

## **CHAPTER VI - HEARING BOARD & VARIANCE PROCEDURES**

### **RULE 1-600 - AUTHORIZATION**

These procedures shall apply to all hearings before the Mendocino County Air Quality Management District Hearing Board as authorized by Division 26, Part 3, Chapter 8 of the California Health and Safety Code, and held in accordance with the provisions of Division 26, Part 4, Chapter 4 of said Code.

### **RULE 1-610 - PETITION PROCEDURE**

#### **(a) Filing Petitions**

Requests for hearings shall be initiated by the filing of a petition with the Clerk of the Hearing Board, and the payment of fees as provided for in Rule 1-320 of these Rules and Regulations. Service of a copy of the petition shall be made on the Air Pollution Control Officer, and on the holder of the permit or variance, if any, involved. Service may be made in person or by mail, and service may be proved by written acknowledgement of the person served or by the affidavit of the person making the service.

#### **(b) Contents of Petitions**

Every petition for Hearing Board action shall state:

- (1)** The name, address and telephone number of the petitioner, or other person authorized to receive service of notices.
- (2)** Whether the petitioner is an individual, co-partnership, corporation or other entity, and the names and addresses of the partners if a co-partnership, the names and addresses of the officers if a corporation, and the names and addresses of the persons in control, if other entity.
- (3)** The type of business or activity involved in the application and the street address at which it is conducted.
- (4)** A brief description of the article, machine, equipment, or other contrivance, if any, involved in the application.
- (5)** The section or rule under which the petition is filed; that is, whether petitioner desires a hearing:
  - (A)** To review an Authority to Construct or Permit to Operate denied by the Air Pollution Control Officer, (Health and Safety Code, Section 42302).
  - (B)** To review the suspension of a permit by the Air Pollution Control Officer, (Health and Safety Code, Section 42306).

- (C) To determine whether a permit shall be revoked, (Health and Safety Code, Section 42307).
- (D) To request a variance under Section 42350 of the Health & Safety Code.
- (E) To modify or revoke a variance previously granted, (Health and Safety Code, Section 42356).
- (6) Each Petition shall be signed by the Petitioner, or by some person on his behalf, and where the person signing is not the Petitioner, it shall set forth his authority to sign.
- (7) Petitions to review a denial of an Authority to Construct or Permit to Operate shall state the reasons given for the denial and reasons for the appeal.
- (8) Petitions for reinstatement of suspended permits shall state the alleged basis for such suspension.
- (9) Petitions for revocation of permits shall state the rule, which is alleged, to have been violated and a brief statement of the facts constituting such alleged violation.

**(c) Variance Petitions**

In addition to the requirements of Rule 1-610(b), petitions for variance shall state briefly:

- (1) The section, order or rule complained of;
- (2) The facts showing why compliance with the section, rule or order is unattainable;
- (3) For what period of time the variance is sought and specific dates for achieving various increments of progress;
- (4) The damage or harm resulting or which would result to petitioner from a compliance with such section, rule or order by either an arbitrary or unreasonable taking of property; or the practical closing and elimination of a lawful business without a corresponding benefit in reducing air contaminants;
- (5) The requirements which petitioner can meet and the date when petitioner can comply with such requirements;
- (6) Whether or not the subject equipment or process is covered by a Permit to Operate issued by the Air Pollution Control Officer;

**(d) Dismissal of Petition**

The petitioner may dismiss his petition at any time prior to the date set for the hearing. Such dismissals requested at least 72 hours in advance of the hearing shall result in a 50% refund of the Hearing Board fee to the petitioner. The Clerk of the Hearing Board shall notify all interested persons of such dismissal.

## **RULE 1-615 - EMERGENCY VARIANCES**

Notwithstanding other provisions of Chapter VI of these regulations, the Chairperson of the Hearing Board or any other member of that Hearing Board designated thereby as the Hearing Officer, may issue, without notice and hearing, an emergency variance or series of variances to an applicant. The emergency variance or series of variances shall be in effect until the hearing to consider a request by the applicant for a variance other than an emergency variance, but not to exceed 30 days.

- (a) Upon receipt of a request for an emergency variance, the Air Pollution Control Officer shall contact the Hearing Officer to establish a time and place for consideration of the request. The Air Pollution Control Officer shall inform the applicant of such time and place.
- (b) The applicant and Air Pollution Control Officer shall present testimony and evidence to the Hearing Officer. The burden of proof shall be on the applicant to demonstrate that a breakdown or other emergency situation exists.
- (c) In order to consider the granting of an emergency variance for an extended breakdown situation, the Hearing Officer should determine the causes of the breakdown and that the equipment failure or malfunction:
  - (1) is not the result of neglect or disregard of any air pollution control law or rule or regulation;
  - (2) is not intentional or the result of negligence;
  - (3) is not the result of improper maintenance.
- (d) After consideration of the emergency variance request, the Hearing Officer may grant or deny an emergency variance. Within five working days following the granting of an emergency variance, a written order shall be issued confirming the decision, with appropriate findings.
- (e) No emergency variance shall be granted unless the Hearing Officer determines that:
  - (1) The emergency variance request is caused by a breakdown condition or other emergency situation and may not be delayed until a properly noticed hearing.
  - (2) Granting of the emergency variance will not cause a public nuisance.
  - (3) Granting of the emergency variance will not create an immediate threat or hazard to public health or safety.
  - (4) Granting of the emergency variance will not interfere with the attainment or maintenance of any national ambient air quality standard.
  - (5) The requirements for a variance set forth in Rule 1-630(c) have been met.

- (f) At any time after an emergency variance has been granted, the applicant or Air Pollution Control Officer may request the Hearing Officer to revise, revoke or further condition the variance and issue an amended written order. All procedures shall be as designated for the original hearing.
- (g) An emergency variance shall remain in effect only as long as necessary to correct the breakdown or emergency condition, but not to exceed the time period required for a properly noticed hearing to consider an interim or 90-day variance in accordance with Rule 1-620(b), or 30 days, whichever is the shorter time period.
- (h) Within ten (10) days after the date of expiration of an emergency variance, the applicant shall submit a written report to the Air Pollution Control Officer including, but not limited to, the following details:
  - (1) Duration of excessive emissions.
  - (2) Estimate of quantity of emissions.
  - (3) Statement of the cause of the occurrence.
  - (4) Corrective measures to be taken to prevent a recurrence.

Documentation of the breakdown condition may be required by the Air Pollution Control Officer.

#### **RULE 1-616 - INTERIM VARIANCE**

Any person who has submitted an application for a variance and who desires to commence or continue operation pending the decision of the Hearing Board on the application, may submit an application for an interim variance. (Health and Safety Code, Section 42351)

- (a) An interim variance may be granted for good causes stated in the order granting such a variance.
- (b) The interim variance shall not be valid beyond the date of the decision of the Hearing Board on the application or for more than 90 days from the date of issuance of the interim variance, whichever comes first.
- (c) The Hearing Board shall not grant any interim variance:
  - (1) after it has held a hearing in compliance with the requirements of Rule 1-620; or
  - (2) that is being sought to avoid the notice of hearing requirements of Rule 1-620.

## **RULE 1-618 - MODIFICATION OF INCREMENTS OF PROGRESS SCHEDULE**

If a person granted a variance with a schedule of increments of progress, files an application for modification of the schedule and is unable to notify the Hearing Board sufficiently in advance to allow the Hearing Board to schedule a public hearing, the Hearing Board may grant a one time interim authorization which is valid for not more than 30 days, to continue operation pending decision of the Hearing Board on the application.

- (a) The Chairperson of the Hearing Board or any other Hearing Board member designated by the Board may hear such application.
- (b) If a member of the public contests a decision made by one member of the Hearing Board, the application shall be reheard by the full Hearing Board within 10 days of the decision.

The interim authorization shall not be granted for a requested extension of a final compliance date or where the original variance expressly required advance application for the modification of an increment of progress. (Health and Safety Code, Section 42351.5)

## **RULE 1-620 - HEARING PROCEDURES**

### **(a) Place of Hearing**

All hearings shall be held at such time and place as designated by the Clerk of the Hearing Board on the notice of hearing.

### **(b) Notice of Hearing**

- (1) Except as provided for in Rule 1-620 (c), (d) and (e) the Hearing Board shall serve notice of the time and place of the hearing upon the Air Pollution Control Officer and upon the applicant or Permit Holder affected not less than 10 days prior to such hearing. (Health and Safety Code, Section 40823)
- (2) Except as provided for in Rule 1-620 (c), (d) and (e) the Hearing Board shall also send notice of hearing to every person who requests such notice and obtain publication of such notice in at least one daily newspaper of general circulation within the district. The notice shall state the time and place of the meeting, and reasonably apprise the people within the district of the purpose of the meeting. (Health and Safety Code, Section 40823)

### **(c) Short Term Variances/Modifications of Increments of Progress**

In the 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 a modification of a schedule of increments of progress, or for an order of abatement:

- (1) The Hearing Board shall serve notice of the time and place of a hearing to grant such a variance or modification upon the Air Pollution Control Officer, all surrounding districts, the California Air Resources Board, the U.S. Environmental Protection Agency, and upon the applicant or Permit Holder not less than 10 days prior to such hearing. (Health and Safety Code, Section 40825)
- (2) Rule 1-620(b)(2) shall not apply. (Health and Safety Code, Section 40825)
- (3) The Chairperson of the Hearing Board or any other member of the Hearing Board so designated by the Hearing Board, may hear an application for an interim variance. If any member of the public contests a decision made by any one member of the Hearing Board, the application shall be reheard by the full Hearing Board within 10 days of the decision. (Health and Safety Code, Section 40825)

**(d) Interim Variance**

In the case of a hearing to consider an application for an interim variance, as authorized in Rule 1-616:

- (1) The Hearing Board shall serve reasonable notice of the time and place of the hearing on the Air Pollution Control Officer and upon the applicant.
- (2) Rule 1-620(b)(2) shall not apply.
- (3) The Chairperson of the Hearing Board or any other member of the Hearing Board so designated by the Hearing Board, may hear an application for an interim variance. If any one member of the public contests a decision made by any one member of the Hearing Board, the application shall be reheard by the full Hearing Board within 10 days of the decision. (Health and Safety Code, Section 40824)

**(e) Regular Variance Procedure**

In the case of a hearing to consider an application for variance, other than a 90 day variance, or an interim variance, or an application for a modification of a final compliance date in a variance previously granted, the notice requirements shall be as follows:

- (1) The Hearing Board shall serve a notice of the time and place of a hearing to the Air Pollution Control Officer, all surrounding districts, the California Air Resources Board, the U.S. Environmental Protection Agency, and upon the petitioner or Permit Holder.
- (2) The Hearing Board shall also publish a notice of the hearing in at least one newspaper of general circulation within the District, and send such notice, at least 30 days prior to the hearing.
- (3) The notice shall state the time and the place of the hearing, the time when, commencing not less than 30 days prior to the hearing, and the place where the application including any proposed conditions or schedule of increments of progress is available for public inspection. (Health and Safety Code, Section 40826)

**(f) Answers**

Any person may file an answer within 10 days after service. All answers shall be served the same as petitions under Rule 1-610(a).

**(g) Continuances**

The Chairperson or any three members of the Hearing Board may grant any reasonable continuance concurred in by petitioner, the Air Pollution Control Officer and by every person who has filed an answer in the action. Such action may be ex parte', without a meeting of the Hearing Board and without prior notice.

**(h) Evidence**

- (1)** Oral evidence shall be taken only on oath or affirmation.
- (2)** 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 to testify; and to rebut the evidence against him. If respondent does not testify in his, or her, own behalf, he may be called and examined as if under cross-examination.
- (3)** The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that 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 any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.
- (4)** Whenever the members of the Hearing Board conducting any hearing deem it necessary to examine any person as a witness at such hearing, the Chairperson of the Hearing Board shall issue a subpoena, in proper form, commanding such person to appear before it at a time and place specified to be examined as a witness. The subpoena may require such person to produce all books, papers, and documents in his possession or under his control, material to such a hearing. A subpoena to appear before the Hearing Board shall be served in the same manner as a subpoena in a civil action, (Health and Safety Code, Sections 40840 & 40841).
- (5)** The Hearing Board may take official notice of any matter that may be judicially noticed by the courts of this state.
- (6)** The Hearing Board shall allow interested members of the public a reasonable opportunity to testify with regard to the matter under consideration, and shall consider such testimony in making its decision, (Health and Safety Code, Section 40828).

## **RULE 1-630 - DECISIONS**

- (a) After a hearing, the Hearing Board may do any of the following: (Health and Safety Code, Section 42309)
- (1) Grant a permit denied by the Air Pollution Control Officer.
  - (2) Continue the suspension of a permit suspended by the Air Pollution Control Officer.
  - (3) Remove the suspension of an existing permit invoked by the Air Pollution Control Officer pending the furnishing by the Permit Holder of the information, analyses, plans, and specifications required.
  - (4) Find that no violation exists and, reinstate an existing permit.
  - (5) Revoke an existing permit, if it finds any of the following:
    - (A) The Permit Holder has failed to correct any conditions required by the Air Pollution Control Officer.
    - (B) A refusal of a permit would be justified.
    - (C) Fraud or deceit was employed in the obtaining of the permit.
    - (D) Any violation of this part, or of any order, rule, or regulation of the district.
  - (6) Grant a variance in accordance with the conditions as further specified in this rule.
- (b) The Hearing Board shall announce its decision in writing, served and filed within 30 days after submission of the cause by the parties thereto and shall contain a statement of findings and the order of the Hearing Board.
- (c) No variance shall be granted unless the Hearing Board makes all of the following findings: (Health and Safety Code, Section 42352)
- (1) That the petitioner for a variance is or will be in violation of a provision of the California Health & Safety Code or of any rule, regulation or order of the District.
  - (2) That due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business.
  - (3) That such closing or taking would be without a corresponding benefit in reducing air contaminants.
- (d) Upon making the specific findings set forth in Rule 1-630(c), 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, applicable to plants and equipment operated by specified industry or business or for specified activity, or to the operations of individual persons.

However, no variance shall be granted if the operation under the Variance, will result in a violation of Rule 1-400 of the District. (Health and Safety Code, Section 42353)

- (e) In prescribing other and different requirements, in accordance with Rule 1-630(d), the Hearing Board shall exercise a wide discretion in weighing the equities involved and the advantages to the residents of the district from the reduction of air contaminants and the disadvantages to any otherwise lawful business, occupation, or activity involved, resulting from requiring compliance with such requirements, (Health and Safety Code, Section 42354).
- (f) The Hearing Board may require, as a condition of granting a variance, that a cash bond, or a bond executed by two or more good and sufficient sureties or by a corporate surety, be posted by the party to whom the variance was granted to assure performance of any construction, alteration, repair, or other work required by the terms and conditions of the variance. Such bond may provide that, if the party granted the variance fails to perform such work by the agreed date, the cash bond shall be forfeited to the district having jurisdiction, or the corporate surety or sureties shall have the option of promptly remedying the variance default or paying to the district an amount, up to the amount specified in the bond, that is necessary to accomplish the work specified as a condition of the variance, (Health and Safety Code, Section 42355).
- (g) The Hearing Board, in making any order permitting a variance, shall specify the time during which such order shall be effective, in no event, except as otherwise provided in Rule 1-630(h), to exceed one year, and shall set a final compliance date, (Health and Safety Code, Section 42358(a)).
- (h) A variance may be issued for a period exceeding one year if the variance includes a schedule of increments of progress specifying a final compliance date by which the emissions of air contaminants of a source for which the variance is granted will be brought into compliance with applicable emission standards, (Health and Safety Code, Section 42358(b)).
- (i) The Hearing Board may rehear a decision if a party petitions for a rehearing within 10 days after a copy of the decision has been mailed to him, (Health and Safety Code, Section 40861).
- (j) The decision shall become effective 30 days after it is filed, unless either of the following occurs:
  - (1) A rehearing is granted by the Hearing Board.
  - (2) The Hearing Board orders that it be made effective sooner. (Health and Safety Code, Section 40863)
- (k) A copy of the decision shall be mailed or delivered to the Air Pollution Control Officer, California Air Resources Board, the U.S. Environmental Protection Agency, 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.

#### **RULE 1-640 - RECORD OF PROCEEDINGS**

A record of all proceedings had before the Hearing Board shall be made. All or any part of this record may be requested by any party to the proceedings or by any interested public citizen. Such

requests shall be in writing and a reasonable fee may be charged, not to exceed the actual cost of providing the written transcript or tape recording copy.

**RULE 1-650 - APPEAL OF DECISION**

- (a) Judicial review may be had of a decision of the Hearing Board by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this Rule, any such petition shall be filed within 30 days after the decision has been mailed. The right to petition shall not be affected by the failure to seek a rehearing before the Hearing Board, (Health and Safety Code, Section 40864(a)).
- (b) The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the Hearing Board and shall be delivered to the petitioner within 30 days after a request therefore by him, upon payment of the fee specified in Rule 1-640, (Health and Safety Code, Section 40864(b)).
- (c) The complete record includes the pleading, all notices and orders issued by the Hearing Board, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case, (Health and Safety Code, Section 40864(c)).
- (d) Where the petitioner, within 10 days after the last day on which a rehearing can be ordered, requests the Hearing Board to prepare all or any part of the record, the time within which a petition may be filed shall be extended until five days after its delivery to him. The Hearing Board may file with the court the original of any document in the record in lieu of a copy thereof, (Health and Safety Code, Section 40864(d)).
- (e) In any proceeding pursuant to Rule 1-650, the court shall receive in evidence any order, rule, or regulation of the district board, any transcript of the proceedings before the Hearing Board, and such further evidence as the court, in its discretion, deems proper, (Health and Safety Code, Section 40865).