

# SB 288 Hearing Process Guidance

January 26, 2007

Senate Bill 288 (SB 288, the "Protect California Air Act of 2003," Health and Safety Code Sections 42500 through 42507), generally prohibits air pollution control and air quality management districts (districts) from making their New Source Review (NSR) rules less stringent than such rules that existed on December 30, 2002. When a district modifies its NSR rule, Air Resources Board (ARB) staff, or other interested parties, may question whether the change constitutes a weakening pursuant to SB 288. The following provides procedural details of how the ARB intends to review a district NSR rule amendment, and if necessary, hold a hearing to determine if the requirements of SB 288 are being met.

This guidance is divided into two procedures. The procedure that applies depends on whether an adopted rule is called into question (Procedure I) or whether the district adopted its rule acknowledging a weakening (Procedure II). This guidance supplements the implementation guidance documents previously issued by ARB. These guidance documents may be found on the ARB SB 288 website at: <http://www.arb.ca.gov/nsr/sb288/sb288.htm>.

Please note that these hearing process guidelines are advisory, rather than mandatory, and are being provided as a statement of ARB's intent of ensuring an orderly, fair and consistent hearing process.

## Procedure I -

**THIS PROCEDURE WILL BE USED WHEN EITHER ARB CONDUCTS A RULE REVIEW, OR ARB RECEIVES A PETITION, WHICH INDICATES A POSSIBLE WEAKENING OF A DISTRICT'S NSR RULE**

- A. ARB staff will conduct a preliminary review to determine if a hearing must be held.
  1. Within 14 days after receipt of a petition or after ARB initiates an SB 288 review, ARB will: acknowledge such receipt in writing to the petitioner (if applicable); inform the district of petition or ARB review; and post the petition and acknowledgement letter on the ARB SB 288 website. Petitioners are strongly advised to raise only those issues that they or another commenter addressed to the district during the public comment period for rule adoption. Petitioners are advised to file SB 288 petitions as soon as possible after district rule adoption, and in no case longer than 30 days thereafter.
  2. The acknowledgment letter will state that ARB's staff review will take no longer than 45 days from date of receipt of petition or initial ARB review.
  3. ARB staff will open discussions with the district to obtain any additional information necessary to perform the evaluation. (Note: The 45-day clock may stop for periods when additional information has been requested, but not received from the district, or if such information is inadequate.)

4. Before the 45-day deadline, ARB staff will discuss the preliminary staff findings with the district and petitioner, if applicable.
5. The Executive Officer of the ARB will issue a determination in writing when a district rule review is concluded and it is found that no hearing is necessary. The Executive Officer will describe the reasons for finding that the rule change is not covered by SB 288; that the change clearly does not weaken the NSR rule contrary to the statute; or that the Executive Officer determines that the weakening is clearly de minimis. (Note: Any decision by the Executive Officer may be challenged in Court.) If ARB staff determines that there is a weakening, then the staff will prepare for a hearing.

B. ARB staff will prepare for a hearing.

1. If ARB staff determines that reasonable cause exists to support the need for a public hearing, ARB staff will inform the district and the petitioner, as applicable, and will assign the case to the next timely hearing date. (Note: ARB intends to conduct SB 288 hearings at least twice a year.) ARB staff will also update the SB 288 website to reflect the staff determination.
2. ARB staff will prepare a Notice of Public Hearing and publish the notice in a newspaper of general circulation within the affected district to allow a 30-day public review of the revised district NSR rule. The hearing notice and all supporting information will also be updated as referenced on the SB 288 website.
3. The Executive Officer will select a hearing officer who will be either a current ARB employee or an ARB retired annuitant, or may hear the matter him or her self, in accordance with sections 39515 and 39516 of the Health and Safety Code. A delegation to a hearing officer will provide that the hearing officer's decision will be final and not subject to review by the Executive Officer or the Board. The hearing officer should disqualify him or her self and withdraw from the hearing on any matter in which he or she may have previously participated as an advisor or advocate to ARB staff or to any other party, or cannot provide a fair and objective hearing.
4. ARB staff will issue a staff report with background discussion, description of the rule revision, SB 288 issues raised by petitioner or ARB review, and offer a recommendation. The staff report will be made available on ARB's SB 288 website, at the ARB Public Information Office, and at the district office at least 10 days prior to the hearing.
5. ARB's Chief Counsel will assign an attorney to assist the hearing officer through all stages of the hearing process, and assign a different attorney to assist ARB staff.

C. The hearing officer will conduct the SB288 hearing on the district rule revision.

1. The hearing will not be conducted in accordance with formal rules of evidence; testimony may be written or oral. The general format for the hearing will be presentation of written and oral testimony to the hearing officer. Cross examination of witnesses will not be conducted.

2. Evidence may include, but is not limited to, the rulemaking record of the district.
3. The hearing will be transcribed and a transcript will be prepared.
4. An oath of truth may be administered to the parties but is not legally required. Members of the public who are not parties to the hearing and wish to provide public testimony will not be required to take an oath of truth.
5. The hearing officer should introduce the matter, review the ground rules, set forth the object of the hearing with reference to SB 288, and ask his or her appointed attorney to review the law.
6. The hearing officer should first call the party who challenged the revision (i.e. the petitioner or ARB staff, if staff initiated the review). The party who challenged the revision (i.e. the petitioner or ATB staff) will have the burden of proving by substantial evidence that the rule revision is not permitted by SB 288.
7. ARB staff will present its report and give its findings and recommendations, and will specifically identify the reasons for its conclusions and recommendations with references to appropriate sections of SB 288.
8. The district will be given the opportunity to present its case and respond to the challenge.
9. The hearing officer will allow any person to offer testimony after the parties have presented their cases.
10. The hearing officer may allow ARB staff, the district, and the petitioner (if any) to make closing remarks after the conclusion of public testimony.
11. It is important that in presenting its case the ARB staff, the district, and any petitioner be very specific as to what actions they recommend the hearing officer take and the reasons for such recommendations.
12. The hearing officer may place time limits on the testimony of the parties and/or public testimony.
13. The hearing officer may ask questions of all witnesses, may hold recesses, may consult with his or her attorney, may hear confidential business information in camera (in private), may issue procedural orders, may continue the hearing to another date and time if necessary to receive more information, and may take other similar actions. If any party or persons testifying offers confidential business information to the hearing officer in camera, the district may also hear the information, provided the district agrees in writing to maintain confidentiality of the information.
14. The hearing officer will close the record and indicate the next steps. Once the hearing is closed, no additional written material will be accepted into the record.

D. The hearing officer will issue a decision.

1. The hearing officer should set forth the decision in writing, with findings supporting the determination. The hearing officer will base his/her decision on the information contained in the record of the hearing.

2. The decision of the hearing officer is final – i.e. no review by the Executive Officer or Board. A party dissatisfied with the ARB decision may file for review of the decision in court.
  3. The decision will be issued no later than 45 days after the conclusion of the hearing.
  4. If the hearing officer determines that the case has not been made that the district rule revision is contrary to SB 288, the ARB will consider the matter closed, and will promptly forward the revision to the U.S. Environmental Protection Agency (U.S. EPA) as a State Implementation Plan (SIP) revision, if applicable. (Note: The rule will have been in effect locally upon adoption by the district, although the rule currently in the SIP may be enforced by the U.S. EPA or a citizen.)
  5. If the hearing officer determines that the revision(s) are out of compliance with SB 288, ARB will give the district the opportunity to hold a hearing to correct the rule in accordance with the decision. The district should notify the ARB and petitioner of its intention within 10 days of the hearing officer's decision. If the district will hold a public hearing, the notice of rulemaking should be issued within 30 days of the hearing officer's decision, unless the district is prevented from doing so by statute or other compelling reason. Any such necessary delay should be accompanied by an alternative rulemaking schedule that sets the hearing as expeditiously as possible. If the district does not agree to change its rule, ARB will take action pursuant to E. below.
- E. If necessary, ARB will hold a formal hearing to adopt a rule revision for the district.
1. ARB staff will proceed in accordance with the procedures set forth in Health and Safety Code section 41500 et. seq. to issue a notice of public hearing in the district affected in order to have the Board consider the adoption of an NSR revision that complies with SB 288.
  2. The full Board will consider the matter in accordance with established procedure. If, in accordance with the hearing officer's decision, either the district or the Board determines that the revision was not permissible under SB 288, then any permit that the district issued pursuant to the revision will be null and void, and anyone who is issued a permit during this interim period should be so informed by the district, and proceed at their own risk.

Procedure II –

**THIS PROCEDURE WILL BE USED TO DETERMINE WHETHER A DISTRICT RULE REVISION THAT WEAKENS THE NEW SOURCE REVIEW PROGRAM IS PERMISSIBLE PURSUANT TO HEALTH AND SAFETY CODE SECTION 42504(d)**

- A. ARB staff will conduct a review to determine completeness and adequacy of evidence submitted by the district.
1. Within 14 days after receipt of the district revision and request for ARB approval, ARB staff will acknowledge such receipt in writing and post the

request and all supporting documents provided by the district on the ARB SB 288 website.

2. The acknowledgment letter will state that ARB's review will take no longer than 45 days from receipt of the district rule package and request for approval.
3. ARB staff will open (or continue) discussions with the district to obtain the district Governing Board's record of decision (findings, minutes, testimony, etc.), the applicable provisions of section 42504(d) upon which the request for approval is based, and any additional information necessary to evaluate the request. Note: The 45-day clock may stop for periods when additional information has been requested, but not received from the district, or if such information is inadequate.
4. ARB will assign the case to next timely hearing date.

B. ARB staff will prepare for a hearing.

1. ARB staff will prepare a Notice of Public Hearing and publish the notice in a newspaper of general circulation within the affected district to allow a 30-day public review of the revised district NSR rule. The hearing notice and all supporting information will also be updated or referenced on the SB 288 website.
2. The Executive Officer will select a hearing officer who will be either a current ARB employee or an ARB retired annuitant, or may hear the matter him or her self, in accordance with sections 39515 and 39516 of the Health and Safety Code. A delegation to a hearing officer will provide that the hearing officer's decision will be final and not subject to review by the Executive Officer or the Board. The hearing officer should disqualify him or her self and withdraw from the hearing on any matter in which he or she has previously participated as an advisor or advocate to ARB staff or to any other party.
3. ARB will issue a staff report that covers the criteria in section 42504(d) and will make a recommendation to the hearing officer. The staff report will be made available on ARB's SB 288 website, at the ARB Public Information Office, and at the district office at least 10 days prior to the hearing.
4. ARB's Chief Counsel will assign an attorney to assist the hearing officer through all stages of the hearing process, and assign a different attorney to assist ARB staff.

C. The hearing officer will conduct the SB 288 hearing on the district rule revision.

1. The hearing will not be conducted in accordance with formal rules of evidence; testimony may be written or oral. The general format for the hearing will be presentation of written and oral testimony to the hearing officer. Cross examination of witnesses will not be conducted.
2. Evidence may include, but is not limited to, the rulemaking record of the district.
3. The hearing will be transcribed and a transcript will be prepared.

4. An oath of truth may be administered to the parties but is not legally required. Members of the public who are not parties to the hearing and wish to provide public testimony will not be required to take an oath of truth.
5. The hearing officer should introduce the matter, review the ground rules, set forth the object of the hearing with reference to SB 288, and ask his or her appointed attorney to review the law.
6. The district should present its request and supporting reasons and should specifically identify the reasons for its conclusions and recommendations that the rule amendment is permissible, with reference to appropriate sections of SB 288.
7. ARB staff will present its report and give its findings and recommendations, and will specifically identify the reasons for its conclusions and recommendations, with reference to appropriate sections of SB 288.
8. The hearing officer will allow any person to offer testimony after the parties have presented their cases.
9. The hearing officer may allow ARB staff, the district, and the petitioner (if any) to make closing remarks after the conclusion of public testimony.
10. It is important that in presenting its case that the ARB staff, the district, and any petitioner be very specific as to what actions they recommend the hearing officer take and the reasons for such recommendations.
11. The hearing officer may place time limits on the testimony of the parties and/or public testimony.
12. The hearing officer may ask questions of all witnesses, may hold recesses, may consult with his or her attorney, may hear confidential business information in camera (in private), may issue procedural orders, may continue the hearing to another date and time if necessary to receive more information, and may take other similar actions.
13. The hearing officer will close the record and indicate the next steps. Once the hearing is closed no additional written material will be accepted into the record.

D. The hearing officer will issue a decision.

1. The hearing officer will set forth the decision in writing, with findings supporting the determination. The hearing officer will base his/her decision on the information contained in the record of the hearing.
2. The decision of the hearing officer is final (i.e. no review by the Executive Officer or Board).
3. The decision will be issued no later than 45 days after the conclusion of the hearing.
4. If the hearing officer determines that the revision meets all procedural and substantive criteria; that the district decision is reasonable and supported by substantial evidence; and that the revision complies with all the conditions in the Health and Safety Code, including section 42504(d)(2),(3), and (4), then the hearing officer will approve the revision and it will become effective on the date specified in the rule. If requested to do so by the district, the ARB will submit the revised rule to the U.S. EPA as a SIP revision. (Note: The district

rule does not become effective until approved by ARB after the hearing is held.)

5. If the hearing officer determines the district's NSR rule revision is not in compliance with SB 288, the hearing officer will prepare a decision stating the reason for the determination and may recommend to the district how to correct the deficiencies, if feasible. Such decision will be forwarded to the district and posted on the ARB SB 288 website within 30 days after the hearing.

E. The district responds to the hearing officer decision.

1. If the hearing officer determines that the rule modifications are out of compliance with SB 288, the district should notify the ARB of its intentions within 10 days of the hearing officer's decision. The following actions may be considered by the district, but are not exhaustive:
  - a. The district, in consultation with ARB staff, may revise its NSR rule in consideration of the hearing officer's decision to comply with SB 288. In this case, the review process will begin again as outlined above in Procedure II.A, et seq.
  - b. The district may return to its Governing Board and adopt another version of the rule.
  - c. The district may bring the matter to court for a writ of mandate.
  - d. The district may decide to do nothing, in which case the rule amendments are not in effect, and the rule that was in effect prior to the amendments will remain in effect.

(Note: The district rule is not effective until ARB has approved the changes - Health and Safety Code section 42504(d).)