Administrative Adjudication of Air Pollution Disputes: The Work of Air Pollution Control District Hearing Boards in California

*Kenneth A. Manaster**

Introduction

Control of air pollution from stationary sources in California is primarily a function of local government.[1] In contrast, state government, principally through the California Air Resources Board (ARB), is responsible for control of air pollution from most types of motor vehicles.[2] The ARB also plays an important oversight and support role in stationary source control efforts, but the major responsibility is still with the local air pollution control districts.[3]

---

* Professor of Law, University of Santa Clara. Adjunct Professor of Law, University of California, Hastings College of the Law. Chairman, Hearing Board, Bay Area Air Quality Management District (AQMD). A.B. 1963, LL.B. 1966, Harvard University. The views expressed in this Article are those of the author personally and are not official statements of the Hearing Board of the Bay Area AQMD. Portions of this Article earlier appeared in papers presented by the author before the Air Pollution Enforcement Symposia of the California Air Resources Board.

[1] CAL. HEALTH & SAFETY CODE § 39002 (West 1979); *see* Simmons & Cutting, *A Many Layered Wonder: Nonvehicular Air Pollution Control Law in California*, 26 HASTINGS L.J. 109, 125 (1974).

[2] CAL HEALTH & SAFETY CODE §§ 39002, 39500 (West 1979); *see also* Western Oil & Gas Ass'n v. Orange County APCD, 14 Cal. 3d 411, 534 P.2d 1329, 121 Cal. Rptr. 249 (1975); J. KRIER & E. URSIN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975 (1977).

[3] CALIFORNIA AIR RESOURCES BOARD, REPORT TO THE LEGISLATURE ON AIR POLLUTION CONTROL ENFORCEMENT PROGRAMS xx (April 1982) [hereafter ARB REPORT]; *see* CAL. HEALTH & SAFETY CODE § 42362 (West 1979) (ARB authority to revoke or modify variance granted by APCD if variance does not require compliance as expeditiously as practicable); *see also* Stauffer Chem. Co. v. ARB, 128 Cal. App. 3d 789, 792, 180 Cal. Rptr. 550, 552 (1st Dist. 1982); Simmons & Cutting, *supra* note 1, at 124-25, 141.

The work of the forty-five air pollution control districts (APCD's) that encompass California has been discussed extensively in the legal literature, with almost all of the discussion emphasizing either the rulemaking powers or the enforcement tools available to the APCD's.[4] This Article examines the adjudicatory authority vested in the APCD's, for most of the significant conflicts between regulatory authorities and stationary sources of air pollution in California are brought within the administrative adjudication process. More specifically, this Article explains some fundamental aspects of the work of the hearing boards in each California APCD and offers some perspectives and suggestions that may assist government and private attorneys, enforcement personnel, industry technical experts, and other witnesses in presenting their cases more effectively before these boards.

The first area of hearing board work to be explored will be applications for variances. This is the type of case that the boards face most frequently.[5] The basic elements of hearing board work appear most

---

[4] *See* ARB REPORT, *supra* note 3, at I-2; Chass & Feldman, *Tears for John Doe*, 27 S. CAL. L. REV. 349 (1954); Chernow, *Implementing the Clean Air Act in Los Angeles: The Duty to Achieve the Impossible*, 4 ECOLOGY L.Q. 537 (1975); Crawford, *The Bay Area Air Quality Management District: Air Pollution Control at the Local Level*, 19 SANTA CLARA L. REV. 619 (1979); Kennedy, *The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles*, 27 S. CAL. L. REV. 373 (1954); Simmons & Cutting, *supra* note 1; Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661 (1971); Willick & Windle, *Rule Enforcement by the Los Angeles County Air Pollution Control District*, 3 ECOLOGY L.Q. 507 (1973); Comment, *California Legislation on Air Contaminant Emissions from Stationary Sources*, 58 CALIF. L. REV. 1474 (1970); Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*, 55 CALIF. L. REV. 702 (1967); 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); Comment, *Stationary Source Air Pollution Control in California: A Proposed Jurisdictional Reorganization*, 26 UCLA L. REV. 893 (1979) [hereafter Comment, *Stationary Source*].

[5] 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.

clearly in variance proceedings. The second category is abatement order requests, another well-established aspect of hearing board activities. As will be shown, abatement cases usually share many of the characteristics and objectives of variance cases. The third category is a relatively new and growing area, the resolution of permit disputes. These disputes include such controversies as requests by APCD officials for revocation of operating permits and appeals by individual companies and others from APCD action on construction and operating permit requests. As with abatement cases, many of the observations regarding variances are relevant to the procedures and goals of permit cases.

I. Preliminary Facts and Approaches

Before analyzing the three types of cases, some basic facts about hearing boards should be outlined. First, each APCD has a hearing board consisting of five members appointed by the district board of directors to staggered, three year terms.[6] Second, at least three of the members are required by statute to bring some relevant expertise to the work. 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 specialization in the fields of environmental medicine, community medicine, or occupational or toxicologic medicine. The other two members are designated as "public members."[7] Third, the members are "part-timers" on the hearing board; that is, they have other work or endeavors to which they probably devote much more time each week than they spend on hearing board matters.[8]

These three facts are significant for 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 the actual conflict of interest situation, in which the board member has been an employee or a consultant for the particular air

---

ARB Report, *supra* note 3, at IV-47, IV-60; *see also* Walker, *The Air Pollution Control Hearing Board — Functions and Jurisdictions*, 27 S. Cal. L. Rev. 399, 400 (1954).

[6] Cal. Health & Safety Code §§ 40800, 40804 (West 1979 & Supp. 1984).

[7] Cal. Health & Safety Code § 40801 (West 1979).

[8] Some hearing boards with light caseloads meet infrequently, no more than a handful of times each year. Others meet on one or more days each week. The South Coast District Hearing Board members "typically hear perhaps 30 to 40 cases a month meeting three times each week." South Coast AQMD, Air Quality Digest 2 (July 1983).

pollution source. That member should not participate in that case at all; the member knows too much.[9] At the other extreme is the member who has no relevant expertise to bring to bear on the particular kind of source at issue. There are many gradations of interest and expertise between these two extremes.

The challenge faced by the attorney for a polluter, for APCD staff, or for an interested intervenor such as a local citizens group[10] is to communicate effectively with these people who presumably are prepared to hear a case, but who have 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 member's concern about the possibly toxic character of emissions or the lawyer's concern about whether proper notice to the public has been given regarding pending proceedings.[11]

Conversely, if the attorney overlooks the fact that some board members know far more about technical issues than others, 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 upon the board members themselves to take the initiative to point out their own areas of ignorance, but this is a somewhat embarrassing thing to expect a member to do when counsel, witnesses, and at least some 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 everyone's time by talking over the members' heads.

One constructive approach to preparing for hearing board proceedings is to gather advance information about the board's practices and predispositions, perhaps by observing current proceedings, reading earlier decisions,[12] or inquiring of attorneys with experience before the

---

[9] *See, e.g.*, CAL. GOV'T CODE §§ 87100-87103, 87302(c) (West 1976 & Supp. 1984).

[10] *See* BAY AREA AQMD, HEARING BOARD RULES § 2.7 ("Application for Intervention") [hereafter BAY AREA RULES].

[11] The public notice requirements are set forth in CAL. HEALTH & SAFETY CODE §§ 40823-40827 (West 1979).

[12] "A hearing board shall announce its decision in writing." CAL. HEALTH & SAFETY CODE § 40860 (West 1979). *See generally* R. FELLMETH & R. FOLSOM,

particular hearing board. The goal is to know the board, to develop an almost intuitive 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 appreciate 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 moments during a hearing 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. Visual aids such as photographs of equipment or line diagrams of processes may often be very informative for the board.

In considering these observations and the analysis that follows, it should be kept in mind that the procedures followed by hearing boards in some APCD's are rather formal, in the nature of judicial proceedings.[13] Others are informal, and some rely heavily upon written documentation of parties' positions rather than upon live testimony.[14] Although most of the discussion in this Article pertains to the formal approach, which the statute apparently contemplates, the differences among various hearing boards should not obscure the more general points. The discussion of the major purposes and basic procedural aspects of hearing board cases should be helpful to attorneys and parties working in any of the APCD's. The objectives of this type of administrative adjudication are probably achieved equally well through both the formal and informal approaches.[15]

CALIFORNIA REGULATORY LAW AND PRACTICE § 139 (1981).

[13] *See, e.g.*, BAY AREA RULES, *supra* note 10, §§ 5.1-.22; *see also* South Coast AQMD, Air Quality Digest 3 (July 1983) ("the Hearing Board takes testimony in courtroom-like proceedings"); SAN DIEGO COUNTY APCD, HEARING BOARD RULES AND REGULATIONS, Rule 18 ("Order of Proceedings"); Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. 27, 60 (1981) ("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.").

[14] *See, e.g.*, POLICY & PROCEDURE FOR THE HEARING BOARD OF THE SANTA BARBARA COUNTY APCD, para. 4 (Feb. 8, 1980) ("The applicant and the Air Pollution Control District shall submit to the Clerk for the District, at least five days prior to the hearing date, all documentary evidence and support materials which they propose to introduce at the hearing.").

[15] Although the hearing boards are structured as essentially independent, adjudicatory arms of the APCD's, there is some risk that a board can become overly reliant upon the opinions and preferences of APCD staff personnel, who regularly appear before the board and who, in contrast to the board members, work full-time on air

II. VARIANCES

A. General Characteristics of Applications for Variances

The main statutory provisions governing variance cases are sections 42350 through 42364 of the Health and Safety Code. The first of these sections states: "Any person may apply to the hearing board for a variance from Section 41701 or from the rules and regulations of the district."[16] The vast majority of 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 excess visible emissions — section 41701's "Ringelmann 2" limitation[17] — will also be a subject of the applicant's request for variance protection. In addition to private applicants, variances are occasionally sought by public agencies, such as municipal sewage treatment plants, electric utilities, federal military[18] and research installations, and hospitals. Procedurally there is nothing different in the treatment of these cases, other than regulatory provisions that may provide for reduced or exempted filing fees.[19]

One statutory requirement from which a variance may not be

---

pollution matters. As one commentary has also implied, 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 staff. Willick & Windle, *supra* note 4, at 531-32.

[16] CAL. HEALTH & SAFETY CODE § 42350 (West 1979).

[17] 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 emissions of an idicated [sic] 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 4, at 624-25 (footnotes omitted). The constitutionality of § 41701's predecessor was declared in People v. Plywood Mfrs., 137 Cal. App. 2d Supp. 859, 291 P.2d 587 (1955).

[18] *See* California *ex rel.* ARB v. Department of the Navy, 431 F. Supp. 1271, 1275-76 (N.D. Cal. 1977).

[19] The statutory authorization for variance fees requirements is CAL. HEALTH & SAFETY CODE § 42364 (West 1979). Also, CAL. HEALTH & SAFETY CODE § 40500 (West Supp. 1984) and § 40510 (West 1979) authorize an addition to variance filing fees for the South Coast AQMD. The addition has been described as "an excess emissions fee based on the total weight of emissions discharged during the variance period in excess of that allowed by air quality rules." South Coast AQMD, Air Quality Digest 8 (July 1983); *see also* B. Frantz, Excess Emissions Fees Program for SCAQMD Hearing Board (paper presented at California ARB, Air Pollution Enforcement Symposium, Apr. 29, 1981) (copy on file with author).

granted is section 41700, the statutory nuisance provision.[20] This important limitation on hearing board power must be kept in mind 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.

Similarly, the legislature has forbidden the granting of variances from district permit schemes, pursuant to section 42300, with particular respect to permits to build, erect, alter, or replace.[21] This prohibition, however, does not preclude the granting of a variance from the requirement of a permit to *operate*. Apparently the legislative belief was that equities sufficient to justify granting a variance might be proved by a source which has already been given authorization to construct new facilities or alterations, but that the variance device would be inappropriate absent the initial permit to build. The latter type of case presumably can be handled by means of an appeal from a denial of a requested permit to build in the first place.

In the ordinary nonnuisance 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. Ordinarily 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 thought that variance applicants are trying to accomplish something improper, to obtain some privilege contrary to the objectives of air pollution control. Such a perspective would be erroneous; if the statutory criteria can be satisfied, the applicant is *entitled* to a variance. It might even be apt at that point to describe the

---

[20] [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 1979). The constitutionality of this section was upheld when challenged as void for vagueness in People v. General Motors Corp., 116 Cal. App. 3d Supp. 6, 172 Cal. Rptr. 470 (1980). Section 42353, which discusses findings and conditions in variance orders, 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 1979).

[21] CAL. HEALTH & SAFETY CODE § 42350 (West 1979).

variance as a matter of right.[22] The legislature designed this procedure for the benefit of 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 a reason, it deserves a variance.

B. The Questions to be Answered

Since the application for variance is ordinarily submitted by the pollution source operator,[23] which is in the best position to explain its need for relief, the burden of proof should rest upon the applicant.[24] 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 that the parties should attempt to address, and that 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 statutory criteria for variance protection? These statutory criteria are found in section 42352. There are three criteria, to be discussed in the order in which they appear in the law.

(a) 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.[25] This requirement is usually the easiest to prove and least debatable of the

---

[22] *Cf.* Currie, *supra* note 13, 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 D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 200 (1975) (variances from zoning ordinances discretionary, but when standards clearly met, may be a right to variance).

[23] 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 AQMD; Findings and Decision entered Mar. 23, 1983); BSP Division Envirotech, No. 613 (Hearing Board, Bay Area AQMD; Order Extending Variance entered Mar. 1, 1979).

[24] Customary legal considerations also lead to this conclusion. *See* CAL. EVID. CODE § 500 (West 1966); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 255-62 (2d ed. 1980).

[25] CAL. HEALTH & SAFETY CODE § 42352(a) (West 1979); *see also* CAL. HEALTH & SAFETY CODE § 41703 (West Supp. 1984).

three. Ordinarily the applicant has received notification from the APCD that it is in violation, or it may have become aware on its own initiative 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 rules and regulations are violated. If this is not done, it becomes extremely difficult for the board, if it sees fit to grant the requested variance, to draw up a decision and an order which specifically limit the coverage of the variance to the applicable provisions. With the 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 generally unfamiliar with district powers and is either unrepresented by an attorney or represented by an attorney unfamiliar with APCD regulations.

(b) That, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property, or (2) the practical closing and elimination of a lawful business.[26] This second requirement is often the most difficult issue the hearing board must resolve. It is best interpreted as having two areas of emphasis.

First, the board must determine whether requiring present compliance would impose a serious hardship on the applicant. This hardship is addressed by the twin 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 even if compliance would require a period of curtailed operations.[27] On the basis of this kind of testimony, the board

---

[26] CAL. HEALTH & SAFETY CODE § 42352(b) (West 1979).

[27] Santa Fe Enameling & Metal Finishing Co., No. 2536-1, at 3 (Hearing Board, South Coast AQMD; Findings and Decision granting variance entered Mar. 9, 1983)

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, have held the broad interpretation to be more consistent with an orderly and fair regulatory scheme for air pollution control.[28]

Hardship alone is not enough to satisfy this second statutory requirement. 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.[29] If the applicant's present and predicted violations, and the hardship compliance would impose, are due to conditions beyond its reasonable control, a variance is warranted. If, on the other hand, it appears that the applicant's predicament is one which has been within

---

("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.").

[28] *See, e.g.*, FMC Corp., No. 1166, at 5-6 (Hearing Board, Bay Area AQMD; Order Granting Variance filed Jan. 5, 1984) ("Applicant would be forced to shut down a substantial portion of its . . . [f]acilities . . . , 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 AQMD; Order Granting Variance filed 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 AQMD; Order Granting Emergency Variance filed 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 AQMD; Order Granting Variance filed 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 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.

[29] "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 operation into compliance . . . ." Willick & Windle, *supra* note 4, at 529.

its reasonable control and which diligence on its part could have avoided, no variance should be granted.[30] The legislature has not offered variance protection for negligent, dilatory pollution sources.

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 now 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 being in violation or did a source test which showed a violation, even though the regulation had been in force long before then. These kinds of arguments have been rejected.[31] 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 such obstacles 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.

This area of inquiry can be immeasurably aided by the readiness of district inspectors, engineers, and lawyers to provide certain information. They should carefully gather together for presentation in the hearing all 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 very 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 be very striking to the board, for example, that the applicant has done nothing at all to control its emissions over a five year period, but if the applicable regulation was promulgated only one year ago and went into

---

[30] City of Davis, No. 83-002, at 1 (Hearing Board, Yolo-Solano APCD; Order Denying Variance entered July 26, 1983) ("The petitioner has failed to correct equipment deficiencies under a previous variance."); James W. Crawford, No. 2545, at 3 (Hearing Board, South Coast AQMD; Findings and Decision denying variance entered Jan. 5, 1982) ("Petitioner has been aware of District Rules and Regulations and has made no effort to come into compliance.").

[31] 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 on its last leg. That runner should not be declared a winner. *See Doubts Rise on Woman's Feat; 'I Ran Race', She Says*, N.Y. Times, Apr. 22, 1980, at B15, col. 1 (Rosie Ruiz victory in Boston Marathon questioned).

effect six months ago, then the applicant's position on the diligence question is not as bad as it might at first appear.

District legal and enforcement staff personnel in variance cases have an obligation to aim their efforts toward the quickest possible cleanup, while also having some compassion for the applicant that really is in a bind "due to conditions beyond its reasonable control." On the other hand, variances are not free passes for irresponsible polluters which have the notion that hearing boards serve merely the convenient function of restraining zealous enforcement personnel who are making the polluters' lives difficult. The responsibilities of lawyers for the APCD to engage in thorough cross-examination on the "reasonable control" issue thus are considerable, and attorneys for variance applicants should alert and prepare their witnesses for this important area of inquiry.

Presumably the quickest cleanup efforts by irresponsible pollution sources will be forthcoming if they must face the ongoing prospect of the district's usual enforcement machinery being used against them.[32] Fortunately it is now seldom that highly negligent or irresponsible sources do come before hearing boards; nevertheless, the statute requires the boards to examine whether an applicant's hardship is essentially self-imposed and therefore not to be relieved, or whether it is due to circumstances beyond its reasonable control and therefore deserving of official mitigation.

(c) That such closing or taking would be without a corresponding benefit in reducing air contaminants.[33] 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.[34] It is also

---

[32] The principal enforcement and penalties provisions are found in CAL. HEALTH & SAFETY CODE §§ 42400-42400.5, 42402-42406 (West 1979 & Supp. 1984). *See, e.g.*, People v. A-1 Roofing Serv., 87 Cal. App. 3d Supp. 1, 151 Cal. Rptr. 522 (1978). 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 cleanup efforts will be diminished. *See generally* Crawford, *supra* note 4, at 630 (enforcement procedures).

[33] CAL. HEALTH & SAFETY CODE § 42352(c) (West 1979).

[34] *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 580-82, 596-602 (4th ed. 1971); W. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW 100-02,

very much the same task that section 42354 requires the hearing board to perform in drawing up the terms and conditions of variance orders. 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 variance requirements."[35]

Since most of the job of evaluating hardship takes place under the second statutory criterion, as discussed above, this third criterion 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? What kind of neighborhood is the source located in 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?[36] What is the nature of air quality in the area already? Will operations under a variance make the air quality any better or worse than it already has been?

The answers to these and other related questions must come largely from the methodical presentation of detailed testimony by district witnesses and the applicant's own technical personnel and consultants. In recent years some of the information has been presented in connection with the federal Clean Air Act requirement that a finding be made of noninterference with the attainment and maintenance of national ambient air quality standards for a variance to qualify as an acceptable compliance schedule constituting a revision of the State Implementation Plan.[37] Whatever the specific federal requirements may be, as interpreted by the United States Environmental Protection Agency, it does seem that fundamentally the same type of information is called for if the hearing board is to have a basis for answering the third statutory question.

110-11, 744 (1977).

[35] CAL. HEALTH & SAFETY CODE § 42354 (West 1979).

[36] As noted above, such emissions might well constitute a violation of § 41700, thus barring any variance relief. *See supra* text accompanying note 20.

[37] *See* Train v. Natural Resources Defense Council, 421 U.S. 60 (1975); U.S. Environmental Protection Agency, Enforcement Div., Region IX, Variances, Variance Orders, Waivers, and Conditional Permits as Compliance Schedule Revisions to the SIP (July 1979) (copy on file with author).

C. Orders

Assuming the hearing board can answer these questions in favor of the applicant for a variance, the remaining challenge to the board is to "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."[38] This provision in essence empowers the board to devise tailor-made requirements for individual sources entitled to variance protection. As noted earlier, section 24354 gives the board considerable discretion to evaluate equities on both sides of the case in drawing up these requirements.[39]

Both the attorneys for a variance applicant and those representing district staff have important roles to play in helping the hearing board develop effective variance orders in keeping with the statutory purposes. First, both parties should have an opinion as to the time needed for solving the polluter's compliance problem. Because of its expertise and basic enforcement responsibilities, the district staff almost always should have a position on whether a variance is justified. Even in those occasional instances when it does not, the staff still should be able to provide the board with its expert opinion on the suitable duration of variance relief. 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 effective 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 upon the applicant's witnesses for this information.

A second major area in which both parties, and especially the district staff, should advise the board of their opinions is operating conditions during the variance period. What emission limitation should the source observe during the variance? Should certain alterations in production processes, schedules, or equipment be required? Exactly what schedule of increments of progress should the applicant be required to follow to come into compliance by the end of the variance period? These and other questions must be resolved by the board, and the district's expertise is essential if the job is to be done well. It should be noted that the

---

[38] CAL. HEALTH & SAFETY CODE § 42353 (West 1979).

[39] *See supra* text accompanying note 34.

statute explicitly requires any variance for a period exceeding one year to have "a schedule of increments of progress specifying a final compliance date."[40]

An additional type of condition, the requirement of a performance bond pursuant to section 42355, should also be considered in appropriate cases. 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. It has been used occasionally by hearing boards for this purpose.[41]

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.[42] 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,[43] but they cannot do it well without the active assis-

---

[40] CAL. HEALTH & SAFETY CODE § 42358(b) (West 1979).

[41] Davis Walker Corp., No. 520 (Hearing Board, Bay Area APCD; Order Granting Variance entered July 7, 1975); Certain-Teed Prods. Corp., No. 509 (Hearing Board, Bay Area APCD; Order Granting Variance, Adopting a Compliance Schedule, and Requiring Bond entered Dec. 23, 1974); *see* J. Abercrombie, Performance Bonds (paper presented at California ARB, Air Pollution Enforcement Symposium, Apr. 25, 1980) (copy on file with author).

In an abatement case, one hearing board has 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). The statutory authority for such a provision other than in a variance order is unclear.

[42] *See supra* text accompanying note 27.

[43] *See supra* note 12. The actual procedures employed for the drafting of orders vary widely among hearing boards, and even a single board will alter its practices among various cases. *See, e.g.*, POLICY & PROCEDURE FOR THE HEARING BOARD OF THE SANTA BARBARA COUNTY APCD, para. 2:

> Final rulings of the Hearing Board shall be drafted and approved for signature by chairperson or designee by the Air Pollution Control District and Counsel within ten days after the hearing. Counsel for applicant and for District shall submit a proposed order, drafted at or right after a hearing to the Hearing Board chairperson or designee.

tance of the parties and their lawyers during the course of the hearings.

D. Interim Variances

As is true for most other aspects of air pollution control in California, the statutory provisions on variances recently have become more complex. One refinement introduced is the interim variance device. Section 42351(a) declares that an applicant for a variance "who desires to commence or continue operation pending the decision of the hearing board on the application"[44] may apply for an interim variance. 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 regular 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 good case for the regular variance protection it seeks when the full hearing on that request is held.[45] A court engages in an analogous inquiry when a preliminary injunction is sought, focusing upon the likelihood that the applicant ultimately will prevail on the merits and upon the relative hardships to the parties and the public if preliminary relief is or is not granted.[46]

In some districts, the hearing board gives greatest attention in this initial inquiry to the reasonable control issue, trying to ascertain preliminarily whether the applicant has been diligent in discovering its noncompliance with district regulations and taking steps to eliminate the problems. If such a showing of diligence is made, the requested interim variance can be granted. At the later hearing on the regular application the applicant's 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 as to make a thorough presentation at the full hearing.

Despite the straightforward purpose of interim variance hearings,

---

[44] CAL. HEALTH & SAFETY CODE § 42351 (West 1979).

[45] *See* Ray Nisson Warehouse, No. 83-003 (Hearing Board, Yolo-Solano APCD; Order Granting Interim Variance entered July 26, 1983); Peter Kiewit Sons' Co., No. 83-001 (Hearing Board, Yolo-Solano APCD; Order Granting Interim Variance entered Apr. 12, 1983).

[46] *See generally* Leshy, *Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner*, 6 ECOLOGY L.Q. 639 (1977).

there are problems associated with them.[47] One difficulty is the scheduling of interim variance hearings. Because hearing boards are not in session full time, this may be a difficult matter.[48] In districts with a population less than 500,000, an interim variance hearing may be held by a designated single hearing board member.[49] 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 having the separate interim variance hearing.

If the board's calendar is so crowded that it cannot even 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 would be within its authority later to combine the two hearings into one.[50] It then could issue a regular variance order, making it retroactive to the date of original filing of the application.[51] That would give the applicant the ultimate legal protection it

---

[47] One of the most prevalent, but least serious, problems is that the phrase "interim variance" in CAL. HEALTH & SAFETY CODE § 42351 (West 1979), like the phrase "emergency variance" in CAL. HEALTH & SAFETY CODE § 42359.5 (West Supp. 1984), has made it necessary to come up with a name for other kinds of variances not so clearly labelled by the legislature. CAL. HEALTH & SAFETY CODE § 40825 (West 1979), one of the provisions on notice requirements, identifies variances that are "to be in effect for a period of not more than 90 days"; these have come to be known as "short" or "short term variances." The longer variances — the main area of variance work — are variously called "full," "regular," or "ordinary" variances. These confusing labels are not a serious problem, for usually the persons involved in a case agree on what they are talking about.

[48] *Cf.* Willick & Windle, *supra* note 4, at 531 n.137.

[49] CAL. HEALTH & SAFETY CODE § 40824(c) (West 1979).

[50] "Petitions for interim variances may not be heard by the Hearing Board if received less than fifteen days prior to the next hearing, except for good cause shown." POLICY & PROCEDURE FOR THE HEARING BOARD OF THE SANTA BARBARA COUNTY APCD, para. 1. The Hearing Board of the Bay Area AQMD ordinarily will combine the interim and regular variance hearings in a case if calendar constraints make it impossible to set the interim variance request more than 30 days ahead of the regular variance hearing. This attempts 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.

[51] It has been argued before the Bay Area Hearing Board 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. Formerly a statutory provision allowed a Bay Area AQMD enforcement proceeding in court to be removed to the Hearing Board. If the board determined that a variance would have been justified, then counsel for the district

wishes, although it would not have given the applicant the interim peace of mind that the statute seems to contemplate. District regulations or discretionary enforcement policies may provide some such reassurance to an applicant by suspending or deferring some enforcement measures while a variance application is pending.[52]

Attorneys 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 quickly as possible. It is therefore often incumbent upon 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 wishes the interim variance device to provide.

E. Emergency Variances

For some years, 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."[53] More recently section 42359.5 has expanded hearing board powers in all districts to deal with emergencies.[54] 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."[55] The maximum length of an emergency variance, however, is thirty days.

---

was required to dismiss the court proceeding. CAL. HEALTH & SAFETY CODE § 24369.1 (West 1975), *repealed by* Act of Sept. 22, 1975, ch. 957, § 10, 1975 Cal. Stat. 2138, 2141; *see* Simmons & Cutting, *supra* note 1, at 121-22. The repeal of that provision by the legislature strongly implies that hearing boards do not now have the authority to take any action in variance cases to determine the merits of violations antedating the source's submission to hearing board jurisdiction.

[52] BAY AREA AQMD, REGULATION 1-402 ("Status of Violation Notices During Variance Proceedings").

[53] CAL. HEALTH & SAFETY CODE § 42359 (West 1979) was added in 1975. Act of Sept. 22, 1975, ch. 957, § 12, 1975 Cal. Stat. 2138, 2186.

[54] CAL. HEALTH & SAFETY CODE § 42359.5 (West Supp. 1984) 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.

[55] CAL. HEALTH & SAFETY CODE § 42359.5 (West Supp. 1984).

Under these provisions districts now have great flexibility in creating as efficient and simple a process as possible for dealing with emergencies, especially breakdowns. One approach is to allow an applicant to "file" its request for emergency relief by telephone.[56] An immediate series of telephone calls involving the applicant, district staff, and a designated hearing board member can produce a decision on the request within a period as brief as a few hours. This procedure has been used extensively in recent years in the many cases involving requests for variance relief by gasoline service station operators experiencing difficulties with components of vapor recovery systems and subject to stringent, immediate sanctions in the absence of variance relief.[57] One advantage of this approach is that it allows for the possibility of imposing immediate conditions upon a source while the emergency is still occurring.

In other cases, in which a swift decision is not critical or the necessary information cannot be obtained from district staff and the applicant to enable the designated member to make an informed decision immediately, hearing board procedures may allow for an initial telephone filing, but 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.[58] The whole incident then can be thoroughly and calmly examined by the board, and retroactive variance relief can be granted if warranted.

Although the emergency variance provisions constitute a marked departure from the formal notice and hearing requirements that traditionally have characterized hearing board work, they are a useful supplement to the main mode of administrative adjudication the boards usually follow. The legislature, in effect, has told the hearing boards to stand ready at all times to listen and respond to the needs of air polluters encountering sudden noncompliance circumstances.

---

[56] BAY AREA RULES, *supra* note 10, § 2.4 ("Emergency Variances"); SAN DIEGO COUNTY APCD, HEARING BOARD RULES AND REGULATIONS, Rules 10(b), 14 (June 12, 1980).

[57] CAL. HEALTH & SAFETY CODE § 41960.2 (West Supp. 1984). The pivotal importance of the hearing board clerk or other administrative personnel in facilitating and keeping a record of the telephone deliberations and decisions should not be underestimated.

[58] CAL. HEALTH & SAFETY CODE § 40501.1 (West Supp. 1984), added in 1981, authorizes single-member hearings in the South Coast AQMD in emergency, interim, or short-term variance cases upon the stipulation of the parties. Because of the great frequency with which that hearing board meets, it would seem that much of its emergency variance work could be handled in prompt hearings.

F. General Observations

This analysis has sought 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 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 cases should be relevant to one or more of the statutory elements the hearing board must resolve.

Obviously considerable preparation by the attorneys is necessary if the presentations are to be efficient and helpful. Discovery devices are available to counsel by virtue of hearing board rules or the state statutory provisions for administrative adjudication.[59] Such advance discovery, or 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. Informal consultations, and formal discovery when necessary, 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.

III. ABATEMENT ORDERS

An order for abatement is the strongest administrative sanction available to an air pollution control district. It has been described by an official of the Santa Barbara APCD as "the ultimate tool available to

---

[59] CAL. HEALTH & SAFETY CODE § 40807 (West 1979) authorizes hearing boards to adopt rules for the conduct of hearings. The rules are to be consistent "so far as practicable" with the rules for administrative adjudication in the state Administrative Procedure Act, ch. 867, 1945 Cal. Stat. 1626 (codified as amended at CAL. GOV'T CODE §§ 11500-11528 (West 1980 & Supp. 1984)). Discovery rules have been adopted by some districts. *See* BAY AREA RULES, *supra* note 10, §§ 6.1-.2; SAN DIEGO COUNTY APCD, HEARING BOARD RULES AND REGULATIONS, Rule 21. In 1981 a superior court ruling upheld hearing board authority to develop rules allowing broader discovery than is permitted under the Administrative Procedure Act. Port of Redwood City v. Hearing Bd., No. 780189 (Super. Ct., San Francisco; Judgment, Findings of Fact and Conclusions of Law entered Sept. 4, 1981).

an air pollution control district for effecting compliance,"[60] by an official of the Ventura County APCD as something that "would probably be used . . . only if other, less onerous, enforcement procedures had failed to correct an air pollution problem,"[61] and by an official of the South Coast AQMD as a measure to be pursued "when the standard enforcement procedures, i.e. notices of violation and misdemeanor penalties, prove inadequate to achieve expeditious compliance."[62] In short, abatement orders are generally 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,"[63] abatement orders in many districts are most frequently sought against violators of the statutory public nuisance provision[64] or of basic requirements of district permit systems.[65] There are a variety of practical and strategic reasons for this tendency, but the overriding fact is that the 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 pol-

---

[60] J. Buchert, Tools Available to Hearing Boards — Abatement Orders, at 1 (Paper presented at California ARB, Air Pollution Enforcement Symposium, Apr. 29, 1981) (on file with author). Mr. Buchert is Chairman of the Hearing Board of the Santa Barbara County APCD.

[61] Letter to author from J. Smithson, Chairperson, Ventura County APCD Hearing Board (Mar. 17, 1982) (on file with author).

[62] Letter to author from P. Greenwald, Deputy District Counsel, South Coast AQMD (Apr. 6, 1982) (on file with author).

[63] CAL. HEALTH & SAFETY CODE § 42451 (West 1979):

> 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 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.

CAL. HEALTH & SAFETY CODE § 42452 (West 1979):

> 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.

[64] CAL. HEALTH & SAFETY CODE § 41700 (West 1979).

[65] CAL. HEALTH & SAFETY CODE § 42300 (West 1979). A good example of a dispute over the application of the terms of an APCD permit system and its exemptions is Julius Goldman's Egg City v. APCD, 116 Cal. App. 3d 741, 172 Cal. Rptr. 301 (2d Dist. 1981).

luters face the prospect of abatement orders.

A. Burdens and Penalties

Although abatement orders can be constructive in nature, and in some respects similar to variances, one difference from variances is that the APCD staff chooses to initiate abatement proceedings.[66] This creates time-consuming and perhaps 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 one reason why they are not brought lightly by APCD personnel. Another critical feature is the severity of the penalties for violation of an abatement order issued by a hearing board.[67] These include prompt enforcement of the abatement order by judicial injunction,[68] civil penalties of up to $6000 for each day of violation of an abatement order,[69] and probably criminal sanctions for commission of a misdemeanor.[70]

B. A Variance By Any Other Name . . .

A great deal of what has been said about the purposes and processes of variance cases is fully 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

---

[66] On March 3, 1983 a bill was introduced in the California Assembly that, *inter alia*, would expand 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). This bill died in committee, and when reintroduced on February 16, 1984 did not contain this broad administrative 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 is discussed in Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350, 358-60 (1st Dist. 1971).

[67] Although § 42450 authorizes a district governing board to issue abatement orders, it would be extraordinary for this legislative body to exercise such adjudicatory authority. The hearing board route under § 42451 is much more likely to be followed.

[68] CAL. HEALTH & SAFETY CODE §§ 42453-42454 (West 1979); *cf.* Application of Circosta, 219 Cal. App. 2d 777, 33 Cal. Rptr. 514 (1st Dist. 1963); Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*, 55 CALIF. L. REV. 702, 706 n.43 (1967).

[69] CAL. HEALTH & SAFETY CODE §§ 42401, 42403-42405 (West 1979 & Supp. 1984).

[70] CAL. HEALTH & SAFETY CODE § 42400 (West Supp. 1984).

APCD staff is trying to prove that the particular source will unjustifiably continue to pollute unless restrained by a hearing board order for abatement.

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.[71] As with the hearing boards' rejection of a strict reading of the hardship criterion in variance cases,[72] the boards have taken a broad, pragmatic interpretation of the relevant factors in an abatement hearing.

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."[73] This effect is allowed only if all the conditions for a variance are met. The basic statutory findings in variance cases thus would have to be satisfied as well.[74]

C. Proof

The statute only requires proof of violation as a basis for abatement.[75] This means that considerable attention will be focused upon 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."[76] This focus upon the duration and magnitude of noncompliance is especially apt when the alleged violation pertains to section 41700, the statutory nuisance prohibition. In these instances, much of the APCD's case will rest upon the testimony of citizen witnesses, which must be clearly presented.[77]

One very effective technique which has been employed in nuisance

---

[71] *See supra* note 63.

[72] *See supra* text accompanying note 27.

[73] CAL. HEALTH & SAFETY CODE § 42452 (West 1979) (quoted *supra* note 63). Such a dual order was issued in Union Oil Co., No. 269-60 (Hearing Board, South Coast AQMD; Findings and Decision entered Mar. 15, 1983).

[74] CAL. HEALTH & SAFETY CODE § 42352 (West 1979).

[75] CAL. HEALTH & SAFETY CODE § 42451 (West 1979) (quoted *supra* note 63).

[76] Crawford, *supra* note 4, at 633.

[77] *See* Manaster, *Early Thoughts on Prosecuting Polluters*, 2 ECOLOGY 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.").

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, of all major air pollution sources in the vicinity, and of 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 the attempted proof of the violations, and the attempted refutation of the charges, an efficient and clear process.

D. Terms and Conditions

Another distinctive aspect of abatement cases is the complexity of the orders entered if a violation is found. Although the statute seems to authorize abatement simply if a violation is proven,[78] the statutory references to "conditional" abatement orders confirm the logical suspicion that other, variance-type issues are inherent in these cases as well. Presumably it will be the rare case in which the APCD seeks a flat injunctive order requiring the respondent to shut down operations entirely.[79] In the usual situation, the district will wish to have an order for abatement which is, as the statute says, "framed in the manner of a writ of injunction requiring the respondent to refrain from a particular act . . . unless certain conditions are met."[80]

In many instances hearing boards have issued conditional abatement orders which require corrective action to be taken on a specified schedule. The schedule is in addition to the command that the violations immediately cease.[81] The Bay Area Board has included provisions stating that conformity with the corrective measures in the order would be deemed to constitute compliance with the abatement directive itself.[82]

---

[78] *See supra* text accompanying note 75.

[79] 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 by-products, whereas the latter does eliminate the pollution but may well eliminate other useful products or services as well.

Manaster, *supra* note 77, at 478-79.

[80] CAL. HEALTH & SAFETY CODE § 42452 (West 1979).

[81] Richard L. Jones, No. 915 (Hearing Board, San Diego County APCD; Order of Abatement entered Sept. 24, 1981).

[82] *See, e.g.*, Imperial West Chem. Co., No. 826 (Hearing Board, Bay Area AQMD; Conditional Order for Abatement filed May 13, 1982). *See generally* Crawford, *supra* note 4, at 634-35.

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. The Bay Area Hearing Board has also, in at least one case, entered an abatement order mandating the complete cessation of the polluting activities, with the agreement of the respondent and the district that the operation would be shut down.[83] In the San Diego and South Coast districts the practice generally seems to be to declare the corrective measures as an alternative to closing the source's operations.[84]

Finally, in instances in which proposed abatement orders have been presented to the Bay Area Board with the consent of all parties to the case, that board has taken the position that it has the responsibility to make sure it is entering an effective order. This view is bolstered by section 42451's direction that an abatement order can be issued on the hearing board's "own motion."[85] 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. Even agreed orders are thus subject to scrutiny in a hearing, and to redrafting and modification by the board members themselves, before the orders can be entered.[86]

---

[83] Crown Tire Co., No. 579 (Hearing Board, Bay Area APCD; Consent Order for Abatement entered Mar. 10, 1977).

[84] Code Welding & Fabrication Co., No. 925 (Hearing Board, San Diego County APCD; Order of Abatement entered 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 APCD; Order of Abatement entered 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."); *see also* South Coast AQMD, No. 2684 (Hearing Board, South Coast AQMD; Findings and Decision for Order for Abatement entered 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.").

[85] CAL. HEALTH & SAFETY CODE § 42451 (West 1979).

[86] *See* Operating Indus., Inc., No. 2121-1 (Hearing Board, South Coast AQMD; Findings and Decision for Order for Abatement entered May 18, 1983). The Board in that case 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.

This raises the possibility that a hearing board can enter an order that no party to the case finds to its liking. On two occasions this occurred in the Bay Area AQMD, and one of the parties challenged the order in court pursuant to CAL. HEALTH & SAFETY CODE § 40864 (West 1979). The Hearing Board's order was defended with

E. Approaches to Abatement Proceedings

Attorneys representing an APCD in an abatement case should make clear to the hearing board just what type of conditional abatement order they are seeking. If they are not clear about the relevant possibilities, and their preferences among them, then the hearing board can only conclude that they are seeking that rare creature, an unconditional abatement order. Technically, APCD attorneys are entitled to present proof of violations and to leave to the hearing board the entire question of a suitable remedy. This would not seem to be the most efficient or responsible course.

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,[87] 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."[88] 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.

A well-written conditional abatement order can be an exceptionally effective tool for compelling a previously severe 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.

---

the assistance of outside counsel chosen by the Hearing Board with approval and funding provided by the district board of directors 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* Pacific Steel Casting Co. v. Hearing Bd. of the Bay Area AQMD, No. 569839-4 (Super Ct., Alameda County; Judgment Granting Motion for Remand to Hearing Board entered May 24, 1983); Port of Redwood City v. Hearing Bd. of the Bay Area AQMD, No. 780189 (Super. Ct., San Francisco; Judgment, Findings of Fact and Conclusions of Law entered Sept. 4, 1981); *see also* Glidden-Durkee Div. of SCM Corp. v. Hearing Bd. of the Bay Area APCD, No. 729-951 (Super. Ct., San Francisco; Petition for Writ of Mandate filed Oct. 28, 1977).

[87] *See supra* text accompanying notes 60-62, 76.

[88] CAL. HEALTH & SAFETY CODE § 42452 (West 1979); *see supra* text accompanying notes 73-74.

IV. PERMIT DISPUTES

The newest area of hearing board work is the resolution of disputes over permits. Section 42300 authorizes every APCD to establish a permit system broadly covering the construction and operation of any equipment or contrivance "which may cause the issuance of air contaminants."[89] The statute identifies three basic situations in which a district's hearing board may be called upon to resolve a permit dispute. Section 42302 allows a permit applicant whose request has been denied by APCD staff to have the hearing board determine "whether or not the permit was properly denied."[90] 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."[91] Section 42307 authorizes an air pollution control officer[92] to request the hearing board to determine "whether a permit should be revoked" when the permittee has been found to be violating district requirements.[93]

A recently added, fourth avenue for permit disputes to come to hearing boards is section 40713. It allows appeals from APCD refusals to approve reductions in emissions for "banking" and later use as offsets against future emission increases.[94] In addition to these statutory provisions for bringing permit disputes before hearing boards, at least one district's permit system regulations explicitly allow for "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."[95]

---

[89] CAL. HEALTH & SAFETY CODE § 42300 (West 1979).

[90] CAL. HEALTH & SAFETY CODE § 42302 (West 1979); *see* People v. A-1 Roofing Serv., 87 Cal. App. 3d Supp. 1, 14, 151 Cal. Rptr. 522, 529-30 (1978); Durochrome Prods., Inc., No. 2143 (Hearing Board, South Coast AQMD; Findings and Decision entered Mar. 27, 1979).

[91] CAL. HEALTH & SAFETY CODE § 42306 (West 1979); *see* Lloyd A. Fry Roofing Co. v. Lunche, 367 F. Supp. 106 (C.D. Cal. 1973).

[92] The air pollution control officer, who is selected by the district's governing board, is the chief executive of an APCD. CAL. HEALTH & SAFETY CODE §§ 40750-40753 (West 1979).

[93] CAL. HEALTH & SAFETY CODE § 42307 (West 1979). The most prominent example of such a proceeding is Standard Oil Co. v. Feldstein, 105 Cal. App. 3d 590, 164 Cal. Rptr. 403 (1st Dist. 1980).

[94] Pacific Gas & Elec. Co., No. 1062 (Hearing Board, Bay Area AQMD; Notice of Appeal filed Nov. 10, 1982).

[95] BAY AREA AQMD, REGULATION 2, RULE 1, § 410. The legality of this provision has been upheld in three superior court rulings. Chevron U.S.A., Inc. v. Hearing Bd. of the Bay Area AQMD, No. 235477 (Super. Ct., Contra Costa County; Applica-

It should be evident from these provisions that permit disputes are not subject to the more specific types of statutory standards that govern the decision of variance cases. The issue in permit cases is more baldly stated in terms of whether a permit was "properly" denied or suspended, or whether a permit "should be revoked" if the permit holder is violating some applicable requirement. This lean statement of the standards hearing boards are to apply in permit disputes necessarily invites the boards to exercise considerable discretion in approaching these controversies.

As a practical matter, in most instances the inquiry will be whether the district staff has made a fair, reasonable interpretation of the applicable legal requirements in its action or finding regarding a permit applicant or permittee. Unless a hearing board can determine that the staff's action was clearly wrong, the board's usual function should be to determine whether the staff view in the permit dispute falls within a sensible interpretation of the language and purpose of the applicable regulations or other requirements. The traditional legal presumption of the regularity and correctness of administrative action[96] first means in this context that the burden of proof in a permit dispute should be on the party challenging the district staff's action or finding.[97] It also means that the hearing board should not lightly disagree with the staff's determinations. A hearing board in permit cases is operating in a fashion analogous 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 to the work of trial courts hearing matters in the first instance.[98] In short, the hearing board should not readily substitute its judgment in permit cases for that of the expert, full-time staff of the APCD. This does not mean, how-

---

tion for Temporary Restraining Order denied May 26, 1982); Port of Redwood City v. Hearing Bd. of the Bay Area AQMD, No. 780189 (Super. Ct., San Francisco; Judgment, Findings of Fact and Conclusions of Law entered Sept. 4, 1981); Kaiser Cement Corp. v. Hearing Bd. of the Bay Area AQMD, No. 441380 (Super. Ct., Santa Clara County; Findings of Fact and Conclusions of Law filed Aug. 19, 1981).

[96] CAL. EVID. CODE § 664 (West 1966) ("It is presumed that official duty has been regularly performed."); *see also* Faulkner v. California Toll Bridge Auth., 40 Cal. 2d 317, 329, 253 P.2d 659, 667 (1953); People v. A-1 Roofing Serv., 87 Cal. App. 3d Supp. 1, 11, 151 Cal. Rptr. 522, 527 (1978).

[97] *See* CAL. EVID. CODE § 660 (West 1966); *see also* People v. A-1 Roofing Serv., 87 Cal. App. 3d Supp. 1, 11, 151 Cal. Rptr. 522, 527 (1978).

[98] It appears that at an earlier stage of statutory development, variances could be granted by county APCD hearing boards or the courts. *See* Comment, *California Legislation on Air Contaminant Emissions from Stationary Sources*, 58 CALIF. L. REV. 1474, 1491 (1970).

ever, that the independent oversight and review function of the hearing board should be forfeited.

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 into specific manufacturing processes, pollution control technology approaches, future emissions predictions, "baseline" emissions histories and formulas,[99] ambient air quality levels, permit review procedures, and the legislative history of individual regulatory specifications.[100]

Many of the permit disputes relate to APCD regulations which are in the process of being changed, especially regulations for the review of new major sources of air pollution. In the Bay Area district this has been true in almost all the permit cases the hearing board has faced in recent years.[101] Clearly a hearing board in such instances is being called upon to clarify some of the serious uncertainties that accompany the evolution and implementation of any new, substantial environmental regulation. This function is particularly sensitive when dealing with new source review provisions, which have great impact on economic development in California.

Because permit cases seem to be individually distinctive, it is difficult to generalize about suggested approaches to the parties' presentations of their positions. Many of the observations offered regarding variance cases also apply here,[102] but the greatest challenge in permit cases is to

---

[99] 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, 164 Cal. Rptr. 403 (1st Dist. 1980).

[100] 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. APCD, 116 Cal. App. 3d 741, 172 Cal. Rptr. 301 (2d Dist. 1981).

[101] *See, e.g.*, Standard Oil Co. v. Feldstein, 105 Cal. App. 3d 590, 164 Cal. Rptr. 403 (1st Dist. 1980); Kaiser Cement Corp. v. Hearing Bd. of the Bay Area AQMD, No. 494183 (Super. Ct., Santa Clara County; Peremptory Writ of Mandamus issued June 11, 1982); Citizens for a Better Environment, No. 837 (Hearing Board, Bay Area AQMD; Order Denying Appeal entered Mar. 3, 1983) (Chevron U.S.A., Inc. Richmond Lube Oil Project); Pacific Gas & Elec. Co., No. 1062 (Hearing Board, Bay Area AQMD; Notice of Appeal filed Nov. 10, 1982); Citizens for a Better Environment, No. 675 (Hearing Board, Bay Area AQMD; Order to Revoke Authority to Construct entered May 1, 1980; Order Modifying Authority to Construct After Rehearing entered June 19, 1980) (Wickland Oil Co. petroleum products distribution terminal); Dow Chem. Co., No. 567 (Hearing Board, Bay Area APCD; Request for Hearing Following Improper Denial of Permit filed Aug. 20, 1976).

[102] *See, e.g., supra* text accompanying notes 39-40, 42.

make sure that the hearing board members — again regardless of their various degrees of technical background knowledge — 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 upon.

CONCLUSION

This survey of the objectives and principal characteristics of hearing board cases is intended to help lawyers and other persons involved in such cases to have a clearer perspective as they prepare to go before hearing boards and as they actually make their presentations there. Greatest attention has been given to the variance process because that is the heart of hearing board work and because it best exemplifies the inquiry into equitable considerations that characterizes most cases before these boards. As has been shown, however, the three types of cases that come before hearing boards often do have different emphases.

One way of summarizing these emphases is to say that in variance cases the issue of the applicant's diligence and good faith 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. Finally, in permit cases technical issues of interpretation of the law and of alternative technological approaches usually control. In all three areas, however, and regardless of these varying emphases, the underlying goal of administrative adjudication by the hearing boards is the same. It is to reduce air pollution as quickly, as greatly, and as fairly as possible, taking into account the needs and hardships of those whose lawful, productive activities contribute air pollution to the environment.