

**MARICOPA COUNTY  
AIR POLLUTION HEARING BOARD  
MANUAL OF PROCEDURES**

(Authority: A.R.S. §§ 49-478 & 49-496(D))

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Submitted to Board of Supervisors for Approval per A.R.S. § 49-496(D)

**ARTICLE 1. NAME, JURISDICTION AND MISSION**

- 1.1 Name
- 1.2 Jurisdiction
- 1.3 Mission

**1.1 NAME**

The Maricopa County Air Pollution Hearing Board (“Board”) is created pursuant to A.R.S. 49-478. The Board consists of five members knowledgeable in the field of air pollution. At least one member is an attorney licensed to practice law in the state. At least three members shall not have a substantial interest in any entity required to obtain an air quality permit. Members serve for three-year terms and are appointed by the Board of Supervisors.

**1.2 JURISDICTION**

The Board has jurisdiction over “appealable agency actions.” A.R.S. § 49-471.15. Appealable agency actions are actions taken by the Maricopa County Air Quality Department (“Department” or “MCAQD”) where the Department determines the legal rights, duties or privileges of a person, or a person is adversely affected by such determination.”

A. The following are appealable agency actions:

- 1. Appeals of permit actions. The Board hears appeals from the approval, denial or revocation of a permit or permit revision by the applicant or any person who filed a comment on the application. A.R.S. § 49-480.02; 49-482.

2. Conditional orders. The Board hears appeals from the approval, denial or revision of a conditional order by the applicant or any person who filed a comment on the petition. A.R.S. § 49-482(A).
3. Appeals of permit transfers. The Board hears appeals of denials of requests for permit transfers. A.R.S. § 49-483(E).
4. Hearings on orders of abatement. The Board hears challenges to orders of abatement issued by the Control Officer (Director of the Maricopa County Air Quality Department). A.R.S. § 49-490.
- 5.. Hearings on suspension or revocation of a conditional order. The Board hears cases where the Department seeks to revoke or suspend a conditional order. A.R.S. § 49-495.6. Appeals of monitoring orders or conditions issued pursuant to A.R.S. § 49-476.01. A.R.S. § 49-476.01(E). Monitoring conditions in a permit shall be appealed with the permit or permit revision imposing such conditions.
- 6.. Appeals of “appealable agency actions.” The Board hears appeals of other “appealable agency actions” not listed above where the Department determines legal rights, duties or privileges or a person is adversely affected by such determination and the person has “exercised any right to comment.” Appeals are limited to issues raised in the comments. A.R.S. § 49-471.15.

B. The following are not appealable agency actions and are therefore not within the Board’s jurisdiction:

1. Notices of Violation and Opportunities to Correct and any notification of substantial compliance or failure to attain substantial compliance. A.R.S. § 41-1009(H).
2. Any rule, ordinance, order, standard or statement of policy of general application issued by a control officer or board of supervisors to implement, interpret or make specific the legislation enforced or administered by the control officer or board of supervisors.
3. Any rule that relates to the internal management of a county and that does not affect private rights or interests.
4. Any decision or action that must be appealed to the hearing board pursuant to section 49-476.01, 49-480.02, 49-482, 49-490 or 49-511 (. set forth in ¶ 1.2(A)(1) – (5) above) or to a final administrative decision obtained by an administrative appeal under section 49-471.15.

- C. An Administrative Law Judge (“ALJ”), instead of the Board, may hear appealable agency actions if the parties concur. A.R.S. § 49-471.15 (C) (authorizing use of State’s administrative hearing statutes A.R.S. § 41, et al.); *see also* A.R.S. § 41-1092.01.

### **1.3 MISSION**

To provide a mechanism for appeals of permits, orders and appealable agency actions to balance the interests of the general public and industrial air pollution sources in the county so that proper compliance with emissions standards can be achieved without undue loss of production, reduction of labor force, and/or strained financial conditions.

## **ARTICLE 2. ORGANIZATION OF THE BOARD**

- 2.1 Members
- 2.2 Quorum and Voting
- 2.3 Officers and Staff
- 2.4 Meeting of the Board
- 2.5 Files and Records; Requests for Records
- 2.6 Adoption of Rules, Manual, Standing Orders and Other Administrative Matters

### **2.1 MEMBERS**

- A. Members of the Board are appointed by the Board of Supervisors for a three-year term. A.R.S. § 49-478(B).
- B. Members shall take their seat upon their appointment becoming effective or the date specified in the order appointing them, if different.
- C. Each member shall have one vote.
- D. A member shall recuse herself or himself if the member has a conflict of interest in any proceeding. A member shall disclose to the Board and any parties if they have actual personal knowledge, outside the record, of any contested matter pending before the Board.
- E. Notwithstanding 2.1(D), if a member's recusal would reduce the number of members available to hear a matter before the Board to fewer than three members, the member shall participate.

### **2.2 QUORUM AND VOTING**

- A. The quorum of the Board is any three members.
- B. A majority of the members voting, a quorum being present, may act for the Board, except in cases of appeals or hearings from actions of the Department.
- C. In any appeal or hearing, the majority of the total membership of the Board shall concur in a decision for it to have effect. If a majority of the total membership of the Board cannot concur in a decision in an appeal or hearing, the action of the Department shall be sustained. A.R.S. § 49-496(B).

## 2.3 OFFICERS AND STAFF

- A. **Officers.** The Board shall elect, annually, at the first meeting of the year, a chair, a vice chair and, at the discretion of the Board, a secretary.
1. The chair shall preside at all meetings of the Board. The chair shall call special meetings of the Board at his or her discretion and upon the request of any two members of the Board. The chair shall also act on requests for subpoenas as provided in Section 3.18.
  2. The vice chair shall act in the absence of the chair with all of the authority of the chair.
  3. If elected, the secretary shall keep the minutes of the Board and shall provide them to the clerk for filing.
- B. **Clerk.** The Department shall provide a staff member to the Board to serve as clerk of the Board.
1. The clerk shall maintain the records of the Board, including the minutes and docket of the Board.
  2. The clerk shall receive appeals and requests for hearing and shall contact the chair to schedule such hearings, subject to such direction as the Board may from time to time provide.
  3. The clerk shall receive all filings and correspondence to the Board and shall ensure that Board members and staff receive such filings promptly, subject to such direction as the Board may from time to time provide.
- C. **Counsel.** The Board may retain counsel knowledgeable in air pollution control law and procedures in accordance with Maricopa County procedures to assist the Board in the performance of its duties.
1. The counsel shall advise the Board on air pollution control and administrative law and procedures and general law relevant to the Board's jurisdiction.
  2. The Board may appoint counsel to serve as its Presiding Officer, in which case the counsel shall follow the provisions for Presiding Officer in addition to the requirements of this subsection.
  3. The Board may use counsel as an examiner, in which case counsel may ask questions of the parties on behalf of the Board to assist the Board in developing the record for decision.
- D. **Presiding Officer.** The Board at its discretion may appoint one of its members, or its counsel, to serve as Presiding Officer for all or part of any matter.
1. The Presiding Officer, once appointed, shall preside over all prehearing matters, at any hearings, and shall rule on any matters, objections or motions subject to appeal to the Board.

2. The Presiding Officer, upon delegation by the Chair or Vice Chair, may issue subpoenas in accordance with A.R.S. § 49-496(C) and Section 3.18.
  3. The Presiding Officer may, at discretion, refer a dispositive prehearing issue to the Board.
  4. The Presiding Officer may prepare a recommended decision for consideration by the Board.
- E. **Board is final authority.** The Board may, by order, direct its officers or staff to take other actions in conformity with these provisions and its orders. In all cases, any action by a Board officer or staff member may be appealed to the Board at the hearing on the matter or, if after the hearing, by motion properly filed.

## 2.4 MEETINGS OF THE BOARD

- A. **Annual meeting.** The Board shall hold its annual meeting to elect officers during the first quarter of each year. Notice of this meeting shall be given in accordance with the Open Meeting Law. Any action, except conduct of a hearing, may be taken at the Annual Meeting.
- B. **Regular meetings.** The Board shall meet at the call of the chair or of any two members. Notice shall be given in accordance with the Open Meeting Law. Any action specified in the published agenda, except conduct of a hearing, may be taken at a regular meeting. Regular meetings may include executive sessions in accordance with Arizona law.
- C. **Hearings.** Hearings shall be called and noticed in accordance with the provisions of the Open Meeting Law and Article 3 of this Manual. A hearing may be conducted at the same meeting as the Annual Meeting or regular meeting by following the provisions of both this Article and Article 3.

## 2.5 FILES AND RECORDS

- A. **Minutes.** The Board shall keep minutes of its annual and regular meetings. Minutes shall be kept of any hearing where the Board reaches a final decision recording the final decision. Otherwise, the electronic or written transcript of the hearing shall serve as the minutes of the hearing. Minutes will be filed with the clerk.
- B. **Docket.** The clerk shall keep the docket of the Board. The docket serves as the administrative record before the board. The docket shall be kept as prescribed in Section 3.4 of this Manual.

- C. **Requests for Records.** All requests for records, including certification of the record for review, shall be directed to the Clerk of the Board. Procedures and fees shall be the same as those used by the Department.

## 2.6 **ADOPTION OF RULES, MANUAL, STANDING ORDERS AND OTHER ADMINISTRATIVE MATTERS**

- A. **Rules.** The Board may propose rules to the Board of Supervisors for possible adoption by the Board. Prior to proposing rules to the Board of Supervisors, the Board will hold a public meeting to explain the rules, publish the proposed rules with a request for public comment in accordance with Maricopa County procedures for at least 30 days, and then consider and act upon any comments at its discretion at a regular meeting prior to submitting a final proposal to the Board of Supervisors. Rules govern the Board at all times.
- B. **Manual.** The Board may propose a Manual of Procedures to the Board of Supervisors for possible adoption by the Board. Prior to proposing the Manual or a revision to it, the Board will hold a public meeting to explain the Manual or proposed revision, publish the proposal on its website with a request for public comment for at least 14 days, and then consider and act upon any comments at its discretion at a regular meeting prior to submitting a final proposal to the Board of Supervisors. The Manual of Procedures generally provides how the Board will administer its functions, but the Board reserves the right, by order, to vary from the Manual in the interest of justice in any particular matter. The Board will maintain a current copy of its Manual on its website.
- C. **Standing Orders.** The Board may adopt Standing Orders at a public meeting to facilitate hearings. Standing Orders may delegate authority to act on behalf of the Board on procedural matters to an officer or staff member of the Board; provide direction on when the Board will entertain certain motions and make similar procedural provisions. Any person properly before the Board may request that the Board act at variance with a Standing Order or rescind a Standing Order and any action taken pursuant to a Standing Order may be reviewed by the Board at hearing or by motion. The Board will maintain its current Standing Orders on its website to assist the public and parties.
- D. **Administrative Matters.** The Board may address other administrative matters not provided above by majority vote at its Annual Meeting or regular meeting. Parties generally are not bound or affected by such matters and are not responsible for knowing administrative matters. Parties are expected to know and abide by the Rules, Manual of Procedures and Standing Orders except as provided by law or as decided after proper request.

## **ARTICLE 3. APPEALS AND HEARINGS**

- 3.1 Scope of Article; General Considerations
- 3.2 Definitions
- 3.3. Commencement of an Appeal or Hearing
- 3.4. Docket; Case Number; Information on Documents
- 3.5. Filing and Service of Pleadings, Motions, or Other Documents
- 3.6. Computation of Time; Additional Time After Service by Mail
- 3.7. Contents of a Notice of Appeal or Request for Hearing
- 3.8. Time for Filing an Answer to a Notice of Appeal or Request for Hearing
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- 3.10. Location of Hearings
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- 3.12. Ex Parte Communications
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- 3.22. Hearing
- 3.23. Evidence
- 3.24. Duties of the Board During a Hearing
- 3.25. Decision of the Board
- 3.26. Rehearing or Review of Decision
- 3.27. Judicial Review

### **3.1. SCOPE OF ARTICLE; GENERAL CONSIDERATIONS**

- A. These rules of procedure govern all appeals to or requests for hearing before the Air Pollution Hearing Board taken under A.R.S. Title 49, Chapter 3, Article 3.
- B. Where a procedure is not established by law, rule, this Article, or an order of the Board, the Board may refer to the Arizona Rules of Civil Procedure for guidance, but the Arizona Rules of Civil Procedure are not binding on the Board or the parties unless the Board issues an order to that effect.
- C. The Board is subject to the Arizona Open Meeting Law and the provisions of A.R.S. § 38-431 *et. seq.*

### 3.2. DEFINITIONS

The terms in this Article have the following meanings:

1. "Appealable agency action" means an action that determines the legal rights, duties or privileges of a party and that is not a contested case pursuant to sections 49-476.01, 49-480.02, 49-482, 49-490 or 49-511. Appealable agency actions do not include rules, orders, standards or statements of policy of general application issued by an administrative agency to implement, interpret or make specific the legislation enforced or administered by it, nor does it mean or include rules concerning the internal management of the agency that do not affect private rights or interests.
2. "Board" means the Maricopa Air Quality Hearing Board appointed by the Maricopa County Board of Supervisors according to A.R.S. § 49-478.
3. "Clerk" means the person designated as Clerk of the Board by the Maricopa County Air Pollution Control Officer.
4. "Control Officer" means the executive head of the department authorized or designated to enforce air pollution regulations pursuant to section 49-473, also known as the Maricopa County Air Quality Department Director.
5. "Department" means the Maricopa County Air Quality Department.
6. "Ex parte communication" means an oral or written communication, not on the public record, made without sufficient prior notice to permit all parties to participate in the communication.
7. "Party" means the petitioner, the Maricopa County Air Quality Department, all persons named by the petitioner as interested persons as provided in 3.7(B)(2), and any interested person the Board has permitted to intervene in the proceeding.
8. "Petitioner" means the person who files a notice of appeal, a request for hearing or seeks review of appealable agency action with the Maricopa County Air Quality Hearing Board established under A.R.S. § 49-478.
9. "Proceeding" means any matter commenced by filing a notice of appeal or request for hearing before the Maricopa County Air Pollution Hearing Board.
10. "Record" means the complete file of the Air Pollution Hearing Board, including but not limited to: The docket; all pleadings, motions, interlocutory ruling, evidence received or considered; objections and offers of proof and rulings thereon; proposed findings and exceptions, any decision, opinion or report of the Board at the hearing; all staff memoranda, other than privileged communications, or data submitted to the hearing officer or members of the agency in connection with their consideration of the case; and any official recording or transcript of the proceeding.

### 3.3. COMMENCEMENT OF AN APPEAL OR HEARING;

- A. **Appeals.** Within the required timeframe to commence an appeal from an act of the Control Officer or Department pursuant to A.R.S. § § 49-471.15, 49-480.02, 49-482 or 49-483(E), a petitioner shall file a written notice of appeal with the

Clerk in care of the Department. The date of filing is the date the Department receives the notice of appeal.

- B. **Requests for Hearing.** Within the required timeframe to request a hearing from an act of the Control Officer or Department pursuant to A.R.S. §§ 49-490 or 49-495, a petitioner shall file a written request for hearing with the Clerk in care of the Department. The date of filing is the date the Department receives the request for hearing.
- C. **Form of Filing Not Limiting.** An error in titling an appeal or request for hearing correctly shall not defeat the jurisdiction of the Board so long as a document containing the required information was filed with the Department on or before the date provided in 3.3(A) or (B).

### **3.4. DOCKET; CASE NUMBER; INFORMATION ON DOCUMENTS**

- A. The Clerk shall maintain a docket of all proceedings and assign each proceeding a case number. For each proceeding, the Clerk shall enter all of the following information on the docket:
  - 1. The case number;
  - 2. The case name;
  - 3. The filing date of the notice of appeal or request for hearing;
  - 4. The receipt date of any answer;
  - 5. The receipt date of any disclosures;
  - 6. The receipt date of prehearing motions, responses, and replies;
  - 7. The dates of the evidentiary hearing;
  - 8. The receipt date of any exhibits proffered by any party;
  - 9. The dates of orders by the Board;
  - 10. The receipt date of any motion for rehearing or review;
  - 11. The Board's decision on any motion for rehearing or review and the date of the decision; and
  - 12. The Board's final decision and the date of the final decision.
- B. A party shall place the case number and the name, address, email address, and telephone number of the party or party's attorney on all pleadings, motions, or other documents filed with the Board.
- C. The Clerk shall maintain the docket in an electronic format and make it available for public review pursuant to applicable public records requirements and to the extent possible shall post the docket on that portion of the Control Officer's website that is reserved to the Board. All final decisions of the Board shall be posted on the website.
- D. The Clerk shall keep the record and ensure that it is preserved for a minimum of 5 years from the date of the final administrative decision or until any judicial action

related to the proceeding is completed. Final decisions of the Board shall not be discarded except by order of the Board.

### **3.5 FILING AND SERVICE OF PLEADINGS, MOTIONS, OR OTHER DOCUMENTS**

- A. Initial filing commencing a matter. Within the time limits for filing, together with the applicable fees, a party shall file the original and an electronic copy of the notice of appeal or request for hearing and any supporting documents with the Clerk and serve a physical copy on each party. Electronic copies shall be in PDF or Word format. All subsequent filings shall be made electronically to the Clerk, with copies to each party and Board counsel. If a party cannot file or receive documents electronically, the party must file a paper motion seeking relief with the Clerk and the Board shall consider granting appropriate relief.
- B. A party shall serve documents other than subpoenas by email in PDF or Word format unless the Presiding Officer or Board orders otherwise. A party is considered served at the time the email is received by the Clerk, or if physical service is required or allowed, of personal service of the document or upon deposit of the document in the United States mail, postage prepaid, in a sealed envelope, addressed to the party being served, at the party's last address of record with the Maricopa County Air Quality Department or the Board. If there is a discrepancy between the records of these agencies, the party serving the document shall use the last address of record with the Board. Each party shall inform the Board of any change of address or email address within 5 days of the change.
- C. Email service shall be demonstrated by the presence of each party's proper email address in the to: or cc: lines of the email. If physical service is required or allowed, a party shall demonstrate proof of service by filing with the Clerk a signed written statement indicating that service was made in person or by mail. The statement shall be attached to the pleading, motion, or other document being filed.
- D. After receiving the Notice of Appeal/Request for Hearing or an Answer of a party, or when the Board finds that the interest of justice so requires, the Board may order any party to publish an appropriate notice in a newspaper of general circulation in the community or communities that may be adversely affected if the petitioner is granted the relief requested in the petitioner's notice of appeal/request for hearing. The party shall publish the notice in the manner prescribed by the Arizona Rules of Civil Procedure, unless the Board determines that another method of publication is more appropriate.

### **3.6 COMPUTATION OF TIME; ADDITIONAL TIME AFTER SERVICE BY MAIL**

- A. In computing any period of time prescribed or allowed by these rules or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The computation shall include last day of the period, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than 11 days, not including the time for mailing permitted in subsection (B), intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation. When that period of time is 11 days or more, not including the time for mailing permitted in subsection (B), intermediate Saturdays, Sundays, and legal holidays shall be included in the computation.
- B. Whenever a party has a right or is required to do some act or proceed within a prescribed period after the service of a notice or other document upon the party and the notice or document is served by physical mail, 5 calendar days shall be added to the prescribed period. This subsection does not apply when time is counted from the date that a party receives the notice or other document. No additional time is allowed when service is by email.

### **3.7. CONTENTS OF A NOTICE OF APPEAL/REQUEST FOR HEARING**

- A. The notice of appeal or request for hearing shall contain the following:
  - 1. The name, address, email address and telephone number of the petitioner and, if the petitioner is represented by an attorney, the name, address, email address, telephone number, and Arizona Bar number of the petitioner's attorney;
  - 2. The names, mailing addresses, and telephone numbers of all of the following interested parties:
    - a. The permittee or registrant, if the permittee or registrant is not the petitioner;
    - b. All persons who filed a notice of appearance in the action before the Department that the petitioner is appealing or requesting a hearing upon; and
    - c. The Department.
  - 3. The specific action of the Control Officer or Department involving the grant, denial, modification, or revocation of a variance, permit, conditional order, appealable agency action, notice of violation or abatement order issued under by the Control Officer or Department or denial of a permit transfer together with citation to the specific statutes and rules involved in the substantive appeal or hearing;
  - 4. For appealable agency actions, whether the party had any right to comment on the action, and if so, the date such comments were filed with copies thereof.
  - 5. The date of the action by the Control Officer or Department;
  - 6. The date the notice of action by the Control Officer or Department was received by the petitioner;

7. The relief requested by the petitioner and a concise statement of the reasons for the appeal or request for hearing;
8. The date of the notice of appeal or request for hearing;
9. The signature of the petitioner or the petitioner's attorney;
10. A verification that the petitioner has served or caused to be served, a copy of the notice of appeal on the Department and all parties named by the petitioner.

B. If the person appealing or requesting a hearing does not want to participate in email filing of all subsequent documents, a separate motion (see section 3.17) requesting relief from email filing with an explanation of why such relief should be granted.

### **3.8. TIME FOR FILING AN ANSWER**

The Department and all parties named by the petitioner shall file an answer to petitioner's notice of appeal/request for hearing within 20 days from service of the notice of appeal or request for hearing on that party. Failure to file an answer may result in a default judgment against the party failing to answer.

### **3.9. CONTENTS OF AN ANSWER**

A. The answer of each respondent shall contain the following information:

1. The name, address, email address, and telephone number of the respondent preparing the answer and, if the respondent is represented by an attorney, the name, address, email address, telephone number, and Arizona Bar number of the respondent's attorney;
2. A response to the petitioner's allegations relating to the action taken by the Control Officer or Department;
3. The relief requested by the respondent;
4. The date of the answer;
5. The signature of the respondent or the respondent's attorney;
6. A verification that the respondent has served or caused to be served a copy of the answer on all other parties.

B. If the person answering does not want to participate in email filing of all subsequent documents, a separate motion (see section 3.17) requesting relief from email filing with an explanation of why such relief should be granted.

### **3.10. LOCATION OF HEARINGS**

All hearings shall be held in Arizona, in Maricopa County, unless the Board finds that it will be more cost effective for the Board and the parties to hold a hearing elsewhere, in which event the Board shall set the location of the hearing.

### **3.11. NOTICE OF HEARING**

- A. If the Board conducts an administrative hearing, the Clerk shall set a date for the hearing no later than 30 days from the date the petitioner filed the notice of appeal or request for hearing with the Department unless the parties consent to or stipulate to a later date. The Clerk shall prepare and serve a notice of hearing as prescribed in A.R.S. § 49-498 and send a copy by email to each party. The Board encourages the parties to stipulate to a date for hearing, which may be beyond the 30-day period.
- B. The notice of hearing shall contain the following information and statements:
  - 1. The date, time, and place of the hearing;
  - 2. The hearing will be on the petitioner's notice of appeal or request for hearing about an action of the Control Officer or Department;
  - 3. Recitation of the particular sections of the statutes and rules involved in the substantive appeal as identified in the parties notice of appeal or request for hearing;
  - 4. The date the petitioner filed the notice of appeal or request for hearing;
  - 5. A statement that the Board may issue subpoenas on behalf of any party;
  - 6. An advisory that all parties may be represented by counsel, may introduce evidence through witnesses and documents, and may cross-examine witnesses of other parties;
  - 7. An advisory about how the parties can obtain the services of an interpreter if an interpreter is needed and that only a County-appointed interpreter may serve as an interpreter in any proceeding before the Board.
- C. The Clerk shall provide notification that reasonable accommodation will be made for the disabled, if the accommodation is requested. The notification shall be served with the notice of hearing and included in any open meeting notice.
- D. At least 15 days prior to the date of the hearing the Clerk shall serve a copy of the notice of hearing on each Board member, the Presiding Officer, if any, and each party.

### **3.12. EX PARTE COMMUNICATIONS**

- A. While any matter is pending before the Board, except to the extent required for disposition of ex parte matters as authorized by law or these rules of procedure:
  - 1. An interested person shall not make or knowingly cause to be made an ex parte communication relevant to the merits of the proceeding to any Board member, Presiding Officer, or employee of Maricopa County who is or may reasonably be expected to be involved in the decisionmaking process.

2. A Board member, Presiding Officer, or employee of Maricopa County who is or may reasonably be expected to be involved in the decisionmaking process shall not make or knowingly cause to be made an ex parte communication relevant to the merits of the proceeding to any interested person.
- B. A Board member, Presiding Officer, or employee of Maricopa County who is or may reasonably be expected to be involved in the decisionmaking process and receives, makes, or knowingly causes to be made a communication prohibited by this Section shall place all written communications and all written responses to the communications in the public record of the proceeding and by oral testimony on the record state the substance of all oral communications.
  - C. Any interested person who receives a communication prohibited by this Section shall file a notice of the communication with the Clerk and serve a copy on all parties to the proceeding. The interested person shall attach to the notice a copy of the communication, if written, or a summary of the communication, if oral.
  - D. When the Board is made aware under subsections (B) or (C) of a communication prohibited by this Section, the Board shall give all parties a reasonable opportunity to respond to the communication. The Board, to the extent consistent with the interests of justice and the policy of the underlying statutes and rules, may require the person responsible for the communication to show cause why the person's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the violation.
  - E. The provisions of this Section apply from the date the notice of appeal or request for hearing is filed to the date on the Board's final administrative decision, unless the person responsible for the communication knew that the proceeding would be commenced, in which case the prohibition applies from the time that the person acquired the knowledge.

### **3.13. CONSOLIDATION**

Upon the motion of a party, the Presiding Officer or Board may consolidate two or more proceedings involving a common question of law or fact when consolidation will avoid unnecessary cost or delay.

### **3.14. CONTINUANCES**

- A. A party applying for a continuance of a hearing shall file a motion with the Clerk and serve all parties no later than 10 days before the scheduled date of the hearing. The Presiding Officer or Board may accept a motion filed later than 10 days before the hearing for good cause. The motion shall state why the continuance is being requested, why a stipulation from adverse parties was not obtained, and the amount of time requested.
- B. Any opposing party may, within 5 days after service of the motion, file and serve a response. The Presiding Officer or Board may permit a reply.
- C. The parties may stipulate to a continuance. The Presiding Officer or Board is not required to accept the stipulation.

### **3.15 AMENDMENTS**

In the event that either party should wish to amend its notice of appeal or request for hearing or answer they must do so by motion prior to commencement of the hearing. In the event that the Control Officer withdraws the action underlying the notice of appeal or the request for hearing or the party filing the notice of appeal or request for hearing wishes to abandon the appeal or hearing, the party shall file a notice of withdrawal with the Clerk who shall notify the Board. The Clerk shall promptly notify the parties that matters are stayed pending Board action. The Board shall review the notice of withdrawal and may order the proceeding terminated or issue such other orders that the Board deems appropriate.

### **3.16. PREHEARING DISCLOSURE**

- A. Within the times set forth in subsection (B), each party shall disclose in writing to every other party:
  - 1. The factual basis of the appeal/request for hearing or response;
  - 2. The legal theory upon which the appeal/request for hearing or response is based, including citations of pertinent legal authorities;
  - 3. The names, addresses, and telephone numbers of all witnesses the party expects to call at the hearing, with a description of the substance of each witness' expected testimony;
  - 4. If a party is a corporation, the name of the state of incorporation. If the party is not an Arizona corporation, the party shall state whether it is qualified to do business in the state by the Arizona Corporation Commission;
  - 5. If the party is a partnership, the name, address, and telephone number of each partner;

6. The names, mailing addresses, and telephone numbers of all of the following interested persons:
    - a. The permittee or registrant, if the permittee or registrant is not the petitioner;
    - b. All persons who filed a notice of appearance in the action before the Department that the petitioner is appealing or requesting hearing;
  7. The name and address of each person whom the party expects to call as an expert witness at the hearing, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert;
  8. A list of documents which indicates the location, custodian, and a general description of any tangible evidence or relevant documents that the party plans to use during the hearing. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the party shall indicate the name and address of the custodian of the document. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.
- B. The parties shall make the initial disclosure required by subsection (A) at least 15 days prior to the date set for hearing, unless the parties otherwise agree, or the Board shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the parties shall serve the disclosures as described in 3.5. At the same time the parties shall file with the Clerk the disclosures and 1 copy of each document listed.
- C. The duties described in subsections (A) and (B) are continuing duties, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. A party shall serve additional or amended disclosures seasonably, but in no event later than 3 days before the hearing, except by leave of the Board.
- D. A party shall include in its disclosure, information and data in the possession, custody, and control of the parties as well as that which can be ascertained, learned, or acquired by reasonable inquiry and investigation.
- E. Each party shall make the disclosure in writing under oath and sign the disclosure.
- F. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the party making the claim shall do so expressly and shall support the claim with a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

### **3.17. MOTIONS**

- A. To obtain an order or other relief from the Board, a party shall make a motion. Motions are generally disfavored unless they assert that the matter is outside the Board's jurisdiction or provide a legal basis for dismissing the action without a hearing on underlying facts. Unless the motion is made during a hearing, the party shall make the motion in writing by filing it with the Clerk with a copy to all parties. For all motions, the party shall state the grounds on which the motion is based and the relief or order sought. The Presiding Officer or Board shall decide prehearing motions based on the written materials submitted by the parties or may take argument at the hearing at the Presiding Officer's or Board's discretion.
- B. Any party may file a response to a prehearing motion within 5 days after service of the motion and serve the response on all parties. The moving party has 2 days after service of a response to file a reply.
- C. For a written motion, a party shall state the grounds on which the motion is based and the relief or order sought in a supporting memorandum. A party's supporting memorandum shall not exceed 15 pages, exclusive of pages containing the table of contents, the table of cases, statutes or other authorities, and the appendix, if any. A reply memorandum shall not exceed 5 pages.
- D. A party shall support motion documents by affidavit or other satisfactory evidence if they contain facts not apparent in the record or facts that are not cognizable through judicial notice.
- E. The Presiding Officer or Board shall rule promptly rule on all motions, but may at discretion defer action until the hearing.

### **3.18. SUBPOENAS**

- A. The Chair, or if delegated to the Presiding Officer, the Presiding Officer may grant a party's request for subpoena from a party as necessary to ensure a complete record is made in the hearing. At least 15 days prior to that hearing, the requesting party shall make a written request for a subpoena which clearly identifies the person, documents, or other evidence desired and the reason the evidence is relevant to the proceeding and why it cannot be obtained without the subpoena. The request shall include a proposed subpoena for signature. The party shall serve the subpoena in the manner prescribed by the Arizona Rules of Civil Procedure. Subpoenas shall be issued in the name of the Chair.
- B. The person to whom a subpoena is directed shall comply with its provisions unless:
  - 1. The party serving the subpoena has failed to comply with subsection (A) of this rule; or

2. At least 10 days prior to the date set for the hearing, the person to whom the subpoena is directed, files a motion to quash or modify the subpoena. In modifying a subpoena in whole or in part, the chair or Presiding Officer shall include a timeframe for compliance that is compatible with the hearing schedule.

### **3.19. DEPOSITIONS**

The Presiding Officer or Board may allow the deposition of a witness who cannot be subpoenaed or is unable to attend the hearing, in the manner and upon the terms designated by the Presiding Officer or Board. The party requesting a deposition shall bear the expense of the deposition.

### **3.20. PREHEARING CONFERENCES**

- A. Upon a motion by a party or on the initiative of the Presiding Officer or Board, a prehearing conference may be set if a prehearing conference will assist the Board to:
  1. Conduct the hearing within the 30-day period prescribed by A.R.S. § 49-490; or
  2. Reach a just, speedy, and less expensive determination of the proceeding.
- B. If the Presiding Officer or Board takes any action at or after the prehearing conference, the Presiding Officer or Board shall prepare a written order reciting the action taken. The order shall become a part of the record of the proceeding.

### **3.21. RECORDING HEARINGS**

- A. The Board shall ensure that the Control Officer provides for a court reporter or an audio or video recording of the hearing.
- B. Any party may use a court reporter to produce a record of the hearing, but that party shall pay for all costs of the court reporter. Where a hearing is recorded by a party's court reporter, the Board shall determine whether the tape recording or the court reporter's recording will be used to prepare the hearing transcript. The Clerk shall ensure that the proceedings are transcribed and provide copies of the transcript to the Board at the time the Board meets to consider its decision on the appeal.
- C. A transcript will not be produced unless requested. Any party that requests a transcript of the proceeding shall pay the Clerk a fee for the cost of the transcript and one copy.

### **3.22. HEARING**

A. The Presiding Officer or Board shall conduct a full evidentiary hearing in any matter properly before it, unless the Board determines, as a matter of law, that the Board lacks jurisdiction or the matter should be dismissed for good cause prior to hearing or the parties stipulate to a settlement. A party may introduce new evidence or evidence that was considered by the Control Officer or Department when it took the action being appealed or for which hearing was requested.

1. In any appeal of the Control Officer's or Department's decision to grant or deny a permit, permit revision or to deny a permit transfer, the petitioner shall present the case in chief and the Department shall respond.
2. In a request for hearing on the issuance of an order of abatement, revocation or termination of a permit, or suspension or revocation of a conditional order, the Department shall present the case in chief and the petitioner shall respond.
3. In any case not otherwise provided, the petitioner shall present the case in chief and the Department shall respond.

B. Except as otherwise provided by law:

1. At a hearing on the Control Officer's or Department's grant or denial of a permit, permit revision, or conditional order, or denial of a permit transfer, the petitioner has the burden of persuasion that the decision was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.
2. At a hearing on the Control Officer's or Department's decision to suspend, revoke, terminate, or reopen, revise or modify at its own initiative material conditions of a permit, permit revision or conditional order, the Department has the burden of persuasion that its action is lawful and supported by a preponderance of the evidence.
3. At a hearing on the Control Officer's or Department's order of abatement or other compliance order, the Department has the burden of persuasion that its action is lawful and supported by a preponderance of the evidence.
4. At any other hearing, the petitioner has the burden of persuasion that the decision was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

C. Unless the parties stipulate otherwise, all hearings must be conducted within 30 days from the date of the notice of hearing given pursuant to Section 3.11.

### **3.23. EVIDENCE**

A. All witnesses at a hearing shall testify under oath or affirmation. All parties shall have the right to present evidence and to conduct cross-examination as may be required for a full and true disclosure of the facts. The Board shall receive relevant, probative, and

material evidence, rule upon offers of proof, and exclude all evidence determined to be irrelevant, immaterial, or unduly repetitious.

- B. Any party may call additional witnesses or introduce into evidence additional documents not disclosed by the party in its notice of appeal, answer, initial prehearing disclosure, or an additional or amended disclosure if that witness or document was not or could not reasonably have been known to that party at the time the party filed its notice of appeal, answer, initial prehearing disclosure, and additional or amended disclosure.
- C. The Board may conduct a hearing in an informal manner and without adherence to the rules of evidence required in judicial proceedings or follow that portion of the Arizona Rules of Evidence that the Board deems appropriate.
- D. The Board, its counsel, if serving as an examiner, and the Presiding Officer may question any witness.
- E. The Board may take judicial notice of judicially cognizable facts. In addition, the Board may take notice of generally recognized technical or scientific facts within the board members' specialized knowledge. The Board shall notify the parties either before or during the hearing, by reference in a preliminary report or otherwise, of the material noticed, including any staff memoranda or data. The parties shall be afforded an opportunity to contest the noticed material. The board members' experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

### **3.24. DUTIES OF THE BOARD DURING A HEARING**

- A. Three members of the Board constitute a quorum; the concurrence of at least the quorum number is necessary for any final decision. The Board may hold a hearing with only a quorum present; a board member may appear by phone if at least one member is physically present. In the event that a member is unable to attend the entire proceeding that member may participate in the decision of the matter only after obtaining and reviewing a transcript or recording of the missed portion, or upon the stipulation of the parties. Any member who cannot participate in a fair and impartial manner or who has a conflict that creates the appearance of lack fairness and impartiality shall recuse himself from participating in the hearing. A party may request the disqualification of a member by filing a motion prior to commencement of the hearing. Such motion shall be considered as with any other motion under these rules. Motions for disqualification are subject to Section 2.1(E).
- B. The Board shall:
  - 1. Issue orders necessary to conduct the hearing in an impartial, orderly, and informal manner;
  - 2. Regulate the course of the hearing;
  - 3. Rule upon procedural matters incidental to the hearing;

4. Designate the order in which parties introduce their evidence; and
5. Admit relevant evidence and exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
6. Exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make the cross-examination and presentation effective for ascertaining the truth, avoiding needless consumption of time and protecting witnesses from harassment or undue embarrassment.

C. The Board may:

1. Administer oaths and affirmations to witnesses
2. Set time limitations for arguments;
3. Exclude a person from the hearing who is disruptive to the proceedings;
4. Exclude a witness from the hearing so the witness cannot hear the testimony of other witnesses;
5. Conduct the hearing in an informal manner without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings is grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative;
6. On request, grant a party's request to be given an opportunity to compare the copy of any documentary evidence submitted with the original;
7. Utilize the services of legal counsel appointed by the Board of Supervisors in the course of the hearing and, to the extent necessary, the Board may meet in Executive Session to receive legal advice from the legal counsel regarding the matters presented in the hearing.
8. *Issue orders to delegate the hearing to a Presiding Officer to include the powers and duties listed hereunder subject to the right of appeal of any decision of the Presiding Officer to the full Board.*

- D. Hearing conducted by a Presiding Officer. If the Board elects to have a Presiding Officer conduct the hearing, the Board shall attend and the Presiding Officer shall rule on all matters, objections and motions during the hearing as set forth in paragraphs B and C above, except C.8. At the conclusion of each party's case, the Board shall hear any appeals of the rulings of the Presiding Officer and make such adjustments as may be necessary. At the conclusion of all parties' cases, the Board shall hear any final appeals and may then allow closing argument at its discretion.

### **3.25. DECISION OF THE BOARD**

- A. The Board may request the parties, the Presiding Officer and/or Board counsel to submit proposed findings of fact and conclusions of law by a specified date and may then ask the Presiding Officer or Board counsel to prepare a draft decision. Parties should submit any such proposed findings of fact and conclusions of law within twenty days of the conclusion of the hearing unless the Board otherwise directs.
- B. The Board shall meet and render its final administrative decision in writing within a reasonable time after the hearing and receiving proposed findings of fact and conclusions of law. The Board's decision shall contain its findings of fact and conclusions of law, separately stated, and its decision. The final administrative decision shall become effective not less than 30 days after issuance unless a rehearing is granted pursuant to 3.26 of this Manual or the Board determines that there is an emergency that warrants an earlier effective date.
- C. The Clerk shall notify each party promptly by either delivering or mailing copies of all decisions and orders, including the findings of fact, conclusions of law, and the final administrative decision of the Board to each party's last known address and posting the decision on the agency website.
- D. Any party may appeal a Board decision to Superior Court in accordance with A.R.S. §§ 49-497.01 within 30 days after service of this decision.
- D. The Board may incorporate by reference findings, conclusions, or a decision previously made by its Presiding Officer.

### **3.26. REHEARING OR REVIEW OF DECISION**

- A. Except as provided in subsection (G), any party to a proceeding before the Board may file a motion with the Clerk for rehearing or review within 30 days after service of the final administrative decision. The party shall attach a supporting memorandum specifying the grounds for the motion together with any affidavits upon which the order is based. The party is not required to file a motion for rehearing or review of the decision in order to exhaust the party's administrative remedies.
- B. Any other party may file a response and/or opposing affidavits within 5 days after service of a motion for rehearing or review. The party shall support the response with a memorandum, discussing legal and factual issues.
- C. The moving party, the responding party, or the Board may request oral argument.
- D. The Board may grant a rehearing or review for any of the following causes materially affecting a party's rights:

1. Irregularity in the proceedings of the Board, or any order or abuse of discretion, that deprived the moving party of a fair hearing;
2. Misconduct of the Board, its officers or staff, or the prevailing party;
3. Accident or surprise that could not have been prevented by ordinary prudence;
4. Newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing;
5. Error in the admission or rejection of evidence or other errors of law occurring at the hearing or during the progress of the proceeding; or
6. Because the findings of fact or decision is not justified by the evidence or is contrary to law.

E. An order modifying a decision or granting a rehearing shall specify with particularity the grounds for the order.

F. Upon its own motion made not later than 15 days after the date of the decision, the Board may grant a rehearing or review

G. If the Board makes specific findings that the immediate effectiveness of a decision is necessary for the preservation of the public health and safety and that a rehearing or review of the decision is impracticable, unnecessary, or contrary to the public interest, the Board may issue a final administrative decision without an opportunity for rehearing or review. A party may seek judicial review of the decision under A.R.S. § 49-497.01.

H. The Board shall rule on the motion for rehearing or review within 15 days after it has been received. If a rehearing is granted, the Board shall hold the rehearing within 90 days after the issue date on the order granting the rehearing.

I. If a motion for rehearing or review is denied, the Clerk shall serve a notice of denial on all parties within 15 days after the denial.

J. If the motion for rehearing or review is granted, the Clerk shall serve the Board's final administrative decision on all parties within 15 days after the Board renders the decision.

### **3.26. JUDICIAL REVIEW**

The final administrative decision of the Board may be reviewed as provided by A.R.S. §49-497.01.

**APPENDIX**

**Standing Order No. 1(R1)**

**BEFORE THE MARICOPA COUNTY  
AIR POLLUTION HEARING BOARD**

In the matter of:	)	
	)	<b>STANDING ORDER No. 1(R1)</b>
Adoption of Standing Order No. 1	)	
Appointment of Presiding Officer and	)	
Disposition of Prehearing Matters	)	Cause No. MCAPHB2010-03-M
<hr/>		

**BEFORE:**

Kimberly W. MacEachern, chair, Jean McGrath and Shane Leonard, members.

**APPEARANCES:**

None.

**PROCEDURAL HISTORY:**

The Hearing Board adopted a proposed "Maricopa County Air Quality Hearing Board Manual of Procedures" on September 16, 2010. The draft Manual of Procedures was forwarded to the Maricopa County Board of Supervisors for approval pursuant to A.R.S. § 49-496(D). The Board of Supervisors approved the Manual of Procedures on October 20, 2010. At its September 16, 2010 meeting, the Board requested that counsel develop a Standing Order, as authorized by Manual of Procedures § 2.6(C), to provide for appointment of a Presiding Officer and appropriate disposition of prehearing matters in preparation for the substantive hearing on the merits. The Board adopted Standing Order No. 1 on December 17, 2010.

Based on experience with Standing Order No.1, the board chair and counsel recommended to the Board that Standing Order No. 1 be amended to grant greater flexibility to address cases where the parties settle and that Standing Order No. 1 be replaced with proposed Standing Order No. 1R1. The Board considered the proposed Standing Order No. 1R1 at its November 14, 2011 special meeting.

**IT IS THEREFORE ORDERED:**

1. Upon receipt of an appeal or a request for hearing, the clerk promptly shall notify the chairman or, if the chairman is not available, the vice chairman, via email that an appeal or request for hearing has been received. The notice shall state the number of days from the permit action or issuance of the order of abatement to receipt of the notice of appeal or request for hearing and shall include a copy of the notice of appeal or request for hearing and any attachments the clerk deems

appropriate to assist the Board in determining whether the appeal or request for hearing is within the Board's jurisdiction. The clerk shall copy the Board and counsel, if any, on this notice, and shall include the notice of appeal or request for hearing.

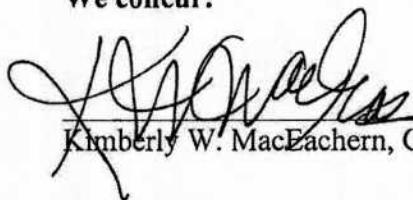
2. Upon receipt of the notice from the clerk, the chairman may designate as presiding officer for the matter one of the following: the chairman, another Board member or Board counsel. The chairman shall notify the Board, the clerk, and Board counsel of this appointment. The clerk will notify the parties and their counsel, if any. Appointment of a presiding officer is not required if the chairman determines that the Board has no jurisdiction, in which case the chairman shall exercise the responsibilities of the presiding officer.
3. The presiding officer shall review the notice of appeal or request for hearing to determine if it falls within the Board's jurisdiction to review. If the presiding officer determines that no jurisdiction exists, the presiding officer may prepare an order of dismissal for lack of jurisdiction. The proposed order shall be circulated to the Board and, if no Board member objects, shall be entered as the Final Decision and Order of the Board. If any member objects, the matter shall be set for hearing.
4. If a matter is not disposed pursuant to paragraph 3 above, the presiding officer shall notify the clerk, who will distribute all papers or materials to the Board unless otherwise directed by the presiding officer or Board. The presiding officer shall then supervise the prehearing process, including setting the schedule for the hearing, ruling on motions or objections, and acting for the chairman in issuing subpoenas pursuant to A.R.S. § 49-496(C) and Section 3.18 of the Manual of Procedures, all in accordance with Section 2.3(D) of the Manual of Procedures. The Board, the clerk, counsel and the parties, as appropriate, shall be copied on all rulings.
  - a. Once a presiding officer is appointed, all pleadings and motions should be filed with the clerk and a copy delivered to the presiding officer. The clerk promptly will forward materials to Board members and counsel, if any (duplicate copies are not required if already provided in capacity as presiding officer).
  - b. The presiding officer may call a prehearing conference to set the schedule, resolve evidentiary and subpoena issues, and to clarify the issues to be presented to the Board at the main, or substantive, hearing on the matter. Counsel may be asked to work with the parties to clarify the issues.
  - c. The presiding officer may, upon request, hold oral or telephonic argument on motions or objections, as the presiding officer deems best for the expedient resolution of the matter.
  - d. If the parties reach settlement or the Appellant/Petitioner withdraws its appeal or request for hearing, the presiding officer may prepare an order approving settlement, dismissing the action, or such other action as

appropriate. The proposed order shall be circulated to the Board and, if no Board member objects, shall be entered as the Final Decision and Order of the Board. If any member objects, the matter shall be set for hearing.

- e. A Board member may, at any time, request that a matter or part of a matter be heard by the full Board by contacting the presiding officer. Upon receipt of such a request, the presiding officer shall schedule the matter or part of a matter for hearing before the full Board.
  - f. The presiding officer shall ensure compliance with the requirements of the Open Meeting Law in all matters. Minutes shall be kept in accordance with Section 2.5(A) of the Manual of Procedures and this Standing Order.
5. Prior to the start of the substantive hearing, the Board shall hear any appeals from parties concerning prior rulings of the presiding officer, as provided in Section 2.3(E) of the Manual of Procedures. Motions stating the basis for such an appeal shall be filed with the clerk and a copy delivered to each Board member and Board counsel, if any.
  6. The Board will hear the substantive hearing. At the hearing, the chairman or the presiding officer, at the chairman's discretion, will preside and rule on motions, objections and other matters on behalf of the Board, subject to appeal to the Board.
  7. A majority of the Board present and participating in a hearing, in person or remotely, shall decide any appeals of a ruling of the chairman or the presiding officer as provided in Section 2.2(B) of the Manual of Procedures.
  8. All final decisions and orders of the Board in a matter that proceeds to hearing shall be decided by a majority of the Board, as provided in A.R.S. § 49-496(A) and Sections 2.2(C) and 3.24(A) of the Manual of Procedures. All decisions shall be in writing. Orders of the chairman or presiding officer pursuant to paragraphs 3 or 4(d) of this Order to which no Board member objects are unanimous orders of the Board and shall be retained as the minutes of the Board as required in Section 2.5(A) of the Manual of Procedures.
  9. The Board reserves the right to vary from this Standing Order No. 1R1 upon application by any party or upon its own motion as justice may require.

So ordered this 14<sup>th</sup> day of November, 2011.

**We concur:**



Kimberly W. MacEachern, Chair



Shane Leonard, Member

Jean McGrath  
Jean McGrath, Member

not present  
Phil Noplos, Member

not present  
Gary Van Hofwegen, Member