

WHAT YOU NEED TO KNOW ABOUT

VARIANCES

AND THE

HEARING BOARD

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About the BAAQMD

The Bay Area Air Quality Management District is the public agency responsible for air quality in nine counties: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, southwestern Solano, and southern Sonoma. Because air pollution recognizes no boundaries, we were created by the State Legislature in 1955 as an agency with regional oversight. Emissions can be transported by the movement of air from one part of the Bay Area to another, causing serious air quality problems far away from their original sources. For this reason, controlling air pollution requires extensive cooperation between communities.

What is the Hearing Board?

The Hearing Board is an independent quasi-judicial body created by California State law with the sole authority to provide temporary relief from Bay Area Air Quality Management District (BAAQMD) rules and regulations under certain circumstances.

Who serves on the Hearing Board?

The Hearing Board has five members. By law, one member must be an attorney, one an engineer, and one a medical expert. The remaining two positions are members of the public. All members are selected by the BAAQMD's Board of Directors for their expertise and ability to participate in an impartial hearing process. To learn more about the Hearing Board members visit the BAAQMD's website at www.baaqmd.gov.

What is the Hearing Board authorized to do?

The Hearing Board is authorized to hear:

- applications from large and small businesses for variances;
- applications for abatement orders from the Air Pollution Control Officer (an abatement order requires a company operating out of compliance to take specific actions or to shut down its operation. This is a severe remedy normally reserved for serious violators);
- appeals by companies from the granting of permits, permit conditions, permit denials and suspensions, denials of emission reduction credits and denials of pollution control plans;
- appeals submitted by third parties from the granting of permits, permit conditions, granting of emission reduction credits and pollution control plans; and
- applications for revocation of permits from the Air Pollution Control Officer (this is a severe remedy normally reserved for serious violators).

Hearings are similar to courtroom proceedings. Both the applicant and the District staff have the opportunity to present facts, arguments and evidence through witnesses placed under oath. After hearing all sides of a case, the Hearing Board reaches a decision, based on the facts and evidence presented to it at the hearing.

What is the Hearing Board NOT authorized to do?

It is important to note that the Hearing Board is not authorized to:

- modify the District's rules and regulations;
- exempt a business from complying with a rule;
- grant a variance from a violation of the public nuisance law, such as one that creates an odor problem or threatens public health or property; or
- review a notice of violation (NOV) in any way.

What is a Variance?

If a facility is out of compliance with a BAAQMD regulation due to extenuating circumstances, or the facility knows it will be out of compliance in the future, a variance from the applicable regulation may be requested.

A variance is an administrative order granting temporary relief from the provisions of District regulation(s). A variance allows a facility to operate while it takes steps to come into compliance with the regulation(s) in question. **Variations can be granted only by the Hearing Board, and not by BAAQMD's inspectors or engineers.**

There may be good reasons why a company cannot immediately comply with air pollution control laws. Operating outside the law can result in a fine, or even the shutdown of an operation. The only legal way to operate while working toward a solution without being subject to penalties is to obtain a variance.

Basis for granting or denying a Variance

In determining the outcome of a case, the Hearing Board considers the law, the rule or regulation that has been violated, the severity of the violations, technical problems, and the advantages and disadvantages to the public and the business involved should a variance be granted.

The Hearing Board must make the following six Findings on a case before a variance can be granted (*Section 42352, California Health & Safety Code*):

- That the applicant for a variance is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the District.
- That due to conditions beyond the reasonable control of the applicant, requiring compliance, would result in either:
 - An arbitrary or unreasonable taking of property, or
 - The practical closing and elimination of a lawful business.
- That the closing or taking would be without a corresponding benefit in reducing air contaminants.
- That the applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance.
- During the period the variance is in effect, that the applicant will reduce excess emissions to the maximum extent feasible.
- During the period the variance is in effect, that the applicant 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 pursuant to a schedule established by the District.

Variations cannot be granted for violations of the State's public nuisance law. This law prohibits emissions that would cause odor or other nuisances in the community, threats to public health or damage to property.

Types of Variations

There are six types of variations:

Emergency

When a situation develops without warning (such as an equipment breakdown, power failure, or a similar event that could cause a violation of BAAQMD regulations), an **emergency** variance is required. Any member of the Hearing Board may review and grant an emergency variance without public notice or a hearing. An emergency variance can only be granted for a period up to 30 days.

Short

If compliance with the District regulation(s) can be achieved within 90 days or less, request a **short-term** variance. [*10-day notice required to BAAQMD's Air Pollution Control Officer (APCO), Applicant, California Air Resources Board (ARB), Federal Environmental Protection Agency (EPA).*]

Interim

If an applicant requires immediate relief for the period between the date of filing of a variance application and the date of the decision on the matter by the Hearing Board, request an **interim** variance. An interim variance is recommended if significant excess emissions will occur between the date of filing and the date of the fully noticed hearing by the Hearing Board. If an interim variance is requested, a hearing will be scheduled as soon as possible. If granted by the Hearing Board for Good Cause, the period of an interim variance shall not exceed 90 days. If an interim variance is requested, applicant must also request a short or a regular variance on the same application.

Regular (or Long-Term)

If compliance with District regulation(s) will take more than 90 days, request a **regular** variance. (*30-day published notice required. 30 days notice to APCO, Applicant, ARB, EPA.*)

Group

If non-compliance with District regulation(s) by each individual applicant comprising a group is based on issues of law and fact common to each applicant, request a **group** variance. (*Noticing requirements as for Short or Regular variations depending on period of the Group variance.*)

Product

Any person who manufactures a product may petition the Hearing Board for a **product** variance from a District rule or regulation. A product variance shall be granted only when a variance is necessary for the sale, supply, distribution, or use of the product. (*Noticing requirements as for Short or Regular variations depending on period of the Product variance.*)

How to apply for a Variance

To apply for a variance, call the Clerk of the Board's office at (415) 749-5073, or stop by the Clerk's Office on the 7th floor at 939 Ellis Street in San Francisco. The Clerk will explain the application procedure and a packet of information will be mailed to the applicant. The variance application form is also available on the website at www.baaqmd.gov/brd/forms. The form must be properly completed and submitted along with a "filing fee". Please refer to BAAQMD Regulation 3, Schedule A – Hearing Board Fees, for a detailed description of all Hearing Board fees.

Once the completed form and applicable fees are submitted to the Clerk of the Hearing Board, the application will be set for a hearing before the Hearing Board. A notice of the hearing date, time and location will be mailed to the applicant. The Hearing Board is also required by law to give public notice of all hearings, except for Emergency and Interim variances.

If public notice must be printed in a newspaper (for regular variances and appeals), a "publication fee" will be charged to the applicant.

Excess emission fees may also be applicable.

What happens at a Hearing?

Applicants must come prepared to the hearing. Bring all relevant information/documents to help the Hearing Board make the six Findings listed earlier.

Hearings are similar to courtroom proceedings. The applicant may appear on its own behalf or be represented by an attorney. Both the applicant and the District staff, through its Legal Division, have the opportunity to present facts, arguments and evidence through witnesses placed under oath. Witnesses may be cross-examined by the opposing side and questioned by Hearing Board members. The public is invited to present any information important to the case. After hearing all sides of a case, the Hearing Board reaches a decision, based on the facts and evidence presented to it at the hearing.

Hearing Board proceedings are conducted in the following steps, which are similar to civil proceedings in the Superior Court:

1. *Announcement of pending matters*
2. *Appearances of parties*
3. *Small business determination (Variance hearings only)*
4. *Opening statement of moving party*
5. *Opening statement of responding party*
6. *Evidence produced by moving party*
7. *Evidence produced by responding party*
8. *Rebuttal evidence produced by moving party*
9. *Sur-rebuttal evidence produced by responding party*
10. *Public testimony*
11. *Closing argument of moving party*
12. *Closing argument of responding party*
13. *Matter decided, taken under submission, or continued*

Among other issues, the Hearing Board attempts to discover why and how the rule is being violated, whether the violation could have been prevented, what is being done to correct the violation, when corrections will be completed, what will happen to the business if it is forced to shut down, how the violation affects the public, and what efforts can be made to reduce excess emissions to the maximum extent feasible.

The BAAQMD may argue against a variance or suggest certain limiting conditions. The public is invited to present any information important to the case.

The Hearing Board then decides whether a variance should be granted, the length of the variance period, and what conditions, if any, should be included. The Hearing Board's decision is effective as of the date of the hearing. A written order will be prepared and mailed to the applicant within 30 days of the hearing date.

If the variance is granted, District staff will monitor the applicant's compliance with the variance. The Hearing Board may impose certain conditions in granting the variance. In such instances, there may be reporting requirements and there may be a requirement to pay excess emission fees. It is the responsibility of the applicant to be sure that these requirements are followed and deadlines met.

If a variance is denied, a petition for a **rehearing** may be submitted within 10 days of the written decision of the Hearing Board.

How to prepare for a hearing

A party may be represented by an attorney or may appear on its own behalf. If a party appears on its own behalf, be sure to know which regulation(s) and rule(s) are being violated, the excess emissions involved, and how and when the facility can come into compliance. It is helpful to bring along to the hearing any technical experts who are assisting in resolving the problem. The party should be prepared to discuss what caused or will cause the violation and what the financial impact will be if a variance is not granted.

Also bring to the hearing any documents, photographs, drawings, equipment records, maintenance records, emission records, correspondence with the District, etc., that may assist in making a comprehensive presentation to the Hearing Board. If any documents are presented at the hearing as evidence, please bring **eight** copies of each document for filing with the Clerk at the hearing.

A video entitled "*Understanding the Variance Process*" is also available for viewing from the Clerk's office.

Small Business Considerations

Reduced filing and excess emission fees for small businesses

Bay Area Air Quality Management District Regulation 3 allows reduced filing fees and excess emission fees to be charged to small businesses. The definition of small business for purposes of reduced filing and excess emission fees can be found in District Regulation 3, Section 209.

Small business considerations in granting of variances by the Hearing Board

California Health and Safety Code Section 42352.5 directs the Hearing Board to consider additional factors when making the required Findings for the granting of a variance to a small business. These special considerations are also listed on the Application for Variance form.

Small business assistance:

Assistance in completing the Application for Variance and in developing a compliance schedule is available to small businesses. Contact the Clerk of the Board's office at (415) 749-5187 or (415) 749-4965 for assistance.

How can you get help?

For more information call the Clerk of the Board's office at (415) 749-5073 or access BAAQMD's website at www.baaqmd.gov. A video on the Hearing Board process is also available for viewing.

If you need help with the technical aspects of the rule or regulation affecting you, call the Enforcement Division's Compliance Assistance line at (415) 749-4999.

If you would like to make an appointment with a District engineer to discuss specific equipment requirements, call the Engineering Services Division at (415) 749-4990.

California Health and Safety Code Sections 42350 through 42372 set forth California's laws pertaining to variances.

Bay Area Air Quality Management District

939 Ellis Street

San Francisco, CA 94109

Variance Applications	(415) 749-5073
Enforcement Services	(415) 749-4795
Inspector Contact	(415) 749-4979
Compliance Assistance	(415) 749-4999
Legal Division	(415) 749-4920
Mutual Settlement	(415) 749-4790
Engineering Services	(415) 749-4990
Air Pollution Complaints	1-800-334-ODOR (6367)
Communications and Outreach	(415) 749-4900
All Other District Business	(415) 771-6000