

Draft October 3, 2011
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL

PROCEDURAL GUIDELINES FOR
PUBLIC HEARINGS ON PERMITS AND LICENSES

Section 1. Authority of the Secretary and Overview

a) The Secretary of the Department of Natural Resources and Environmental Control (“Department”) is authorized hold a public hearing on matters pending a final decision before the Department, as provided in Title 7 of the Delaware Code. These guidelines set forth the procedures for a public hearing on a permit or license application. The Secretary may delegate the authority to preside over a public hearing to a subordinate, who may also delegate the authority to any person. The Department determines if a public hearing should be held based upon the mission and policies of the Department, the best interests of the State, and pursuant to applicable laws and regulations.

b) These Procedural Guidelines for Public Hearings on Permits and Licenses (“Guidelines”) apply only to public hearings held on permit or license applications under 7 *Del. C.* Chapters 60 (Environmental Control), 63 (Hazardous Waste Management), 66 (Wetlands), 70 (Coastal Zone Act) and 72 (Subaqueous Lands). The programs under Chapter 60 subject to these Guidelines include: Air Quality Management, Wells, National Pollutant Discharge Elimination System (NPDES), Solid Waste, Water Allocation, Solid and Hazardous Waste, Wetlands and Subaqueous Lands. The term “public hearing” in these Guidelines refers only to public hearings conducted under the authorities listed above. In public hearings on initial permits and licenses pursuant to

authorities and programs other than those listed above, a hearing officer may use these Guidelines as an advisory resource in appropriate proceedings.

c) The public hearings held pursuant to the programs listed in subsection (b) above do not fall within the scope of the procedural requirements applicable to the Department in the Delaware Administrative Procedures Act, 29 *Del. C.* Ch. 101, with the exception of public hearings under the Coastal Zone Act, which are made subject to APA by the *Regulations Governing Delaware's Coastal Zone*, Section O.4.

d) The Department intends to make these Guidelines consistent with all statutes applicable to the Department, and with the Department's regulations, but in the event that there is a conflict between these Guidelines and such statutes and regulations, the statutes and regulations control. Selected statutory provisions and sections of the Department's Regulation are cited within these Guidelines for convenience, and such citation is not to be construed as restricting any private rights independent of the legal provision cited.

e) These Guidelines are provided to give applicants and the public an overview and idea of what to expect in a public hearing. These Guidelines are advisory only, and are limited to the intentions and expectations of the Department. The Department may need to make exceptions from these Guidelines in its discretion under appropriate circumstances. Nothing in these Guidelines is intended to bind the Department or to create any due process or other rights in any persons. Many of the Guidelines are advisory to the Hearing Officer, and the Hearing Officer retains all full and due discretion to determine and tailor the best course of action under the circumstances at hand. These Guidelines are not intended to affect substantive rights.

Section 2. General Guiding Principles

a) The purpose of a public hearing is to receive and solicit comments from the public. A member of the public is not a party to the proceeding by the fact of having requested the hearing, and as such, is not entitled to rights such as the right to cross examine, provided that, in the hearing officer's discretion, questions may be presented to participants.

b) The Department will conduct its public hearings in an open and fair manner, which should encourage public participation, within reasonable time limits and other practical constraints. The Department and all other public hearing participants should respect the views and opinions expressed during the public hearing. All participants in the public hearing process, including an applicant, the public and the Department, are expected to conduct themselves with the utmost courtesy and respect for others, and to comply with the decisions and rulings of the hearing officer.

Section 3. Public Notice

a) The purpose of the public notice is to inform the public of the pending action, so that the public may request in writing a public hearing within a specified time period.

b) The public notice should occur through publication as a legal classified advertisement. This generally consists of publication in a newspaper of general circulation in each county in which the subject of the proposed notice may take place and in a newspaper of general circulation throughout the State. The legal notice will include a description of the pending action and its location. It will also provide information on

how a member of the public may contact the Department to obtain further information about how to request a public hearing.

c) The public notice should provide the public with at least 15 days from the date of publication of the legal notice to request a hearing. However, the Department may determine longer time periods may be appropriate or required to accommodate other legal requirements or as warranted by the nature of the pending action.

d) For more specific information on public notice on permit and license applications and particular legal requirements, *See 7 Del. C. §§ 6004, 6312, 6608, 7005, and 7205; Regulations Governing Solid Waste, Section 4.A.2; Title 7, Delaware Administrative Code, 1102 Air Quality Management Regulations, Section 12; Regulations Governing the Construction and Use of Wells, Section 12; Regulations Governing the Allocation of Water, Section 4.02 F and G; Regulations Governing the Control of Water Pollution, Sections 511-513; Title 7, Delaware Administrative Code, 7501 Marina Regulations, Sections 4.3.2.4 and 4.3.2.5; Title 7, Delaware Administrative Code, 7502 Wetlands Regulations, Sections 11.0; Guidance Document for the Delaware Regulations Governing the Location of Hazardous Waste Storage, Treatment, and Disposal Facilities, Section (b); and Regulations Governing Delaware's Coastal Zone, Sections N and O.*

Section 4. Request for a Public Hearing

a) A person may request a public hearing on a pending action that was the subject of a public notice, by hand-delivery, U.S. mail or e-mail, to the Department's contact person for the application, a meritorious request for a hearing, which should indicate the following: 1) a familiarity with the Department's pending action, and 2) a

reasoned statement of the probable impact of the pending action. In addition, the request should include the person's name and address, and, if available, a telephone number and e-mail address. The request for a hearing must be received by the Department on or before the time deadline specified in the public notice.

b) The Department will notify the person(s) requesting the public hearing of its decision on whether or not to hold a public hearing.

c) For each pending matter, the Department will maintain a list of persons who may be affected by the Department's final decision as an "Interested Persons List." The Department intends to include on the Interested Persons List each person who provided the Department with a name and address in order to receive Department communications on the specific pending matter. The Department may add additional names based upon a person's involvement in any preliminary or prior decisions. The Interested Persons List should include: 1) all persons who requested to be added to the Department's mailing list pursuant to a public notice or the department determined should be added due to their prior interest; 2) all persons who provided their name and address on the Interested Persons List at the public hearing or who submitted timely written comments to the Department, and 3) the person who applied for the regulatory permission that was the subject of the public hearing.

d) For more specific information on requests for public hearings on permit and license applications and particular legal requirements, *See 7 Del. C. §§ 6004, 6312, 6608, 7005, and 7205 and applicable regulations. See also Section 3.d. supra.*

e) After consultation to the extent practical with all persons requesting the public hearing and with the applicant, the Department will schedule a public hearing at a

location convenient and suitable for the public to attend and reasonably near the subject of the public hearing.

f) Section 4, subsections (a), (b), (d) and (e), are not applicable to requests for permits for manufacturing land uses and for the expansion or extension of nonconforming uses under the Coastal Zone Act because the public hearing is mandatory under 7 *Del. C.* § 7005(a).

Section 5. Informal Pre-hearing Procedures and Public Workshop

a) Public Workshop. Prior to holding a public hearing, the Department may hold one or more public workshops. The Department will make efforts to hold a public workshop, at a location and time convenient to the public, in order to allow the public to learn about the pending action in a more informal setting. The Department may provide notice of a public workshop in the same manner as notices of pending actions, except that the time for adequate notice may be reduced if warranted by time constraints. Consistent with the informal nature of the public workshop, it will not be transcribed or recorded. A Department representative will preside over a public workshop. Department and applicant representatives should answer, to the extent reasonably possible and prudent, all relevant, material, non-privileged, and not unduly burdensome, questions and requests for information at the public workshop. The Department and applicant may provide information at a later date if additional time is needed to answer a question or to provide the requested information. The Department's presiding representative at a public workshop may make a decision concerning any dispute over any information requested at a public workshop. The public workshop is a chance for the Department, the applicant, and the public to exchange information and ideas in an informal setting, with the goal of

enhancing the public's ability to make meaningful, helpful and insightful comments at the public hearing. All attendees should comport themselves accordingly. To preserve the informal setting, the public hearing will ordinarily not refer back to the proceedings of the public workshop, and documents distributed at the public workshop will ordinarily not be included in the record, provided that use of such documents in a public workshop is not by itself grounds for excluding such documents from the record.

b) Informal Pre-hearing Procedure. The Department may hold informal meetings or conference calls, prior to the public hearing, with the applicant and persons requesting the public hearing, that may seek to resolve the request for a public hearing and may employ alternative dispute resolution techniques in order to achieve a complete or partial consensus. If all persons requesting the public hearing agree to withdraw their requests, the Department may choose to not hold the public hearing, and if so, the Department will make efforts to inform the public.

Section 6. Notice of a Public Hearing

a) The Department will provide public notice of the public hearing in the manner provided in Section 3, except that the notice will allow the submission of timely written comments, including questions, if a person cannot attend the public hearing or otherwise may want to submit comments in writing.

b) The public notice also should be provided to any person entitled to receive a public notice pursuant to law or regulations, including but not limited to the applicant and all persons requesting the public hearing.

c) Written comments are to be submitted at or before the public hearing, but the time to submit written comments may be extended in the discretion of the hearing officer.

Section 7. The Hearing Officer, Conduct of the Public Hearing, and the Record

a) The Hearing Officer will open the public hearing at the designated time and place and concisely explain the nature and purpose of the public hearing and the scheduled reasonable time to conclude the hearing. The Hearing Officer will request that each person present at the public hearing identify themselves on a list of persons in attendance at the hearing. The identification should include their name and address, including e-mail address, and telephone number. The list will be used to identify public speakers and to inform the persons of the Department's final action.

b) The Hearing Officer is charged with taking and analyzing the comments and evidence, and making a Report. The Report will consist of recommended findings of fact, recommended conclusions of law, and a recommended decision. The standard of proof for each findings of fact is by a preponderance of the evidence.

c) The Hearing Officer may allow the Department and applicant to make brief introductory statements to assist in the public's understanding of the subject matter of the public hearing. The Hearing Officer may allocate time among the public speakers to allow the opportunity to hear from all public speakers within the scheduled hearing time. The Hearing Officer may arrange the order of the public speakers for the convenience of all concerned. Once all public speakers have been heard from initially, the Hearing Officer may allow the remaining time for any public speakers to speak.

d) The Hearing Officer may make rulings as needed and otherwise take action to maintain proper decorum and civility during the public hearing. The Hearing Officer may exercise discretion to exclude comments that are irrelevant, immaterial, repetitive, unduly burdensome, offensive, inappropriate, or of limited probative value, including questions or requests for information. Persons not complying with the Hearing Officer's ruling, or otherwise disrupting the public hearing, are subject to removal from the public hearing and other sanctions including criminal prosecution for disorderly conduct pursuant to *7 Del. C. § 1301*.

e) The Hearing Officer has the authority to collect and seek information to facilitate the development of a proper and informative record upon which the permit or license decision can be prudently and effectively decided. The record should include the legal notices and other underlying procedural documents, the transcript of the public hearing, and any non-privileged documents provided to the Hearing Officer, or relied upon, in making the Report. The Hearing Officer will retain custody and control of the record in such a way that the record will be available for the Secretary's review. Once the Secretary's Order is issued, the Hearing Officer will retrieve the record and retain custody and control of it until such time as it is certified and transmitted to the appropriate appellate body by the Hearing Officer or until after the time for appeal has expired. Every document in the record should be marked in sequential lettering or numbering. Every document introduced at the public hearing should be identified by the Hearing Officer on the transcript, by heading and by the person offering it.

f) Pertinent information previously determined to be confidential information and protected from public release, under the Department's Freedom of

Information Act Regulations § 6, may be considered and relied upon by the Hearing Officer and the Secretary, but will remain confidential and protected from public release. This confidential information considered and relied upon by the Hearing Officer or the Secretary will be filed under seal when the record is certified and transmitted to the appropriate appellate body by the Hearing Officer.

g) The Hearing Officer may close the record for public comments at the conclusion of the public hearing. The Hearing Officer may determine that the hearing will be continued or that the record will remain open for a certain time period in order to allow an additional written or oral comment at a continued public hearing.

h) The record may be re-opened after it has closed to allow consideration of new important information. A person may request that the record be re-opened by submitting a written request to the Hearing Officer that includes the new and important information that should be considered, and provide an adequate explanation of the reasons the information was not provided when the record was open. In the exercise of discretion, the Hearing Officer will consider whether the delay is justified balanced against the value of the information expected to be received. The Hearing Officer will determine whether the re-opening of the record requires further public notice.

i) The Hearing Officer will make his Report solely based on and relying on facts in the record. The Hearing Officer will not prejudge the matter and will consider the public comments with an open mind; The Hearing Officer will not make a final judgment on an appropriate outcome until after the close of the record.

Section 8. The Role of the Department and an Applicant

a) The applicant is expected to participate at the public hearing through the presence of knowledgeable representative(s) capable of answering relevant questions on the subject matter of the public hearing. In appropriate cases and circumstances, the Hearing Officer may need the applicant to file complex, technical testimony in writing prior to the public hearing. The applicant may appear personally or by counsel at the public hearing and produce any competent evidence on the applicant's behalf. The Department may provide the applicant with questions prior to the public hearing which may be answered at the public hearing by the applicant. The burden is on the applicant to demonstrate that the applicant has complied with and fulfilled all programmatic and other requirements to be considered for the permit or license, and that the applicant should be granted the permit or license, consistent with sound public policy and applicable statutory and regulatory directives including without limitation 7 *Del. C.* §§ 6001, 6301, 6602, 7001 and 7201.

b) The Department intends to have knowledgeable staff at the public hearing familiar with the application, who can address anticipated issues. When the subject of the public hearing is a draft document/permit/plan of the Department, Department staff will explain the basis for the draft, and a greater degree of participation by Department staff can be expected. For all other public hearings on permit applications, Department staff ordinarily will not be in a position to provide any recommendation as to the appropriate and ultimate disposition of the permit application.

c) The Hearing Officer can draw on the technical assistance of the Department's experts after the close of the record, in reviewing the record and answering technical questions and such assistance need not be included or reflected in the record.

d) The applicable Division(s) of the Department may prepare a memorandum ("Response Document"), for inclusion in the record, to assist the Hearing Officer or otherwise respond to questions or issues raised as part of the public hearing process. The Response document may explain the reasons supporting one or more positions, and may include the Division's proposed recommended action or permit.

Section 9. Issuance of a Secretary's Order

a) The Secretary will issue a final written Order as the Department's final decision, which shall be effective on the date as stated in the Order ("Order"). The Order may adopt, reject or modify, in whole or in part, the Hearing Officer's Report, or remand for further development of the record or consideration of other information or concerns.

b) The Order may direct and delegate implementation of the Order.

c) The Department intends to serve the Secretary's Order on the permit applicant, and on all person(s) who requested the public hearing, by appropriate means such as personal service or by U.S. mail or e-mail, and will otherwise serve it as required by law,

d) The Department also intends to provide notice of the issuance of the Secretary's Order by U.S. mail or e-mail, to all interested persons as determined in Section 4, List of Other Interested Persons.

e) Appeals of the Secretary's Order shall be as provided in the applicable provisions of the Delaware Code and the Department's Regulations.