

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

PROCEDURAL GUIDELINES FOR
PUBLIC HEARINGS ON PROPOSED REGULATIONS AND PLANS

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 a proposed regulation or plan, as authorized under *Section 6010 of Title 7 of the Delaware Code* and such other authorizing authority in *Title 7*. These guidelines set forth the procedures for a public hearing on a proposed regulation or plan, when such a public hearing is required to be held. The Secretary may delegate the authority to preside over a public hearing to a subordinate or any person to preside as the Department’s Hearing Officer.

b) These Procedural Guidelines for Public Hearings on Proposed Regulations (“Guidelines”) apply only to public hearings held on proposed regulations or plans required to be held by Delaware’s *Administrative Procedures Act, 29 Del C. S10101 et seq.* (“APA”). *APA Section 10161(b)* requires the Department to follow APA Subchapters I (Policy and Definitions) and II (Agency Regulations) when it promulgates a regulation.

c) *Section 10113* of the *APA* exempts the following agency actions from the notice and public hearing procedures that the *APA* otherwise requires be followed to promulgate a regulation:

- 1) Descriptions of agency organization, operations and procedures for obtaining information;

- 2) Rules of practice and procedure used by the agency;
- 3) Delegations of authority to subordinates;
- 4) Nonsubstantive changes in existing regulations to alter style or form or to correct technical errors;
- 5) Codifications of existing agency or judicial principles of decision derived from previous decisions and rulings.

d) *APA Section 10102* sets forth the following definitions, which are incorporated to the extent that apply to the promulgation of a regulation:

1) “Regulation” shall mean “any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court.” A regulation does not include the Department’s “explanation of or reasons for its decision of a case, advisory ruling or opinion given in a hypothetical or other state fact situation or terms of an injunctive order or license.”

2) “Substantive” or “substantive in nature” means, “when used in connection with regulations, those regulations allowing, requiring, or forbidding conduct in which private persons are otherwise free or prohibited to engage, or regulations which state requirements, other than procedural, for obtaining, retaining or renewing a license or any kind of benefit or recompense.”

e) The Department defines “public hearing” in these Guidelines as to only to on-the-record public hearings conducted under the Department’s authority to issue a regulation or approve a plan under the Department’s applicable statutory authority. 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.

f) 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 on a proposed regulation is to provide the public an opportunity to be heard, and conversely for the Department to hear or consider comments from the public. A member of the public is not a party to the proceeding, except a proponent of a proposed regulation shall be entitled to present support for a

proposed regulation, subject to reasonable time limits. A participant in a hearing is not entitled to rights such as the right to cross examine, provided that, in the hearing officer's discretion, questions may be asked and subject to answer by the Department at the hearing officer's discretion.

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 observers, public speakers, 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 of a Proposed Regulation

a) The purpose of the public notice is to inform the public of the pending regulation so that the public may provide timely comments on the proposed regulation. The public notice should conform to the legal requirements for a public notice of a proposed regulation, as established by and published in the Delaware *Register of Regulations*.

b) The public notice should occur through publication as a legal classified advertisement and in the Delaware *Register of Regulations*. This generally consists of publication in a newspaper of general circulation in each county in which the subject of the proposed regulation may take place and in a newspaper of general circulation throughout the State. The legal notice will include a brief but reasonably accurate summary of the proposed regulation. It will also provide information on how a member

of the public may contact the Department to obtain further information about the proposed regulation.

c) The Department's public notice should be published at least twenty (20) days in advance of the scheduled public hearing. The publication may provide more notice when the Department determines such increased notice is either appropriate under the circumstances, or is required by the law or regulation.

Section 4. Informal Pre-hearing Procedures and Public Workshop

a) 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 proposed regulation in a more informal setting than a public hearing. 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 normally may not be transcribed or recorded. A Department representative will preside over a public workshop in order to facilitate its conduct and the representative may be the hearing officer who presides over the public hearing. 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 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) The Department may hold informal meetings or conference calls, prior to the public hearing, with interested persons in order to review any issues informally.

Section 5. Notice of a Public Hearing on a Proposed Regulation

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.

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 consideration of the public comments, and provide a reasonable explanation of the proposed regulation, or amended proposed regulation, if the hearing officer recommends adoption of the proposed regulation or amended proposed regulation as a final regulation. The recommendation of an amendment to the proposed regulation should provide an explanation of whether the amendment is substantive change that will require a further public notice and public hearing, if the Hearing Officer's recommendation is adopted by the Secretary.

c) The proponent of a proposed regulation is entitled to develop an administrative record to support the proposed regulation, subject to reasonable time limits established by the Hearing Officer.

d) 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.

e) 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*.

f) The Hearing Officer has the authority to collect and seek information to facilitate the development of a proper and informative record upon which the proposed regulation 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.

g) 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.

h) The Hearing Officer may close the record for public comments at the conclusion of the public hearing unless the public notice provides for a later date. 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.

i) 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.

j) The Hearing Officer will make his Report solely based on and relying on a record of decision that the hearing officer develops for the Secretary and shall include the public hearing record, the hearing officer's personal inspection and investigation of sites and facilities, and discussions and documents that may not be in the public hearing record. The promulgation of a regulation is a legislative function under the General

Assembly's delegation of authority to promulgate rules and regulations to administer statutes. The Hearing Officer will not make a final decision on a proposed regulation until after the close of the public comment period.

k) The Department intends to have knowledgeable staff at the public hearing familiar with the proposed regulation, who can address anticipated issues. The Hearing Officer can draw on the technical assistance of the Department's experts after the close of the public hearing. The Hearing Officer may request assistance from the applicable Division(s) of the Department, which may include the post-hearing submission of a memorandum ("Response Document") or other document, for inclusion in the record of decision, in order 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 experts' recommended amendments to the proposed regulation upon consideration of the public comments or other new information.

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 public participants 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.

f) The Department will utilize its administrative steps as outlined in the Department's internal policy set forth in the Regulatory Development Policy.