

(k) "Interim Variance." A variance issued in accordance with Health and Safety Code Section 42351, allowing a Petitioner to commence or continue operation pending the decision of the Hearing Board on the petition for Regular Variance. This type of variance may not exceed 90 days or the date of the hearing on the Regular Variance, whichever comes first.

(l) "Negligence." For purposes of Rule 17, Petition for Emergency Variance, negligence means failure to use the care that a prudent person usually exercises.

(m) "Party/Parties." Party/Parties means those interested persons and companies, or their legally authorized representatives, who have appeared or filed papers in connection with a matter before the Hearing Board. However, offering public comment pursuant to Rule 12, Public Comment, does not confer Party status.

(n) "Petitioner." The Party who files a petition with the Hearing Board.

(o) "Regular Variance." A variance issued in accordance with Health and Safety Code Section 42352, which allows a Petitioner to operate in violation of an APCD rule or permit condition while it takes steps to come into compliance with the rule or condition.

(p) "Rule(s)." Rule(s) shall refer to the Hearing Board Rules of Procedure, unless otherwise indicated.

(q) "Respondent." The Party served with a petition by the Petitioner.

Rule 3 - Chair and Vice Chair

At the first regular meeting of each calendar year, or as soon thereafter as the Board's schedule permits, the members of the Hearing Board shall select one of their members to serve as Chair of the Board.

At the first regular meeting of each calendar year, or as soon thereafter as the Board's schedule permits, the members of the Hearing Board shall select one of their members to serve as Vice-Chair to fulfill the duties and responsibilities of the Chair in the Chair's absence.

If neither the Chair nor the Vice-Chair is present at a hearing, the Hearing Board members who are present shall select a Hearing Board member to serve as Chair for that particular hearing.

Duties of the Chair and Vice-Chair can be delegated to other Hearing Board members, as the Chair or Vice-Chair sees fit.

Rule 4 - Minutes; Preparation of Record

The Clerk of the Hearing Board shall cause to be prepared a minute order for each matter heard before the Hearing Board. The minute order shall include the time and place of each meeting of the Hearing Board, the names of members present, all official acts of the Hearing Board, the votes by members and, when requested by a member or Party to the hearing, the reasons for a member's dissent or approval. The minutes or a true copy thereof signed by the Clerk of the Hearing Board shall be maintained in accordance with the applicable records retention schedule for the Hearing Board.

All proceedings of the Hearing Board shall be recorded. Copies of the recordings will be made available upon request and payment of the fee therefor. In the event judicial review is initiated pursuant to Health and Safety Code Section 40864, the Hearing Board shall prepare the record of the proceedings upon payment of the fee specified in Government Code Section 69950. In all other cases, the requesting Party may arrange for the preparation of such transcript and the cost of such transcript shall be paid by said Party. The Parties may stipulate with the approval of the Hearing Board that a transcript is the official record of the proceeding. Transcripts may be certified by the Clerk of the Hearing Board provided that the costs of such certification shall be paid by the requesting Party.

Rule 5 - Hearing Board Hours

The Hearing Board will promptly convene the hearing at the time specified in the Notice of Hearing. The Hearing Board may recess at the discretion of the Chair. It will reconvene promptly at the time specified by the Chair.

Rule 6 - Disqualification of Hearing Board Members

A Hearing Board member shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any Party may request the disqualification of any member by filing an affidavit prior to the taking of evidence in the event a fair hearing cannot be accorded. A disqualification request may be made prior to the taking of evidence upon the sworn testimony of the Party requesting disqualification. Such a request may also be made prior to submission of the case, provided the grounds could not have been previously known. The issue

raised by the request shall be determined by the other members of the Hearing Board, except that such Hearing Board member may voluntarily withdraw. 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.

Rule 7 - Quorum

Three members of the Hearing Board shall constitute a quorum. Concurrence of at least three members of the Hearing Board is required to grant a request in any matter, except an Emergency Variance as set forth in Rule 17, Petition for Emergency Variance.

Rule 8 - Hearing by Fewer than Four Members

If only three members are present to conduct a hearing, the Hearing Board, in its sole discretion, may offer the Petitioner the opportunity to continue the hearing until a later date when four or more members are available. The hearing shall be scheduled for the next available hearing date, unless otherwise specified by the Hearing Board; provided that nothing in this Rule 8, Hearing by Fewer than Four Members, shall be construed as authorizing the Hearing Board to conduct hearings outside of the timeframes established by applicable law.

Unless otherwise required by these Rules or other applicable law, decisions issued by a panel of three or more Hearing Board members shall be valid and binding.

Rule 9 - Effectiveness of Action

Unless otherwise required by these Rules or other applicable law, a decision of the Hearing Board shall become effective upon the concurring vote of the required number of members.

The absence or resignation of Hearing Board members shall not affect any action taken by the Hearing Board provided:

- (a) A quorum is present for the decision-making, and
- (b) The required number of Board Members concur in the decision.

Rule 10 - Participation by Previously Absent Member

A Hearing Board member who is unable to attend all the hearings in a matter may participate in the decision of the matter, including without limitation approval of minute orders, provided such member has reviewed the record of the missed proceedings, or upon the stipulation of all parties.

Rule 11 - Representation by Counsel

The Petitioner or Respondent, may be represented by counsel in any matter before the Hearing Board. However, representation is not mandatory. If a Party elects to proceed in a matter without counsel said Party shall have no right to a rehearing of the matter for the reason that counsel was not present.

Rule 12 - Public Comment

At each Hearing Board meeting, the Hearing Board shall allow any member of the public to address the Hearing Board on a matter within its jurisdiction. Unless otherwise allowed by the Chair, the total amount of time for public testimony shall be no more than three minutes per speaker. Any person wishing to address the Hearing Board must complete and deliver to the Clerk of the Hearing Board a "Request to Speak" form prior to the time that the "Public Comment" period commences; the form shall include a description of the subject the speaker wishes to address. A speaker shall not be heard during the "Public Comment" portion of the meeting on a matter listed on the agenda.

In the event that a meeting is conducted via teleconference, the public comment procedures specified in the publicly noticed agenda shall apply.

Rule 13 - Request for Hearing

(a) Except as otherwise expressly provided in this Rule 13, Request for Hearing, a request for hearing shall be initiated by the filing of a petition with the Clerk of the Hearing Board at 10124 Old Grove Road, San Diego, California, 92131, and the payment of the fee provided for in APCD Rule 42, Hearing Board Fees.

(b) Petitions may be submitted to the Hearing Board electronically on the Hearing Board website. If a petition is not submitted electronically, the following procedures apply:

(1) If the petition, together with any accompanying documents, contains a total of 10 pages or less, the Clerk of the Hearing Board shall not later than the day the petition is filed transmit a copy of the petition and any accompanying documents to the APCD.

(2) If the petition together with accompanying documents contains a total of more than 10 pages, the Petitioner shall provide 15 copies to the Clerk of the Hearing Board.

(c) The Petitioner shall, not later than the date the petition is filed, also serve the APCD at 10124 Old Grove Road, San Diego, California 92131, unless the APCD or Air Pollution Control Officer is the Petitioner. The Petitioner shall also serve the petition and any accompanying documents upon the holder of the permit or variance, provided that the Petitioner is not also the holder of such permit or variance. Service may be made in person or by mail and service may be proved by written acknowledgment of the person served or by affidavit of the person making the service.

(d) Petitions for a Regular Variance shall be filed and served no later than 35 days before the date set for hearing.

(e) A request for an Emergency Variance shall be initiated by calling or contacting the Air Pollution Control Officer. A petition shall be filed and served pursuant to this Rule 13, Request for Hearing, and the fee therefor paid, no later than the second working day following the initial contact with the APCD.

(f) All other petitions shall be filed, and served in such manner as to be received by Respondent(s) no later than 14 days before the date set for hearing.

Rule 14 - Contents of Petitions

(a) Every petition shall contain the following information:

(1) The name, address and telephone number and email, if available, of the Petitioner, or other person authorized to receive service of notices.

(2) The type of business or activity involved in the petition 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 petition, and its location.

(4) The petition shall indicate whether Petitioner desires a hearing:

(A) To determine, pursuant to Health and Safety Code Section 42302.1, whether a permit was properly issued.

(B) To determine whether a permit was properly suspended under Health and Safety Code Section 42306.

(C) To review the denial or conditional granting of an Authority to Construct or Permit to Operate under Health and Safety Code Section 42302 and APCD Rule 25, Appeals.

(D) To determine whether a permit shall be revoked pursuant to Health and Safety Code Section 42307.

(E) For a Regular Variance under Health and Safety Code Section 42350.

(F) For an Interim Variance under Health and Safety Code Section 42351.

(G) To revoke or modify a variance under Health and Safety Code Section 42356.

(H) To consider adoption, modification or revocation of a schedule of increments of progress and/or final compliance date in accordance with Health and Safety Code Sections 42357 and 42358.

(I) To consider a petition for an order for abatement pursuant to Health and Safety Code Section 42451.

(5) Each petition shall be verified and signed by Petitioner, or by some person legally authorized to sign on his or her behalf, and where the person signing is not the Petitioner, it shall set forth his or her authority to sign to the satisfaction of the Clerk of the Hearing Board.

(6) In a petition for revocation of a permit the Air Pollution Control Officer shall allege:

(A) The rule under which the permit was granted;

(B) The relevant APCD Rule or Health and Safety Code Section that the permittee allegedly violated; and

(C) A brief statement of the facts constituting the alleged violation.

(7) Petitions for reinstatement of suspended permits shall allege:

(A) The rule under which the permit was granted;

(B) A brief statement explaining why the permit was suspended;

(C) A brief statement explaining why the permit should be reinstated.

(8) A petition for an order of abatement shall allege:

(A) The statute or rule alleged to be violated; and

(B) Why the order would not have the effect of a variance.

(b) Petitioner is encouraged to submit the petition on the form(s) provided on the APCD Hearing Board website (see subsection (d)). If Petitioner does not use the form(s) provided on the APCD Hearing Board website, petition should be typewritten double-spaced, on letter-sized paper, on one side of the paper only, leaving a marking of at least four inches at the top and one inch on the left side of the first sheet. All succeeding sheets shall have a one-inch margin at the top and the left side. Notwithstanding the foregoing, the Hearing Board may, in its discretion, accept any legible petition.

(c) If Petitioner chooses to include a memorandum containing legal arguments in support of the petition, such memorandum shall be filed and served with the petition.

(d) Petition forms may be found on the APCD's Hearing Board website in a section titled "How to File a Variance Petition or Permit Appeal." " and can be viewed at [Variance and Permit Appeal Filing Fees \(sdapcd.org\)](http://sdapcd.org). Hard copies are available at 10124 Old Grove Road, San Diego, California, 92131.

Rule 15 - Petitions for Regular Variance

In addition to the matters required by Rule 14, Contents of Petitions, petitions for variance shall include:

(a) The section, rule or order from which a variance is requested.

(b) A written statement demonstrating that the conditions of Health and Safety Code Section 42352 exist. Such statement shall include:

(1) Facts showing that Petitioner is or will be discharging air contaminants in excess of those allowed by Health and Safety Code Section 41701, or in violation of any APCD rule, regulation, or order;

(2) Facts showing that requiring compliance would result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business; and that such results are due to conditions beyond Petitioner's reasonable control;

- (3) Facts showing actions Petitioner took to comply since the adoption of the rule, regulation, or order from which the variance is sought;
- (4) Facts showing whether an unreasonable burden would be imposed upon the Petitioner if immediate compliance is required;
- (5) If Petitioner is a public agency, a statement and supporting facts indicating whether requiring immediate compliance would impose an unreasonable burden on an essential public service as defined in Health and Safety Code Section 42352(a)(2).
- (6) Facts showing that the closing or taking would be without a corresponding benefit in reducing contaminants;
- (7) Facts showing that Petitioner has given consideration to curtailing operations of the source in lieu of obtaining a variance;
- (8) Facts showing that during the period the variance is in effect, the Petitioner will reduce excess emissions to the maximum extent feasible;
- (9) Facts showing that 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 APCD, and report these emission levels to the APCD pursuant to a schedule established by the APCD;
- (10) A statement and supporting facts, indicating whether Petitioner's business is a small business as defined by the Small Business Administration, and whether Petitioner's business emits 10 tons or less per year of air contaminants; if the Petitioner is a small business and emits 10 tons or less per year of air contaminants, the statement shall also describe:
 - (A) The reasons for any claimed ignorance of the requirement from which a variance is sought;
 - (B) The Petitioner's financial and other capabilities to comply;
 - (C) The impact on the Petitioner's business and the benefit to the environment which would result if the Petitioner is required to immediately comply.
- (11) The period of time the variance is sought and why.
- (12) If the Petitioner requests a variance exceeding one year, a proposed schedule of "increments of progress" (Compliance Schedule), itemizing tasks to become compliant, if necessary, including but not limited to the following:
 - (A) The date by which contracts for emission control systems or process modification will be awarded or the date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;
 - (B) The date of initiation of onsite construction or installation of emission control equipment or process change;

(C) The date by which onsite construction or installation of emission control equipment or process modification is to be completed;

(D) Such additional increments of progress as may be necessary or appropriate to permit close and effective supervision of progress toward timely compliance; and

(E) The date by which final compliance is to be achieved.

(F) Whether operations would constitute a nuisance under such variance, if granted.

(G) Whether the subject equipment or process is covered by Authorities to Construct or a Permit to Operate issued by the Air Pollution Control Officer, and if so, the permit number.

(H) Amount of allowable emissions associated with equipment and amount of calculated excess emissions due to non-compliance, including the calculation basis, in the units of measures specified in the permit to operate or applicable regulation.

(I) State the projected amount of emissions and excess emissions for the period of the variance, if granted.

(c) Notwithstanding the foregoing, Title V sources shall not be granted a variance, from the requirement for a permit to operate or use.

Rule 16 - Petition for Interim Variance

The Hearing Board may grant an Interim Variance for good cause in accordance with Health and Safety Code Section 42351. The Interim Variance may not exceed 90 days or the date of the hearing on the Regular Variance, whichever comes first. The petition for Interim Variance shall include all of the information required by Rule 15 Petition for Regular Variance.

Rule 17 - Petition for Emergency Variance

(a) A request for an Emergency Variance pursuant to Health and Safety Code Section 42359.5, shall be initiated and filed pursuant to Rule 13(d), Request for a Hearing.

(b) Upon receipt of a request for an Emergency Variance from the APCD Rules and Regulations, the Chair of the Hearing Board, or any other member of the Hearing Board the Chair may designate, may issue without notice and public hearing, an Emergency Variance up to 30 days. An Emergency Variance shall be issued only if the Chair or member(s) finds all of the following:

(1) Good cause exists for granting the variance.

(2) The situation as outlined in the request constitutes an emergency.

(3) The operation resulting from the variance shall not create a private or a public nuisance.

(4) The purpose of the emergency request is not to avoid notice requirements for a hearing on the request.

(5) It is impractical to hear the request at the next scheduled meeting of the Hearing Board.

(6) In the event of a Breakdown Condition, as defined by APCD Rule 98, Breakdown Conditions: Emergency Variance, the requirements such rule, and subsection (i) hereof for requesting a variance have been fulfilled.

(c) The Clerk of the Hearing Board shall notify the Air Pollution Control Officer and the person requesting a variance of the time and place of consideration for the request for an Emergency Variance. The Clerk of the Hearing Board shall make a good faith effort to provide actual notice to the Air Pollution Control Officer. However, if after a good faith attempt, the Air Pollution Control Officer cannot be reached, the Clerk of the Hearing Board may leave a message at a phone number and/or email address specified by the Air Pollution Control Officer, and such message shall meet the requirements of this Rule 17, Request for Emergency Variance.

(d) Before granting an Emergency Variance the Chair or designated member(s) of the Hearing Board (1) shall give the Air Pollution Control Officer an opportunity to respond to the request, and (2) may consult the Air Pollution Control Officer in order to obtain information.

(e) An Emergency Variance shall not be granted from the requirement that an Authority to Construct be secured from the APCD before building, erecting, altering, or replacing any article, machine, equipment or other contrivance, which may cause the issuance of air contaminants.

(f) In granting an Emergency Variance pursuant to subdivision (a) of this Rule 17, Petition for Emergency Variance, the Chair or designated member(s) of the Hearing Board may impose conditions, as appropriate, which shall remain in effect during the term of the Emergency Variance.

(g) The Clerk of the Hearing Board shall notify the Air Pollution Control Officer when an Emergency Variance is granted pursuant to this Rule 17, Petition for Emergency Variance, and within 30 days shall submit to the California Air Resources Board a copy of the order granting an Emergency Variance.

(h) If a variance beyond 30 days will be required, the Petitioner may also file a petition for a variance of appropriate duration at the time the petition for the Emergency Variance is filed.

(i) Breakdown Conditions

(1) No Emergency Variance for a Breakdown Condition as defined in APCD Rule 98, Breakdown Conditions: Emergency Variance, shall be granted unless the Chair or other designated member(s) finds that:

(A) The occurrence constitutes a Breakdown Condition;

(B) Continued operation is not likely to create an immediate threat or hazard to public health or safety; and

(C) Continued operation in a breakdown condition will not interfere with the attainment or maintenance of any national or California ambient air quality standard.

(2) An Emergency Variance resulting from a Breakdown Condition shall remain in effect only for as long as necessary to repair or remedy the Breakdown Conditions, but in no event after a properly noticed hearing to consider a petition for other than an Emergency Variance has been held, or 30 days from the date of the subject occurrence, whichever is sooner.

Rule 18 - Permit Appeals

(a) Within 30 days after receipt of notice from the Air Pollution Control Officer of denial or conditional approval of an application for an Authority to Construct or a Permit to Operate, the applicant may petition the Hearing Board in writing. The Hearing Board shall, except as provided in Health and Safety Code Section 42302.1, hold a public hearing no more than 30 days after the date the petition was filed, and take any action authorized by Health and Safety Code Section 42309; such order may be subject to specified conditions.

(b) Within 10 days after receipt of notice from the Air Pollution Control Officer of suspension of a permit, the applicant may petition the Hearing Board in writing. The Hearing Board shall, except as provided in Health and Safety Code Section 42302.1, hold a public hearing no more than 30 days after the date the petition was filed, and sustain, reverse, or modify the action of the Air Pollution Control Officer; such order may be subject to specified conditions.

(c) Within 30 days of any decision or action pertaining to the issuance of a permit by the APCD, except as otherwise provided in Health and Safety Code Section 42302.1, any aggrieved person who, in person or through a representative appeared, submitted written testimony, or otherwise participated in the action before the APCD, may file a petition requesting that the Hearing Board hold a public hearing to determine whether or not the permit was properly issued. The Hearing Board shall hold a hearing and make a decision on the matter within 30 days of the date the petition was filed, except as otherwise provided in Health and Safety Code Section 42302.1.

(d) In addition to the matters considered by Rule 14, Contents of Petitions, appeals of a denial or conditional approval of an Authority to Construct or Permit to Operate shall set forth a summary of the application or a copy thereof, the alleged reasons for the denial or conditional approval, and the reasons for appeal.

Rule 19 - Amendments

At any time before a matter is decided by vote of the Hearing Board the Hearing Board may permit a Party to amend its petition, provided that such amendment does not require issuance of a new public notice. The Hearing Board may, in its discretion, upon stipulation or ten days' notice, permit amendment of a petition for variance or appeal either before or after submission on such terms and conditions as it may determine to be proper. The Hearing Board may continue the hearing, or reopen the hearing if the

case has been decided by a vote of the Hearing Board, whenever an amendment to a petition for variance or appeal makes it necessary to do so.

If the Respondent asserts that time is needed to respond to the amendment, the Chair, or designated member, may continue and/or reopen the matter if determined to be necessary.

Rule 20 - Response

(a) Any person or entity served with a petition may file a response which may;

(1) Object to the jurisdiction of the Hearing Board;

(2) Object to the form of the petition;

(3) Admit the petition in whole or in part;

(4) Present new matter by way of defense.

(b) Responses shall be filed and served at least five working days prior to the hearing. Notwithstanding the foregoing, a response to a petition for Emergency Variance may be made orally at the hearing.

(c) The response shall be signed by or on behalf of the Respondent and shall state Respondent's mailing address. It need not be verified or follow any particular form.

(d) If a Respondent chooses to include a memorandum of legal arguments in support of the response, such memorandum shall be filed and served within the time period allowed for filing the response. The Hearing Board may, in its discretion, accept a late memorandum upon a showing of good cause.

(e) Responses shall be served on the Petitioner and to all of the same parties and in the same manner as petitions are served.

Rule 21 - Submitted Material

Unless otherwise specified in these Rules, any Party or member of the public, has seven days prior to the Hearing Board meeting to supply written information to the Clerk of the Hearing Board. If the written material is not submitted by the seven-day deadline, the Hearing Board will not consider the written material, except for good cause shown. If the Hearing Board does not find good cause for the late submission of material, the Party shall nevertheless be permitted to present the information verbally during its presentation before the Board. See also Rule 25, Evidence.

Parties should be prepared to present their evidence and arguments to the Hearing Board, as further specified in Rule 23, Order of Procedures. Visual presentations (e.g. slideshows) are recommended but not required.

Unless otherwise authorized by the Chair, neither Party's presentation shall exceed one hour in length.

Rule 22 - Notice of Hearing

The Clerk of the Hearing Board shall mail, deliver or otherwise convey a notice of hearing in accordance with the requirements of the Health and Safety Code.

The agenda for each regular meeting shall be posted on the APCD Hearing Board's website and at 10124 Old Grove Road, San Diego, California, 92131, in accordance with Government Code Section 54954.2(a).

Rule 23 - Order of Procedures

(1) The order of proceedings before the Hearing Board shall ordinarily be as follows. The Chair may, in its discretion, alter the order of proceedings as may be desirable to expedite the business of the Hearing Board.

- (a) Announcement of pending matters;
- (b) Enter appearances;
- (c) Fee waiver determination (if applicable);
- (d) Small business/essential public service determination (if applicable);
- (e) Summary of evidence by APCD representatives;
- (f) Evidence and argument by moving party;
- (g) Evidence and argument by responding party;
- (h) Public testimony;
- (i) Rebuttal evidence or argument, where necessary.

(2) The Chair may adopt reasonable rules of procedure including, but not limited to, limiting the amount of time allocated for testimony on particular issues and for each individual speaker.

Rule 24 - Official Notice

The Hearing Board may take official notice of any matter which may be judicially noticed by the courts of this State.

Rule 25 - Evidence

- (a) Oral evidence shall be taken only on oath or affirmation.
- (b) Each Party shall have these rights: (1) to call and examine witnesses; (2) to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination; (3) to impeach any witness regardless of which Party first called him or her to testify; and (4) to rebut the evidence against him or her.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to relying on for the conduct of serious affairs. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding, unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are effective in civil actions. Irrelevant and unduly repetitious evidence shall be excluded.

(d) Petitioners for variances shall present evidence regarding efforts to comply after filing the petition and prior to the hearing.

(e) At any time 10 or more days prior to a hearing or a continued hearing, any Party may mail or deliver to the opposing Party a copy of any affidavit which the Party proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the other Party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, the opposing Party's right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

The notice referred to above shall be substantially in the following form:

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

Rule 26 - Request for Discovery; Statements; Writing

(a) Subject to subsections (b)-(d) below, a Party is entitled to obtain the following from another Party:

(1) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(2) Statements of witnesses then proposed to be called by the Party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included above;

(3) All writings that the Party then proposes to offer in evidence;

(4) Any other writing or thing which is relevant and which would be admissible in evidence;

(5) Investigative reports made by or on behalf of the APCD or other Party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (d), inclusive, or summary thereof.

(b) Requests for discovery must be made in writing prior to the hearing. Requests must be made within 30 days after service of the initial petition or within 15 days after such service of any additional pleadings.

(c) For the purpose of this section, "statements" include written statements by the person, signed or otherwise authenticated by him or her, stenographic, mechanical, electronic or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

(d) Nothing in this section shall authorize the inspection or copying of any writing or thing that is privileged or otherwise exempt from disclosure by law.

Rule 27 - Subpoenas

(a) Before the hearing has commenced and during continuances between hearings the Chair of the Hearing Board shall issue subpoenas and subpoenas *duces tecum* at the request of any Party for attendance or production of documents at the hearing. Compliance with the provisions of Code of Civil Procedure Section 1985 shall be a condition precedent to the issuance of a subpoena *duces tecum*. After the hearing has commenced the Hearing Board may authorize the Chair to issue subpoenas and subpoenas *duces tecum*.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the State and shall be served in accordance with the provisions of Code of Civil Procedure Sections 1987 and 1988. Witnesses shall not be required to attend hearings outside of their own counties, unless the hearing is located 150 miles or less from their place of residence. Notwithstanding the foregoing, the Chair may endorse a subpoena requiring the attendance of a witness if a party presents an affidavit demonstrating that the testimony of such witness is material and necessary to the proceeding.

(c) All witnesses appearing pursuant to subpoena, other than the Parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the Parties or officers or employees of the State or any political subdivision thereof, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court, as provided in Government Code Section 68093.

Rule 28 - Continuances

(a) Except for good cause, all requests for continuances of matters set for hearing shall be in writing and shall be received by the Clerk of the Hearing Board at least three (3) business days prior to the time set

for the hearing. Requests for continuance shall be made only after the requesting Party has contacted the other Party to discuss the continuance. The written request for continuance shall state when the other Party was contacted to discuss the continuance, and it shall state whether the other Party opposes or consents to the request for continuance. In considering whether to grant a continuance for good cause after the three (3) business days have lapsed, the Hearing Board will consider: (1) the extent to which the Party seeking the continuance is responsible for the events leading to the late request; and (2) whether the Party seeking the continuance made a good faith effort to comply with the requirements of this Rule 28, Continuances.

(b) The Hearing Board may find that good cause exists if it finds that the matter before the Hearing Board involves issues that could not be adequately addressed through the filing of the petition and additional memoranda in the time permitted under these rules and regulations or if the Hearing Board determines that additional time is necessary or desirable to determine the issues or to receive additional evidence or legal argument. If a continuance is granted pursuant to this subsection, the Hearing Board may adopt a schedule according to which the Parties shall file and serve any additional materials.

(c) Requests for continuance made orally at the time the matter is set for hearing before the Hearing Board are not recommended.

Rule 29 - Withdrawal of Petition or Appeal

The Petitioner may withdraw his or her petition or appeal at any time before the Hearing Board decides a matter by vote, without a hearing or meeting of the Hearing Board. The withdrawal shall be made in writing to the Clerk of the Hearing Board. The Clerk of the Hearing Board shall confirm in writing the withdrawal of the item. The Clerk of the Hearing Board shall notify all interested persons of such withdrawal.

Rule 30 - Failure to Appear for Hearing

If a hearing is properly noticed and a Party fails to appear at the hearing, the Hearing Board may deny the petition or appeal, or may take action based upon the Party's express admissions or upon other evidence.

Rule 31 - Findings

(a) The Clerk of the Hearing Board shall make reasonable efforts to ensure that draft Hearing Board orders are available on the Hearing Board website within three business days of the date of the Hearing Board's decision.

(b) A Party may request formal written findings no later than at the conclusion of its hearing before the Hearing Board.

(c) When written findings have been requested, the Hearing Board shall adopt them within 45 days of the oral announcement of the decision. Notwithstanding the foregoing, the Hearing Board may extend

the deadline up to a maximum of 60 days if it finds that the 45-day deadline would unduly burden the Party preparing the findings.

(d) Unless the Hearing Board orders written findings to be otherwise prepared, such findings shall be prepared as follows: the Party prevailing at the hearing shall prepare proposed findings within 10 days of the close of the hearing; such proposed findings will be served by mail or personal delivery on the Hearing Board and the opposing Party; the opposing Party will have 10 days from receipt to comment in writing on the proposed findings and/or make proposed alternate findings; such comments and/or alternate proposed findings shall be served on the other Party and the Hearing Board by mail or personal delivery. Upon receipt, the Chair of the Hearing Board shall review all proposed findings and/or comments and recommend final formal findings to the members of the Hearing Board who participated in the hearing for their adoption. The Hearing Board may, but is not required to, adopt the prevailing Party's proposed written findings, in whole or in part.

(e) The Clerk of the Hearing Board shall set the recommended final formal findings for hearing, and send copies of them to all parties, with no less than 10 days' notice.

(f) At the hearing, the Hearing Board shall adopt its findings which shall then be set forth in the Hearing Board's written decisions pursuant to Rule 33, Decision.

Rule 32 - Compliance Schedules

(a) In granting a Regular Variance from the APCD's Rules and Regulations, the Hearing Board shall specify a final compliance date by which any article, machine, equipment, or contrivance which is the object of the variance will be brought into full compliance with all applicable requirements of these Rules and Regulations; the final compliance date shall not exceed the expiration date of the variance.

(b) In the event that the Party subject to the schedule violates any of its terms, the Air Pollution Control Officer may seek revocation or modification of the variance by the Hearing Board pursuant to Health and Safety Code Section 42356 and may take enforcement action pursuant to Health and Safety Code Section 42400.

(c) Pursuant to Health and Safety Code Section 42357, 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 in such schedule.

Rule 33 - Decision

The decision shall be made by a formal action of the Hearing Board at the hearing. A written minute order of the decision shall be filed with the Clerk of the Hearing Board and shall include the reasons for the decision. The Clerk of the Hearing Board shall mail or personally deliver copies of the decision to all parties or their attorneys as soon as possible after the hearing. The Clerk of the Hearing Board may also make the decision available to the public on the APCD Hearing Board webpage.

Rule 34 - Effective Date of Decision

Except as otherwise provided by these rules or Hearing Board order, the decision shall become effective on the date issued by the Hearing Board.

Rule 35 - Rehearing

(a) Pursuant to Health and Safety Code Section 40821, the Hearing Board, with four or more members present, may rehear any matter within 30 days of the effective date of the decision.

(b) Pursuant to Health and Safety Code Section 40861, a Hearing Board may rehear a decision if a Party petitions for rehearing within 10 days after a copy of the decision has been mailed to such Party. Such petition shall be in writing and shall set forth the reasons and grounds for rehearing. Petitioner shall state in his or her petition if he or she desires to be heard.

(c) Timely filed petitions shall be placed on the agenda for the next regular meeting or as soon thereafter as possible under applicable noticing requirements. At the meeting, the Hearing Board will determine whether the request for rehearing should be granted based upon the information presented in the petition and, in the Hearing Board's sole discretion, testimony of the Parties. If the Hearing Board grants the request for rehearing, the rehearing shall be scheduled for the next available meeting, in accordance with public noticing requirements, unless otherwise specified by the Hearing Board.