

California Environmental Protection Agency



AIR RESOURCES BOARD
Compliance Division

ADVISORY

Product Variances

Number 116

November 15, 1994

Changes in State Law - Senate Bill 2680 Product Variances

A bill has recently been signed into law that creates a new type of variance called a "product variance". Senate Bill 2680 specifies that any person who manufactures a product may now apply for a product variance. This legislation is effective immediately.

We have enclosed a copy of the bill and have summarized the major changes and additions to the Health and Safety Code.

Amendment to 42352.5

HSC 42352.5 is amended to read: "The hearing board, in determining whether or not the petitioner has presented evidence sufficient to make the finding specified in paragraph (2) of subdivision (1) of Section 42352 or paragraph (2) of subdivision (a) of Section 42368, shall consider in addition to any other relevant factors ..." (emphasis added).

Article 2.5 (Product Variances)

Article 2.5 is added to the Health and Safety Code. A summary of the provisions of this article are as follows:

Section 42365 - Anyone who manufactures a product may apply for a product variance.

Section 42366 - The product variance is only available if the variance is required to be granted for, and attached to a product as opposed to provisions of the HSC (42350) in which the variance is granted to an individual.

(2)

Section 42367 - A product variance cannot be granted from the requirement to have an authority to construct.

Section 42368 (a) - Specifies five findings that must be made by the hearing board in order for the product variance to be granted.

Section 42368 (b) - Specifies that if conditions are imposed on the use of the product, then a notice must be furnished to the users and suppliers of the product notifying them that the product is under variance.

Section 42369 - A product variance cannot be issued if the use of the product will violate HSC 41700.

Section 42369 - No emergency variances are available under this statute.

Section 42372(a) & (b) - A product variance cannot initially be granted for a period exceeding two years. If it is granted for more than one year it must include an increments of progress schedule.

Section 42372(b) - An extension of a product variance can only be granted with a finding of good cause and proof of the five findings required by Section 42368.

Section 42372(c) - If the hearing board determines that only a rule change will bring the product into compliance with district rules, the air pollution control officer will set a hearing date for a public hearing before the governing board and make a recommendation to either adopt or amend the rule. The governing board has one year from the effective date of the variance to make a decision to either amend or adopt a rule, or determine that no amendment, rule or regulation is warranted.

Please Note

The description provided above is only a summary of the impacts of this bill on the variance program. It is recommended that you read the bill in its entirety and inform your staff and hearing board members, as appropriate, about the changes.

If you have any questions please call Mary Boyer, Chief, Compliance Training and Data Management Branch at (916) 322-6037.

Enclosure

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An act to amend Section 42352.5 of, and to add Article 2.5 (commencing with Section 42365) to Chapter 4 of Part 4 of Division 26 of, the Health and Safety Code, relating to air pollution, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 6, 1994. Filed with Secretary of State September 7, 1994.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2680, Bowen. Air pollution: product variances.

(1) Existing law authorizes any person to petition the hearing board of an air pollution control district or air quality management district for a variance from the rules, regulations, or orders of the district.

This bill would prescribe criteria and conditions for the granting of product variances from district rules and regulations to persons who manufacture products. The bill would impose a state-mandated local program by imposing new duties on the districts with regard to the granting of product variances.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.
(3) The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 42352.5 of the Health and Safety Code is amended to read:

42352.5. (a) The hearing board, in determining whether or not the petitioner has presented evidence sufficient to make the finding specified in paragraph (2) of subdivision (a) of Section 42352 or paragraph (2) of subdivision (a) of Section 42368, shall consider, in addition to any other relevant factors, both of the following:

(1) In determining whether or not conditions exist which are beyond the reasonable control of the petitioner, the hearing board shall consider the extent to which the petitioner took actions to comply or seek a variance, which were timely and reasonable under the circumstances. In so doing, the hearing board shall consider actions taken by the petitioner since the adoption of the rule, regulation, or order in which the variance is sought.

(2) Determining whether or not requiring compliance would result in an arbitrary or unreasonable taking of property or the practical closing and elimination of a lawful business, the hearing board shall consider whether or not an unreasonable burden would be imposed upon the petitioner if immediate compliance is required.

(b) (1) As used in this subdivision, "small business" has the same meaning as defined by the Small Business Administration, except that no stationary source which is a major source, as defined by applicable provisions of the federal Clean Air Act (42 U.S.C. Sec. 7661 (2)), is a small business.

(2) If the petitioner is a small business and emits 10 tons or less per year of air contaminants, the hearing board shall consider the factors specified in subdivision (a) in the following manner:

(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.

SEC. 2. Article 2.5 (commencing with Section 42365) is added to Chapter 4 of Part 4 of Division 26 of the Health and Safety Code, to read:

Article 2.5 Product Variances

42365. Any person who manufactures a product may petition the hearing board for a product variance from a rule or regulation of the district pursuant to this article.

42366. A product variance is only available if, to provide effective relief, the variance is required to be granted for, and attached to, a particular product, as distinguished from the variance that may be granted to an individual petitioner pursuant to Section 42352. A product variance shall be granted only when a product does not comply with district rules or regulations and the variance is necessary for the sale, supply, distribution, or use of the product.

42367. No product variance shall be granted pursuant to this article from a requirement for a permit to build, erect, alter, or replace any article, machine, equipment, or other contrivance pursuant to Section 42300.

42368. (a) No product variance shall be granted unless the

hearing board makes all of the following findings:

(1) The manufacture, distribution, offering for sale, sale application, soliciting the application, or use of the product is, or will be, in violation of a rule, regulation, or order of the district.

(2) Due to conditions beyond the reasonable control of the petitioner, 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.

(3) The taking or closing would be without a corresponding benefit in reducing air contaminants.

(4) The petitioner exercised due diligence in attempting to locate, research, or develop a product that is in compliance with district rules and regulations.

(5) During the period that the product variance is in effect, the petitioner shall quantify any excess emissions to the maximum extent feasible and report the emission levels to the district, if requested by the district.

(b) If the product variance is granted subject to conditions on the use of the product, within 10 days from the effective date of the variance, and for the duration of the time period of the variance, the petitioner shall cause a written notice to be furnished to any retailer, distributor, and purchaser of the product who is located within the district. The written notice shall be, attached to, or otherwise accompany, the product, and shall include all of the following information:

(1) That the product is being sold pursuant to a product variance granted by the district hearing board.

(2) The beginning and ending dates of the product variance.

(3) Any other conditions set forth in the product variance.

(c) Within 10 days from the effective date of the granting of the product variance, the district shall cause to be published pursuant to Section 6061 of the Government Code, the information specified in subdivision (b).

(d) The district hearing board may prescribe requirements or conditions in the product variance that are applicable to the product, other than those imposed by statute or by any rule, regulation, or order of the district board, if those requirements or conditions are not more onerous.

42369. (a) No product variance shall be granted if the use of the product under the variance will result in a violation of Section 41700.

(b) No emergency product variance shall be granted pursuant to this article.

42370. If the product variance is granted and the product is in compliance with subdivisions (b) and (d) of Section 42368, the petitioner may manufacture, and any person may distribute, offer for sale, sell, apply, solicit the application of, or use the product under the conditions set forth in the product variance.

42371. Sections 42350.5, 42351, 42351.5, 42352.5, 42354 to 42357,

inclusive, 42359, and 42362 to 42364, inclusive, shall apply to the granting of product variances pursuant to this article.

42372. (a) The hearing board, in making any order permitting a product variance, shall specify the time during which the order shall be effective, which, except as provided in subdivision (b), shall not exceed one year, and shall set a final compliance date.

(b) A product variance may be issued for a period exceeding one year, but in no event to exceed two years from the date of the granting of the initial product variance, if the product variance includes a schedule of increments of progress specifying a final compliance date by which the emission of air contaminants from the product for which the product variance is granted will be brought into compliance with applicable emission standards and all district rules, regulations, and orders. No extension may be granted to a petitioner without a showing of good cause and proof of compliance with the findings required by Section 42368.

(c) If the product variance is for a process or product that is equivalent to, or exceeds, the applicable standards required by the district's rules and regulations, and the hearing board granting the variance specifies that the only way to achieve compliance will be for the district to adopt or amend a rule or regulation, the air pollution control officer within 180 days from the effective date of the variance, shall set a public hearing before the district governing board and make a recommendation on whether or not the board should adopt or amend a rule or regulation to bring the product into compliance. The district governing board shall, within one year of the effective date of the variance, take action to (1) adopt or amend a district rule or regulation to bring the product into compliance, or (2) determine that no amendment, rule, or regulation is warranted. If the district governing board fails to take either action, nothing in this subdivision shall limit the petitioner's rights and remedies under existing law.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure the continued operation and competitiveness of businesses and manufacturers in this state, thereby preserving jobs and improving the general economic climate, it is necessary that this act take effect immediately.