

Fairness in the Air: California's Air Pollution Hearing Boards

*Kenneth A. Manaster**

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* Professor of Law, Santa Clara University; Visiting Professor of Law, Stanford Law School; Counsel, Pillsbury Winthrop Shaw Pittman LLP; Member (1973-1990) and Chairman (1978-1989), Hearing Board, Bay Area Air Quality Management District.

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I.

INTRODUCTION

Air pollution law is complicated. The statutes and regulations are based on technical knowledge, and educated guesswork, drawn from various fields of environmental and health science and engineering. The complexity and frequent uncertainty of that information contribute to legal mandates which are laden with technical jargon and are often reevaluated and changed.¹

The complexity of these laws is compounded in California by this state's unique, multilayered division of governmental authority over air pollution. Another complicating factor is the unrelenting political sensitivity of the topic. The political stakes are high for many reasons, with the economic implications of pollution control topping the list. Despite this complexity, or perhaps because of it, there is no doubt that a lot has been accomplished to improve air quality in California, both before and since the federal government assumed its heavy role in air pollution regulation. There also is no doubt that much more needs to be done.

There is recurrent doubt, however, about whether California's regulatory system is fair, especially in its treatment of air pollu-

1. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 318 (4th ed. 2003) ("Chemistry, engineering, medicine, and meteorology interact with law to produce modern air quality control policy. Scientific understanding of air pollution is constantly in flux, which challenges air quality management schemes to stand ready for change.").

tion sources and the specific communities they affect. This article examines California's air pollution hearing boards, an important regulatory forum with direct bearing on this question. These boards are unique in many respects, for they are not quite the same as anything else in California environmental and land use regulation. One of their most striking characteristics is that the hearing boards are predominantly composed of individuals who are not air pollution experts, even though the decisions they make usually involve technical questions, often of an extraordinarily sophisticated nature. Most significantly, the hearing boards are a key feature—indeed *the* key feature—of California's attempt to ensure that fairness is a consistent component of government efforts to clean and protect the air.

Regulation of air pollution from stationary sources in California is primarily the responsibility of local and regional air pollution control districts (APCDs).² In contrast, state government, principally through the California Air Resources Board (ARB), regulates air pollution from most types of motor vehicles.³ The

2. CAL. HEALTH & SAFETY CODE §§ 39002, 40000 (West 2006). See *Beentjes v. Placer County Air Pollution Control Dist.*, 254 F. Supp. 2d 1159, 1162-63 (E.D. Cal. 2003) (“The California Legislature has determined that local and regional authorities have the primary responsibility for control of air pollution from all sources other than emissions from motor vehicles.”); *Sherwin-Williams Co. v. S. Coast Air Quality Mgmt. Dist.*, 104 Cal. Rptr. 2d 288, 293 (Ct. App. 2001) (“The SCAQMD conducts the primary planning, rulemaking, and enforcement activities at the local level, and adopts regulations to control sources of air pollution in Los Angeles, Orange, Riverside, and San Bernardino Counties.”); *Western Oil & Gas Ass’n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 162 (1989) (“Air pollution control districts are provided with the primary responsibility for the control of nonvehicular air pollution.”); *People ex rel. Deukmejian v. County of Mendocino*, 36 204 Cal. Rptr. 897, 903 (1984) (holding that local regulation of aerial application of phenoxy herbicides was not prohibited by state or federal statute.) (“Local and regional authorities have the primary responsibility for the control of air pollution from all sources other than emissions from motor vehicles.”). See also Nicholas C. Yost, *Environmental Regulation - Are There Better Ways?*, 25 *ECOLOGY L.Q.* 564, 572 (1999); William Simmons & Robert H. Cutting, Jr., *A Many Layered Wonder: Nonvehicular Air Pollution Control Law in California*, 26 *HASTINGS L.J.* 109, 125 (1974).

3. CAL. HEALTH & SAFETY CODE § 39500 (West 2006). See *Beentjes*, 254 F. Supp. 2d at 1168 (“This general framework suggests that the State recognizes that certain aspects of air pollution control are necessarily a highly localized function.”); *Western Oil & Gas Ass’n v. Orange County Air Pollution Control Dist.*, 534 P.2d 1329 (1975); 2 KENNETH A. MANASTER & DANIEL P. SELMI, *CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE* § 41.01 (2005). (“Local and regional authorities have primary responsibility for controlling air pollution from nonvehicular sources, while the control of vehicular sources is the [Air Resources] Board’s responsibility.”) See also JAMES E. KRIER and KENNETH URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975* (1977).

ARB also plays an important oversight role in stationary source control, but major responsibility there still rests with the APCDs.⁴

There are thirty five APCDs in the state, now called either "air quality management districts" (AQMDs) or "air pollution control districts." Most of the published literature on their functions emphasizes their rulemaking or enforcement powers or unusual policy initiatives.⁵ This article instead examines their adjudicatory authority, for most of the major conflicts between regulatory authorities and stationary sources in California are brought into

4. See, e.g., CAL. HEALTH & SAFETY CODE § 42362 (West 2006) (ARB authority to revoke or modify an APCD variance which does not require compliance as expeditiously as practicable or otherwise meet statutory requirements); *Stauffer Chem. Co. v. California Air Res. Bd.*, 180 Cal. Rptr. 550 (Cal. App. 1st Dist. 1982) ("The statutory scheme empowers the Board to oversee the effectiveness of local programs and regulations . . ."). For fuller discussion of the functions of the ARB relative to hearing boards, see *infra* Section VI. See also CALIFORNIA AIR RESOURCES BOARD, REPORT TO THE LEGISLATURE ON AIR POLLUTION CONTROL ENFORCEMENT PROGRAMS (Apr. 1982) [hereinafter ARB REPORT]; CALIFORNIA AIR RESOURCES BOARD, EVALUATION OF THE SAN DIEGO COUNTY AIR POLLUTION CONTROL DISTRICT'S AIR POLLUTION CONTROL PROGRAM (2000); CALIFORNIA AIR RESOURCES BOARD, EVALUATION OF THE ANTELOPE VALLEY AIR POLLUTION CONTROL DISTRICT'S AIR POLLUTION CONTROL PROGRAM (1999); CALIFORNIA AIR RESOURCES BOARD, EVALUATION OF THE NORTHERN SONOMA COUNTY AIR POLLUTION CONTROL DISTRICT'S PROGRAM (1991); CALIFORNIA AIR RESOURCES BOARD and U.S. ENVIRONMENTAL PROTECTION AGENCY, A JOINT EVALUATION OF THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT PROGRAM (Mar. 1988); Simmons & Cutting, *supra* note 2, at 124-25, 141.

5. See, e.g., Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141 (1998); Daniel P. Selmi, *Transforming Economic Incentives from Theory to Reality: The Marketable Permit Program of the South Coast Air Quality Management District*, 24 ENVTL. L. RPT. 10695 (Dec. 1994); Lisa Trankley, Comment, *Stationary Source Air Pollution Control in California: A Proposed Jurisdictional Reorganization*, 26 UCLA L. REV. 893 (1979); Thomas H. Crawford, *The Bay Area Air Quality Management District: Air Pollution Control at the Local Level*, 19 SANTA CLARA L. REV. 619 (1979); Eli Chernow, *Implementing the Clean Air Act in Los Angeles: The Duty to Achieve The Impossible*, 4 ECOLOGY L.Q. 537 (1975); Simmons & Cutting, *supra* note 2; Daniel L. Willick & Timothy J. Windle, *Rule Enforcement by the Los Angeles County Air Pollution Control District*, 3 ECOLOGY L.Q. 507 (1973); Jan Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661 (1971); Vernon McDade, Note, *California Code of Civil Procedure Section 731(a): Denial of Private Injunctive Relief from Air Pollution*, 22 HASTINGS L.J. 1401, 1403-06 (1971); Ellyn Adrienne Hersman, Comment, *California Legislation on Air Contaminant Emissions from Stationary Sources*, 58 CALIF. L. REV. 1474 (1970); Doug Haydel, Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*, 55 CALIF. L. REV. 702 (1967); Harold W. Kennedy, *The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles*, 27 S. CAL. L. REV. 373 (1954); and Robert L. Chass & Edward S. Feldman, *Tears for John Doe*, 27 S. CAL. L. REV. 349 (1954).

the administrative adjudication process, that is, to the APCD hearing boards.

Although the hearing boards are little known to the public, they have tremendous importance for air quality throughout the state. The significance of their work begins with the obvious, direct effect of their decisions on actual air pollutant emissions. Less obvious, but also critical, is that most hearing board cases fundamentally are efforts to make sure that pollution laws are applied fairly.⁶ Each category of hearing board cases represents an opportunity for air quality to be protected while ensuring that other, competing interests are fully considered. Without such opportunities, air pollution control could be dangerously overwhelmed by its esoteric, technical details, and justice could be ignored. It should be reassuring to the California public that the law provides the hearing boards as forums for the mitigation of this danger. Just how strongly reassured we should be, however, is less clear, for alongside the many strengths of the hearing board process, there are undeniable weaknesses.

This article is an update of my earlier article, "Administrative Adjudication of Air Pollution Disputes: The Work of Air Pollution Control District Hearing Boards in California."⁷ Because basic features of the law governing California's air pollution hearing boards have remained in place over the years, the original article reportedly continues to be useful for lawyers and others. Nonetheless, some important aspects of the law have changed, and so have many of the practices hearing boards follow. Furthermore, in many parts of the state, hearing boards now often face cases of far greater technical and legal complexity, and environmental and economic significance, than in the past. This article adds new material to address these developments, while retaining previous text that still has validity. My aim is to offer a work of continuing usefulness to government and private attorneys, hearing board members, enforcement personnel, businesses and other regulated entities, citizens groups,

6. Although this article will not attempt to systematically analyze different concepts of fairness, or justice, served by hearing boards, some of these concepts will be discernible. It will be seen that in a variety of ways hearing boards promote a blend of ideas of fairness. A more systematic presentation of concepts of justice may be found at KENNETH A. MANASTER, *ENVIRONMENTAL PROTECTION AND JUSTICE* 21-37 (2d ed. 2000) (distinguishing among distributive justice, corrective justice, and procedural justice).

7. 17 U.C. DAVIS L.REV. 1117 (1984).

and technical experts and other types of witnesses—in sum, to anyone involved with the work of hearing boards.

Initially, basic aspects of hearing boards will be discussed, in Section II. Then the three types of hearing board cases will be examined in turn:

- The first type, applications for variances, will be addressed in Section III. This is by far the kind of case the boards face most frequently.⁸ The key elements of all hearing board work appear most clearly in variance proceedings.
- The second category is abatement order requests, another well-established aspect of hearing board activities. As will be shown in Section IV, abatement cases usually share many of the characteristics and objectives of variance cases.
- The third category, one that has grown in importance and variety in recent years, is the resolution of permit disputes, to be discussed in Section V. These often controversial cases include appeals by individual companies, citizens groups, and others from APCD decisions on construction and operating permits for air pollution sources.

In Section VI, a host of problematic issues will be addressed under the catch-all heading of changes, controversies, and confusions. Major changes in recent years in key aspects of hearing board operations will be explored, along with aspects that have provoked sharp controversy. Overlapping with these changes and controversies are issues on which there has been, and may inevitably continue to be, confusion in hearing boards' ap-

8. A total of 657 variances and 3 abatement orders were granted during the period from July 1, 1980 through June 30, 1981. This number reflects only the variance orders received by the ARB. . . . Out of the 660 [sic] variances granted, the [South Coast] AQMD issued 410 orders or 62 percent of the total (which seems reasonable since the SCAQMD has the most sources), the San Joaquin County APCD issued 59 or 9 percent, [San Diego County] APCD and [Kern County] APCD issued 7 percent each, and the [Bay Area] AQMD issued 6 percent of the total. Fifteen of the 45 districts issued 1 percent or less of the total number of variances in the State and 25 districts, or 56 percent of the districts, issued no variances during the noted time period. ARB Report, *supra* note 4, at IV-47, IV-60

See also Herbert V. Walker, *The Air Pollution Control Hearing Board — Functions and Jurisdictions*, 27 S. CAL. L. REV. 399, 400 (1954). Surprisingly, recent ARB figures on total variances issued are similar to the numbers reported over 20 years earlier, although the number of districts in existence is different. For example, in 2002 there were approximately 660 variances granted, with the five principal districts issuing them being the South Coast AQMD, San Joaquin Valley Unified APCD, San Diego APCD, Santa Barbara APCD, and Bay Area AQMD. Generally the total number of variances and abatement orders issued annually is about 700. Email from Judy Lewis, Associate Air Pollution Specialist, California Air Resources Board, to author (June 24, 2004, 04:39 PDT; July 7, 2004, 05:46 PDT) (on file with author).

proaches to their tasks. Section VII will offer concluding perspectives on the current and future importance of California's hearing boards.

II.

HEARING BOARD BASICS

Each of the 35 APCDs is directed by statute to have "one or more" hearing boards.⁹ The only district that has more than one is the San Joaquin Valley APCD. When it came into being in 1992, it was to have a single board, but the legislature soon directed the appointment of three hearing boards, each serving a different region within that geographically expansive district.¹⁰

A. *The Members*

A hearing board consists of five members appointed by the district governing board to staggered, three year terms.¹¹ Ordi-

9. CAL. HEALTH & SAFETY CODE § 40800 (West 2006).

10. Section 1(b)(5) of S.B. 124, enacted on October 14, 1991, as Chapter 1201, Statutes of 1991-1992, created "a single hearing board." Section 6(b)(5) of A.B. 3400, enacted on September 21, 1992, as Chapter 765, Statutes of 1991-1992, and now codified as CAL. HEALTH & SAFETY CODE § 40600(a)(4), amended this requirement and created three hearing boards, each to serve a separate region of the district "as defined by the unified district board." See also S.B. 1267, 1994 Reg. Sess. § 5 (Cal. 1994).

11. CAL. HEALTH & SAFETY CODE §§ 40800, 40804 (West 2006). Section 40800 also allows for the appointment of "one alternate member for each member" and specifies that the alternate "may serve only in the absence of the member, and for the same term as the member." Alternates, however, may not conduct single member hearings on matters such as interim variance and emergency variance requests. In many APCDs, no alternates have been appointed because no need for them has been found. In at least one district, alternates were appointed but "due to the infrequency of meetings and the necessity of filing FPPC Conflict of Interest forms the alternate positions have all resigned and they have not been refilled by the Governing Board." Letter from Karen Nowak, Counsel for Antelope Valley Air Quality Management District, to author (May 2, 2004) (on file with author). In the Bay Area AQMD, the hearing board alternates "are called upon very infrequently to participate in Hearing Board activities whenever the regular member is unable to attend any of the hearings (once or twice a year for one or two categories)." Letter from Neel Advani, Deputy Clerk of the Boards, Bay Area Air Quality Management District, to author, (Apr. 13, 2004) (on file with author). In the three regional hearing boards of the San Joaquin Valley APCD, "[t]he frequency of participation for alternate members is low." Letter from Sissy Smith, Clerk to the Boards, San Joaquin Valley Air Pollution Control District, to author (Apr. 26, 2004) (on file with author). In contrast, the El Dorado County AQMD Hearing Board alternates have "participated frequently" in the board's activities. Letter from Thomas R. Fashinell, Acting Chairperson, El Dorado County Air Quality Management District Hearing Board, to author, (Apr. 27, 2004) (on file with author). In the busiest hearing board, "[i]n general, alternates sit for the regular member around five to ten days per year."

narily three members are required for a quorum. The statute also specifies that “no action shall be taken by the hearing board except in the presence of a quorum and upon the affirmative vote of a *majority of the members of the hearing board.*” (Emphasis added.) The underlined language means that the agreement of three members is needed for action, even if only three or four members are present to constitute the quorum.¹²

Three of the members are required by statute to meet certain qualifications for the position. One member must be admitted to practice law in California, one must be a registered professional engineer, and one must be “from the medical profession” with “specialized skills, training, or interests . . . in the fields of environmental medicine, community medicine, or occupational/toxicologic medicine.” The other two members are simply designated as “public members.”¹³

The medical member usually is a doctor, although the statutory language does not limit this category to that segment of the medical profession. The statute does require the medical member to have some “specialized skills, training, or interests” pertinent to the types of health issues often arising in air pollution disputes. No such specific skills are required of the lawyer and engineer members, nor of the public members. Thus, with the possible exception of their medical members, hearing boards are not legally required to be composed of experts in any aspect of air pollution, and they usually are not.

There are, however, two variations on this statutory approach to the composition of hearing boards. First, in a district with a population of less than 750,000, if the governing board “is unable to appoint a person with the qualifications specified in Section 40801 who is willing and able to serve,” then a vacancy on the

South Coast Air Quality Management District Hearing Board, Response to Author's Questionnaire 5 (July 30, 2004) (on file with author) [hereinafter SCAQMD Questionnaire].

12. CAL. HEALTH & SAFETY CODE § 40820 (West 2006). This section also identifies a few appropriate exceptions from the quorum requirement in proceedings, for example, involving interim, short term, or emergency variances. See, e.g., California Energy Co., Inc., Nos. BG 92-1, 92-2, 92-3 (Hearing Board, Great Basin Unified Air Pollution Control District, Findings and Order Granting Modification of Schedule of Increments of Progress) (Aug. 13, 1992) (modification of schedule of increments of progress issued by hearing board chairman, pursuant to Sections 40825(c) and 42357).

13. CAL. HEALTH & SAFETY CODE § 40801 (West 2006).

hearing board may be filled by the appointment of “any person.”¹⁴

Second, in contrast with this pragmatic provision allowing lesser expertise in smaller districts’ hearing boards, there are provisions specifying greater expertise requirements for South Coast AQMD (SCAQMD) Hearing Board members. In October, 1991, the legislature enacted a set of provisions specifically addressed to that hearing board.¹⁵ These enactments resulted from controversy that had developed regarding its practices and membership.¹⁶ One unusual provision directed the SCAQMD board of directors to “retire the current hearing board and appoint in its place a new hearing board.”¹⁷ This section also added greater specificity to the required qualifications for the new lawyer, engineer, and medical appointees to the South Coast hearing board.¹⁸

14. CAL. HEALTH & SAFETY CODE § 40802 (West 2006).

15. CAL. HEALTH & SAFETY CODE §§ 40501, 40501.1, 40501.3 (West 2006).

16. See HAMILTON, RABINOVITZ & ALTSCHULER, INC., THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD: FINDINGS, ANALYSES AND RECOMMENDATIONS (Feb. 1991) [hereinafter HR&A STUDY].

17. CAL. HEALTH & SAFETY CODE § 40501.1(a) (West 2006). Another unusual attempt to change a hearing board’s membership occurred in 2001, when the board of directors of the Bay Area AQMD sought to terminate the membership of two hearing board members. This controversial effort was abandoned as it quickly was determined that the board of directors had not followed lawful procedures and that there were inadequate legal grounds for ending the members’ service prior to the expiration of their three year terms. See Noam Levey, *Air Board Illegally Ousts Two Members in Secret*, SAN JOSE MERCURY NEWS, Aug. 10, 2001, at 1B; Michael J. Coren, *2 Reinstated as Air Board Admits to Breaking Rules*, SAN JOSE MERCURY NEWS, Aug. 16, 2001, at 1B.

18. An exhaustive study of the South Coast Hearing Board by outside consultants in early 1991 had noted some concern that “one or more of the current statements of requirements [in Section 40801] were too general to assure that the appointee to the seat would have the specialized skills and experience necessary to exert the significantly more expert perspective on matters coming before the Board that was presumably sought by the Legislature when it attached special professional requirements to these seats.” HR&A STUDY, *supra* note 16 at 130. In essence, the consultants seemed to be opining that in the statute the legislature had not said all that it really meant. Under the more specific requirements in effect since October 1991, and now codified in Section 40501.1 of the Health and Safety Code, the lawyer member is to have “two or more years of practice, preferably with litigation experience.” The engineer member must be someone with “a bachelor’s degree from an accredited college in chemical, mechanical, environmental, metallurgical, or petroleum engineering, with two or more years of practical experience, and preferably who is a professional engineer registered pursuant to the Professional Engineers Act.” Although the first part of this statement of the engineer’s credentials is more demanding than the requirements stated in Section 40801 for the engineer member in other districts, ironically the latter part is less so. Section 40801 requires that the member be a registered professional engineer, while Section 40501.1(a)(2) only states a preference in that regard. Lastly, the medical member in the South Coast

In all districts, the members are “part-timers” on the hearing board; that is, they have other work or endeavors to which they devote more time each week than they normally spend on hearing board matters. The only exception is the hearing board in the South Coast Air Quality Management District, which often has a sufficiently heavy caseload that it must function on nearly a full-time basis.¹⁹

District must be “a licensed physician, with two or more years of practical experience, preferably in the fields of epidemiology, physiology, toxicology, or related fields.”

19. In some districts, there are so few air pollution sources that the board rarely meets at all. *See, e.g.*, Letter from Lakhmir Grewal, Deputy Air Pollution Control Officer, Calaveras County Air Pollution Control District, to author (Apr. 6, 2004) (on file with author) (the hearing board “has not been convened in more than three years”); Letter from Karen Nowak, Counsel for Antelope Valley Air Quality Management District, to author (May 2, 2004) (on file with author) (“The Mojave Desert AQMD Hearing Board has not seen any significant cases over the last 5 years. . . . The AVAQMD Hearing Board has only heard 1 official petition in its entire existence (since 1997).”); E-mail memorandum from Harry Krug, Colusa County Air Pollution Control District, to author (Apr. 14, 2004; 1:18 PDT) (on file with author) (“The Hearing Board has met 3 times in the last 16 years. It has not met in the last few years.”); Telephone interview with Kate Haas, Modoc County Air Pollution Control District (Feb. 9, 2004) (reporting that the hearing board has never been used in that district); Letter from Thomas R. Fashinell, Acting Chairperson, El Dorado County Air Quality Management District Hearing Board, to author (Apr. 27, 2004) (on file with author) (“Last year we met about 4 times, but that is quite unusual. I would estimate an average frequency of 1-2 times/year”); and Letter from Robert L. Reynolds, Air Pollution Control Officer, Lake County Air Quality Management District, to author (Apr. 15, 2004) (on file with author) (“The Hearing Board conducts hearings approximately 1 or 2 times a year.”). *See also* E-mail memorandum from Gary Bovee, Tehama County Air Pollution Control District, to author (Apr. 5, 2004; 10:17 PST) (on file with author) (“The Tehama County Air Pollution Control District is a small rural district and the hearing board hasn’t had to meet in five or six years.”). In August 2005, however, a complex permit appeal was filed with the Tehama County board, which held numerous hearings on the matter in succeeding months. InEnTec Medical Services LLC, No. 05-001 (Hearing Board, Tehama County Air Pollution Control District, Request for Hearing and Appeal) (Aug. 12, 2005). The author served as one of the attorneys for the permittee in that proceeding.

In other districts, the hearing boards meet much more often. In 1983, the South Coast District Hearing Board typically heard about 30 to 40 cases per month and met three times per week. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, AIR QUALITY DIGEST 2 (July 1983). The situation was similar as of 2004: “The SCAQMD Hearing Board is scheduled to meet three days per week, Tuesday through Thursday. . . . The calendar may have up to five cases in a single day. . . . The Hearing Board is always dark on Mondays since the SCAQMD is on a four-day work schedule, Tuesday through Friday. On occasion, the Hearing Board will conduct a hearing off site and evenings or weekends when there is an expectation of great interest by a large number of people who might not otherwise be able to testify.” SCAQMD Questionnaire 4, *supra* note 11. The hearing board at the Sacramento Metropolitan AQMD in 2003 was meeting about once a month, although not long before then it was meeting much more frequently and in 2004 its caseload eased

B. *“Getting Through” to the Members*

These basic facts about the composition of hearing boards are significant for anyone, especially attorneys, appearing before hearing boards. In each case counsel deals with an assortment of from three to five board members who pose a number of possible problems. One problem arises from counsel’s inability to know just how much or how little relevant background each member brings to a given case. At one extreme is an actual conflict of interest, in which the board member has active involvement with a party to the case. For example, the member might be a stockholder or employee of the air pollution source or a consultant to it, or the member might be associated with another party to the case, such as a citizens group which is challenging a source’s permit. Such a member should not participate in the case at all. The member presumably knows at least one of the parties too well, has a stake or at least an extra level of interest in the outcome, actually is or at least appears to be biased in favor of one party, and perhaps also knows too much already about the facts.²⁰

to require meetings only about every other month. Telephone interview with Sacramento Metropolitan Air Quality Management District Hearing Board Clerk (Aug. 12, 2003); Letter from Donna Fielstra, Clerk, Sacramento Metropolitan Air Quality Management District, to author (Apr. 30, 2004) (on file with author). Often there is an upsurge in variance case filings in a district when a new regulation is about to come into force. After initial difficulties in compliance with the new regulation are sorted out, the hearing board’s caseload returns to a less active level.

Occasionally, when a hearing board is faced with a complex case requiring multiple hearing days, the board may schedule two or three consecutive days of sessions, although this may be difficult to coordinate with the members’ other commitments. The need for such heavy scheduling is increased when an external deadline—such as an imminent effective date for a regulation or impending action by another government agency—creates pressure for hearing board action before the deadline arrives. For example, the Bay Area District Hearing Board scheduled three consecutive hearing days in order to resolve an emission credits dispute shortly before the regulatory deadline for which the challenged credits were needed. Appeal of Southeast Alliance for Environmental Justice, No. 3304 (Hearing Board, Bay Area Air Quality Management District, Transcript of Proceedings) (June 14-16, 2000).

20. Some hearing boards have included provisions in their procedural rules that address this difficulty. SEE, e.g., Bay Area AQMD Hearing Board Rule 5.14 [hereinafter Bay Area Rules] (“A Hearing Board member shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration.”); Monterey Bay Unified APCD Regulation VI, Rule 7.5.1 (“A Hearing Board member shall disqualify himself and withdraw from any case in which, in his opinion, he cannot accord a fair and impartial hearing or consideration.”); and South Coast AQMD Rule 1217 (“A hearing officer or District Board member shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration.”). With or without such a rule, hearing board members commonly recognize that at times their participation in a specific case would be inappropriate. For example, in 2003 the

At the other extreme is the wholly untainted member, who has no prior contact with any of the parties and no relevant expertise to bring to bear on the particular kind of source at issue. Obviously there are many gradations of interest and expertise between these two extremes.

The challenge faced by the attorney for a pollution source, for APCD staff, or for an interested party such as a local citizens group, is to communicate effectively with—to get through to—these people. Presumably the board is prepared to hear the case, but its members have widely varying degrees of pertinent background. To meet this challenge, counsel should attempt to become familiar with the areas of interest and knowledge of board members as demonstrated in prior proceedings. It can be very helpful to the attorney and client, as well as to the board itself, if counsel is ready to respond to specific areas of likely concern of the board members, such as the medical professional's concern about the possibly toxic character of emissions; the engineer's wish to clearly understand technical aspects of the polluting process or available abatement technology; or the lawyer's concern about whether proper public notice of the proceedings has been given²¹ or about the possible impact of other pending legal proceedings related to the issues before the hearing board.

Santa Barbara County APCD hearing board considered a permit appeal filed by The Boeing Company concerning emissions from marine vessels associated with a regulated stationary source and used to deliver rocket assemblies to Vandenberg Air Force Base in that county. "Of the 5 Hearing Board members, two recused themselves. One member was an ex-Boeing engineer who was receiving a pension from Boeing. The second was a retired Air Force Colonel who works for an environmental consulting company that works directly for VAFB. A third Hearing Board member who works at VAFB (M-F, 8-5) did not recuse himself from the matter." SANTA BARBARA COUNTY AIR POLLUTION CONTROL DISTRICT, MEMORANDUM RE CASE No. 40-03-P (June 19, 2003), at n.1. See also City College of San Francisco, No. 3409, at 1-2 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 5, 2002) (Prior to hearing, board informed parties that "a member of the Hearing Board had previously served as a part-time faculty member of the Astronomy Department at applicant's campus. . . . Both Counsel for applicant and APCO voiced no objection to the member participating in the hearing."); and In the Matter of the Appeal of Citizens for Review of Medical and Infectious Waste Imports into Tehama County, No. 05-001 (Hearing Board, Tehama County Air Pollution Control District); Email memorandum from William Murphy, Tehama County Counsel, to John T. Hansen, Counsel, Pillsbury Winthrop Shaw Pittman, LLP (Oct. 24, 2005; 3:22 PDT) (on file with author) (Lawyer member recused himself because his son was employed by the law firm representing the company to which the permit under challenge was issued). A fuller discussion of pertinent legal requirements concerning conflict of interest problems is presented *infra* at Section VI (B).

21. The public notice requirements are set forth in CAL. HEALTH & SAFETY CODE §§ 40823-40827 (West 2006).

Conversely, if the attorney overlooks the fact that some board members know a lot less than others about technical issues, a presentation of proof and argument at a technically sophisticated level may go over the heads of the lay people on the board. Counsel might hope to rely on the board members themselves to take the initiative to point out their own areas of ignorance, but this may be embarrassing for a member to do when counsel, witnesses, and fellow board members seem perfectly at ease with the technical jargon. Counsel is thus challenged to present evidence and argument at levels of sophistication suitable to the various abilities and interests of the board. Counsel should not talk down to hearing board members, nor should counsel waste time by talking over the members' heads.

A constructive approach to preparing for hearing board proceedings is to gather advance information about the board's practices and predispositions, perhaps by observing prior proceedings, reading earlier decisions if possible,²² or inquiring of

22. "A hearing board shall announce its decision in writing." CAL. HEALTH & SAFETY CODE § 40860 (West 2006).

In the HR&A study of the South Coast AQMD Hearing Board, it was recommended that future attention be given to the question of whether that Board should "apply some form of the rule of *stare decisis*, so that the same question cannot be repeatedly raised and re-raised." HR&A STUDY, *supra* note 16 at Appendix I, p. 2. Plainly no consistent reliance on precedent is possible unless a reference tool is available that presents prior decisions in a systematic and accessible format. Hardly any such tool exists, however, so it is virtually impossible for current hearing board members in any district to systematically research prior decisions of their own or other districts in order to identify relevant precedents that might be applicable to a case under consideration. Instead, ad hoc reliance on the anecdotal memories of members, district staff personnel, or parties seems to be the only recourse. As the HR&A Study of the South Coast board perceptively noted:

Unlike an appellate court or most regulatory bodies, there is no composite written public record of Hearing Board decisions. Consequently, neither Board members nor students of Board operations can review such a record for consistency [among decisions] except by laboriously creating a new record from the minute orders and other decision documents and tapes that are available at the Board.

The operational effect of the absence of a written public record is that the individual memories of Board members constitute the sole institutional memory of the organization. The Board staff is not looked to for citations or other information on substantive precedents Counsel for petitioners and for the District now and then cite some prior Board action in a similar case in the course of making their arguments, but this is quite sporadic and no such argument can be closely documented because there is no standard record to present or cite.

HR&A STUDY, *supra* note 16 at 44-45.

Similarly, there is hardly any way for an outside attorney or other person to undertake methodical research into precedents in preparation for hearing board cases or for identification of prior decisions that could be cited usefully in papers or briefs in current cases. To the author's knowledge, the only systematic research tool devel-

attorneys—such as the APCD’s attorneys—with experience before the particular board. The goal is to know the board as well as possible, to develop an awareness of the types of issues with which the various members are prepared to deal comfortably. On those issues, counsel can proceed at a fairly rapid pace, and the board members will welcome the effort.

On the other, unfamiliar issues, counsel must not hesitate to offer fundamental, explanatory information. The parties also should not hesitate to inquire, at suitable junctures during a hearing, about whether some of the board members would like to hear such basic testimony and whether any aspects of the case are unclear. The offer will be appreciated, especially by those lacking experience in technical areas such as chemistry and engineering that frequently arise in air pollution cases. Similarly, visual aids such as photographs of equipment or line diagrams of processes can be quite informative for the board.

It is common for easels, flip charts, and overhead projectors to be used by parties, and it usually is helpful to the board to supplement these large displays by providing each member with a smaller, hard copy of what is being depicted. It is to be expected that there will be increasing use of electronic presentation tools before hearing boards, particularly in complex cases. For example, the installation of computer screens at each member’s seat in some APCD hearing rooms, along with larger wall screens, opens up new possibilities for presentation of evidence.

Even in preparing for hearings, the advent of the Internet and computer resources has made life easier for the attorney or party preparing to go before an APCD hearing board. For many years, of course, some districts have published small pamphlets about variance applications and procedures.²³ As of 2005, however, about three-fourths of the districts have websites, and most of those present, in addition to district rules and regulations, other material specifically related to hearing boards.²⁴ Thus, it now is not unusual to find on-line information such as a hearing board’s

oped for this purpose exists at the Pillsbury Winthrop Shaw Pittman LLP law firm in San Francisco. It has developed a voluminous, proprietary database of decisions of the Bay Area AQMD Hearing Board; this system covers that board’s decisions since 1973, organizing and summarizing them according to a comprehensive index of significant issues addressed. The author is counsel to that firm.

23. See, e.g., BAY AREA AIR QUALITY MANAGEMENT DISTRICT, VARIANCES AND THE HEARING BOARD § 2 (Sept. 2004).

24. Additional assistance available through the California Air Resources Board and its website will be discussed in Section VI (A) *infra*.

procedural rules, schedule of meetings, roster of members, administrative support personnel contacts, fee schedules, guidance about how papers are to be filed and hearings are conducted, and minutes and orders from previous cases. The South Coast Hearing Board has even prepared an informative CD-ROM disk entitled "Understanding the Variance Process," which is distributed by that board as well as by hearing boards elsewhere in the state.

In considering these observations and the analysis that follows, it should be kept in mind that the procedures followed by hearing boards in some APCDs are rather formal, in the nature of judicial proceedings.²⁵ Others are much more informal,²⁶ and

25. See, e.g., Letter from Neel Advani, Deputy Clerk of the Boards, Bay Area Air Quality Management District, to author, (Apr. 13, 2004) (on file with author) ("All hearings are conducted formally in the manner of a courtroom trial."); and SCAQMD Questionnaire 2-3, *supra* note 11 ("Our hearings are conducted somewhat like a semi formal courtroom trial. Testimony is presented under oath through direct- and cross-examination. An audio-taped record of the proceedings is recorded. The witnesses are subject to questioning by Hearing Board members. At the close of testimony, the Hearing Board deliberates, a motion is made and voted on, and the decision is rendered on the record."). See generally David P. Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. at 27, 60 ("It seems clear that in general a quasi-judicial hearing is a helpful means of ascertaining the facts relevant to the grant or denial of a variance."). In the San Diego APCD hearing board, and perhaps in others as well, in one respect the proceedings are even more formal than in virtually all courts. Not only is all testimony by witnesses required to be under oath, but so are statements by attorneys.

26. See, e.g., Letter from Sissy Smith, Clerk to the Boards, San Joaquin Valley Air Pollution Control District, to author (Apr. 26, 2004) (on file with author) (reporting that the hearing boards' meeting "setting is somewhat informal" and that "[d]uring the hearing, the board members freely ask questions of either party and there is often interaction between all parties present. It is common for the boards to allow District staff and the petitioners to ask questions, offer rebuttals, and to make unsolicited statements outside of their formal presentations."); Letter from Robert L. Reynolds, Air Pollution Control Officer, Lake County Air Quality Management District, to author (Apr. 15, 2004) (on file with author) ("If the hearing is contested by the public, applicant, or AQMD, the hearings are extremely formal and include a court reporter and attorneys. If it is not contested then it is less formal but witnesses are sworn in, the hearing is tape recorded with minutes and a formal order follows."); Letter from Thomas R. Fashinell, Acting Chairperson, El Dorado County Air Quality Management District Hearing Board, to author (Apr. 27, 2004) (on file with author) (reporting that more complex cases are conducted "in a quite formal manner (Board of Supervisors meeting room)" while others "have been held in a more relaxed atmosphere (conference rooms)."); Letter from Karen Nowak, Counsel for Antelope Valley Air Quality Management District, to author (May 2, 2004) (on file with author) ("The MDAQMD Hearing Board tends to utilize a cross between a formal process and an informal process. The petitioner [in a variance case] is required to give a presentation regarding the necessity and reasons for the variance. The Hearing Board members then ask questions and quite often a discussion ensues. . . . After the Hearing Board questions and any discussion the District staff presents its position. . . . The Hearing Board then discusses making the six findings

some rely heavily on written documentation of parties' positions rather than on live testimony. Although most of the discussion in this article pertains to the formal approach, which the statute generally contemplates, the differences among hearing boards should not obscure their broader similarities. The objectives of this type of administrative adjudication probably can be achieved equally well through both formal and informal approaches.

III.

VARIANCES

A. Variance Applications

The major statutory provisions governing variance cases are sections 42350 through 42364 of the Health and Safety Code. The first of these provisions states, "Any person may apply to the hearing board for a variance from Section 41701 or from the rules and regulations of the district."²⁷ Most variance applications are filed by private industrial, agricultural, and commercial operations seeking temporary protection from district rules and regulations. In some instances, the statutory ban on excessive visible emissions—section 41701's "Ringelmann 2" limitation²⁸—

and usually agrees by consensus. Then a rather formalized motion is made and the Hearing Board votes on whether to grant the variance.").

In at least one district, the San Joaquin Valley APCD, many hearings are conducted through video teleconferencing. This is done consistently by the Northern Region and Southern Region boards, in order to avoid the extensive travel time—and associated automotive emissions—that would be involved if District personnel from the central office in Fresno were regularly required to travel the great length of the District to hearings in the other two offices. Telephone interview with Sissy Smith, Clerk to the Boards, San Joaquin Valley Air Pollution Control District (Sept. 9, 2004). For example, on June 4, 2003 the Northern Region Hearing Board of the San Joaquin Valley Unified APCD convened in Modesto to conduct variance hearings and other business. Participating through video teleconferencing were an assistant district counsel, two inspectors, and the board's clerk from the Central Region Office in Fresno. See SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, ACTION SUMMARY MINUTES FOR THE NORTHERN REGIONAL HEARING BOARD MEETING (June 4, 2003).

Government Code Section 54953, part of the Ralph M. Brown Act's requirements for open meetings by local agencies, permits "the legislative body of a local agency [to] use teleconferencing for the benefit of the public or the legislative body of a local agency in connection with any meeting or proceeding authorized by law." CAL. GOV'T CODE § 54953(b)(1) (West 2004). As will be discussed below with respect to other Brown Act provisions, it is generally accepted that APCD hearing boards are covered by the Act. See *infra* at Section VI (B).

27. CAL. HEALTH & SAFETY CODE § 42350(a) (West 2006).

28. The easiest, oldest, and most economical method of measuring opacity is with the naked eye aided by the Ringelmann Chart. The Ringelmann Chart is a graph containing various shades of grey coinciding with a dark plume of particulate emis-

will also be a subject of the applicant's request for variance protection.

In addition to private applicants, variances are often sought by public institutions and government agencies, such as municipal sewage treatment plants, electric power generators, federal military²⁹ and research installations, and hospitals. Procedurally and substantively there is nothing different in the treatment of these cases, other than some allowances for filing fee reductions or exemptions.³⁰

One requirement from which a variance may not be granted is Health and Safety Code Section 41700, the statutory public nuisance provision.³¹ This important limitation on hearing board power must be considered in every case in which there is some evidence of nuisance-type effects on persons living, working, or traveling in the vicinity of the source in question. Neither the applicant nor APCD personnel involved in the case should attempt to persuade the hearing board to grant a variance when operation under the variance probably would create a nuisance.

sions of an indicated denseness or opacity. . . . The state standard of Ringelmann 2 or forty percent opacity applies in those districts that have not enacted a more stringent regulation.

Crawford, *supra* note 5, at 624-25 (footnotes omitted).

The constitutionality of § 41701's predecessor was declared in *People v. Plywood Mfrs. of Cal.*, 127 Cal. App. 2d Supp. 859, 291 P.2d 587 (1955). *But see* *People v. Atchison, Topeka & Santa Fe Ry. Co.*, 268 Cal. App. 2d 501, 74 Cal. Rptr. 222 (1968) (application of statutory Ringelmann limits to railroad locomotive emissions held constitutionally impermissible as an unreasonable burden on interstate commerce). Enforcement of this section through criminal proceedings was upheld in *People v. A-1 Roofing Serv, Inc.*, 87 Cal. App. 3d Supp. 1, 151 Cal. Rptr. 522 (1978).

29. *See* *California ex rel. State Air Res. Bd. v. U.S. Navy*, 431 F. Supp. 1271, 1275-76 (N.D. Cal. 1977) (confirming federal installations' duty to comply with "state implementation standards" under federal Clean Air Act), *aff'd*, 624 F.2d 885, 887 (Cal. Ct. App. 1980).

30. The statutory authorization for variance filing fees requirements is CAL. HEALTH & SAFETY CODE § 42364 (West 2006), with a partially redundant provision at § 40510(b) covering the South Coast AQMD.

31. [N]o person shall discharge from any source whatsoever such quantities of air contaminants or other materials which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.

CAL. HEALTH & SAFETY CODE § 41700 (West 2006).

The constitutionality of this section was upheld against a void for vagueness challenge in *People v. General Motors Corp.*, 116 Cal. App. 3d Supp. 6, 172 Cal. Rptr. 470 (1980). Section 42353 expressly provides that "no variance shall be granted if the operation, under the variance, will result in a violation of Section 41700." CAL. HEALTH & SAFETY CODE § 42353 (West 2006).

Similarly, the legislature has forbidden the granting of a variance from a district permit system's "requirement for a permit to build, erect, alter, or replace" polluting equipment.³² In other words, a variance may not excuse a source, even temporarily, from obtaining a permit to *construct*. This provision, however, does not preclude the granting of a variance from some of the specific terms of a permit to construct that already has been obtained, or even from the requirement to have a permit to *operate*.³³ Apparently the legislative conclusion was that equities sufficient to justify granting a variance might be proved by a source which already has been given permission to construct new facilities or alterations, but that the variance device would be inappropriate absent the initial permit to build. If a source has sought a permit to construct but the district staff has declined to issue it, a challenge to the staff's action should be pursued not through variance proceedings but through the source's prompt appeal from the denial of the requested permit.³⁴ For a source

32. CAL. HEALTH & SAFETY CODE § 42350(b)(1) (West 2006). The basic statutory authorization for district permit systems is found at § 42300, which covers permits that are needed "before any person builds, erects, alters, replaces, operates, or uses" any contrivance which may cause the issuance of air contaminants. Permits to build are commonly referred to as "permits to construct" or "authorities to construct," and permits to use are usually called "permits to operate." See, e.g., Sacramento Metro. Air Quality Mgmt. Dist. Rule 201, §§ 301-02, available at <http://www.airquality.org/rules/rule201.pdf> (amended Apr. 26, 2001); Mariposa County Air Pollution Control Dist. Rule 401, available at <http://www.arb.ca.gov/drdb/mpa/curhtml/r401.htm> (last visited Jan. 28, 2006) ("An Authority to Construct shall remain in effect until the Permit to Operate for that source for which the application was filed is either granted or denied . . ."). Other, newer restrictions on variance relief are found in Section 42350(b)(2) concerning sources holding permits under the federal Clean Air Act's Title V program and Section 42350(b)(3) concerning emission-capped trading programs. The former limitations are discussed *infra* note 155.

33. A legal opinion issued by the ARB interpreted Section 42350 to evidence "a clear legislative intent that hearing boards are not precluded from issuing variances from permit to operate requirements in appropriate circumstances." Memorandum from W. Thomas Jennings, Staff Counsel, California Air Resources Board, to James J. Morgester, Chief of Compliance Division, California Air Resources Board 3 (Apr. 8, 1986) (on file with author).

34. See discussion *infra* at Section V(A). A statutory provision added in 1994 does afford limited variance relief to a permit applicant, even an applicant for a permit to construct, when there is "a delay in the approval of the permit" despite the applicant's "due diligence . . . in the permit process." CAL. HEALTH & SAFETY CODE § 42301.3(g)(1) (West 2006). This provision was carefully drawn to avoid suggesting that it undermines the prohibition of Section 42350(b)(1) against variances from the requirement of a permit to construct. Indeed Section 42301.3(g)(4) expressly declares that no such legal effect is to be found. Additional discussion of § 42301.3(g)(1) is presented *infra* at note 88.

The ARB has explained this provision as follows:

that has not even attempted to obtain a permit to construct, but nonetheless has gone ahead and built some polluting equipment, the legislature offers no sympathy and the hearing board can offer no variance.

In the ordinary variance case, whether the applicant is a private or public entity, the goal of the application is the same: to buy time for the source to be able to continue operating more or less normally despite being in violation of a district regulation or the statutory Ringelmann provision. Usually the applicant will urge that it needs this period of time to complete corrective action to solve the problem. Given this objective, it might be suspected that variance applicants are trying to accomplish something improper, to obtain a privilege contrary to the objectives of air pollution control. Such a perspective would be erroneous. If the statutory criteria are satisfied, the applicant is entitled to a variance. It might even be apt at that point to describe the variance as a matter of right.³⁵ The legislature designed this process to benefit and protect air pollution sources that have good reasons for needing time to continue operating without being subject to enforcement penalties. If an applicant can demonstrate such reasons, it deserves a variance because fairness calls for it and the statute demands it.

What HSC 42301.3(g) does allow is a variance to be granted from the underlying rule requirement to install air pollution control equipment or meet a more stringent emission standard or limitation. It is not a variance from a permit, but rather a variance issued to a source when there has been a delay in the permitting process, and this delay has resulted in the source's inability to comply.

ARB COMPLIANCE DIVISION, AMENDED ADVISORY NO. 117(A), VARIANCES FROM THE REQUIREMENT TO INSTALL AIR POLLUTION CONTROL EQUIPMENT OR ACHIEVE EMISSION STANDARD/LIMITATION (Mar. 14, 1995).

35. See Currie, *supra* note 25, at 60-61:

[I]f a pollution statute creates a substantive right in the polluter to obtain relief upon meeting prescribed criteria, contemporary Supreme Court opinions strongly suggest that the polluter has a property interest within the protection of the due process clause, and that he is entitled to a quasi-judicial hearing if his allegations state a claim on which relief can be granted.

See also DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 176 (2d ed. 1986) ("The issuance of a [zoning] variance is largely discretionary. . . [However], when standards are clearly met, there may be a right to a variance. . ."); DANIEL P. SELMI AND KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 8:24 (1989, 2003) ("One or more of the legal requirements . . . deserve to be temporarily 'varied' or relaxed.").

B. *The Questions to be Answered*

Since the application for a variance is ordinarily submitted by the pollution source operator,³⁶ which is in the best position to explain its need for relief, the burden of proof should rest upon the applicant.³⁷ In the formal, trial-type procedures followed by some hearing boards, the applicant thus presents its argument and evidence first, followed by the APCD. The general question the parties should attempt to address, and the hearing board must answer, is simply this: Does the proof presented by the applicant and the district in the case demonstrate that the applicant satisfies the six statutory criteria for variance protection? These statutory criteria, which will be discussed here in the order in which the statute presents them, are listed in section 42352(a). That section requires the hearing board to make "all of the following findings."³⁸

The first three findings have been in the Code and essentially unchanged since at least 1972.³⁹ Generally they concern the applicant's past circumstances and its justifications for claiming entitlement to variance protection. The last three findings entered

36. Occasionally an application is presented by a third party, such as a contractor constructing new sewage treatment facilities for a public agency, or a manufacturer of a product on behalf of retail vendors subject to APCD regulations regarding sales of the product. See *State Indus., Inc.*, No. 2890 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 23, 1983) (manufacturer of water heaters); and *BSP Division Envirotech*, No. 613 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Jan. 19, 1978) (contractor installing incineration equipment at sewage treatment plant). In 1994 the legislature acknowledged the fairness and efficiency of variance relief under some circumstances for a product itself. Accordingly, it enacted Sections 42365-42372 allowing "product variances" to be granted at the request of "any person who manufactures a product" and who can make the required statutory showing. See discussion *infra* at Section III(F)(1).

37. Customary legal considerations also lead to this conclusion. See CAL. EVID. CODE § 500 (West 2006) ("a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief"). See also MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 88 (2002). ("Generally the proponent of an order has both the burden of producing evidence (that is, to come forward with evidence or suffer dismissal of the case) and the burden of persuasion (often called the burden of proof).")

38. Narrowly drawn exceptions to the requirement that all of the findings must be made are found in Code Section 42301.3(g) regarding permit applications that are delayed in the permit approval process, as discussed *supra* at note 34, and also are found in the Code sections pertaining to product variances, as discussed *infra* at Section III (F) (1).

39. See *Assem. B. 549*, 1972 Reg. Sess. §§ 5, 12 (Cal. 1972). Earlier versions of these statutory provisions, as applied by the Hearing Board of the original Los Angeles County APCD, are noted in Walker, *supra* note 8, at 401.

the law in 1989.⁴⁰ Their collective emphasis is on the future, i.e., on the applicant's capability and willingness to mitigate the air pollution that would be created by its activities during the period of requested variance relief.

(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.*⁴¹ This requirement is usually the easiest to prove and least debatable of the six. Ordinarily the applicant has received notification from the APCD that it is in violation, or it may have become aware on its own that it is not currently in full compliance or will not be in the foreseeable future. If the hearing board is not shown that the violation requirement is met, no variance can be granted because none is needed.

The critical responsibility of the parties on this issue is to make sure that the hearing board is properly advised as to exactly which provisions of the district's regulations are violated. If this is not done, it becomes extremely difficult for the board to issue an order which clearly limits the variance coverage to the applicable provisions. With increasingly complex and occasionally overlapping regulatory provisions on the books, it is important that all parties to these cases, and the board as well, understand exactly what the violations are. Often the APCD staff and its attorney are in the best position to bring out this information. This is especially true when the applicant is unfamiliar with district powers and is either unrepresented by an attorney or represented by an attorney unfamiliar with APCD regulations.

(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.*⁴² This second requirement is often the most difficult issue the hearing board must resolve. It is best understood as having two areas of emphasis—hardship and diligence.

40. See Assem. B. 2595, 1988 Reg. Sess. § 30 (Cal. 1988).

41. CAL. HEALTH & SAFETY CODE § 42352(a)(1) (West 2006); see also CAL. HEALTH & SAFETY CODE § 41703 (applications to hearing board for schedule of increments of progress for compliance with new regulation having a future effective date or for modification of new regulation's schedule of increments of progress).

42. CAL. HEALTH & SAFETY CODE § 42352(a)(2) (West 2006). The quoted language is the core of this subsection and has been in the statute since 1972. The two additional sentences that were added to this subsection in 1992, by Section 1 of S.B. 1728, enacted September 29, 1992 as Chapter 1025, Statutes of 1992, are discussed below.

First, the board must determine whether requiring present compliance would impose a serious hardship on the applicant. This hardship is addressed by the phrases “an arbitrary or unreasonable taking of property” and “the practical closing and elimination of a lawful business.” In order to evaluate the alleged hardship, the board is likely to be interested in evidence on such questions as the nature of the applicant’s goods or services, the extent to which others could provide those goods or services if the applicant temporarily could not do so, the size of the applicant’s labor force and payroll, the amount of the applicant’s capital investment in the facility in question, and the ability of the applicant to stay in business if uninterrupted compliance were required.⁴³ On the basis of this kind of information, the board

43. Santa Fe Enameling & Metal Finishing Co., No. 2536-1, at 3 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 9, 1983) (“Failure to grant the variance would harm petitioner in that petitioner would lose approximately 40 percent of its sales which would ultimately result in the closing of the business which has taken the family 22 years to establish.”); Oliver Rubber Company, No. 3141, at 4 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Mar. 6, 1997) (“[D]ue to a backlog of customer orders, Applicant cannot cut back on production during the 10-day period in question without incurring a significant financial burden, the need to lay off its employees and without suffering a serious loss of business.”); Darling International, Inc., No. 4061-7, at 4 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Dec. 16, 1998) (“Failure to grant the variance would cause harm to petitioner by the loss of business if petitioner’s customers are forced to take their business to other processors in the basin resulting in the closing of its facility and the layoff of approximately seventy-five employees.”); Herman Goelitz Candy Company, Inc., No. 3260, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (July 1, 1999) (“Applicant would experience a hardship, because Applicant would be forced to curtail its operations and would suffer approximately \$27.8 million in lost sales and would be required to cut its payroll by \$5.7 million which would significantly impact employees and the community.”); Vertis, Inc., No. 3358, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 11, 2001) (“Applicant would experience a hardship, because 60 employees would lose their jobs since operations would need to be shut down. Also, there is the threat of possible loss of long-term contracts, which would not allow for all of the 60 employees to be rehired.”); Aera Energy LLC, No. 752 (Hearing Board, Ventura County Air Pollution Control District, Order Granting Variance) (May 17, 2003), at 6 (“Immediate compliance would require Petitioner to shut in approximately 120 wells . . . This action would result in production losses of at least 800 barrels of oil. Ceasing production would result in revenue losses of approximately \$18,000 per day from oil.”); and Southern California Edison Co., No. 1262-81, at 5 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Aug. 18, 2004) (“Denial of the variance would cause economic harm to petitioner if Unit No. 15 is shut down and blackouts occur in violation of the California’s [sic] Public Utility Commission (CPUC) order. Petitioner is required by the CPUC to provide power to the island and to minimize blackouts and power failures.”).

can determine whether compliance would be a hardship. A variance cannot be granted unless such hardship is proven.

The view of hardship just suggested is much broader than a strict reading of the twin phrases on this point might suggest. The strict view, allowing variance relief only when something akin to an unconstitutional taking of property can be shown, would drastically narrow the availability of variance relief. Hearing boards throughout California, however, for many years have found the more expansive interpretation consistent with an orderly and fair regulatory scheme for air pollution control.⁴⁴ More recently, language was added to the Health and Safety Code to confirm this view. Section 42352.5(a)(2) now broadly directs hearing boards to supplement their inquiry into the hardship question by considering "whether or not an unreasonable burden would be imposed upon the petitioner if immediate compliance is required."⁴⁵

Hardship alone is not enough to justify this second statutory finding. There is also the area of emphasis indicated by the words "due to conditions beyond the reasonable control of the petitioner." This language requires the hearing board to make a finding of some minimum level of past diligence on the applicant's part before variance protection is justified.⁴⁶ If the appli-

44. See, e.g., FMC Corp., No. 1166, at 5-6 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Jan. 5, 1984) ("Applicant would be forced to shut down a substantial portion of its . . . [facilities . . .], pending the development of suitable complying replacement coatings. Approximately 4100 of Applicant's 5800 employees would be laid off as a consequence of such a plant shutdown."); National Can Corp., No. 1080, at 3-4 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (July 7, 1983) ("Requiring compliance with the District's rules at this time would force the Applicant to curtail operation . . . on the weekends, curtailing a substantial portion of its operations and subjecting the Applicant to loss of income, loss of customer goodwill and possibly to contractual liability."); Exxon Co., U.S.A., No. 842, at 4 (Hearing Board, Bay Area Air Quality Management District, Order Granting Emergency Variance) (May 27, 1982) ("Such a shutdown would also cause Applicant to lose a substantial amount of business and deprive Applicant's customers of the products they need and utilize . . ."); see also Western Can Co., No. 1148, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Oct. 27, 1983) ("[W]ithout the relief prayed for, Applicant would be forced to shut down permanently after providing jobs and serving the community for some 64 years."). A systematic analysis of this type of equitable discretion may be found in Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 182-92.

45. This provision was added by A.B. 3790 in 1992. See Section 5 of ch. 1126, Statutes of 1992.

46. "It has been the practice of the [Los Angeles County] Hearing Board to grant variance petitions when the petitioner is exercising 'due diligence' in bringing his

cant's present and predicted violations, and the hardship compliance would impose, are due to conditions beyond its reasonable control, a variance is warranted. If, in contrast, the applicant's predicament is one which has been within its reasonable control and which diligence on its part could have avoided, no variance should be granted.⁴⁷ The legislature has not offered variance protection for negligent, dilatory pollution sources.

operation into compliance" Willick & Windle, *supra* note 5, at 529. See also The Sherwin Williams Co., No. PV005, at 6 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Jan. 28, 1998) ("Petitioner worked diligently to develop compliant marine antifouling coatings."); Jefferson Smurfit Corp., No. 3212, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Mar. 26, 1998) ("Applicant showed that it had acted reasonably The company applied for a variance before doing the testing; the applicant discussed the testing with the District staff; and Applicant did the testing in an efficient manner, taking less time than initially requested."); Raychem Corp., No. 3216, at 2-3 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (June 11, 1998) (applicant's discovery of fugitive emissions from coating line "was a surprise," and ensuing noncompliance, despite cessation of production and development of phased schedule for construction of abatement equipment, was beyond applicant's reasonable control); and Southern California Edison Co., No. 1262-81, at 4 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Aug. 18, 2004) ("Petitioner could not have anticipated the equipment malfunction because petitioner followed established engineering protocols . . . and has worked closely with the manufacturer to ensure that the equipment is operated and maintained as recommended by the manufacturer.").

47. City of Davis, No. 83-002, at 1 (Hearing Board, Yolo-Solano Air Pollution Control District, Order Denying Variance) (July 26, 1983) ("The petitioner has failed to correct equipment deficiencies under a previous variance."); James W. Crawford, No. 2545 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Jan. 5, 1982) ("Petitioner has been aware of District Rules and Regulations and has made no effort to come into compliance."); Mariana Packing Co., No. 3047, at 2 (Hearing Board, Bay Area Air Quality Management District, Order Denying Variance) (Jan. 18, 1996) ("[B]ecause of Applicant's own administrative neglect or contracting error, Applicant failed to purchase the NOx retrofit kit in time to meet the January 1, 1996 deadline established by Regulation 9-7-301."); Micrel, Inc., No. 3206, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Denying Variance) (Feb. 5, 1998) (Applicant failed to demonstrate "that it has acted and is acting with reasonable diligence to comply with the regulations;" applicant "operated its semiconductor facility . . . without first obtaining permits from the District; conducted photoresist operations continuously for more than one year without abatement equipment; and exceeded its permitted [12 months] limit for combined POC and NPOC emissions by 1.3 tons in a period of 8 months."); Vernon Textiles Industries Inc., No. 4933, at 5 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (July 1, 1998) ("the delay in achieving compliance was due to petitioner's failure to act with sufficient diligence"); Tosco San Francisco Area Refinery, No. 3268, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Denying Variance) (June 17, 1999) (applicant, which failed to isolate leaking connections to stop the leaks and delayed repairs until a scheduled shutdown, had not proven the leaks were due to conditions beyond its reasonable control); Supertex, Inc., No. 3324, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Denying Variance) (Nov. 30, 2000)

Occasionally hearing boards have heard a contrary argument about the meaning of the “reasonable control” language. They have been urged to find that, regardless of an applicant’s past history of inattention to its air pollution control obligations, variance relief is justified if immediate abatement of the pollution is beyond the source’s reasonable control. Similarly, they have been urged to find diligence when the source addressed the emissions problem soon after the APCD cited it for a violation or did testing which showed a violation, even though the regulation had been in force long before then.

These kinds of arguments have been rejected, as they should be.⁴⁸ To have accepted them would make variance relief available to a polluter who chooses to wait until the APCD’s enforcement efforts focus on it. If the polluter cannot then immediately comply, because of obstacles such as control equipment construction and installation delays, it would have a period of exemption from enforcement. This is not what the legislature has told the hearing boards to allow.

The inquiry into diligence can be immeasurably aided by the readiness of district inspectors, engineers, and lawyers to provide pertinent information. They should present in the hearing the relevant district records about the past history of the source’s activities, especially its history of contact with APCD enforcement staff which should have alerted it to its responsibilities. It is important that the attorneys for both the applicant and the APCD make clear to the hearing board precisely when the pertinent regulations came into force or were amended into the version at issue in the case. It may seem troubling to the board, for example, that the applicant has done nothing at all to control its emis-

(“Applicant failed to meet its burden of proof with respect to this finding because Applicant repeatedly failed to follow its consultant’s advice regarding the proper operation of its abatement equipment.”); and Kushwood Manufacturing Inc., No. 4989-3, at 3 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 25, 2002) (“the problems with product finish quality experienced by petitioner were the result of inconsistent coating application procedures, inadequate housekeeping measures, and inadequate quality control procedures at petitioner’s facility. . . . Petitioner’s anticipated violation of the permit condition is not due to conditions beyond the reasonable control of petitioner.”).

48. To understand the rejection of these arguments, it may be helpful to think of the metaphor of the purported marathon runner who only enters the race near the finish line. That runner should not be declared a winner. See Malcolm Moran, *Doubts Rise on Woman’s Feat; ‘I Ran Race,’ She Says*, N.Y. TIMES, Apr. 22, 1980, at B15 (questioning Rosie Ruiz’s victory in Boston Marathon); Neil Amdur, *Backtalk; 20 Years Later, the Legend of Rosie Ruiz Endures*, N.Y. TIMES, Apr. 16, 2000, § 8, at 11.

sions over a five year period, but if the applicable regulation was promulgated only one year ago and went into effect six months ago, then the applicant's position on the diligence question is not as weak as it might first appear.

As with the hardship inquiry, the legislature more recently has elaborated on the factors bearing on diligence. . Section 42352.5(a)(1) now mandates consideration of "the extent to which the petitioner took actions to comply or seek a variance, which were timely and reasonable under the circumstances." This provision also calls for consideration of "actions taken by the petitioner since the adoption" of the requirement for which variance protection is sought. These clarifications confirm the sensible, retrospective approach to diligence which hearing boards already were employing.

District legal and enforcement personnel—in variance cases and generally—have an obligation to aim their efforts toward the quickest possible compliance, but the variance process also should encourage them to have compassion for the applicant that genuinely is in a bind "due to conditions beyond its reasonable control." On the other hand, variances are not free passes for irresponsible polluters harboring the notion that hearing boards merely serve the convenient function of restraining zealous enforcement personnel from making polluters' lives difficult. The responsibilities of APCD staff members and lawyers to engage in thorough inquiry into the "reasonable control" issue thus are considerable, and attorneys for variance applicants should prepare their witnesses for this important area of concern.

Presumably the quickest compliance efforts by irresponsible pollution sources will be forthcoming if they must face the ongoing prospect that the district's enforcement machinery can be used against them.⁴⁹ Fortunately it is seldom that highly negligent or irresponsible sources come before hearing boards; nevertheless, the statute requires the boards to examine whether an applicant's hardship is largely self-imposed and therefore not to

49. The principal enforcement and penalties provisions are found in CAL. HEALTH & SAFETY CODE §§ 42400-42400.6, 42402-42410 (West 2006). *See, e.g., A-1 Roofing Serv.*, 151 Cal. Rptr. at 522 (misdemeanor conviction under Section 42400 for violation of APCD regulations). To the extent that the risks and burdens imposed by the enforcement machinery are small—either because the courts hesitate to impose full penalties or because enforcement personnel do not press vigorously for penalties in court or for substantial settlements—the incentives for corrective efforts will be diminished.

be relieved, or whether it is due to circumstances beyond its reasonable control and therefore deserving of official mitigation.

In 1992 the legislature added two sentences to Section 42352(a)(2). They supplement the traditional hardship and diligence inquiries with language tailored to public agencies, a category of variance applicants not usually concerned about their "property" or "business" in the conventional sense. The new language first clarifies that for an applicant that is a "public agency,"⁵⁰ the inquiry pertinent to the hardship and diligence finding is "whether or not requiring immediate compliance would impose an unreasonable burden upon an essential public service."⁵¹ This latter phrase then is defined by a list of government functions that may at times need variance relief from air pollution restrictions, i.e., "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."

This clarification is helpful, for hearing boards have long struggled to shoehorn the circumstances of these types of public activities into the private business-oriented language of the Section 42352(a)(2) finding.⁵² Nonetheless, the problem is not completely solved by this amendment. There remain other critical public activities which are not included within the "essential public service" definition but which can and do occasionally submit variance applications, e.g., military bases, postal service facilities, forest or wildlife management agencies, and even the Federal Reserve Bank.⁵³ Presumably hearing boards must continue to

50. Section 42352(b) offers an expansive, straightforward definition of "public agency."

51. CAL. HEALTH & SAFETY CODE § 42352(a)(2) (West 2006). The bill adopting this new language is identified *supra* at note 45.

52. *Compare* University of California, San Francisco, No. 3344 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 14, 2001) (applicant performs an "essential public service" in operating its Medical Center and performing medical research there) *with* California State University, Hayward, No. 3018 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Jan. 18, 1996) (requiring immediate compliance "would result in an arbitrary and unreasonable taking of property or closing of a lawful business") and San Quentin State Prison, No. 3006 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 21, 1995) (requiring immediate compliance "would result in an arbitrary and unreasonable taking of property or closing of a lawful business.")

53. *See, e.g.*, Federal Reserve Bank of San Francisco, No. 501 (Hearing Board, Bay Area Air Pollution Control District, Order Granting Variance) (July 17, 1974); The U.S. Postal Service, San Francisco Division, No. 505 (Hearing Board, Bay Area

contort the pre-existing language of the (a)(2) finding in order to grant worthy applications covering these functions, even though the new language omits them from the "essential public service" category. The contortions are less painful now, however, because of the above-mentioned gloss on the hardship issue offered by Section 42352.5(a)(2) for all types of variance applicants. It too focuses attention on the "unreasonable burden" that could be imposed on the petitioner, regardless of whether it is a public agency or provides an essential public service.

Another category of variance applicants which has received special legislative attention is small businesses. The addition of Section 42350.5 to the Code in 1992 emphasized the importance of helping small business operators through the variance process.⁵⁴ That section requires districts that offer forms "for use in filing an application for a variance" to include in such forms a notice to small businesses that the district's assistance is available "in filling out the form and developing compliance schedules."

More substantively, Section 42352.5(b) charitably expands the scope of factors the hearing board is to consider in evaluating a variance application from a small business which emits ten or fewer tons per year of air contaminants. These factors bear on the hardship and diligence finding under Section 42352(a)(2), as elaborated on in Section 42352.5(a). They now are to include the extent and timeliness of the applicant's attempts to comply or seek a variance, the reasons for "any claimed ignorance of the requirement from which a variance is sought," the applicant's "financial and other capabilities to comply," and "the impact on the petitioner's business and the benefit to the environment which would result" if immediate compliance were required. Although these considerations are mostly redundant with other, longstanding statutory provisions, the reference to "timely actions to . . . seek a variance," and the mention of "claimed ignorance" of requirements, suggest a more lenient reception is to be given to

Air Pollution Control District, Order Denying Variance) (Oct. 10, 1974); U.S. Fish and Wildlife Service, No. 1987 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 1, 1988); California Department of Forestry and Fire Protection, No. 2801 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Oct. 27, 1993); Travis Air Force Base, No. 3061 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (May 2, 1996); and Onizuka Air Force Station, No. 3339 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (July 12, 2001).

54. This section, as well as Section 42352.5 which is discussed next, were added by A.B. 3790, enacted on September 29, 1992 as Chapter 1126, Statutes of 1992.

small business applicants. Presumably the small operator whose limited resources and expertise impeded its understanding of applicable requirements, or delayed its filing for variance relief, has a better chance of obtaining variance protection than a larger or more heavily polluting applicant would have.⁵⁵

(3) *That the closing or taking would be without a corresponding benefit in reducing air contaminants.*⁵⁶ This third factor calls the hearing board's attention to the actual character and level of the applicant's emissions. One way of interpreting this provision is to say that it calls for a balancing of the hardship to the applicant if compliance is required against the benefit to the public if the pollution is curtailed by compliance. This is the classic type of balancing of competing interests that courts have performed in nuisance cases for centuries.⁵⁷ It is also very similar to the task that Section 42354 requires the hearing board to perform in drawing up the conditions of each variance order. Under that section the 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."⁵⁸

Since most of the job of evaluating hardship takes place under the second statutory criterion, as discussed above, this third crite-

55. See, e.g., Cal West Equipment Co., Inc., No. 3044 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (Mar. 7, 1996) (variance granted to small business applicant which "claimed ignorance of the requirement from which a variance is sought because the District had used Applicant's product as the basis for the VOC standard and Applicant believed it was in compliance with the District's regulations."). More generous treatment of small business applicants, however, should not be so unrestrained as to resuscitate the "Rosie Ruiz" argument whose rejection is discussed *supra* at note 48.

56. CAL. HEALTH & SAFETY CODE § 42352(a)(3) (West 2006).

57. See generally DAN B. DOBBS, THE LAW OF TORTS 1325-1330 (2000) (describing factors typically weighed by courts in determining unreasonableness in nuisance cases); WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW 110-121 (1977) (describing the factors analyzed in balancing harm and utility that apply to nuisance cases); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 116-122 (2d ed. 1994) (comparing rights theories of nuisance law to economic theories); and 1 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 1.06 (2005). See also City College of San Francisco, No. 3409, at 1-2 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (Dec. 5, 2002) ("If applicant shuts down its Boiler #2, the main campus of City College of San Francisco would suffer major disruption affecting 32,350 students and 1,800 some employees. Students may drop classes.")

58. CAL. HEALTH & SAFETY CODE § 42354 (West 2006).

tion largely adds the mandate that the board take a hard look at the actual air pollution involved in the case. The board needs answers to questions such as these: Exactly what are the pollutants in question? In what quantities are they being emitted? Over what time periods are they being emitted? In what kind of neighborhood is the source located and what effects of the emissions are experienced there? What do we know about the health effects of these emissions? Even apart from health effects, are these emissions annoying or offensive, either by themselves or in combination with emissions from other sources in the area?⁵⁹ What is the nature of air quality in the area already? Will opera-

59. As noted above, such emissions might well constitute a violation of § 41700, thus barring any variance relief. *See supra* text accompanying note 31.

Also, the ARB has examined the possible significance of banked or traded emission reduction credits (ERCs) with reference to the balancing of interests under the (a)(3) finding. The ARB concluded, “Regardless of the benefit that may derive from the use of ERCs, the hearing board is not authorized to require the source, at this stage of the proceedings, to purchase ERCs in order to enable the source to provide evidence [for] the findings.” Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to James Morgester, Chief, Compliance Division, California Air Resources Board 7 (Jan. 27, 1999) (on file with author). The possible relevance of ERCs to the (a)(5) finding is discussed *infra* at note 66. ARB’s view rested on the language of Section 42353 and the clear statutory plan that only after the specific variance findings are made is the board authorized to “prescribe requirements” applicable to the variance recipient’s operations. Section 42353 is discussed *infra* at Section III(C). In at least one APCD, however, ARB’s position has not been followed, and the provision of emission offsets—either through surrender of ERCs or through financial contributions to district emission reduction incentive programs—has been expressly relied on by hearing boards in making various statutory findings. *See, e.g.*, Big West of California, LLC, No. S-05-04R, (Southern Region Hearing Board, San Joaquin Valley Air Pollution Control District, Order Granting Variance) (Mar. 9, 2005), at 4-6 ((a)(3) and (a)(5) findings supported by determination that if applicant is “unable to implement a mitigation approach during the variance period, they [sic] shall fully offset the excess NOx emissions by funding local emission reduction activities under a District emission reduction incentive program” with the funding to “occur at the rate of \$15,000 per ton of excess NOx emissions”); Pastoria Energy Facility, LLC, No. S-04-48R (Southern Region Hearing Board, San Joaquin Valley Air Pollution Control District, Order Granting Variance) (Oct. 13, 2004), at 4 ((a)(5) finding supported by determination that applicant “has proposed to mitigate the project’s impacts by surrendering ERC to offset a portion of the excess NOx emissions, over one ton, released during the variance period”); Spreckels Sugar Co., No. C-01-16S (Central Region Hearing Board, San Joaquin Valley Air Pollution Control District, Order Granting Variance) (June 7, 2001), at 3 ((a)(4) finding supported by determination that applicant “will provide to the District ERCs equal to 20% of the excess NOx, SOx, and PM10 generated from firing the boiler on #6 fuel oil.”) In each of these instances, the variance order also includes the offsets among the order’s required conditions; in other instances, the offsets are not identified with reference to the statutory findings, but only are included as required, mitigating conditions. *See orders cited infra* at note 92.

tions under a variance make the air quality any better or worse than it already has been?

The answers to these and related questions must come largely from the presentation of detailed testimony by district witnesses and the applicant's own technical personnel and consultants. In some instances, this type of information has been presented in connection with federal Clean Air Act requirements that a finding be made of noninterference with the attainment and maintenance of national ambient air quality standards so that a variance can qualify as a revision of the State Implementation Plan (SIP).⁶⁰ As will be discussed below,⁶¹ there has been serious confusion and conflict over this and other aspects of the linkage between the federal Clean Air Act and California's variance process. Whatever the correct interpretation of federal law may be, it does seem that fundamentally the same type of information as may be federally required is also called for if the hearing board is to have a basis for answering the third statutory question under California law.

(4) That the applicant for the variance has given consideration to curtailing operations of the source in lieu of obtaining a variance. This criterion requires the variance applicant to demonstrate that it has considered solving its noncompliance problem through limited operations and without a variance. This requirement thus explicitly authorizes hearing boards to reject a variance request when there has been no such consideration by the applicant. Realistically, however, it is hard to imagine an applicant that has not at all considered—and would admit to this inattentiveness—how it might alter its activities in order to come into compliance and thereby avoid the expense and inconvenience of a variance proceeding.

More importantly, the boards would seem to be authorized implicitly to reject applications even when there has been such consideration and feasible, not overly burdensome means of eliminating the violation have been identified but have not been adopted.⁶² An additional reason for rejecting variance relief under these circumstances is the possible cost advantage the ap-

60. See *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975); U.S. ENVIRONMENTAL PROTECTION AGENCY REGION IX ENFORCEMENT DIVISION, VARIANCES, VARIANCE ORDERS, WAIVERS, AND CONDITIONAL PERMITS AS COMPLIANCE SCHEDULE REVISIONS TO THE SIP (July 1979) (on file with author).

61. See discussion *infra* at Section III(F)(2).

62. See, e.g., *Supertex, Inc., No. 3324*, at 4 (Hearing Board, Bay Area Air Quality Management District, Order Denying Variance) (Nov. 30, 2000) (“[T]he Applicant

plicant could enjoy as compared to competitors that already are in compliance because they are quietly bearing the burden of curtailed operations or increased pollution controls which this applicant has not yet shouldered.⁶³ This finding's main significance thus is that an applicant that somehow reasonably can curtail operations, and thereby eliminate its violation, simply does not need a variance and should not be granted one.

(5) *During the period the variance is in effect, that the applicant will reduce excess emissions to the maximum extent feasible.* This requirement seems conceptually simple: The applicant must prove that its noncomplying emissions during the variance period will be reduced as much as is "feasible." Stated conversely, excess pollution allowed by the variance must be as little as possible.⁶⁴ This seemingly clear message, of course, must be read in statutory context if this finding is to have sensible meaning. Emissions reductions "to the maximum extent feasible" are not simply whatever reductions are technologically possible. The feasibility limitation must be understood in conjunction with the hardship and curtailment findings discussed above. The excess emissions reduction finding thus focuses on emissions from operations that are allowed to continue according to the "unreasonable burden" criterion of hardship under (a)(2) and that need not be further curtailed pursuant to the (a)(4) finding.

The question, in other words, is whether reasonable emissions reductions are possible while the noncomplying operations continue under the variance. To answer this question, the hearing board has to closely scrutinize specific, and usually temporary, mitigation measures that the applicant can employ during the variance. Such measures might include changes in fuels or produc-

fails to meet this requirement because there is evidence that Applicant could comply by curtailing its operations.")

63. See CALIFORNIA AIR RESOURCES BOARD, FUNDAMENTALS FOR HEARING BOARD MEMBERS 11 (March 28, 2003) available at www.arb.ca.gov/enf/variance/boardmem.htm ("It should also be determined that the variance will not give the petitioner an unfair competitive advantage over other businesses of the same type."). Cf. Kushwood Mfg. Inc., No. 4989-3 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 25, 2002) (order denying variance relief and stating "compliant topcoats, including the same topcoats being used by petitioner, are being used successfully by other wood furniture manufacturers within the District. The evidence indicates that the problems being experienced by the petitioner are the result of improper application of the coatings by petitioner, rather than with the compliant topcoats.").

64. Excess emission fees are discussed *infra* at Section III(C).

tion schedules, shifting of raw materials from one storage tank to another, or use of portable abatement devices.

As will be discussed below,⁶⁵ hearing boards have long had the power to impose emissions restrictions within the conditions of variance orders pursuant to Health and Safety Code Sections 42353 and 42354. Excess emissions reduction is therefore not a new factor in variance cases, or at least in variance orders. What is new with Section 42352(a)(5), however, is imposition of the burden of proof on the applicant on this factor. Essentially the addition of (a)(5) to the Code in 1989 emphasized the importance of continued emissions reductions during variances. It also eased the hearing board's task on this point by facilitating the creation of an evidentiary foundation for an order requiring such reductions. Now the applicant who fails to carry its burden—of proving how great, or small, feasible reductions are—simply should not be granted a variance because this finding then could not be made.⁶⁶ Rarely, of course, should this unproductive result

65. See Section III(C), *infra*.

66. Similarly, the curtailment finding of (a)(4) emphasizes a long-standing variance consideration, rather than adding a new one. The applicant who was found capable of reasonably curtailing operations as a means of coming immediately into compliance did not deserve a variance because it did not need one. That applicant could be deemed not necessarily in violation of the law as required by (a)(1), or its claim of hardship beyond its "reasonable control" could be found unpersuasive under (a)(2). The same result also would be compelled for a source that is allowed by district rules to use ERCs as a compliance alternative, and thus is able to substitute the surrender of ERCs for compliance with ordinary emissions limitations. See Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to James Morgester, Chief, Compliance Division, California Air Resources Board 7 (Jan. 27, 1999) (on file with author).

The ARB also notes that when district rules do not allow the ERCs option, a variance applicant can satisfy the (a)(5) finding, as the legislature intended, only by minimizing "the source's *own* emissions, since it is the source's emissions which are 'excess.'" The offering of emission reductions achieved earlier or elsewhere, and then embodied in banked or traded ERCs, would not seem to be an acceptable alternative method of making the (a)(5) showing. As ARB says, the (a)(5) finding "requires an inquiry into the efforts the source will make to reduce its own excess emissions." *Id.* at 8. ARB contradicts itself, however, by then stating that "nothing in Section 42352 would prevent [ERCs] from being taken into account" by the hearing board "either with respect to the findings or to the terms of the variance," if the source proposes "this method of reducing emissions if reductions at its own facility were infeasible." *Id.* at 7-8. The better view—in terms of consistency with ARB's own analysis of (a)(5) and with the overall statutory scheme—is to consider uses of ERCs not as possible support for the variance findings but only as part of the variance order's conditions, as discussed *infra* at note 92. Nonetheless, as earlier mentioned, some hearing boards in recent years have incorporated ERCs into both portions of their orders. See orders cited *supra* note 59.

be reached, for the applicant's chore on this point is, as stated earlier, fundamentally not a difficult one.

(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. This finding, like the previous two, relates to the applicant's performance during the variance term, rather than to the advance circumstances that precipitated the variance request. It also confirms, rather than creates, the hearing board's power to issue an order requiring the variance holder to keep close track of its emissions and provide that data to APCD staff personnel. Nonetheless, the applicant now must take the initiative to declare its willingness to comply with a staff request for emissions monitoring or other quantification methods and reports. Implicitly this statutory section confers power on the district to make such a request, to establish a schedule for the emissions reporting, and to have the hearing board enforce the request through its variance order.

Generally, any sensible applicant should be entirely willing to express a cooperative attitude and provide a basis for this finding. However, there may be instances in which honest differences of view may arise as between the applicant and the district. For example, the district may request monitoring and reporting on a schedule the source operator considers needlessly burdensome because of the frequency of the prescribed activities. The source also might consider the requested monitoring equipment and analytical methods to be excessively costly and unjustified by the limited utility of the information they would generate. These are the types of disputes the hearing board would have to resolve before it could make the (a)(6) finding and write a fitting order.

C. *Orders*

If the hearing board concludes that it can make the six statutory findings in favor of the variance applicant, the board's remaining task is to issue an order granting the relief. That chore has two principal aspects. First, the order must explain the bases for the findings. Second, the board must set out the duration and conditions of the variance protection, i.e., it must "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.”⁶⁷ This provision empowers the board to devise tailor-made requirements for the individual variance recipient.

1. Explaining the Findings

The Health and Safety Code directs each hearing board to “announce its decision in writing” in each case, and to “immediately” file copies with the board’s clerk and to mail copies to “all of the parties or their attorneys.”⁶⁸ The statute also mandates that the decision “shall include the reasons for the decision.”⁶⁹ In past years, there was uncertainty among California’s various hearing boards as to the practical meaning of this requirement. If the basic statutory obligation in variance cases is that the hearing board “make” the six findings, is it enough to declare each finding in a conclusionary manner or must a much fuller statement of “reasons for the decision” accompany each one? The better practice, now the nearly universal practice, is for the hearing board to explain in at least moderate detail the facts and evaluations that underlie each finding.

A major impetus for the widespread acceptance of the necessity and value of such explanations has been pronouncements on this subject by the ARB. As early as 1987, the ARB issued a legal opinion which concluded:

The mere citation of Health and Safety Code Section 42352 in a decision on a petition for a variance is not legally sufficient. Applicable statutes and case law require that the hearing board’s written decision must include a statement of facts, application of the facts to the findings required by Health and Safety Code Section 42352, and a conclusion granting or denying the petition. . . .

The mere recitation of the statutory findings will not be sufficient, because the recitation of the findings does not provide the reason the findings were made. The record must show that an adequate analysis of the circumstances involved in each petition for a variance occurred.⁷⁰

In addition to basing its conclusion on interpretation of the Code provisions, the ARB also borrowed heavily, and appropriately,

67. CAL. HEALTH & SAFETY CODE § 42353 (West 2006).

68. CAL. HEALTH & SAFETY CODE at § 40860.

69. CAL. HEALTH & SAFETY CODE at § 40862.

70. Memorandum from Margery Knapp to James Morgester (Nov. 10, 1987) (on file with author). This internal ARB legal opinion was transmitted to hearing boards in an ARB Advisory, dated February 18, 1988, entitled “Legal Requirements for Variance Orders.”

from judicial decisions calling for local agencies' land use decisions to be supported by explanations of findings in sufficient detail to allow effective judicial review.⁷¹ Apart from these legal bases for the conclusion, it obviously makes strong policy sense for a hearing board to explain its decision well. This written exercise helps to maximize the likelihood that the board really has thought through all of the pertinent issues and reached a sound, defensible result. Also, the parties will be enabled to understand the bases for the resolution of their concerns, and any interested members of the public will have a better opportunity to understand what has been done.

The ARB has added muscle to its opinion by occasionally reminding hearing boards of ARB's power to revoke or modify any hearing board's variance order. This authority derives from Code Section 42362, which broadly authorizes such ARB action "if, in its judgment, the variance does not require compliance . . . as expeditiously as practicable, or the variance does not meet the requirements of this article." This provision has been in the Code since 1975, but the power it confers has hardly ever been exercised.⁷² Nonetheless, the state board often brings its author-

71. The most important of these decisions was *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). More recently, ARB has found further support for its conclusion in judicial decisions under the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000 et seq., such as *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 365, 1 Cal. Rptr. 3d 726 (2003) ("CEQA has very specific requirements regarding what findings must be in the record. Do not ignore the requirements or . . . you will find yourself in the unenviable position of having your judgment reversed")

72. The ARB official with principal responsibility for variance oversight reported in 2004 that "as long as I've been in the program (about 12 years) [we] have never had to 'revoke' a variance." Email memorandum from Judy Lewis, Associate Air Pollution Specialist, California Air Resources Board, to author (June 24, 2004) (on file with author).

On December 14, 2005, the ARB did exercise its statutory authority, at the request of district staff, and held a "rehearing" pursuant to Sections 42362 and 42363 on a variance order granted by the Hearing Board of the North Coast Unified AQMD. See *Petition for a Variance by Evergreen Pulp, Inc.*, No. 2005-3A (Hearing Board, North Coast Unified Air Quality Management District, Findings and Order) (July 15, 2005); and CALIFORNIA AIR RESOURCES BOARD, NOTICE OF PUBLIC HEARING ON EVERGREEN PULP, INC. PETITION AND VARIANCE (Dec. 10, 2005), stating, "[T]he California Air Resources Board has scheduled a Public Hearing . . . to consider the following: A Rehearing of the Petition and Variance" See also John Driscoll, *State Air Quality Official Listens About Pulp Mill*, EUREKA TIMES STANDARD, Dec. 15, 2005 ("The hearing office with the California Air Resources Board . . . was originally to consider whether to overturn a variance the regional air quality hearing board issued Evergreen Pulp But an agreement reached between North Coast Unified Air Quality Management District and the company asked instead that the term of the variance be cut short by four months.").

ity to hearing boards' attention. More concretely, ARB frequently indicates that specific orders need fuller explanation, in order to avoid exercise of the state agency's authority to override or change them.⁷³

As earlier noted,⁷⁴ three hearing board members must agree before a variance application can be granted or denied. It is not unusual, of course, for there to be disagreement among hearing board members as to whether there is a basis for making all of the requisite findings. In those situations, the written decision virtually always records how each member has voted. Addition-

ARB has characterized the language in Section 42362 regarding compliance "as expeditiously as practicable" as, in effect, creating an additional, "implicit finding" requirement for variance orders. ARB similarly labels the prohibition on variance relief from the statutory public nuisance provision, discussed *supra* at note 31. See CALIFORNIA AIR RESOURCES BD., FUNDAMENTALS FOR BOARD MEMBERS, available at <http://www.arb.ca.gov/enf/variance/boardmem.htm> (last visited Jan. 28, 2006). Whether or not these two considerations are called "findings" of one sort or another, they are important enough that the hearing board should address them in each variance order.

A fuller discussion of ARB's various functions relative to hearing boards is presented *infra* at Section VI(A).

73. See, e.g., Letter from James Morgester, Chief of Compliance Division, California Air Resources Board, to author (Mar. 17, 1989) (on file with author) ("As you are aware, ARB reviews each variance order your Hearing Board issues to determine whether the provisions of the HSC are met. In reviewing variances issued after January 1, 1989, we found the following variance does not make all six findings now required under Section 42352.). See also CALIFORNIA AIR RESOURCES BOARD, ARB VARIANCE REVIEW POLICY FOR COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 42352 (Mar. 8, 1991) ("[T]he ARB reviews each variance order granted. It has been our policy to return variance orders that do not comply with the requirements of Health and Safety Code (HSC) Section 42352. . . . If the variance order does not provide the findings and the reasons, we will return it to you with the recommendation that the order be reheard or that appropriate corrections to the order be made"); Letter from James Morgester, Chief of Compliance Division, California Air Resources Board, to Hearing Board Chairman (name and district redacted) (Sept. 12, 2001) (on file with author) ("As part of our oversight responsibility, the Air Resources Board reviews variance orders granted by hearing boards throughout the state. It has come to our attention that a variance order recently submitted by your Board . . . does not adequately address part two of Health and Safety section 42352(2) [sic]. . . . Please note, future variance orders submitted to ARB that are missing any portion of a required finding or with any other deficiency will be returned by the ARB to you for modification or rehearing."); and Letter from Paul Jacobs, Acting Chief of Enforcement Division, California Air Resources Board, to Hearing Board Chairman (name and district redacted) (Apr. 4, 2002) (on file with author) ("Variance order #02-02 does not contain statements which specify the . . . reason for the decision as required by H&SC Section 40862. These statutory requirements are in keeping with the decision of the California Supreme Court in *Topanga Association for a Scenic Community v. County of Los Angeles*.")

74. See text *supra* note 12.

ally, in some hearing boards it has become the practice for dissenting members to append to the decision an explanation of the grounds of their disagreement with the majority.

There are many good reasons for dissenting views to be expressed in writing. These reasons have been explored by numerous scholars and judges with respect to the purposes of judicial dissents. For example, United States Supreme Court Justice John Paul Stevens has said:

[I]t actually facilitates the fair adjudication process if everyone states his own conclusion as frankly as he can. I think it also serves the purpose to let the litigants know that . . . their arguments were understood and they were persuasive to some, even though not to all. . . . I think preserving in the record of the opinion of the case itself, the fact that there was a diverse point of view . . . may make a record that will help at a future date when the same issue may be again presented for reexamination.⁷⁵

Justice Stevens's last point is of particular salience with respect to the challenge faced by the attorney preparing to go before a hearing board, as discussed above.⁷⁶ If the attorney is to communicate effectively with the board members, he or she should be as familiar as possible with how they approach hearing board matters. Dissenting views can be as informative in this regard as explanations of majority views.

From this perspective, there is little or no reason for members to hesitate to write dissents. There is, of course, some potential for lengthy, inaccurate, and even intemperate dissents to be written, which may contribute to inefficiency or friction in the hearing board. In an apparent overreaction to such abuses, the Hearing Board of the Bay Area AQMD (BAAQMD) added to its procedural rules in 2002 a provision indicating that "[s]eparate dissenting or concurring opinions of individual Hearing Board members will not be included in the Hearing Board decision/Order on any matter."⁷⁷ No other hearing board has this prohibition, which is both unnecessary and unwise.

75. QUOTED IN KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* 272-273 (2001). Justice Stevens has also written, "If there is disagreement . . . about how a case should be resolved, I firmly believe that the law will be best served by an open disclosure of that fact, not only to the litigants and their lawyers, but to the public as well." *Id.*, Foreword by Justice Stevens, at xii.

76. See text *supra* note 21.

77. Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 10.5, available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005). If this restriction were to be interpreted to allow concurring or dissenting members to

2. Duration

Both the attorneys for a variance applicant and those representing district staff have important roles to play in helping the hearing board develop effective and lawful variance orders. Because of its expertise and enforcement responsibilities, the district staff almost always should have a position on whether a variance is justified.⁷⁸ Even in those occasional instances when it does not, the staff still should be able to provide the board with its views on the suitable duration of variance relief, if any is granted. The district's air pollution engineers and testing experts, as well as the applicant's personnel, consultants, and equipment suppliers, should be able to offer opinions as to the amount of time needed to obtain, install, and bring into operation any control measures the source will use to come into compliance. Equally desirable is the staff's opinion as to whether the proposed control approach is likely to work. The hearing board should not have to rely solely on the applicant's witnesses for this information.

The duration of variance relief at times has been a point of contention additionally because of uncertainty about hearing boards' power to grant retroactive variance relief. There are two types of variance retroactivity. First, it has been argued that variance relief can be granted retroactively to a date prior to the date of filing of the application. Presumably the effect of such an approach would be to invalidate district notices of violation issued to a source even prior to the filing. Many years ago, a Health and Safety Code provision allowed a BAAQMD enforcement proceeding in court to be removed to the hearing board. If the board then determined that a variance would have been justified, counsel for the district would have been required to dismiss the court proceeding.⁷⁹ The legislature's repeal of that provision strongly implies that hearing boards no longer have any authority

issue written explanations of their votes in some other manner, separately from the board's written decision, it still would undercut the value of expressed concurrences and dissents. Not only would it be harder for the parties and public to gain access to these minority views, but paradoxically their separate presentation could give them more dramatic significance than a disagreement on the merits—a not unusual occurrence—ordinarily deserves.

78. The appropriate weight to be given this opinion is addressed *infra* in Section VII.

79. CAL. HEALTH & SAFETY CODE § 24369.1 (West 1975), *repealed by* Act of Sept. 22, 1975, ch. 957, § 10, 1975 Cal. Stat. 2138, 2141; Simmons & Cutting, *supra* note 2, at 121-22.

to determine in variance cases the merits of violations antedating sources' submission to hearing board jurisdiction.

The second, more common retroactivity concern arises when a hearing board is asked to make its variance order effective as of the date the initial variance request was filed, even if that had occurred weeks or months prior to the hearing and decision. The BAAQMD hearing board adopted this practice in the 1980s, but it was criticized a few years later by the ARB in correspondence regarding specific cases. The ARB stated, "[W]e know of no other districts which have adopted rules allowing variances to be retroactive to the date of application."⁸⁰ In late 1993, the ARB formalized its disagreement, explaining to all districts that even though the Code "does not specifically address the issue of retroactivity," various practical and policy considerations led ARB staff to conclude "that a variance shall be effective prospectively only."⁸¹

Subsequently, ARB softened its position, recognizing that under some circumstances it is fair and sensible to allow variance protection to extend as far back as the date of initial filing.⁸² ARB still emphasizes that "retroactive variances should not provide a safe harbor for violators who belatedly apply for variances,"⁸³ but it also recognizes that occasionally a considerable period of time elapses before the hearing or resolution of a variance application. Such delay can occur for reasons—such as the board's difficulties in scheduling a heavy caseload or in assembling a quorum—having nothing to do with the efforts of the ap-

80. Letter from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to Thomas Ferrito, Chairman, Bay Area Air Quality Management District Hearing Board 2 (Jan. 6, 1993) (on file with author).

81. CALIFORNIA AIR RESOURCES BOARD, ADVISORY ON RETROACTIVE VARIANCES (Dec. 13, 1993), at 2, 4.

82. See CALIFORNIA AIR RESOURCES BOARD, ADVANCED HEARING BOARD WORKSHOP MANUAL 5 (Mar. 2003). See also Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to Hollis Carlile, Chairman, Southern Region Hearing Board, San Joaquin Valley Unified Air Pollution Control District 10 (May 5, 1997) (on file with author) ("We believe the better view is that variances are effective prospectively only, with any additional enforcement relief to be afforded by the District in accordance with its exercise of 'prosecutorial discretion.' However, it is accepted hearing board practice in some Districts to designate the effective date of the variance as the date the petitioner filed the application for a variance.") See, e.g., Monterey Bay Unified APCD, Reg. VI, Rule 4.5, available at <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised Dec. 13, 1984) ("If a variance is subsequently granted . . . , it may become effective no earlier than the date and time of the initial written filing.")

83. *Id.*

plicant itself. There is little justification for leaving a variance applicant in protracted jeopardy of district enforcement action when administrative factors such as these prevent prompt completion of the matter.⁸⁴

Indeed, in recognition of the fairness of retroactive variance relief in many cases, and to avoid unnecessary burdens on enforcement staff, at least one district has adopted a sensible rule suspending the issuance of notices of violation “during the period between the date of filing for the variance application and the date of decision by the Hearing Board.” During that time, however, “evidence of additional violations shall be collected and duly recorded,” and violation notices may thereafter be issued if the variance is denied. If it is granted, however, no notices are to be issued “except in extraordinary circumstances as determined by the Air Pollution Control Officer.”⁸⁵

3. Conditions

Beyond the important question of what a variance’s duration should be, another major aspect of variance orders is the operating conditions to be imposed during the variance period. As noted earlier, Health and Safety Code section 42353 requires the hearing board to prescribe alternative requirements that will govern the source’s operations while it works toward compliance with its normal regulatory obligations. Also, Section 42354 gives

84. In response to ARB’s original objections to the BAAQMD board’s practice, the District’s counsel wrote a point-by-point rebuttal to each of ARB’s arguments. Memorandum from John Powell, District Counsel, Bay Area Air Quality Management District, to Thomas J. Ferrito, Chairperson, Hearing Board, Bay Area Air Quality Management District (Jan. 11, 1993) (on file with author). That document concluded:

The net effect of the ARB view . . . would require applicants in many cases to first seek an emergency variance . . . , then to seek an interim variance . . . and then to seek a regular variance. Such an approach would be unduly burdensome and costly for the applicant, for the District Staff, and for the Hearing Board. It seems highly unlikely that such an unwieldy arrangement was contemplated by the Legislature.

Id. at 3.

At about the same time, a member of that Hearing Board cogently outlined a common variance application scenario in which, “even in the case of a diligent Applicant, the Hearing Board may not have sufficient evidence to justify the granting of a variance until some months after the commencement of a violation.” Memorandum from Gail McCarthy, Member, Bay Area Air Quality Management District Hearing Board (Jan. 1993) (on file with author).

85. Bay Area Air Quality Mgmt. Dist. Rule 1-402, “Status of Violation Notices During Variance Proceedings” available at <http://www.baaqmd.gov/dst/regulations/index.htm#reg1> (last amended May 2, 2001).

the hearing board considerable discretion to evaluate the equities of the case in drawing up these requirements.⁸⁶

Many questions arise at this point, and the parties should be prepared to suggest answers. What emission limitations should the source observe during the variance? Should specific alterations in production processes, schedules, or equipment be required? Exactly what schedule of increments of progress should the applicant be required to follow in order to come into compliance by the end of the variance period? These and other questions must be resolved by the board as it issues its variance order, and the district's expertise, and the applicant's intimate knowledge of its operations, should be brought to bear on them.

The statute explicitly requires any variance for a period exceeding one year to have "a schedule of increments of progress specifying a final compliance date."⁸⁷ Additionally, variance orders may require the payment of excess emission fees, which are statutorily authorized.⁸⁸ These fees are linked to the quantity and type of emissions discharged during the variance period in excess of what regulations ordinarily allow. The setting of fee schedules in any APCD is, of course, a statutory function entrusted to the district's governing board, pursuant to Code provisions such as Section 42311; only if that board has established

86. See *supra* text accompanying notes 58, 67.

87. CAL. HEALTH & SAFETY CODE § 42358(b) (West 2006).

88. CAL. HEALTH & SAFETY CODE §§ 40506(b) and 40510 (West 2006) authorize an emissions-based addition to permit and variance fees in the South Coast AQMD. Although the Code is less clear about the authorization for such fees in other districts, it was held in *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App.3d 1132, 250 Cal. Rptr. 420 (1988) that emissions-based fees were allowed elsewhere by the broad permit fees provisions in Section 42311. The court stated, "The express reference to the possibility of using emissions as a basis for the south coast district board's fees in section 40510 is not sufficient to overcome the strong indications of legislative intent in the legislative analysts' reports pertaining to section 42311." *Id.* at 1144. Implicit statutory confirmation of the power to impose excess emission fees is found in Section 42301.3(g)(1), discussed *supra* at notes 34 and 38. That provision allows limited variance protection for an applicant for a permit to construct when there is a delay in the permit approval process. It also declares, "The hearing board shall not impose any excess emission fees in connection with the grant of the variance." Obviously this statement would be unnecessary if no such power already existed. It also has been suggested that excess emission fees are authorized by Sections 42353 and 42354, which establish hearing board power to impose extensive variance conditions, including requirements that would mitigate the impact of operations during the variance period. Interview with Judy Lewis and Leslie Krinsk, California Air Resources Board, Sacramento, California (June 16, 2004).

such fees, may the hearing board impose them in appropriate cases.⁸⁹

As noted above,⁹⁰ the ARB has considered whether hearing boards have the power to require the surrender of emission reduction credits (ERCs) as a condition in variance orders. In effect, ERCs would be used as a means to actually mitigate excess emissions in the air, rather than just mitigating them monetarily through fee payments. The ARB has observed that, pursuant to a hearing board's power and "wide discretion" under Sections 42353 and 42354 to prescribe requirements in a variance order, "a hearing board could require a source to purchase ERCs as a condition of receiving a variance as long as the hearing board determined that this condition was not 'more onerous' than compliance with the underlying rule which led to the variance request."⁹¹ Assuming that somehow the comparative onerousness of ERCs versus ordinary emissions requirements can be calculated rationally, ARB's view seems warranted by the breadth of the statutory authority granted to hearing boards in drafting variance orders. In some districts, such as the South Coast AQMD and the San Joaquin Valley APCD, it has become a common

89. For examples of district rules implementing these fees, see Bay Area Air Quality Mgmt. Dist. Regulation 3, Section 3-301, Schedule A, available at <http://www.baaqmd.gov/dst/regulations/index.htm#reg1> (last amended June 15 2005); El Dorado County Air Quality Mgmt. Dist., Rule 606.3(C), available at <http://www.arb.ca.gov/drdb/ed/cur.htm> (adopted June 20, 2000) (a variance petitioner may be required "as a condition of granting a variance . . . , to pay excess emission fees to mitigate excess emissions"); Kern County APCD, Rule 305.1 ; and South Coast AQMD, Rule 301(d)-(h).

90. *Supra* notes 59, 66.

91. Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to James Morgester, Chief, Compliance Division, California Air Resources Board 8 (Jan. 27, 1999). An additional observation offered by ARB regarding ERCs and variances is misguided. The ARB says that generally ERCs "do the most good for air quality when left in the bank." Therefore, it says, a hearing board may conclude in a particular case that certain types of ERCs—such as "interchangeable ERCs"—"will not result in actual reductions in air contaminants, and will not benefit air quality." *Id.* ARB's position on this point amounts to an invitation to hearing boards to disregard or override state law, district regulations, or both. If there are statutory provisions or district regulations authorizing the issuance and use of ERCs, it is not within a hearing board's power to determine that this policy has been written into law unwisely and to diminish the economic value of lawfully created ERCs by selectively disallowing their use. ARB seems to be suggesting that the only good ERC is an unused ERC. If that view were to prevail, there probably would be no ERCs created at all because there would be no incentive to do so if they could never be used. In any event, that is not the law, and hearing boards do not have the power, in an individual case or more broadly, to try to make it so. The author appeared as counsel for the holder of interchangeable ERCs in the hearing board proceedings discussed *supra* at note 19.

practice for hearing boards to require—or at least cajole—variance applicants into surrendering ERCs. In the latter District, for example, it is a fairly common practice in variance cases involving large quantities of excess emissions for ERCs to be surrendered in amounts usually equaling 20% of the excess emissions.⁹²

Another possible type of condition, the requirement of a performance bond pursuant to section 42355, should also be considered in appropriate cases. The statutory purpose of a bond is “to assure performance of any construction, alteration, repair, or other work required by the terms and conditions of the variance.”⁹³ A bond provides an added incentive to stay on schedule toward compliance, especially when there is some reason to doubt the future diligence of the applicant. A bond has been imposed, however, only rarely in hearing board orders.⁹⁴

92. Telephone interview with W. Clark, Compliance Manager, San Joaquin Valley Air Pollution Control District (Apr. 11, 2005). *See, e.g.*, Sunrise Power Co., No. S-01-16S (Southern Region Hearing Board, San Joaquin Valley Air Pollution Control District, Order Granting Variance) (May 9, 2001), at 4 (“To mitigate the excess NOx and CO emissions, the Petitioner shall obtain and surrender ERCs equal to 20% of the excess NOx and CO emissions generated during the variance period above the noted variance levels.”); Hanford LP, No. C-04-06S, at 5 (Central Region Hearing Board, San Joaquin Valley Air Pollution Control District, Order Granting a Short Variance) (July 21, 2004) (“... Hanford shall obtain and surrender ERCs equal to 100% of the actual excess SOx emissions generated during the variance period.”) *See also* orders cited *supra* at note 59. In one instance, the Bay Area AQMD hearing board’s inclination to require both excess emission fees and the surrender of ERCs was objected to as unauthorized and illogical overreaching. The board then recognized that although one or the other measure made sense, the imposition of both would be inherently contradictory and, in effect, would impose requirements more onerous than permissible. Only the excess emission fees were ordered. Chevron Products Co., No. 3382 (Hearing Board, Bay Area Air Quality Management District, Order Granting Variance) (May 23, 2002). Telephone interview with John T. Hansen, Pillsbury Winthrop Shaw Pittman LLP, counsel for Chevron Products Co., (May 5, 2005).

93. CAL. HEALTH & SAFETY CODE §42355(a) (West 2006).

94. Davis Walker Corp., No. 520 (Hearing Board, Bay Area Air Pollution Control District, Order Granting Variance) (July 7, 1975); Certain-Teed Prods. Corp., No. 509 (Hearing Board, Bay Area Air Pollution Control District, Order Granting Variance) (Dec. 23, 1974); *see* James Abercrombie, Performance Bonds (Apr. 25, 1980) (paper presented at California Air Resources Board, Air Pollution Enforcement Symposium, on file with author).

Occasionally a bond is required by an abatement order, although this too is rare. This was done in a 1991 case before the Butte County AQMD hearing board. *See* Louisiana Pacific Corp., No. 91-26 (Hearing Board, Butte County Air Pollution Control District, Conditional Order for Abatement) (May 24, 1991). This order incorporated a Stipulated Settlement Agreement which required the respondent to deposit \$100,000 into a specified bank “as collateral against meeting the increments of progress set forth in the Order for Abatement.” The Agreement provided that a

specified portion of the deposit was to be forfeited to the District as a civil penalty "for each increment of progress date or goal that is not met" and that the full amount would be forfeited for other, more substantial failures. Although this provision appeared to be more in the nature of an advance deposit against future penalty assessments, rather than a means "to assure performance," the parties at times did label it as a "performance bond." *Id.* (Release of Order for Abatement Performance Deposit entered January 4, 1993) ("the performance bond on deposit . . . is hereby released . . .").

In an extremely contentious abatement case in the early 1980s, the SCAQMD hearing board required the respondent to post "a bond or other financial security . . . in the sum of two million dollars (\$2,000,000) to ensure performance of the terms of the Order for Abatement as modified and to ensure availability of funds to operate and maintain air pollution control measures after closure of the landfill." Operating Indus., Inc., No. 2121-2, at 13 (Hearing Board, South Coast AQMD; First Modification of Order for Abatement entered Aug. 2, 1983). Although the statutory authority for requiring a bond in an abatement order is not as clear as it is for variance orders, such a provision was judicially upheld in the Operating Industries case. The dispute and its resolution were described by SCAQMD counsel as follows:

[O]ur hearing board issued the order for abatement requiring OII to undertake remedial actions at its landfill District inspectors subsequently discovered numerous violations of the order and the hearing board thereupon required the company to post a performance bond in the amount of 2 million dollars. The bond was intended to create an added incentive for the company to comply and to ensure availability of funds for installation and operation of emission controls OII filed a petition for a writ of mandate pursuant to CCP § 1094.5 seeking to overturn the bond requirement. The company argued that the board has no authority to issue such a requirement in the context of an order for abatement Los Angeles Superior Court Judge John L. Cole determined . . . that the hearing board does have authority to require posting of financial security in connection with an order for abatement and that such a requirement was properly imposed in this case. Judge Cole reasoned that the general grant of authority to issue orders requiring compliance with District rules provided adequate authority to require posting of financial security, when there was evidence that such security was reasonably necessary to assure compliance with District rules. The court determined, however, that there was evidence that OII could not obtain a bond or immediately post cash security in the sum of 2 million dollars due to its poor financial condition. The court therefore commanded the hearing board to reconsider the form of financial security which should be posted.

Letter from Peter Greenwald, Senior Deputy District Counsel, South Coast Air Quality Management District, to author (Aug. 12, 1986).

See also South Coast Air Quality Mgmt. Dist. v. Operating Indus., Inc., Case No. C 466 425 (Los Angeles County Superior Court, Peremptory Writ of Mandamus) (Jan. 18, 1984). Thereafter OII and the District agreed that the company would create a trust fund with an initial deposit of \$200,000 and would place a \$1.8 million dollar deed of trust on certain other real property OII owned. The hearing board could order use of the initial deposit for the emission controls required by the abatement order if OII defaulted on any of the order's requirements. OII would use best efforts to sell the mortgaged property and deposit the sale proceeds, up to \$1.8 million, in the trust fund as well. "In addition, the District could force a sale of this property if OII was found to be in default of obligations under the order for abatement." Thereafter most of the initial deposit was directed by the District for use in ensuring "continued operation of the gas gathering and control systems at the landfill." Also, in the summer of 1986, the other property was sold and the full \$1.8 million was

In short, close attention must be paid to the specific terms of the variance order. For the particular source covered by the order, the terms of the variance are the law. Since the ordinary regulations do not apply, the specific regulatory provisions involved in the case must be brought out with complete clarity.⁹⁵ District enforcement personnel will have to treat the terms of the variance as the law applicable to the variance holder for the period of the variance. These personnel cannot do their jobs, and the source cannot know what is expected of it, unless the variance conditions are clear and complete. The statutory responsibility for drawing up such orders ultimately rests with the hearing boards themselves,⁹⁶ but they cannot do it well without the active assistance of the parties and their lawyers during the hearings.

deposited in the trust fund for further use in remediation of the site. Letter from Peter Greenwald to author, at 3.

95. See *supra* text accompanying note 41.

96. See *supra* note 22. The procedures employed for the drafting of orders vary widely among hearing boards, and even a single board will alter its practices from one case to another. In many districts, initial drafting of orders is commonly done by a member of the district staff who has participated in the proceeding. Often the drafting is undertaken first by the prevailing party's attorney or other representative. In many instances, of course, a hearing board member or the board's clerk will perform this task. Interview with Judy Lewis and Leslie Krinsk, California Air Resources Board, Sacramento, California (June 16, 2004). Ultimately, of course, the board itself must edit, approve, and issue the final order.

For examples of pertinent hearing board rules, see, e.g., Antelope Valley Air Quality Management District, Rule 515 (d)-(e) ("Findings and Decision"):

Formal written Findings and Decision of the Hearing Board shall be prepared by the Hearing Board unless otherwise directed by order of the Hearing Board.

Whenever parties are directed to prepare the Findings and Decision of the Hearing Board, the Findings and Decision shall be submitted to the Hearing Board within fifteen (15) days after the date of the hearing. . . . Prior to submittal, the Findings and Decision shall be approved by the opposing party. When parties cannot agree to the form of the Findings and Decision, a hearing may be requested to determine the form of the Findings and Decision.

This rule tracks the language of South Coast Air Quality Management District Rule 515. In response to the high volume of cases it has faced for many years, the Hearing Board of the South Coast District has developed many procedural rules which subsequently have been adopted or adapted by hearing boards elsewhere in the state.

See also Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 10.3, available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005):

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

D. *Interim Variances*

As with other aspects of air pollution law in California, the statutory provisions on variances have become more complex over the years. An example of this development is the splintering of the variance concept into a variety of categories. One such refinement is the interim variance. Another is the emergency variance. The presence of these phrases in the Health and Safety Code has prompted the coining of names for other kinds of variances not so clearly labeled by the legislature. For example, Section 40825, part of the batch of statutory requirements for notice of hearings, identifies variances that are “to be in effect for a period of not more than 90 days.” These are now commonly known as “short” or “short term variances.” The phrase “short variances” even now appears in one statutory section.⁹⁷ Longer variances, the main area of variance work, are usually called “full,” “regular,” or “ordinary” variances.⁹⁸ The lack of consistency in use of these labels is not a serious problem, for usually people involved in a case agree on what they are talking about.

Section 42351(a) declares that a variance applicant “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.”⁹⁹ Section 42351(b) then states that an interim variance may be granted “for good causes stated in the order” and may not last longer than either the date of decision on the underlying variance application or ninety days, whichever occurs first. This preliminary period of variance protection is granted on the basis of an abbreviated, initial inquiry into “good causes.” “Good causes” seems to contemplate a preliminary examination of the likelihood that the applicant will be able to make a persuasive case for the requested, underlying va-

97. CAL. HEALTH & SAFETY CODE § 40501.3 (West 2006).

98. See, e.g., Mendocino County Air Quality Mgmt. Dist. Rule 1-620(c), (e), available at <http://www.co.mendocino.ca.us/aqmd/Regulations.htm> (last revised May 6, 2003) (“short term variance” and “regular variance”); Great Basin Unified Air Pollution Control Dist. Rule 602(E)(3)-(4), available at <http://www.gbuapcd.org/rulesandregulations/index.htm> (adopted Sept. 5, 1974) (“short term variance” and “regular variance”); Mojave Desert Air Quality Mgmt. Dist. Rule 503(e)(3), available at <http://www.arb.ca.gov/drdb/moj/cur.htm> (adopted Aug. 1, 1975) (“short variance”); and Yolo-Solano Air Quality Mgmt. Dist., Rule 5.1(402.5) available at <http://www.arb.ca.gov/drdb/ys/cur.htm> (adopted Feb. 23, 1994) (“general variance – 90 days or less” and “general variance – greater than 90 days”).

99. CAL. HEALTH & SAFETY CODE § 42351 (West 2006).

riance protection when the full hearing is held.¹⁰⁰ A court engages in an analogous inquiry when a preliminary injunction is sought, focusing predominantly on the likelihood that the applicant ultimately will prevail on the merits, and also assessing the relative hardships to the parties and the public if preliminary relief is or is not granted.¹⁰¹

Hearing boards occasionally provide explanations of the meaning of “good causes.” The Bay Area AQMD Hearing Board did so in a 2004 decision, using language which reflects the preliminary injunction analogy:

[A] finding of Good Cause is requisite to the granting of an Interim Variance. An Application for an Interim Variance will typically be set for hearing on an expedited schedule, one consequence of which is the preclusion of a more considered review of the Application by both the District and interested members of the public. Because of this, the granting of an Interim Variance . . . based upon such a truncated procedure, should occur only when Applicant can demonstrate both 1) that there is a likelihood that the six regular variance criteria will be met, and 2) that significant adverse consequences will result if the granting of variance relief is delayed until a hearing on a regular variance Application occurs.¹⁰²

The board then denied relief on the basis that no showing at all had been made by the applicant “regarding adverse consequences from delayed consideration by the Hearing Board.” The board rejected the argument that adverse consequences were shown simply because “the Applicant will be subject to additional penalties for noncompliance.” Even though the applicant may be uncertain about the ultimate outcome of its variance re-

100. See *Delta Energy Center, LLC*, No. 3438 (Hearing Board, Bay Area Air Quality Management District, Order Granting Interim Variance) (Oct. 30, 2003); *Ray Nisson Warehouse*, No. 83-003 (Hearing Board, Yolo-Solano Air Pollution Control District, Order Granting Interim Variance) (July 26, 1983); *Peter Kiewit Sons’ Co.*, No. 83-001 (Hearing Board, Yolo-Solano Air Pollution Control District, Order Granting Interim Variance) (Apr. 12, 1983).

101. See generally D. Riesel, *Preliminary Injunctions and Stays Pending Appeal in Environmental Litigation*, SJ101 ALI-ABA 107, 111 (2004) (“Traditional analysis has required the movant to demonstrate a substantial likelihood of success on the merits, a substantial threat that he will suffer irreparable harm unless the preliminary injunction is granted, that the threatened injury if the injunctive relief is denied outweighs the possible harm to defendants if relief is granted, and that issuance of injunctive relief will serve the public interest. Indeed this is still the law being applied by many courts.”); and John D. Leshy, *Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner*, 6 *ECOLOGY L.Q.* 639 (1977).

102. *Ox Mountain Landfill*, No. 3463, at 3 (Hearing Board, Bay Area Air Quality Management District, Order Denying Interim Variance) (Apr. 28, 2004).

quest, the board said, “the granting of variance relief through the truncated procedure of an Interim Variance hearing must be based upon a more compelling cause.”¹⁰³

On its face, this approach to interim variances seems flawed, though on closer examination of its context, it probably is not. The board says that satisfaction of the six statutory criteria—or an initial showing of the likelihood of satisfying them—is not enough. However, if an applicant can indeed satisfy the six statutory criteria, and especially the hardship and diligence criterion of Section 42352(a)(2), then it is contradictory at the interim variance stage to conclude that no adverse consequences will flow from delayed consideration of the regular variance request. The same adverse consequences will flow at that stage as would flow from denial of the regular variance. The most obvious such consequence is the imposition of monetary penalties, as the board recognizes. Under the statutory language of Section 42352(a)(2), the threat of penalties must be understood as creating serious pressure for precisely the types of hardship that variances are intended to ease, i.e., operational and financial burdens on businesses and similar activities.¹⁰⁴ It is these burdens that interim variances are supposed to promptly mitigate for protection of an applicant whose ultimate position on the full variance request looks promising. Accordingly, to require “compelling cause” to be shown, including specific burdens beyond the usual burdens of compliance, is incorrect. There is no evident reason to make it extra hard for interim variance relief to be obtained by an applicant who otherwise is likely to prevail at the full hearing.¹⁰⁵

Of course, as earlier mentioned,¹⁰⁶ the Bay Area AQMD hearing board has long followed the practice of making its variance orders effective as of the initial filing of the variance request. A regulation in that District also protects the variance applicant from enforcement action pending ultimate resolution of the variance proceeding. Under those practices, if a hearing board

103. *Id.* at 4.

104. See text *supra* at note 42.

105. In *Aera Energy LLC, No. 751*, at 5 (Hearing Board, Ventura County Air Pollution Control District, Order Granting Interim Variance) (Mar. 1, 2003), the board “found that there was good cause to grant an interim variance because there is a substantial probability that at the noticed hearing in this matter the petitioner will be able to prove” the six statutory criteria as well as the unlikelihood that a nuisance or immediate public health threat would be created and the reasonableness of the increments of progress.

106. See text *supra* at notes 80-85.

grants regular variance relief and makes it retroactive to the date the application was filed, then the denial of an interim variance ultimately creates no unfair outcome. The Bay Area Hearing Board's 2004 decision was based on the understanding of these practices by the parties and the board.¹⁰⁷ Therefore, in that context, the seeming harshness of the interim variance denial ultimately could be avoided. However, in a district that does not follow such practices, the "compelling cause" approach would be neither lawful nor fair.

In most districts, the hearing board gives greatest attention in interim variance cases to the reasonable control or diligence issue, the second area of emphasis under Section 42352(a)(2).¹⁰⁸ The board tries to ascertain preliminarily whether the applicant has been diligent in discovering its noncompliance with district regulations and taking steps to eliminate the problems.¹⁰⁹ If such a showing of diligence is made, an interim variance can be granted. At the later hearing on the regular application, proposed corrective measures and all other aspects of the case can be explored in detail. Often the interim variance hearing provides a good opportunity for the board to identify questions the parties should research further so they can make thorough presentations at the full hearing.¹¹⁰

Despite the straightforward purpose of interim variance hearings, there are a few problems associated with them. One difficulty is the scheduling of interim variance hearings. Because hearing boards are not in session full time, this may be a difficult

107. Telephone interview with Adan Schwartz, Senior Assistant District Counsel, Bay Area Air Quality Management District (May 6, 2005).

108. See text *supra* at note 46.

109. The South Coast AQMD Hearing Board emphasizes that "good cause" must be based on "persuasive evidence" that the circumstances leading to the violation "could not reasonably have been avoided by Petitioner, or anticipated in sufficient time to provide for public notice of the variance hearing" and that the petitioner "exercised diligence in petitioning for the interim variance and scheduling the interim variance hearing." HEARING BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, GOOD CAUSE GUIDELINES 2.

110. The South Coast AQMD Hearing Board has stated, with regard to both interim and emergency variances, "Since it is sometimes the case that the Petitioner does not yet know the cause of the event necessitating the variance, and/or the steps that will be required to bring them back into compliance, the Petitioner is only required to present the information that has been gathered by the date of the emergency or interim variance hearing. Complete evidence supporting the six findings, however, should be developed and presented by the time of the short or regular variance hearing." *Id.*

matter.¹¹¹ In smaller districts, those with a population of fewer than 750,000, the problem is less acute, for an interim variance hearing may be held by a designated, single board member.¹¹² This further suggests that an interim variance hearing is to be abbreviated and preliminary in character. Where this expedient is not available, however, a question remains as to how long a gap between an interim variance hearing and a regular variance hearing justifies even holding the separate interim variance hearing.

If the board's calendar is so crowded that it cannot schedule an interim variance hearing until a date very close to the regular variance hearing, it is not efficient to hold a separate, initial hearing, especially because the hearing board could later combine the two hearings into one.¹¹³ It then could issue a regular variance order, making it retroactive to the date of original filing of the application. That would give the applicant the complete legal protection it wishes, although it would not have given the applicant the interim peace of mind that the statute contemplates. As earlier discussed, district regulations or discretionary enforcement policies may provide some such reassurance to an applicant by suspending or deferring enforcement measures while a variance application is pending.¹¹⁴

111. Cf. Willick & Windle, *supra* note 5, at 531 n. 137.

112. CAL. HEALTH & SAFETY CODE § 40824(c) (West 2006). This provision also broadly requires the interim variance request to be reheard by "the full hearing board" within 10 days of the decision "[i]f any member of the public contests a decision made by a single member." It is difficult to imagine that this requirement would be frequently invoked, at least by anyone other than an unsuccessful interim variance applicant. That applicant probably would not even need to rely on this section, however, because of the rehearing right specifically afforded to "a party" by Section 40861.

A single member hearing is similarly allowed in the smaller districts on a request for an "interim authorization," a temporary modification of a schedule of increments of progress in a variance order. Interim authorizations can be granted to allow continued operation of the source when the applicant "is unable to notify the hearing board sufficiently in advance to allow the hearing board to schedule a public hearing on the application." Whether issued by a full board or a single member, no more than one interim authorization per application can be granted and it cannot extend for more than 30 days. CAL. HEALTH & SAFETY CODE § 42351.5 (West 2006).

113. The Hearing Board of the Bay Area AQMD at times has combined the interim and regular variance hearings in a case if calendar constraints made it impossible to set the interim variance request more than 30 days ahead of the regular variance hearing. This approach sought to minimize unnecessary duplication of hearings, recognizing that it is difficult to avoid repetition of information when the same case is heard in these two stages.

114. See text *supra* at notes 80-85.

Attorneys and parties in an interim variance hearing should assist the hearing board in keeping the focus of the proceedings limited to a preliminary survey of issues, and the diligence issue in particular. Some applicants have a difficult time comprehending this two-step process, which is understandable since they are interested in getting as much variance protection as they can as soon as they can. It is therefore often incumbent on the APCD's attorney to assist the applicant and the hearing board in keeping the interim variance hearings directed toward the useful, but limited, protection the legislature designed the interim variance device to provide.

E. *Emergency Variances*

Since 1975, Section 42359 has contained a vague reference to the possibility of dispensing with ordinary notice and hearing requirements for variances "in the case of an emergency."¹¹⁵ A few years later, section 42359.5 expanded hearing board powers in all districts to deal with emergencies.¹¹⁶ That section now refers to "an emergency variance" which may be granted by a designated single member of a board "without notice and hearing." Such an emergency variance may be issued for "good cause, including, but not limited to, a breakdown condition."¹¹⁷ The maximum length of an emergency variance, however, is thirty days.

Under these provisions each district now has flexibility to create an efficient and simple process for dealing with emergencies, especially breakdowns.¹¹⁸ An approach followed in some dis-

115. CAL. HEALTH & SAFETY CODE § 42359 (West 2006) was added in 1975. Act of Sept. 22, 1975, ch. 957, § 12, 1975 Cal. Stat. 2138, 2186.

116. CAL. HEALTH & SAFETY CODE § 42359.5 (West 2006) was added in 1976, Act of Sept. 6, 1976, ch. 773, § 1, 1976 Cal. Stat. 1814, but originally only applied to the San Diego County APCD. It was amended in 1979 to apply to all districts. Act of July 10, 1979, ch. 239, § 5, 1979 Cal. Stat. 494, 495.

117. CAL. HEALTH & SAFETY CODE § 42359.5 (West 2006). As mentioned *supra* note 11, alternate hearing board members are barred by Section 40800 from holding single member emergency variance hearings.

118. "Breakdown condition" is not statutorily defined. District regulations, however, often provide a definition. *See, e.g.*, Bay Area Air Quality Mgmt. Dist. Regulation 1-208, available at <http://www.baaqmd.gov/dst/regulations/index.htm#reg1> (last amended May 2, 2001) (defining "breakdown" as "[a]ny unforeseeable failure or malfunction of any air pollution control equipment or operating equipment which causes a violation . . . where such failure or malfunction" is not the result of intent, neglect, or improper maintenance, and is neither a nuisance nor an "excessively recurrent breakdown of the same equipment.>"). On May 25, 2001, Section 42359.6 was added to the Health & Safety Code as an urgency measure to clarify and broaden the ability of facilities to receive emergency variances during the electrical

tricts is to allow an applicant to “file” its request for emergency relief by telephone.¹¹⁹ An immediate series of telephone calls, involving the applicant, district staff, and a designated hearing board member, can produce a decision within a few hours. In this process, the pivotal importance of the hearing board clerk and other administrative personnel in facilitating, and keeping an accurate record of, telephone deliberations and decisions on emergency variances cannot be underestimated.

The telephone procedure has been used in a great variety of cases. For example, it was resorted to frequently by gasoline service station operators who experienced difficulties with components of vapor recovery systems and would have been subject to stringent, immediate sanctions in the absence of variance relief.¹²⁰ One advantage of this approach is that it allows for the possibility of imposing immediate conditions on a source while the emergency is still occurring. Other districts, while recognizing the importance of swift action on emergency variance requests, choose not to hear them by telephone, but instead make sure that a board member is available on short notice to conduct a hearing in person and render a prompt decision. This is the practice, for example, followed by the San Diego APCD Hearing Board.¹²¹

In emergency variance cases in which a swift decision turns out not to be critical, or necessary information cannot be obtained from district staff and the applicant to enable the designated member to make an informed decision immediately, hearing

energy crisis then facing California. The section emphasized that “a breakdown condition includes” the startup or shutdown of a facility operating under an interruptible power program contract, or the failure of a facility to operate air emission control equipment, if either situation was caused by a power interruption or curtailment initiated by the state’s Independent System Operator or a public utility. By its terms, the section expired on January 1, 2003.

119. See, e.g., Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 2.5.d, *available at* http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005) (“An applicant may convey a request for an emergency variance to the Clerk by telephone or in person.”); and San Diego APCD Hearing Board Rule 10(d) (“A request for an emergency variance shall be initiated by calling or contacting the Air Pollution Control Officer. A petition shall be filed . . . not later than the second working day following the initial contact.”).

120. CAL. HEALTH & SAFETY CODE § 41960.2(d) (West 2006).

121. See San Diego Air Pollution Control District Rule 97 (1995), *available at* <http://www.sdapcd.org/rules/rules/Reg5pdf/R97.pdf>; and SAN DIEGO AIR POLLUTION CONTROL DISTRICT HEARING BOARD, MINUTES OF THE EMERGENCY VARIANCE HEARING, (June 8, 2004) (regarding Petition for Emergency Variance of Duke Energy South Bay LLC, No. 3919). The author appeared as counsel for the applicant in that proceeding.

board procedures may allow for an initial telephone filing, a written filing soon thereafter, and a deferred decision. Within a few weeks of the initial request, the full board can review the matter and hold a hearing just as it would in any short term variance case.¹²² The whole incident then can be thoroughly examined by the board, and retroactive variance relief can be granted if warranted.

Some districts have adopted regulations that deal in two steps with emergencies based on breakdowns. The first step allows the source to promptly notify district staff of the breakdown problem and to have a short grace period—usually no more time than the sooner of the end of the production run or a specified number of hours such as 24 or 48—in which to eliminate the problem without enforcement action being taken by the district.¹²³ If, however, the problem cannot be resolved within the designated breakdown allowance, the emergency variance process then can be used.¹²⁴

Although emergency variance procedures are a marked departure from the notice and hearing requirements that traditionally have characterized hearing board work, they are a useful supplement to the administrative adjudication format the boards usually follow. The legislature has directed the hearing boards to stand ready to promptly listen and respond to the needs of air polluters encountering sudden noncompliance circumstances. The legislature apparently understands the wisdom and fairness in the adage “Justice delayed is justice denied.”¹²⁵

122. CAL. HEALTH & SAFETY CODE § 40501.3 (West 2006), added in 1981, authorizes single member hearings in the South Coast AQMD in emergency, interim, or “short variances” cases on the stipulation of the parties. Because of the unique frequency with which that hearing board meets, it would seem that much of its emergency variance work can be handled in prompt hearings.

123. Occasionally it is asserted that this approach improperly creates an “administrative variance.”

124. See, e.g., Sacramento Metro. Air Quality Mgmt. Dist. Rule 602, §§ 301-04, available at <http://www.airquality.org/rules/rule602.pdf> (amended Dec. 6, 1978); and San Luis Obispo County Air Pollution Control District Rule 107 (1995), available at <http://www.arb.ca.gov/DRDB/SLO/CURHTML/R107.htm>.

125. JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS 472 (Justin Kaplan ed., 17th ed. 2002).

F. Variance Variations

1. Product Variances

Occasionally hearing boards receive variance requests filed by one person on behalf of others. As earlier noted,¹²⁶ some of these requests have been made by a manufacturer of a product on behalf of its customers, usually distributors or users of the product. The basis for the request is that sale or use of the product would constitute a violation of APCD regulations governing pollution-causing characteristics of the product. The most common types of products have been paints, coatings, and adhesives, which are the subject of numerous, increasingly stringent limitations on their ingredients.¹²⁷ In view of the large numbers of affected—often small business—customers, the financial and logistical burdens of the variance process, and the damage to good will suffered by a manufacturer which is distributing products that jeopardize its customers' legal status, it is not surprising that manufacturers have taken the initiative to try to obtain variance protection for others affected by their noncomplying products.

Prior to 1994, hearing boards relied on the basic statutory criteria for variances in order to grant such relief at the behest of manufacturers. In September of that year, however, an urgency measure removed any doubt about whether hearing boards have the power to grant variances to manufacturers of noncomplying

126. *Supra* Section III(B) n. 36.

127. *See, e.g.*, International Paint, Inc. (Interlux Division), No. 3431 (Hearing Board, Bay Area Air Quality Management District, Order Granting Extension of Product Variance) (Aug. 9, 2004) (fiberglass solvent). *Cf.* State Industries, Inc., No. 2890, at 4 (Hearing Board, South Coast Air Quality Management District, Order Granting Regular Variance) (Mar. 23, 1983) ("Said variance is granted to wholesalers, retailers and installers which offer State, Rheem or American water heaters for sale in the District, whether or not such wholesalers, retailers or installers appeared in these proceedings.") With respect to the gas-fired water heaters at issue, which violated restrictions on nitrogen oxides emissions, the discerning hearing board which granted relief to the manufacturers' customers soon denied relief to one of the manufacturers itself. Rheem Manufacturing Co., No. 2887-9, at 4 (Hearing Board, South Coast Air Quality Management District, Order Denying Variance) (Apr. 19, 1983) ("At least three water heater manufacturers other than Rheem (American Appliance Corp., State Industries and Amtrol) claim to have developed full lines of complying water heaters [P]etitioner has not taken steps in a reasonably expeditious manner to achieve compliance. In particular, we note that [its] program for evaluation of alternate burner designs was not commenced until . . . well over three years after adoption of the Rule.")

products.¹²⁸ Another new variance category, “product variances,” was created within a new batch of Health and Safety Code provisions.¹²⁹ Although these provisions are not frequently invoked,¹³⁰ they offer a more efficient and forthright way of adapting hearing board functions to the peculiarities and exigencies of these types of cases when they arise.

In most respects the statutory provisions are close adaptations of the basic statutory approach. For example, the petitioner must demonstrate that the product is or will be in violation, requiring compliance would impose hardship due to conditions beyond the

128. A.B. 2680, 1994 State Assem., Reg. Sess. (Cal. 1994). See Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to Hollis B. Carlile, Chairman, Southern Region Hearing Board, San Joaquin Valley Unified Air Pollution Control District 28 (May 5, 1997) (on file with author) (“The standard variance provisions did not quite fit the product situation, but served as the basis for the findings and conditions for granting product variances.”).

129. CAL. HEALTH & SAFETY CODE §§ 42365-42372 (West 2006). Prior to the enactment of these provisions, these types of cases occasionally were classified by hearing boards as “class action” variances or “group variances.” Although such cases can be handled more efficiently now under the product variance category, some districts still include provisions in their procedural rules for other situations in which the class or group variance approach may be suitable. See, e.g., Monterey Bay Unified Air Pollution Control Dist., Regulation VI, Rule 7.10, available at <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised Dec. 13, 1984), which states:

Validity of Class Action: As soon as practicable after the commencement of a proceeding brought as a class action, the Hearing Board shall determine whether it may properly be so maintained and may, if necessary, hold a hearing with respect to this determination prior to the initiation of hearings on the merits of the application.

Bay Area AQMD Hearing Board Rule 2.7 sets forth in considerable detail the procedures to be followed for this type of class action variance filing, although such cases are labeled as “Group Variances.” The latter terminology also is employed in the South Coast AQMD. South Coast AQMD, Rule 303(j) (“Group Variance Fees”).

130. See, e.g., The Sherwin Williams Co., No. PV005 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Jan. 28, 1998 and Nov. 24, 1998) (marine antifouling coatings); Minnesota Mining & Manufacturing Co., No. 2937 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (June 1, 1995) (adhesive for pavement marking tape, symbols and legends). The enactment of a new district regulation can prompt the filing of a flurry of product variance applications by manufacturers facing compliance difficulties. See, e.g., TACC, No. 3300 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (May 11, 2000) (contact bond adhesive); Level One Contact Adhesives, Inc., No. 3303 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (May 11, 2000) (contact bond adhesive); Wilsonart International, Inc., No. 3295 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (Apr. 6, 2000) (contact bond adhesive). As of mid-2005, the South Coast AQMD Hearing Board reported that it “seldom” received product variance applications. Interview with South Coast Air Quality Management District Hearing Board, Diamond Bar, California (June 14, 2005).

petitioner's reasonable control, and the hardship would be without a corresponding benefit in reducing air contaminants.¹³¹ The duration of a product variance is generally limited to one year but may cover two years if a schedule of increments of progress and final compliance date are included. Extensions also are allowed for good cause.¹³²

The most curious and distinctive of these statutory sections provides that if a hearing board grants a product variance and specifies that "the only way to achieve compliance will be for the district to adopt or amend a rule or regulation," then the air pollution control officer must set a public hearing before the district governing board and recommend whether the regulation should be amended. The governing board then must act within one year of the variance order, either by amending the regulation or determining that a change is not warranted.¹³³ There is a certain Alice in Wonderland quality to this provision. What the hearing board is allowed to do obviously is not to specify how "compliance" can be achieved. Rather, the board can trigger a process that could change the regulation so that the manufacturer's product gets a new chance to comply, but with a different set of legal requirements.

Although oddly constructed, the provision's basic notion is sound. If the hearing board has delved into the capability of a product to comply with a district regulation and has concluded that compliance is not possible, the governing board should know about this finding. It also probably should look again into the wisdom and feasibility of its original enactment.

In fact it is not uncommon in product variance cases for the possibility of an amendment to the pertinent regulation already

131. CAL. HEALTH & SAFETY CODE § 42368(a)(1)-(3). It also must be shown that the applicant "exercised due diligence in attempting to locate, research, or develop a product that is in compliance with district rules and regulations." *Id.* at § 42368(a)(4). The South Coast AQMD Hearing Board has found this provision particularly difficult to address when "a competitor of the petitioner has appeared or sent written comments opposing the variance on the ground that the competitor makes a product that complied with applicable District rules." SCAQMD QUESTIONNAIRE, *supra* note 11, at 7. The challenge the board faces is to determine whether the competitor's assertions are validated by actual and substantial usage of the product.

A product variance cannot be granted from a preconstruction permit requirement or where use of the product would result in a nuisance. CAL. HEALTH & SAFETY CODE §§ 42367, 42369(a).

132. *Id.* at § 42372(a)-(b).

133. *Id.* at 42372(c).

to be under consideration by the staff, and even the governing board, while the variance request is pending.¹³⁴ It is important, however, as the ARB has stated, that the hearing board not "usurp the authority of the District governing board by engaging in rulemaking."¹³⁵ It is not the hearing board's function to second-guess or undercut the legislative enactments of the governing board. If product variances were granted without a clear demonstration of all the factors required by the provisions added in 1994, such usurpation of authority might in effect come to pass. Product variance cases may indeed raise questions about the ultimate feasibility of compliance more strongly and urgently than other types of variance requests do, but that does not change the basic, limited role of the hearing board.

2. Links to Federal Law

The importance of federal law in air pollution control increased dramatically after 1970, when the modern Clean Air Act was created by Congress.¹³⁶ In ensuing years, considerable attention has been given to the relationship between variances granted by California hearing boards and the requirements of the federal Act. The fundamental question has been this: What significance, if any, does a California variance have under the federal Clean Air Act? The answer also has been clear for many years: A variance has no legal significance under the federal scheme unless and until it is approved by the U.S. EPA as a revision to California's state implementation plan under the federal statute.¹³⁷

134. Cal West Equipment Co., Inc., No. 3044 (Hearing Board, Bay Area Air Quality Management District, Order Granting Product Variance) (Mar. 7, 1996) (variance granted until pending amendment of regulation is adopted or for one year, whichever is sooner). See also Letter from Curtis Coleman to Jackie Dix, Clerk, South Coast Air Quality Management District Hearing Board (Apr. 7, 1999) (on file with author) (concerning the Sherwin Williams Company product variance, *supra* n. 130). ("The Sherwin-Williams Company no longer requires variance relief under the above referenced variance. The SCAQMD Governing Board amended Rule 1106.1 on February 12, 1999 . . . Thus, Sherwin-Williams is in compliance with Rule 1106.1 requirements.)

135. Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board to Hollis B. Carlile, Chairman, Southern Region Hearing Board, San Joaquin Valley Unified APCD 28 (May 5, 1997) (on file with author).

136. Pub. L. 91-604, December 31, 1970.

137. "Historically, EPA has not recognized variances issued pursuant to state law and has taken the position that such variances do not shield sources from enforcement under federal law. If, however, a variance is submitted to EPA and is found to meet the substantive requirements of the Clean Air Act (CAA) governing SIP revi-

More concretely, this answer means that even though the recipient of a variance is protected from state or APCD officials' enforcement of specific California air pollution statutes and APCD regulations, the variance holder remains subject to enforcement of any applicable requirements of federal law. The confusing nature of this state-federal scheme is most evident when the federal requirements include the California statutory provisions and APCD regulations which are covered by the variance but which also previously have been approved by the EPA as part of the California SIP. Thus the source covered by a variance is safe from enforcement under state law, but remains subject to enforcement of the very same provisions as a matter of federal law.

Although the question was posed and the answer given many years ago, there has been a great deal of confusion and controversy regarding details of this linkage between hearing board variances and the national Clean Air Act. The following summary of the major developments in this ongoing saga may be helpful for understanding of the present situation and future developments.

In decisions as early as 1975 and 1976, the U. S. Supreme Court recognized that a variance granted under state law could provide protection from enforcement of federal law—including state requirements federally approved as part of a SIP—only if the variance was submitted to the EPA and approved as a SIP revision.¹³⁸ On the basis of those rulings and similar EPA pronouncements, California hearing boards were instructed by the EPA and the ARB to modify aspects of their hearing procedures and variance orders so that the orders could be submitted by ARB to EPA as proposed SIP revisions.¹³⁹ Hearing boards fol-

sions, it can be approved as a revision to the SIP, thereby receiving federal recognition." Cal. State Implementation Plan Revision, South Coast Air Quality Management District, 63 Fed. Reg. 51,325 (Sept. 25, 1998).

138. *Train v. Natural Res. Def. Council, Inc.* 421 U.S. 69 (1975) (upholding EPA's treatment of individual variances as SIP revisions); *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) ("[I]f the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance . . . ; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan.")

139. *See, e.g.,* Memorandum from Matthew Walker, Environmental Protection Agency, to Mabel Harder, Bay Area Air Pollution Control District (Jan. 8, 1973) (on file with author) ("Here are the latest revisions in the regulations for submission of compliance schedules. For our purposes we treat variances the same as compliance schedules."); State Implementation Plans, 40 Fed. Reg. 58317 (Dec. 16, 1975) (proposed Environmental Protection Agency regulations on issuance of variances to

lowed this guidance and regularly transmitted variance orders to ARB for this purpose, and ARB in turn submitted those orders to EPA.¹⁴⁰ Periodically, EPA responded back to ARB and the hearing boards with the Agency's evaluation of orders which had been submitted.¹⁴¹ EPA would state in writing whether the variances were approvable or unapprovable as SIP revisions.¹⁴²

It was widely assumed, both by hearing boards and variance holders, that through this process EPA indeed was approving some variances as SIP revisions, and thus was adding temporary

Clean Air Act Implementation Plans); California Plan Revision - Metropolitan Los Angeles Intrastate Air Quality Control Region (AQCR), 43 Fed. Reg. 25684, 25687 (June 14, 1978) ("[E]ach variance still must satisfy the requirements of section 110 of the Clean Air Act and 40 CFR Part 51 in order to be approved by EPA as a revision to the SIP."). See also California and Hawaiian Sugar Co., No. 503, at 2 (Hearing Board, Bay Area Air Quality Control District, Order Modifying Variance and Compliance Schedule) (Oct. 30, 1975) ("[T]he Hearing Board has requested and received testimony from both parties herein with respect to the question of whether the emissions permitted by this variance would have an adverse effect on the attainment or maintenance of national ambient air quality standards, as required by federal Clean Air Act as interpreted by the United States Supreme Court in *Train v. National [sic] Resources Defense Council*, 7 E.R.C. 1735 (April 16, 1975).").

140. "[C]opies of the CARB cover letters to EPA were also submitted to the local districts from which the variances originated. However, . . . these cover letters consistently stated that the enclosed variances were being submitted to EPA in accordance with former 40 C.F.R. § 51.6(d) and asked EPA for the disposition of the variances as compliance schedule revisions to the SIP. The letters' reference to § 51.6(d) was to the EPA regulation governing submission of SIP revisions for EPA approval. Any recipient of these CARB cover letters to EPA would logically conclude CARB was asking EPA to approve the variances." Lawrence J. Straw, Jr., "Variance Protection Risks and the Need for State Leadership and Candor," 1992 Cal. Envtl. L. Rep. 117. See, e.g., Letter from James Morgester, Chief of Enforcement Division, California Air Resources Board, to Carl Kohnert, Jr., Environmental Protection Agency (Jan. 15, 1982) (on file with author) ("In accordance with 40 CFR 51.6(d), I am enclosing for your information hearing board orders . . .").

141. See, e.g., Letter from Thomas W. Rarick, Environmental Protection Agency, to James Morgester, Chief of Compliance Division, California Air Resources Board (June 17, 1987) (on file with author). The letter stated, "Pursuant to § 110(a)(3) of the Clean Air Act, (CAA) as amended, the Environmental Protection Agency (EPA), shall approve a compliance schedule as a revision to the SIP providing it meets the criteria required by 40 Code of Federal Regulations, Part 51. We have listed the criteria and indicated any deficiencies in meeting each item. Any additional condition included in an order which we feel will prevent or delay approval is noted (Attachment 1)." The Attachment, entitled "Evaluations as Compliance Schedule Revisions to the SIP," evaluated 17 variance orders submitted by seven different APCDs.

142. See, e.g., Letter from Terry L. Stumph, Environmental Protection Agency, to James Morgester, Chief of Enforcement Branch, California Air Resources Board (May 26, 1977) (on file with author). This letter stated, using the boiler plate language employed for many years in these communications, "[W]e find eighteen [variances] to be unapprovable with respect to one or more deficiencies . . . The remaining forty-four (44) variances are approvable as submitted."

immunity from enforcement of federal law to the variance's conferral of immunity from state law enforcement.¹⁴³ In the late 1980s, however, it was discovered that the process was not what it appeared to be. ARB was only submitting variance orders to EPA for informational purposes, and not as proposed SIP revisions. EPA was responding as to whether the orders were "approvable" or "unapprovable," but was not actually approving or disapproving any orders at all. It appeared then, as it still does, that no California variance order has ever been submitted and approved as a revision of the California SIP.¹⁴⁴ This means, of course, that during the period of variance protection provided by a hearing board, the source remains in jeopardy of enforcement of federal requirements such as SIP provisions, even if they are the same requirements for which the variance was granted.

Beyond the seeming unfairness of this disjointed result—when an APCD hearing board finds good reason to excuse temporary noncompliance but federal law ignores that conclusion—serious potential exists for the federal government, or a plaintiff suing under the Clean Air Act's citizen suit provision, to induce a court to impose harsh penalties on a source covered by a variance. Few such cases have been brought, but those which have been filed have been very burdensome to the variance holders because, in addition to the expenses of litigation, the monetary penalties the federal government has sought to extract from sources

143. See Letter from Linda Thornton, South Coast Air Quality Management District, to James Morgester, California Air Resources Board (Sept. 12, 1978) (on file with author) (concerning EPA disapproval of specific variances).

144. Interview with Judy Lewis and Leslie Krinsk, California Air Resources Board, Sacramento, California (June 16, 2004).

Following the disclosure that no variances were actually being submitted as SIP revisions, ARB clarified its practices as of October 1, 1989. ARB also conceded, "In the past, there has not been a clearly delineated process for handling the possible submittal of hearing board orders in California to EPA for approval as SIP revisions . . . This may have lead [sic] to some confusion regarding the status of such orders from a federal perspective." Memorandum from James D. Boyd, California Air Resources Board, to All Air Pollution Control Officers (Sept. 14, 1989) (on file with author) The transmittal language and citations of relevant authority in ARB's submittals of variances to the EPA were changed to make clear that they were only for EPA's "information" as required by federal grant provisions. See, e.g., Letters from James Morgester, Chief of Compliance Division, California Air Resources Board, to David Howekamp, Environmental Protection Agency (Nov. 2, 1989 and Aug. 15, 1991) (on file with author) ("As part of our 1988/89 EPA 105 grant requirements, I am enclosing for your information Hearing Board Orders submitted to me by the following air pollution control districts . . .").

in this quandary have been large.¹⁴⁵ Some commentators on this practice of federal “overfiling” against sources holding California variances have argued forcefully against the harshness and unfairness of EPA’s use of submitted variances as a “federal enforcement weapon.”¹⁴⁶ Other commentators, however, have defended the practice on various rationales.¹⁴⁷

In 1990 the U.S. Supreme Court decided *General Motors Corporation v. U.S.*, a case arising from federal overfiling of an enforcement action against a Massachusetts air pollution source protected from state law enforcement through an extension of the regulatory compliance date—in effect, a variance.¹⁴⁸ In contrast with the California ARB’s practice of not submitting vari-

145. “One of the important factors in EPA overfiling is the discrepancy between local penalties and EPA penalties. State penalty amounts are dramatically lower than federal penalties.” Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 *ECOLOGY L.Q.* 207, 233 (1993). Even the settlement of such cases has been costly. As described in the cited article, United Airlines settled a federal overfiling action with a penalty of over \$200,000; the action had been brought while United was operating pursuant to a variance issued by the Bay Area AQMD Hearing Board. *Id.* at 236-241. *See also* U.S. v. Mobil Oil Corporation, No. Civ. S-87-0627, U.S. District Court, Eastern District of California, Consent Decree filed November 10, 1992 (civil penalty of \$950,000 in settlement of multi-million dollar complaint claims; variances had been issued by the Kern County APCD Hearing Board). The author assisted defense counsel in both the United Airlines and Mobil Oil proceedings.

146. Lawrence J. Straw, Jr., *California Air Pollution Variances: A Federal Enforcement Weapon*, 1991 *CAL. ENVTL. L. REP.* 203; Lawrence J. Straw, Jr., *Variance Protection Risks and the Need for State Leadership and Candor*, 1992 *CAL. ENVTL. L. REP.* 117; and Christian F. Kemos, *A Not-So-Hot Ticket: Orders for Abatement from Air Quality Management Districts and Their Implications*, 11 *HASTINGS W.-N.W. J. ENVTL. L. & POL’Y* 85, 88 (2004). (“[B]ringing a federal enforcement action in the face of the state’s rational determination of whether to grant a variance usurps the role meant to belong to the states in enforcing air pollution control.”) *See also* Laurence Chaset, *Title V Variances: To Be or Not To Be—The Prospect for Federal Enforcement of Operating Permits Issued under Title V of the 1990 Clean Air Amendments*, 2000 *CAL. ENVTL. L. REP.* 48, stating as follows:

EPA has long taken the position that it will not recognize state-issued variances from federally enforceable air pollution control requirements. Consistent with this view, EPA has occasionally taken enforcement action against facilities in the state which had applied for and had been granted a variance from an applicable regulatory requirement incorporated into the State Implementation Plan (“SIP”). Such federal “overfiling” has prompted justifiable outrage when it has occurred, and, to date, EPA has resorted to this tactic but rarely in California.

147. *See* W. Thomas Jennings, *California Air Pollution Variances and Federal Enforcement: A Different Perspective*, 1992 *CAL. ENVTL. L. REP.* 111; Melnick & Willes, *supra* note 145. Debate over the propriety of federal overfiling extends beyond air pollution cases to other realms, such as hazardous waste management violations. *See* Joel A. Mintz, *Enforcement “Overfiling” in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 *VA. ENVTL. L.J.* 425 (2003).

148. *Gen. Motors Corp. v. U.S.*, 496 U.S. 530 (1990).

ances to EPA as proposed SIP revisions, the Massachusetts extension had been submitted. There was, however, a long delay between the state's submittal and the EPA's decision on it. The question presented was whether the EPA was entitled under the Act to commence enforcement proceedings for violation of the underlying SIP requirements during the period in which the Agency itself, at some bureaucratic leisure, was considering the possible revision of the SIP requirements governing the source. The Supreme Court unanimously upheld this overfiling power, concluding that "the statute does not reveal any congressional intent to bar enforcement of an existing SIP if EPA delays unreasonably in acting on a proposed SIP revision."¹⁴⁹

Subsequent amendments to the Clean Air Act established a definite time period for EPA action on SIP revisions.¹⁵⁰ Nonetheless, as a matter of national policy, the risk remains of federal overfiling of enforcement proceedings which are inconsistent with the state's treatment of the source whose variance is under consideration for EPA approval. In California, the risk is magnified, for in the absence of submittal of a variance as a SIP revision, the possibility that the EPA or a citizen plaintiff will sue remains open indefinitely, or at least until expiration of the applicable statute of limitations.

In more recent developments, the EPA has taken additional steps apparently to erase any vestige of doubt about whether variances issued by California hearing boards provide protection from enforcement of federal law requirements. In 1997 and 2004, the EPA officially "corrected" the California SIP—along with the SIPs of some other states—to delete state statutory provisions and APCD regulations that set forth the powers and procedures of hearing boards pertaining to issuance of variances.¹⁵¹ This correction seems unnecessary and redundant, in view of the

149. *Gen. Motors Corp.*, 496 U.S. at 540.

150. 42 U.S.C. § 7410(k)(2) (2000 & Supp. 2003).

151. Correction of American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans, 61 Fed. Reg. 38,664 (July 25, 1996) (Proposing the first of these corrections, EPA referred to the addition of Section 110(i) to the Clean Air Act and stated, "[T]he variance provisions currently in the SIPs were rendered without legal effect by amendments to the Clean Air Act enacted by Congress in 1977."); Correction of American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans, 62 Fed. Reg. 34,641 (June 27, 1997); Corrections to the California State Implementation Plan, 69 Fed. Reg. 3045 (Jan. 22, 2004); Corrections to the California State Implementation Plan, 69 Fed. Reg. 67,062 (Nov. 16, 2004). A petition for judicial review of the 1997 rule was dismissed for lack of standing. *Indus. Envtl. Ass'n. v. Browner*, 2000 WL 689518 (9th Cir. May 26, 2000).

early judicial and EPA statements on the impotence of state variances as shields from federal enforcement, and in view of the presence of most of these provisions in the SIP for more than two decades.¹⁵²

Nonetheless, EPA apparently found it advisable to make the separation as clear and complete as possible, by cleansing from the SIP any and all provisions pertaining to variances.¹⁵³ The cumulative result of this effort, on top of the prior judicial and administrative pronouncements, is that sources operating under variances from California hearing boards now should have no doubt about their status: They are safe from enforcement of California law and APCD regulations during the variance, but they are not safe from enforcement of federal requirements.

Ironically, while EPA was taking these actions to seal the divorce between California variances and federal law, concerted efforts were being made to breathe new life into the relationship. The catalyst for these efforts, beginning in the mid-1990s, was the implementation by California APCDs of the federal operating permits program under Title V of the Clean Air Act.¹⁵⁴ Issuance of these permits, predominantly to large industrial and power generating sources, carried a renewed prospect for a serious lack of coordination between APCD functions and federal enforcement actions. Under hearing board authority to grant variances from conditions in APCD permits,¹⁵⁵ the possibility was envi-

152. EPA seemed to acknowledge this point when it stated, "Moreover, because state-issued variances require independent EPA approval in order to modify the substantive requirements of a SIP, removal of these variance provisions from the SIP will have no effect on regulated entities." Corrections to the California State Implementation Plan, 69 Fed. Reg. 3045, 3046 (Jan. 22, 2004).

153. "EPA's basic argument is that it eliminated the variance and hearing board provisions in the California SIP because they were confusing, especially to the regulated industry. . . . But . . . the Air Resources Board and industry groups responded that the EPA rulemaking that eliminated the variance and hearing procedures seemed to indicate that EPA's policy [of rarely bringing enforcement actions against sources under variance] may change, and that enforcement actions against those using variances to exceed emission caps would be justified. Also, these groups contended, why remove a SIP provision after allowing it to exist for years?" INSIDE CAL/EPA (May 15, 1998).

154. 42 U.S.C. §§ 7661-61(f) (2000 & Supp. 2003).

155. The Health & Safety Code mandates that "Title V sources shall not be granted a variance . . . from the requirement for a permit to operate or use." CAL. HEALTH & SAFETY CODE § 42350(b)(2) (West 2006). This prohibition is an adaptation of the long-standing prohibition, discussed *supra* at Section III(A), against the granting of variances from permits to construct. Title V sources, now required by federal law to have permits to operate, cannot be excused from this type of basic requirement through variances. Nonetheless, hearing board power to grant vari-

sioned—indeed considered likely—that the holder of a permit issued under both California law and the federal Title V would be granted variance relief under California law but would remain at risk of federal enforcement proceedings, and burdensome monetary penalties, at the instigation of citizen plaintiffs or the EPA.¹⁵⁶ The relatively swift procedures for hearing board variances would stand in stark contrast with the more protracted procedures for modification of Title V permits.

In view of the extraordinary volume of detailed conditions in many Title V permits, and the highly predictable need for occasional variance relief from some of these conditions, the search for a way to reconcile these two legal regimes began. Thus far, the most significant product of this effort was the adoption in the South Coast AQMD of Rule 518.2, which allows Title V sources to receive a form of variance protection, structured as temporary alternative operating conditions, which will promptly have effect under federal law, as well as state law.¹⁵⁷ After initial reluctance

ances from specific conditions of permits to operate, whether or not those permits also serve as Title V permits, remains undiminished. *See also* Section 42301(d), which states, *inter alia*, “The issuance of any variance or abatement order is a matter of state law and does not amend a Title V permit in any way.”

In Aera Energy LLC, No 752 (Hearing Board, Ventura County Air Pollution Control District, Order Granting Regular Variance) (May 12, 2003 and Sept. 15, 2003), a variance was granted from conditions of a Title V permit. The variance orders, however, contained no intimation that the variance relief had any federal law significance whatsoever. A similar order was entered in Petition for a Variance by Evergreen Pulp, Inc., No. 2005-3A (Hearing Board, North Coast Unified Air Quality Management District, Findings and Order) (July 15, 2005), which is discussed *supra* note 72. The dispute related to that facility included a strong prospect that a citizen suit under the federal Clean Air Act would be filed against it. Telephone interview with George Poppic, California Air Resources Board (Dec. 16, 2005).

The principal thrust of Section 42301(d) is to allow the issuance of a permit to operate to an otherwise qualified Title V source even if the source is operating under a variance at the time of issuance. The provision also states that variance provisions that “prescribe a compliance schedule may be incorporated into the permit consistent with Title V and this division.” For an example of an APCD rule apparently intended to implement this provision, *see* Northern Sierra Air Quality Management District Rule 718 (1991), *available at* http://www.myairstdistrict.com/Reg_VII_-_718.pdf.

156. “[T]housands of companies in the state could be vulnerable to lawsuits that contend Clean Air Act provisions have been violated because of excess emission allowed by permit variances. . . . Enforcement against companies that exceed emission limits established in permits likely would be triggered not by EPA itself, but by outside entities” INSIDE CAL/EPA 2 (Mar. 3, 2000). *See also* Chaset, *supra* note 146.

157. Attempts to develop and secure EPA approval of a model Title V variance rule, led by the San Diego County APCD and the Bay Area AQMD, had not borne fruit as of the end of 2005. *See* Variances Under Title V, Bay Area Air Quality

by EPA, and subsequent revision of the Rule by the District, EPA approved the incorporation of Rule 518.2 into the SIP for the South Coast District.¹⁵⁸

Management District (proposed rule, July 11, 1997) (on file with author). Other districts may be adopting an informal ad hoc approach, treating appropriate variance orders as minor modifications of the Title V permits.

Additional, similar complications, including the risk that a Title V permit holder will receive disparate treatment from the APCD and the federal EPA, arise when the recipient of a permit to operate which also serves as a Title V permit appeals some of the permit's conditions to a hearing board, pursuant to procedures discussed *infra* at Section V(A). See, e.g., Chevron U.S.A. Inc., No. 3451 (Hearing Board, Bay Area Air Quality Management District, Appeal) (Dec. 29, 2003); Valero Refining Co., No. 3453 (Hearing Board, Bay Area Air Quality Management District, Appeal) (Dec. 30, 2003); and Valero Refining Co., No. 3454 (Hearing Board, Bay Area Air Quality Management District, Appeal) (Dec. 30, 2003). The author is one of the attorneys for the appellant in the latter two cases.

158. Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 67 Fed. Reg. 57,954 (Sept. 13, 2002); Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 67 Fed. Reg. 38,626 (June 5, 2002) (EPA's proposed approval of Rule 518.2 as a SIP revision). EPA described the Rule as follows:

Rule 518.2 is designed to allow federal recognition of variances through a SIP-approved process that provides adequate public and EPA participation and that will ensure that the substantive requirements of the CAA continue to be met. In brief, this rule establishes a procedure through which an applicable requirement in the SIP may be temporarily modified as it applies to a particular source. The rule accomplishes this by establishing a mechanism for the creation of alternative operating conditions (AOCs), a means by which to offset any emissions in excess of the otherwise applicable requirements that would result, and provisions for EPA and public review and EPA veto of proposed AOCs through the title V "significant" permit revision process rather than through the source-specific SIP revision process.

Id. at 38627.

Compare Clean Air Act Proposed Interim Approval of the Title V Operating Permit Programs for Nineteen California Air Pollution Control Districts, 59 Fed. Reg. 63,289, 63,292 (Dec. 8, 1994) (EPA interim approval of Title V permit authority for 19 other California APCDs). In this earlier action, EPA noted that "EPA regards State and District variance provisions as wholly external to the [Title V permit] programs submitted for approval EPA does not recognize the ability of a District to grant relief from the duty to comply with a federally-enforceable part 70 [40 C.F.R. Part 70] permit, except where such relief is granted through procedures allowed by part 70."

The South Coast Hearing Board issued its first order under Rule 518.2 in Southern California Edison Co., No. 1262-81, (South Coast Air Quality Management District, Minute Order) (July 15, 2004).

An earlier version of the South Coast District's Rule 518.2 is included in the regulations of the Antelope Valley AQMD. The Antelope Valley region formerly was part of the South Coast AQMD, and when the Antelope Valley District was formed, it "inherited" Rule 518.2. That District does not apply the Rule, nor has EPA approved it under federal law. Telephone interview with Karen Nowak, Deputy District Counsel, Antelope Valley Air Quality Management District (Nov. 30, 2005).

G. *General Observations*

This analysis of variances primarily has attempted to delineate the principal features of variance cases and the kinds of information attorneys must include in presentations before hearing boards. Certainly all of the written submissions, testimony, and argument of the parties in the variance process must be directed to helping the board resolve the issues the statute requires it to address and to helping it draw up an effective, intelligible, and enforceable order if a variance is justified. The key word is "relevance." All aspects of the applicant's and the APCD's submissions and presentations should be relevant to one or more of the statutory elements the hearing board must resolve.

Obviously considerable preparation by the parties and their attorneys is necessary if the presentations are to be efficient and helpful. As will be discussed below, discovery methods sometimes are available to counsel by virtue of hearing board procedural rules.¹⁵⁹ Such advance discovery, or—more commonly—informal exchanges of information between the parties, should be used to facilitate early, thorough preparation of the parties' positions. The hearing itself certainly should not be the first, or even the principal, forum for the APCD staff and lawyers to find out about the applicant's problems and proposed solutions. Advance consultations in one form or another should be pursued by both the district's and the applicant's counsel, so that when hearings are held the information presented is comprehensive, clear, and above all relevant to the job the statute requires the hearing boards to do in variance cases.

IV.

ABATEMENT ORDERS

An order for abatement is the strongest administrative sanction available to an APCD. An abatement order has been described as "the ultimate tool available to an air pollution control district for effecting compliance,"¹⁶⁰ something that "would probably be used . . . only if other, less onerous, enforcement

159. See *infra* Section VI(C).

160. James Buchert, Chairperson, Santa Barbara County Air Pollution Control District Hearing Board, Tools Available to Hearing Boards - Abatement Orders (Apr. 29, 1981) (paper presented at California Air Resources Bd., Air Pollution Enforcement Symposium) (on file with author).

procedures had failed to correct an air pollution problem,"¹⁶¹ and a measure to be pursued "when the standard enforcement procedures, i.e. notices of violation and misdemeanor penalties, prove inadequate to achieve expeditious compliance."¹⁶² These characterizations remain apt, for the uses and purposes of abatement orders have changed little. In short, abatement orders have long been viewed as a remedy of last resort—the heavy artillery to be brought out when lesser weapons have failed.

Although theoretically available against violators of any regulation "prohibiting or limiting the discharge of air contaminants,"¹⁶³ abatement orders are most often sought against violators of the statutory public nuisance provision¹⁶⁴ or basic requirements of district permit systems.¹⁶⁵ There are numerous practical and strategic reasons for this tendency, but the overriding factor is that sources brought before hearing boards in abatement order cases are generally those that district staffs believe are operating farthest from the required procedures and emission regulations. These most troublesome of polluters face the prospect of abatement orders.

161. Letter from John Smithson, Chairperson, Ventura County Air Pollution Control District Hearing Board, to author (Mar. 17, 1982) (on file with author).

162. Letter from Peter Greenwald, Deputy District Counsel, South Coast Air Quality Management District, to author (Apr. 6, 1982) (on file with author).

163. The principal statutory provision is CAL. HEALTH & SAFETY CODE § 42451(a) (West 2006):

On its own motion, or upon motion of the district board or the air pollution control officer, the hearing board may, after notice and a hearing, issue an order for abatement whenever it finds that any person is constructing or operating any article, machine, equipment, or other contrivance without a permit required by this part, or is in violation of Section 41700 or 41701 or of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air.

See also *id.* § 42452:

The order for abatement shall be framed in the manner of a writ of injunction requiring the respondent to refrain from a particular act. The order may be conditional and require a respondent to refrain from a particular act unless certain conditions are met. The order shall not have the effect of permitting a variance unless all the conditions for a variance, including limitation of time, are met.

164. *Id.* § 41700. A related provision, Section 42301.7(c)(2), specifically authorizes an APCD to seek an order for abatement under certain circumstances against a threatened release of air contaminants from a source within 1,000 feet of a school. By its terms, however, that provision allows such an order to be sought from an APCD's governing board, rather than its hearing board. See *infra* note 167.

165. CAL. HEALTH & SAFETY CODE §§ 42300-42316 (West 2006). A dispute over the application of the terms of an APCD permit system and its exemptions was the basis of Julius Goldman's *Egg City v. Air Pollution Control Dist.*, 116 Cal. App. 3d 741 (2d Dist. 1981).

A. *Burdens and Penalties*

Although abatement orders can be quite constructive and similar to variances, one key difference is that the APCD staff, rather than the source, chooses to initiate the proceeding.¹⁶⁶ The agency's filing then creates time-consuming and often costly obligations for the source to respond to the charges against it. This hardship imposed by the process itself is one of the onerous aspects of abatement cases. It is also a reason why they are not brought lightly by APCD personnel.

166. The pleading by which an abatement proceeding is commenced is often titled an "accusation," a term borrowed from the California Administrative Procedure Act. CAL. GOV'T CODE § 11503 (West 2006). In some districts, procedural rules describe the basic content of an accusation and of the respondent's "notice of defense," often borrowing heavily from the language of that Act. Compare CAL. GOV'T CODE §§ 11503, 11505-11506 (West 2006) with Monterey Bay Unified Air Pollution Control Dist. Regulation VI, Rules 5.9-5.11, available at <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised Oct. 16, 2002), and Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules §§ 4.3-5, available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005). Indeed it is in abatement proceedings that hearing boards choose most closely to follow the terminology and processes set forth in the California Administrative Procedure Act. See CAL. HEALTH & SAFETY CODE § 40807 (West 2006) (hearing board's procedural rules to conform, "so far as practicable," to the California Administrative Procedure Act's administrative adjudication provisions). Not all districts subscribe to the APA terminology. See, e.g., Tehama County Air Pollution Control District Rule 5:8 (1985), available at <http://www.arb.ca.gov/DRDB/TEH/CURHTML/R5-8.HTM>. ("petition for an abatement order") and Rule 5:11, available at <http://www.arb.ca.gov/DRDB/CURHTML/R5-8.HTM> ("answer"), and South Coast Air Quality Management District Rules 803-804 (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r803.pdf>, <http://www.aqmd.gov/rules/reg/reg08/r804.pdf> ("petition for order for abatement").

The power to initiate abatement proceedings has remained limited to APCD staffs, despite occasional attempts to broaden it. For example, in 1983 a bill was introduced in the California Assembly that, *inter alia*, would have expanded the terms of § 42451 to make it possible for "any aggrieved person" to make a motion before a hearing board for the issuance of an order for abatement. A.B. 1638, Cal. Legis., 1983-1984 Reg. Sess. (introduced by Assemblyman Margolin). The bill died in committee, and when reintroduced in early 1984 did not contain this broad standing provision. A.B. 3298, Cal. Legis., 1983-1984 Reg. Sess. (introduced by Assemblyman Margolin).

The relationship between APCD regulatory programs and private nuisance remedies under California law is discussed in *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 127-31 (1st Dist. 1971). An intensive examination of the relationship between common law nuisance and modern air pollution regulatory systems is presented in NOGA MORAG-LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE (2003). Included in that study is analysis of the protracted abatement proceedings in the Bay Area AQMD Hearing Board concerning the Pacific Steel Casting Company in Berkeley. See *id.* at 153-161, 174-177.

Another critical feature is the severity of the sanctions for violation of an abatement order issued by a hearing board.¹⁶⁷ These primarily include enforcement of the abatement order by judicial injunction,¹⁶⁸ civil penalties of up to \$25,000 for each day of violation of the order,¹⁶⁹ and criminal punishments for commission of a misdemeanor.¹⁷⁰

B. *A Variance By Any Other Name . . .*

A great deal of what has been said above in Section III about the purposes and processes of variance cases is applicable to cases in which orders for abatement are sought. This should come as no surprise, for the issues in both types of cases are fundamentally the same. The primary difference is that in a variance case the applicant is trying to prove its good faith and diligence in eliminating its violations, whereas in an abatement case the APCD staff is trying to prove that the particular source will unjustifiably continue to pollute unless restrained by a hearing board order for abatement.

167. Although § 42450 authorizes a district governing board to issue abatement orders, it would be extraordinary for this legislative body to exercise such adjudicatory authority. *Cf.* Letter from M. David Stirling, Chief Deputy Attorney General, State of California, to Assemblyman William Baker 2 (May 14, 1991) (on file with author) stating:

The Board of Directors [of an APCD] is empowered only to issue, after notice and a hearing, an order for abatement (§42450) The enforcement and penalty authority, however, including the power to bring actions seeking civil penalties, is vested exclusively in the APCO (Health & Safety Code, §§ 42400 *et seq.*) The Board of Directors is not given *any* authority to direct the APCO in the exercise of his enforcement authority. . . .

The Health and Safety Code is clear that the hearing board performs the District's judicial function (see §§ 40800 *et seq.*) Therefore, as due process prohibits the Board of Directors from attempting to influence the authority exercised by the APCO, it also prohibits any effort by the Board in the exercise of its judicial function.

168. CAL. HEALTH & SAFETY CODE §§ 42453-42454 (West 2006); *Cf. In re Cir-costa*, 219 Cal. App. 2d 777 (1st Dist. 1963) (petition for habeas corpus denied and criminal contempt upheld against violator of injunction issued to enforce Bay Area APCD hearing board's order for abatement of open burning); Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*, 55 CALIF. L. REV. 702, 706 n. 43 (1967).

169. CAL. HEALTH & SAFETY CODE §§ 42401, 42403 (West 2006). . Additional levels of penalties for various types of violations of hearing board orders are included, along with penalties for violations of other requirements, in Sections 42402 (strict liability), 42402.1 (negligence), 42402.2 (knowing emission), 42402.3 (willful and intentional emission), 42402.4 (knowing and intentional falsification of documents), and 42402.5 (administrative civil penalties).

170. *Id.* § 42400(a). *See also id.* § 42400.3.5 (misdemeanor for knowing violation of hearing board order related to toxic air contaminants).

The inquiry in either type of case nonetheless is very much the same. It examines the nature of the violations, the burden that compliance would impose on the source, the diligence or lack of it which has characterized the operation, and the actual air pollution effects. This inquiry occurs in an abatement case even though the statutory provision on abatement orders is so succinct as to be virtually silent regarding the pertinent issues in an abatement proceeding.¹⁷¹ As with hearing boards' rejection of a strict reading of the hardship criterion in variance cases,¹⁷² the boards have taken a broad, pragmatic interpretation of the relevant factors in an abatement hearing.¹⁷³

The correspondence between abatement and variance cases is highlighted by the statutory allowance for the possibility that a conditional abatement order may be entered which will have "the effect of permitting a variance." This effect is allowed, of course, only if all the "conditions for a variance, including limitation of time, are met."¹⁷⁴ This means that the basic statutory findings required in variance cases would have to be satisfied and that the order fundamentally would have to be structured, and time-limited, in the fashion of a variance order.

C. Proof

The statute has always required proof of violation as a basis for abatement, although a newer provision allows for stipulated abatement orders even in the absence of such proof, as will be discussed below.¹⁷⁵ The traditional requirement means that considerable attention ordinarily is focused on the severity of the violation. This is true also because district resources are most likely to be brought to bear in an abatement proceeding against "a persistent and unjustifiable polluter."¹⁷⁶ This focus on the du-

171. See *supra* note 163.

172. See *supra* text accompanying notes 42-45.

173. The South Coast AQMD has set forth three findings that must be made before an abatement order can be issued. South Coast Air Quality Management District Rule 806(a) (1988), available at <http://www.aqmd.gov/rules/reg/reg08/r806.pdf>. These findings, which are adaptations of statutory variance findings, are discussed in Kemos, *supra* note 146, at 85, 91-94.

174. CAL. HEALTH & SAFETY CODE § 42452 (West 2006). Such dual orders were issued in Union Oil Co., No. 269-60 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 15, 1983), and Louisiana Pacific Corp., No. 91-26 (Hearing Board, Butte County Air Pollution Control District, Conditional Order for Abatement) (May 24, 1991).

175. CAL. HEALTH & SAFETY CODE § 42451 (West 2006).

176. Crawford, *supra* note 5, at 633.

ration and magnitude of noncompliance is especially appropriate when the alleged violation pertains to section 41700, the statutory nuisance prohibition. In these instances, much of the APCD's case will rest on the testimony of citizen witnesses, which must be clearly presented.¹⁷⁷

One very effective technique which has been employed in odor nuisance abatement cases to present the clearest picture of the situation is the use of a carefully marked map showing the locations of the alleged violator, all major air pollution sources in the vicinity, and complaining citizens. As each witness testifies, his or her location at the time of alleged discomfort can be pinpointed in relation both to the respondent and to the other sources in the area. Often the respondent's assertion will be that the other local sources are at least as likely to be the cause of the problem as is respondent. The use of this kind of visual aid helps to make attempted proof of the violations, and attempted refutation of the charges, an efficient and clear process.¹⁷⁸

Section 42451(b) allows a hearing board to issue an abatement order "pursuant to the stipulation of the air pollution control officer and the person or persons accused."¹⁷⁹ The hearing board may issue a stipulated order "without making the finding" that the respondent is in violation of any legal requirement. Even before the addition of this subsection in 1986, abatement proceedings often were resolved on the basis of a proposed order agreed to by both parties. Such orders, however, still had to recite that the respondent was violating the law, and this recital often was a stumbling block to securing the respondent's agreement. This obstacle has been removed by Section 42451(b), and stipulated abatement orders are now fairly common.¹⁸⁰

177. See Kenneth A. Manaster, *Early Thoughts on Prosecuting Polluters*, 2 *ECOLOGICAL L.Q.* 471, 489 (1972) ("The testimony of such witnesses should be limited to their actual observations and the identifiable effects of the pollution on themselves and their property.").

178. Difficulties experienced by the Bay Area AQMD in developing effective procedures for responding to citizens' odor nuisance complaints, and confirming their validity, are discussed in Morag-Levine, *supra* note 166, at 155-156, 160-161, 174-177.

179. CAL. HEALTH & SAFETY CODE § 42451(b) (West 2006). This provision was added by Stats. 1986, ch. 147, § 1.

180. In response to a question posed by the South Coast AQMD, the ARB confirmed that "a current violation is not a condition precedent to the issuance of a Stipulated Order for Abatement." Memorandum from Kathleen Walsh, General Counsel, California Air Resources Board, to Nancy Feldman, District Prosecutor, South Coast Air Quality Management District 2-A-1 (May 3, 2002).

D. *Terms and Conditions*

Another distinctive aspect of abatement cases is the usual complexity of the orders entered if a violation is found. Although the statute seems to authorize abatement simply if a violation is proven, Section 42452's reference to "conditional" abatement orders confirms the logical suspicion that other, variance-type issues are inherent in these cases as well. It is the rare case in which the APCD seeks a flat injunctive order requiring the respondent to shut down operations entirely.¹⁸¹ More commonly, the district will wish to have an order for abatement which is, as the statute says, framed in the manner of an injunc-

"The issuance of a stipulated order for abatement is not an uncommon occurrence under the SCAQMD." Kemos, *supra* note 146, at 85, 95-96. This commentary also describes stipulated orders as "a regulatory tool less severe than an order for abatement" but "a somewhat more stringent regulatory tool than a variance." *Id.* at 96. For examples of stipulated abatement orders, see *Air Pollution Control Officer v. Tosco Corp.*, No. 2145 (Hearing Board, Bay Area Air Quality Management District, Conditional Order for Abatement) (Feb. 8, 1990) (stipulation for odor reduction and monitoring measures, despite absence of finding of a public nuisance and respondent's denial of responsibility for alleged odors); *Air Pollution Control Officer v. Pacific Refining Co.*, No. 2052 (Hearing Board, Bay Area Air Quality Management District, Conditional Order for Abatement) (Sept. 13, 1990); *Air Pollution Control Officer v. Integrated Environmental Systems*, No. 2971 (Hearing Board, Bay Area Air Quality Management District, Conditional Order for Abatement) (Sept. 7, 1995); *Air Pollution Control Officer v. Unocal San Francisco Refinery*, No. 3134 (Hearing Board, Bay Area Air Quality Management District, Stipulated Unconditional Order for Abatement) (Dec. 19, 1996).

181. "As a general rule it may be said that mandatory relief is always preferable to negative injunctive relief because the effect of the former is to continue the activity, with its benefits to society, while reducing the polluting byproducts, whereas the latter does eliminate the pollution but may well eliminate other useful products or services as well." Manaster, *supra* note 177, at 478-79. For an example of an unconditional order, see *Petition for an Order for Abatement re Louisiana Pacific Corp.*, No. 87-02 (Hearing Board, North Coast Unified Air Quality Management District, Order for Abatement) (Feb. 26, 1987). In contrast, in *APCO v. USS-POSCO Industries*, No. 2445 (Hearing Board, Bay Area Air Quality Management District, Order Denying Request for Abatement Order) (Aug. 1, 1991), the hearing board found no need for an unconditional order and even rejected a proposed stipulated conditional order for abatement as "unnecessary" in light of the respondent's prior "commitment to minimize the emission of air contaminants." *Id.* at 5-7.

In the South Coast AQMD Hearing Board, "[a]pproximately once a year, the Hearing Board issues an order that requires a business to shut down part or all of its facility." SCAQMD QUESTIONNAIRE, *supra* note 11, at 1. See, e.g., *Zamora Mexican Foods, Inc.*, No. 5344 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Jan. 30, 2003) ("orders you to immediately cease and desist operating or allowing the operation of any and all deep fryers, kettles, or other vessels at the commercial food processing facility located at . . .").

tion requiring the respondent "to refrain from a particular act unless certain conditions are met."¹⁸²

Conditional abatement orders generally require corrective action to be taken on a specified schedule. The schedule sometimes is stated in addition to the command that the violations immediately cease.¹⁸³ In other formulations, an order will include provisions stating that conformity with the order's corrective measures would be deemed to constitute compliance with the abatement directive itself.¹⁸⁴ Such conformity, however, would not have the effect of a variance, and the source would still remain subject to ordinary enforcement penalties for violations of district regulations.¹⁸⁵ In many other instances, the order declares the corrective measures as an alternative to closing the source's operations or otherwise abating the violation.¹⁸⁶

Even when a stipulated abatement order is proposed, the hearing board still has the responsibility to make sure it is entering an

182. CAL. HEALTH & SAFETY CODE § 42452 (West 2006).

183. Richard L. Jones, No. 915 (Hearing Board, San Diego County Air Pollution Control District, Order of Abatement) (Sept. 24, 1981).

184. *See, e.g.*, Imperial West Chem. Co., No. 826 (Hearing Board, Bay Area Air Quality Management District, Conditional Order for Abatement) (May 13, 1982). *See generally* Crawford, *supra* note 5, at 634-35.

185. With this in mind, some abatement orders specify amounts of monetary penalties that the respondents agree to pay for predicted violations during the periods covered by the orders.

186. Code Welding & Fabrication Co., No. 925 (Hearing Board, San Diego County Air Pollution Control District, Order of Abatement) (Dec. 3, 1981) ("[A]n Order of Abatement shall be issued enjoining Code Welding and Fabrication Company, Inc. from continuing to operate abrasive blasting equipment . . . unless the following conditions are met . . ."); William G. Seel, No. 917 (Hearing Board, San Diego County Air Pollution Control District, Order of Abatement) (Oct. 22, 1981) ("[T]he Hearing Board . . . issues an Order of Abatement enjoining Respondent from continuing to operate this facility unless the increments of progress and conditions set out in Exhibit A attached are met."); *Air Pollution Control Officer v. Pacific Refining Co.*, No. 1235 (Hearing Board, Bay Area Air Quality Management District, Conditional Order for Abatement) (May 31, 1984) ("The Hearing Board Orders, that Respondent . . . abate all odorous emissions from its Hercules facility forthwith, unless Respondent complies with the following conditions . . ."); *South Coast Air Quality Management District v. Union Pacific Railroad*, No. 4979, at 32-33 (Hearing Board, South Coast Air Quality Management District, Findings and Decision for Modification of an Order for Abatement) (Sept. 29, 1998) ("[T]o cease and desist its operations . . . at the location known as the 'Slover' siding . . . or comply with the conditions set forth below"). *See also* South Coast Air Quality Management District, No. 2684 (Hearing Board, South Coast Air Quality Management District, Order for Abatement) (Nov. 17, 1981) ("The Hearing Board hereby issues an Order for Abatement of the emissions from Respondent, Los Angeles County Mechanical Department's non-complying gasoline dispensing facilities. Said facilities shall comply with Rule 461 on and after October 23, 1981, or cease operations.").

effective order. This view is bolstered by Section 42451(b)'s requirement that the board must "include a written explanation of its action in the order for abatement." The explanation requirement presupposes that the board has evaluated the proposed order and concluded that its terms and conditions are sound and worthy of adoption.¹⁸⁷ In this regard, the ARB has interpreted the statutory allowance for stipulated orders as designed to discourage district staffs and alleged violators from entering into agreements delaying or relaxing requirements "without the review of an objective Hearing Board and public review and comment." The ARB emphasizes the importance of "[i]ndependent review and explanation of the order by the Hearing Board, [and] the opportunity for input from [the] public and District staff in an open forum."¹⁸⁸

A further indication of the hearing board's ultimate responsibility for the content of its abatement orders is the long-standing language in Section 42451(a) that an abatement order can be issued on the hearing board's "own motion." This suggests that even if the parties do not believe an abatement order is warranted, the hearing board may nonetheless issue one on terms it finds justified by the evidence.¹⁸⁹ Even agreed orders are thus

187. In the USS-POSCO proceeding discussed *supra* at note 181, a hearing board wholly rejected a proposed stipulated order for abatement.

188. Memorandum from Kathleen Walsh, General Counsel, California Air Resources Board, to Nancy Feldman, District Prosecutor, South Coast Air Quality Management District 2-3 (May 3, 2002). The South Coast AQMD Hearing Board also exercises the power to modify stipulated orders after their initial entry even if the parties do not stipulate to the modification; this action will only be taken, however, after a properly noticed public hearing. See *South Coast Air Quality Management District v. Hillman Holdings, LLC*, No. 5182, at 10 (Hearing Board, South Coast Air Quality Management District, Findings and Decision of Petition for Stipulated Order for Abatement) (Sept. 21, 2000) ("The Hearing Board may modify the Order for Abatement without the stipulation of the parties upon a showing of good cause, therefore, and upon making the findings required by Health and Safety Code Section 42451(a) and DISTRICT Rule 806(a)."). This practice is discussed at Kemos, *supra* note 146, at 85, 95-96.

189. CAL. HEALTH & SAFETY CODE § 42451 (West 2006). Although the ARB has interpreted this language to mean that "[t]he hearing board can initiate its own action to conduct an abatement hearing," this does not appear ever to have been attempted, nor would it be a feasible or fair way for a proceeding to be conducted. Memorandum from Leslie Krinsk, Senior Staff Counsel, California Air Resources Board, to Hollis B. Carlile, San Joaquin Valley Unified Air Pollution Control District 29 (May 5, 1997). A hearing board could not function both as prosecutor and adjudicator, nor would it have the authority to mandate APCD staff to serve in the former role. Cf. *supra* note 167. A more sound interpretation of "on its own motion" is simply that, after a proceeding has been initiated by the APCD staff and a hearing has been held, the hearing board has the responsibility to determine

subject to scrutiny in a hearing, and to redrafting and modification by the board members themselves, before the orders can be entered.¹⁹⁰

E. *Approaches to Abatement Proceedings*

If the APCD staff and a potential respondent have come to agreement on a proposed stipulated order for abatement under Section 42451(b), their obvious task is to persuade the hearing board of the proposal's good sense, practicality, and fairness to all concerned interests, including the public's interest in clean air. In cases in which there is no such stipulation, attorneys representing an APCD should make clear to the hearing board exactly what provisions are desired if the agency is seeking entry of a conditional abatement order. If APCD attorneys are not clear about the possible provisions and their preferences among them, then the hearing board can only conclude that they are seeking that rare creature, an unconditional abatement order. Technically, under Section 42451(a), APCD attorneys are entitled to present proof of violations and just leave to the hearing board the entire question of a suitable remedy. This is not the most efficient or responsible course.

whether an abatement order is warranted, and what its content should be, even if the staff or respondent takes a different view of what the final resolution of the matter should be.

190. See *South Coast Air Quality Management District v. Operating Indus., Inc.*, No. 2121-1 (Hearing Board, South Coast Air Quality Management District, Order for Abatement) (May 18, 1983). The board entered its order on the basis of a stipulation of the parties, but with the modification of one deadline to a date earlier than the parties had agreed. *Id.* at 3. Other aspects of this complex abatement proceeding, including the requirement for posting of a bond, are discussed *supra* at note 94. This modification power raises the possibility of entry of an order which no party to the case finds to its liking and which a party then has challenged in court pursuant to the judicial review provision in Health & Safety Code § 40864. On a few occasions this has occurred in the Bay Area AQMD. The hearing board's order then was defended with the assistance of outside counsel chosen by the hearing board, with approval and funding provided by the district's governing board under previously established procedures. In the absence of this ultimate, albeit rare, resort to outside representation, hearing board orders could amount to little more than a rubber stamp for district staff positions. See *Judgment Granting Motion for Remand to Hearing Board, Pacific Steel Casting Co. v. Hearing Bd. of the Bay Area Air Quality Management District* (Cal. Super. Ct. Alameda County 1983) (No. 569839-4); *Port of Redwood City v. Hearing Bd. of the Bay Area Air Quality Management District* (Cal. Super. Ct. San Francisco County 1981) (No. 780189). See also *Petition for Writ of Mandate, Glidden-Durkee Div. of SCM Corp. v. Hearing Bd. of the Bay Area Air Pollution Control District* (Cal. Super. Ct. San Francisco County 1977) (No. 729-951). For further discussion of the provision of counsel to hearing boards, see *infra* Section VI(A).

In contrast, attorneys representing respondents must carefully appraise the prospects of entirely avoiding the imposition of any form of abatement order on their clients. If those prospects are dim, counsel's attention should shift to the delineation of constructive terms and conditions that the client can live with while promptly solving its compliance problems. Ideally counsel should seek to minimize the exposure of the source to enforcement penalties by obtaining an order that has "the effect of permitting a variance."¹⁹¹ One way to promote this result is to file a separate application for variance and to seek its consolidation for hearing with the accusation. This may tend to shift the inquiry onto more positive, solution-oriented ground. This option should only be pursued if there are solid reasons for believing that the source can satisfy the statutory criteria for entitlement to a variance. Often, however, such reasons will not be available because abatement proceedings, as discussed earlier, are not usually brought against diligent sources.

A well-written conditional abatement order, whether developed by advance stipulation or during the course of a contested hearing, can be an effective tool for compelling a serious offender to come promptly into compliance. The full range of expertise and creativity of the APCD, the respondent, and their respective lawyers should be made available to the hearing board in each case in the attempt to construct this tool.

V.

PERMIT DISPUTES

The third area of hearing board work is the resolution of disputes over permits. Cases in this category are infrequent in almost all districts, but when they arise, they tend to be complex and challenging for the boards. Section 42300 authorizes every APCD to establish a permit system broadly covering the construction and operation of any equipment "which may cause the issuance of air contaminants."¹⁹² Within the elaborate permitting processes established under this authority, various types of controversies come before hearing boards.

191. See *supra* text accompanying note 174.

192. CAL. HEALTH & SAFETY CODE § 42300 (West 2006).

A. *Varieties of Permit Disputes*

The Health and Safety Code identifies five principal situations in which an APCD hearing board can be called on to resolve a permit dispute. First, Section 42302 allows a permit applicant whose request has been denied by APCD staff to have the hearing board determine “whether the permit was properly denied.”¹⁹³ Although this statutory phrasing might be read to indicate that this avenue of redress is only available to a permit applicant whose permit request has been denied in its entirety, the provision is widely and sensibly understood to have broader applicability. Under it, review may be sought by an applicant who was issued a permit but with some conditions imposed that the applicant finds objectionable. In that event, the appeal focuses on the district’s denial of the permit as requested, rather than of any permit at all.¹⁹⁴

Second, Section 42306 allows a permittee whose permit has been suspended by the district staff to have the board determine “whether or not the permit was properly suspended.”¹⁹⁵ This

193. CAL. HEALTH & SAFETY CODE § 42302 (West 2006); see *A-1 Roofing Serv.*, 151 Cal. Rptr. at 529-30; *Durochrome Prods., Inc.*, No. 2143 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Mar. 27, 1979); *Rialto Power Corp.*, No. 3405 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Feb. 1987) (holding district’s denial of permits to construct was improper). Pursuant to the Air Pollution Permit Streamlining Act of 1992, CAL. HEALTH & SAFETY CODE §§ 42320-42323, a permit denial based on certain contested prior violations is subject to appeal under Section 42302 and to a tailored set of proof requirements regarding those violations. *Id.* at §§ 42333(e), 42335.

In the South Coast AQMD, “[a]t any point in time there are 20 to 25 pending appeals,” mostly of this type. However, “[v]ery few of these go to hearing.” Instead, during pre-hearing conferences the Hearing Board encourages settlement of these disputes, which the parties usually reach. SCAQMD QUESTIONNAIRE, *supra* note 11, at 4. Section 42311(h) authorizes an APCD governing board to set fees “to cover the reasonable costs of the hearing board incurred as a result of appeals from district decisions on the issuance of permits.” The hearing board may waive all of part of such fees “if it determines that circumstances warrant that waiver.”

194. In many districts, this allowance is spelled out in regulations explicitly providing for appeals from “denial or conditional approval” of a permit. See, e.g., Glenn County Air Pollution Control District Rule 114 (1999), available at <http://www.arb.ca.gov/DRDB>; Imperial County Air Pollution Control District Rule 211 (1999), available at <http://imperialcounty.net/ag>; and San Joaquin Unified Air Pollution Control District Rule 5060 (1993), available at <http://www.valleyair.org/rules/currenrules/r5060.pdf>.

The relationship between variances and appeals by disappointed permit applicants is addressed *supra* text at notes 32-34.

195. CAL. HEALTH & SAFETY CODE § 42306 (WEST 2006). See *Lloyd A. Fry Roofing Co. v. Lunche*, 367 F. Supp. 106 (C.D. Cal. 1973).

provision is rarely, if ever, invoked. Third, Section 42307 authorizes an air pollution control officer to request the hearing board to determine “whether a permit should be revoked” when the permittee has been found to be violating district requirements.¹⁹⁶ The fourth avenue for permit disputes to come to hearing boards is Section 40713. It allows appeals from APCD refusals to approve emissions reductions for “banking” and later use as offsets against future emission increases.¹⁹⁷

Fifth, Section 42302.1 allows “any aggrieved person,” who previously has participated in some way in the district’s permitting action, to appeal “any decision or action pertaining to the issuance of a permit by a district.” The hearing board’s responsibility then is to “hold a public hearing and . . . render a decision on whether the permit was properly issued.” Proceedings under Section 42302.1 are commonly referred to as “citizen appeals” or “third party appeals.”¹⁹⁸ In addition to this statutory provision for such appeals, some districts also have similar rules authorizing third party appeals.¹⁹⁹

196. CAL. HEALTH & SAFETY CODE § 42307 (West 2006). The most prominent example of such a proceeding is *Standard Oil Co. v. Feldstein*, 105 Cal. App. 3d 590 (1st Dist. 1980).

197. *Pacific Gas & Elec. Co.*, No. 1062 (Hearing Board, Bay Area Air Quality Management District, Notice of Appeal) (Nov. 10, 1982). See also *Kaiser International Corp. v. Executive Officer*, No. 5110 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Oct. 2, 2003). Judicial review of the Kaiser International decision is discussed *infra* note 206. Section 40709(a) of the Health & Safety Code requires every district to establish “a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions.”

198. “Although the Hearing Board colloquially refers to these cases as ‘appeals,’ the Health and Safety Code does not use the term ‘appeal.’” SCAQMD QUESTIONNAIRE, *supra* note 11, at 9. Although originally the statutory time period for filing this type of appeal was 10 days, it was changed to 30 days in 1999. 1999 Stats., ch. 643, § 12. Cf. *Padres Hacia Una Vida Mejor v. Davis*, 96 Cal. App. 4th 1123, 1126 (2002) (“By letter dated July 14, 1999, the [San Joaquin Valley Unified APCD] hearing board advised Padres its petition was rejected because it was filed late and without the required filing fee.”)

199. Even before the enactment of Section 42302.1 in 1988, the Bay Area AQMD had such a rule, broadly allowing for a permit applicant or “any other person dissatisfied with the decision” on a permit application to “appeal to the District Hearing Board for an order modifying or reversing that decision.” Bay Area AQMD, Regulation 2, Rule 1, § 410 (as amended October 7, 1981). The legality of this provision was upheld in three superior court rulings. *Chevron U.S.A., Inc. v. Hearing Bd. of the Bay Area Air Quality Mgmt. Dist.*, No. 235477 (Contra Costa Cty. Super. Ct. May 26, 1982); *Port of Redwood City v. Hearing Bd. of the Bay Area Air Quality Management District* (Cal. Super. Ct. San Francisco County 1981) (No. 780189); *Kaiser Cement Corp. v. Hearing Bd. of the Bay Area Air Quality Management*

B. *The Standard of Review*

It is evident from these provisions that permit disputes are not subject to the type of detailed statutory standards that govern the decision of variance cases. The issue in permit cases—often referred to as the “standard of review”—is more skeletally framed as whether a permit was “properly” denied, suspended, or issued; whether emission reduction credits were “properly refused;” or whether a permit “should be revoked” if the permit holder is violating some applicable requirement.

In practice, however, the inquiry within these terse standards should be whether the district staff has made a fair, reasonable interpretation of the applicable legal requirements in its action regarding a permit applicant or permittee. The hearing board’s usual function should be to determine whether the staff view in the permit dispute falls within a sensible application of the language and purpose of the pertinent regulations or other requirements.

This perspective is consistent with the traditional legal presumption of the regularity and correctness of administrative action.²⁰⁰ This presumption means that the burden of proof in a permit dispute should be on the party challenging the district staff’s action or finding.²⁰¹ It also means that the hearing board

District (Cal. Super. Ct. Santa Clara County 1981) (No. 441380). The rule in its present form now closely tracks the statutory language in Sections 42302 and 42302.1. The rule also adds, “The Hearing Board may reverse or modify the decision of the APCO if it determines that the decision was erroneous.” Another example of a district rule based on Section 42302.1 may be found at Monterey Bay Unified Air Pollution Control Dist., Regulation II, Rule 211(3.2). *available at* <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised Oct. 16, 2002).

Section 3.6 of the Bay Area Hearing Board’s Rules, which generally covers intervention in permit appeals, also declares, “In all cases involving permit regulations, an Application for Intervention filed by the permit applicant or permit holder shall be granted as a matter of right.” This provision assures that a permittee whose permit is challenged through a third party appeal will be able to protect its interests as a full party to the appeal proceeding. Even in the absence of such a provision, as a matter of fundamental fairness the permit applicant or permittee always should be allowed to participate fully as the real party in interest when its permit is under challenge.

200. CAL EVID. CODE § 664 (West 2006) (“It is presumed that official duty has been regularly performed.”). *See also* *Faulkner v. California Toll Bridge Auth.*, 40 Cal. 2d 317, 329 (1953); *A-1 Roofing Serv.*, 151 Cal. Rptr. at 527.

201. *See* CAL EVID. CODE § 660 (West 2006); *see also A-1 Roofing Serv.*, 151 Cal. Rptr. at 527.

Even though the burden of proof is on the party challenging the district’s decision, and thus that party presumably should go first with presentation of its case, often a more efficient course is to allow the district staff to begin the evidentiary hearings with a brief explanation of the permit action at issue and the introduction into evi-

should not lightly disagree with the staff's determinations. A hearing board in permit cases is operating analogously to the role of an appellate court reviewing administrative agency action. This is in contrast to the board's function in variance or abatement cases, where the better analogy is the work of trial courts determining matters in the first instance.²⁰² In short, the hearing board should not substitute its judgment in permit cases for that of the expert, full-time staff of the APCD.²⁰³

This does not mean, of course, that this oversight and review function of the hearing board should be forfeited through automatic, uninformed deference to the staff. It also does not mean that the hearing board's review of the district's permitting action must be restricted by barring the introduction of any evidence other than the documentation that was before the staff when it considered and made its decision. That documentation, compiled more or less as an "administrative record" of the staff's action, should be the evidentiary core of the case. Nonetheless, the party challenging that action should have an opportunity to pre-

dence of the administrative record, as discussed *infra* text at notes 204-206. In this manner, the hearing board can be oriented at the outset on basic aspects of the district action under dispute. Following this introductory testimony, the permit challenger then should be allowed to proceed to demonstrate the alleged impropriety of the action.

202. *But see* Memorandum from Michael Strumwasser, Strumwasser & Woocher LLP, to Edward Camarena, Chair, South Coast Air Quality Management District Hearing Board (Jan. 22, 2001) (on file with author) regarding *Communities for a Better Environment v. Executive Officer*, No. 5031-3, stating:

The function of the Hearing Board is analogous to the familiar administrative-law function of an administrative adjudicator conducting a hearing on an appeal from the denial of a permit or license, or on a disciplinary action imposed by an employing agency. . . .

Nevertheless, there is a sense in which this Hearing Board is conducting a "review" of a decision of an inferior officer.

It appears that at an earlier stage of statutory development, variances could be granted by either county APCD hearing boards or the courts. *See* Hershman, *supra* note 5 at 1491.

203. Adaptations of the standard of review approach presented here may be found at Appeal of the Southeast Alliance for Environmental Justice *et al.* from the Exxon Co., No. 3304 (Hearing Board, Bay Area Air Quality Management District, Order Denying Appeal) (June 29, 2000), at 4-6; Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules §3.5, available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005); and OFFICE OF LEGAL AFFAIRS, CALIFORNIA AIR RESOURCES BOARD, LEGAL INFORMATION FOR VARIANCE HEARING BOARD MEMBERS, at 14-15. *See also* Letter from Edward Camarena, South Coast Air Quality Management District Hearing Board Chair, to author (Aug. 11, 2004) (on file with author) ("[T]he Hearing Board . . . would limit its review to whether the Executive Director [sic] applied the relevant statutes and regulations to the application in a way that was reasonable, fair, and complete.").

sent additional, extrinsic evidence relevant to the propriety of the action under the standard of review as described above. Although a hearing board may be functioning generally as an administrative appellate tribunal, it is, after all, a "hearing" board.

Furthermore, the administrative record may not have the formality and thoroughness of a record presented to an appellate court, and the hearing board is not statutorily authorized simply to read briefs and the agency's documentary record and then render a ruling.²⁰⁴ Accordingly, the hearing board should hear relevant evidence in order to give the challenger of the district's permit action a fair chance in a public forum to demonstrate that the district has erred.²⁰⁵

The scope of the evidence is a separate matter from the scope of the review in permit disputes. Occasionally it is argued that a hearing board which takes any such additional evidence must necessarily be prepared to render its own independent judgment on the underlying permit questions at issue. That conclusion does not follow logically or legally. The focus of the case remains the reasonableness of the district's action. Resolution of that inquiry must combine examination of the administrative record with the hearing of further evidence relevant to the reasonable-

204.Thus, upon the request of an applicant whose request for [emission reduction credits] has been denied, the Health and Safety Code requires the Hearing Board to hold a hearing, to take testimony, and to consider that testimony in making its decision. The effect of these directives in the Health and Safety Code is to *prohibit* the Hearing Board from limiting its review to the record that was in front of the Executive Officer at the time he made his decision.

Kaiser International Corp. v. Executive Officer, No. 5110 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Oct. 2, 2003), at 4. See also SCAQMD QUESTIONNAIRE, *supra* note 11, at 11. ("The Hearing Board review would not be limited to the record created by the air district when it acted on the application, because the Health and Safety Code requires the Hearing Board to hold a hearing and to accept testimony.")

205. Cf. Memorandum from Michael Strumwasser to Edward Camarena, *supra* note 202, agreeing that additional evidence should be heard, but asserting that there is no administrative record of the district's decision. The memorandum states, "Cases before the Hearing Board are not limited to the record before the Executive Officer, and, indeed, there is no such record certified to the Hearing Board." Admittedly the form and content of documentation of a permitting decision probably will vary considerably from one instance to the next, particularly since permit appeals to hearing boards are so infrequent. In that sense, perhaps it is correct to assert that such documentation cannot be equated with a record on appeal in a judicial forum. Nevertheless, as a practical matter it usually is feasible for APCD staff to compile the major pertinent documents in a fashion that all parties can agree is a fair presentation of the factual bases for the decision. That compilation should suffice as an administrative record, which then becomes the focal point of information to be considered by the hearing board.

ness of what the district did on the basis of the information before it, or otherwise fairly available to it, at the time it acted.²⁰⁶

Permit cases tend to be unusually technical, both scientifically and legally. The customary variance case emphasis on issues such as economic hardship, nuisance effects, and reasonable control is replaced in permit cases with much more sophisticated and time-consuming inquiries. These delve into the details of specific manufacturing processes, pollution control technology approaches, future emissions predictions, baseline emissions histories and formulas,²⁰⁷ ambient air quality levels, permit review

206. The South Coast AQMD Hearing Board has followed this approach, indicating that “although this Board concluded that the record would not be limited to documents in the Executive Officer’s permit file, the Hearing Board also concluded that it would consider only documents that are relevant to determining whether the actions that the Executive Officer took . . . were proper. During the hearing, Petitioner would be allowed to allege that there was other information, not contained in the permit file, which the Executive Officer should have considered in making his decision.” *Kaiser Int’l Corp. v. Executive Officer*, No. 5110 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Oct. 2, 2003, at 6-7). *See also* SCAQMD QUESTIONNAIRE, *supra* note 11, at 11. (“The petitioner would be allowed to allege that there was other information that the Executive Officer should have considered, but did not consider, in making his decision.”).

Somewhat clouding this sensible approach, however, the Hearing Board chose to describe it as “a *de novo* hearing.” *Id.* at 10-11. That phrase would seem to carry the unintended and inaccurate connotation that the Hearing Board would give no deference at all to the District’s decision and would consider the permit question as if the District’s determination had not taken place. *See* Black’s Law Dictionary 725 (7th ed. 1999), defining “hearing *de novo*” as “a reviewing court’s decision of a matter anew, giving no deference to a lower court’s findings” or “a new hearing of a matter, conducted as if the original hearing had not take place.” Indeed, precisely this perspective was asserted when Kaiser International Corporation pursued judicial review of the Hearing Board’s rejection of its appeal of the district’s denial of emission reduction credits. *Kaiser Int’l Corp. v. Hearing Board*, No. B178997, Appellant’s Opening Brief at 14-17 (Cal. Ct. App. 2d, Div. 3, filed May 17, 2005). *Compare id.* to Response Brief for Executive Officer of the South Coast Air Quality Management District, at 6, filed Oct. 13, 2005, stating:

The Hearing Board ruled that while they would undertake a *de novo* review, that review was limited to whether or not the Executive Officer “properly” denied the application for credits. This meant that the Hearing Board would not set out on a new fact finding expedition years after the application was filed. This was a task for the Executive Officer, with a large full time staff of engineers.

The appellant’s reply, however, continued to argue “that unfettered *de novo* (i.e., anew, fresh) review . . . is the correct standard of review. Thus, the Hearing Board is authorized to consider *all* relevant evidence and argument that petitioner might present to it in its consideration of whether *it* should grant or deny Kaiser’s applications.” *Id.*, Appellant’s Reply Brief, at 2, filed Nov. 7, 2005. As of March 2006, the appellate court had not ruled on this dispute.

207. An exhaustive analysis of the kinds of problems encountered in determining a past baseline against which to compare future emissions may be found in *Standard Oil Co. v. Feldstein*, 105 Cal. App. 3d 590 (1st Dist. 1980).

procedures, and the legislative history of individual regulatory specifications.²⁰⁸

At times, permit disputes brought before hearing boards have related to APCD regulations which are in the process of being changed, especially regulations for new source review of major projects. In the Bay Area district this has been true in a number of complex permit cases the hearing board has faced over the years.²⁰⁹ A hearing board in such instances is being called on to clarify serious uncertainties that may accompany the evolution and implementation of any new, substantial environmental regulation. This function is particularly sensitive when dealing with new source review provisions, which may have substantial impact on economic development.

C. *To CEQA or Not To CEQA*

As if these challenging kinds of issues were not enough, in some districts a new layer of legal and factual complexity has been added. Hearing boards have allowed citizen appeals under Section 42302.1 to include claims that the APCD has violated the requirements of the California Environmental Quality Act (CEQA).²¹⁰ That lengthy and complex statute—augmented by the even lengthier and more detailed CEQA Guidelines²¹¹—creates detailed processes for environmental review of discretionary governmental actions which may have significant, adverse environmental effects. As is widely known, CEQA is the statute that creates the environmental impact report requirements to which a

208. Complex issues of interpretation of the purposes and operation of permit schemes can also arise in abatement cases involving permit violations, as illustrated in *Julius Goldman's Egg City v. Air Pollution Control Dist.*, 116 Cal. App. 3d 741 (2d Dist. 1981).

209. *See, e.g.*, *Standard Oil Co. v. Feldstein*, 105 Cal. App. 3d 590 (1st Dist. 1980); *Peremptory Writ of Mandamus, Kaiser Cement Corp. v. Hearing Bd. of the Bay Area Air Quality Management District* (Cal. Super. Ct. Santa Clara County 1982) (No. 494183); *Citizens for a Better Environment*, No. 837 (Hearing Board, Bay Area Air Quality Management District, Order Denying Appeal) (Mar. 3, 1983) (*Chevron U.S.A., Inc. Richmond Lube Oil Project*); *Pacific Gas & Elec. Co.*, No. 1062 (Hearing Board, Bay Area Air Quality Management District, Notice of Appeal) (Nov. 10, 1982); *Citizens for a Better Environment*, No. 675 (Hearing Board, Bay Area Air Quality Management District, Order Modifying Authority to Construct) (June 19, 1980) (*Wickland Oil Co. petroleum products distribution terminal*); *Dow Chem. Co.*, No. 567 (Hearing Board, Bay Area Air Pollution Control District, Request for Hearing Following Improper Denial of Permit) (Aug. 20, 1976).

210. CAL PUB. RES. CODE §§ 21000 *et seq.* (West 2006).

211. CAL CODE REGS. tit. 14, §§ 15000 *et seq.* (2004).

multitude of state and local government actions are subject each year.

Hearing boards which have grappled with CEQA claims have found them extraordinarily difficult to address, which should come as no surprise. By statutory prescription, the focus of CEQA is broad, "to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment."²¹² There is nothing in CEQA, however, to indicate that the legislature believed that air pollution hearing boards had the capability, and should have the authority, to address these broad and diverse considerations in governmental decisionmaking. In contrast, by its own detailed procedural and remedial provisions, CEQA makes clear that review of agency action subject to the Act is to be sought in court.²¹³ Similarly, there is nothing in the Health and Safety Code to indicate a specific legislative intention to vest in hearing boards any jurisdiction whatsoever to hear CEQA claims.

There is, however, a semantically plausible argument that the skeletal statutory standard of review, asking whether a permit action was "properly" taken, opens up alleged CEQA violations for hearing board consideration. The better view, adopted by the South Coast AQMD Hearing Board, is that there is no such jurisdiction in hearing boards under the terms of CEQA or the Health and Safety Code.²¹⁴ Among the arguments found persuasive by that board were the following:

212. CAL PUB. RES. CODE § 21001(g) (West 2006).

213. See, e.g., *id.* §§ 21167-21168.5 (West 2006).

214. Southern California Pipe Trades District Council, No. 831-256 (Hearing Board, South Coast Air Quality Management District, Minute Order) (Dec. 22, 1993). Earlier the South Coast Hearing Board did include CEQA issues within its jurisdiction in permit appeals. See, e.g., *Petition of Rialto Power Corp.*, No. 3405 (Hearing Board, South Coast Air Quality Management District, Findings and Decision) (Feb. 1987) at 29 ("The District has complied with the requirements of CEQA as a responsible agency for Petitioner's project, and no additional CEQA documentation is required.")

The 1993 case is one of many permit appeals brought in the South Coast and Bay Area districts by trade unions under the citizen appeals provisions of Section 42302.1 and related district rules. Although there has been criticism that unions have initiated these appeals for collateral reasons relating to non-union construction projects, the breadth of the statutory allowance for citizen appeals has left no doubt about the unions' right to initiate these proceedings. See Stephen G. Hirsch, *Green with Enmity: Organized Labor's Use of Environmentalism as Leverage Has Contractors Crying Foul, But So Far Courts Have Sided with the Unions*, THE RECORDER, Aug. 6,

CEQA analysis requires a review of every area of potential environmental impact, well beyond air quality issues, and therefore beyond the level of expertise expected of the Hearing Board. . . . Clearly, the Health and Safety Code, in vesting the Hearing Board with only limited authority over environmental matters, did not intend that the Hearing Board exercise its jurisdiction over such comprehensive environmental matters as CEQA challenges.

Without the expertise required to adjudicate CEQA matters, the proceedings conducted by the hearing board would necessarily be lengthy and complicated. . . . There simply was no legislative intent that CEQA cases be entertained by the Hearing Board and without the necessary statutory and regulatory tools to govern the conduct of such a case, the Hearing Board would be seriously compromised in its ability to do so.²¹⁵

Recognizing that the South Coast AQMD Hearing Board is often and aptly described as the only “full time” and “professional” hearing board,²¹⁶ it must be concluded that the limitations on its capacity to hear CEQA matters would ordinarily be even more severe for hearing boards elsewhere.

To find CEQA jurisdiction in hearing boards would be to disregard, and override, CEQA’s finely wrought provisions for expert and expeditious judicial review. As suggested by the South Coast Hearing Board, such a conclusion also would presuppose a depth and breadth of legal and technical expertise in hearing board members which would seldom correspond with reality and

1992, at 1; Reynolds Holding, *Bargaining Chip for the 90’s: Unions Pressure Firms on Environment*, S.F. CHRON., Sept. 2, 1992, at A1. The scope of these citizen appeal provisions has also allowed a company to obtain hearing board review of a permit issued to a competitor company. See *Kaiser Cement Corp. v. Air Pollution Control Officer*, No. 1437 (Hearing Board, Bay Area Air Quality Management District, Order Finding Error) (Jan. 8, 1987) (appeal filed by Kaiser Cement Corporation against permit to construct granted to Lone Star Industries for modification of existing facility for unloading of cement from ships).

The South Coast’s conclusion was rejected, and jurisdiction over CEQA claims was assumed, in *Appeal of Citizens for Review of Medical and Infectious Waste Imports into Tehama County*, No. 05-001, cited *supra* note 19. The author, as one of the attorneys for the permittee, assisted in preparing the opposition to this assumption of CEQA jurisdiction.

215. Southern California Pipe Trades District Council, No. 831-256, *supra* note 214 (Motion to Dismiss Portions of Petitioner’s Appeals) (Dec. 8, 1993) at 9-11.

216. Email from Judy Lewis, California Air Resources Board, to author (June 24, 2004) (on file with author) (referring to the South Coast AQMD Hearing Board members “as ‘professional’ hearing board members – working 3 days per week as opposed to others who may meet once a year or month”); and Interview with Hearing Board, South Coast Air Quality Management District, Diamond Bar, California (June 14, 2005).

never correspond with the statutory qualifications for hearing board membership.²¹⁷

In short, there is virtually nothing in California statutes to indicate that hearing boards are authorized to resolve CEQA disputes, and thus the statutes do not confer such jurisdiction.²¹⁸ Conversely, if an APCD has incorporated CEQA requirements into its own permitting rules, then the hearing board's basic authority to hear appeals of alleged violations of those rules would seem to encompass CEQA issues covered by the district's own requirements. This is the view taken in the Bay Area AQMD, whose hearing board has heard and resolved a series of difficult cases alleging violations of the district's rules implementing CEQA.²¹⁹ There is no reason, of course, to believe that the hearing board in a district with such rules is any more qualified to resolve CEQA matters than a board in a district without them.

217. See text *supra* at notes 13-18.

218. This conclusion is not undermined by the 1993 addition to Section 42302.1 of convoluted phrasing related to an uncodified, limited CEQA exemption for permitting of certain applications of coatings in existing automotive manufacturing plants. See Stats. 1993, ch. 1131, § 3. This narrowly focused addition allowed for a permit appeal under Section 42302.1 to determine only whether the bill's own exemption criteria were satisfied, and not whether any provisions of CEQA were violated. In making this narrow expansion of jurisdiction to include specific issues beyond the Health & Safety Code, and another explicit addition in Sections 42331(a) and 42332(a) of the Code, the Legislature made clear that hearing board jurisdiction otherwise is confined to issues within the Code. To dispute this conclusion is to assert that the Legislature engaged in a meaningless act, setting forth power which already existed.

219. Consolidated Appeals of the Pipe Trades Council *et al.* from the Authority to Construct Permit Issued December 14, 1987 to USS-POSCO Industries, Nos. 1857-1858 (Hearing Board, Bay Area Air Quality Management District, Final Order Concerning CEQA Issues) (June 23, 1988); Appeal of the People United for a Better Oakland *et al.* from the Permit to Operate Issued to Integrated Environmental Systems, No. 3165 (Hearing Board, Bay Area Air Quality Management District, Order Denying Appeal) (Apr. 2, 1998); and Appeal of the Southeast Alliance for Environmental Justice *et al.* from the Grant of Interchangeable Emission Reduction Credit Certificates, No. 3304 (Hearing Board, Bay Area Air Quality Management District, Order Denying Appeal) (June 29, 2000). In the latter case, the author appeared as counsel for the holder of the certificates. For one of the Bay Area board's earliest CEQA-related decisions, see Appeal of Citizens for a Better Environment, Nos. 675 and 677 (Hearing Board, Bay Area Air Quality Management District, Revised Order) (Aug. 23, 1979) (denying District's claim of general exemption from CEQA). In that case, the Hearing Board subsequently found, "It is not undisputed that the Air Pollution Control Officer has shown that he participated in the preparation of the Environmental Impact Report prepared under the supervision of the California State Lands Commission, has reviewed the Final Environmental Impact Report for the project, and has determined that any significant environmental effects of the project within the jurisdiction of the District have been mitigated." *Id.* Order Modifying Authority to Construct After Rehearing filed June 19, 1980.

Nevertheless, if the district's governing board has adopted CEQA rules, and explicitly or implicitly allowed appeals to the hearing board regarding them, that would seem to be a choice within its power to make.²²⁰

D. *Approaches to Permit Cases*

Because permit cases tend to be individually distinctive, it is difficult to generalize about suggested approaches to the parties' presentations of their positions. Usually the greatest challenge in permit cases is to make sure that the hearing board members—regardless of their various degrees of expertise—understand the technical evidence being presented. Counsel for the parties in such a case must strive to translate their clients' detailed and expert familiarity with the facts, and counsel's own interpretations of the law, into clear explanations of the points they wish the hearing board to grasp and act on.

VI.

CHANGES, CONTROVERSIES, AND CONFUSIONS

A. *Changes*

Many of the preceding sections discuss changes in law and practice concerning California's hearing boards. Three additional changes with broad significance warrant further discussion. They are the role of the ARB, the functions of the hearing board chairperson, and the use of outside counsel to the board.

First, the ARB has assumed a more active and influential role. Although the ARB many years ago presented training sessions for APCD enforcement personnel, more recently it has regularly offered training sessions targeted at hearing board members.²²¹

220. See, e.g., Placer County Air Pollution Control District, Rules 308-309. Although numerous APCDs have rules mentioning the applicability of CEQA to permitting, hardly any have rules specifically addressing administrative appeals of CEQA determinations. An unusual exception, placing jurisdiction in the district's governing board rather than its hearing board, is Siskiyou County APCD Rule 2.14, which states, "The Control Officer's determination regarding compliance with CEQA may be appealed by any affected party Any appeal shall be made to the APCD Board Any appeal of the Control Officer's CEQA determination for a project shall be heard and decided by the Air Pollution Control Board prior to any decision by the Hearing Board regarding an appeal, if applicable, of a permit for the same project made pursuant to Regulation V." In effect, this regulation places CEQA appeals before the governing board, but permit appeals on other grounds before the hearing board, even if both proceedings derive from the same permit.

221. ARB's "Variance Oversight Program" is described at www.arb.ca.gov/enf/variance/variance.htm. The ARB's "Basic Course" and "Advanced Course" work-

This is a welcome development, for as hearing board work has become more complex, it has become more important for members to have well-focused preparation for their duties. They need to understand the scope of their responsibilities under the law, as well as the types of procedures their predecessors have developed for handling different kinds of cases.

In conducting these sessions, and in intermittently distributing written guidance to hearing boards about significant questions that arise, the ARB staff serves as a clearinghouse through which hearing board members from different parts of the state can learn from each other, as well as from ARB personnel and staff experts from various APCDs.²²² If the ARB maintains its commitment to dedicating qualified staff and adequate resources to fulfill this support and “quality control” role for the hearing boards, the caliber of hearing board work can only be enhanced.

Additionally, as earlier mentioned, ARB is statutorily empowered to perform a key backstopping role in variance cases.²²³ The possibility that ARB will exercise its authority to revoke or modify variance orders can be a strong inducement for hearing boards to make sure their procedures and orders are in accord with statutory requirements.²²⁴

A second change in hearing board practices revolves around the role of the chairperson.²²⁵ As the variety and complexity of

shops for hearing board members are summarized at www.arb.ca.gov/ent/variance/avhb.htm.

222. Additionally, representatives of industry occasionally attend these training sessions, allowing them to understand hearing board functions better as well. Interview with Judy Lewis and Leslie Krinsk, California Air Resources Board, Sacramento, California (June 16, 2004).

223. See *supra* text at notes 72-73.

224. In a case before the South Coast AQMD Hearing Board, ARB enforcement officials’ attempt to persuade the hearing board to alter the anticipated outcome of its hearings was strongly objected to because “CARB’s proper role in reviewing decisions of the Hearing Board does not arise [under Health & Safety Code Sections 42360-42363] until after an order is issued by the Hearing Board. No order has yet been issued in this case and, hence, CARB has no jurisdiction or authority to be involved at this stage of the proceedings.” Letter from Lawrence Straw, Jr., to James Morgester, California Air Resources Board, re Security Environmental Systems, Inc., SCAQMD Hearing Board Case No. 1958-8, (March 13, 1980) (on file with author). The author assisted in the preparation of this objection.

225. Section 40806 of the California Health & Safety Code requires each hearing board to “select a chairman from its members.” In some districts, the masculine statutory term is modified to “chairperson” or “chair.” See, e.g., Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 5.6, (using “Chairperson”) and Bay Area Air Quality Mgmt. Dist. Hearing Board Rules § 10.4, (using “Chair”), available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005).

cases have grown, the chair's duties have also tended to expand and diversify. Thus, in addition to presiding over hearings, the chair often has other duties. For example, in the Lake County AQMD, "The Hearing Board Chairperson approves hearing date/times, runs meetings, signs orders, and may sit alone for emergency hearings."²²⁶ The chair of the South Coast AQMD Hearing Board "conducts up to three or four pre-hearing conferences on some days. Prehearing conferences are used to discuss any issues relevant to the proceedings, including witnesses, subpoenas, exhibits, discovery matters, legal issues and the length of time needed to complete the proceeding."²²⁷ In the Mojave Desert AQMD, "[t]he Chair runs the meetings and also is the first person called to hear emergency and/or interim petitions."²²⁸ In the El Dorado County AQMD Hearing Board, "[t]he chairperson may be designated as a single reviewer/signatory on a finalized document."²²⁹ Often these types of duties are set forth individually in specific hearing board rules, and in some districts a separate rule also attempts to list all the chairperson's responsibilities.²³⁰

This type of expansion of the role of the chairperson recognizes the need for delegation of specific tasks in order to promote more efficient discharge of boards' responsibilities. As the chair's responsibilities increase, however, there is a risk that the power of that individual may come to be seen as greater than it really is, especially in the eyes of the individual enjoying that position. Even though the spotlight in hearing board matters usually is on the chairperson, it must be remembered that each of the five members has equal responsibility for hearing the case

226. Letter from Robert L. Reynolds, Air Pollution Control Officer, Lake County Air Quality Management District, to author (Apr. 15, 2004), *supra* note 19.

227. SCAQMD QUESTIONNAIRE, *supra* note 11, at 4.

228. Memorandum from Karen Nowak, Mojave Desert Air Quality Management District, to author (May 2, 2004) (on file with author).

229. Letter from Thomas Fashinell, Acting Chairperson, El Dorado County Air Quality Management District Hearing Board, to author (Apr. 27, 2004) (on file with author).

230. See, e.g., Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 5.18 ("Authority for scheduling cases before the Hearing Board or continuing cases before the Hearing Board rests with the Chair of the Hearing Board . . ."), and Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 13.2, (listing twelve "Duties of the Chair") available at http://www.baaqmd.gov/brd/hearingboard/hb_rules.pdf (effective Dec. 5, 2005).

and casting his or her vote on its resolution.²³¹ A corollary of this responsibility is the need for each member to be free to air his or her relevant concerns during the hearings, and to ask questions bearing on the way he or she ultimately will vote. When the chairperson presides with too heavy a hand, taking center stage to the exclusion of full participation by other members, the process has gone awry.

Conversely, the chairperson does have a responsibility to ensure that the proceedings are efficient and orderly, and at times this duty is problematic because of the inclination of one or another member to engage in excessive, time-consuming statements or questions. The chairperson is then challenged to find a way, as diplomatically yet effectively as possible, to rein in his or her colleague and get the proceeding back on a relevant, expeditious track.

At times even a bigger challenge is to maintain calm and order in the hearing room itself. Parties, and sometimes their lawyers, can become quite vocal and exercised when things are not going their way, and the chairperson bears the burden of restraining outbursts they may be inclined to make. Even more challenging is the maintenance of decorum when the audience at a hearing is agitated about how a proceeding is unfolding. There have been cases before hearing boards in which residents of a neighborhood, citizen group representatives, labor union representatives, or others have attended the hearings and found it difficult to remain quiet during the proceedings.

In these disruptive circumstances, the chairperson should be respectful of the concerns animating the outbursts, yet firm in restraining them. Interested members of the public should be reminded, repeatedly if necessary, that they will have "a reasonable opportunity to testify with regards to the matter under consideration," as required by Health and Safety Code Section 40828.²³²

231. As discussed *supra* text at note 12, Section 40820 predicates hearing board action "upon the affirmative vote of a majority of the members of the hearing board."

232. The "management and control of contentious hearings, especially those where there is participation by the public," is identified by the South Coast AQMD Hearing Board as one of the most challenging aspects of its activities. That board has identified "four key factors that are important in the maintenance of an orderly process in contentious hearings." They are the formal setting of the hearing, the demeanor of the members, security, and the opening remarks by the Chair, which are described as "[p]erhaps the most important factor when there are potentially volatile members of the public." Explaining this last factor, the board has stated:

Even in the public testimony phase of the proceedings, however, members of the public may be intemperate or unfocused in their statements. The chairperson then may decide it is necessary to call for restraint and perhaps to impose a time limit on each speaker. Nevertheless, so long as the public testimony is relevant to the issues before the board, the chairperson and members should be indulgent and attentive so that the public truly has a fair opportunity to be heard.

A chairperson who is unsure about his or her responsibility for decorum, and who lets a proceeding become disorderly at the instance of either the parties or the audience, is not doing the job properly. That chairperson creates serious risks that the board will be unable to clearly hear and understand the evidence that is relevant and, therefore, that the parties to the case will not be given a fair hearing. Those risks may lead not only to unwise resolution of cases, but to judicial reversals as well.

A third important change in hearing board practice is increased use of outside counsel to the hearing board. As earlier noted,²³³ judicial challenges to some abatement orders have necessitated the retention of outside counsel to defend hearing board orders. In addition to these instances, some hearing boards have found it necessary, either for specific cases or as a matter of regular practice, to have the advice of counsel. This advice is in addition to input provided by the attorney member of the hearing board and by attorneys for the parties to the proceedings, including the attorney for the APCD staff. Resort to a separate source of legal advice apparently has come to be seen as necessary because of the increasing difficulty of hearing board work.

In recognition of this need, at the suggestion of the Monterey Bay Unified APCD, Section 40809 was added to the Health and Safety Code in 1986. It provides that the county counsel's office "may represent both the district and the hearing board on a matter relating to a hearing before the hearing board as long as the same individual attorney does not represent both the district and

In this situation, it is important to identify the participants, tell them that this is not an open forum, that it is like a court proceeding, what the procedure will be, that they will have an opportunity to testify under oath, that they may be cross examined and that the Hearing Board will deliberate in public, make its decision in public and state the reasons for its decision.

SCAQMD QUESTIONNAIRE, *supra* note 11, at 6.

233. *Supra* note 190.

the hearing board.”²³⁴ This provision does not apply, however, to the Bay Area AQMD or the South Coast AQMD.²³⁵ Assuming that the designated lawyers within a county counsel’s office can construct and respect an ethical wall as contemplated by this provision, Section 40809 is a workable response to the occasional need for outside legal advice for a hearing board.

There are some risks associated with this access to independent legal advice, even from the county counsel’s office. Particularly with a hearing board that meets very infrequently, and whose members are not well versed in their duties and the intricacies of the Health and Safety Code, there may be a tendency to rely too heavily on counsel’s advice. For example, there may be an inclination to seek counsel’s views on the merits of a case before the hearing board, rather than limiting the advice to background legal and procedural matters. The injection of such views into the proceedings is not proper, in view of basic procedural requirements governing hearing board matters, including requirements that the members themselves make the decisions and that decisions be based on sworn testimony.

The risks associated with outside counsel’s role are magnified when that attorney does not approach the proceedings in an unbiased fashion, or at least appears to have some conflicting interest. This risk is much less likely when the county counsel’s office provides the attorney than when a private firm does, as can occur in the Bay Area or South Coast districts.²³⁶ A private attorney rendering independent legal advice to a hearing board should not

234. CAL. HEALTH & SAFETY CODE § 40809(a) (West 2006). At originally introduced, the bill which became Section 40809 would have authorized a district’s governing board to “contract to employ legal counsel to advise the hearing board concerning matters of law and administrative procedure.” See S.B. 854, as introduced by Sen. Mello, March 5, 1985. The Monterey Bay district previously had contracted with private counsel to provide “legal guidance services,” including sitting with the hearing board during regular meetings and conferring “with the Chair as needed.” Memorandum from Larry Odle, Air Pollution Control Officer, Monterey Bay Unified Air Pollution Control District, to the Air Pollution Control Board (July 19, 1984) (on file with author). While retaining the option to continue to use private counsel, the Monterey Bay district staff sought the new provision in order to reduce costs by being able “to utilize the Monterey County Counsel’s office to provide these services.”

235. CAL. HEALTH & SAFETY CODE § 40809(b) (West 2006).

236. “Legal questions regarding substantive matters before the [South Coast AQMD] Hearing Board (e.g., the interpretation of provisions of the Health and Safety Code setting out the fact findings for variances) are handled by the legal member of the Hearing Board. Other questions involving the Hearing Board’s authority or procedures may be directed to outside counsel.” SCAQMD QUESTIONNAIRE, *supra* note 11, at 5.

have any of the types of conflicts of interest that would taint or disqualify a hearing board member in the proceeding.²³⁷

B. *Controversies*

A dispute arose in the late 1980s over the applicability of the Ralph M. Brown Act²³⁸ to hearing board proceedings. The Brown Act is the open meetings law applicable to local government agencies. For many years, almost all hearing boards have assumed—usually without serious analysis of the question—that the Brown Act applies to them. In the Bay Area AQMD and the Monterey Bay Unified APCD, however, staff attorneys had reached the contrary conclusion. In 1986 this departure from majority practice was questioned. Through a rather protracted and, at times, contentious process, the issue was presented to the ARB, which in turn requested and received a formal legal opinion from the Attorney General.²³⁹

The specific question before the Attorney General was whether a hearing board is required to conduct its deliberations in public after it has concluded public hearings on a matter but not yet reached and “announce[d] its decision in writing,” as required by statute.²⁴⁰ The Bay Area and Monterey Bay boards believed that the Brown Act was not applicable because its terms focused on legislative bodies, rather than purely adjudicatory

237. Conflict of interest issues related to hearing board members are discussed *infra* at Section VI(B). An objection to a hearing board's use of a particular private firm as outside counsel in a permit case arose in Appeal of Contra Costa Carbon Plant, No. 3402 (Hearing Board, Bay Area AQMD). See Letter from Kenneth A. Manaster, Pillsbury Winthrop LLP, to Thomas Dailey, Chairperson, Bay Area Air Quality Management District Hearing Board (Nov. 14, 2002) (objecting to hearing board's choice of outside counsel “presently representing an environmental organization that is suing Tosco Corporation, the owner and operator of the carbon plant which is the subject of this appeal. This involvement presents a conflict of interest for [the attorney] and, more importantly, compromises the appearance of impartiality of the Hearing Board's proceedings if he participates in them.”). See also Appeal of the City of Morgan Hill, No. 3350 (Hearing Board, Bay Area Air Quality Management District, Minute Order Denying Appellants' Motion for Reconsideration) (Mar. 11, 2002) (“The Board voted 3-1 to deny Appellants' request to disqualify outside counsel. . . . The reason for the Board's decision was that Appellants had failed to show any violation of due process.”).

238. CAL. GOV'T CODE §§ 54950 *et seq.* (West 2006).

239. See Dale Champion, *Bay's Smog Board Guards Its Secrets*, S. F. CHRON., Aug. 30, 1988, at B6; Dale Champion, *Appeals Panel Under Fire: Smog Board Punt on Secrecy Issue*, S. F. CHRON., Sept. 8, 1988, at A6; and Editorial, *A Defiant Board Should Obey Law*, S. F. CHRON., Sept. 12, 1988, at A16.

240. CAL. HEALTH & SAFETY CODE § 40860 (West 2006).

bodies.²⁴¹ Additionally, those boards believed that the Health and Safety's Code requirements for public hearings, public testimony, and written decisions provided more than adequately for public access, both to provide relevant input into decisions and to receive information about evidence received and decisions made.

Somewhat surprisingly, as these two hearing boards reviewed the issue and the implications of open deliberations, lawyers from both environmental groups and industry joined in urging that the Brown Act was not applicable.²⁴² As one attorney summed up, their view, "There are really good reasons why judges are able to deliberate in private, and I think they all apply to [a hearing board]. I cannot think of a distinction."²⁴³ Indeed, probably the principal concern of the Bay Area hearing board was that the depth, vigor, and candor of deliberations would be chilled, and the integrity of decisions would suffer, if deliberations had to be conducted in public.

Despite the linguistic oddity of treating hearing boards as legislative bodies, and despite the serious concerns about the practical impacts of applying the Brown Act, the Attorney General's opinion concluded:

The Ralph M. Brown Act does require the deliberations of a hearing board of an air pollution control district, after it has conducted a public hearing on a variance, order of abatement or permit appeal, to be conducted in public. The act prohibits the hearing board from conducting such deliberations in private with the board's counsel or the board's attorney member.²⁴⁴

In the aftermath of this opinion, all hearing boards eventually acquiesced in following the Attorney General's view.

241. "Interpreting 'legislative body' to also include nonlegislative bodies simply adds a nonsensical gloss to the statute, which defeats the effort of the Legislature to plainly delineate the Act's purpose and effect." Memorandum from Ed Kendig, District Counsel for Enforcement, Monterey Bay Unified Air Pollution Control District, to Monterey Bay Unified Air Pollution Control District Hearing Board 8 (Sept. 2, 1987) (on file with author).

242. The great volume of documents generated on this question by various APCD officials, hearing boards, the ARB, and private attorneys, was supplemented by a public hearing convened by the Bay Area hearing board. Transcript, Hearing Board Conference in Re Applicability of Brown Act to Hearing Board Activities (Hearing Board, Bay Area Air Quality Management District) (Sept. 8, 1987). At that hearing, views were presented by ARB counsel, Bay Area AQMD counsel, Monterey Bay Unified APCD counsel, a former hearing board member, and attorneys for environmental groups and industry.

243. *Id.* at 31 (statement of Marc Mihaly).

244. 71 Cal. Op. Att'y Gen. 96 (1988).

There has been no demonstrable resulting decline in the quality of hearing board decisions, though there are anecdotal observations that hearing board members are more hesitant to express their opinions and uncertainties in a public forum than they would be in a closed session. Nonetheless, it is widely considered helpful to the parties to a case, and to the public generally, for these discussions to be conducted openly. As the Vice Chair of the South Coast hearing board opined on compliance with the Brown Act, "It works."²⁴⁵

One aspect of Brown Act compliance that may not always work is the requirement of an opportunity for public comment.²⁴⁶ If, as has happened in some districts, this requirement is construed to allow members of the public to speak about a case without being under oath and subject to cross-examination, and perhaps even without identifying themselves, then considerable confusion and wasted time can be the result.²⁴⁷ Such comments cannot be any part of the basis for the hearing board's decision, and yet it is hard to have confidence that a board could "unring the bell" of having already heard and been influenced by unsworn and unquestioned statements. When form is elevated over substance through this application of the Brown Act, the risk of legally tainting the ultimate decision in the case is considerable.

A far better approach, efficiently and fairly reconciling the Brown Act's public comment requirement with Health and Safety Code Section 40828's public testimony requirement, is fol-

245. Interview with South Coast Air Quality Management District Hearing Board (June 14, 2005) (statement of Laurine Tuleja).

246. Cal. Gov. Code § 54954.3. This provision states, "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body"

247. This approach was followed, with many hours devoted to public comment, in a series of hearings in Appeal of Citizens for Review of Medical and Infectious Waste Imports into Tehama County, No. 05-001 (Hearing Board, Tehama County Air Pollution Control District), *supra* note 19. See also Letter from John Hansen, Pillsbury Winthrop Shaw Pittman, LLP to Mel Oldham, Tehama County Air Pollution Control District Hearing Board Chair (Oct. 25, 2005) (on file with author) ("As you know, many people made comments both on September 8 and October 11 during the Brown Act public comment periods, which totaled approximately three hours. . . . Many also spoke numerous times, thus making a mockery of the three-minute limit."). Judicial review of the hearing board's treatment and resolution of this matter was initiated in February 2006. InEnTec Medical Services California, LLC v. Hearing Board of the Tehama County Air Pollution Control District, No. 56912, Verified Petition for Writ of Administrative Mandamus filed February 2, 2006 (Superior Court, Tehama County).

lowed in some districts. In the Bay Area AQMD hearing board, for example, the following statement is customarily made by the chairperson at the beginning of each hearing, describing how and when the public will be heard:

Members of the public are afforded the opportunity to testify on any docket on the calendar. All calendars for hearings are posted at District headquarters at least 72 hours in advance of hearings. At the beginning of the hearings on the calendared dockets, an opportunity is also provided for the public to speak on items of interest to the public that are within the hearing board's subject matter jurisdiction currently not calendared. Speakers will be limited to three minutes each.

With this approach, orderly opportunities are provided for members of the public to speak at the outset on matters broadly related to the hearing board, and to testify more specifically and formally at the public testimony phase of the evidentiary hearing.

A second area of controversy, one that is likely to continue to produce difficulty, concerns the ethical standards of conduct applicable to hearing board members, particularly with regard to conflicts of interest. Whenever it appears that a member's outside associations or activities raise doubt about his or her ability to discharge hearing board duties properly, the question arises as to just what the applicable standards of conduct are.²⁴⁸ The difficulty in answering this question arises because there is no single, comprehensive set of standards that clearly applies to hearing boards.

Instead, there are various different legal sources that either are directly applicable to hearing board members or are targeted at

248. The range of circumstances raising this question is vast. See, e.g., Letter from James Lents, Executive Officer, South Coast Air Quality Management District, to South Coast Air Quality Management District Hearing Board (June 17, 1987) (on file with author) ("I believe that the Port's presentation to the Board violated the spirit of statutes providing for public access to Board hearings. In addition, the Board's action in allowing its meal to be paid for by an entity closely tied to a party before the Board appears inappropriate."); Appeal of Citizens for Review of Medical and Infectious Waste Imports into Tehama County, No. 05-001 (Hearing Board, Tehama County Air Pollution Control District, Notice and Motion Requesting Voluntary Recusal of Boardmember), *supra* note 19 (recusal sought because chair "as a member of the local Kiwanis Club . . . had sat through a presentation given by one of the parties"); Security Environmental Systems, Inc., No. 1958-8 (Hearing Board, South Coast Air Quality Management District, Motion to Disqualify) (May 8, 1989) (disqualification of member sought because District's witness, an enforcement official, "teaches a class with [the member] at U.C.L.A. on the subject of toxic air contaminants" and both are "therefore co-participants in a venture to the economic benefit of both of them.").

other kinds of adjudicators analogous to hearing board members.²⁴⁹ The latter sources can provide useful guidance for hearing boards, even if they are not strictly binding on them.²⁵⁰ There also are numerous judicial precedents, either interpreting statutory provisions on ethical conduct or applying constitutional principles of due process of law to require impartial decision makers in administrative hearings.²⁵¹

Given this array of sources of law, there remains significant uncertainty regarding the governing standards. It is beyond the scope of this article to explore the many levels of this uncertainty and seek to resolve it. Nonetheless, it should be evident that proper discharge of hearing board functions requires the type of objective and unbiased attitude expected of members of the judiciary. Fortunately, in some APCDs, there are rules that set forth this expectation, and some even spell out procedures to be followed for voluntary or involuntary disqualification of a member whose impartiality is in question. Borrowing partially from the Administrative Procedure Act, rules in the Bay Area, Monterey Bay, and South Coast districts require a member to “disqualify himself or herself and withdraw from any case” in which the member “cannot accord a fair and impartial hearing or consideration.”²⁵² The spirit of pronouncements such as these is clear, and should be heeded by hearing board members in all districts. Where controversies inevitably will develop is in applying these rules, and the other directly pertinent or analogous sources of law, to the facts of individual situations.

249. The ARB has identified such sources as including the Political Reform Act, CAL. GOV'T CODE §§ 81000 *et seq.*; and the Code of Judicial Ethics, particularly Canons 2A, 2C, 3B(4), 3B(8), and 3E. See OFFICE OF LEGAL AFFAIRS, CALIFORNIA AIR RESOURCES BOARD, INFORMATION FOR HEARING BOARD MEMBERS 6-8 (2001). Furthermore, CAL. GOV'T CODE § 87406.1 expressly prohibits a former hearing board member from engaging in certain activities relating to the Air Pollution Control District for one year after leaving the board.

250. See, e.g., California Administrative Procedure Act, CAL. GOV'T CODE §§ 11340-11544 (West 2006), especially § 11512(c) and § 11425.40; CAL. CIV. PROC. CODE § 170.1 (West 2006).

251. See, e.g., *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002).

252. See CAL. GOV'T CODE § 11425.40 (West 2006); Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 5.14, *available at* <http://www.baaqmd.gov/dst/regulations/index.htm#reg5> (effective Dec. 5, 2005); Monterey Bay Unified Air Pollution Control Dist., Regulation VI, Rule 7.5.1 *available at* <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised June 19, 2002); and South Coast Air Quality Management Dist. Rule 1217 (1978), *available at* <http://www.aqmd.gov/rules/reg/reg12/r1217.pdf>.

C. Confusions

Finally, two relatively minor but persistent areas of confusion in hearing board practice deserve brief mention. The first is discovery, i.e., the use in hearing board proceedings of some of the methods employed in advance of courtroom trials for the exchange of information among the parties. These methods include written interrogatories, witness lists, oral depositions, requests for admission of facts, and document production requests. Because hearing board proceedings are not governed by the Administrative Procedure Act, the discovery provisions of that statute do not automatically apply.²⁵³ However, a hearing board's procedural rules may provide for discovery methods to be available, including those set forth in the APA, and some districts have such rules in place.²⁵⁴

As suggested earlier,²⁵⁵ use of these methods can aid the parties' preparation and contribute to more efficient, well-focused hearings. Probably the most obviously constructive method for use in hearing board cases is the exchange of witness lists. Beyond this, however, confusion and frustration arise when hearing boards are called upon to resolve disputes over other discovery devices. For example, if written interrogatories are submitted, or a request for admission of facts or production of documents, it is not unusual for a party to object to some of the requested items. The hearing board then finds itself obligated to go through a tedious process of reviewing and evaluating the appropriateness of each request.

Hearing boards usually are ill-suited to perform this function, and attempts to resolve discovery disputes tend to be very time-consuming for all concerned.²⁵⁶ It is in part for this reason that many districts do not allow discovery at all. In those which do

253. Cal. Gov. Code §§ 11507.5-11507.7.

254. See, e.g., Monterey Bay Unified Air Pollution Control Dist., Regulation VI, Rules 6.1-6.2 available at <http://www.arb.ca.gov/drdb/mbu/cur.htm> (last revised June 19, 2002); San Diego Air Pollution Control District Rule 75 (1985), available at <http://www.sdapcd.org/rules/rules/Reg5pdf/R75-75-1.pdf>. In 1981 a superior court ruling upheld hearing board authority to develop rules allowing broader discovery than is permitted under the APA. *Port of Redwood City v. Hearing Bd. of the Bay Area Air Quality Mgmt. Dist.* (Cal. Super. Ct. San Francisco County 1981) (No. 780189).

255. *Supra* Section III(G).

256. Southeast Alliance for Environmental Justice, *supra* note 203 (Order Granting Motion to Compel Discovery) (May 2, 2000). In this matter, the Bay Area AQMD Hearing Board had before it appellants' requests for the District to produce 38 documents and provide 88 admissions, plus requests for the intervenor-real party in interest to produce 26 documents and provide 66 admissions. Following consulta-

allow it in one form or another, probably the most efficient way to perform the daunting task of resolving disputes is to delegate it to the chairperson or the attorney member of the board.²⁵⁷ For the multi-member panel to meet in public session, as some boards have done, to hash through discovery specifics is unwise, usually contributing no added benefit to the process beyond what an individual member could accomplish.

In sum, the confusion surrounding discovery can be eliminated by eliminating discovery altogether, but there is a price to be paid for ruling out the practical benefits of structured exchanges of information prior to hearing. If some discovery is to be allowed, its potentially disruptive and delaying effects at least can be reduced by delegating to a single member the responsibility for resolving discovery disputes.

Another area of confusion that occasionally confronts hearing boards is requests for rehearing of decisions. Section 40821 says that 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."²⁵⁸ Section 40861, a somewhat redundant provision, states that a board "may rehear a decision if a party petitions for a rehearing within 10 days" after the decision has been mailed to him. Taken together, these provisions clearly establish that a party to a case may request a rehearing, but what is less certain is whether the board itself can choose to have a rehearing even if no party has requested it. That latter option would seem to make sense, assuming the board has some good reason to revisit a matter.²⁵⁹

Ordinarily the rehearing prospect arises when a party requests it. What is confusing to hearing boards at that point is whether they are required to have a hearing on the rehearing request and to deliberate publicly on whether to grant it.²⁶⁰ Under this *modus operandi*, if the decision is then made to grant rehearing,

tion and partial agreement among the parties, "a total of 96 requests for Documents or Admissions remain unresolved and are thus the subject of this ruling."

257. As mentioned *supra* text at note 227, in the South Coast AQMD Hearing Board, the chair addresses discovery matters in prehearing conferences.

258. CAL. HEALTH & SAFETY CODE § 40821 (West 2006).

259. The Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules appear to contemplate this route, allowing that "[a]ny member of the Hearing Board may request a rehearing within 10 days of the effective date of any decision by filing a Request to Rehear." Bay Area Air Quality Mgmt. Dist. Hearing Bd. Rules § 5.14, *available at* <http://www.baaqmd.gov/dst/regulations/index.htm#reg5> (effective Dec. 5, 2005).

260. Presumably the same question would arise under the Bay Area rule cited *supra* note 259, if a member actually files a "Request to Rehear."

then the rehearing itself would be scheduled for a subsequent date, following proper public notice. Alternatively, can the board or its chairperson, acting without a hearing, decide whether to grant the rehearing? If the decision is to grant it, then a properly noticed rehearing would be scheduled. If instead the board determines to deny the rehearing request, there would be no hearing at all.

There is no clear statutory answer to this little conundrum. From a practical standpoint, considering efficiency and expense to the taxpayers and the parties, it would seem that if the written request for rehearing appears to present strong grounds for the board to delve back into the matter, the board should grant the request without a hearing and schedule the rehearing itself. The only actual "hearing" then would be the rehearing. If, however, the rehearing request appears to offer weak bases for reconsidering the matter, the more prudent course would seem to be to schedule the request but only for argument on whether there later should be a rehearing. Proceeding in this manner seems fairer than just ruling based on the papers alone, for this approach allows the party who wishes rehearing to have his day "in court," at least to the extent of being heard about why a rehearing is warranted. After hearing such argument, the board can decide whether a rehearing, including the taking of testimony, is warranted. If it is, then a further occasion should be scheduled for the rehearing. Otherwise, the rehearing request would be denied, there would be no additional hearing, and the original decision would stand.

VII.

CONCLUSION

This survey of the objectives and major characteristics of hearing board work is primarily intended to help lawyers and others involved in cases to have a clearer perspective as they prepare to go before hearing boards and as they make their presentations there. Greatest attention has been given to the variance process because that is the heart of hearing board work. It also best exemplifies the inquiry into equitable considerations which characterizes most cases before these boards.

As has been shown, however, the three types of cases generally have different emphases. In variance cases the question of the applicant's diligence in seeking to comply frequently dominates the proceedings. In abatement cases, in contrast, the nature and

extent of the violations often seem to be of most critical concern. Lastly, in permit cases technical issues of interpretation of the law and of alternative technological approaches usually control.

In all three formats, and regardless of these varying emphases, the underlying goal of administrative adjudication by California's hearing boards is the same. It is to reduce air pollution as quickly, greatly, and fairly as possible. If this goal is to be well served by hearing boards, their members must fully understand and respect the responsibilities entrusted to them. They must approach their role—whether exercised many times a week or only once every few years—with respect for the laws that govern their authority and respect for the concerns and constraints being expressed by the parties and members of the public who come before them. Hearing board members must recognize that the district staff's expertise is generally deserving of considerable deference. Nevertheless, even though that expertise usually is emphasized in each case through staff reports and testimony, ultimately the hearing board must be independent of the staff, deferential to its expertise to a sizable degree, but not a rubber stamp.²⁶¹

If a hearing board develops a reputation over time for bias toward a particular type of party—whether it be the APCD staff, industry, or environmental groups—that board is likely to find its functions drastically diminished. A hearing board's reputation for bias, or for persistent inefficiency or internal dissension, can lead to avoidance of the board. District staff will think twice about bringing abatement actions, instead preferring to take violators directly to court or to exercise prosecutorial discretion to develop settlements embodied in enforcement agreements. Potential variance applicants will choose to run the risk of being subjected to enforcement proceedings, rather than subject themselves to the time and expense of variance proceedings with highly unpredictable, or predictably unfavorable, outcomes. Even potential challengers to permit decisions may find other avenues for working out disputes over the APCD's permitting ac-

261. Although the hearing boards are structured as independent, adjudicatory arms of the APCDs, there is some risk that a board can become overly reliant on the opinions and preferences of APCD staff personnel, who regularly appear before the board and who work full-time on air pollution matters. As one commentary also implied many years ago, the fact that the district governing board makes APCD policy and appoints hearing board members may also constrain some members to be wary of great departures from the views of that board and the district's staff. Willick & Windle, *supra* note 5, at 531-32.

tions. In other words, when a hearing board ceases over a sustained period of time to be perceived as an impartial forum, it probably has lost sight of the commitment to fairness that the statutory scheme contemplates. Moreover, by inducing potential parties to avoid it, such a hearing board may succeed only in making itself extraneous.

The complexity of hearing board work, and controversial decisions now and then, occasionally spark legislative proposals to alter or eliminate some hearing board responsibilities. In 2005, for example, a bill was introduced that would drastically reduce and redistribute hearing board functions.²⁶² Ironically, the types of cases essentially targeted for removal from hearing boards under this bill would be variances and abatement orders, leaving permit disputes unaltered. Although there undoubtedly is room for reform and improvement in hearing board functions, and it may be wise for the legislature to take a hard look at how hearing boards are constituted and empowered, this bill seems to have it backwards. Permit disputes are the types of cases for which hearing boards are least well suited, while variances and abatement cases make much more sense for resolution by APCD hearing boards.

Although hearing board members, as noted at the outset of this article, are usually not air pollution experts, there are good reasons for entrusting them with the responsibilities hearing boards have long and admirably discharged, especially in the variance and abatement realms. In many instances, of course, members do bring relevant expertise to their positions. More commonly, service over the course of some years develops in most members considerable familiarity, if not expertise, with many aspects of the air pollution regulatory scheme.

Even beyond these capabilities, as members of the communities their decisions affect, hearing board members apply the type of common sense and popular wisdom usually expected of jurors.

262. A.B. 1231, 2005 State Assem., Reg. Sess. (Cal. 2005), introduced by Assemblyman Jerome Horton on February 22, 2005. For an earlier example of a similar, unsuccessful proposal, see A.B. 768, 1991 State Assem., Reg. Sess. (Cal. 1991), which would have allowed any person to require a hearing board to transfer any matter to the Office of Administrative Hearings for appointment of an administrative law judge. In January 2006, A.B. 1231 was amended into wholly different provisions. As amended, the bill would not alter any hearing board functions. Instead, it would require APCDs to biennially report to the ARB on variance and abatement order activities and related emissions. ARB, in turn, would be required to publish this information on the internet.

Paradoxically, part of the uniqueness of hearing boards, and of the rationale for them, is that these air pollution “judges” actually are expected to bring to their work many of the attributes of jurors. As one ARB attorney described it, there is something “very American” about hearing boards because of this local citizen involvement.²⁶³

In conclusion, the responsibilities of hearing board members have grown to be very serious and substantial, and members should take them on only if they recognize this and are prepared to act accordingly. Because hearing board members are not the primary air pollution experts at APCDs, they may occasionally feel unqualified for the job when faced with the complexities of modern air pollution law and science. At the same time, precisely because hearing board members are not air pollution experts, and instead are a diverse group of members of the community, they are extremely well qualified to do what the Health and Safety Code expects of them. If California’s air pollution laws are to be applied fairly, to promote just treatment of both pollution sources and the communities affected by them, it is up to the hearing boards to make it happen.

263. Interview with Judy Lewis and Leslie Krinsk, California Air Resources Board, Sacramento, California (June 16, 2004) (statement of Leslie Krinsk).