



BOARD OF SUPERVISORS AGENDA ITEM REPORT

Requested Board Meeting Date: 10/17/2023

*= Mandatory, information must be provided

Click or tap the boxes to enter text. If not applicable, indicate "N/A".

***Title:**

Air Quality Hearing Board (AQHB) Manual of Procedures update

***Introduction/Background:**

The Pima County AQHB is required to adopt a manual of procedures to govern its operation (PCC 17.04.220). The last AQHB manual of procedures was written in 1979 and is in need of an update.

***Discussion:**

The Board members spent months reviewing and updating the manual of procedures based on best current business practices. The draft manual of procedures was made available to stakeholders and the general public for review and comment. The AQHB met on September 18, 2023 and discussed the submitted comments and approved a final draft manual of procedures which incorporated minor updates associated with the submitted comments. The AQHB approved the final draft manual of procedures for submission to the Board of Supervisors for approval.

***Conclusion:**

The Air Quality Hearing Board requests your approval of the new revised manual of procedures. After approval the AQHB will follow the manual of procedures in all future applicable matters before the AQHB.

***Recommendation:**

Approval of the revised AQHB manual of procedures

***Fiscal Impact:**

No Fiscal Impact

***Board of Supervisor District:**

1 2 3 4 5 All

Department: Environmental Quality

Telephone: 520-724-7400

Contact: Fatima Munoz

Telephone: 520-724-7331

Department Director Signature: _____

Date: _____

9/21/23

Deputy County Administrator Signature: _____

Date: _____

21 Sept 2023

County Administrator Signature: _____

Date: _____

9/22/23

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**PIMA COUNTY
AIR QUALITY HEARING BOARD
MANUAL OF PROCEDURES**

(Adopted [Month] [Date], 2023)

ARTICLE 1. NAME & JURISDICTION

- 1.1 Name
- 1.2 Jurisdiction

1.1 NAME

The Pima County Air Quality 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 (as defined in A.R.S § 38-502) 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

- A. The Board has jurisdiction over agency actions as provided by statute; these include:
 - 1. Permit actions. The Board hears appeals from the approval, denial or revocation of a permit or the approval or denial of a permit revision or conditional order by the applicant or any person who filed a comment on the application. A.R.S. §§ 49-480.02; 49-482.
 - 2. Permit transfers. The Board hears appeals of denials of requests for permit transfers. A.R.S. § 49-483(E).
 - 3. Orders of abatement. The Board hears challenges to orders of abatement issued by the Control Officer. A.R.S. § 49-490.
 - 4. Suspension or revocation of a conditional orders. The Board has original jurisdiction in cases where the Department seeks to revoke or suspend a conditional order. A.R.S. § 49-495.
 - 5. Monitoring. The Board hears appeals of monitoring conditions in a permit when appealed with the permit, permit revision, or order of abatement imposing such conditions. A.R.S. § 49-476.01(E).

6. Other “appealable agency actions.” The Board hears appeals of other “appealable agency actions” 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 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(I);
 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; and
 3. Any rule that relates to the internal management of the county and that does not affect private rights or interests.
- 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.

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.
- 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 self-recuse if the Member has a conflict of interest in any proceeding. A Member shall disclose to the Board and all Parties if they have actual personal knowledge, outside the record, of material facts of any contested matter pending before the Board but shall not disclose the substance or source of that knowledge.
- 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 may participate with the consent of the Board and all Parties.

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.

2.3 OFFICERS AND STAFF

- A. Officers. The Board shall elect, annually, at the first meeting of the year, a Chair, and Vice Chair.
1. The Chair shall preside at all meetings of the Board. The Chair shall have discretion to call special meetings of the Board or 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.
- B. Secretary. The Department shall provide a staff member to the Board to serve as Secretary of the Board.
1. The Secretary shall keep and file the minutes of the Board.
 2. The Secretary shall maintain the records of the Board, including the minutes and docket of the Board.
 3. The Secretary 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.
 4. The Secretary shall receive all filings and correspondence directed 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 Pima 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 Hearing Officer, in which case the Counsel shall follow the provisions for Hearing Officer in addition to the requirements of this subsection.

3. The Board may use Counsel to examine Parties and witnesses on behalf of the Board to develop the record for any decision.
- D. Hearing Officer. The Board has the discretion to appoint one of its Members, or its Counsel, to serve as Hearing Officer in any matter. The Board may appoint a Hearing Officer with respect to any number of specified appeals or with respect to all appeals then pending or filed after the date of appointment until the Board revokes such appointment as provided in Rule 2.3(D)(5).
1. The Hearing Officer shall preside at all hearings and shall rule on any objections or motions subject to appeal to the Board.
 2. The Hearing Officer, upon delegation by the Chair, may issue subpoenas in accordance with A.R.S. § 49-496(C) and Section 3.18.
 3. The Hearing Officer has the discretion to refer a dispositive prehearing issue to the Board for its determination.
 4. The Hearing Officer may prepare a recommended decision for consideration by the Board.
 5. At any time, the Board may revoke the Hearing Officer's appointment and appoint another to serve as Hearing Officer, or it may conduct the hearing and all related procedures without appointing a Hearing Officer. The Board may revoke the Hearing Officer's appointment either for a specific appeal or appeals, or it may revoke the Hearing Officer's appointment entirely.
- 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 an 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, including an appropriately noticed 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, including an appropriately noticed

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, the statutes authorizing the hearing, and Article 3 of this Manual. A hearing may be conducted in conjunction with 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 or produce a recording or transcript of annual and regular meetings and file them with the Secretary.
- B. Docket. The Secretary 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 Secretary of the Board. Procedures and fees shall be the same as those used by the Department.

2.6 MANUAL, STANDING ORDERS AND OTHER ADMINISTRATIVE MATTERS

- A. Manual. The Board may propose a Manual of Procedures to the Board of Supervisors for possible adoption by the Board of Supervisors. Prior to proposing the Manual or a revision to it, the Board will hold a regular meeting to explain the Manual or proposed revision, publish the proposal on its website with a request for public comment 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. 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.
- B. Standing Orders. The Board may adopt Standing Orders 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.

- C. **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 Computing Time
- 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
- 3.9 Contents of an Answer to a Notice of Appeal or Request for Hearing
- 3.10 Location of Hearings
- 3.11 Notice of Hearing
- 3.12 Ex Parte Communications
- 3.13 Consolidation
- 3.14 Continuances
- 3.15 Amendments
- 3.16 Prehearing Disclosure
- 3.17 Motions
- 3.18 Subpoenas
- 3.19 Depositions
- 3.20 Prehearing Conferences
- 3.21 Recording Hearing
- 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 Default
- 3.28 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 Quality 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:

- A. “Appealable agency action” means an action by the Control Officer that the Board has jurisdiction to review or decide as provided in Rule 1.2.
- B. “Board” means the Pima County Air Quality Hearing Board appointed by the Pima County Board of Supervisors according to A.R.S. § 49-478.
- C. “Control Officer” means the executive head of the Air Division of the Pima County Department of Environmental Quality. A.R.S. § 49-473.
- D. “Department” means the Pima County Department of Environmental Quality.
- E. “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.
- F. “Party” means the Petitioner, the Department, all persons named by the Petitioner as interested persons as provided in Rule 3.7(A)(2), and any interested person the Board has permitted to intervene in the proceeding.
- G. “Person” means an individual or any legally cognizable entity including but not limited to any public or private corporation, company, partnership, firm, association, government, political subdivision or any agency or department thereof.
- H. “Petitioner” means the person who files a notice of appeal or request for hearing, or who seeks review of appealable agency action with the Board.
- I. “Proceeding” means any matter commenced by filing a notice of appeal or request for hearing before the Board.
- J. “Record” means the complete file of the Board, including but not limited to: 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.

- K. “Respondent” means any person interested in a Proceeding named by the Petitioner in a notice of appeal or request for hearing pursuant to Rule 3.7(A)(2), including the Department.

3.3 COMMENCEMENT OF AN APPEAL OR HEARING;

- A. Appeals. Unless statute or rule provides otherwise, a Petitioner shall file a notice of appeal with the Secretary within 30 days after notice is given by the Control Officer or Department to such person of any act that may be appealed under Arizona statute and these Rules. Failure to timely file a notice of appeal shall deprive the Board of jurisdiction. The date of filing is the date the Department receives the notice of appeal.
- B. Requests for Hearing. Unless statute or rule provides otherwise, a Petitioner shall file a request for hearing with the Secretary within 30 days after notice of an act of the Control Officer or Department pursuant to A.R.S. §§ 49-490 or 49-495, a Petitioner shall file a request for hearing with the Secretary 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 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 Secretary shall maintain a Docket of all proceedings and assign each Proceeding a case number. For each Proceeding, the Secretary 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 a party proffers in advance of a hearing;
 9. The dates of orders by the Board;
 10. The date of the Board's decision;
 11. The receipt date of any motion for rehearing or review;
 12. The Board's decision on any motion for rehearing or review and the date of the decision; and
 13. 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 Secretary shall maintain the docket 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 Secretary 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. 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 Secretary and serve a copy on each party. Electronic copies shall be in PDF or Word format. All subsequent filings shall be made electronically to the Secretary with electronic copies to each party.
- B. A Party shall serve documents other than subpoenas by email in PDF or Word format unless the Hearing Officer or Board orders otherwise for good cause upon the request of a Party. A Party is considered served at the time the email is received by the Secretary, or if physical service is ordered, at the time 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 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 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 ordered, a Party shall demonstrate proof of service by filing with the Secretary a written statement, signed by the Party, 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 COMPUTING TIME

- 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 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. This subsection does not apply unless the Hearing Officer or Board orders physical service under Rule 3.5(B) and shall only apply to documents physically served by mail or that are filed in response to documents physically served by mail.

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, mailing address, email address, and telephone number of the Petitioner and, if the Petitioner is represented by an attorney, the name, mailing address, email address, telephone number, and Arizona Bar number of the Petitioner's attorney;
 2. The names, mailing addresses, email address (if known) 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. Identification of the specific action of the Control Officer or Department that the Petitioner is asking the Board to review, hear, or determine 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 cannot participate in email filing of all subsequent documents, a separate motion (see § 3.17) requesting an order requiring service by regular mail with an explanation why the Board should grant such relief.

3.8 TIME FOR FILING AN ANSWER

- A. Each Respondent shall file an answer to Petitioner's notice of appeal/request for hearing within 15 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.
- B. Within 5 days of receiving notice that a notice of appeal or notice of hearing has been filed with the Secretary, but not sooner than 15 days after the date that all Parties identified in such notice have been served, a person authorized by Statute and these Rules to intervene as a Party may be permitted to intervene upon filing a motion to intervene with the Secretary and serve such motion on all other Parties. The motion to intervene shall state whether the Parties consent to such intervention and include a provisional answer meeting the requirements of Rule 3.9.
- C. In deciding a motion to intervene, the Hearing Officer or Board shall consider:
 1. Whether Arizona statute or other law confers a right to intervene;
 2. Whether the claim or defense of the person moving to intervene shares a question of law or fact in common with the proceeding; and
 3. Whether the intervention is in the interests of justice and whether intervention will unduly delay or prejudice the proceedings.

3.9 CONTENTS OF AN ANSWER

- A. The answer of each Respondent shall contain the following information:
 1. The name, mailing address, email address, and telephone number of the Respondent preparing the answer and, if the Respondent is represented by an attorney, the name, mailing 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 Respondent cannot participate in email filing of all subsequent documents, a separate motion (see § 3.17) requesting an order requiring service by regular mail with an explanation why the Board should grant such relief.

3.10 LOCATION OF HEARINGS

All hearings shall be held in Pima County, Arizona unless the Board finds that it will be in the interest of the Board, the Parties, or the Public 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 Secretary 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 Secretary shall prepare and serve a notice of hearing as prescribed in A.R.S. § 49-498 by sending a copy by email to each Party. The Board encourages 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:
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 that any Party may request the services of a County-approved interpreter.
- C. The Secretary shall provide written notification that reasonable accommodations will be made for any disabled person, if requested in advance of the hearing. The notification shall be served with the notice of hearing.
- D. At least 15 days prior to the date of the hearing the Secretary shall serve a copy of the notice of hearing on each Board member, the Hearing Officer, 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, Hearing Officer, or employee of Pima County who is or may reasonably be expected to be involved in the decision-making process.
 2. A Board member, Hearing Officer, or employee of Pima County who is or may reasonably be expected to be involved in the decision-making 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, Hearing Officer, or employee of Pima County who is or may reasonably be expected to be involved in the decision-making 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 state the substance of all oral communications on the record by oral testimony.
- C. Any interested person who receives a communication prohibited by this Section shall file a notice of the communication with the Secretary 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 Hearing 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 Secretary and serve all Parties no later than 10 days before the scheduled date of the hearing. The motion shall state why the continuance is being requested, whether the other Parties stipulate to the continuance, and the amount of time requested. The Board may accept a motion filed less than 10 days before the hearing for good cause.
- B. Any Party may oppose a motion to continue a hearing by filing and serving a response within 5 days after service of the motion.
- C. No reply is permitted unless ordered by the Board.
- D. The Hearing Officer and Board are not required to accept a stipulation of the Parties to continue any hearing.

3.15 AMENDMENTS

In the event that either Party should wish to amend its notice of appeal, request for hearing, or answer it 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 Secretary who shall notify the Board. The Secretary 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; no expert shall be permitted to testify unless the Party calling such person has made these disclosures;
 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 11 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 Secretary 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 Secretary. For all motions, the Party shall state the grounds on which the motion is based and the relief or order sought. The Hearing 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 Hearing Officer 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 and the response memorandum of any Party opposing the motion 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 by the moving Party 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 Hearing Officer or Board shall promptly rule on all motions, but may defer any decision until the hearing or after the hearing. For a motion to be considered and ruled upon before the hearing, the moving Party shall file and serve the motion in writing no less than 8 days before such hearing.

3.18 SUBPOENAS

- A. The Chair or Hearing Officer may grant a Party's request for subpoena 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.

- 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 Hearing Officer shall include a timeframe for compliance that is compatible with the hearing schedule.

3.19 DEPOSITIONS

The Hearing 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 Hearing Officer or Board. The Party requesting a deposition shall bear the expense of the deposition, including the cost of a qualified court reporter.

3.20 PREHEARING CONFERENCES

- A. Upon a motion by a Party or on the initiative of the Hearing Officer or Board, the Board may conduct a prehearing conference, 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 Hearing Officer or Board takes any action at or after the prehearing conference, the Hearing 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. If the Control Officer does not provide a court reporter, any Party may use a court reporter to produce a transcript 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 audio or video recording it produces or the

court reporter's audio recording will be used to prepare the hearing transcript. When the Board provides a court reporter, the Secretary 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. If the Board does not provide a court reporter, a transcript will not be produced unless requested. Any person that requests a transcript of the proceeding shall pay the Secretary a fee for the cost of the transcript and one copy.

3.22 HEARING

- A. The Hearing 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 it lacks jurisdiction or the matter should be dismissed as a matter of law 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 or 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 or the Hearing Officer or Board order for good cause, all hearings must be conducted within 30 days from the date of the notice of hearing given pursuant to Section 3.3.

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 Arizona Rules of Evidence or it may follow those portions of the Arizona Rules of Evidence that the Board deems appropriate. Nevertheless, in determining the weight that the Board gives to the evidence it receives, it may consider, among other factors, whether such evidence would constitute hearsay within the meaning of the Arizona Rules of Evidence or would otherwise be inadmissible under those Rules.
- D. The Hearing Officer, Board or Counsel, if serving as an examiner, may question any witness.
- E. The Board may take notice of judicially cognizable facts but shall not take notice of any generally recognized technical or scientific facts within a Board Member's specialized knowledge. Nevertheless, the Board may direct the Parties to provide supplemental evidence, argument, or briefing on a subject that a Board Member

believes or suspects would be relevant to its determination. In identifying such subjects, Board Members may rely on their legal, technical, or scientific knowledge and experience.

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 or other remote means so long as 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 self-recuse unless all Parties consent. 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; however, the Party bearing the burden shall presumptively present evidence first;
 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; and

7. Administer oaths and affirmations to witnesses.
- C. The Board may:
1. Set time limitations for arguments;
 2. Exclude a person from the hearing who is disruptive to the proceedings;
 3. Exclude a witness from the hearing so the witness cannot hear the testimony of other witnesses;
 4. Conduct the hearing in an informal manner without adherence to the Arizona Rules of Evidence. Neither the manner of conducting the hearing nor the failure to adhere to the Arizona Rules of Evidence is grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative;
 5. On request, grant a Party's request to be given an opportunity to compare the copy of any documentary evidence submitted with the original;
 6. 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 Counsel regarding the matters presented in the hearing.
 7. Delegate the hearing to the Hearing Officer to include the powers and duties listed herein subject to the right of appeal of any decision to the full Board.
- D. If the Board delegates the hearing to the Hearing Officer, the Board shall attend and the Hearing Officer shall rule on all matters, objections and motions during the hearing as set forth in paragraphs B and C above, except (C)(7). At the conclusion of each Party's case, the Board shall hear any appeals of the rulings of the Hearing 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 ask the Hearing Officer or Counsel to draft decision with proposed findings of fact and conclusions of law by a specified date.

- B. The Board shall meet and render its final administrative decision in writing within a reasonable time after the hearing.
- C. 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 Rule 3.26 or the Board determines that there is an emergency that warrants an earlier effective date.
- D. The Secretary shall notify each party promptly by either emailing copies of all decisions and orders, including the findings of fact, conclusions of law, and the final administrative decision of the Board to email addresses provided by each Party and by posting the decision on the agency website.
- E. 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 the decision.
- F. The Board may incorporate by reference findings, conclusions, or a decision previously made by its Hearing Officer.
- G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.
- H. No decision of the Board shall set any precedent; each case shall be decided upon its own merits and the circumstances of that case, and the Board shall not answer an informal request for advice or decide moot questions. No advice, opinion, or information given by any Member, Secretary, Counsel, or any other employee of Pima County shall be binding on the Board.

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 Secretary 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, opposing affidavits or both 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, the Hearing Officer, 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 promptly decide and serve its decision on any motion for rehearing or review. If a rehearing is granted, the Board shall hold the rehearing within 90 days after the issue date on the order granting the rehearing.

3.27 DEFAULT

If a Party fails to answer, serve a prehearing disclosure statement, sit for any duly noticed deposition, or appear at a prehearing conference or hearing when any of the above are required by these Rules, the Presiding Officer or Board may order a continuance so that the Party may comply with such requirement or the Hearing Officer or Board may dispose of the matter on the record after hearing any other Parties who have appeared.

3.28 JUDICIAL REVIEW

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

This PIMA COUNTY AIR QUALITY HEARING BOARD MANUAL OF PROCEDURES is adopted this 18th day of September, 2023, to become immediately effective upon approval of the Pima County Board of Supervisors.



Marian LaLonde, Chair

Concurring: Ann Marie Wolf, Vice Chair

Dr. Paloma Beamer

Dustin Fitzpatrick

Dr. Philip Harber

Approved this ____ day of _____, 2023.

Chair, Pima County Board of Supervisors

ATTEST:

Clerk, Pima County Board of Supervisors

APPROVED AS TO FORM:



Civil Deputy County Attorney