HEARING BOARD RULES

These Rules are effective as of May~~March~~ 2010~~December 5, 2002~~

HEARING BOARD

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

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HEARING BOARD RULES
BAY AREA AIR QUALITY MANAGEMENT DISTRICT

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HEARING BOARD RULES
BAY AREA AIR QUALITY MANAGEMENT DISTRICT

ARTICLE 1. General

§ 1.1 Location of Office. The office of the Hearing Board of the Bay Area Air Quality Management District is located at 939 Ellis Street, San Francisco, California 94109.

§ 1.2 Definitions. For the purpose of the rules and regulations contained in these Rules:

1.2.a. "Action" means any proceeding on an application for variance, appeal, or accusation.

1.2.b. "Affidavit" means a declaration under penalty of perjury.

1.2.~~b~~c. "Air Pollution Control Officer" means Air Pollution Control Officer of the Bay Area Air Quality Management District.

1.2.~~c~~d. "Appeared" means a party has appeared in an action before the Hearing Board when the party has filed an application, appeal, petition of any kind, or notice of defense, or when the party has otherwise responded to an accusation.

1.2.~~d~~e. "Clerk" means the Clerk of the Hearing Board of the Bay Area Air Quality Management District.

1.2.~~e~~f. "Consent Calendar" means a procedure for expediting the presentation of evidence at variance hearings where the District and the applicant have stipulated to the facts. Evidence in consent calendar matters is submitted in declarations by the applicant to the District's legal office and the Hearing Board before the variance hearing. In addition to submitting declarations, the applicant must submit proposed findings of fact and law to the District and the Hearing Board before the hearing. In all other respects, a consent calendar proceeding must comply with all standard requirements and the requirements set forth in these rules for obtaining a variance.

1.2.~~f~~g. "District" means the Bay Area Air Quality Management District.

1.2.~~g~~h. "Group Variance" means a proceeding brought by one or more persons, firms, or corporations on behalf of themselves and others, all of whom have an ascertainable common interest in the matter and would be affected similarly by any order of the Hearing Board, and in which there is a question of a common or general interest to such persons and in which the parties are numerous and it is impracticable to bring them all before the Hearing Board.

1.2.~~h~~i. "Hearing Board" means the Hearing Board of the Bay Area Air Quality Management District. "Hearing Board Alternate Member" is designee to regular "Hearing Board Member" and may serve in the absence and capacity of the regular

Hearing Board Member. In the absence of the Hearing Board Chair, the Hearing Board Vice Chair will serve as Chair and not the Alternate Member

1.2.~~i~~j. "Interim Variance" means a temporary variance, which may be granted pending the decision of the Hearing Board on the full variance application. An interim variance may be granted by the Hearing Board only upon a showing of good cause under the California Health & Safety Code Section 42351 and may not extend beyond the date of the decision of the Hearing Board on the full variance application or 90 days from the date of issuance of the interim variance, whichever occurs first.

1.2.~~j~~k. "Language Assistance" means oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

1.2.~~k~~l. "Party" means the District, the applicant, the respondent, the appellant, and any person, other than an officer or an employee of the District in his or her official capacity, who has been allowed to appear in the proceeding, except that a member of the public appearing under § 5.6.f. shall not be deemed a "party."

1.2.~~l~~m. Unless the context otherwise requires, the words "applicant," "respondent," "appellant," or "party" include an authorized agent of such person.

1.2.~~m~~n. "Product Variance" means a variance that specifically states it is a product variance and is submitted by an Applicant who manufactures a particular product or products.

1.2.~~n~~o. "Short Term Variance" means a variance or series of variances totaling not more than 90 days.

1.2.~~o~~p. "Summary Disposition" means the disposition of a matter without requiring the attendance of the Applicant at any hearing thereon.

§ 1.~~5~~3 Construction of Rules. These Rules are adopted to facilitate the work of the Hearing Board and shall be liberally construed to effectuate that purpose. For purposes of acting on Requests for Rehearings, no action of the Hearing Board shall 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.

ARTICLE 2. Variances

§ 2.1 Form of Papers. All variance applications shall be filed using the Hearing Board format (see attachment 1). Any application not submitted in this format will be considered incomplete.

2.1.a. All documents filed with or submitted to the Hearing Board shall be submitted to the Hearing Board Clerk. Submissions shall include the original and nine (9)~~eight~~ copies.

2.1.b. Documents filed with or submitted to the Hearing Board shall be provided in typewritten format on 8½ x 11 inch paper, one-sided, and double-spaced.

2.1.c. Document submissions in paper format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk. Document submissions must be legible in an unalterable electronic format or facsimile format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk, provided that the original documents, the proper filing fee, and required copies are filed by close of business on the next working day.

2.1.d. The Hearing Board Clerk shall not accept any filing that does not substantially comply with Sections 2.1 and 2.2.

§ 2.2 Application for Variance.

2.2.a. An application for variance shall be signed by the applicant or its authorized agent, or by the representative of a group who has submitted an application for a group variance, and shall state the grounds for the application and the specific section(s) of the regulations of the District, as well as the specific dates, for which a variance is requested.

2.2.b. An application for variance shall contain a concise statement of the facts constituting the reasons for the application. If a group variance is asserted, facts supporting the need for group relief shall be stated. The application shall also identify briefly the basis for each of the findings under Health & Safety Code Section 42352.

2.2.c. An application shall contain a description of the property sufficient for its identification, the name of the owner thereof and the nature of the title or interest of the applicant. A map showing the location of the property and a line diagram of the process, where applicable, shall be included with the application. An application shall contain a copy of the BAAQMD Permit to Operate or Authority to Construct for the Facility so long as such Permit is less than 50 pages. If the Permit is greater than 50

pages, all portions relevant to the application shall be provided and one electronic copy of the entire permit to the Clerk of the Hearing Board.~~.~~

2.2.d. An application should state, to the extent possible, the number and types of emissions points and measured values or estimates of the quantity and nature of emissions. The application should also state the estimated quantity of emissions in excess of the maximum allowed during the period of the requested variance.

2.2.e. An application for variance shall contain a statement of the "increments of progress" towards compliance proposed by applicant and shall include the following, as applicable:

2.2.e.1. The dates by which contracts for emission control systems or process modifications will be awarded or orders will be issued for the purchase of component parts to accomplish emissions control or process modification;

2.2.e.2. The date of initiation of onsite construction or installation of emission control equipment or process change;

2.2.e.3. The date by which onsite construction or installation of emission control equipment or process modification is to be completed;

2.2.e.4. Such additional increments of progress as may be necessary or appropriate to permit close and effective supervision of progress toward timely compliance; and

2.2.e.5. The date by which final compliance is to be achieved.

2.2.f. An application for variance shall include a statement of the applicant's evaluation as to whether the granting of the requested variance will adversely affect the attainment and maintenance of pertinent national ambient air quality standards.

2.2.g. An application shall include a statement of whether or not the applicant intends to file additional written material.

2.2.h. An application shall close with a request for a variance, which shall set forth the starting, and ending dates and any condition of the desired variance. No variance relief will be granted for a period preceding the date of filing of an application for variance.

2.2.i The earliest date regular variance protection can begin is the date of the granting of the regular variance. This shall not apply to short term variances. Variance protection prior to the effective date of a regular variance may only be obtained through an interim variance application.

2.2.j~~i~~. The Hearing Board may adopt a suggested form of Application for Variance and/or Interim Variance.

2.2.kj. All applicants who have not previously appeared before the Hearing Board are encouraged to watch the "Variance Process" video at the Clerk's office prior to attending a hearing. Upon at least two business days' advance notice, the Clerk's office shall make this video available for viewing during regular business hours.

§ 2.3 Application for Intervention. Any person who claims that he or she has an interest relating to the subject of a proceeding, and that the disposition of the proceeding may impair or impede his or her ability to protect that interest, may file a written application for intervention in that proceeding. The application shall be timely, shall set forth the grounds and purpose of such intervention, and shall be served by mail or in person upon the parties to the proceeding. In exercising its discretion as to whether to grant or deny such an application, the Hearing Board shall consider whether intervention would unduly delay or prejudice the adjudication of the rights of the parties. In all cases involving permit regulations, an Application for Intervention filed by the permit applicant or permit holder shall be granted as a matter of right.

§ 2.4 Response to Applications. The Hearing Board may require the Air Pollution Control Officer to file a response to any or all applications in such a manner as the Hearing Board may from time to time direct. Any such response shall be served on the applicant and any other parties who have appeared in the case. The Hearing Board may also require the Air Pollution Control Officer to file facility emissions as well as facility enforcement and permitting histories.

§ 2.5 Emergency Variance.

2.5.a. The procedures set forth in this Section are to be used in applying for an emergency variance when a breakdown condition as defined in Regulation 1-208 exceeds the end of the production run or 24 hours, whichever is sooner; when vapor recovery system components are marked "Out of Order" pursuant to Health & Safety Code Section 41960.2; or when any other emergency, as determined by the Hearing Board, occurs under Health & Safety Code Sections 42359 and 42359.5.

2.5.b. An applicant for an emergency variance is required to pay the appropriate filing fee, whether or not the requested variance relief is granted.

2.5.c. An emergency variance may be granted without notice and hearing or, at the discretion of the Hearing Board, a hearing may be held. An emergency variance shall not remain in effect longer than 30 days.

2.5.d. An applicant may convey a request for an emergency variance to the Clerk by telephone or in person. This 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 initial telephone request.

2.5.d.1. At the time of making the request for an emergency variance, the applicant shall explain in detail the grounds for the request, including such information as the foresee ability of the cause of the emergency and whether the applicant has used good maintenance practices. The applicant will also explain how the failure or malfunction was discovered, the date it first occurred, if a source test was done and when the test was performed, outline permit conditions and item numbers if affected, and identify any excess emissions.

2.5.d.2. Upon receiving the request, the Clerk shall promptly notify the Air Pollution Control Officer of the request. The Air Pollution Control Officer shall promptly respond to the Clerk within five (5) business days, stating his or her recommendation on the request b B ased on a good cause standard.

2.5.d.3. Upon receiving the Air Pollution Control Officer's response, the Clerk shall convey the request and the Air Pollution Control Officer's recommendation to an individual member of the Hearing Board, which is determined by the Hearing Board Clerk on a rotational basis.

2.5.d.4. The Hearing Board member who receives the request and recommendation shall grant or deny the request, at that time, shall shall obtain further information orally or in writing from the applicant or the Air Pollution Control Officer before acting on the request, or shall defer the matter for later consideration by the Hearing Board.

2.5.d.5. If the request for an emergency variance is granted by the individual member, the applicant shall be advised of this by telephone or in person. After an emergency variance has been granted, a written order granting the emergency variance shall be issued under such terms and conditions as the Hearing Board member deems warranted; however, no such order will be entered unless the applicant has submitted the appropriate filing fee to the Clerk. Failure to submit the filing fee by the end of the fourth full working day following the initial request will prevent the emergency variance protection orally granted from having any legal effect whatsoever and may constitute a violation of Regulation 3.

2.5.e. If an application for emergency variance is denied, an applicant may submit an application for variance. The Hearing Board member may deem the application for variance filed as of the date the request for emergency variance was initially conveyed to the Clerk. In this case, the application for variance must be delivered to the Clerk by the end of the fourth working day following notification of the denial of the emergency variance.

2.5.e.1. The application for variance should include the material normally contained in a variance application, as specified in § 2.2 of the Hearing Board Rules, and in particular should describe in detail the unforeseeable circumstances leading to the emissions, indicate the expected time within which to reach compliance, and give an estimate of the quantity of emissions during these circumstances.

2.5.e.2. An application must state whether or not the additional emissions during this time contain any hazardous or odorous substances.

§ 2.6 Verification. Unless the state, or a county, city or district thereof, or an officer of such in his or her official capacity is an applicant or complainant or a party, the application, complaint or paper shall be verified. The form of verification, executed within this State, 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)

§ 2.7 Group Variances.

2.7.a. The Hearing Board shall accept for consideration an application for a group variance when the variance relief sought by each individual applicant comprising the group is based on issues of law and fact common to each applicant.

2.7.b. The application for a group variance shall include individual applications or written declarations by each applicant, setting forth sufficient evidence to support the findings that the Hearing Board is required to make pursuant to Health & Safety Code Section 42352. Each declaration must be stipulated to by the District's legal office to be admissible. The declaration must be signed under penalty of perjury and include consent to be represented by the named, authorized group representative and an agreement that each applicant will be bound by the Hearing Board order. No person may be included in the group variance unless he or she has submitted an admissible declaration.

2.7.c. The Hearing Board shall schedule a pre-hearing conference at least seven days before the scheduled hearing for a group variance in conformance with Article 5 of these Rules.

2.7.d. Applicant(s) shall file a final copy of the declarations, proposed conditions, and proposed findings of fact and law with the Hearing Board at least five (5) working days before the scheduled full hearing.

2.7.e. Witnesses may present testimony on behalf of the groups at the hearing; it shall not be necessary for each individual applicant to present testimony.

2.7.f. The Hearing Board shall immediately remove an application from the group variance upon the objection of the District or of any Hearing Board member and continue the removed application to the next available date for an individual hearing. The District, any applicant, or any Hearing Board member may make a motion to disallow use of the group variance procedure in a particular case or to remove an application from the group variance and consider it individually.

§ 2.8 Interim Variance.

2.8.a. The Hearing Board shall accept for consideration an application for an interim variance when the variance relief sought is temporary to extend for a period pending the decision of the Hearing Board on the full variance application.

2.8.b. The period of relief sought for an interim variance may not exceed 90 days prior to the full variance hearing and may not extend beyond the date of the decision of the Hearing Board on the full variance application.

2.8.c. The Hearing Board may grant an interim variance upon a showing of good cause as authorized by the California Health & Safety Code Section 42351.

2.8.d. Any request for Regular~~Long Term~~ Variance relief that begins before a hearing can be held shall include a request for Interim Variance relief.

§ 2.9 Consent Calendar Requirements.

2.9.a. Applicant shall obtain the concurrence of the attorney in the District's legal offices assigned to handle the variance proceeding that such matter should be placed on the consent calendar.

2.9.b. Applicant shall submit copies of witness declarations signed under penalty of perjury, proposed conditions, and proposed findings of fact and law to the responsible attorney in the District's legal offices five (5) working days before the hearing date for the variance. The District's attorney may waive the requirements of this paragraph.

2.9.c. After concurrence and signature by the responsible attorney in the District's legal office, applicant shall file a final copy of declarations, proposed conditions, and proposed findings of fact and law with the Hearing Board at least two (2) working days before the scheduled hearing date.

2.9.d. The Hearing Board shall call and hear consent calendar matters first on its calendar.

2.9.e. The Hearing Board shall receive any public testimony on a consent calendar matter before proceeding with the case.

2.9.f. The Hearing Board's proceedings on a consent calendar matter shall in all respects conform in all respects to the Hearing Board Rules, except that the Board shall base its ruling on the declarations submitted.

2.9.g. At any time prior to the submission of the case, the Hearing Board shall immediately remove a matter from the consent calendar upon the written or oral motion

of the District or the applicant, or any Board member, and assign the matter to the next available hearing date while fully complying with notice requirements for the type of variance at issue. If, prior to the submission of the case, a member of the public requests the removal of a matter from the consent calendar, the Board shall consider the reasons for the request.

2.9.h. The Hearing Board shall not include any matter on the consent calendar that involves emissions of toxics, harm to public health or any other potential nuisance.

2.9.i. The Hearing Board shall have copies of the stipulated variance available for public review.

§ 2.10 Filing and Excess Emission Fees. The application shall be accompanied by the filing fee as fixed by the District's Board of Directors as set forth in Regulation 3, Schedule A. The applicant shall verify excess emissions at the Hearing or, in the case of an Emergency Variance, prior to final adjudication. Excess emissions shall be included as a condition in the final Order. If applicant cannot estimate excess emissions, the District will determine best estimates and invoice applicant based on fees as outlined in Regulation 3, Schedule A.

§ 2.11 Waiver of Filing Fees. A request for a hardship waiver of filing and other fess pursuant Regulation 3 shall be made at the time of filing of the application. The request shall include a detailed description of why it is a hardship for the applicant to pay the filing or other fees.

2.11.a .The request shall include financial information backing up the hardship waiver. The applicant can supply financial information during the hearing for review by the hearing board and have it returned to them. This information should include IRS 990 forms for non-profit organization, personal 1040 forms for Sole Proprietiers or Citizen Applicants, IRS 1120 Forms for Corporations, and IRS Form for LLCs.

2.11.b The Waiver of Filing Fee request shall be adjudicated by the Hearing Board prior to any other items or motions being heard in the case with the exception of Motions for Disqualifications.

2.11.c If the Hearing board chooses to grant the fee waiver the case may continue normally. If the Hearing Board chooses to deny the Fee Waiver then the application shall be afforded reasonably opportunity to pay the fees or withdraw their application. The Hearing Board will not proceed with Hearing the application until all fees due are paid in full as determine by the Clerk.

~~**§ 2.11 Extensions of Variances.** Extensions of variances can be filed by the applicant submitting a letter of request for extension which should be comprehensive to include a schedule of increments of progress if the request is for an extension up to or less than one year, and shall be subject to applicable requirements of Section 2.2.e.1. through Sections 2.2.e.j of the Hearing Board Rules, as well as applicable Hearing Procedures contained in Article 5.~~

§ 2.12 Variance Modification. The applicant may submit a request to the Haring Board to modify or change the conditions of a granted Variance. The Hearing Board may modify or revoke its Order granting the variance pursuant to Health and Safety Code Section 42356. The Hearing Board may consider the request at a regular hearing or consent calendar.

§ 2.13 Extension of Short Term Variances. The applicant may submit an application to extend a Short Term Variance period to no more than 90 days in total length. If more than 90 total days is needed, the applicant must file a new application for a Regular variance.

§ 2.14 Extension of Regular Variances. Requests for Extensions of variances can be filed by the applicant submitting a letter of request for extension prior to the end of the variance period which should be comprehensive to include a schedule of increments of progress if the request is for an extension up to or less than one year, and shall be subject to applicable requirements of Section 2.2.e.1. through Sections 2.2.e.j of the Hearing Board Rules, as well as applicable Hearing Procedures contained in Article 5.

ARTICLE 3. Appeals

§ **3.1 Who May Bring an Appeal.** An applicant for a permit or any other person dissatisfied with the decision of the Air Pollution Control Officer regarding a permit, or any other person authorized by law, may appeal to the Hearing Board for an order modifying or reversing a decision of the Air Pollution Control Officer.

§ **3.2 Form of Papers.** The heading for appeals shall be as follows:

BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

APPEAL

In the Matter of the Appeal of
(COMPANY NAME) DOCKET NO.
_____
from

3.2.a. All documents filed with or submitted to the Hearing Board shall be submitted to the Hearing Board Clerk. Submissions shall include the original and nine (9)~~eight~~ copies.

3.2.b. Documents filed with or submitted to the Hearing Board shall be provided in typewritten format on 8½ x 11 inch paper, one-sided, and double-spaced.

3.2.c. Document submissions in paper format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk. Document submissions in an unalterable electronic format or facsimile format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk, provided that the original documents, the proper filing fee, and required copies are filed by close of business on the next working day.

3.2.d. The Hearing Board Clerk shall not accept any filing that does not substantially comply with this Article.

§ **3.3 Appeal.** Appeals in accordance with the District's Permit Regulations or statutory provisions shall include a copy of the permit or permit application, supporting documents, and the decision of the Air Pollution Control Officer. A map showing the location of the subject property and a line diagram of the process, where applicable, shall be included with the appeal. The appeal shall set forth the issues raised by the appeal and the principal facts in support thereof.

§ 3.4 Issues on Appeal. Where the Appeal concerns any action or decision of the Air Pollution Control Officer pertaining to issuance or denial of a permit, the decision of the Hearing Board is limited to determining whether the permit was properly issued or denied. (Health and Safety Code Sections 42302, 42302.1). However, if the permit was denied pursuant to Health and Safety Code Section 42333, the Hearing Board shall consider the factors set forth in Health and Safety Code Section 42335 and shall set aside the denial upon making the determinations provided for in Section 42335.

§ 3.5 Standard of Review. The traditional legal presumption is one of the correctness of a regulatory agency's action. See Cal. Evid. Code § 664 (West 1966) [sic] ("It is presumed that official duty has been regularly performed."); People v. A-1 Roofing Serv., 87 Cal. App. 3d Supp. 1, 11; 151 Cal. Rptr. 522, 527 (1987). As such, the Board may not readily substitute its judgment for that of the agency's expertise. Rather, the Board's role is to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO and whether the APCO followed proper and appropriate procedures and guidelines. Traditional legal presumption also directs that the burden of proof in an appeal should be on the party challenging the APCO's action or finding. See Cal. Evid. Code Sect. 660 (West 1996).

In light of the above, the proper scope of the Hearing Board's review is one of deference to the District's determination with the burden on the Appellants to show the District's action…was erroneous. Specifically, it is the Board's task to determine whether the agency's interpretation of its duty was reasonable and if its performance of that duty was regularly performed.

An exception to the above exists for Appeals under Health and Safety Code Section 42335 where the Hearing Board must consider the determinations set forth therein. In that event the Hearing Board must be satisfied from the evidence whether such determinations should be made.

§ 3.~~4~~6 Application for Intervention. Any person who claims that he or she has an interest relating to the subject of a proceeding, and that the disposition of the proceeding may impair or impede his or her ability to protect that interest, may file a written application for intervention in that proceeding. The application shall be timely, shall set forth the grounds and purpose of such intervention, and shall be served by mail or in person upon the parties to the proceeding. In exercising its discretion as to whether to grant or deny such an application, the Hearing Board shall consider whether intervention would unduly delay or prejudice the adjudication of the rights of the parties. In all cases involving permit regulations, an Application for Intervention filed by the permit applicant or permit holder shall be granted as a matter of right.

§ 3.~~5~~7 Response to Applications. The Hearing Board may require the Air Pollution Control Officer to file a response to any or all applications in such a manner as

the Hearing Board may from time to time direct. Any such response shall be served on the applicant and any other parties who have appeared in the case.

§ 3.~~6~~8 **Filing Fees.** The application shall be accompanied by the filing fee as fixed by the District's Board of Directors as set forth in Regulation 3, Schedule A.

3.~~7~~9 **Result of Appeal.** The Hearing Board upon determination that the APCO erred in a permitting or emission reduction credit decision shall then determine the remedy as specified in BAAQMD Regulation 2, Rule 1, Section 410.2. The Hearing Board may reverse, allow, or modify the decision of the APCO. Where the Hearing Board finds the Air Pollution Control Officer acted in error, the Hearing Board may allow the decision if the Board finds the error to be harmless. If necessary, further hearings may be held to consider the remedy.

ARTICLE 4. Accusations

§ 4.1 Who May Bring an Accusation. An accusation may be brought on the motion of the Air Pollution Control Officer, pursuant to Health & Safety Code Section 42307 or 42451; or on the motion of the District Board of Directors or by the Hearing Board, on its own motion, pursuant to Health & Safety Code Section 42451; or on the motion of any person authorized by law.

§ 4.2 Form of Papers. The heading for accusations shall be as follows:

BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

(NAME)	DOCKET NO.
_____ Complainant,	
vs.	Accusation of Violation
	of Regulation
(COMPANY NAME) Respondent.	(number)

4.2.a. All documents filed with or submitted to the Hearing Board shall be submitted to the Hearing Board Clerk. Submissions shall include the original and nine~~ten~~ (9) copies.

4.2.b. Documents filed with or submitted to the Hearing Board shall be provided in typewritten format on 8½ x 11 inch paper, one-sided, and double-spaced.

4.2.c. Document submissions in paper format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk. Document submissions in an unalterable electronic format or facsimile format in compliance with all applicable rules of service will be deemed "filed" at the time date stamped by the Hearing Board Clerk, provided that the original documents and required copies are filed by close of business on the next working day.

4.2.d. The Hearing Board Clerk shall not accept any filing that does not comply with this Article.

§ 4.3 Accusation. An accusation shall be a written statement of charges, which shall set forth in ordinary and concise language the acts, or omissions with which the respondent is charged to the end that the respondent will be able to prepare its defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such

statutes and rules. The allegations of the accusation may be on information and belief. The accusation shall be verified unless made by a public officer acting in his or her official capacity or by an employee of the District acting as an employee. The accusation shall close with a request for an order for abatement.

§ 4.4 Service of Accusation: Form, Manner and Proof.

4.4.a. Upon the filing of the accusation the District Counsel shall serve a copy thereof on the respondent as provided in § 4.4c. The District Counsel may include with the accusation any information which he or she deems appropriate, but he or she shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the Hearing Board, will acknowledge service of the accusation and constitute a notice of defense. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7 of the Government Code.

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

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the Hearing Board within 15 days after the accusation was personally served on you or mailed to you, the Bay Area Air Quality Management District may proceed upon the accusation. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to the Hearing Board, Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, California 94109. You may, but need not, be represented by counsel at any or all stages of these proceedings. Hearing Board Rule § 5.~~8~~~~7~~.b. states: If the respondent to an accusation fails to file a notice of defense, affidavits and respondent's express admissions may be used as evidence without any notice thereof to respondent, and the Hearing Board may at a public hearing decide the matter or dismiss the action.

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

4.4.c. The accusation and all accompanying information may be sent to respondent by any means selected by the District Counsel. But no order adversely affecting the rights of the respondent shall be made by the Hearing Board in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be provided in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or rule or regulation requires respondent to file his address with the District and to notify the District of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the District as required thereby.

§ 4.5 Notice of Defense.

4.5.a. Within 15 days after service of the accusation, the respondent may file with the Hearing Board a notice of defense in which respondent may:

4.5.a.1. Request a hearing;

4.5.a.2. Object to the accusation upon the ground that it does not state acts or omissions upon which the Hearing Board may proceed;

4.5.a.3. Object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare its defense;

4.5.a.4. Admit the accusation in whole or in part;

4.5.a.5. Present new matter by way of defense.

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

4.5.b. Any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Unless objection is made as provided in § 4.5.a.3, all objections to the form of the accusation shall be deemed waived.

4.5.c. The notice of defense shall be in writing signed by or on behalf of the respondent and shall state its mailing address. The notice of defense need not be verified or follow any particular form.

4.5.d. Even if the respondent does not file a notice of defense, the respondent may:

~~**4.5.**d.1. File a statement of mitigation, or~~

4.5.d.1~~2~~. File a request for a variance which includes the matters required by § 2.2.

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

§ 4.7 Amendment of Accusation after Submission. The Hearing Board may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and an opportunity to show that it will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in its behalf. If such prejudice is shown, the Hearing Board shall reopen the case to permit the introduction of additional evidence.

§ 4.8 Cross-Applications. If an application for a short term or regular variance and request for an order for abatement are both filed on the same subject matter, hearings on such applications shall be set for the same date unless the District or the variance applicant shows that a hearing on the same date would impose an undue hardship and the Chairperson of the Hearing Board, or designated member, concurs.

§ 4.9~~6~~ Application for Intervention. Any person who claims that he or she has an interest relating to the subject of a proceeding, and that the disposition of the proceeding may impair or impede his or her ability to protect that interest, may file a written application for intervention in that proceeding. The application shall be timely, shall set forth the grounds and purpose of such intervention, and shall be served by mail or in person upon the parties to the proceeding. In exercising its discretion as to whether to grant or deny such an application, the Hearing Board shall consider whether intervention would unduly delay or prejudice the adjudication of the rights of the parties. In all cases involving permit regulations, an Application for Intervention filed by the permit applicant or permit holder shall be granted as a matter of right.

§ 4.10~~7~~ Response to Applications. The Hearing Board may require the Air Pollution Control Officer to file a response to any or all applications in such a manner as the Hearing Board may from time to time direct. Any such response shall be served on the respondent and any other parties who have appeared in the case.

§ 4.11~~2~~ Period of Abatement Order. The Hearing Board shall specify the period that it retains jurisdiction over the Order of Abatement. The respondent or APCO may file an application to modify or terminate the period of the Abatement Order. The Hearing Board may consider the application at a regular hearing or on the Consent Calendar.

§ 4.12 Abatement Order Conditions. The Hearing Board may impose conditions it deems proper and necessary on any order of abatement. The respondent

or APCO may file an application to modify the conditions of an Order of Abatement. The Hearing Board may consider the application at a regular hearing or on the Consent Calendar.

ARTICLE 5. Hearing Procedure

§ 5.1 Time and Place of Hearing. The Hearing Board shall determine the time and place of hearing. The hearing on an accusation shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense. The hearing shall be held at the offices of the Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, California, unless otherwise determined. All hearings shall be held in a location readily accessible to the public.

§ 5.2 Notice of Hearing. In all cases the notice of hearing shall be substantially in the following form but may include additional information:

> *You are hereby notified that a hearing will be held before the Hearing Board of the Bay Area Air Quality Management District at 939 Ellis Street, San Francisco, California, on _____ day of _____, 20___, at the hour of _____ (upon the issues raised by the application) (upon the charges made in the accusation served upon you). You should be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Clerk of the Hearing Board.*

5.2.a. The Clerk of the Hearing Board shall mail, deliver, or transmit a notice of hearing to the applicant, respondent, the Air Pollution Control Officer, the holder of the subject permit or variance involved, if any, and to any person entitled to notice under Division 26, Health & Safety Code.

§ 5.3 Attendance at Hearing.

5.3.a. A party requesting relief in a Hearing Board proceeding must appear in person or by legal counsel or other qualified representative in any hearing scheduled on the request, unless specifically notified otherwise by the Hearing Board or the matter is scheduled for Summary Disposition.

5.3.b. With the exception of pre-hearing and emergency variance conferences, Hearing Board members shall participate in Hearing Board hearings, meetings, and workshops in person only.

§ 5.4 Pre-Hearing Conferences.

5.4.a. Upon filing of an application for an appeal, a variance or an order for abatement, a pre-hearing conference may be scheduled to take place no more than seven days after the filing of the application unless otherwise stipulated by the parties.

5.4.b. The purpose of the pre-hearing conference shall be to discuss any issues relevant to the proceedings, including witnesses, subpoenas, exhibits, discovery matters, legal issues and the length of time needed to complete the proceeding.

5.4.c. The pre-hearing conference may be held by the Chairperson of the Hearing Board, Vice-Chairperson, or a designated member, and attended, in person or by telephone, by representatives for the petitioner and the respondent.

5.4.d. There is no public notice requirement for a pre-hearing conference held by only one Board member.

§ **5.5 Representation by Counsel.** A party in any Hearing Board proceeding may be represented by legal counsel, but this is not mandatory. If a party elects to proceed without legal counsel, this does not entitle such party to a rehearing.

§ **5.6 Order of Proceedings.** The order of proceedings before the Hearing Board shall ordinarily be as follows. The Chairperson may in his or her discretion alter the order of proceedings as may be desirable to expedite the business of the Board.

a. Announcement of pending matters;

b. Appearances of parties;

c. Fee waiver determination;

d~~c~~. Small business determination (Variance hearings only)

e~~cd~~. Opening statement of moving party;

f~~ed~~. Opening statement of responding party;

g~~fe~~. Evidence produced by moving party;

h~~gf~~. Evidence produced by responding party;

i~~hg~~. Rebuttal evidence produced by moving party;

j~~ih~~. Surrebuttal evidence produced by responding party;

k~~ji~~. Public testimony;

l~~kj~~. Closing argument of moving party;

m~~lk~~. Closing argument of responding party;

n. Excess emissions statement and fees;

o~~ml~~. Matter decided, taken under submission or continued.

§ 5.7 Withdrawal, Abandonment or Dismissal of Actions.

5.7.a. Prior to 72 hours ~~At any time~~ before a hearing is scheduled on calendar, the moving party may file in the office of the Hearing Board a written abandonment or withdrawal of the action, or the parties may file a stipulation for abandonment. The filing of either document shall operate to terminate the action. In conformance with the Ralph M. Brown Act, in the event that the request for withdrawal is submitted less than 72 hours before the scheduled hearing, the hearing may be canceled and the party(ies) may be subject to sanctions as listed in Article 11.

5.7.b. After a hearing has been scheduled on calendar, the moving party may file in the office of the Hearing Board a written request for dismissal of the action, or the parties may file a stipulation requesting dismissal by the Hearing Board.

5.7.c. Requests for abandonment or withdrawal for hearings must be received by the Clerk 72 hours prior to the time set for the hearing, excluding Sundays and holidays. When the Clerk has obtained approval for an abandonment or withdrawal from the Chairperson of the Hearing Board, or, in his or her absence, the Vice Chairperson, the Clerk will notify the other members of the Hearing Board and the parties involved in the case of the change in the schedule. When the abandonment or withdrawal is not approved, the Clerk will notify the party making the request.

5.7.d. The Hearing Board may, on its own motion, in the furtherance of justice and for good cause, order an action dismissed.

§ 5.8 Failure to Appear for Hearing or to File a Notice of Defense.

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

5.8.b. If the respondent to an accusation fails to file a notice of defense, affidavits and respondent's express admissions may be used as evidence without any notice thereof to respondent, and the Hearing Board may at a public hearing decide the matter or dismiss the action.

5.8.c. Nothing herein shall be construed to deprive the party of the right to make a showing by way of mitigation.

§ 5.9 Amendment of Accusation before Submission. At any time before the matter is submitted for decision, the Hearing Board may file or permit the filing of an amended accusation. All parties shall be notified thereof. If the amended accusation presents new charges, the Hearing Board shall afford the respondent the reasonable opportunity to prepare its defense thereto, but it shall not be entitled to file further pleadings unless the Hearing Board so orders. Any such new charges shall be deemed

controverted, and any objections to the amended accusation may be made orally and shall be noted in the record.

§ 5.10 Amendment of Accusation after Submission. The Hearing Board may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and an opportunity to show that it will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in its behalf. If such prejudice is shown, the Hearing Board shall reopen the case to permit the introduction of additional evidence.

§ 5.11 Amendment of Application for Variance or Appeal. The Hearing Board may in its discretion, upon stipulation or ten days notice, permit the amendment of an application 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 submitted, whenever an amendment to an application for variance or appeal makes it necessary to do so.

§ 5.12 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.

§ 5.13 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, provided such member has read the transcripts or heard a tape recording of the missed proceedings, or upon the stipulation of all parties.

§ 5.14 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 case, stating with particularity the grounds upon which it is claimed that a fair and impartial 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.

§ 5.15 Hearing Board Discretion to Rehear. Any member of the Hearing Board may request a rehearing within 10 days of the effective date of any decision by filing a Request to Rehear. Within 30 days following the effective date of the decision the Hearing Board, with at least four members present, shall conduct a hearing on the

request and determine whether a rehearing is warranted. If for any reason, the Board is not able to hold a hearing with at least four members present during that 30-day time period, then the Request to Rehear shall be deemed denied at the expiration of that period without any further action by the Board.

§ **5.16 Request for Rehearing.** A party may file a written request for a rehearing of a decision within ten (10) calendar days after a copy of the decision has been mailed to it. The Hearing Board may, with or without a response from the parties, grant or deny the request for rehearing. If for any reason, the Board is not able to hold a hearing with at least four members present during that 30-day time period, then the Request to Rehear shall be deemed denied at the expiration of that period without any further action by the Board.

§ **5.17 Presentation and Filing of Record.** All ~~proceedings~~ hearings ~~and pre-hearing and emergency variance conferences~~ of the Hearing Board shall be recorded.

§ **5.18 Continuances.** Authority for scheduling cases before the Hearing Board or continuing cases before the Hearing Board rests with the Chair of the Hearing Board or, in his or her absence, the Vice Chair. Requests for continuance of cases scheduled before the Hearing Board for a Thursday~~Monday~~ must be received by the Clerk prior to 3:00 P.M. of the preceding Monday~~Thursday~~. For hearings which are set for other days, the request must be received by the Clerk 72 hours prior to the time set for the hearing, excluding Sundays and holidays. It is the responsibility of the parties before the Hearing Board to notify the Clerk when one or more of them request continuance of a hearing. When the Clerk has obtained approval for a continuance from the Chair of the Hearing Board, or in his or her absence, the Vice Chair, the Clerk shall notify the other members of the Hearing Board and other parties involved in the case of the change in schedule. When the continuance is not approved, the Clerk shall notify the party making the request.

§ **5.19 Orders.** All orders of the Hearing Board shall be in writing and shall contain the reasons for the Board's decision. The Hearing Board may order either party to prepare a draft written order. In that case, the party shall submit the order in the format required by the Hearing Board in hard copy and in a Clerk-approved electronic format. If the party directed to submit a proposed order fails to do so within ten days or any different time period specified by the Chair of the Hearing Board, then the other party may submit a proposed order within ten days after the date on which the proposed order was originally due. 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 such party first requests and receives permission from the Board to file such a response or objections. In addition, the failure of any party to provide a draft written order after being directed to do so by the Hearing Board shall be grounds for consideration of sanctions as described in Article 11, or the imposition of administrative civil penalties under Health and Safety Code Section 42402.5 to the extent authorized by the Bay Area Air Quality Management District's Board of Directors. Written orders may be issued upon one signature of the Hearing Board by the Chair or Acting/Vice Chair.

ARTICLE 6. File Docket and Hearing Calendar

§ 6.1 Filing of Papers. All papers filed with or submitted to the Hearing Board shall be in an original and nine (9)~~eight~~ copies. The Clerk shall file the original in the original case file. One copy shall be filed in each member's case file and ~~three~~ four copies shall be forwarded to District staff. If conformed copies are requested by the party filing a document, the party shall provide sufficient additional copies for this purpose. Papers presented in proper form, accompanied with the required number of copies, and the required fee, if any, shall be deemed filed on the day presented.

§ 6.2 File Docket. The Clerk shall maintain in the office of the Hearing Board a docket of all applications for variance, accusations, and appeals and shall be assigned a docket number. The docket shall be available for public inspection at the principal office of the Hearing Board during office hours.

§ 6.3 Hearing Calendar. The Clerk shall maintain a calendar of matters scheduled for hearing. The calendar shall be available for public inspection at the office of the Hearing Board. A copy of the calendar may be obtained from the Clerk.

§ 6.4 Case Records. Material which comprises the Hearing Board's records in cases on the docket is available for inspection by the public and the District staff in the office of the Clerk during normal office hours. This material will not be available outside the Clerk's office. Copies of records may be obtained at the Clerk's office upon payment of the actual cost of preparation. Records of the Hearing Board do not necessarily include records of the District. ~~When a transcript of a hearing is ordered, the original shall be delivered to the Clerk and shall be included in the pertinent case file.~~If a transcript is requested by either party, notice is to be given to the Clerk of the Hearing Board a minimum of ten (10) days prior the hearing in order for a court reporter to be scheduled. The total cost of appearance and transcript charges are to be borne by the requesting party. Alternatively, either party may request that the Hearing Board recording tape(s) be duplicated for transcription purposes. If a transcript is prepared at the request of either party, a copy shall be provided to the Clerk at no cost and included in the pertinent case file.~~–~~ Withdrawal of evidence shall not be permitted while any issue concerned in the hearing is still pending a final decision either before the Hearing Board or before the courts. If after a final decision by the Hearing Board no further proceeding for review has been initiated within the time prescribed by law, exhibits may be withdrawn at the request of the party, which submitted them, and upon order of the Hearing Board. Tapes and transcripts of hearings shall be retained by the Clerk of the Hearing Board for a period consistent with District and Health & Safety Code records retention policies.

ARTICLE 7. Pleadings

§ 7.1 Responses.

7.1.a. Any person served with an application may file a response which may include, but is not limited to:

7.1.a.1. Objection to the jurisdiction of the Hearing Board.

7.1.a.2. Objection to the form of the application in that it is so indefinite or uncertain that he or she cannot identify the circumstances upon which the claim for relief is based, or prepare a defense or response.

7.1.a.3. Admission of the facts in the application, in whole or in part.

7.1.a.4. A notice of defense, including but not limited to, a denial of facts asserted in the application.

7.1.a.5. Presentation of new matters which the Hearing Board should consider in hearing the application.

7.1.a.6. Discussion of whether the respondent approves of the relief sought in the application, in whole or in part.

7.1.b. Responses to any application shall be in writing, signed by or on behalf of the respondent, and shall state the respondent's mailing address. The response need not be verified or follow any particular form. The response must be filed and served at least five (5) working days prior to the hearing, unless a different time schedule is established at a pre-hearing conference or unless the petition is served less than five (5) working days prior to the hearing, in which case the response must be filed as soon as possible before the hearing.

§ 7.2 Amendments to Applications.

7.2.a. At any time before the matter is submitted for decision, the Hearing Board may permit a party to amend its application provided that such amendment does not require issuance of a new public notice, i.e., the change does not involve the air contaminant which is the subject of the application, the company name, facility address, etc. The Hearing Board may in its discretion, upon stipulation or ten days notice, permit the amendment of an application 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 submitted, whenever an amendment to an application for variance or appeal makes it necessary to do so.

7.2.b. If the respondent asserts that time is needed to respond to the amendment, the Chairperson of the Hearing Board, or designated member, may continue and/or reopen the matter if determined to be necessary.

§ 7.3 Cross-Applications. If an application for a short term or regular variance and request for an order for abatement are both filed on the same subject matter, hearings on such applications shall be set for the same date unless the District or the variance applicant shows that a hearing on the same date would impose an undue hardship and the Chairperson of the Hearing Board, or designated member, concurs.

§ 7.4 Opening Briefs.

7.4.a. The parties may file an opening brief, which may contain but shall not be limited to:

7.4.a.1. A statement of the case, setting forth concisely the nature of the action.

7.4.a.2. The relief sought.

7.4.a.3. A summary of the material facts.

7.4.a.4. Any new matters which the Hearing Board should consider in hearing the application.

7.4.a.5. Points and Authorities.

7.4.b. The moving party's opening brief shall be filed and served at least 10 working days prior to the hearing. The respondent's opening brief shall be filed five (5) working days prior to the hearing and all reply papers at least two (2) working days before the time scheduled for the hearing, unless the Chairperson of the Hearing Board, or designated member, determines otherwise upon request.

§ 7.5 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 Hearing Board.

ARTICLE 8. Motions

§ 8.1 Motions to Dismiss. The following motions may be submitted to the Hearing Board in any matter.

8.1a. **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 within sufficient time to enable it to be ruled upon prior to the commencement of the presentation of evidence.

8.1.b. **Motion to Dismiss for Lack of Certainty.** Prior to the taking of any evidence, the respondent may make a motion to dismiss based on uncertainty, ambiguity, or unintelligibility of the petition. The Hearing Board may dismiss the application or may order a recess in the proceedings in order to allow the moving party to amend the application as necessary.

8.1.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 his or her presentation of evidence.

§ 8.2 Memorandum of Points and Authorities.

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

8.2.b. A memorandum of points and authorities shall 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.

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

§ 8.3 Filing Moving and Supporting Papers. All moving and supporting papers shall be filed and served at least 10 working days, all papers opposing the motion at least five (5) working days, and all reply papers at least three (3) working days before the time scheduled for the hearing, unless the Chairperson of the Hearing Board, or designated Board member, determines otherwise upon request.

ARTICLE 9. Discovery and Evidence

§ 9.1 Subpoenas.

9.1.a. The Chairperson of the Hearing Board may issue subpoenas at the request of any party for attendance of witnesses at the hearing. The Chairperson shall issue any subpoena requested by the Hearing Board pursuant to Health and Safety Code Section 40840. 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.

9.1.b. Any party seeking a subpoena shall give the opposing party at least 24 hours telephone or written notice prior to requesting the subpoena.

9.1.c. If a party objects to the issuance of a subpoena, the opposing party shall notify the Clerk of its opposition and may request that a hearing be scheduled on the matter. The Clerk shall notify both parties by telephone of the date, time, and location of the hearing.

9.1.d. In order for a subpoena to be issued from the Hearing Board, a party must submit a proposed form of subpoena and a declaration under penalty of perjury that establishes the following: the information sought is relevant to the subject matter involved; the information is not privileged; and complying with the subpoena will not impose an undue burden.

9.1.e. Subpoenas shall be served in accordance with the provisions of Section 1987 and 1988 of the Code of Civil Procedure. Service of the subpoena shall be made at least 10 days before the time required for attendance, unless the Chairperson of the Hearing Board, or designated member, specifies a shorter time in the subpoena. Any person receiving a subpoena signed by the Chairperson of the Hearing Board, or designated member, pursuant to Health & Safety Code Section 40840 shall appear before the Hearing Board at a time and place specified in the subpoena to be examined as a witness and/or to produce all books, papers, and documents in his or her possession, or under his or her control, which are specified in the subpoena. If the person being subpoenaed resides outside the geographical boundaries of the District, however, the witness shall not be obliged to appear unless the subpoena is accompanied by an affidavit of the requesting party showing that the testimony or records of such witness is material and necessary, and the Chairperson of the Hearing Board, or designated member, has endorsed on the subpoena an order requiring the attendance of such witness.

9.1.f. All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed for witnesses in civil actions in a superior court, as provided in Government Code Sections 11510 and 868093.

9.1.g. Witness fees shall be paid by the party requesting the subpoena.

§ 9.2 Affidavits.

9.2.a. At least 10 days prior to a hearing, or a continued hearing, any parties that propose to introduce an affidavit into evidence shall mail or deliver a copy of such affidavit to all other parties together with a notice as provided in § 9.2.b, except as provided in § 5.7.b. Unless another party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, the 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 in person. If an opportunity to cross-examine an affiant is not afforded after request thereof is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

9.2.b**.** The notice referred to in § 9.2.a shall be substantially in the following form:

The accompanying affidavit of [name of affiant] *will be introduced as evidence at the hearing in* [title of proceeding]. [Name of affiant] *will not be called to testify in person and you will not be entitled to question the affiant 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 mailing or delivering the affidavit to the opposing party].

§ 9.3 Evidence.

9.3.a**.** Oral evidence shall be taken only on oath or affirmation.

9.3.b. Each party shall have these rights: to call and examine witnesses; 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; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his own behalf, he may be called and examined as if under cross-examination.

9.3.c. The hearing shall 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 shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.
Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil action, or unless the District's legal office and the applicant or respondent so stipulate.

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

9.3.e. **Public Testimony.** Pursuant to Health & Safety Code Section 40828(a), the Hearing Board shall allow interested members of the public a reasonable opportunity to testify with regard to the matter under consideration, and the Hearing Board shall consider such testimony in making its determination, provided, however, that such testimony and evidence shall be relevant and material to the matter being heard by the Hearing Board. The Chairperson of the Hearing Board may impose reasonable limits on the duration of oral presentations. Written testimony may be submitted if presented and summarized by the author at the hearing.

9.3.f. **Official Notice.**

9.3.f.1. In reaching a decision, the Hearing Board may take official notice of any generally accepted technical or scientific matter within the Hearing Board's special field, or of any fact which may be judicially noticed by the courts in the State of California.

9.3.f.2. Unless waived by the parties, the party seeking to have a matter officially noticed must file and serve a Request for Official Notice no later than five days before the hearing at which the matter is to be noticed, if feasible. The Request for Official Notice must include the materials which will be presented to the Board and a brief statement of the finding or opinion which it is proposed that the Board will develop from the materials. Any party opposing the request shall be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority.

9.3.f.3. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto.

§ 9.4 Protective Orders.

9.4.a. Upon a motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without administrative action, and for good cause shown, the Hearing Board may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one (1) or more of the following:

9.4.a.1. That the discovery not be had;

9.4.a.2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

9.4.a.3. That the discovery may be had only by a method of discovery other than selected by the party-seeking discovery;

9.4.a.4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

9.4.a.5. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

9.4.b. If the motion for a protective order is denied in whole or in part, the Hearing Board may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

ARTICLE 10. Findings

§ 10.1 Minute Orders. The Clerk shall cause to be prepared a minute order for each matter heard before the Hearing Board, if requested by any Party or the Hearing Board. The minute order, if necessary, shall be filed following the hearing and shall include the names of the members present, the names of each party and representative, the list of witnesses and exhibits, the decision of the Hearing Board, and the votes by members. The minute order or a true copy thereof signed by a Board member shall form a part of the case file of the Hearing Board. The Clerk shall mail the minute order to the affected parties.

§ 10.2 Effective Date of Decision. The decision of the Hearing Board shall become effective upon the filing of the findings and decision, unless otherwise ordered by the Hearing Board.

§ 10.3 Board Preparation of Findings and Decisions. Formal written Findings and Decisions of the Hearing Board shall be prepared by the Hearing Board, unless the Hearing Board directs a party to prepare such findings and decision. Failure of any party to prepare a draft written Order upon direction of the Hearing Board Chair may be subject to sanctions as per Article 11 of these Rules.

§ 10.4 Findings and Decisions. Findings and decision shall be reduced to writing, served, and filed within 30 days after the date of the hearing, and they shall contain a brief statement of facts found to be true, the determination of the issues presented, findings, and the order of the Hearing Board. The Chair of the Hearing Board may grant an extension to the 30-day deadline if circumstances warrant it. A copy of the Findings Decision and Order shall be mailed or delivered to the Air Pollution Control Officer, the applicant, and to every person who has filed pleadings or who has appeared as a party in person or by counsel at the hearing. A copy shall be mailed to the State Air Resources Board within 30 days after the granting of the variance unless an extension has been granted.

§ 10.5 Dissenting or Concurring Opinion. Separate dissenting or concurring opinions of individual Hearing Board members will not be included in the Hearing Board decision/Order on any matter.

§ 10.6 Clerical Errors. The Hearing Board may correct clerical errors in its orders without further hearings and issue the amended order using the process specified in 10.4.

ARTICLE 11. Sanctions

§ 11.1. 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 Hearing Board Chairperson or presiding member conducting the meeting may order the disruptive persons removed from the hearing room and continue the hearing.

§ 11.2. 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.

§ 11.3. 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, is disruptive of 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 Chairperson, 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 Chairperson 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.

ARTICLE 12. Language Assistance

§ **12.1.** In accordance with Government Code Sections 11435.05-11435.65, the Hearing Board proceedings shall be conducted in English.

§ **12.2.** If a party or the party's witness does not proficiently speak or understand English and before commencement of the hearing, the Hearing Board shall provide the party or witness an interpreter.

§ **12.3.** The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the Chairperson so directs, otherwise by the party at whose request the interpreter is provided.

§ **12.4.** The Chairperson's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the part in need of the interpreter to pay.

§ **12.5.** An interpreter used in a hearing shall be certified pursuant to Section 11435.30. However, if an interpreter certified pursuant to Section 11435.30 cannot be present at the hearing, the Chairperson shall have discretionary authority to provisionally qualify and use another interpreter, the services of which may be available through District contractor resources.

§ **12.6.** The Hearing Board shall advise each party of the right to an interpreter at his or her discretion. Each party in need of an interpreter shall also be encouraged to give timely notice to the Hearing Board so that appropriate arrangements can be made.

§ **12.7.** The rules of confidentiality of the Hearing Board or District, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing, whether or not the rules so state.

§ **12.8.** The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

ARTICLE 13. Officers of the Hearing Board and Duties

§ 13.1 Election of Officers. The Chairperson and Vice Chairperson of the Hearing Board shall be elected annually ~~during the month of May~~ by June 30th of each year. Elections can be held by regular or electronic mail. However, elections may be held more frequently for the following reasons: Change in Hearing Board members; Chair or Vice Chair elect to resign their position; or three members of the Hearing Board request a new election.

§ 13.2 Duties of the Chair. The Chairperson, and in the Chair's absence, the Vice Chairperson, shall have the following duties and authority:

1. Set the calendar.
2. Preside at each hearing.
3. Rule on objections and admissibility of evidence~~.~~, except that any such evidentiary rulings may be overruled by a majority vote of the Hearing Board.
4. ~~4.~~ Rule on all Motions/Requests for a continuance, substitution of counsel, and

   ~~a~~amendments to filings (variances, stipulated agreements, etc.)
5. Schedule deliberations on a Motion to Rehear.
6. Issue subpoenas either upon the request of any party or the Hearing Board.
7. Assign orders to be written.
8. Sign written orders.
9. Issue protective orders.
10. Hold pre-hearing conferences.
11. Decide the schedule for motions, responses and rule on requests for filed hearings.
12. Any other duty or authority granted by the Hearing Board.

ATTACHMENT NO. 1

Variance Application Form Instructions

Requests for variances from Bay Area Air Quality Management District (BAAQMD) air pollution regulations should be submitted to the Hearing Board of the BAAQMD using the attached form.

The Hearing Board is an independent quasi-judicial body created by California State law with the sole authority to grant variances from air quality regulations. After your application has been reviewed by the Hearing Board, you and the Bay Area Air Quality Management District staff will appear in a public hearing before the Hearing Board to present your respective positions.

Proper completion of the Application will help the Hearing Board fully consider your request and will help you prepare for the hearing. Any Application that is not substantially complete shall not be accepted by the Hearing Board Clerk.

FILING STEPS:

1. Properly complete the Application for Variance form. The form is available on the website at http://www.baaqmd.gov/Forms.aspx~~www.baaqmd.gov/publications/forms~~ under "All Board of Directors Forms". You may complete the form on your computer and submit the copy you print on your printer.

2. ~~I~~If you need more space and attach additional pages, properly identify the numbered ~~s~~section of the Application form that they support.

3. SMALL BUSINESSES: Review the Small Business Considerations section of the Application for Variance (Page 12, Nos. 21 and 22). If you meet the requirements~~,~~ complete and sign the Small Business Declaration (Page 13).

4. Submit the filing fee with the Application and make check payable to BAAQMD. **See District Regulation 3, Schedule A- Hearing Board Fees**.

5. Mail or otherwise deliver an original and nine copies of the Application and all other papers to:

Hearing Board
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Clerk of the Hearing Board contact phone # for questions: (415) 749-5073~~127~~.

BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

APPLICATION FOR VARIANCE

In the Matter of the Application of	)	
_____	)	
(Applicant: Insert business or organization name above)	)	
	)	DOCKET NO. _____
	)	(Assigned by Clerk)
For a Variance from Regulation(s):	)	
_____	)	
(Applicant: Insert Regulations in form: Regulation _____, Rule _____, Section _____)	)	

TYPE OF VARIANCE REQUESTED (see Page 3 for further information)

☐ SHORT ☐ INTERIM ☐ REGULAR ☐ GROUP ☐ PRODUCT

VARIANCE PERIOD REQUESTED (see Page 10, No. 20):

From: _____ To _____

TOTAL NUMBER OF (CALENDAR) DAYS IN VARIANCE PERIOD: _____

(Note: Variance relief will not be granted for any period preceding the date of filing of the Application for Variance.)

[ALL DOCUMENTS FILED WITH THE CLERK'S OFFICE BECOME PUBLIC RECORD]

SUMMARY PAGE

NAME OF APPLICANT: _____

FACILITY ADDRESS: _____

City, State, Zip: _____

PLANT # or G #: _____ SOURCE #(S): _____

`

CONTACT: Name, title, company (if different than Applicant), address, and phone number of persons authorized to receive notices regarding this Applicant (no more than two authorized persons).

_____

_____

_____

Zip _____ *Zip* _____

☎ ( ) _____ *Ext.* _____ ☎ ( ) _____ *Ext.* _____

Fax ( ) _____ *Fax* ( ) _____

E-mail _____ *E-mail* _____

California Bar # _____ California Bar # _____

BRIEFLY SUMMARIZE EQUIPMENT/ACTIVITY SUBJECT TO THIS VARIANCE REQUEST:

LIST DISTRICT REGULATIONS, RULES AND PERMIT CONDITIONS SUBJECT TO THIS VARIANCE REQUEST:

SUMMARY OF TOTAL EXCESS EMISSIONS:

Pollutants	Net Emissions After Mitigation (lbs/day or Opacity %)

[You May Attach Additional Pages If Necessary]

TYPE OF VARIANCE REQUESTED:

NOTE: The date of filing of the Application for Variance is the earliest allowed starting date for a variance. State law [California Health and Safety Code (H&SC)] imposes requirements on the amount of time to be allowed for notification of the public and air quality regulatory agencies before a hearing on a variance request can be held by the Hearing Board. Review the following descriptions of the types of variances, and select that which is most appropriate for your situation:

SHORT: If compliance with the District Rule(s) can be achieved in **90 (calendar) days or less**, request a short-term variance. [*10-day notice required to Bay Area Air Quality Management District's Air Pollution Control Officer (APCO), Applicant, California State Air Resources Board (ARB), Federal Environmental Protection Agency (EPA).]*

INTERIM: If Applicant requires immediate relief for the period between the date of filing of 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 required, a hearing will be scheduled as soon as possible. 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 Rule(s) will take **more than 90 (calendar) days**, request a regular variance. *(30-day published notice required. 30 days notice to APCO, Applicant, ARB.)*

GROUP: If non-compliance with District Rule(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 variances 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 variances depending on period of the product variance.)*

BAAQMD Regulation 1-402: **"Status of Violation Notices During Variance Proceedings:** Where a person has applied for a variance, no notices shall be issued during the period between the date of filing for the variance application and the date of decision by the Hearing Board for violations covered by the variance application. However, during the period between the date of the filing for a variance and the date of decision by the Hearing Board, evidence of additional violations shall be collected and duly recorded. Where the variance is denied, evidence of violations collected between the filing date and decision date shall be reviewed and a notice of violation issued for violations occurring during that period shall be served upon said person. Where the variance is granted, no notice of violation shall be issued for violations occurring during that period except in extraordinary circumstances as determined by the APCO."

NOTE: The Environmental Protection Agency (EPA), a federal agency, does not recognize California's variance process, which is established by state law. The EPA considers facilities operating under a variance to be operating in violation of District regulations. Facilities that are in violation and then obtain a variance are advised that the EPA can independently pursue legal action based on federal law against the facility for continuing to be in violation.

1. **Briefly describe the type of business and processes at your facility (Attach a map showing location)**

See Small Business Considerations on Page 12, No. 21 before answering the following question:

Is Applicant a "Small Business" as defined by Health & Safety Code Section 42352.5(b)(1)?
Yes ☐ No ☐

Is Applicant a "Major Source" as defined by the applicable provisions of the Federal Clean Air Act, 42 U.S.C. Sec. 7661(2)? Yes ☐ No ☐

Is Applicant a "public agency" as defined in Health & Safety Code Section 42352(b)?
Yes ☐ No ☐

2. Describe the equipment/activity for which a Variance is being sought (type of equipment/activity, source numbers, purpose, why is it essential to your business). Attach a copy of the BAAQMD Permit to Operate or Authority to construct for the subject equipment and/or facility so long as such Permit is less than 50 pages. If the Permit is greater than 50 pages, all portions relevant to the Application shall be provided.

Is there a regular maintenance and/or inspection schedule for this equipment? Yes ☐ No ☐

If Yes, how often?

What was the date of the last maintenance and/or inspection?_____

Are maintenance records available? Yes ☐ No ☐

Was there any indication of problems? Yes ☐ No ☐

[You May Attach Additional Pages If Necessary]

APPLICANT'S PETITION FOR REQUIRED FINDINGS

California Health and Safety Code (H&S Code) 42352 requires the Hearing Board to make six findings for a variance to be granted. In this Section, Applicant must provide sufficient information to enable the Hearing Board to make a decision on each of the six findings:

Finding # 1: ***That the Applicant for a variance is, or will be, in violation of Health and Safety Code Section 41701 or of any rule, regulation or order of the District.***

3. List all District Regulations, Rules, and/or Permit Conditions from which Applicant is seeking variance relief. Briefly explain how Applicant is or will be in violation of each rule or condition. If Applicant is requesting relief from Regulation 6, and the excess opacity during the variance period will reach or exceed 40% (Ringelmann 2), Applicant should also request relief from California Health and Safety Code Section 41701.

Regulation, Rules, Permit Conditions	Explanation

4. Has the District issued any Notice(s) of Violation (NOVs) to the Applicant concerning the subject of this variance request? Yes ☐ No ☐ **If "Yes", please attach copies of the NOVs**.

5. Has the equipment in question or any other equipment at this facility been under variance protection during the last year? Yes ☐ No ☐

Docket #	**Variance Period**	**Nature of Emission**	**Regulation/Rule/Section**

6. List all NOV(s) issued to equipment at the **entire** facility during the previous 12 months:

Date of Notice	**NOV #**	**Nature of Emission**	**Regulation/Rule/Section**

[You May Attach Additional Pages If Necessary]

Finding # 2: ***That, due to conditions beyond the reasonable control of the Applicant, requiring compliance would result in either (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination of a lawful business.***

7. Describe, in detail, the event leading to the need for a variance:

8. Has the Applicant received any complaints from the public regarding the operation of the subject equipment or activity within the last year? Yes ☐ No ☐

Date of Complaint	**Number of Complaints**	**Nature of Complaint**

9. Explain why it is beyond Applicant's reasonable control to comply with the Regulation(s) and/or Permit Condition(s):

[You May Attach Additional Pages If Necessary]

10. When and how did Applicant first become aware that it was not in compliance with the Rule(s) and/or permit condition(s)?

11. What actions has Applicant taken since that time to achieve compliance with the Regulation(s) or permit condition(s)?

12. What would be the harm to Applicant's business if the variance were not granted?

Economic losses: $_____

Number of Employees laid off (if any):_____

Provide detailed information regarding economic losses, if any, (anticipated business closure, breach of contracts, hardship on customers, layoffs and/or similar impacts).

[You May Attach Additional Pages If Necessary]

Finding # 3: ***That the closing or taking would be without a corresponding benefit in reducing air contaminants.***

13. List the estimated or measured excess emissions or excess opacity, if any, on a daily basis, or over a more appropriate period of time (For example: duration of requested variance period, hourly basis). Also list emissions reductions proposed by Applicant as mitigation. If no excess emissions or opacity are expected during the variance period, go to No. 16.

Pollutant	(A) Estimated Excess Emissions (lbs/day)	(B) Reduction Due to Mitigation (lbs/day)	(C)** Net Emissions After Mitigation (lbs/day)

**Column A minus Column B = Column C

14. Show the calculations used to determine the excess emissions listed in No. 13. Are the values in No. 13 based on measurements_____ or estimates_____?

15. Do the additional emissions during the variance period contain any Toxic Air Contaminants (TACs) [pursuant to Health and Safety Code Section 39655] or odorous substances? Yes ☐ No ☐

If Yes, list the TACs or odorous substances and approximate amounts:

16. List measured or estimated annual emissions from entire facility for each pollutant which is the subject of this variance application:

Pollutant	**Total Emissions from Entire Facility (tons/year)**

[You May Attach Additional Pages If Necessary]

Briefly explain the basis for these facility emission values:

Finding # 4: ***That the Applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance.***

17. Explain why the Applicant cannot curtail or terminate operations in lieu of obtaining a variance:

Finding # 5: During the period that the variance is in effect, the Applicant will reduce excess emissions to the maximum extent feasible.

18. Explain how Applicant plans to reduce (mitigate) excess emissions during the variance period to the maximum extent feasible, or why reductions are not feasible (mitigation may include reductions at other sources):

Finding # 6: During the period the variance is in effect, the Applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the District, and report these emissions levels to the District pursuant to a schedule established by the District.

19. Has the District requested that the Applicant monitor or otherwise quantify emissions during the variance period? Yes ☐ No ☐

If Yes, please describe how Applicant will do so:

APPLICANT'S PLAN FOR ACHIEVING COMPLIANCE:

20. How does the Applicant intend to achieve compliance with the Rule(s) and/or permit condition(s)? Include a detailed description of any equipment to be installed and/or modifications or process changes to be made, a list of the dates by which the actions will be completed, and an estimate of total costs:

Detailed Description:

Schedule Of Increments Of Progress:

Increment Description	Completion Date

Applicant may propose operating conditions for the variance period which may be considered by the Hearing Board in its evaluation of the variance application.

PROPOSED OPERATING CONDITIONS:

Variance Period Requested: From:_____ To:_____

Total Number of (Calendar) Days in Variance Period: _____

(Note: Variance relief will not be granted for any period preceding the date of filing of the Application for Variance.)

Date of Application: _____

Completed By: _____ Title: _____
_____ (Print Name)

[You May Attach Additional Pages If Necessary]

The following verification must be signed by the owner, manager, director or other responsible party of the plant, business, factory, or agency requesting the Variance.

VERIFICATION

I, the undersigned, hereby declare under the penalty of perjury, under the laws of the State of California, that I have read the foregoing document, including attachments and the items therein set forth, and that I know its contents, are true.

Dated at _____, on _____

Signature _____

Print Name_____

Title _____

[You May Attach Additional Pages If Necessary]

SMALL BUSINESS MATTERS

Small Business Assistance: Assistance in completing the Application for Variance and in developing a compliance schedule is available to small businesses. Contact the office of the Hearing Board Clerk at (415) 749-5073 for assistance.

Small Business Considerations in the Granting of Variances by the Hearing Board: California Health & 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.

21. Definition of Small Business for purposes of special considerations:

Is Applicant a manufacturing or wholesaling business with fewer than 100 employees?
Yes ☐ No ☐ Number of Employees: _____

OR

Is Applicant a retailing or service business with annual sales under $5 million?
Yes ☐ No ☐ Annual Sales: $_____

AND

Does Applicant emit 10 tons or less per year of air contaminants? Yes ☐ No ☐

If the Applicant satisfies the above conditions, the Hearing Board will consider the following special factors:

(A) In determining the extent to which the petitioner took timely actions to comply or seek a variance, the Hearing Board shall make specific inquiries into, and shall take into account, the reasons for any claimed ignorance of the requirement from which a variance is sought.
(B) In determining the extent to which the petitioner took reasonable actions to comply, the Hearing Board shall make specific inquiries into, and shall take into account, the petitioner's financial and other capabilities to comply.
(C) In determining whether or not the burden of requiring immediate compliance would be unreasonable, the Hearing Board shall make specific inquiries into, and shall consider, the impact on the petitioner's business and the benefit to the environment which would result if the petitioner is required to immediately comply.

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 a small business for the purpose of these reduced fees is different than the definition used by the State of California for the special considerations listed above.

22. Definition of Small Business for purposes of reduced filing and excess emission fees (District Regulation 3, Section 209; Both the number of employees AND gross annual income must apply);

Does Applicant have no more than 10 employees?
Yes ☐ No ☐ Number of Employees: _____

Does Applicant have a gross annual income of no more than $750,000?
Yes ☐ No ☐ Gross Annual Income: $_____

Is Applicant not affiliated with a non-small business? Yes ☐ No ☐

1. I am an officer, partner or owner of the Applicant herein, or a duly authorized agent of the Applicant authorized to make the representations set forth herein.

2. The Applicant is a business that meets the following definitions of Small Business (check those that are applicable):

Small Business for Purposes of Special Considerations (No. 21) _____

Small Business for Purposes of Filing and Excess Emission Fees (No. 22) _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, at _____, California

_____

Signature **Print Name**

_____

Position with Company

Revised 12/9/08 – (HBAPPLIC)

~~BEFORE THE HEARING BOARD~~
~~OF THE~~
~~BAY AREA AIR QUALITY MANAGEMENT DISTRICT~~
~~STATE OF CALIFORNIA~~

~~APPLICATION FOR VARIANCE~~

In the Matter of the Application of	)	
	)	
_____	)	
	)	
(Applicant: Insert business or organization name above)	)	
	)	
	)	DOCKET NO. _____
	)	(Assigned by Clerk)
For a Variance from Regulation(s):	)	
	)	
_____	)	
	)	
(Applicant: Insert Regulations in form: Regulation_____, Rule_____, Section_____)	)	
	)	

TYPE OF VARIANCE REQUESTED (see Page 3 for further information)

☐ SHORT ☐ INTERIM ☐ REGULAR ☐ GROUP ☐ PRODUCT

VARIANCE PERIOD REQUESTED (see Page 10, No. 20):

From:_____ To_____

TOTAL NUMBER OF DAYS IN VARIANCE PERIOD: _____

(Note: Variance relief will not be granted for any period preceding the date of filing of the Application for Variance.)

[ALL DOCUMENTS FILED WITH THE CLERK'S OFFICE BECOME PUBLIC RECORD]

SUMMARY PAGE

NAME OF

APPLICANT:_____

FACILITY ADDRESS:_____

City, State, Zip:_____

PLANT # or G #:_____ SOURCE #(S):_____

`

CONTACT: Name, title, company (if different than Applicant), address, and phone number of persons authorized to receive notices regarding this Applicant (no more than two authorized persons).

_____	_____
_____	_____
_____	_____
_____ *Zip*	_____ *Zip*
☎ ( ) _____ *Ext.*	☎ ( ) _____ *Ext.*
Fax ( ) _____	*Fax* ( ) _____
E-mail _____	*E-mail* _____
California Bar #_____	California Bar #_____

BRIEFLY SUMMARIZE EQUIPMENT/ACTIVITY SUBJECT TO THIS VARIANCE REQUEST (See Page 4, No.2):

LIST DISTRICT REGULATIONS, RULES AND PERMIT CONDITIONS SUBJECT TO THIS VARIANCE REQUEST (See Page 5, No. 3):

SUMMARY OF TOTAL EXCESS EMISSIONS (See Page 8, No. 13):

Pollutants	Net Emissions After Mitigation (lbs/day or Opacity %)

TYPE OF VARIANCE REQUESTED:

NOTE: The date of filing of the Application for Variance is the earliest allowed starting date for a variance. State law [California Health and Safety Code (H&SC)] imposes requirements on the amount of time to be allowed for notification of the public and air quality regulatory agencies before a hearing on a variance request can be held by the Hearing Board. Review the following descriptions of the types of variances, and select that which is most appropriate for your situation:

SHORT: If compliance with the District Rule(s) can be achieved in **90 days or less**, request a short-term variance. [*10-day notice required to Bay Area Air Quality Management District's Air Pollution Control Officer (APCO), Applicant, California State Air Resources Board (ARB), Federal Environmental Protection Agency (EPA).]*

INTERIM: If Applicant requires immediate relief for the period between the date of filing of 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 required, a hearing will be scheduled as soon as possible. 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 Rule(s) will take **more than 90 days**, request a regular variance. *(30-day published notice required. 30 days notice to APCO, Applicant, ARB.)*

GROUP: If non-compliance with District Rule(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 variances 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 variances depending on period of the product variance.)*

BAAQMD Regulation 1-402: **"Status of Violation Notices During Variance Proceedings:** Where a person has applied for a variance, no notices shall be issued during the period between the date of filing for the variance application and the date of decision by the Hearing Board for violations covered by the variance application. However, during the period between the date of the filing for a variance and the date of decision by the Hearing Board, evidence of additional violations shall be collected and duly recorded. Where the variance is denied, evidence of violations collected between the filing date and decision date shall be reviewed and a notice of violation issued for violations occurring during that period shall be served upon said person. Where the variance is granted, no notice of violation shall be issued for violations occurring during that period except in extraordinary circumstances as determined by the APCO."

NOTE: **The Environmental Protection Agency (EPA), a federal agency, does not recognize California's variance process, which is established by state law. The EPA considers facilities operating under a variance to be operating in violation of District regulations. Facilities that are in violation and then obtain a variance are advised that the EPA can independently pursue legal action based on federal law against the facility for continuing to be in violation.**

1. **Briefly describe the type of business and processes at your facility (Attach a map showing location)**

See Small Business Considerations on Page 12, No. 21 before answering the following question:

Is Applicant a "Small Business" as defined by Health & Safety Code Section 42352.5(b)(1)?
Yes ☐ No ☐

Is Applicant a "Major Source" as defined by the applicable provisions of the Federal Clean Air Act, 42 U.S.C. Sec. 7661(2)? Yes ☐ No ☐

Is Applicant a "public agency" as defined in Health & Safety Code Section 42352(b)?
Yes ☐ No ☐

2. Describe the equipment/activity for which a Variance is being sought (type of equipment/activity, source numbers, purpose, why is it essential to your business). Attach a copy of the BAAQMD Permit to Operate or Authority to construct for the subject equipment and/or facility so long as such Permit is less than 50 pages. If the Permit is greater than 50 pages, all portions relevant to the Application shall be provided.

Is there a regular maintenance and/or inspection schedule for this equipment? Yes ☐ No ☐

If Yes, how often?

What was the date of the last maintenance and/or inspection?_____

Are maintenance records available? Yes ☐ No ☐

Was there any indication of problems? Yes ☐ No ☐

APPLICANT'S PETITION FOR REQUIRED FINDINGS

California Health and Safety Code (H&S Code) 42352 requires the Hearing Board to make six findings for a variance to be granted. In this Section, Applicant must provide sufficient information to enable the Hearing Board to make a decision on each of the six findings:

Finding # 1: ***That the Applicant for a variance is, or will be, in violation of Health and Safety Code Section 41701 or of any rule, regulation or order of the District.***

3. List all District Regulations, Rules, and/or Permit Conditions from which Applicant is seeking variance relief. Briefly explain how Applicant is or will be in violation of each rule or condition. If Applicant is requesting relief from Regulation 6, and the excess opacity during the variance period will reach or exceed 40% (Ringelmann 2), Applicant should also request relief from California Health and Safety Code Section 41701.

Regulation, Rules, Permit Conditions	Explanation

4. Has the District issued any Notice(s) of Violation (NOVs) to the Applicant concerning the subject of this variance request? Yes ☐ No ☐ **If "Yes", please attach copies of the NOVs**.

5. Has the equipment in question or any other equipment at this facility been under variance protection during the last year? Yes ☐ No ☐

Docket #	**Variance Period**	**Nature of Emission**	**Regulation/Rule/Section**

6. List all NOV(s) issued to equipment at the **entire** facility during the previous 12 months:

Date of Notice	**NOV #**	**Nature of Emission**	**Regulation/Rule/Section**

~~**Finding # 2:** ***That, due to conditions beyond the reasonable control of the Applicant, requiring compliance would result in either (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination of a lawful business.***~~

~~**7.** Describe, in detail, the event leading to the need for a variance:~~

~~**8.** Has the Applicant received any complaints from the public regarding the operation of the subject equipment or activity within the last year? Yes ☐ No ☐~~

~~**Date of Complaint**~~	~~**Number of Complaints**~~	~~**Nature of Complaint**~~

~~**9.** Explain why it is beyond Applicant's reasonable control to comply with the Regulation(s) and/or Permit Condition(s):~~

~~**10.** When and how did Applicant first become aware that it was not in compliance with the Rule(s) and/or permit condition(s)?~~

~~**11.** What actions has Applicant taken since that time to achieve compliance with the Regulation(s) or permit condition(s)?~~

~~**12.** What would be the harm to Applicant's business if the variance were not granted?~~

~~Economic losses: $_____~~

~~Number of Employees laid off (if any):_____~~

~~Provide detailed information regarding economic losses, if any, (anticipated business closure, breach of contracts, hardship on customers, layoffs and/or similar impacts).~~

Finding # 3: *That the closing or taking would be without a corresponding benefit in reducing air contaminants.*

13. List the estimated or measured excess emissions or excess opacity, if any, on a daily basis, or over a more appropriate period of time (For example: duration of requested variance period, hourly basis). Also list emissions reductions proposed by Applicant as mitigation. If no excess emissions or opacity are expected during the variance period, go to No. 16.

Pollutant	(A) Estimated Excess Emissions (lbs/day)	(B) Reduction Due to Mitigation (lbs/day)	(C)** Net Emissions After Mitigation (lbs/day)

**Column A minus Column B = Column C

14. Show the calculations used to determine the excess emissions listed in No. 13. Are the values in No. 13. based on measurements_____ or estimates_____?

15. Do the additional emissions during the variance period contain any Toxic Air Contaminants (TACs) [pursuant to Health and Safety Code Section 39655] or odorous substances? Yes ☐ No ☐

If Yes, list the TACs or odorous substances and approximate amounts:

16. List measured or estimated annual emissions from entire facility for each pollutant which is the subject of this variance application:

Pollutant	**Total Emissions from Entire Facility (tons/year)**

~~Briefly explain the basis for these facility emission values:~~

~~**Finding # 4:** ***That the Applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance.***~~

~~**17.** Explain why the Applicant cannot curtail or terminate operations in lieu of obtaining a variance:~~

~~***Finding # 5: During the period that the variance is in effect, the Applicant will reduce excess emissions to the maximum extent feasible.***~~

~~**18.** Explain how Applicant plans to reduce (mitigate) excess emissions during the variance period to the maximum extent feasible, or why reductions are not feasible (mitigation may include reductions at other sources):~~

~~***Finding # 6: During the period the variance is in effect, the Applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the District, and report these emissions levels to the District pursuant to a schedule established by the District.***~~

~~**19.** Has the District requested that the Applicant monitor or otherwise quantify emissions during the variance period? Yes ☐ No ☐~~
~~**If Yes, please describe how Applicant will do so:**~~

APPLICANT'S PLAN FOR ACHIEVING COMPLIANCE:

20. How does the Applicant intend to achieve compliance with the Rule(s) and/or permit condition(s)? Include a detailed description of any equipment to be installed and/or modifications or process changes to be made, a list of the dates by which the actions will be completed, and an estimate of total costs:

Detailed Description:

Schedule Of Increments Of Progress:

Increment Description	**Completion Date**

Applicant may propose operating conditions for the variance period which may be considered by the Hearing Board in its evaluation of the variance application.

PROPOSED OPERATING CONDITIONS:

Variance Period Requested: From:_____ To:_____

Total Number of Days in Variance Period: _____

(Note: Variance relief will not be granted for any period preceding the date of filing of the Application for Variance.)

Date of Application: _____

~~Completed By: _____ Title: _____~~
~~(Print Name)~~

~~**The following verification must be signed by the owner, manager, director or other responsible party of the plant, business, factory, or agency requesting the Variance.**~~

~~**VERIFICATION**~~

~~I, the undersigned, hereby declare under the penalty of perjury, under the laws of the State of California, that I have read the foregoing document, including attachments and the items therein set forth, and that I know its contents, are true.~~

~~Dated at _____, on _____~~

~~Signature _____~~

~~Print Name _____~~

~~Title _____~~

SMALL BUSINESS MATTERS

Small Business Assistance: Assistance in completing the Application for Variance and in developing a compliance schedule is available to small businesses. Contact the office of the Hearing Board Clerk at (415) 749-5187 for assistance.

Small Business Considerations in the Granting of Variances by the Hearing Board: California Health & 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.

21. Definition of Small Business for purposes of special considerations:

Is Applicant a manufacturing or wholesaling business with fewer than 100 employees?
Yes ☐ No ☐ Number of Employees: _____

OR

Is Applicant a retailing or service business with annual sales under $5 million?
Yes ☐ No ☐ Annual Sales: $_____

AND

Does Applicant emit 10 tons or less per year of air contaminants? Yes ☐ No ☐

If the Applicant satisfies the above conditions, the Hearing Board will consider the following special factors:

(A)In determining the extent to which the petitioner took timely actions to comply or seek a variance, the Hearing Board shall make specific inquiries into, and shall take into account, the reasons for any claimed ignorance of the requirement from which a variance is sought.
(B)In determining the extent to which the petitioner took reasonable actions to comply, the Hearing Board shall make specific inquiries into, and shall take into account, the petitioner's financial and other capabilities to comply.
(C)In determining whether or not the burden of requiring immediate compliance would be unreasonable, the Hearing Board shall make specific inquiries into, and shall consider, the impact on the petitioner's business and the benefit to the environment which would result if the petitioner is required to immediately comply.

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 a small business for the purpose of these reduced fees is different than the definition used by the State of California for the special considerations listed above.

22. Definition of Small Business for purposes of reduced filing and excess emission fees (District Regulation 3, Section 209):

Does Applicant have no more than 10 employees?
Yes ☐ No ☐ Number of Employees: _____

Does Applicant have a gross annual income of no more than $500,000?
Yes ☐ No ☐ Gross Annual Income: $_____

Is Applicant not affiliated with a non-small business? Yes ☐ No ☐

~~Declaration Regarding Small Business~~

~~1. I am an officer, partner or owner of the Applicant herein, or a duly authorized agent of the Applicant authorized to make the representations set forth herein.~~

~~2.The Applicant is a business that meets the following definitions of Small Business (check those that are applicable):~~

~~Small Business for Purposes of Special Considerations (No. 21) _____~~

~~Small Business for Purposes of Filing and Excess Emission Fees (No. 22) _____~~

~~I declare under penalty of perjury that the foregoing is true and correct.~~

~~Executed on_____, at _____, California~~

_____ _____

~~**Signature** **Print Name**~~

_____

~~Position with Company~~

~~(Revised 7/26/00 HBAPPLIC.DOC)~~

~~The current filing fees for the Hearing Board are found in District Regulation 3, Schedule A. Please review the Schedule carefully to determine the appropriate fee for your request. Some things to consider when calculation the appropriate fee that is to be submitted with your Application:~~

- ~~Long Term Variance Fee (variance request exceeds 90 calendar days)~~
- ~~Short Term Variance Fee (variance request is less than 90 calendar days)~~
- ~~Interim Variance Fee (additional fee if Interim Variance requested)~~
- ~~Emergency Variance Fee~~
- ~~Appeals require a Filling Fee~~
- ~~Requests for Intervention require a Filing Fee~~