

LOUIS L. REDDING CITY COUNTY BUILDING
8TH FLOOR



800 N. FRENCH STREET
WILMINGTON, DELAWARE 19801
(302) 395-8383
(302) 395-8385 FAX

COUNCIL

August 13, 2020

**SUBMITTED VIA EMAIL AND
DNREC ONLINE PORTAL**

Department of Natural Resources and Environmental Control
Attn: Lisa Vest
Hearing Officer
The Richardson & Robbins Building
89 Kings Highway, Dover, DE 19901
lisa.vest@delaware.gov
DNRECHearingComments@delaware.gov
<https://dnrec.alpha.delaware.gov/public-hearings/comment-form/>

RE: Application of Croda, Inc. for a Construction Permit, Docket # 2020-P-A-0018

Dear Ms. Vest:

We write to you regarding the virtual public hearing held by the Department of Natural Resources and Environmental Control ("DNREC") on July 21, 2020 (the "Hearing") regarding the application of Croda, Inc. ("Croda") for a construction permit. The Hearing was invalid for the reasons noted below. As such, we are hereby requesting that a hearing that properly conforms with the requirements of a "public hearing," which at a minimum provides for contemporaneous participation and interaction between the public and DNREC, be scheduled. Related thereto, we are submitting this letter memorandum as part of public comment in the above-captioned Docket.

**I. DNREC's Hearing Without Contemporaneous Oral Public Comment
Violated Governor Carney's Proclamation # 17-3292**

Governor Carney issued Proclamation #17-3292 (the "Proclamation") on or about March 13, 2020. The purpose of the Proclamation was to allow for virtual, instead of personal, meetings in the interest of protecting citizens of the State from the public health threat of COVID-19. *See* Proclamation.

Specifically, the Proclamation, at paragraph 1, provides that all meetings of public bodies governed by 29 *Del. C.* Section 10001, et seq., may be conducted electronically by means of telephone or videoconference. The Proclamation further provides that, once the public body has decided to conduct a meeting electronically, the public body must comply with the requirements for a public hearing set forth in paragraphs 2. – 6. of the Proclamation, which follow:

2. The technology used must permit members of the public body to hear the comments of and speak to all those participating, **and members of the public to hear the comments of and speak to such members of the public body contemporaneously.** Public participants must also be permitted to electronically access presentation materials and submit questions or comments.

3. During any public meeting conducted by electronic means, each member of the public body will identify him or herself before speaking **so that members of the public are able to hear the comments of the members of the public body.**
4. Notice requirements of public meetings will continue as required by law and will include the electronic information necessary for participation.
5. Meetings already noticed shall be updated as soon as practicable with the information necessary for members and the public to participate electronically.
6. **All other rules and procedures applicable to public meetings shall be followed.**

Governor Carney's Proclamation (emphasis added)

The Proclamation applies to DNREC as a "public body." Furthermore, paragraph 6 of the Proclamation, as discussed further in Part V., ensured that all existing rules and procedures applicable to public meetings of a public body like DNREC remain in effect despite that meetings could now be held virtually.

a. DNREC is a "Public Body"

The Proclamation applies to each "public body" governed by 29 *Del. C.* §§ 10001, et seq. DNREC qualifies as a "public body" under 29 *Del. C.* § 10002(h), which very broadly provides that:

"Public body" means... any regulatory, administrative, advisory, executive, ... body of the State... including, but not limited to, any... department, agency, committee... council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

As identified above, 29 *Del. C.* § 10002(h) refers to the appointment of any entity, body, or public official who is impliedly or specifically charged by any other public official to advise or to make reports, investigations, or recommendations. Related to this, DNREC Secretary Garvin, as a "public official of the State," appointed you as the hearing officer to investigate this matter, make a report, and make a recommendation regarding Croda's permit application. These actions fall within the scope of 29 *Del. C.* § 10002(h)(3). Accordingly, DNREC is a "public body."

b. The Public Hearing Qualified as a "Public Meeting"

The public hearing on Croda's permit application satisfies the definition of "meeting," as set forth at 29 *Del. C.* § 10002(g). In relevant part, Section 10002(g) defines "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing."

The public hearing on Croda's permit application, like permit applications generally, involved the *discussion* of DNREC's responsibility to review permit applications. In addition, the Hearing on Croda's permit application included *taking action* by addressing the public hearing and public comment aspect related to a permit application. As such, the Hearing that was conducted by a DNREC hearing

officer, appointed by the Secretary of DNREC, was a “public meeting” of a “public body” governed by 29 *Del. C.* §§ 10001, et seq. Consequently, the hearing was subject to the requirements of the Proclamation (in addition to further requirements discussed below).

The public hearing on Croda’s permit application did not allow for contemporaneous oral comment during the Hearing. Consequently, DNREC failed to satisfy the obligations placed on it for a public meeting by the Proclamation. In particular, the hearing failed to allow for oral comment by the public and the public was unable to hear the comments of and speak to all those participating during the Hearing, contemporaneously. The above violated the express requirement in the Proclamation at paragraph 2 that “[t]he technology used must permit members of the public body to hear the comments of and speak to all those participating, and members of the public to hear the comments of and speak to such members of the public body contemporaneously.” In effect, DNREC permitted members of the public to virtually attend the hearing in individual, isolated “silos,” unaware that there were other members of the public in the virtual meeting. This is inconsistent with precedent for DNREC hearings (discussed below in Section IV.) and contrary to the intent of the Proclamation to provide for public participation and interaction between members of the public and the public body during the Hearing.

II. DNREC’s Public Hearing Without Contemporaneous Oral Public Comment Violated the Governor’s Declaration of a State of Emergency

In addition to the Proclamation, Governor Carney issued a *Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (the “Emergency Declaration”). Although they contain non-substantive differences in language, the Proclamation and the Emergency Declaration are consistent in the obligations they placed on a “public body” that chooses to conduct a virtual public hearing. In relevant part, the Emergency Declaration established that:

5. ... all public meetings of executive branch public bodies governed by 29 *Del. C.* §§ 10001 et seq. ... may be conducted electronically, either by means of telephone conference call or video-conference call. *The technology used must permit members of the public body to hear the comments of and speak to all those participating, and members of the public to hear the comments of and speak to such members of the public body contemporaneously.* Public participants must also be permitted to electronically access presentation materials and submit questions or comments. During any public meeting conducted by electronic means, each member of the public body will identify him or herself before speaking so that members of the public are able to hear the comments of the members of the public body...

Emergency Declaration, para. 5 (emphasis added)

Notably, Governor Carney has modified the Emergency Declaration many times. Importantly, however, the Governor has not altered paragraph 5 (above). In one of the many modifications to the Emergency Declaration, the Governor authorized public meetings of a public body governed by 29 *Del. C.* §§ 10001, et seq., to be conducted in person in public buildings so long as attendees’ safety could be ensured. See *Twentieth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (the “20th Modification”).

Notwithstanding the allowance for in-person public meetings, the 20th Modification encouraged public bodies “to conduct meetings electronically, either by means of telephone conference call or video conference call...” See 20th Modification, ¶E.1. The 20th Modification also established that the Emergency Declaration had the force of law (declaring that: “[t]his Order has the force and effect of law. Any failure to comply with the provisions contained in a Declaration of a State of Emergency or any modification

to a Declaration of the State of Emergency may constitute a criminal offense...”).

The Emergency Declaration was extended for an additional 30 days on August 5, 2020. As such, the Emergency Declaration has been in place since enacted on March 12, 2020 through the time of the Hearing (and continues to present). Thus, the obligations placed on public bodies by the Emergency Declaration applied to DNREC as of the Hearing.

As discussed above in Section I., DNREC is a “public body” governed by 29 *Del. C.* §§ 10001, et seq. As further discussed in Section I, the Hearing was a “public meeting” governed by 29 *Del. C.* §§ 10001, et seq. Consequently, DNREC and the Hearing were subject to the requirements of the Emergency Declaration.

Despite being subject to the requirements of the Emergency Declaration, the Hearing on Croda’s permit application did not allow for public interaction or oral comment by the public during the Hearing. This was in contravention to the Emergency Declaration, ¶ 5, that establishes that “[t]he technology used must permit members of the public body to hear the comments of and speak to all those participating, and members of the public to hear the comments of and speak to such members of the public body contemporaneously.”

III. DNREC’s Public Hearing on Croda’s Permit Application Without Contemporaneous Oral Public Comment Violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001, et seq.

As discussed above, the Emergency Declaration, at Paragraph 5, provides for video-conferencing of public meetings. This provision is subject to and must be read consistent with the requirements provided for under the Delaware Freedom of Information Act. In particular, 29 *Del. C.* § 10006 allows a public body to hold a public meeting via video-conference pursuant to certain conditions, as follows:

During meetings where video-conferencing is used, each member must be identified, all participants shall be able to communicate with each other at the same time, and members of the public attending at the noticed public location or locations of the meeting must be able to hear and view the communication among all members of the public body participating by video- conference.

29 *Del. C.* § 10006 (emphasis added).

Section 10006 expressly controls the conduct of a public hearing held by DNREC by means of video-conference. The Governor’s Proclamation mandated that the procedures established by Section 10006 shall be followed. DNREC’s failure to allow members of the public to orally comment at the same time (*i.e.*, contemporaneously), and to communicate, during the Hearing on Croda’s permit application is in violation of 29 *Del. C.* § 10006.

IV. DNREC’s Public Hearing Regarding Croda’s Permit Application Without Contemporaneous and Interactive Oral Public Comment Violated DNREC’s Regulations

a. The Public Hearing Was Contrary to DNREC’s Precedent for Public Hearings

According to DNREC’s regulations, the purpose of a public hearing is to provide a formal platform for the public to hear details regarding a particular topic and to comment on that matter. *See* Department of Natural Resources and Environmental Control, *Public Comment Protocol*, <https://dnrec.alpha.delaware.gov/public-hearings/comments/>

Historically, DNREC has interpreted the above procedure to allow the public to gather in one location and for the public to provide oral commentary to DNREC, allowing for communication, back and forth, during the public hearing. This process has been in place for years. Neither the Emergency Declaration nor the Proclamation altered this precedent. Notwithstanding this, DNREC apparently has chosen to disregard this precedent. This is problematic especially given that the Proclamation (at paragraph 6) expressly mandated that existing “procedures applicable to public meetings shall be followed.”

Contrary to precedent, DNREC now allows only for submission of *written* comments during the public comment period for any matter. This new process does not allow the public to orally comment, or to hear “live” comments, questions, or concerns, which often lead to additional questions or concerns, and thus allow for a robust hearing.

The changes to the process are inconsistent with DNREC’s traditional meaning of and standards for a “public hearing.” In contrast to its current interpretation, DNREC has traditionally allowed for dialogue between the public and DNREC during the public hearing. Related to this point, in *Kearney v. Coastal Zone Indus. Control Bd.*, the Superior Court described a standard hearing by DNREC as being comprised of the following: “a **standard public hearing**, [is a hearing] during which documents regarding the permit were submitted into the record, [representatives for the applicant] again explained the project, and members of the public [contemporaneously] asked questions, made statements and submitted written comments.” *Kearney v. Coastal Zone Indus. Control Bd.*, 2005 Del. Super. LEXIS 454, 5-6 (Del. Super. Ct. Mar. 18, 2005)(emphasis added).

The Court’s description of the hearing indicates that the public’s questions and oral statements occurred contemporaneous with the applicant’s explanation of the project during the hearing. As the Court discussed, the standard for a public hearing by DNREC, includes questions and oral statements by the public during the hearing.

The Emergency Declaration and Proclamation simply authorized DNREC to continue holding public meetings in-person, if attendees’ safety could be ensured. However, if safety was a concern due to COVID-19, then DNREC was authorized to conduct virtual public meetings subject to the obligations under the Emergency Declaration and the Proclamation. The Emergency Declaration and the Proclamation did not alter DNREC’s procedures for public hearings. In fact, the Proclamation mandated that the standard procedures for a public hearing by DNREC, providing for open and contemporaneous comments during the hearing, shall continue to be followed. *See* Proclamation, ¶ 6. This did not occur, in violation of DNREC’s obligations under the Proclamation.

b. The Public Hearing Violated DNREC’s Regulations

DNREC’s Regulation 12.0 *Public Participation* expressly governs public participation in a hearing (and comment thereto) related to an air permit application. Specifically, 7 *Del. Admin. C.* 1102, § 12.2 establishes that “[u]pon receipt of... a permit application, in proper form, the Department shall provide for public participation and comment by:”

...

12.2.4 Holding, if the Department receives a meritorious request for a hearing within 15 calendar days of the date of the advertisement described in 12.2.2 of this regulation, or if the Department deems it to be in the best interest of the State to do so, a public hearing on an application for **interested persons to appear and submit written or oral comments** on the air quality impact of the proposed action.

7 *Del. Admin. C.* 1102, § 12.2.4 (emphasis added).

Accordingly, when a public hearing is held on an air permit application, as here, DNREC's Regulations at 7 *Del. Admin. C.* 1102 § 12.2.4 expressly require that the public be permitted to participate in the hearing and to orally comment at the hearing. In violation of its own Regulations, DNREC did not permit the public to do so. Consequently, any action taken by DNREC to grant the application is invalid. *See, e.g., B.W. Elec., Inc. v. Gilliam-Johnson*, 2019 Del. Super. LEXIS 173, *12-13 (Super. Ct. Apr. 4, 2019)

Conclusion

The public hearing held by DNREC on Croda's permit application, without allowing for members of the public to participate in and to make contemporaneous oral comment during the Hearing, was in violation of the Proclamation, the Emergency Declaration, 29 *Del. C.* §§ 10001, et seq., and DNREC's own Regulations and related precedent. Consequently, the public hearing on Croda's permit application was invalid, and any permit that may be issued in reliance thereon is subject to being reversed.

We respectfully request that this letter memorandum be placed in the record for Croda's permit application in the above Docket. In addition, we request that a hearing be held that complies with DNREC'S legal obligations for a public hearing.

Very Truly Yours,

/s/ Jea Street

Councilman Jea Street

/s/ David Carter

Councilman David Carter

/s/ Penrose Hollins

President Pro Tempore
Penrose Hollins

/s/ George Smiley

Councilman George Smiley

/s/ Karen Hartley-Nagle

Council President Karen
Hartley-Nagle

/s/ Dee Durham

Councilwoman Dee Durham

/s/ Michael P. Migliore, Esq.

Michael P. Migliore