

Vivyana Prado, Bar No. 365027
Michael Claiborne, Bar No. 281308
LEADERSHIP COUNSEL FOR JUSTICE AND ACCOUNTABILITY
2210 San Joaquin St.
Fresno, CA 93721-1127
Telephone: (559) 369-2790
vprado@leadershipcounsel.org
mclaiborne@leadershipcounsel.org

Attorneys for Petitioner
184 Community Action Group

Kayla Karimi, Bar No. 329648
Natalia Ospina, Bar No. 308561
CENTER ON RACE, POVERTY & THE ENVIRONMENT
1012 Jefferson Street
Delano, CA 93215-2239
Telephone: (661) 720-9140
kkarimi@crpe-ej.org
nospina@crpe-ej.org

Attorneys for Petitioner
Comité Progreso de Lamont

SAN JOAQUIN VALLEY AIR DISTRICT HEARING BOARD

184 COMMUNITY ACTION GROUP, an
unincorporated association; COMITÉ
PROGRESO DE LAMONT, an unincorporated
association,

Petitioners,

v.

SAN JOAQUIN VALLEY AIR POLLUTION
CONTROL DISTRICT,

Respondent.

KERN ENERGY,

Real Party in Interest.

H.B. Case No.: S-26-11A

**PETITIONERS' OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE
PETITIONERS' TRIAL BRIEF AND
ADDITIONAL EXHIBITS AND
EVIDENCE FOR KERN ENERGY
REFINERY PROJECT NO. S-1251187**

I. INTRODUCTION

Petitioners 184 Community Action Group and Comité Progreso De Lamont (“Petitioners”) oppose the last minute motion filed by Respondent San Joaquin Valley Unified Air Pollution Control District (“the District”). In the alternative, Petitioners move to amend their Petition to conform to the factual evidence and arguments raised in the trial brief and to be presented at the hearing on the merits.

II. THE DISTRICT’S MOTION TO STRIKE SUBSTANTIVE CLAIMS MUST BE DENIED

Petitioners oppose Respondent’s Motion to Strike Petitioners’ Trial Brief as there is no material variance between the Petition and Petitioner’s Trial Brief that would preclude factual arguments from being raised. Moreover, amendments to pleadings in the administrative hearing context are liberally allowed.

A. Pleadings in Administrative Proceedings are Liberally Construed and Amendments Before and During a Hearing on the Merits are Liberally Allowed

Respondents correctly note that administrative pleadings are construed liberally. Indeed administrative proceedings are not bound by the strict rules of pleadings, and “[s]o long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between administrative pleadings and proof.” (*Stearns v. Fair Employment Practice Commission* (1971) 6 Cal.3d 205, 212-213; *Margarito v. State Athletic Com.* (2010) 189 Cal.App.4th 159, 170; *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 941.)

Case law demonstrates that a variance between the allegations in a pleading and the proof only become material once it has actually misled the adverse party to their prejudice in the action

or in their defense on the merits. (*Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 382 (1952).) Courts apply this standard more liberally in the administrative setting than in a court action. (*Fair Employment Practice Commission*, 6 Cal.3d at 213) Even in situations where a variance did take place, if no prejudice flowed from it then the issue is moot and Respondent has no variance claim that could lead to preclusion. (*Fair Employment Practice Commission*, 6 Cal.3d at 214 – 215.)

When a party claims prejudice in this context, “the showing must demonstrate that the party was ‘unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely.’” (*Id.* at *17, quoting *Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3d Cir. 1990).) Further, non-prejudicial amendments at trial to conform to proof are actually favored to further justice and avoid unnecessary additional litigation. (*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd.*, 93 Cal.App.5th 995, 997 (2023).)

Similarly liberal standards apply to amendments to administrative pleadings. As the 5th Circuit aptly recognized, “[l]iberal construction and easy amendment of pleadings are accepted procedure in an administrative law context” and “[t]he most important characteristic about pleadings in the administrative process is their unimportance.” (*Morgan & Culpeper, Inc. v. OSHRC* (5th Cir. 1982) 676 F.2d 1065, 1066 quoting *I K. Davis*, Administrative Law 523 (1958).) California law is in accord. In the administrative hearing context, amendments to pleadings are liberally allowed. (See *L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd.* (2023) 93 Cal.App.5th 995, 1011; *In re Calstrip Steel Corp.* (Cal. O.S.H.A., June 30, 2017, Nos. 12-R3D6-1998, 1999) 2017 CA OSHA App.Bd. Lexis 66, p. *15.) An amendment to conform to proof must be permitted even *during* a civil trial unless the “adverse party can establish prejudice.” (*South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1124 [85 Cal.Rptr.2d 647].) “A variance between pleading and proof does not justify the denial of an

amendment to conform pleading to proof unless the unamended pleading 'misled the adverse party to his prejudice in maintaining his action or defense upon the merits.'" (*Id.*)

B. The Petition Adequately Informed Respondent Regarding Petitioners' Claims and Respondent Suffers No Prejudice.

Here, Respondent claims that Petitioner's Trial Brief for revocation of the permit contains newly introduced arguments, and because of this have not had meaningful time to respond and have been prejudiced in their ability to defend against the petition. (*Objection to Trial Brief And Motion to Strike*, pp. 2.) This is objectively false. On May 29, 2026, Petitioner's filed their petition for appeal of permit approval, over four months ago, where Respondents were made aware of Petitioner's arguments in favor of permit revocation, including related to the exclusion of modified emission units and improper use of Emission Reduction Credits ("ERCs"). (*Petition*, pp. 6.) Respondent was "informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process" through the Petition. (*Fair Employment Practice Commission*, 6 Cal.3d at 212-213; *State Athletic Com.* 189 Cal.App.4th at 170; *Board of Medical Examiners*, 49 Cal.App.3d at 941.)

Petitioners broadly and inclusively explain that "the Hearing Board may revoke the ATC Permit if it finds that the District violated *any part* of the Health and Safety Code, order, rule, or regulation of the District." (*Id.* [emphasis added].) Regarding ERCs, the Petition goes on to allege more specifically that "The Emission Reduction Credits Banked Are Invalid," that "ERCs must be "real, enforceable, quantifiable, surplus, and permanent" at the time of ATC permit issuance," and that "[t]he District erroneously allowed for the banking of ERC certificate C-1579-1 to offset the increased VOC emissions associated with the Project." (Petition at 11.) For Respondents now to contend, a day before the hearing on the merits, that was not on notice that Petitioners may introduce evidence that the ERCs are invalid because they are not "real" or "surplus" is directly contradicted

by Petitioners' inclusion of this argument in the Petition. At a minimum, liberal standards applicable to construction of administrative petitions requires that the Hearing Board overrule Respondent's objection.

Similarly, with respect to Respondent's contention that it was not adequately informed that Petitioners would contend that modified emissions units were part of a continuous process, the Petition alleges emission units were part of the broader hydrogen energy generation process. Petitioners referred explicitly to the District Rule definition of a "project" as "a single permitting action involving the modification, addition or shutdown of one or more emissions units." (Petition, p. 12.) Petitioners made clear throughout the Petition that underlying this claim is a position that an appropriate permit determination required inclusion of all emissions units involved in the Project, and Respondent was adequately on notice of the claim.

Respondent fails to provide any case law that supports its objection and motion. In fact, each case that Respondent cites determines that the alleged variances were immaterial. (*Fair Employment Practice Commission*, 6 Cal.3d at 213; *Richfield Oil Corp.*, 38 Cal.2d at 381; *Board of Medical Examiners*, 49 Cal.App.3d at 942.) For example, in *Stearns v. Fair Employment Practice Commission*, the court determined that while the accusations stated both a refusal to rent based on discrimination and a claim for discriminatory practices in renting, "[e]ven assuming that the accusation charged only a refusal to rent, and not discriminatory rental practices, we do not believe that any such variance between the accusation and proof justifies a reversal of the commission's order against Stearns." (*Id.* at 212.) Similarly, in *Richfield Oil Corp.* a variance was not material where a complaint alleged joint control of premises and evidence was presented at trial that the premises were in fact leased. And in *Board of Medical Examiners*, the court held that the phrase the allegation of "improper and unethical psychological services including but not limited to the following" was not impermissibly vague for pleading purposes despite the implication that other

improper conduct may be presented at trial.

Moreover, Respondent provides no evidence whatsoever that it was prejudiced by the alleged variances beyond that the Trial Briefs were filed three business days before the hearing on the merits. As an initial matter, it was the District itself that sought a continuance from Wednesday October 7 to Friday October 9 for submission of trial briefs. The mere fact that the Trial Brief was submitted within days of the hearing on the merits is not enough to establish any prejudice. Nothing prevented the District from providing an addendum to its staff report to address the issues in Petitioner's Trial Brief, and nothing is stopping its witnesses from contesting each of the arguments in the Brief at the hearing on the merits. Like in *Stearns v. Fair Employment Practice Commission*, Respondent had notice of the substance of Petitioner's arguments from the filing of the Petition itself and had ample opportunities to marshall evidence in opposition to those arguments. As it is not prejudiced, Respondent cannot object to the presentation of evidence that the ERCs are invalid or that the equipment is part of a continuous process.

Clearly, Respondents have been "[i]nformed of the substance of the charges and afforded the basic appropriate elements of procedural due process" in this case, where they have had four months and opportunity to respond to Petitioner's legal and factual claims for revocation of the permit at issue. (*Fair Employment Practice Commission*, 6 Cal.3d at 212-213.; *State Athletic Com.* 189 Cal.App.4th at 170; *Board of Medical Examiners*, 49 Cal.App.3d at 941.)

III. THE DISTRICT'S MOTION TO STRIKE EVIDENCE MUST BE DENIED

The District's objections to ten evidentiary exhibits on the basis of foundation and relevance lack merit and must be denied. District Rule 5210 part 1.4 provides the following guidance regarding admissibility of evidence before the Hearing Board:

"The hearing need not be conducted according to technical rules relating to

evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to relying on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.”

As an initial matter, then, there is no basis for the objection for lack of foundation. And as to relevance, each of the exhibits are relevant to Petitioners’ claims. Petitioners provide the following brief descriptions of the challenged exhibits’ relevance to Case No. A-26-11A:

	Petitioners’ Exhibits	Petitioners’ Description of Relevance
1.	Exhibit Q. CARB, Review of the San Joaquin Valley Air Pollution Control District Emission Reduction Credit System (2020)	Exhibit Q consists of a report published by CARB that provides valuable insight into the District’s current ERC program. CARB flagged patterns of inadequacies in the District’s ERC program and provided directions on how it should be managed. These inadequacies arise in the ERC issued for this Project. The Hearing Board should now consider this evidence in determining whether the ERC relied upon in issuing this permit aligns with the pattern identified by CARB. This evidence is relevant to whether the permit was properly issued and whether revocation is justified.
2.	Exhibit R. San Joaquin Valley Unified Air Pollution Control District, Federal Offset Equivalency, District Advisory (2022)	Exhibit R is a District Advisory describing equivalency of the District’s ERC Program with the federal standard. The Advisory describes that the District’s program can no longer show equivalency and so must comply with federal requirements in the operation of the District’s ERC Program. The Hearing Board should consider this Advisory as evidence regarding the federal requirement that surplus must be shown at the time of ERC use.
3.	Exhibit S. CalEPA Kern Energy August 2024 and June 2026 Activity Logs	The California Environmental Protection Agency (CalEPA) is the California state-level agency that oversees all environmental departments, including the California Air Resources Board (CARB). Since 2023, CalEPA has published Activity Logs for

		facilities of concern, including Kern Energy (Exhibit S). These Activity Logs compile compliance, monitoring, and enforcement information from all relevant federal, state, and local environmental regulators onto a single hand out to provide easily accessible information to the public and to facilitate internal coordination and information sharing among regulators, including the San Joaquin Valley Air Pollution Control District. CalEPA intends these Activity Logs to inform permitting efforts. The Hearing Board should now consider this evidence in determining whether the permit was properly issued and whether revocation is justified.
4.	Exhibit T. Kern County Grand Jury Report on Kern County Fire Department Emergency Services Disaster Readiness	Exhibit T demonstrates that there are insufficient emergency services in Kern County to protect vulnerable residents in the event of a disaster. Kern Energy's existing operations already pose a significant source of potential disaster with potentially fatal impacts to the surrounding communities. The proposed Project introduces new risks, which will exacerbate the already severe emergency services gap in Kern County. These Project risks must be properly quantified by an accurate VOC emissions calculation, and should have been considered in permitting. The Hearing Board should now consider these risks in determining whether the permit was properly issued and whether revocation is justified.
5.	Exhibit U. Kern Oil & Refining Co., Permit Application for Authority to Construct for a Modification of Emission Unit with Valid PTO/Valid ATC, Application No. §-37-77-10	Exhibit U includes the final ATC for a Diesel Hydrotreater and Reformer approved by the Air District in 2004. Given the lack of transparency about the current state of the hydrogen recovery process, the ATC contains important and clarifying information regarding how hydrogen may be recovered currently and which units it travels through. The Hearing Board should now consider this evidence in determining whether there have been modifications to the emissions units, and thus whether the permit was properly issued and whether revocation is justified.

6.	Exhibit V. San Joaquin Valley Air Pollution Control District, Final Authority to Construct, Application No. S-37-4-22 (Apr. 8, 2025)	Exhibit V consists of the final 2025 ATC for the platformer and chloride scrubber. Petitioners' present Exhibit V as evidence of the project description for the platformer and chloride scrubber as well as the date on which the ATC was approved by the District. This evidence is relevant to whether the permit was properly issued because it supports the argument that there has been a physical change or change in method of operation and to whether permit approvals have been improperly split and constitute piecemealing.
7.	Exhibit W. San Joaquin Valley Air Pollution Control District, Proposed Authority to Construct, Application No. S-37-4-22 (Feb. 19, 2025)	Exhibit W consists of the proposed ATC for the platformer and chloride scrubber. Petitioners' present Exhibit W to demonstrate how the permit unit was described and whether the ATC explicitly considered how the emission units might be part of future hydrogen energy generation. This evidence is relevant to whether there has been a physical change or a change in method of operation.
8.	Exhibit AA. Environmental Protection Agency Emission Reduction Banking Manual	Exhibit AA is a U.S. Environmental Protection Agency manual on Emission Reduction Banking, which provides federal guidance and explanations such as how to define "real" emission reductions in an ERC program and individual ERC banking. Specifically, there are pertinent explanations of source-shifting and when present it invalidates the real and present requirements of a valid ERC. These definitions and explanations are significant to whether source shifting should be considered when determining if the ERC used in this permit represents "real" emission reductions or is consequently invalid.
9.	Exhibit BB. Arvin/Lamont CERP Appendix C: Source Apportionment and Community Inventories (June 9, 2022)	Exhibit BB demonstrates that Kern Energy is the largest source of NOx, VOC/ROGs, and PM2.5 in the Arvin/Lamont CERP boundaries. This fact supports Petitioners' statement that Kern Energy is a significant source of concern for the surrounding

		communities and is thus relevant to whether revocation of the permit is justified. It is also important background information that the Hearing Board should consider in endeavoring to fully understand the project and environmental context.
10.	Exhibit CC. Sasan Saadat and Sara Gersen, Reclaiming Hydrogen for a Renewable Future: Distinguishing Oil & Gas Industry Spin from Zero-Emission Solutions (2021)	Exhibit CC provides details on the physical properties of purified hydrogen, including how it behaves in pipelines intended for other gases. These facts are relevant when considering whether existing policies and procedures for calculating emission leaks, including CAPCOA/CARB Guidelines have been properly applied to pipelines that will be transporting purified hydrogen.

IV. CONCLUSION

Based on the foregoing, the District's objections must be overruled and its motions to strike must be denied. In the alternative, the Hearing Board should grant Petitioners' request to amend the petition to conform to proof presented in the Trial Brief and at the hearing on the merits. Respondent was adequately informed of all of Petitioners' arguments in the Petition, and it has provided no evidence that any variance between the Petition and Trial Brief is material or prejudicial. Moreover, its objections to evidence for lack of foundation are without support in this administrative context, and each of the exhibits are relevant for the reasons discussed above. To deny Petitioners their right to present these arguments and evidence would be prejudicial error.

Dated: October 14, 2026

LEADERSHIP COUNSEL FOR
JUSTICE AND ACCOUNTABILITY

By: /s/ Vivyana Prado
Vivyana Prado
Michael Claiborne

Attorneys for Petitioner
184 Community Action Group

Dated: October 14 , 2026

CENTER ON RACE, POVERTY & THE
ENVIRONMENT

By: /s/ Natalia Ospina
Kayla Karimi
Natalia Ospina

Attorneys for Petitioner
Comité Progreso De Lamont