

**Regulation 7, Hearing Board
Revisions to Rule 112, Rule 117, Rule 120,
Rule 123, Rule 124 and Rule 126**

BACKGROUND

The Ventura Air Pollution Control District is proposing minor changes to six of the 21 rules in Regulation VII, Hearing Board. The six rules, all adopted on August 12, 1969, unless otherwise noted, are:

- 1) Rule 112, Contents of Petitions
- 2) Rule 117, Answers
- 3) Rule 120, Notice of Hearing

- 4) Rule 123, Findings, Variance or Abatement Order, originally adopted 8/17/76.
- 5) Rule 124, Decision
- 6) Rule 126, Effective Date of Decision

No emission reductions will result from the proposed changes, which are meant to both facilitate administration of the Hearing Board and align the rules more closely with California Health and Safety Code.

PROPOSED REVISIONS

Rule 112

Rule 112 specifies the contents of Hearing Board petitions. Section B is being rewritten to exclude the requirement for a "proposed order," which staff feels is unnecessary. The Hearing Board requires only "the facts to support the requested action," as proposed, and a description of the relief requested. Staff prepares all orders according to the Hearing Board decision. The proposed revision reads as follows:

- B. Each petition shall include ~~a proposed order specifically setting forth all findings required by Rule 123, the facts to support those findings, the requested action and a description of the relief desired from the Hearing Board.~~**

Rule 117

Rule 117, Answers, is proposed for repeal. Staff believes that the rule has never been cited. It is unclear where the rule originated. At this time, the rule has no purpose and is proposed for deletion.

~~Any person may file an answer within ten (10) days after service. All answers shall be served the same as petitions under Rule 111.~~

Rule 120

Rule 120 specifies the public notice requirements for the Hearing Board. Several requirements vary according to the population of the county; and the population of Ventura County now exceeds the threshold of 750,000. Therefore, regular variances require 30 day public notice (reference H&SC Section 40826). The 750,000 threshold and reference to it are proposed for deletion in Subsection A.2, as follows:

2. **In case of a hearing to consider an application for a variance, other than an interim variance or a 90-day variance, or an application for a modification of a final compliance date in a variance previously granted, the notice requirements for the hearing shall be as follows:**
 - a. **The Clerk of the Hearing Board shall serve a notice of the time and place of a hearing to grant a variance upon the Air Pollution Control Officer, all other districts within the air basin, the state board, the Environmental Protection Agency, and upon the applicant or permittee, not less than 15 30 days prior to the hearing, ~~except as provided in Subsection A.2.d.~~**
 - b. **The Clerk of the Hearing Board shall also publish a notice of the hearing in at**

least one daily newspaper of general circulation in the District, and shall send the notice to every person who requests the notice, not less than ~~15~~ **30** days prior to the hearing, ~~except as provided in Subsection A.2.d.~~

- c. The notice shall state the time and place of the hearing; the time when, commencing not less than ~~15~~ **30** days prior to the hearing, and place where the application, including any proposed conditions or schedule of increments of progress, is available for public inspection; and any other information that may be necessary to reasonably apprise the people within the District of the nature and purpose of the meeting.
- d. ~~If the population of the District exceeds 750,000 the Hearing Board shall serve, publish, and send the notice pursuant to Subsections A.2.a and A.2.b, and make information available pursuant to Subsection A.2.c, not less than 30 days prior to the hearing.~~

(Reference Health and Safety Code Section 40826).

Note that the first paragraph of Subsection A.2 may be misinterpreted. The paragraph excludes two application types from the requirement for a 30-day notice: an interim variance and a 90-day variance. The remaining two application types require a 30-day notice; a "regular" variance and "an application for a modification of a final compliance date in a variance previously granted."

Staff also proposes to add as Subsection A.4 the requirements of Health and Safety Code 40825 and 40825(a) for 90-day variances. This new section will specify additional notice requirements, as follows:

4. In case of a hearing to consider an application for a variance, or a series of variances, to be in effect for a period of not more than 90 days, or an application for modification of a schedule of increments of progress:

The Clerk of the Hearing Board shall serve a notice of the time and place of a hearing to grant such a variance or modification upon the Air Pollution Control Officer, all other districts within the air basin, the state board,

the Environmental Protection Agency, and upon the applicant or permittee, not less than 10 days prior to the hearing. (Reference Health and Safety Code Section 40825).

Abatement orders that act like a variance with a term of 90 days or less will be subject to Subsection A.4. Abatement orders that act like a variance with a term longer than 90 days will be subject to Subsection A.2.

For additional information on Hearing Board notice requirements, see the ARB chart in Appendix A.

Rule 123

Rule 123 specifies the findings required for a Variance or Abatement Order. Section A applies to Variances. All findings in Section A refer to specific Health & Safety Code sections except Subsection A.8. Subsection A.8 states that, to grant a variance, the Hearing Board must find "*that continued operation is not likely to create an immediate threat or hazard to public health or safety.*" This finding has been an issue for variance requests that involve diesel particulate matter and ARB's finding that there is no safe ambient concentration (or emission level) of diesel PM.

Several recent variance requests have involved diesel engines and diesel particulate emissions:

1. The City of Simi Valley requested a variance to allow the operation of a stationary diesel engine at their waste water treatment plant until a new low-emissions diesel engine was installed to comply with the state's Air Toxic Control Measure for Stationary Diesel Engines. The engine operated during power shortages or interruptions, as determined by California ISO (the state's power agency) or when the facility's normal electrical service fails. The engine had historically very low use. (Reference: Hearing Board Case Nos. 786 and 790)
2. The County of Ventura requested a variance to allow the operation of a stationary diesel engine at their waste water treatment plant until they were able to "opt out" of their interruptible service contract with Southern California Edison Company. The engine operates during power shortages or interruptions as determined by California ISO, or when the facility's normal electrical service fails. The engine had historically very low use. (Reference: Hearing Board Case Nos. 787)

3. Venoco, Inc. requested a variance that would allow the operation of one stationary diesel engine as a back-up compressor while the facility's electric compressors were repaired. The engine would operate in excess of its permitted hours per year. The engine was in compliance with the state's Air Toxic Control Measure for Stationary Diesel Engines. (Reference: Hearing Board Case Nos. 808)
4. Vintage Production California LLC requested a variance to flare natural gas while a pipeline was being repaired. During the hearing a suggestion was made that Vintage install a temporary diesel engine to compress some of the natural gas so that it could be shipped via an alternate route. The Hearing Board decided not to require that Vintage install a diesel engine to compress the gas. (Reference: Hearing Board Case No. 823)

In the cases involving the City of Simi Valley, County of Ventura and Venoco, Inc. the variances were granted. In each of the above cases, the Hearing Board discussed or commented on the finding requirement in Subsection A.8 in relation to ARB's finding that there is no safe ambient concentration or emission level for diesel PM. In several instances Hearing Board members have requested that the District remove Subsection A.8 to alleviate this situation.

Subsection A.8 was added to the rule as Subsection A.5 on November 21, 1978. The Board letter is no longer available and the reason for the addition is unknown. A finding requires that toxic emission limits continue to be met, as specified in Rule 36 (New Source Review - Hazardous Air Pollutants), Rule 51 (Nuisance) is met, and the excess emissions are reduced to the maximum extent possible (Rule 123, Subsections A.7 and A.5 respectively).

Staff initially proposed deleting Subsection A.8, but the Advisory Committee recommended a clarification. The Committee suggested replacing the word "immediate" with "acute." An immediate hazard could exist at that time, but concentration levels may be relatively low. An acute hazard is one that can reach a crisis point rapidly, a much more serious situation. Staff agrees with the Advisory Committee suggestion and recommends the following revision:

- A. **No variance shall be granted unless the Hearing Board makes all of the following findings:**

8. **That continued operation is not likely to create an acute immediate threat or hazard to public health or safety.**

Section B applies to Abatement Orders. Subsections B. 2 and B.3 and are proposed for deletion because they are not included in Health and Safety Code. In a recent case, Subsection B.3 became an issue. The hearing involved the closure of a small print shop until a Permit to Operate was obtained. The Hearing Board and County Counsel discussed at length whether the order could be considered the "closing of a business without a corresponding benefit in reducing air contaminants." However, abated sources have no emissions, so overall emissions are reduced. The Abatement Order was ultimately issued.

A more significant issue is the benefit of closing a non-compliant emission source weighed against displacement of a workforce. In permitting cases, the source is significantly in control of the length of the Order by cooperating with permitting staff. This can limit downtime. However, some cases involve excess or hazardous emissions that cannot be reduced any other way. In these cases, public health is protected by abating the source. Workforce displacement becomes secondary.

The Hearing Board is not prevented from deliberating on these issues to reach a decision. The proposal is to exclude these issues from the findings.

Section B of Rule 123, including Subsections B.2 and B.3, was added to the rulebook as Rule 125 on August 17, 1976. The Board letter for that day is no longer available and the reason for adding the subsections is unknown. Subsection B.2 is unnecessary because the Hearing Board constitutes due process. Both Subsection B.2 and B.3 are recommended for deletion because they are not required by state law and are unnecessary.

- B. **No order for abatement shall be granted unless the Hearing Board makes all of the following findings finds:**

- ~~1. That the respondent is in violation of Section 41700 or 41701 of the Health and Safety Code or of any rule, regulation or order of the District. (Reference Health and Safety Code Section 42451).~~

- ~~2. That the order of abatement will not constitute a taking of property without due process of law.~~

~~3.—That if the order for abatement results in the closing or elimination of an otherwise lawful business, such closing would not be without a corresponding benefit in reducing air contaminants.~~

Rule 124

Rule 124 specifies the requirements for a Hearing Board decision. Revisions to Section F are proposed to make it consistent with H&SC Sections 40860, 40862 and 42360.

F. The Hearing Board decision shall be in writing, served and filed within a reasonable time, five days in the case of an emergency variance, after submission of the cause by the parties thereto and shall contain therewith a brief statement of facts found to be true, the determination of the issues presented, and The decision shall include the reasons for the decisions (Reference Health and Safety Code Section 40862). Within 30 days of any order granting, modifying or otherwise affecting a variance by the Hearing Board, either the Air Pollution Control Officer or the Hearing Board shall submit a copy of the order. A copy shall be mailed or delivered to the Air Pollution Control District, the California Air Resources Board, the petitioner, and to every person who has filed an answer or who has appeared as a party in person or by counsel at the hearing (Reference Health and Safety Code Sections 40860 and 42360).

In addition, Section K is incorrect and proposed for deletion. Excess emission fees are based on Rule 41.D and not on EPA's "Ben Able" program. EPA's "Ben Able" program is not suitable for use with the variance process and may be inconsistent with California Health and Safety Code. Subsequent sections will be renumbered.

K.—In the case of any major stationary source (100 tons per year potential), the variance order must notify the source that it will be required to pay a noncompliance penalty under Section 120 of the Clean Air Act as amended in August 1977. The

~~noncompliance penalty shall be calculated using the method prescribed in 40 CFR 67.~~

Due to this deletion, the remaining sections are being renumbered and re-referenced.

Rule 126

Rule 126 specifies the effective date of a Hearing Board decision. The rule is worded similarly to referenced Health and Safety Code Section 40863;

"40863. The decision shall become effective upon filing, unless the hearing board orders otherwise."

Health and Safety Code Section 40860 states that a Hearing Board decision must be filed "immediately" with "its clerk." In the District's case, that is the Ventura County Clerk of the Board.

This rule has been the source of confusion. Staff typically considers the effective date to be either 1) the date the order is granted or 2) a future date governed by a threshold. For example, a source cannot meet the emission limit in a revised rule by the compliance date. Although a variance may be issued weeks or months earlier, it would go into effect on the compliance date.

Since the filing must include a decision, the "filing date" is the date the signed final order is filed with the Clerk of the Board. We need to remember the difference between an "effective date" and an "implementation date." While the Hearing Board decision becomes effective on the "effective date," the order may include many other dates. In fact, an order may include a compliance schedule with a specific compliance date for each item. With this in mind, the language of the rule becomes clearer.

Nevertheless, staff is recommending the following revision to Rule 126 to specify that the Hearing Board decision becomes effective when the signed final order is filed with the Clerk of the Board.

The decision shall become effective upon filing of the signed final order with the Clerk of the Board, unless the Hearing Board orders otherwise. (Reference Health and Safety Code Section 40863)

EMISSION REDUCTION / COST EFFECTIVENESS

Health & Safety Code § 40703 states that the district must consider, and make public, "the cost-effectiveness of a control measure." The proposed revisions are not control measures, so it is not necessary to calculate cost-effectiveness. Nevertheless, the proposed revisions are administrative in

nature and no additional costs to either the District or stakeholders are expected.

In addition, because BACT requirements and feasible control measures are not involved, an incremental cost-effectiveness analysis under Health & Safety Code Section 40920.6 is not required.

SOCIOECONOMIC IMPACT

Health & Safety Code § 40728.5 requires the Air Pollution Control Board consider the socioeconomic impact of any new rule or amendment to an existing rule if air quality or emission limits are significantly affected. The proposed revisions are administrative

in nature and do not include emission limits. The proposed revisions will significantly affect neither air quality nor emission limitations in Ventura County. Therefore, an evaluation of the requirements of Health & Safety Code § 40728.5 is not necessary.

ENVIRONMENTAL IMPACTS OF METHODS OF COMPLIANCE / CEQA

Methods of Compliance

California Public Resources Code § 21159 requires the District to perform an environmental analysis of the reasonably foreseeable methods of compliance if the proposed rule requires "the installation of pollution control equipment, or [specifies] a performance standard or treatment requirement..." The proposed revisions are administrative in nature and do not involve a requirement to install air

pollution control equipment. Therefore, an analysis is not necessary.

CEQA Requirements

Staff has determined that the proposed revisions are exempt from the requirements of the CEQA under Section 15061(b)(3) of the CEQA Guidelines because it can be seen with certainty that there is no possibility that these changes may have a significant effect on the environment.

ANALYSIS OF EXISTING FEDERAL AND DISTRICT REGULATIONS

California Health & Safety Code § 40727.2(a) requires districts to provide a written analysis of existing regulations prior to adopting, amending or repealing a regulation. Section 40727.2(a) states:

In complying with Section 40727, the district shall prepare a written analysis as required by this section. In the analysis, the district shall identify all existing federal air pollution control requirements, including, but not limited to, emission control standards constituting best available control technology for new or modified equipment, that apply to the same equipment or source type as the rule or regulation proposed for adoption or

modification by the district. The analysis shall also identify any of that district's existing or proposed rules and regulations that apply to the same equipment or source type, and all air pollution control requirements and guidelines that apply to the same equipment or source type and of which the district has been informed pursuant to subdivision (b).

The proposed revisions include no emission control standards; therefore, the requirements of Health & Safety Code § 40727.2(a) are satisfied pursuant to Health & Safety Code § 40727.2(g).

PUBLIC COMMENT AND MEETINGS

Advisory Committee
September 28, 2010

There was one public participant at this meeting. After discussion, the Committee recommended two changes to the proposed revisions:

1. For Rule 114, the Committee suggested that a variance appeal may be prevented by removing the reference to Rule 113. Staff agreed to drop the proposed Rule 114 revision.
2. For Rule 123, Subsection A.8, the Committee felt that public health issues cannot be

implemented using the nuisance clause (Subsection A.7). The Committee suggested replacing the word "immediate" with "acute." An immediate hazard could exist at that time, but concentration levels may be relatively low. An acute hazard is one that can reach a crisis point rapidly, a much more serious situation. Staff agreed to make this change.

With these changes, the Advisory Committee unanimously recommended approval of the proposed revisions .

APPENDIX A

Variance and Abatement Order Reference Charts

An excerpt from the handout materials from the

California Air Resources Board
Advanced Hearing Board Workshop

Conducted at the
Ventura County Air Pollution Control District
July 27 and July 28, 2010

VARIANCE REFERENCE CHART

TYPE	DURATION	NOTICE REQs	CONSIDERATIONS
EMERGENCY	30 Day Maximum	None	1 Board member may issue. Cannot be issued to avoid HSC 40824 / 42351
SHORT	HSC Section 42359.5 90 Day Maximum	HSC Section 42359.5 10 Day Minimum to APCO, Air Basin, ARB, EPA and Petitioner	HSC Section 42359.5 **1 Hearing Board member may hear (Six Findings Required.)
INTERIM	HSC Section 40825 90 Day Maximum or date of decision on the short or regular application	HSC Section 40825 Reasonable notice to APCO and Petitioner. Cannot be granted to avoid notice required.	HSC Section 40825 & 42352 **1 Hearing Board member may hear. May be granted for "good cause". Cannot be granted after regular hearing
REGULAR	HSC Section 42351(b) 1 Year Maximum unless schedule of increments of progress is included	HSC Section 40824 & 42351(c) *30 Day Minimum to APCO, Air Basin, District, ARB, EPA, Petitioner and any interested member of the public	HSC Section 40826 & 42352 Public notice of hearing in at least one newspaper of general circulation. (Six Findings required)
MODIFICATION OF FINAL COMPLIANCE DATE	HSC Section 42358 Determined by the Hearing Board	HSC Section 40826 Same as Regular Variance	HSC Section 40826 & 42352 May be granted for "good cause"
MODIFICATION OF INCREMENTS OF PROGRESS	Determined by the Hearing Board	HSC Section 40826 10 Days Minimum to APCO, Air Basin, District, ARB, EPA and Petitioner	HSC Section 40826 & 42357 **1 Hearing Board member may hear
INTERIM AUTHORIZATION	30 Day Maximum HSC Section 42351.5	HSC Section 40825 Reasonable notice to APCO and Petitioner HSC Section 40824	HSC Section 40825 **1 Hearing Board member may hear. Cannot be used to extend FCD HSC Section 42351

* Reduces 30 day notice to 15 days if District population is 750,000 or less. ** One Hearing Board member may hear if District population is 750,000 or less.

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NOTES

HSC Section 40862: The decision of a Hearing Board shall include the reasons for the decision.

HSC Section 42350: A variance may not be obtained from the requirement for a permit to build, alter, erect or replace. Title V sources may not be granted a variance from the requirement for a permit to operate or use.

HSC Section 42351: A regular variance application must be filed before an interim variance can be granted. Good causes for granting an interim variance must be stated in the order. No interim shall be granted after a regular hearing has been held.

HSC Section 42352: No variance can be granted unless the hearing board makes all the following findings:

1. In violation of HSC Section 41701 or District Rules and Regulations,
2. Due to conditions beyond the reasonable control of the petitioner, requiring compliance would, result in either
 - (a) an unreasonable taking of property, or
 - (b) the closing or elimination of a lawful business.
3. Closing or taking would not have a corresponding benefit in reducing air contaminants.
4. Petitioner has considered curtailing operations in lieu of applying for a variance.
5. During variance petitioner will reduce excess emissions to the maximum extent feasible.
6. During variance, petitioner will monitor or quantify emission levels if requested by the district.

HSC Section 42353: The Hearing Board shall prescribe requirements other than those imposed by statute or by any rule, regulation, or order of the district board, not more onerous. However, no variance shall be granted if the operation, under a variance will result in a nuisance.

HSC Section 42355: The Hearing Board can require the posting of a bond by the petitioner to assure performance of work/construction or repairs.

HSC Section 42356: The Hearing Board may modify or revoke, by written order permitting a variance.

HSC Section 42358: Variance must specify an effective time and final compliance date. Variance over one year must include IOPS.

HSC Section 42360: Copy of the order must be submitted to ARB within 30 days of granting the Variance.

HSC Section 42362: ARB can modify or revoke variance if, in its judgment, the compliance schedule is not as expeditious as practicable or the variance does not meet HSC requirements.

HSC Section 42368: No "product" variance can be granted unless 5 specific findings are made.

HSC Section 42366: Product variances are only available if in order to provide relief, the variance is granted for, and attached to, the product.

HSC Section 42301.3(g): Can petition for a variance from requirements to install a/p control equipment if there is a delay in permit approval.

This chart is provided by ARB for quick reference only.
Refer to the Health and Safety Code for complete information.

ABATEMENT ORDER REFERENCE CHART

TYPE	HSC PROVISIONS	NOTICE REQs	CONSIDERATIONS
ABATEMENT ORDER	Hearing Board can issue for recurring violations of HSC 41700 (NUISANCE) or 41701 (OPACITY), for operating without a permit, or for violations of district rules. The applicant can be the district board, hearing board, or the APCO. HSC Section 42450 & 42451(a)	10 day minimum notice to APCO and applicant and anyone requesting such notice. Must publish in at least one daily newspaper in circulation within the district. HSC Section 40823	Can be issued if a threat to air contaminant release near schools exists. Can be issued with or without a finding or violation. (Strict "cease and desist".) Hearing Board determines effective time span. HSC Section 42301.7(c.2) & 42451(b)
CONDITIONAL ABATEMENT ORDER - DOES NOT ACT AS A VARIANCE	Abatement Order can be conditional and require a respondent to refrain from a particular act unless certain conditions are met. HSC Section 42452	Same as regular Abatement Order HSC Section 40823	No findings required. No enforcement relief supplied.
CONDITIONAL ABATEMENT ORDER - ACTS LIKE A VARIANCE	Same as Conditional Abatement Order that does not act as a variance. HSC Section 42452	Depending on duration of the order – 10 day and 30 day notice required as prescribed for regular and short variance orders. HSC Section 40825 & 40826	Six Findings Required Cannot have the effect of permitting a variance unless all conditions for a variance are met. HSC Section 42307.1(2), 42451(b), & 42452

NOTES

Stipulated Agreement for Abatement Orders

- A stipulated agreement is a document also associated with abatement orders.
- It is a document that is drawn up between the district and the source where there is a settlement of past violations, civil or criminal, and bond amounts for the term of the abatement order.
- The stipulated agreement should not be confused with the abatement order.
- This agreement only addresses the settlement for past violations and bonds.
- It does not include any of the operating conditions during the abatement order.
- It should not include the increments of progress schedule during the abatement order.

This chart is provided by ARB for quick reference only.
Please refer to the Health and Safety Code for complete information.