

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
RULES/REGULATIONS FOR PUBLIC WORKSHOPS AND HEARINGS**

Section 1. Statement of Department Policy.

The Department, in its role as representative of the public, recognizes that participation by and input from an informed public assists the Department in performing its regulatory functions. It is the policy of the Department to seek and facilitate such participation and input when allowed by the statutes or regulations that govern the Department's operations. These regulations shall be construed in a manner that promotes and furthers this policy.

Section 2. Definitions.

Whenever used in these rules/regulations, unless otherwise expressly stated in the pertinent statutes or regulations, the following terms shall have the meanings ascribed herein:

- A. "Applicant" means a person who files an application to the Department, or who files an application for any draft permit, permit, variance, or rulemaking issued by the Department.
- B. "Department" means the Department of Natural Resources and Environmental Control of the State of Delaware.
- C. "Hearing Officer" means the person duly authorized by the Secretary of the Department as his representative for the purpose of conducting a hearing pursuant to the provisions of the Delaware Code.
- D. "Person" means any individual, partnership, corporation, association, organization, institution, cooperative enterprise, municipality, commission, political subdivision, or other duly established legal entity.

Section 3. Requests for Public Hearing.

Any person may submit a request in writing for a public hearing on any draft permit, variance, or rulemaking issued by the Department. The Department shall consider such requests and hold a public hearing if the person requesting the hearing has an interest that could or will be impacted by the Department's action and identifies such interest in the request for public hearing. The request for a public hearing shall be submitted to the Department within forty five (45) days of the Department's public announcement of the draft permit, permit, variance, or rulemaking that is the subject matter of the proposed hearing.

The Department may in its discretion hold a public hearing or public workshop without a request by any interested person if the Department believes that such hearing or workshop will assist it in the performance of its regulatory functions.

Section 4. Public Notice.

A. Public Notice. The Department shall provide public notice (including to the Public Notice List as defined in these regulations) of all draft permits, permits, variances, and rulemakings and all applications for a draft permit, permit, variance, or rulemaking.

B. Contents of Public Notice for Hearings. In addition to the requirements imposed by law, the Department shall issue notice of any public hearing containing at least the following:

1. A statement of the legal authority and jurisdiction under which the proceeding is to be held;
2. A reference to the particular section of the statutes and rules involved;
3. A short and plain statement of the subject of the hearing;
4. The place of the hearing;
5. The time and date of the hearing, which shall be at least thirty five (35) days after first publication of notice of the hearing.

Public notice of the hearing shall be published in a daily newspaper of general circulation throughout the State and a newspaper of general circulation in the County in which the subject matter of the hearing is located and the hearing will take place.

B. Public Notice List. In order to facilitate informing the public of upcoming workshops, public hearings, and other opportunities for public comment, the Department shall maintain a list of citizens and organizations interested in receiving by mail or e-mail a copy of each public notice of draft permits, permits, variances, rulemakings, applications for same, Department workshops, public hearings, or other opportunities for public comment ("the Public Notice List"). The Department shall mail or email a copy of each such public notice to each person or organization on the list within twenty-four (24) hours of the issuance of the public notice.

C. Department Contact Person. The Department shall identify a Department contact person to whom persons or organizations may submit appropriate contact information to be included on the Public Notice List ("the Department Contact Person"). The Department Contact Person shall maintain and update the list within twenty (20) days of receiving new or changed contact information, and shall not delete names from the Public Notice List unless requested to do so in writing by the individual or the Department Contact Person has written proof that the mail or email address is no longer valid and has given or attempted to give at least thirty (30) days notice of intent to delete.

D. The Department shall state the existence of the Public Notice List, the identity of the Contact Person, and sufficient information on how to join the Public Notice List, in each Public Notice issued by the Department.

Section 5. Public Workshops.

From time to time, but at no time after a public hearing has been noticed on the subject matter, the Department may conduct public workshops when developing TMDLs, discharge or emission limits, draft permits, variances, rulemakings, or other regulatory efforts. The Department shall conduct such workshops in one of three ways:

A. Public Workshop on the Record ("Type I Workshop"). The Department shall conduct all proceedings of a Type I Workshop on the record and shall record all statements, testimony, and comments by stenographic or other mechanical means. The Department shall include the record generated at the workshop in the administrative record of any subsequent public hearing or other proceeding conducted on the subject matter of the workshop.

B. Public Workshop with Record Made of Public Comments Only ("Type II Workshop"). The Department shall conduct the proceedings of a Type II Workshop without making a record of the workshop proceedings. However, the Department shall announce and make available at the Type II Workshop an opportunity for members of the public and public interest organizations to make comments on the subject matter of the proceeding on the record. Such record of the public comments shall be made by stenographic or other mechanical means. The Department shall include the record of public comments made at the workshop in the administrative record of any subsequent public hearing or other proceeding conducted on the subject matter of the workshop.

C. Public Workshop with No Record Made ("Type III Workshop"). The Department shall conduct the proceedings of a Type III Workshop without making a record of the workshop proceedings. When conducting a Type III Workshop, the department shall announce at the commencement and the conclusion of the workshop that the workshop is not being conducted on the record, that statements or comments made during the workshop will not be included in the record for any public hearing or other proceeding conducted on the subject matter of the workshop, and that persons interested in making public comment to be included in such record must attend the public hearing or other proceeding. The Department shall not include any information from a Type III Workshop in the administrative record of any public hearing or other proceeding conducted on the subject matter of the workshop.

The public notice for the Public Workshop shall identify the type of workshop it will be and a description consistent with this section of how statements or comments made at the workshop shall be treated for purposes of the record of any subsequent public hearing or other proceeding conducted on the subject matter of the workshop.

D. Hearing Officer Attendance at Workshops. In order to assure that the Hearing Officer's decision is based solely on matters in the record, the Hearing Officer shall only attend those parts of a Public Workshop that are conducted on the record.

E. Limits on Presentations at Public Workshops. For all parts of a Public Workshop conducted on the record, the public shall be allowed an amount of time for presentations at least equal to that allowed the Applicant for its presentation.

F. Availability of Transcript. The transcript of those portions (if any) of the Public Workshop conducted on the record shall be made available to the public as part of the Public Record. The Department will make all reasonable efforts to make the transcript available within fourteen (14) calendar days of the conclusion of the Public Workshop.

Section 6. Public Record.

A. The Department shall maintain the Public Record for matters that are the subject of a public hearing. The Public Record for each type of hearing should consist of at least the following:

1. Hearing on Permit Application/Draft Permit:
 - a. The Application;
 - b. All supporting documents submitted by the Applicant;
 - c. The Draft Permit, if any;
 - d. All written comments or statements received from third parties and the Department's responses thereto;
 - e. All documents used by the Department in preparing the draft permit;
 - f. All Department memoranda concerning the draft permit, including supporting documents, if any;
 - g. The transcript of the public hearing; and
 - h. All exhibits, documents or other materials used at the public hearing and made part of the record by the Hearing Officer.

2. Regulation Adoption or Modification:
 - a. The proposed regulation or modification;
 - b. Reference to background documents relied on in the proposal, and if practical, the documents themselves;
 - c. All written comments or statements received from third parties and the Department's responses thereto;
 - d. All documents used by the Department in creating the proposed regulation or modification;
 - e. All Department memoranda concerning the proposed regulation or modification;
 - f. The transcript of the public hearing; and
 - g. All exhibits, documents or other materials used at the public hearing and made part of the record by the Hearing Officer.

3. Variance:

- a. The Application;
- b. All supporting documents submitted by the Applicant;
- c. All written comments or statements received from third parties and the Department's responses thereto;
- d. All Department memoranda concerning the proposed variance;
- e. The transcript of the public hearing; and
- f. All Exhibits, documents or other materials used at the public hearing and made part of the record by the Hearing Officer.

B. The Department shall add materials to the Public Record within five (5) business days of receipt by the Department and provide notice to the Public Notice List within twenty four (24) hours of all such additions to the Public Record.

C. The Department shall make as much of the Public Record available on-line as possible. The Department may also facilitate access to the Public Record by making photocopies available for pickup by the public upon written or telephonic request to the Department Contact Person. In all cases, the Department shall make a copy of the Public Record available for review by members of the public at the Department office closest to the location of the subject matter of the hearing. The Department shall also make a copy of the Public Record available for review or reference at the Public Hearing. The Department shall provide notice to the Public Notice List of the fact and manner of the availability of the Public Record.

Section 7. Pre-Hearing Comments.

A. Each public notice of a public hearing shall inform the public that individuals and organizations may submit written comments and questions to the Department ("Pre-Hearing Comments") by a date certain prior to the hearing and that the Department will be prepared to answer those questions at the hearing. The deadline date for submission of Pre-Hearing Comments shall be at least thirty (30) days after the latter of: (1) the issuance of the public notice (2) and the inclusion of the subject matter of the hearing in the Public Record. The Department shall set the date for the public hearing for such date after the Pre-Hearing Comment deadline that allows the Department adequate time to be able to respond fully to the Pre-Hearing Comments at the public hearing.

B. To facilitate the exchange of information and minimize duplication or repetition, the Department shall within five (5) days after receipt of any Pre-Hearing Comments provide notice to the Public Notice List of the submission of comments, including the identity of the persons or organizations that submitted the Pre-Hearing Comments and instructions on where copies of the comments may be viewed, copied, or obtained.

C. The Department shall make all Pre-Hearing Comments available to the public as part of the Public Record. The Department may also make the Pre-Hearing Comments available by making copies of the submissions available for review at a location within a reasonable

distance of the subject matter of the hearing, by providing copies to those requesting a copy from the Department, or by posting the Pre-Hearing Comments on a Department website. The public notice announcing the hearing shall provide details on how the Pre-Hearing Comments will be made available to the public.

Section 8. Public Hearing Procedures.

A. Hearing Officer. The following shall govern the conduct of the Hearing Officer:

1. No person who has any personal interest (whether financial, prior business, or prior regulatory relationship with the Applicant) in the subject matter of the hearing shall serve as Hearing Officer.
2. The Hearing Officer shall conduct the hearing in a fair and impartial manner.
3. The Hearing Officer shall have the power to:
 - a. Administer oaths and affirmation;
 - b. Rule upon motions and requests;
 - c. Admit or exclude evidence;
 - d. Hear arguments on the facts and law;
 - e. Do all acts and take all measures necessary for the maintenance of order and efficient conduct of the hearing;
 - f. Continue a hearing if the hearing cannot be completed in a single evening or for other reasons such as the unavailability of witnesses; and
 - g. Issue subpoenas to compel the attendance of witnesses or the production of documents in connection with a public hearing.

B. Time of Hearing. Public Hearings shall be scheduled during evening hours in order to maximize attendance by the public.

C. Hearing Location. Public hearings shall be held in a public building that is neutral, suitable and appropriate for such a meeting. Such public building shall be as near as possible to the location at which the activity that is the subject matter of the hearing shall take place. The Department shall utilize Department offices for public hearings only as a last resort.

D. Sign-in Sheet. At each public hearing, the Department shall provide a sign-in sheet for all persons attending the hearing. The sheet shall allow each individual the opportunity to indicate at least the following:

- * Name and organization (if any)
- * Whether the individual wants to provide comments during the hearing
- * Whether the individual wants to ask questions of the Department or Applicant during the hearing

- * Whether the individual wants to receive post-hearing communications and, if so, email or mailing address to which such information should be sent

The Hearing Officer shall use the Sign-in Sheet in connection with the conduct of the public hearing. Failure to sign in shall not preclude any person from participating in any aspect of the hearing.

E. **Hearing on the Record.** All public hearings held by the Department shall be on the record and shall be recorded by stenographic or other mechanical means. The transcript of the hearing shall be made available to the public as part of the Public Record. The Department will make all reasonable efforts to make the transcript available within fourteen (14) calendar days of the conclusion of the hearing.

F. **Structure of the Public Hearing.** All public hearings held by the Department shall utilize the following structure:

1. *Hearing Opening Procedures* -- The Hearing Officer shall bring the hearing to order. The Hearing Officer shall provide information on the subject matter of the hearing, the Sign-In Sheet, the structure and processes of the hearing, that the hearing is on the record, and that persons may obtain post-hearing information as described in these regulations.
2. *Presentation by the Department* -- A representative of the Department, with knowledge of the subject matter of the hearing and authorized by the Department to speak for and on behalf of the Department ("the Department Representative"), shall be sworn in by the Hearing Officer. The Department Representative shall be a member of Department staff or an outside consultant working for the Department, and shall speak for and on behalf of the Department at the hearing. The Department Representative shall present the Department's responses to all Pre-Hearing Comments submitted pursuant to these regulations. The presentation of these responses shall include sufficient information (either in the form of a written handout or detailed oral description) so that a reasonable member of the public could determine the identity of the commenter, the substance of the comment, and the substance of the department's response to that comment. The Department Representative may also (but is not required to) make a presentation of information concerning the subject matter of the hearing.
3. *Presentation by the Applicant* -- A representative of the Applicant, with knowledge of the subject matter of the hearing and duly authorized to speak for and on behalf of the Applicant ("the Applicant Representative"), shall be sworn in by the Hearing Officer. The Applicant Representative may (but is not required to) make a presentation of information concerning the subject matter of the hearing.
4. *Preliminary Round of Public Comments* -- Each person attending the hearing shall have the right (but not the obligation) to make one set of oral comments, not exceeding ten (10) minutes in length, during the hearing. After the Presentation by the Applicant, the Hearing Officer shall invite first all persons who indicated on the Sign-In Sheet and

then all others present to make his/her set of public comments on the subject matter of the hearing. A person may chose to defer making comments at this time, and reserve the right to make his/her comments during the Second Round of Public Comments. The Hearing Officer may, for good cause shown, grant an individual additional time for oral comment. In lieu of making oral comments, a person may submit written comments at the hearing. There shall be no limit on the length of such written comments.

5. *Questioning of the Department Representative* -- After the Preliminary Round of Public Comments is completed, the Hearing Officer shall invite those in attendance to question the Department Representative. This questioning shall be conducted under the following rules:

- a. Each person wishing to ask questions shall ask all questions he/she has.
- b. Questions shall not duplicate questions asked by another questioner. A question that seeks clarification of a response to a previous question, however, shall not be deemed duplicative.
- c. Questions shall be limited to the subject matter of the hearing. A question that seeks information about an aspect of the Applicant's operations that is not directly the subject matter of the hearing will be allowed if the information sought has a logical relationship to the subject matter of the hearing.
- d. Questions shall not be intended to harass, annoy, or ridicule the representative, the Department, or the Applicant.
- e. The Hearing Officer may, after warning the questioner and giving a chance to rephrase the question, direct the representative not to answer a question asked in violation of these rules. In warning the questioner and directing after a rephrased question, the Hearing Officer shall adequately identify the reasons why the question violates these rules. For questions deemed duplicative, the Hearing Officer shall adequately identify the question being duplicated, including the identity of the person who asked the question and the nature of the response previously given.
- f. The Department Representative shall answer each question in as full and complete a manner as possible. If the Department Representative indicates on the record that he/she does not know the information necessary to provide a full and complete answer, then the representative may consult with other personnel or contractors of the Department before answering the question.
- g. If a question in compliance with these rules cannot be answered by the Department Representative, even after consultation with other Department personnel or contractors, then the questioner shall have the right to request that the Hearing Officer open an Unanswered Question Procedure pursuant to which (a) the Department shall provide an answer in writing at a future date; (b) the

commencement of the Post-Hearing Comment period is suspended until after the answer is provided; and (c) the questioning may be continued in a supplemental hearing if upon motion to the Hearing Officer filed within five (5) days of the placing of the answer in the Public Record the questioner can demonstrate that additional new questions arise from the answer given. All materials generated as a result of an Unanswered Question Procedure shall be made part of the Public Record.

6. *Questioning of the Applicant Representative* -- After the Questioning of the Department Representative is completed, the Hearing Officer shall invite those in attendance to question the Applicant Representative. This questioning shall be conducted under the following rules:

- a. Each person wishing to ask questions shall ask all questions he/she has.
- b. Questions shall not duplicate questions asked by another questioner. A question that seeks clarification of a response to a previous question, however, shall not be deemed duplicative.
- c. Questions shall be limited to the subject matter of the hearing. A question that seeks information about an aspect of the Applicant's operations that is not directly the subject matter of the hearing will be allowed if the information sought has a logical relationship to the subject matter of the hearing.
- d. Questions shall not be intended to harass, annoy, or ridicule the representative, the Department, or the Applicant.
- e. The Hearing Officer may, after warning the questioner and giving a chance to rephrase the question, direct the representative not to answer a question asked in violation of these rules. In warning the questioner and directing after a rephrased question, the Hearing Officer shall adequately identify the reasons why the question violates these rules. For questions deemed duplicative, the Hearing Officer shall adequately identify the question being duplicated, including the identity of the person who asked the question and the nature of the response previously given.
- f. The Applicant Representative shall answer each question in as full and complete a manner as possible. If the Applicant Representative indicates on the record, that he/she does not know the information necessary to provide a full and complete answer, then the Applicant Representative may consult with other personnel or contractors of the Applicant before answering the question.
- g. If a question in compliance with these rules cannot be answered by the Applicant Representative, even after consultation with other Applicant personnel or contractors, then the questioner shall have the right to request that the Hearing Officer open an Unanswered Question Procedure pursuant to which (a) the

Applicant shall provide an answer in writing at a future date; (b) the commencement of the Post-Hearing Comment period is suspended until after the answer is provided; and (c) the questioning may be continued in a supplemental hearing if upon motion to the Hearing Officer filed within five (5) days of the answer the questioner can demonstrate that additional new questions arise from the answer given. All materials generated as a result of an Unanswered Question Procedure shall be made part of the Public Record.

7. *Second Round of Public Comments* -- After the Questioning of the Applicant Representative, the Hearing Officer shall invite first all persons who indicated on the Sign-In Sheet and then all others present who did not make comments during the Preliminary Round of Public Comments to make his/her set of public comments on the subject matter of the hearing. The Hearing Officer may, for good cause shown, grant an individual additional time for oral comment.

8. *Hearing Closing Procedures* -- After the Second Round of Public Comments is completed, the Hearing Officer shall close the hearing after explaining the Post-Hearing Procedures.

G. Rules of evidence shall be used as guidance but shall not strictly apply during the public hearing. The Hearing Officer shall have the right to exclude irrelevant, immaterial, unduly repetitions and cumulative evidence.

H. Burden of Proof. In all public hearings on draft permits, permits, and variances, the Applicant shall bear the burden of proof of showing that the draft permit, permit or variance requested satisfies all legal requirements.

I. Persons need not be represented by an attorney to participate in a public hearing. A representative of an organization (whether or not an attorney) may ask questions on behalf of his/her organization. The Department shall not deem the presentation of one's own views or those of one's organization to be the unauthorized practice of law.

Section 9. Post-Hearing Procedures.

A. *Post-Hearing Written Comments*. Within fifteen (15) days of (1) the close of the public hearing or (2) the completion of all Unanswered Question Procedures (whichever comes later), individuals and organizations may submit additional written comments on the subject matter of the hearing ("Post-Hearing Comments") to the Department. All Post-Hearing Comments shall be included in the Public Record.

B. *Department Response to Post-Hearing Comments*. The Department shall prepare and include in the Public Record responses to all Post-Hearing Comments that include sufficient information so that a reasonable member of the public could determine the identity of the commenter, the substance of the comment, and the substance of the department's response to that comment. To the extent that the Department believes a Post-Hearing comment is duplicative of

a previously submitted comment that the Department has already answered, it shall be sufficient for the Department to so indicate by specific reference to the previously-submitted question and response.

C. Post-Hearing Submissions by Applicant. If the Applicant submits any information to the Department on the subject matter of the public hearing after the hearing has closed (regardless of any outstanding Unanswered Question Procedures), such materials shall be placed in the Public Record and notice provided to the Public Notice list of such placement. For a period of twenty (20) days after placement of the materials in the Public Record and public notice of such placement, any person may submit public comments on the newly-submitted materials. Any such public comments shall be filed in the Public Record.

D. Hearing Officer Report. After the close of all Unanswered Question Procedures and comment periods on post-hearing submissions by the Applicant, the Hearing Officer shall prepare a written report on the subject matter of the hearing. The Hearing Officer Report shall be placed in the Public Record and notice of such placement shall be made to the Public Notice List.

E. Comments on Hearing Officer Report. For a period of twenty (20) calendar days after placement of the Hearing Officer Report in the Public Record and public notice of such placement, any person may submit public comments on the Hearing Officer's Report. Any such public comments shall be filed in the Public Record.

F. Secretary's Decision. After receipt of the Hearing Officer's Report and the public comments on the Hearing Officer Report, the Secretary shall make a final decision based on the record submitted to him in accordance with the law. The Secretary's decision shall be embodied in a final order that shall contain findings of fact and conclusions of law or reasons for the final determination. The Secretary's decision shall be made part of the Public Record.

E. Availability of Post-Hearing Documentation. The Department shall provide by email or mail its Response to Post-Hearing Comments, the Hearing Officer Report, the Secretary's Order, and any other post-hearing documents issued on the subject matter of the hearing by or on behalf of the Department to all persons who requested post-hearing documents on the Sign-In Sheet or who otherwise requested it in writing by the close of the Post-Hearing Written Comment period.