

# **VARIANCE INFORMATION PACKET**

Produced by  
THE SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT  
in cooperation with the  
SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD

## Table of Contents

I.	<u>What is a Variance?</u> .....	1
	A. Relief from District Rules, District Permit Conditions or Health and Safety Code .....	1
	B. No Relief from Other Laws .....	1
	C. Alternatives to Seeking a Variance .....	2
II.	<u>Role of the Air District in the Variance Process</u> .....	3
	A. Does Not Represent the Petitioner .....	3
	B. Cannot Give Specific Advice .....	3
III.	<u>Types of Variances</u> .....	3
	A. Variances or Product Variances .....	3
	B. Emergency Variance .....	3
	C. Interim Variances .....	4
	D. Regular and Short Term Variances .....	5
	E. Regular and Short Term Product Variances .....	7
IV.	<u>Overview of the Variance Process</u> .....	8
	A. Assessment of Need .....	8
	B. Application .....	8
	1. <u>Generally</u> .....	8
	2. <u>Fees</u> .....	9
	3. <u>Information Submitted with the Application</u> <u>is Public Information</u> .....	9
	C. Notice .....	10
	D. Staff Report .....	10
	E. Hearing .....	11
	1. <u>Generally</u> .....	11
	2. <u>About the Hearing Board</u> .....	12
	3. <u>Presentation of Evidence</u> .....	12
	4. <u>Hearings are Public Meetings</u> .....	13
	F. Findings and Order .....	13
	G. Compliance .....	14
V.	<u>Rehearing of a Variance Decision</u> .....	14
VI.	<u>Modification, Extension of Final Compliance Date</u> .....	14
VII.	<u>Things That Any Person Seeking a Variance Should Have</u> .....	14

## I. What is a Variance?

### A. **Relief from District Rules, District Permit Conditions<sup>1</sup> or Health and Safety Code**

A variance is temporary relief from the need to comply with:

- Any rule or regulation of the air district in which the source of air contaminants is located;
- Any order of the air district in which the source of air contaminants is located;
- Section 41701 of the California Health and Safety Code. Section 41701 prohibits the discharge of air contaminants, other than uncombined water vapor, which is darker than Ringlemann No. 2 or a 20 percent opacity.

This relief is provided for by state law and cannot be abrogated by District rule or regulation. Air districts may have regulations that specify the procedure to be followed when applying for variances, however, these procedures may not deny relief otherwise provided for by state law. A person or entity that applies for variance relief is referred to as an “applicant” or “petitioner.”

### B. **No Relief from Other Laws**

A variance may only grant relief from the three items listed above. It may not grant relief from:

- Violations occurring before the filing of a petition with the Clerk of the Hearing Board;
- Federal air pollution control laws, including federal regulations adopted by reference in District rules;
- Other federal laws;
- State laws other than Health and Safety Code section 41701;
- If the District has a permit system, the requirement for a permit to build, alter, erect or replace;
- District rules other than those requested in the variance application.

---

<sup>1</sup> When a source seeks relief from a permit condition, that person is technically seeking relief from District Rule 201 - General Permit Requirements.

### C. Alternatives to Seeking a Variance

Variations may be costly in that they require an application fee and may require an excess emissions fee. Sources may also choose to seek advice from an attorney or a consultant and incur costs associated with that consultation. No person or business is compelled to seek a variance. Other options typically include:

- Operate in Compliance: A source always has the option of immediately correcting any deficiency that prevents the source from complying with applicable rules, regulations, permit conditions and statutes.
- Operate In Violation: A source may choose to continue to operate in violation, including any consequences that may stem from operating in violation. This typically involves enforcement action by the District, including civil penalties and possibly an abatement order. This option is clearly not recommended by the District.
- Shutdown: A source may avoid some violations by ceasing that operation which is causing the violation or by shifting production to other equipment or facilities.
- Alternative Compliance: In certain instances, a source may utilize the District alternative compliance program. This is not available to every source. A source interested in using alternative compliance should obtain a current copy of Sacramento Metropolitan Air Quality Management District Rule 107 - Alternative Compliance and/or seek advice from an attorney or other consultant, as necessary, to determine whether this is an option. For additional information, contact the Program Coordination Division of the District.
- Breakdown Conditions: In certain circumstances, a source may be able to obtain relief under District Rule 602 - Breakdown Conditions. See Section IV.B. - Emergency Variations, *infra*.

**It is critical for any person who is applying for a variance to understand that there is no “right” to a variance nor are variations granted by simply filling out the paperwork. There is an obligation on the person seeking the variance to prove at the hearing before the hearing board that he/she is entitled to variance relief by producing sufficient evidence to meet the findings required by law.**

## **II. Role of the Air District in the Variance Process**

### **A. Does Not Represent the Petitioner**

The local air district does not and cannot represent a source seeking a variance before the Hearing Board. However, the District may take an official position on the merits of a variance petition. See Staff Report, pg.10, below.

### **B. Cannot Give Specific Advice**

The local air district staff cannot and does not give specific advice to sources who may need variance relief. Assistance to small businesses in filling out the application form and developing a compliance schedule is available through the Clerk of the Hearing Board.

Typically, when a violation of a District rule is discovered, District staff may advise a source of its options. The decision to seek a variance may require legal and/or technical advice. It is the obligation of the source to determine which advice is necessary and seek advice from the appropriate persons before and during the variance process. A source cannot and should not rely upon comments made by District staff as a basis for seeking or not seeking either a variance or advice from the source's own attorney or consultant.

## **III. Types of Variances**

### **A. Variances or Product Variances**

There are two broad categories of variances: variances and product variances. A product variance allows a product, such as a coating or adhesive, that does not comply with District rules to be manufactured, sold, distributed and applied within the District. This type of variance is only available to the manufacturer of the product. A product variance only applies to a specific product, not to all products from a particular manufacturer.

Variances allow any person that is subject to a District rule, permit, or Health and Safety Code section 41701 to get relief from the need to comply with applicable requirement(s). This is by far the most common type of variance sought by industry.

### **B. Emergency Variance**

Under Health and Safety Code section 42359.5(a):

“The chairman of a district hearing board, or any other member of the hearing board designated thereby, may issue, without notice and hearing, an emergency variance to an applicant.”

An emergency variance may be issued for good cause, including, but not limited to, a breakdown condition. Health and Safety Code section 42359.5(b). The District has defined breakdown conditions in Rule 602. Emergency variances have very strict criteria and time lines for relief. For more detail see District Rule 602. California Health and Safety Code section 42369 prohibits emergency product variances.

### **C. Interim Variances**

An interim variance may be granted to the following:

“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.” California Health and Safety Code section 42351(a).

“An interim variance may be granted for good causes stated in the order granting such a variance. The interim variance shall not be valid beyond the date of decision of the hearing board on the application of the variance or for more than 90 days from date of issuance of the interim variance, whichever occurs first.” California Health and Safety Code section 42351(b).

The purpose of an interim variance is to allow a source to operate between the filing of an application for a variance and the time for a hearing on an application for a variance. An application for a short term or regular variance must be on file or filed simultaneously with the application for an interim variance. If there is no application for a short term or regular variance, the interim application may be lodged with the Clerk, but no action may be taken on the interim petition until both petitions are on file.

California Health and Safety Code section 40824 requires the Hearing Board to give “reasonable notice” for interim variance applications. “Reasonable notice” has been defined by District Rule 601 to be three days notice, where the public notice is posted in a place accessible to the public at the District office.

In order to have an interim variance application granted, the Hearing Board must find “good causes.” “Good causes” may be shown in a number of different ways, including “a substantial likelihood of meeting the findings required by Health and Safety Code section 42352.”

California Health and Safety Code section 42371 allows an interim product variance.

#### **D. Regular and Short Term Variances**

A short term variance is a variance for 90 days or less. Short term variances require a ten day public notice period under Health and Safety Code section 40825. A regular variance is essentially the same as a short term variance except for two provisions. First, a regular variance requires a 30 day public notice period. Second, a regular variance may extend beyond 90 days.

In order to have an application for either a regular or short term variance granted, a petitioner/applicant must prove, by a preponderance of the evidence, that the petitioner/applicant can meet all six findings in Health and Safety Code section 42352.

The findings required by Health and Safety Code section 42352 to issue a short term or regular variance are:

“(1) That the petitioner for a variance is, or will be, in violation of Section 41701 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 (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination of a lawful business. In making those findings where the petitioner is a public agency, the Hearing Board shall consider whether or not requiring immediate compliance would impose an unreasonable burden upon an essential public service.

For purposes of this paragraph, ‘essential public service’ means a prison, detention facility, police or firefighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency.

- (3) That the closing or taking would be without a corresponding benefit in reducing air contaminants.
- (4) That the applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance.
- (5) During the period the variance is in effect, that the applicant will reduce excess emissions to the maximum extent feasible.
- (6) During the period the variance is in effect, that the applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the District, and report these emission levels to the District pursuant to a schedule established by the District.”

However, if a variance will be longer than one year, Health and Safety Code section 42358 requires a schedule of increments of progress. A schedule of increments of progress is defined by Health and Safety Code section 39051 as:

“[A] statement of dates when various steps are to be taken to bring a source of air contaminants into compliance with emission standards and shall include, to the extent feasible, the following:

- (a) The date of submittal of the final plan for the control of emissions of air contaminants from that source to the appropriate district.
- (b) The date by which contracts for emission control systems or process modifications will be awarded, or the date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification.
- (c) The date of initiation of onsite construction or installation of emission control equipment or process change.
- (d) The date by which onsite construction or installation of emission control equipment or process modification is to be completed.

- (e) The date by which final compliance is to be achieved.
- (f) Such other dates by which other appropriate and necessary steps shall be taken to permit close and effective supervision of progress toward timely compliance.”

Although not required by law, the District or Hearing Board may request a schedule of increments of progress for a variance that will be shorter than one year.

### **E. Regular and Short Term Product Variances**

Regular and short term product variances are essentially the same as a regular or short term variance except a regular product variance cannot be for more than two years.

The findings required by Health and Safety Code section 42368 to get a short term or regular product variance are:

- “(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.”

If the product variance will exceed one year, there must be a schedule of increments of progress.

Where there are a number of manufacturers that are similarly situated and need similar relief, the group may collectively seek a product variance.

#### **IV. Overview of the Variance Process**

##### **A. Assessment of Need**

Under Health and Safety Code section 42352 a variance may not be granted unless all six of the findings listed above are proven by a preponderance of evidence. Since this is mandatory, a source should assess whether it believes it can meet these findings before applying for a variance. Once again, this may require legal and/or technical advice. It is the obligation of the source to seek such advice from an attorney or consultant retained by the source.

##### **B. Application**

###### **1. Generally**

If a source determines that a variance is appropriate, the next step is to submit an application for a variance (also called a variance petition) to the Clerk of the Hearing Board. A petition/application may be obtained from the Clerk of the Hearing Board, or may be downloaded from the SMAQMD World Wide Web<sup>2</sup> site, in various word processing formats or in Adobe Acrobat Portable Document Format (.pdf).

The Hearing Board may not act on variances prior to the filing of a complete petition/application with the Clerk of the Hearing Board and payment of the appropriate fee. In the case of ongoing violations, it may be in the best interest of the source to get a petition on file as quickly as possible. However, the filing of a variance petition does not preclude the District from taking enforcement action for violations that occurred prior to the effective date of the variance order.

If a petitioner/applicant requires assistance in filling out the petition/application form, the petitioner/applicant should contact the Clerk of Hearing Board.

When a petition/application is submitted, the Clerk of the Hearing Board will advise the source of the next regularly scheduled hearing date on which the petition will be heard. The hearing date depends upon the date the completed petition is submitted and the number of days of public notice required for the type of variance sought. The number of days of public notice required is listed in Section V.C. "Notice," (infra). A list of the regularly scheduled meetings is available from the Clerk of the Hearing Board

---

<sup>2</sup> [www.airquality.org](http://www.airquality.org)

and is published on the SMAQMD World Wide Web site. It may be possible to have a matter heard on a date other than a regularly scheduled hearing date. This would be at the sole discretion of the Hearing Board members. Contact the Clerk of the Hearing Board for additional information.

## 2. Fees

When a petition/application is submitted, a fee is due. The fee varies with the type of variance. Small businesses have a separate fee schedule. Also, sources which have extreme financial hardship may apply for a fee waiver. The fee schedule is found in District Rule 302 - Hearing Board Fees. In addition to the application fee, other fees, including fees for staff time in drafting the staff report, may be due after the hearing.

Sources obtaining variance relief may also have to pay an “excess emissions” fee. This fee is charged to all sources that obtain a variance that is effective for more than 90 days and where “excess emissions” are indicated in the staff report. See District Rule 302, section 301.4. The baseline for calculating excess emissions for fee purposes is the emissions of the source if the source were in full compliance with all rule and permit requirements.

In certain circumstances, it is possible to obtain a refund of fees. See District Rule 302.

## 3. Information Submitted with the Application is Public Information

It is usually necessary for sources to submit information relevant to the variance petition/application and granting of a variance along with the petition/application. The District and the Hearing Board prefers the submission of as much information as possible in advance to give both the District and the Hearing Board the opportunity to adequately review the information before the hearing. This includes detailed, factual answers to the questions in the petition/application. If a great deal of information is presented at the hearing, it may be necessary to delay or continue the hearing in order for the Hearing Board and/or District to review and comment on any such evidence.

Any information submitted in the variance process, both with the petition and at the hearing, becomes a public record which must be disclosed to any member of the public upon request. If a petitioner/applicant has trade secret information which is relevant to the granting of the variance, the petitioner/ applicant should contact the Clerk of the Hearing Board before submitting that information.

### C. Notice

State law mandates hearing dates for all variance hearings, except emergency variances, be publicly noticed. One effect of a public notice period is that a person seeking a variance must have a completed application and the appropriate fee submitted to the Clerk of the Hearing Board not later than two days prior to the last day on which the notice must be published in time for the hearing. The number of days of required notice is provided for in the Health and Safety Code. See Health and Safety Code sections 40824-40826. As a matter of procedure, District Rule 601 - Hearing Board Procedures specifies that where reasonable notice is required, three days is reasonable notice.

Type of Proceeding	Public Notice Period
Emergency Variance	None
Interim Variance	3 days to District and Petitioner
Short term variance	10 days to District, Air Resources Board, U.S. EPA, other air districts in the air basin and the Petitioner.
Regular Variance	30 days to all above agencies plus published in newspaper
Modification of Final Compliance Date	Same as regular variance
Modification to Increments of Progress	Same as short term variance

### D. Staff Report

When an application is received, a copy of the application and any documents submitted with the application are forwarded to the District's Office of District Counsel. District Counsel, with the aid of District staff, will complete a staff report. The staff report will contain the District's assessment of the application and evidence submitted with the application and whether, in the District's opinion, a variance can or should be granted. This assessment includes:

- An opinion on whether sufficient evidence to meet the six findings required to grant a variance has been submitted;
- Any additional information that, in the opinion of the District, should be submitted to assist the Hearing Board in making the findings;
- A calculation of excess emissions that will result from the variance;

- Any specific conditions that, in the opinion of the District, should be attached to the variance if the variance is granted.

Excess emissions are calculated two ways: by comparing emissions under variance with the emissions if the source were in compliance, and by comparing emissions under variance to the mass emissions allowed by permit. This information is used to determine whether the source is subject to excess emissions fees under to Rule 302, section 301.4. It is also used to determine the baseline for mitigating emissions while under variance and is used by the Hearing Board to weigh the burdens of compliance against the benefit to air quality by requiring compliance.

A copy of the staff report is usually sent to the Hearing Board members and the petitioner/applicant the week before the variance hearing. The petition/application is always attached to the staff report.

In addition to any documents, evidence or other information submitted by the source, the staff report may contain information from the District's files on the facility or operation. Usually, any information from the District's files that are used in drafting the staff report are attached as exhibits.

## **E. Hearing**

### **1. Generally**

Next to the application, the hearing is the most important step in the variance process. At the hearing, the petitioner/applicant has the opportunity to address the Hearing Board and present its case. The petitioner/applicant can present its case on its own, or have an attorney or consultant present the case. At this time, the petitioner/applicant has the opportunity to address the District's staff report and present evidence or arguments to the Hearing Board. It is very important to note that the burden of producing evidence to meet the findings required by law is on the petitioner/applicant. Petitioner/Applicants should provide documentation, testimony, or demonstrative evidence both with the application and at the hearing that will assist the Hearing Board in making the required findings.

### **2. About the Hearing Board**

The Hearing Board is a panel of five persons that serves as the impartial quasi-judicial body of the District. The Hearing Board is authorized to address petitions for variances, petitions for abatement orders, permit appeals and appeals from a denial of emission reduction credits.

The members are appointed by the Sacramento Metropolitan Air Quality Management District Board of Directors, but the Hearing Board members are not employees of the District. The Hearing Board members are citizens and typically have other professions. By law, the Hearing Board must contain one member who is licensed in the medical profession, one member who is a licensed professional engineer, one licensed attorney and two public members.

The Clerk of the Hearing Board is available during normal business hours to receive any communications addressed to the Hearing Board. Except during a hearing, any communication that a person may have for the Hearing Board must be addressed to the Clerk. At no time should a person attempt to directly contact a member of the Hearing Board.

The Hearing Board also has legal counsel. This person advises the Hearing Board on legal issues related to the business of the Hearing Board and drafts the Findings and Order at the conclusion of hearings. As with the Hearing Board members, any communication with the Hearing Board counsel should be directed through the Clerk of the Hearing Board.

### 3. Presentation of Evidence

Since the petitioner/applicant has the burden of proof, the petitioner/applicant goes first. The petitioner/applicant should explain the circumstances that led to the violations and how the petitioner/applicant will come into compliance. The District will also be given an opportunity to address the Board, any evidence or arguments presented by petitioner/applicant and present its own evidence, if any. The Hearing Board will control the flow of testimony. Throughout the hearing, members of the Hearing Board will ask questions of both the petitioner/applicant and the District. All witnesses on behalf of the petitioner/applicant and the District are sworn to give their testimony or verify the information in documents under penalty of perjury.

Petitioner/applicants should not “hold back” any evidence. Under normal circumstances, this is the only opportunity a source has to present evidence, unless the evidence was not available at the time of the first hearing. If the petitioner/applicant is going to submit documents or other exhibits, 10 copies need to be brought to the hearing or otherwise submitted to the Clerk of the Hearing Board to ensure that all members of the Hearing Board, the Clerk, Hearing Board Counsel and the District each have a copy.

The Hearing Board will typically give the petitioner/applicant and the District an opportunity to present a closing statement. The Hearing Board will then discuss the merits of the petition and usually take a vote at the Hearing. If it is a particularly complex or long case, the Hearing Board may take the matter under submission and

continue the hearing to the next meeting for a decision. The vote will also include any specific conditions that the source must comply with during the variance period. It is important for a source to pay close attention to the conditions placed on the variance. Failure to comply with the conditions of a variance or to ensure that all the relief necessary is included in the motion and vote, will result in future violations and enforcement action by the District.

#### 4. Hearings are Public Meetings

The hearing is a public meeting. In addition to any member of the public being allowed to attend the meeting, the public is allowed to address the merits of the petition to the Board. This meeting is tape recorded and the tape recording and any documents presented to the Hearing Board are a public record that are subject to disclosure to any person upon request.

#### **F. Findings and Order**

After the hearing, the counsel for the Hearing Board will draft a document called the findings and order. This includes the specific facts found by the Hearing Board that resulted in the outcome of the hearing. It will also specify what rules or other laws the petitioner/applicant is relieved from complying with, and alternative conditions, if any, the petitioner/applicant must comply with. Again, it is important that this document reflect the correct information because it serves as the basis for future determinations of compliance by the District. The failure to comply with the conditions of a variance or a schedule of increments of progress are violations separate from any violations that may have led to the variance. The District may take enforcement action against a petitioner/applicant if the petitioner/applicant fails to comply with the variance order or a schedule of increments of progress.

Once the findings and order is completed, the petitioner/applicant will receive a copy, provided that all fees that are due have been paid. The relief in the order is effective from the date of the hearing in which a decision was issued, unless the Hearing Board specified a different date. In no case may relief be granted prior to the date on which a completed application and application fee was submitted to the Clerk of the Hearing Board.

A copy of the findings and order is sent to the State Air Resources Board. This State oversight agency has the authority to modify or overrule a variance granted by the Hearing Board.

## **G. Compliance**

Since a variance provides only temporary relief, at some point in the future the source must be in full compliance with all District rules and state law. Variance orders may be written in a way that causes the variance to terminate once compliance is achieved.

## **V. Rehearing of a Variance Decision**

A hearing board, with not fewer than four members present, may, in its discretion, within 30 days of the effective date of the decision, rehear any matter. The rehearing requires a ten day public notice period under Health and Safety Code section 40821.

## **VI. Modification, Extension of Final Compliance Date**

The Hearing Board may modify or revoke, by written order, any order permitting a variance. See Health and Safety Code section 42356. The hearing to modify the variance requires a ten day public notice period under Health and Safety Code section 40823.

The Hearing Board may review and for good cause, such as a change in the availability of materials, equipment, or adequate technology, modify a schedule of increments of progress or a final compliance date in such a schedule. See Health and Safety Code section 42357. A hearing to modify a schedule of increments of progress requires a ten day public notice period under Health and Safety Code section 40823. An Interim Authorization to Modify a Schedule of Increments of Progress may be obtained with reasonable notice. See Health and Safety Code section 42351.5. A hearing to modify a final compliance date requires a 30 day public notice period under Health and Safety Code section 40826.

## **VII. Things That Any Person Seeking a Variance Should Have**

- A variance petition/application.
- A copy of the provisions of the California Health and Safety Code regarding variances and hearing boards.
- California Health and Safety Code sections 41700 and 41701.

- Sacramento Metropolitan Air Quality Management District Rule 601.
- Sacramento Metropolitan Air Quality Management District Rule 302.
- A copy of the District Rule from which the petitioner/applicant is seeking relief. If the petitioner/applicant is seeking relief from a permit condition, a copy of the permit and Sacramento Metropolitan Air Quality Management District Rule 201.
- If you are considering an emergency variance, Sacramento Metropolitan Air Quality Management District Rule 602.
- If you are considering using Alternative Compliance, Sacramento Metropolitan Air Quality Management District Rule 107.

These items may be obtained from the Sacramento Metropolitan Air Quality Management District website or the Clerk of the Hearing Board.