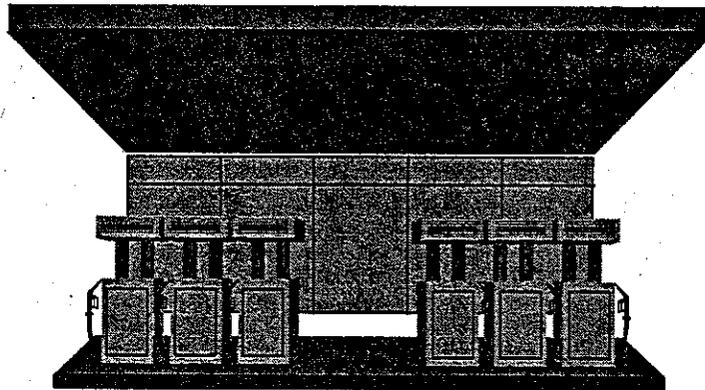


California Environmental Protection Agency

 **Air Resources Board**

Staff Report



Proposed Amendments to the Variance Provisions of the California Reformulated Gasoline Regulations

Release Date: December 8, 1995



ACKNOWLEDGEMENTS

This report was prepared with the assistance and support from the other divisions and offices of the Air Resources Board. In addition, we would like to acknowledge the assistance and cooperation that we have received from the staff of the California Energy Commission.

Principal Authors:

Stationary Source Division

Richard Vincent, Fuels Section

Office of Legal Affairs

Robert Jenne

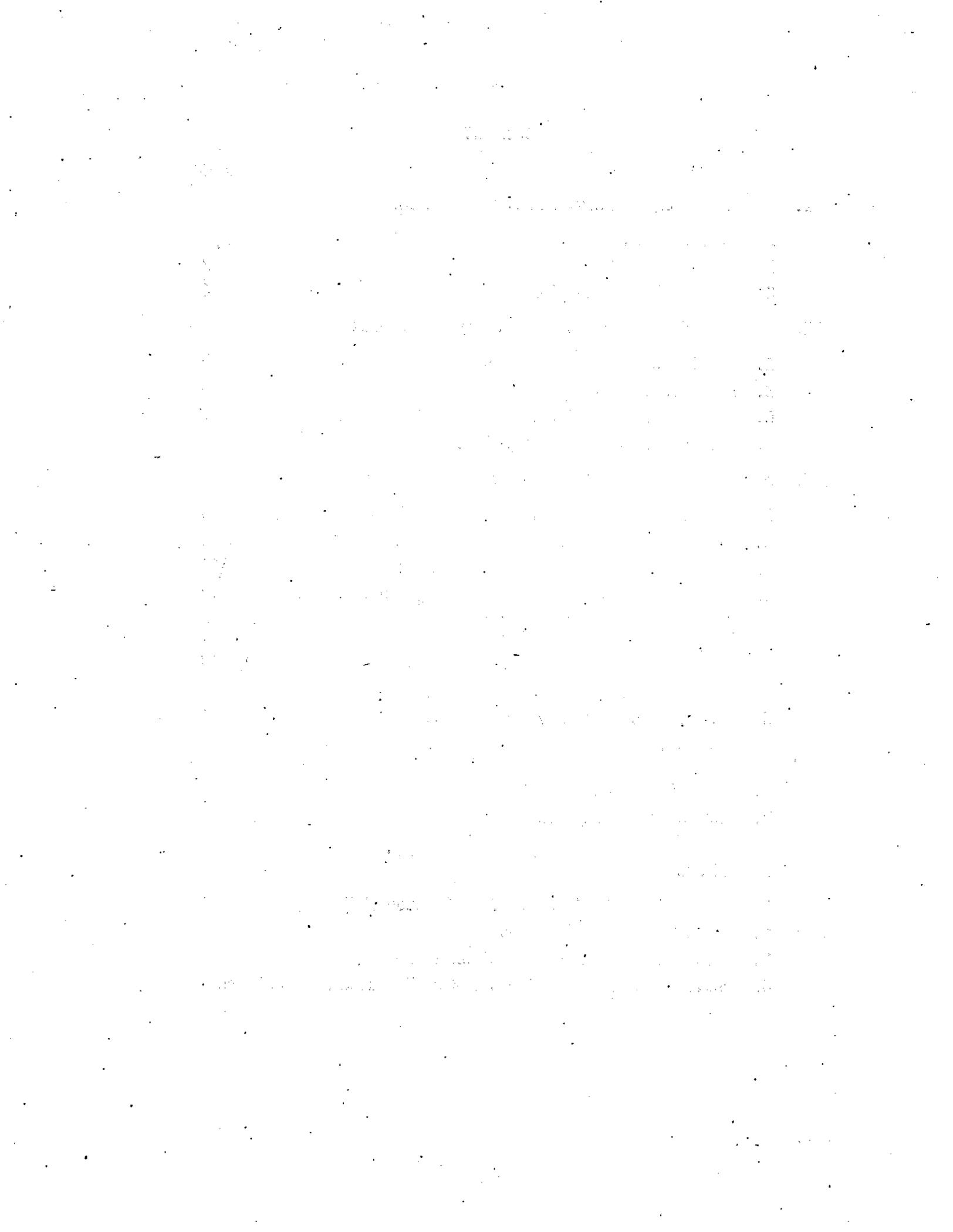
Reviewed and Approved By:

Peter D. Venturini, Chief, Stationary Source Division
Dean C. Simeroth, Chief, Criteria Pollutants Branch
John Curtis, Manager, Fuels Section



Content

	<u>Page</u>
I. Introduction, Summary, and Recommendation	
A. Introduction	1
B. Summary	2
C. Staff's Recommendation	4
II. Background and Need for Regulatory Amendments	
A. About the CaRFG Regulations	5
B. About Variances	6
C. Requirements of SB 709	7
D. Development of Variance Guidelines	8
III. Proposed Amendments to Section 2271 (Variances)	
A. Fees to Accompany Variance Applications	10
B. Use and Protection of Confidential Information	11
C. Requirements for the Compliance Plan	11
D. Factors to Be Considered in Making the Findings Necessary for Granting Variances	12
E. Fee for Variance Gasoline	13
F. Limitation of Duration of Variances	13
G. Other Amendments	14
H. Adoption as Emergency Regulations	14
IV. Economic and Environmental Impacts	
A. Economic Impacts	15
B. Environmental Impacts	17
Appendices	
1. Senate Bill 709 (Stats. 1995, Chapter 675)	
2. Draft Variance Guidelines	
3. Proposed Amendments to Section 2271	
4. Estimated Administrative Costs of Variance Applications	



I

INTRODUCTION, SUMMARY, AND RECOMMENDATION

A. Introduction

This report is the Initial Statement of Reasons by the staff of the Air Resources Board (ARB or Board) in support of a proposal to the Board for regulatory amendments. The staff is proposing amendments to the variance provisions of the "California Reformulated Gasoline" (CaRFG) regulations.¹ The proposed amendments would provide guidelines for considering any application for variance and in placing conditions in any variance that may be granted. The Board is required by SB 709 (Stats. 1995, Chapter 675) to adopt such guidelines in the form of regulations. (SB 709 is shown in Appendix 1.)

The CaRFG regulations, effective on March 1, 1996, include limits on eight properties of gasoline (which are described in Chapter II). Also, in section 2271, the regulations allow the Executive Officer to grant variances from the eight property limits, under certain circumstances, and to include variance conditions that further the purposes of the regulations. The additions now being proposed for section 2271 would add specific criteria for identifying the circumstances that allow a variance, and they would specify conditions that shall be placed in a variance.

Before SB 709 was introduced in the Legislature, the staff received comments from refiners who were concerned about how the ARB might handle variance applications. In response, the staff published a draft set of variance guidelines and held a public workshop, on August 1, 1995, to receive comments on the draft. SB 709 was signed subsequently. In consideration of comments at the August workshop and the requirements of

1. Title 13, California Code of Regulations (CCR), Section 2271.

SB 709, we modified the guidelines and drafted amendments to section 2271, which were discussed at a second workshop on November 30, 1995. The amendments proposed here are based on the modified guidelines and comments received at the November workshop. (The staff's modified draft guidelines are shown in Appendix 2.)

The draft guidelines reflect the staff's belief that a variance should be the last resort for a company having difficulty in meeting the CaRFG standards. That is, a variance should be granted only if the applicant has no alternative that would avoid extraordinary hardship. Absent a demonstration that there is no alternative, a refiner who temporarily cannot make complying gasoline should use the marketplace to address its situation.

B. Summary

1. Why does the staff recommend amending the CaRFG variance provisions?

The additions to section 2271 are being proposed in response to SB 709, which requires the Board to adopt as regulations "guidelines for the consideration of variances and the imposition of fees and conditions". This legislative requirement parallels the staff's pre-existing intent to set and communicate policy on the evaluation of variance applications under section 2271 and on conditions to be placed in variances. We believe that setting such policy will be useful for (1) streamlining the handling of variance applications (if any are made), (2) discouraging attempts to use variances inappropriately as a compliance tool, and (3) assuring gasoline producers who have expended significant capital on CaRFG compliance that other parties will not be able to use variances as means to minimize unfairly their own expenditures, and (4) assuring the public that minimal excess emissions will occur due to variances.

Our evaluation of refiners' compliance plans indicates that all refiners will be producing CaRFG by the regulatory deadline--March 1, 1996. Therefore, we do not anticipate any applications for variances needed for initial compliance. However, refiners may later encounter unexpected situations, such as equipment failures, that could prompt variance applications. Besides satisfying SB 709, the proposed amendments to section 2271 should ensure that such applications will be made only when truly justified by circumstances beyond the applicant's reasonable control.

2. What are the proposed amendments?

The proposed amendments are mostly insertions of new language into the existing section 2271, Title 13, CCR. The proposed amendments would:

- o Levy a fee on a variance recipient of \$0.15 per gallon for all gasoline sold under a variance. (Under SB 709, the collected fees must go to the "High Polluter Repair or Removal Account".)
- o Limit most variances to 120 days duration or less, with an allowable extension of up to 90 additional days after a new application and public hearing. These time limits would not apply for variances related to a "physical catastrophe that occurs at a refinery.
- o Set fees to accompany variance applications, so that the ARB can recover its costs of processing the variance.
- o Specify that information designated "confidential" by a variance applicant will be handled according to the ARB's existing confidentiality regulations, and that such information may be considered by the Executive Officer in reaching a decision to grant or deny a variance.
- o Require an applicant's variance compliance plan to include specific increments of progress, and require the applicant to demonstrate that the plan is the most expeditious practical route to compliance.
- o Specify factors for the Executive Officer to consider in making the necessary findings for granting a variance. Among other things, these provisions would ensure that a variance will be granted only when the applicant has made reasonably diligent and timely efforts to achieve compliance and has made a substantial showing that no alternative to a variance would eliminate or mitigate the need for a variance.
- o Specify that the California Predictive Model and calculations involving true vapor pressures will be used to estimate the excess emissions from granting the variance.

3. What issues have been raised about the proposed amendments?

During consideration of the draft variance guidelines and the proposed amendments, most commenters have endorsed the idea of a per-gallon variance fee set at a fixed value. However, a few refiners have argued that the fee should be set for each case by some method that would allow consideration of factors such as (1) the recipient's previous commitment of capital to compliance, (2) the degree to which the variance gasoline would be out-of-compliance, and (3) the expense of providing oxygen, if the variance gasoline would meet the oxygen standard.

The staff recognizes arguments in favor of considering these factors. However, we believe that incorporating them in some alternative to the flat fee would be difficult. Attempting to implement

a case-by-case fee would raise many issues and would counter the basic intent to ensure equity for complying parties.

C. Staff's Recommendation

The staff recommends that the Board approve the proposed amended section 2271, as presented in Appendix 3.

II

BACKGROUND AND NEED FOR REGULATORY AMENDMENT

A. About the CaRFG Regulations

The CaRFG regulations were adopted by the Board in November 1991. They establish specifications for eight gasoline properties:

sulfur content	oxygen content
aromatic hydrocarbon content	benzene content
Reid vapor pressure (RVP)	olefinic hydrocarbon content
50% distillation temperature	90% distillation temperature

The specifications are shown in Table 1. All gasoline leaving a refinery or importing facility in California (that is, gasoline destined for use within the state) must comply by March 1, 1996. Gasoline leaving pipeline terminals or other distribution points that do not receive gasoline by truck must comply by April 15, 1996. All gasoline offered for sale at any point or supplied to vehicles must comply by June 1, 1996.

The "cap" limits in the table must be met at all times by all persons who sell or supply gasoline. In addition, each refiner or importer ("producer") must meet more stringent limits. For each property but RVP and oxygen, a producer may choose to meet either the "flat" limit or the "averaging" limit. The flat limit applies to every batch of finished gasoline. The averaging limit is similar to a number that must not be exceeded by the rolling 180-day average value of a property.

A producer can opt for alternative values of flat or averaging limits if the alternatives have emission effects at least as good as the limits in Table 1. The "predictive models" or an emission test program must be used to demonstrate the equivalency. No alternatives are allowed for the cap limits, and no alternative flat or averaging limit can exceed the cap in Table 1.

**Table 1. CaRFG Standards for Gasoline Sold in California
(to become effective in 1996)**

	"Flat" Limit	"Averaging" Limit	"Cap" Limit *
Reid vapor press. (psi, max)	7.0	--	7.0
sulfur (ppmw, max.)	40	30	80
Benzene (vol.%, max.)	1.00	0.80	1.20
Aromatic HC (vol.%, max.)	25	22	30
Olefins (vol.%, max.)	6.0	4.0	10
Oxygen (wt.%)	1.8 to 2.2**	--	2.7 (max.)
Temp. at 50% distilled (deg. F, max.)	210	200	220
Temp. at 90% distilled (deg. F, max.)	300	290	330

* The "caps" apply to all gasoline at any place in the marketing system, regardless of alternative specifications.

** This oxygen specification is already in force during the "winter oxygenate season", when there is a "minimum cap" of 1.8 wt.%.

B. About Variances

A "variance" is a temporary and limited relief from a regulation. Section 2271 authorizes the ARB's Executive Officer to grant variances from the CaRFG standards, under certain conditions. A variance can be considered whenever (1) the applicant cannot meet a regulatory standard and (2) that inability is due to reasons beyond the applicant's reasonable control. For a variance to be granted, satisfaction of these and other criteria discussed below must be demonstrated at a public hearing.

There are various circumstances that could prompt a party to apply for a variance. However, most of the cases in which variances may be appropriate probably would fall under one of two general situations:

- o *Late Initial Compliance:* The applicant will not be able to complete preparations to produce or supply complying gasoline by March 1, 1996. (This is not anticipated.)

- o *Breakdown:* The applicant has complied with the CaRFG standards but will be temporarily unable to maintain compliance because of an unexpected problem.

To grant a variance, the ARB Executive Officer must find, on the basis of an application and testimony at a public hearing, that:

- o "Because of reasons beyond the reasonable control of the applicant, requiring compliance ... would result in an extraordinary hardship"; and
- o "The public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants which would result from issuing the variance"; and
- o The applicant has a plan for achieving compliance, and the plan "can reasonably be implemented and will achieve compliance as expeditiously as possible".

(The quoted passages are existing language in Title 13 CCR section 2271(d).)

Any regulated party can apply for a variance. However, parties other than refiners and importers could find it difficult to meet the requirement for a compliance plan.

C. Requirements of SB 709

SB 709 added a new section, 433013.2, to the Health and Safety Code. New subsection (b) authorizes the Board to impose fees and conditions in variances granted from gasoline specifications.

New subsection (c) requires the Board to adopt regulations that establish:

- "guidelines for the consideration of variances and the imposition of fees and conditions",
- "methods for estimating excess emissions",
- "factors to be considered in determining what is beyond the reasonable control of the applicant", and
- "a schedule of fees...to cover the reasonable and necessary costs to the state board [ARB] in processing the variance".

New subsection (c) also requires the Board to hold at least one public workshop, and to initially adopt the regulations as emergency regulations.

New subsection (d) requires that "all variance fee revenues...except those fees paid by an applicant for a variance to cover the reasonable and necessary costs to the State Board (ARB) for processing the variance shall be transmitted to the Treasurer for deposit in the High Polluter Repair or Removal Account". (This subsection also specifies that the fees will be available upon appropriation by the Legislature to retire old light-duty vehicles, in accordance with the State Implementation Plan.) The bill does not specify the amount of the fees that would be levied on the variance application.

New subsection (e) requires that in variance decisions, the Board shall "take into account whether the variance will place the applicant at a cost advantage over other persons".

New subsection (f) limits variance periods to 120 days, with a possible extension of 90 days upon need. Section (g), however, specifies that these time limitations do not apply in cases of a "physical catastrophe" occurring to a producer of complying gasoline.

SB 709 is reproduced in Appendix 1.

D. Development of Variance Guidelines

Prior to the passage of SB 709, the staff received public and private comments from several refiners about the variance provisions in section 2271. In general, refiners requested the issuance of guidelines to clarify the provisions of section 2271, similar to guidelines that were published in 1993 about potential variances from the standards on the aromatic hydrocarbon content of diesel fuel. A key reason for the request was concern that, without definitive guidelines, a variance could be sought merely as an economical means of regulatory compliance--rather than a last resort by a company that had diligently pursued other ways to mitigate an unavoidable problem. Also, some refiners were concerned about the determination of fees that could be levied on gasoline produced under variance.

In response to these concerns, the staff published a draft set of guidelines on variances (July 13, 1995) and held a workshop (August 1, 1995) to receive comments on the draft. (The draft guidelines are in Appendix 2.) Subsequently, SB 709 was passed and signed. To meet the requirements of the bill, the staff developed draft amendments to section 2271, which were discussed at a second workshop (November 30, 1995). The amendments now are being proposed after consideration of the comments at the second workshop.

A major element of the proposal is a fee of 15 cents to be levied on every gallon of non-complying gasoline produced under variance. A fee of that size would protect the investments of all refiners and encourage refiners to exhaust all practical alternatives to a variance. There was discussion at both the workshops about adjusting fees to the degree of non-compliance. However, the staff believes that a fixed fee is more appropriate. A fixed fee would avoid controversy over equity

in setting a variable fee, and it would be much easier to administer. Also, a fixed fee should discourage market speculation that could be driven by uncertainty about the size of a variable fee.

Chapter III discusses the proposed amendments in more detail.



III

PROPOSED AMENDMENTS TO SECTION 2271 (VARIANCES)

This chapter provides detail on the proposed amendments and their purposes. It is intended to satisfy Government Code section 11343.2, which requires that a non-controlling "plain English" summary of the regulation be made available to the public.

A. Fees to Accompany Variance Applications

SB 709 requires the Board to set fees by which the ARB can recover its costs of handling variance applications. The staff has estimated these costs as shown in Table 3. (Additional detail is in Appendix 4.)

Table 3. Costs of Administering Variance Applications

	Regular Hearing	Emergency Hearing
Reproduction of application	\$150	\$0
Mailing application to concerned parties	\$400	\$0
Staff's preparation for hearing	\$2,000	\$400
Hearing	\$3,100	\$1,600
Post-hearing tasks	\$1,000	\$500
TOTAL	\$6,700	\$2,500

Accordingly, the staff proposes a fee of \$6,700 to accompany an application for a "regular" variance (a variance based on a full hearing held after issuance of a hearing notice) and a fee of \$2,500 to accompany an application for an emergency variance. If the applicant for a regular variance would choose to withdraw its application before the hearing, \$4,100 would be refunded. The \$4,100 is the estimated cost that would be avoided if the hearing does not take place.

B. Use and Protection of Confidential Information

Sections 91000 and 91022 of the California Code of Regulations specify the ARB's procedures for handling information designated as confidential by a submitting party. Proposed subsection (b)(2) of section 2271 would ensure that these provisions apply to information submitted by a variance applicant (if the applicant so desires), and that any information that qualifies for confidentiality protection under California law may be considered by the Executive Officers in reaching a decision to grant or deny a variance. Subsection (b)(2) would also require the applicant to provide a justification for the confidentiality claim at the time the claim is made. This provision will help the executive officer to more quickly determine whether the information is truly entitled to confidentiality treatment under California law.

This proposed subsection could result in a variance being granted, in part, on the basis of information that will not be available to the public. The staff believes that the provision is needed to give some applicants a reasonable ability to make the required showing of economic hardship. In many cases, this showing may involve data on the applicant's cost of operation, revenues, or economic health. Applicants can be expected to be very reluctant to make public disclosures of such information, since doing so could place them at a competitive disadvantage.

C. Requirements for the Compliance Plans

The current section 2271 requires the applicant to submit a plan by which compliance will be achieved expeditiously if a variance is granted. The proposed new language specifies more detail about what material must be included in a compliance plan (see section 2271(a)(4)). Also, the new language places the burden on the applicant of demonstrating that the proposed compliance plan is the most expeditious way to achieve compliance, and requires a showing that the applicant has sufficient control over implementing the plan to make the plan practical (see section 2271(e)(3)).

The plan elements specified in the proposed language are similar to conditions that the Executive Officer found appropriate and necessary to include in variances that were previously granted from the ARB's standard for the aromatic hydrocarbon content of diesel fuel. The proposed requirements to demonstrate expeditiousness and practicality are to ensure that if a variance is granted, it will last only as long

as needed and that the recipient will achieve compliance at the end of the variance.

D. Factors to be Considered in Making the Findings Necessary for Granting Variances

The current Section 2271(d) sets forth the findings necessary for a variance to be granted. The proposed amendments clarify and expand on these findings by adding a new subsection (e), "Factors to be Considered in Making the Necessary Findings for Granting Variances".

SB 709 requires the Board to specify factors to be considered in making a finding that the need for a variance is beyond the applicant's reasonable control. Proposed subsection (e)(1) would respond to this mandate by requiring a demonstration of diligent and timely effort to achieve compliance. In the case of variances to delay initial compliance with the March 1, 1996 CaRFG standards, the applicant would have to show timely capital expenditures, reasonable efforts to obtain permits, and reasonable diligence in the implementation of its compliance plans previously submitted to the ARB as required by section 2269. In the case variances sought due to a "breakdown" that occurs after initial compliance, the applicant would have to show that the problem occurred despite the use of process design, methods of operation, and levels of oversight and maintenance that are regarded as standard in the industry. These requirements are intended to discourage reliance on variances as a means of delaying or minimizing capital expenses that are appropriate for achieving and maintaining compliance. The staff believes that an applicant should first exhaust all opportunities provided by the marketplace to achieve compliance; a variance should be the remedy of last resort.

With regard to the showing of extraordinary economic hardship, proposed subsection (e)(2) would require a demonstration that a variance is the only reasonable means for addressing the problem. Specifically, the applicant would have to show, among other things, that it:

- cannot reasonably obtain complying gasoline or blendstocks for making complying gasoline, and
- cannot use the Predictive Models* to decrease the amount of gasoline that requires a variance or the degree to which the gasoline will not comply.

Also, the applicant would be required to compare the economics of operation without a variance, during the proposed variance period, with the economics of operation after compliance is achieved. The applicant

* The Predictive Models compare exhaust emissions between the CaRFG standards and alternative values for those standards. The models were adopted into the CaRFG regulations in April 1994, by reference. (See Title 13, CCR, section 2265.)

may also address the economic effects on its customers or the public if it were forced to curtail its gasoline business as a result of failure to obtain a variance.

With respect to the evaluating the public interest in granting or denying a variance, proposed subsection (e)(2) would require the Executive Officer to consider the effects of a variance on the applicant's customers, other gasoline producers, the general public, and air quality. These new provisions would ensure that appropriate and adequate consideration is given to the effects of the proposed variance.

The method of estimating the effect on air quality would be based on the California Predictive Model for exhaust emissions and calculations using true vapor pressures for evaporative emissions (if the variance would limit RVP to a value other than 7.0 psi). These provisions are proposed in response to the requirement of SB 709 that "methods of estimating excess emissions" be included in the regulation.

E. Fee for Variance Gasoline

The staff proposes a fee of 15 cents levied on every gallon of gasoline produced under a variance. This fee would discourage applications for variances that will not be truly necessary for avoiding extraordinary hardships, and it would ensure that no company could use a variance to reduce artificially its manufacturing costs and thus undercut its competitors' capital investments in compliance. The staff has estimated that the "average" gallon of CaRFG will have a production cost about ten cents above the cost of conventional (non-oxygenated, non-federal-RFG) gasoline, with a range of 5 to 15 cents per gallon. Setting the fee at the upper end of the production cost range should help to protect refiners' investments and encourage refiners to seek variances only as last resorts.

The fee would be paid by the applicant in advance of the sale or release of variance gasoline. During that period, only as much variance gasoline as is "pre-paid" could be sold.

F. Limitation of Duration of Variances

Currently, there is no absolute maximum for the duration of a variance other than a six-month limit for a variance issued for a breakdown. SB 709 requires a limit of no more than 120 days for most variances, with an extension of up to 90 days upon a showing of need at a new hearing. However, the bill also allows an unlimited extension (subject to the requirement for expeditious compliance) in the case of a physical catastrophe in the gasoline-making processes of a refinery. The proposed amendments would make these changes.

G. Other Amendments

Other changes to section 2271 are:

1. Proposed subsection (d) contains new language to set forth the SB 709 requirement that a decision to grant or deny a variance shall be based solely upon substantial evidence in the record of the variance proceedings.
2. A non-exclusive list of possible variance conditions has been added to subsection (f)(1). These possible conditions are reporting requirements, specifications on gasoline properties, and the compliance plan.
3. It has been clarified that any condition relating to the Reid vapor pressure shall not allow a Reid vapor pressure limit that is less stringent than the applicable federal limit.
4. Provisions were added to clarify that a variance will be valid for all "downstream" customers of a variance recipient, for subsequent sales of variance gasoline sold in accordance with the variance.
5. Miscellaneous clarifications, editorial corrections, and section-numbering changes have been made.

H. Adoption as Emergency Regulations

As mentioned previously, SB 709 requires the regulations to be initially adopted as emergency regulations. Accordingly, ARB staff will propose that the Board approve the regulations, and that the regulations be submitted to the Office of Administrative Law (OAL) as emergency regulations. Upon approval by OAL, under Government Code Section 11346.1 emergency regulations are legally effective for a 120-day period. This will allow the amended provisions of section 2271 to be used to evaluate any variance applications that may be received during this 120-day period. During the period, the ARB staff will complete the Final Statement of Reasons and other administrative requirements, specified in the Administrative Procedure Act. The complete package will be resubmitted to OAL as a normal non-emergency submission, to replace the emergency regulations upon final OAL approval.



IV

ECONOMIC AND ENVIRONMENTAL IMPACTS

A. Economic Impacts

Summary

Adoption of the proposed amendments to section 2271 would not impose costs on any identifiable party. However, a company that chooses to apply for a variance might have to bear a variance fee that, under some circumstances, could be more expensive than whatever conditions would have been placed in a variance under the existing section 2271. Under the proposed amendments, variances would still be available for regulated parties to avoid certain temporary unproductive costs. However, the practical effect of the amendments is that only costs exceeding \$0.15 per gallon (the variance fee) would be avoidable.

The proposed amendments should not have a significant adverse economic impact on businesses. The proposed amendments should also not affect the creation or elimination of jobs within California, the creation of new businesses or elimination of businesses within California, the expansion of businesses currently doing business in California, or the ability of California businesses to compete with businesses in other states.

Legal Requirements for Analysis

State law (Government Code sections 11346.3 and 11346.5) requires regulatory agencies to evaluate the economic impacts of a proposed regulation on California businesses. Agencies must assess the potential effects a proposed regulation on jobs and on business expansion, creation, or elimination. Also, agencies must consider the effect of the proposed regulation on the ability of California businesses to compete with businesses in other states.

Businesses Affected

Gasoline refiners are the entities most likely to be affected by the proposed amendments. The only refiners affected would be companies who face an unexpected difficulty in complying with the CaRFG standards, and choose to respond to this difficulty by applying for a variance. Since such an incident is unpredictable, no particular entity that may be affected can be identified at this time.

Customers of a variance recipient could be affected indirectly by the proposed amendments if the recipient raises its price to offset part of the variance fee. However, price competition would limit the recipient's ability to do this, and the impetus to raise the price would probably last only as long as the variance, which would be temporary.

Economic Impacts

Under the existing section 2271, a variance recipient would be subject to variance conditions that could include some costs. Under the proposed amendments, a direct cost of \$0.15 per gallon would be imposed for every variance. It is possible that under some circumstances, the \$0.15 per gallon fee might be greater than the fee that would have been imposed under the existing section 2271. The certainty of the variance fee would dissuade companies from applying for a variance to deal with a problem if there were any alternative cheaper than \$0.15 per gallon. Thus, it is possible that a company with a temporary compliance problem could find relief via the amended section 2271 more expensive than under the current provisions.

A variance is a temporary arrangement that is chosen by a refiner, and refiners generally can shift production from gasoline to other products, to some extent, if the net revenue from gasoline becomes unfavorable. There is thus no reason to predict a significant adverse impact of the proposed amendments over the industry in general or for any particular potential variance recipient over an extended period. However, it is also possible that--for some unidentifiable refiner in some unknown future situation--the \$0.15 fee could have a significant adverse impact on profitability in the short term. Therefore, the Executive Officer has determined that the adoption of the amendments may have a significant adverse impact on some individual businesses, under some circumstances, even though businesses overall will not be adversely impacted.

The proposed amendments would minimize the potential for a variance recipient to gain an unfair economic advantage over its competitors.

No small business will incur any costs unless it elects to obtain a variance. No member of the class of business that is most likely to obtain variances--refiners--is a small business under California law. No element of government will incur direct costs because of the adoption or use of the proposed amendments. There is no reason to expect any effect of the proposed amendments upon employment business activity.

Since almost all gasoline subject to the CaRFG standards is made in California, and because exported gasoline is not subject to those standards, any effects of the amendments would not affect the competitiveness of California refiners. It is possible that marketers who sell near the state borders and compete with marketers of non-CaRFG across those borders could see their margins reduced during the term of a refiner's variance. This could occur if such a marketer had no short-term alternative to that refiner as a supplier and the refiner succeeded in raising its price to help pay for a variance. However, the refiner's ability to do this would be limited by price competition, and the duration of this effect would be only for the duration of the variance.

B. Environmental Impacts

Both the California Environmental Quality Act (CEQA) and Board policy require the ARB to consider the potential environmental impacts of proposed regulations. Because the ARB's program involving the adoption of regulations has been certified by the Secretary of Resources (Public Resources Code section 21080.5), CEQA allows the ARB's environmental analysis to be included in the Initial Statement of Reasons in lieu of preparing an environmental impact report or negative declaration.

ARB staff has considered the environmental impacts of the proposed amendments, and has concluded that the amendments will not have any significant adverse impacts on the environment. Variances from the CaRFG regulations are already allowed under the existing section 2271, Title 13, CCR. Refinery operations during variances granted under the amended section 2271 should not differ from operations during variances under the current section. In addition, the proposed amendments will tend to discourage unnecessary variance applications and to promote expeditious termination of a variance. Therefore, excess emissions from variances, if any, are likely to be reduced by the proposed amendments.



Appendix I

Senate Bill 709 (STATS. 1995, Chapter 675)



Senate Bill No. 709

CHAPTER 675

An act to add Section 43013.2 to the Health and Safety Code, relating to air pollution.

[Approved by Governor October 8, 1995. Filed with Secretary of State October 10, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

SB 709, Maddy. Air pollution: variances: legislative intent.

Existing law authorizes the State Air Resources Board to adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution that the state board has found to be necessary, cost-effective, and technologically feasible to regulate air pollution.

This bill would prescribe procedures for the granting of variances by the state board or its executive officer from gasoline specifications adopted by the state board. The bill would require variance fee revenues to be deposited in a specified account and used, upon appropriation, to implement a program for accelerated retirement of light-duty vehicles to reduce emissions, as specified. The bill would state that certain of its provisions are declaratory of existing law.

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

SECTION 1. Section 43013.2 is added to the Health and Safety Code, to read:

43013.2. (a) (1) The Legislature finds and declares that variances from the state board's gasoline specifications may be needed if gasoline producers cannot meet the specifications as required due to circumstances beyond their reasonable control, and that the state board's process for granting variances from fuel specifications should be clarified.

(2) It is the intent of the Legislature that the variance process consider the impacts of granting the variance on all parties, including the applicant, the public, the producers of complying fuel, and upon air quality.

(b) The state board may grant variances from gasoline specifications adopted by the state board pursuant to Sections 43013 and 43018. In granting a variance, the board may impose fees and conditions.

(c) The state board shall adopt regulations to implement this section in accordance with Chapter 3.5 (commencing with Section

11340) of Part 1 of Division 3 of Title 2 of the Government Code. The regulations shall establish guidelines for the consideration of variances and the imposition of fees and conditions. Any fees or conditions shall be imposed in a fair and equitable manner consistent with the regulations. The regulations shall include methods for estimating excess emissions and factors to be considered in determining what is beyond the reasonable control of the applicant. The regulations also shall establish a schedule of fees to be paid by an applicant for a variance to cover the reasonable and necessary costs to the state board in processing the variance. The state board shall adopt initial regulations as emergency regulations after conducting at least one public workshop. The initial adoption of emergency regulations following the effective date of this section shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

(d) All variance fee revenues collected pursuant to this section by the state board, except those fees paid by an applicant for a variance to cover the reasonable and necessary costs to the state board for processing the variance, shall be transmitted to the Treasurer for deposit in the High Polluter Repair or Removal Account created pursuant to subdivision (a) of Section 44091. All money deposited in the account pursuant to this section shall be available, upon appropriation by the Legislature, to implement a program for accelerated retirement of light-duty vehicles to achieve the emission reductions required by the M-1 Strategy of the 1994 State Implementation Plan.

(e) In considering whether to grant a variance, and with regard to any fees and conditions that are imposed as part of the variance, the state board shall take into account whether granting the variance will place the applicant at a cost advantage over other persons, including those persons who produce complying gasoline.

(f) Any determination of the state board, or the executive officer of the state board pursuant to the authority delegated pursuant to Section 39516, regarding the issuance of any variance from gasoline specifications shall be based solely upon substantial evidence in the record of the variance proceeding. The variance shall be valid for a period not exceeding 120 days, commencing on or after March 1, 1996. The variance may be extended, subject to this section, for up to 90 additional days, upon a showing of need. The board shall grant a variance only for the minimum period required to attain compliance.

(g) If a physical catastrophe occurs to a producer of complying gasoline, the state board may extend a variance upon the showing of need. Notwithstanding subdivision (f), any variance extension related to a physical catastrophe shall be approved by the state board. As used in this subdivision, "physical catastrophe" means a sudden

unforeseen emergency beyond the reasonable control of the refiner, causing the severe reduction or total loss of one or more critical refinery units that materially impact the refiner's ability to produce complying gasoline. "Physical catastrophe" does not include events which are not physical in nature such as design errors or omissions, financial or economic burdens, or any reduction in production that is not the direct result of qualifying physical damage.

(h) Notwithstanding any other provision of law, except in the case of emergency variances, the state board shall provide at least 10 days' public notice of its consideration of any variance or extension.

(i) Subdivisions (b) and (e) do not constitute a change in, but are declaratory of, existing law.



Appendix 2

Draft Guidelines for Variances from the Standards in the California Reformulated Gasoline Regulations

(Underlined text shows additions made to the version that was discussed at the August 1, 1995 workshop, pursuant to comments at that workshop. This revised draft is reproduced here to document the development of the proposed regulatory amendments, which if adopted will be controlling.



Draft August 1, 1995

revised draft December 5, 1995

State of California
Air Resources Board

(Draft) GUIDELINES FOR VARIANCES FROM THE STANDARDS
IN THE CALIFORNIA REFORMULATED GASOLINE REGULATIONS

The following guidelines apply to variances from the California Reformulated Gasoline Regulations, which will take effect on March 1, 1996. Although we have no information to suggest that we will receive variance applications, we believe that it is advisable to establish in advance a "framework" for handling any applications that may be forthcoming. The purpose for this action is to promote efficiency and uniformity in handling applications if and when they are made.

Variances are viewed as a last resort for a company having difficulty in meeting the standards. That is, a variance request will be denied unless the applicant has no alternative that would avoid the "extraordinary hardship" as described in the guidelines. Absent demonstrations that there are no alternatives, we will expect a refiner who (temporarily) cannot make complying gasoline to employ every opportunity to use the marketplace to address its situation.

1. What is the purpose of this document?

This document provides the ARB staff's guidance to prospective applicants for variances from the standards in the California reformulated gasoline (CaRFG) regulations (in Title 13, sections 2262.2 to 2262.7; CCR. See the footnote below.)

The regulations establish specifications for eight gasoline properties:

sulfur content	oxygen content
aromatic content	benzene content
Reid vapor pressure (RVP)	olefinic content
50% distillation temperature	90% distillation temperature

The specifications are shown in Attachment 1. All gasoline leaving a refinery or importing facility in California (that is, gasoline destined for use within the State) must comply by March 1, 1996. Gasoline leaving pipeline terminals or other distribution points that do not receive gasoline by truck must comply by April 15, 1996. All gasoline offered for sale at any point or supplied to vehicles must comply by June 1, 1996.

Variances may be obtained from only the standards in the cited sections, which previously were referred to as the "Phase 2" standards. There is no provision for variances from other ARB gasoline standards or from CaRFG regulatory requirements other than the standards.

This document:

- o Summarizes the requirements for variance applications and the criteria that control the granting of variances;
- o Describes how the ARB staff will administer variance applications;
- o Outlines the procedure of a variance hearing; and
- o Outlines the principles that will guide the ARB staff in making a recommendation to the variance hearing officer.

2. What is a variance?

Section 2271 authorizes the ARB Executive Officer to grant variances from the CaRFG standards, under certain conditions. A "variance" is a temporary and limited relief from a regulation. A variance can be considered whenever (1) the applicant cannot meet a regulatory standard and (2) that inability is due to reasons beyond the applicant's reasonable control. For a variance to be granted, satisfaction of these and other criteria discussed below must be demonstrated at a public hearing.

There are various circumstances that could prompt a party to apply for a variance. However, most of the cases in which variances may be appropriate probably will fall under one of two generic situations:

- o *Late Initial Compliance*: The applicant will not be able to complete preparations to produce or supply complying gasoline by March 1, 1996; or
- o *Breakdown*: The applicant has complied with the CaRFG standards but will be temporarily unable to maintain compliance because of a technical problem.

A period of public notice is required before an applicant receives its variance hearing. Section 2271 also allows an "emergency variance" proceeding in which the notice requirement is waived. The last section of this document describes the differences between an ordinary variance and an emergency variance.

3. What are the necessary criteria for receiving a variance?

To grant a variance, the ARB Executive Officer must find, on the basis of an application and testimony at a public hearing, that:

- o "Because of reasons beyond the reasonable control of the applicant, requiring compliance ... would result in an extraordinary hardship"; and
- o "The public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in

avoiding any increased emissions of air contaminants which would result from issuing the variance"; and

- o The applicant has a plan for achieving compliance, and the plan "can reasonably be implemented and will achieve compliance as expeditiously as possible".

(The quoted passages are in Title 13 CCR section 2271(d).)

4. Who can apply for a variance?

Any party whose gasoline must meet the standards may apply for a variance and attempt to demonstrate satisfaction of the above criteria. Different considerations may be important for different types of business, as discussed in the following:

Refiners A refiner who applies for a variance will usually do so because the process modifications for achieving compliance will not be ready by March 1, 1996 or because of a breakdown. In either case, the compliance plan must contain measures under the refiner's direct control, such as completing process changes or repairing equipment. The direct control over the plan's measures will be material to the hearing officer's determination about ensured timely compliance if a variance is granted.

Importers An importer who plans to receive CaRFG from its own out-of-state refinery will be treated as if that refinery were located in California, provided that a compliance plan has been submitted and updated in accordance with section 2269. If no section 2269 compliance plan has been submitted, the importer may find it difficult to demonstrate grounds for a variance.

The situation differs if the out-of-state source of gasoline is not owned by the importer who seeks a variance and, thus, is not under the importer's direct control. In such an out-of-state source is unable to produce complying gasoline on or after March 1, 1996, the importer may not be able to propose a satisfactory compliance plan for the purpose of obtaining a variance.

The requirement to demonstrate extraordinary hardship will apply to a person who intends to import CaRFG but who does not now import gasoline to California. It is likely that making this demonstration would be more difficult for such persons than would be the case for an established importer.

Distributors, Retailers, Commercial Users There may be a few instances in which a distributor (who is not an importer), retailer, or user of gasoline could benefit from a variance. Such businesses could find it difficult to acquire complying gasoline if production is not adequate. However, obtaining a variance to deal in non-complying gasoline generally would not relieve the problem. This is because such a variance would not permit the variance holder's supplier to supply the holder with non-complying gasoline from a source within the State. Such permission could be granted only through a variance to the supplier. A supplier's

variance would "follow" the supplier's gasoline to protect the distributor and customers.

Also, a distributor would probably lack control over a plan to eventually obtain complying gasoline. A supply of complying gasoline would depend upon the actions of the supplier. Therefore, ensuring timely compliance could be difficult for the distributor.

5. When should a variance application be made?

Section 2271 does not limit when an application may be submitted. However, as a practical matter, for a variance that would begin on March 1, 1996, an application should be made by January 1, 1996 to ensure adequate time for a thorough review, a public notice, a hearing, and the hearing officer's written decision.

6. How can an applicant demonstrate an extraordinary economic hardship associated with compliance?

Since any hardships must be shown to be "extraordinary", an applicant will have to make a substantial showing to meet the hardship criterion. The applicant should address its ability to mitigate the hardship by obtaining complying gasoline from non-traditional sources. That is, mere inability to produce or obtain complying gasoline by conventional or traditional means may not, by itself, adequately demonstrate extraordinary hardship. Also, the applicant should address the utility of the "Predictive Models" for mitigating hardship.

An applicant should compare the economics of operations without a variance, for the period over which a variance is proposed, with the economics of operation after its variance compliance plan has been implemented. That is, "extraordinary hardship" will be measured against the eventual cost of long-term compliance. The operations may include facets of the applicant's business other than gasoline if those facets are directly affected by the ability to conduct the gasoline business. An applicant may also address any supply shortages that could result from the failure to grant a variance and the economic effects of such shortages on persons who do, or could, receive gasoline from the applicant.

7. How can an applicant show that the hardship would be due to reasons beyond its reasonable control?

An applicant for a variance beginning March 1, 1996 must show that it has made diligent and timely efforts to achieve compliance. Timely capital expenditures and efforts to obtain the permits for necessary refinery modifications will be important evidence in determining whether or not an applicant has acted with reasonable diligence. If the applicant is a refiner, this evidence should be consistent with the information that has been provided to the ARB in the refiner's periodic compliance plans that are required by section 2269, "Submittal of Compliance Plans."

An applicant must show in the variance application that a breakdown could not have been prevented or mitigated by application of standard industrial practices. "Standard industrial practice" means elements of design, methods of operation, and levels of oversight and maintenance that are regarded as good practice in the applicant's type of business.

8. What should a proposed compliance plan contain?

The plan should be presented in considerable detail and include definitive increments of progress (observable milestones). The increments of progress should describe frequent and measurable steps in the recipient's progress toward compliance during the term of the variance. The application should show how the plan satisfies the requirement (discussed below) and that the plan will achieve compliance as expeditiously as possible.

For the situation of a refiner's late initial compliance, the compliance plan must, at a minimum, set forth the sequence and respective dates of all key events in the construction process (for equipment to enable production of CaRFG) including securing of financing, completion of plans and engineering drawings, ordering of equipment, receipt of equipment, signing of construction and other necessary contracts, commencement and completion of various phases of work, commencement and completion of testing, and other similar events and dates.

9. How much non-complying gasoline can be sold under a variance?

It is the responsibility of the applicant to propose and defend the allowable production rate for non-complying gasoline. The purpose of a variance is to provide relief for the period needed to achieve compliance. In general, variances may permit production rates up to the refiner's expected complying production rate. We recognize that a refiner's actual gasoline production rate will depend on various choices that the refinery makes regarding its product slate, crude oil output, and imports of various gasoline blendstocks.

The Executive Officer will limit the production or importation of variance gasoline during each 30-day period of a variance, unless there is reason to use a different period.

10. Can a refiner who produces some CaRFG obtain a variance to produce non-complying gasoline also?

Yes. If a refiner can utilize only a portion of its nominal production capacity for CaRFG, it may qualify for a variance. All the criteria and requirements discussed above apply to the application and variance in such a case.

11. How long could a recipient operate under a variance?

One of the required findings for a variance is that the compliance plan "can reasonably be implemented and will achieve compliance as expeditiously as possible." No variance will be permitted to extend past the time when compliance can be achieved under the expedited compliance plan.

As discussed above, a refiner who qualifies for a variance through a diligent effort to comply will normally be expected to have accomplished a major portion of its compliance plans submitted in response to section 2269. Therefore, variances will be limited to the amount of time needed to come into compliance, and we anticipate that variances in excess of six months will be very unusual, if permitted at all.

12. What will be the status during a variance of designated alternative limits that are in an "averaging account" when the variance begins?

Both the periods of validity of low DALs and the deadlines for offset of high DALs will be extended by times equal to the duration of a variance.

13. What payments may be required as a variance condition?

Section 2271(e) authorizes the Executive Officer to include in a variance conditions that he finds necessary to carry out the purposes of California's air pollution control laws. We expect that any variance will be conditioned on the applicant's agreement to pay \$0.15 per gallon of non-complying gasoline, into an air pollution mitigation fund. A fee of that size will be adequate to protect the investments of all refiners and to encourage refiners to exhaust all practical alternatives to a variance. A fixed fee should discourage market speculation that could be driven by uncertainty about the size of payments.

14. How would payments be administered?

A variance recipient will be required to set up an escrow account to receive payments. The funds in the account will be used for an environmental benefit determined by the Executive Officer, in a manner that will not benefit the variance recipient. Funds will have to be guaranteed in advance of the production of variance gasoline. Either a performance bond must be posted before production begins or the recipient must make payments into escrow at the beginning of each of several periods identified in the variance. In the latter case, in each period, the variance recipient could sell, supply or produce noncomplying gasoline under the variance only to the extent there were sufficient funds in the escrow account.

15. What other condition may be placed in a variance?

Required Increments of Progress Section 2271(e) requires that any variance must contain a condition specifying increments of progress that

must be met to ensure timely compliance with the CaRFG standards. These increments should be designed to ensure that the variance recipient is making a full commitment to complete the compliance plan by the end of the variance period. It will be particularly important to include early and detailed increments to ensure that any needed financial expenditures are being made. While the compliance plan submitted by the applicant will be the starting point, that plan may be revised or supplemented in the variance order to ensure it meets the applicable requirements.

Gasoline Quality A variance will cover only the CaRFG limits for which the recipient has demonstrated an inability to comply. For such limits, a variance order may require compliance with lesser limits that can be achieved without entailing the extraordinary hardship that engendered the variance. Such a condition would be designed to minimize the emissions associated with gasoline sold under the variance and to aid in enforcing the regulatory limits.

Reporting There will be detailed reporting requirements. They will be designed to ensure that the variance recipient accounts for all non-complying gasoline sold under the variance and to aid in identifying gasoline illegally introduced into the distribution system.

16. What will be the procedure for granting a variance?

The ARB staff will review a variance application immediately upon its receipt. If the application contains the required elements, a variance hearing will be scheduled. A notice of the hearing will be sent, at least 20 days in advance, to all parties who have indicated interest in such proceedings. The Executive Officer will designate a hearing officer, who will not discuss the content of the application with any party before the hearing.

At the hearing, the applicant must present its case. The presentation should include all evidence needed to establish satisfaction of the variance criteria. During or after the presentation, the hearing officer and the staff may question the applicant. The public hearing may be recessed so that the hearing officer may receive confidential information from the applicant. Then, the ARB staff will comment on the application and the applicant's testimony. The hearing officer also will call other parties who wish to testify or offer written evidence. Such parties may be questioned by the hearing officer.

After completion of the above testimony, the applicant will be allowed a closing statement in which to modify the application. This will be followed by a closing statement and recommendation by the staff. The hearing will then be closed.

The hearing officer will provide a recommendation to the ARB Executive Officer, who will render the final decision. If the decision is to grant a variance, the Executive Officer will issue a variance order that will document the basis for the decision (excluding any confidential testimony or evidence) and state all conditions on the variance. If a variance is denied, the Executive Officer will issue a written statement

explaining the denial. The hearing officer's decision will be conveyed immediately to the applicant and be made publicly available.

17. When can an emergency variance be granted?

An emergency variance may be granted after a hearing that has been held without a 20-day public notice. Section 2271(h) allows an emergency variance in a situation in which extraordinary economic hardship clearly would occur if compliance were otherwise required during a 20-day notice period. An emergency variance can be granted for a 45-day maximum.

Although no general notice to the public is required to hold an emergency variance hearing, the staff must notify all persons who have previously indicated their desire to be notified of such hearings. The hearing may be conducted by telephone conference call accessible to such persons.

All the criteria necessary for receiving an ordinary variance apply also to an emergency variance. In addition, the problem that triggers an application for an emergency variance must have been unforeseeable and must require immediate attention. Either the problem must be correctable within 45 days or there must be evidence that an ordinary variance can be granted to follow the emergency variance. If 45 days is not sufficient to correct the problem, an ordinary variance hearing, with a 20-day notice period, must be scheduled during the emergency variance period.

Attachment for
Guidelines for Variances from the Standards in CaRFG Regulations

CaRFG Standards for Gasoline Sold in California
(to become effective in 1996)

	"Flat" Limit	"Averaging" Limit	"Cap" Limit *
Reid vapor pressure (psi, max)	7.0	--	7.0
sulfur (ppmw, max.)	40	30	80
Benzene (vol.%, max.)	1.00	0.80	1.20
Aromatic HC (vol.%, max.)	25	22	30
Olefins (vol.%, max.)	6.0	4.0	10
Oxygen (wt.%)**	1.8 to 2.2	--	1.8 (min.) 2.7 (max.)
Temperature at 50% distilled (deg. F, max.)	210	200	220
Temperature at 90% distilled (deg. F, max.)	300	290	330

* The "caps" apply to all gasoline at any place in the marketing system, regardless of alternative specifications.

** The oxygen specification (1.8 to 2.2 %) already is in force during the "winter oxygenate season". In some situations, the minimum cap for oxygen may apply only during that season. (See below.)

For each property but RVP and oxygen, a refiner may choose either the "flat" limit or the "averaging" limit. The flat limit applies to every batch of finished gasoline. The averaging limit is similar to a number that must not be exceeded by the rolling 180-day average value of a property. Alternative values of flat or averaging limits can be used if they have emission effects equivalent to the effects of the limits listed above. The "predictive models" or an emission test program must be used to demonstrate the equivalency. No alternatives are allowed for the cap limits (except as discussed below for oxygen).

Special considerations apply to alternatives to the oxygen limits:

- All the listed limits for oxygen are enforced during the "winter oxygenate season", without exception.
- If an alternative flat limit for oxygen has been approved and is less than 1.8 wt.%, the minimum oxygen cap at 1.8 wt.% will apply only during the winter oxygenate season.



Appendix 3.

Proposed Amendments to Section 2271



Amend section 2271, Title 13, California Code of Regulations, to read as follows:

(Additions to the text are shown in **bold underline**. Deletions are shown by ~~strikeout~~.)

Section 2271. Variances

- (a) **Applications for Variances.** Any person who cannot comply with the standards set forth in sections 2262.1 through 2262.7 because of reasons beyond the person's reasonable control may apply to the executive officer for a variance. **Except for emergency variances as provided in section (h), the application shall be accompanied by a fee of \$6700.00 to cover the costs of processing the variance. If the applicant withdraws the application before the variance hearing is held, \$4100.00 of the fee shall be refunded.** The application shall set forth:
- (1) The applicable section(s) ~~in~~ **from** which the variance is sought;
 - (2) The specific grounds upon which the variance is sought;
 - (3) The proposed date(s) by which compliance with the provisions of the applicable section(s) will be achieved; and
 - (4) A **compliance** plan reasonably detailing the method by which compliance will be achieved. **The proposed compliance plan shall include increments of progress (i.e., specific events and dates) that describe periodic, measurable steps toward compliance during the proposed term of the variance.**
- (b) **(1) Notices and Public Hearings for Variances.** Upon receipt of an application for a variance containing the information required in section (a), the executive officer shall hold a hearing to determine whether, or under what conditions and to what extent, a variance from the requirements of the applicable section(s) is necessary and will be permitted. Notice of the time and place of the hearing shall be sent to the applicant by certified mail not less than 20 days prior to the hearing. Notice of the hearing shall also be submitted for publication in the California Regulatory Notice Register and sent to every person who requests such notice, not less than 20 days prior to the hearing.
- (2) Treatment of Confidential Information.** Information submitted to the executive officer by a variance applicant may be claimed as confidential. **If an applicant claims information as confidential, the applicant shall also provide accompanying documentation in support of the claim of confidentiality. The documentation shall include the material identified in Title 17, CCR, section 91022(c). Information claimed as confidential shall be handled in accordance with the procedures specified in Title 17, California Code of Regulations (CCR), sections 91000 to 91022. The executive officer**

may consider such confidential information in reaching a decision to grant or deny a variance.

- (c) Public Participation in the Variance Process. At least 20 days prior to the hearing, the application for the variance shall be made available to the public for inspection. Interested members of the public shall be allowed a reasonable opportunity to testify submit written and oral testimony at the hearing, and their testimony shall be considered.
- (d) Necessary Findings for Granting Variances. The decision to grant or deny a variance shall be based solely upon substantial evidence in the record of the variance proceeding. No variance shall be granted unless the executive officer makes all of the following findings are made:
- (1) That, because of reasons beyond the reasonable control of the applicant, requiring compliance with the applicable section(s) would result in an extraordinary economic hardship.
 - (2) That the public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants which would result from issuing the variance; and
 - (3) That the compliance plan proposed by the applicant can reasonably be implemented and will achieve compliance as expeditiously as possible.
- (e) Factors to be Considered in Making the Necessary Findings for Granting Variances.

In making the findings specified in section (d)(1), the factors set forth below shall be considered. It is the responsibility of the applicant to provide the information necessary to adequately evaluate these factors.

(1) Regarding the finding specified in section (d)(1):

(A) To demonstrate that noncompliance is 'beyond the reasonable control of the applicant', the applicant must demonstrate that reasonably diligent and timely efforts to achieve compliance have been made. Where a variance is sought from initial compliance with the March 1, 1996 requirements, the applicant shall show that timely capital expenditures and efforts to obtain the permits for necessary refinery modifications have been made, and that the applicant has been reasonably diligent in attempting to follow the periodic compliance plans required by section 2269, "Submittal of Compliance Plans". Where a variance is sought due to a breakdown, the applicant shall demonstrate that the breakdown could not have been prevented or mitigated by the application of standard industrial practices. "Standard industrial practices" means elements of design.

methods of operation, and levels of oversight and maintenance that are regarded as generally accepted practice in the applicant's type of business.

(B) To demonstrate that requiring compliance would result in an "extraordinary economic hardship", the applicant must make a substantial showing that no alternative to a variance would eliminate or mitigate the need for a variance. Potential alternatives that the applicant shall address include the following: (i) obtaining complying gasoline from outside sources, or obtaining blending materials that would allow production of complying gasoline, and (ii) using the California Predictive Model (as specified in Title 13, CCR, section 2265) to maximize the production of complying gasoline, or to minimize the degree of noncompliance, through the use of a PM alternative gasoline formulation. The applicant shall compare the economics of operations without a variance, for the period over which the variance is proposed, with the economics of operations after the variance compliance plan has been implemented (e.g., the economic hardship during the term of the variance shall be measured against the eventual cost of long-term compliance.) The operations may include facets of the applicant's business other than gasoline operations, if those facets are directly affected by the ability to conduct the gasoline business. An applicant may also address any supply shortages that could result from the failure to grant a variance and the economic affects of such shortages on the persons who do, or could, receive gasoline from the applicant.

(2) Regarding the finding specified in section (d)(2):

(A) The executive officer shall consider the potential effects of issuing or denying the variance on the applicant's customers, the producers of complying fuel, the general public, and upon air quality. The executive officer shall also consider whether granting the variance will place the applicant at a cost advantage over other persons, including those persons who produce complying gasoline.

(B) To evaluate the potential effect upon air quality, the excess emissions from granting the variance shall be estimated as follows.

(i) Exhaust emissions: The fractional change in emissions from using the variance gasoline shall be estimated with the California Predictive Model (model). Inputs to the model shall be the limits to be placed on the regulated properties of the variance gasoline by the variance conditions and the limits set forth in sections 2262.1 through 2262.7 that correspond in form (flat or averaging) to the variance limits. For each air basin in which the variance gasoline will be sold, the estimate of excess exhaust emissions shall be the fractional change in emissions (output by the model), times the estimated fraction of gasoline use in the air basin represented by the variance gasoline.

times the inventory of exhaust emissions from gasoline-powered vehicles in the air basin.

(ii) *Evaporative hydrocarbon emissions:* Excess evaporative emissions shall be estimated for a limit greater than 7.0 pounds per square inch (psi) on the Reid vapor pressure (RVP) of variance gasoline. This estimate shall apply only for the period when RVP is limited to 7.0 psi. The true vapor pressure corresponding to the RVP limit for variance gasoline shall be divided by the true vapor pressure corresponding to RVP at 7.0 pounds per square inch. For each air basin in which the variance gasoline will be sold, the estimate of excess evaporative emissions shall be that ratio, minus 1.0, times the estimated fraction of gasoline use in the air basin represented by the variance gasoline, times the inventory of emissions due to the evaporation of gasoline from all sources in the air basin.

(3) Regarding the finding specified in section (d)(3):

The applicant shall demonstrate why the proposed compliance plan is the most expeditious way to achieve compliance, and the applicant shall demonstrate sufficient control over the implementation of the plan to make the plan practical. In the case of a proposed variance that would begin on March 1, 1996, the compliance plan shall identify and provide a date for each key step that remains to be accomplished for attaining compliance. As applicable, these steps shall include financing, engineering plans, ordering and contracts, receipt of major equipment, commencement and completion of construction, and testing.

(f) *Conditions and Fees in Variance Orders.*

In imposing fees and conditions in variance orders, the executive officer shall take into account the potential for such fees and conditions to place the applicant at a cost advantage over other persons, including those persons who produce complying gasoline.

(1) *Conditions.*

(A) Any variance order shall specify a final compliance date by which the requirements of the applicable section(s) will be achieved. Any variance order shall also contain a condition that specified increments of progress necessary to assure timely compliance be achieved, and such other conditions, such as limitations on the gasoline specifications; that the executive officer, as a result of the testimony received at the hearing, finds necessary to carry out the purposes of Division 26 of the Health and Safety Code. Such conditions may include, but are not limited to, reporting requirements, limitations on the gasoline specifications, and the elements of the variance compliance plan as proposed by the applicant, with any modifications made by the executive officer.

(B) Any variance order granting a variance from section 2262.1 shall impose a substitute gasoline Reid vapor pressure limit as stringent as feasible under the circumstances, in no case to exceed 9.0 pounds per square inch. For areas where, and in seasons when, federal regulations require a lesser maximum Reid vapor pressure limit, a variance order shall not impose a Reid vapor pressure limit that is less stringent than the federal limit.

(C) The executive officer may require, as a condition of granting a variance, that a cash bond, or a bond executed by two or more good and sufficient sureties or by a corporate surety, be posted by the party to whom the variance was granted to assure performance of any construction, alteration, repair, or other work required by the terms and conditions of the variance. Such bond may provide that, if the party granted the variance fails to perform such work by the agreed date, the cash bond shall be forfeited to the state board, or the corporate surety or sureties shall have the option of promptly remedying the variance default or paying to the state board an amount, up to the amount specified in the bond, that is necessary to accomplish the work specified as a condition of the variance.

(D) The variance order shall limit the amount of variance gasoline sold or supplied from the applicant's production or import facility during each 30-day period of the variance, or during such other time period as the executive officer may specify.

(E) The variance order shall specify that once a quantity of variance gasoline has been sold or supplied by the applicant in accordance with the variance, subsequent transactions involving that variance gasoline by another producer, distributor, retailer, end user, or other person shall also be exempt from the applicable requirements.

(2) Fees. A fee of \$0.15 shall be levied on the applicant for each gallon of gasoline sold or released for sale under variance during the term of the variance. The fee shall be paid by the applicant periodically, in advance of the sale or release of variance gasoline in each period. The executive officer shall specify the payment schedule in the variance order.

(g) Duration of Variances.

(1) A variance shall be granted only for the minimum period necessary for the applicant to attain compliance with the applicable regulations. Except for a variance related to a physical catastrophe, no variance which is issued due to conditions of breakdown, repair, or malfunction of equipment shall have a duration, including extensions, of more than six months. 120 days; however, a variance may be extended for up to 90 additional days if the applicant demonstrates that the requirements of

sections (d) and (e) are met. In order to receive an extension of a variance, the applicant must submit an application as specified in section (a), and a hearing must be held as specified in sections (b) and (c).

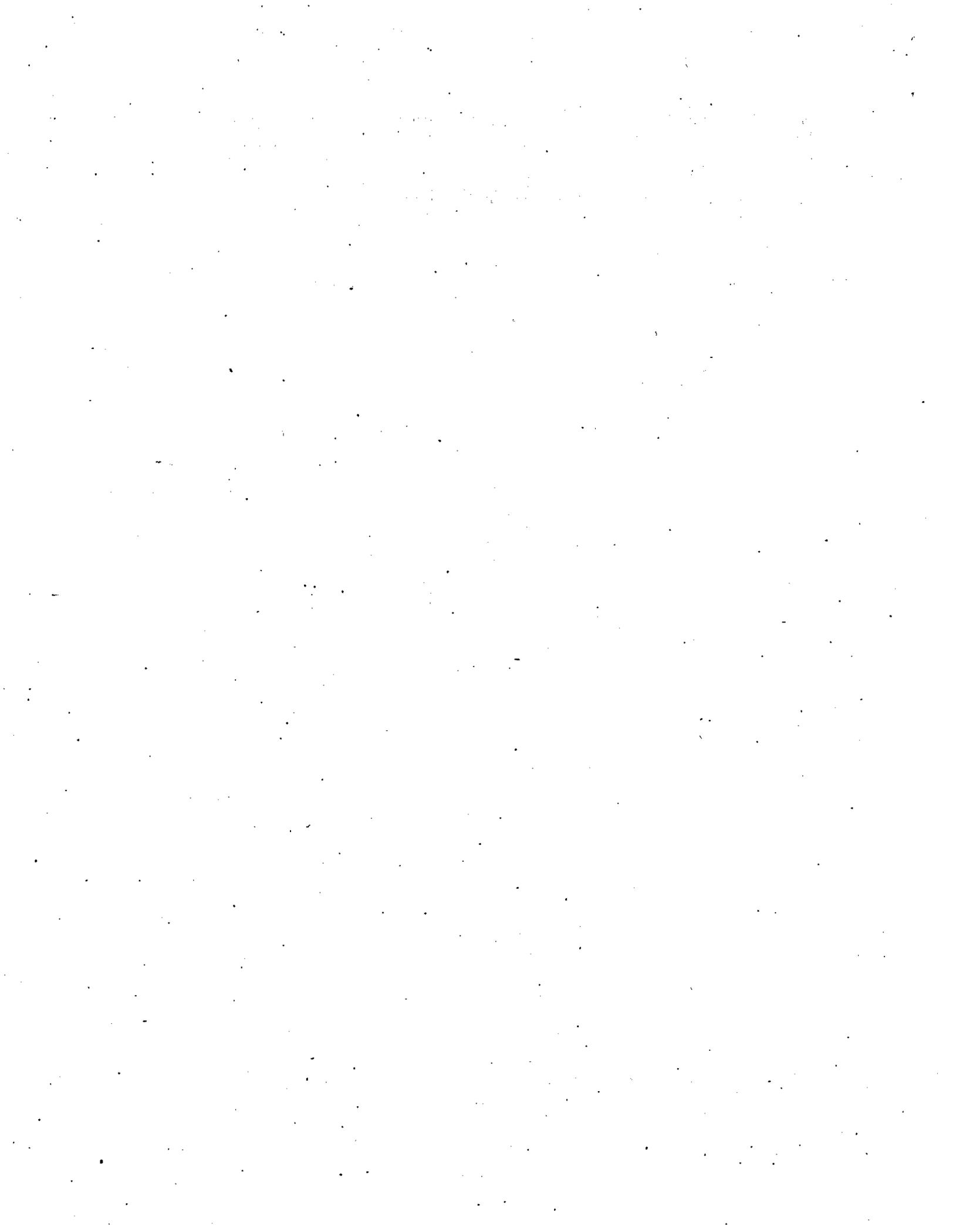
(2) Variances Related to a Physical Catastrophe. Notwithstanding the provisions of section (g)(1), a refiner may be granted a variance with a duration of more than 120 days, or a variance extension of more than 90 days, if the applicant demonstrates that the additional time is necessary due to a physical catastrophe, and the requirements of sections (d) and (e) are met. In order to receive a variance or variance extension, the applicant must submit an application as specified in section (a) and a hearing must be held as specified in sections (b) and (c). As used in this section, "physical catastrophe" means a sudden unforeseen emergency beyond the reasonable control of the refiner, causing the severe reduction or total loss of one or more critical refinery units that materially impact the refiner's ability to produce complying gasoline. "Physical catastrophe" does not include events which are not physical in nature such as design errors or omissions, financial or economic burdens, or any reduction in production that is not the direct result of qualifying physical damage.

(h) Emergency Variances. The executive officer may, after holding a hearing without complying with the provisions of sections (b) and (c), issue an emergency variance to a person from the requirements of the applicable section(s) upon a showing of reasonably unforeseeable extraordinary hardship and good cause that a variance is necessary. The applicant for an emergency variance shall pay a fee of \$2500.00. In connection with the issuance of an emergency variance, the executive officer may waive the requirements of section (f)(1)(C). No emergency variance may extend for a period of more than 45 days. If the applicant for an emergency variance does not demonstrate that he or she can comply with the provisions of the applicable section(s) within such 45-day period, an emergency variance shall not be granted unless the applicant makes a prima facie demonstration that the findings set forth in section (d) should be made. The executive officer shall maintain a list of persons who have informed the executive officer in writing of their desire to be notified by telephone in advance of any hearing held pursuant to section (h), and shall provide advance telephone notice to any such person.

(I) Situations in which Variances Shall Cease to be Effective. A variance shall cease to be effective upon failure of the party to whom the variance was granted substantially to comply with any condition of the variance.

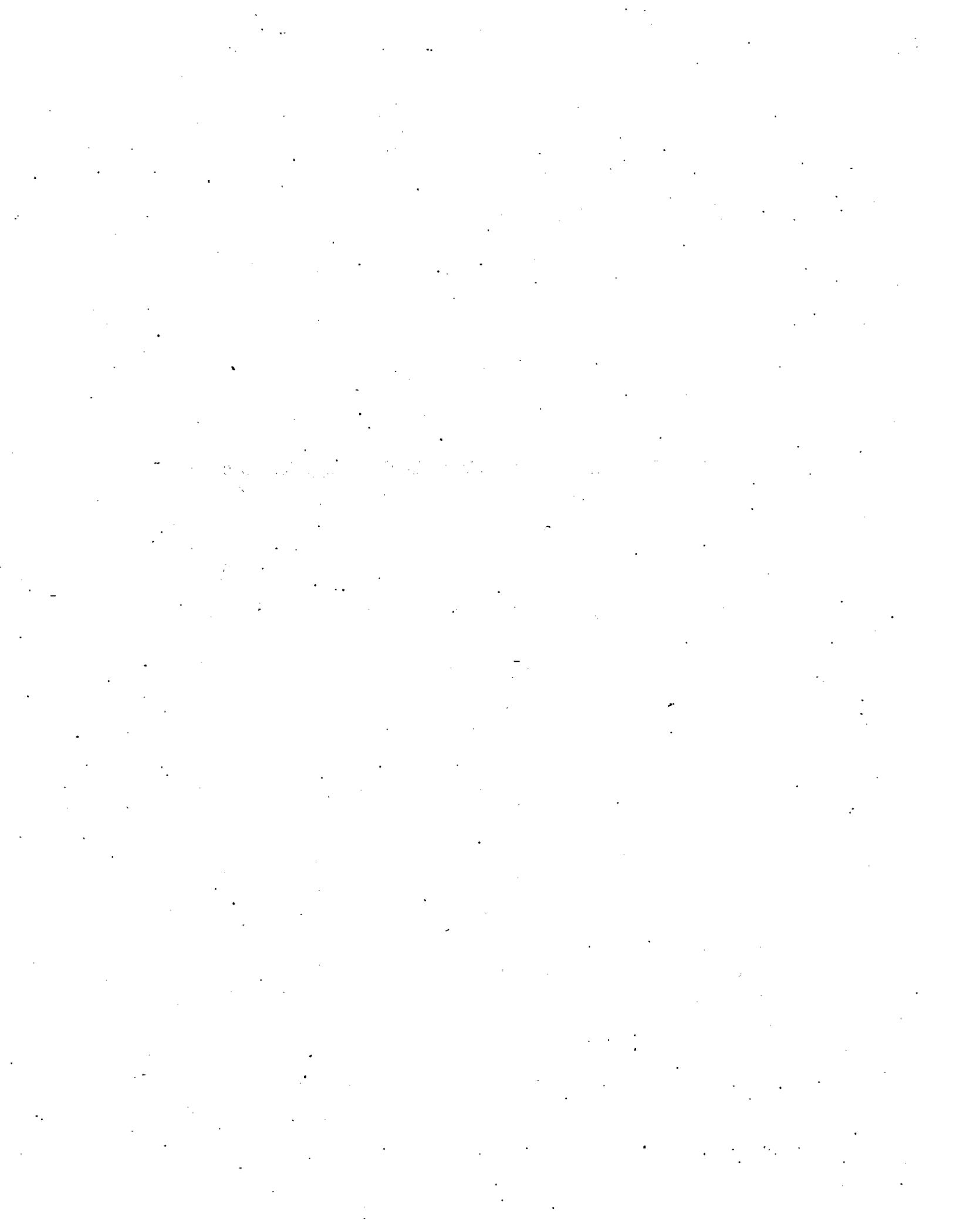
(j) Modification and Revocation of Variances. Upon the application of any person, the executive officer may review and for good cause modify or revoke a variance from the requirements the applicable section(s) after holding a hearing in accordance with the provisions of sections (b) and (c).

NOTE: Authority cited: sections 39600, 39601, 43013, 43013.2, 43018, and 43101, Health and Safety Code; and Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975). Reference: sections 39000, 39001, 39002, 39003, 39010, 39500, 39515, 39516, 41511, 40000, 43000, 43013.2, 43016, 43018, and 43101, Health and Safety Code; and Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975).



Appendix 4

Estimated Administrative Costs of Variance Applications



Estimated Administrative Costs of Variance Applications

	Regular Hearing	Emergency Hearing
Reproduction		
20-page document, 500 copies @ \$.015/page	\$150	\$0
Mailing		
20-page document , 500 copies	\$400	\$0
Staff's Preparation Time *		
Review application	\$285	\$70
Technical discussions with applicant	\$850	\$105
Financial analyses	\$285	\$0
Prepare staff position	\$285	\$70
Arrange hearing, publish notice	\$285	\$140
Hearing		
1-day use of Board hearing room:	\$180	\$90 (telephone)
Court reporter; 100 pages x \$6.50/page:	\$650	\$325
Staff time **		
hearing officer (div. chief)	\$425	\$215
chief counsel	\$430	\$215
staff counsel, III	\$375	\$190
SSD branch chief	\$320	\$160
SSD staff (2)	\$480	\$240
legal secretary	\$180	\$90
clerical	\$120	\$60
Post-Hearing		
Hearing officer's report**		
hearing officer	\$425	\$215
chief counsel (4 hours)	\$215	\$110
executive officer (4 hours)	\$230	\$115
Compile hearing record** (clerical)	\$120	\$60
Total Cost	\$6,690	\$2,470

* valued at the top of the associate engineer pay range, plus 30% (\$35.50/hour)

** mid-range salary per day (except as noted) plus 30% for fringe benefits

