SAPA and Fair Hearings: NYC DEC Permitting and Enforcement Hearings

Hon. James T. McClymonds
Chief Administrative Law Judges, NYS DEC

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
OFFICE OF HEARINGS AND MEDIATION SERVICES

DEC HEARING PROCEDURES

James T. McClymonds
Chief Administrative Law Judge

I. INTRODUCTION

A. Background: DEC's Jurisdiction

1. Policy: to conserve, improve and protect the State's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the State and their overall economic and social well being (Environmental Conservation Law [ECL] § 1-0101[1])

2. Environmental Conservation Law (ECL) -- Chapter 43-B of the Consolidated Laws of New York

3. Federal Clean Water Act and Clean Air Act

4. Other statutes: Navigation Law; Public Service Law article 10

5. Department's Regulations: Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

B. Department of Environmental Conservation (DEC): Overview
-- see Appendix A

1. Nine DEC Regions: Regional Staff
2. Central Office
3. Office of General Counsel
4. Office of Hearings and Mediation Services (OHMS)

C. DEC Office of Hearings and Mediation Services: Key Players

1. Commissioner of Environmental Conservation

2. Administrative Law Judges (Environmental Impact Examiners)
   a. Separate from Department staff; the ALJ is the Commissioner's representative in complying with procedural and substantive statutory and regulatory mandates
      -- see Matter of Bath Petroleum Storage, Inc., ALJ Ruling, Dec. 10, 2004, at 4-5
   b. Vested with broad powers to manage and conduct proceedings, and rule on motions, requests, and issues presented for decision
   c. Executive Order 131 -- ALJ independence
   d. Ex parte communication rules
      -- see 6 NYCRR 622.16; 6 NYCRR 624.10

3. Deputy Commissioner for Hearings and Mediation Services; Chief Administrative Law Judge (Supervising Envtl. Impact Examiner); Hearings Counsel

D. Applicable DEC Hearing Regulations: State Administrative Procedure Act (SAPA) Article 3 Adjudicatory Proceedings

1. Uniform Enforcement Hearing Procedures (6 NYCRR part 622)

2. Permit Hearing Procedures (6 NYCRR part 624)
   -- see also Public Service Law article 10 (16 NYCRR Part 1000)

3. Miscellaneous Procedures (not covered here)
   a. Freedom of Information Law (FOIL) (see Public Officers Law article 6; 6 NYCRR part 616)

   b. Mediation: Including settlement conferences pursuant to 6 NYCRR 621.9

II. PART 622 -- UNIFORM ENFORCEMENT HEARING PROCEDURES

A. General Background: Application

1. Quasi-criminal in nature; CPLR-like civil proceedings; results in imposition of civil penalties and remedial obligations
-- see ECL article 71; 6 NYCRR 622.1

2. Department initiated -- generally two parties: DEC staff attorney as prosecutor; respondents

3. Alleged violation of ECL, regulations, and permits, certificates or orders issued by DEC; adjudication of past acts

4. Scope of proceedings: determine liability, impose penalties, permit revocation, and remedial action

5. ALJ's Role -- Trier of Fact: develop record, draft hearing report based upon record, make recommendations to the Commissioner

B. Initiation of Proceedings

1. Commencement of Proceedings

a. Notice of Hearing and Complaint (see 6 NYCRR 622.3[a])

b. Motion for Order Without Hearing (in lieu of or in addition to complaint) (see 6 NYCRR 622.12)

c. Notice of Intent To Modify, Suspend or Revoke an existing permit, where violation of law alleged (see 6 NYCRR 622.3[b][2]; 6 NYCRR 621.13)

d. Summary abatement and summary suspension orders (see 6 NYCRR 622.14; 6 NYCRR part 620) (imminent danger to health or welfare of the people or irreversible or irreparable damage to natural resource [ECL 71-0301])

2. Answer/Response to Motion for Order Without Hearing (20 days) (see 6 NYCRR 622.4; 6 NYCRR 622.12[c])
   -- Answers are filed with staff
   -- Responses to motions for order without hearing are filed with staff and Chief ALJ
   -- Extension requests made first to staff; inform the Chief ALJ if granted. If denied, may make application to Chief ALJ.

3. Methods of Service of Complaint (see 6 NYCRR 622.3[a][3])
   -- Personal service consistent with CPLR
   -- Certified Mail/complete upon receipt

4. Pre-Hearing Conference: Staff initiated; OHMS not involved (see 6 NYCRR 622.8)
   -- Opportunity to resolve, define, and clarify issues between parties before hearing

5. Discovery (see 6 NYCRR 622.7)
   -- Governed by CPLR article 31
   -- Bills of particulars not allowed; depositions only by leave

C. Referral to OHMS

1. Statement of Readiness for Adjudicatory Hearing (see 6 NYCRR 622.9)
   a. Staff initiated
   b. Discovery complete (see 6 NYCRR 622.7)
   c. Reasonable attempt has been made to settle

2. Staff initiated Motions for Order Without Hearing/Default Judgment

3. Other Motions (Staff and Respondent initiated) (see 6 NYCRR 622.6[c] [Motion practice])
   a. Motions addressed to the pleadings
      -- Motion for more definite statement of the complaint (within 10 days of completion of service of complaint) (see 6 NYCRR 622.4[e])
      -- Motions to Clarify or Dismiss Affirmative Defenses (see Matter of Truisi, Chief ALJ Ruling on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010)
      -- Motions to Dismiss the Complaint (see Matter of Estate of Ryan, Ruling of the Chief ALJ on Motion to Dismiss, Oct. 15, 2010, at 11 [failure to state a claim]; Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014, at 10 [defense based on documentary evidence])
   b. Discovery motions (see 6 NYCRR 622.7)
   c. If no ALJ assigned, motions made to Chief ALJ (see 6 NYCRR 622.6[c][1])

4. Assignment of ALJ; Assignment letter

5. Notice of Enforcement Hearing (see 6 NYCRR 622.9[e])

D. Conduct of Hearings

1. Date and Location: Date by agreement of parties; usually located in DEC Regional Office where violation allegedly occurred.

2. ALJ has broad authority to conduct hearing, including subpoena power (see 6 NYCRR 622.10[b])
   -- Subpoena duces tecum to be served on State or local government official, see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Discovery Requests, Dec. 11, 2013, at 4-5.

3. Trial-like proceedings: Opening statements; presentation of sworn witnesses and documentary evidence; direct and cross examination; closing statements (see 6 NYCRR 622.10[a]; 6 NYCRR 622.11[a])

4. Burden of Proof (see 6 NYCRR 622.11[b])
   -- Department staff has burden of proving all charges
   -- Respondent has burden of proving all affirmative defenses

5. Standard of Proof (see 6 NYCRR 622.11[c])
   -- preponderance of the evidence
   -- hearsay not per se inadmissible; goes to weight of evidence (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008)

6. Stipulations (see 6 NYCRR 622.18[c])
   -- Removes issues from proceeding
   -- Stipulation on all charges results in termination of proceedings with no further action (see Organization and Delegation Memorandum 94-13, “Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings” [May 5, 1994])

E. Post-Hearing Proceedings

1. Closing Briefs and Replies: if allowed by ALJ (see 6 NYCRR 622.10[a][5])

2. Close of Record -- Upon ALJ's receipt of stenographic record, submission of additional materials agreed to at hearing, briefs or replies, whichever occurs last

3. ALJ's Hearing Report -- 45 days after close of record. Usually not issued until Commissioner's order. Contains findings of fact, conclusions of law, and recommendations on penalty, remediation and all other issues before ALJ (see 6 NYCRR 622.18[a])

4. Recommended Decision – ALJ's hearing report may be issued as recommended decision. Additional comment period (see 6 NYCRR 622.18[a][2], [3])

5. Commissioner's Order/Decision and Order -- 60 days after close of record, or 30 days after comments due on recommended decision if one issued. Commissioner's order contains:
   a. Findings of fact and conclusions of law, or reasons for final decision
   b. Finding of liability or dismissal of charges
   c. Assessment of penalties and other sanctions
   d. Direction for abatement or restoration or provision of financial security (see 6 NYCRR 622.18[e])

6. Distribution of Commissioner's Order

F. Summary Procedures

1. Motion for Default Judgment (6 NYCRR 622.15)
   -- see Matter of Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006 (standards)
   -- see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 2-3 (proof of facts sufficient to support the claim charged); Matter of Samber Holding Corp., Order of the Commissioner, March 12, 2018, at 1 (proof of facts must be sufficient to enable ALJ and Commissioner to determine that staff has a viable claim)
   -- Notice of motion for default judgment to be provided to respondent (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009, at 1-2)
   -- Consistent with CPLR 3215(g)(4), additional service of complaint on corporation (see Matter of Milu, Inc., Order of the Commissioner, May 25, 2007, at 1)

2. Motion for Order Without Hearing (6 NYCRR 622.12)
   -- administrative equivalent of summary judgment (see Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003)
   -- Sufficiency of evidence on summary judgment, see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008
   -- for example of unopposed motions, see Matter of Hornburg, Commissioner Order, Aug. 26, 2004, adopting Chief ALJ Ruling/Hearing Report, at 10

3. Summary Abatement/Suspension Proceedings (6 NYCRR 622.14; 6 NYCRR part 620)
   -- condition or activity presents an imminent danger to health or welfare, or results in or is likely to result in irreversible or irreparable damage to natural resources (see 6 NYCRR 620.2[a])
   -- DEC staff's burden of persuasion; respondent's burden of production to prove condition or activities do not come within section 620.2(a)

4. Expedited Enforcement Proceeding
   -- SPDES Discharge Monitoring Report (DMR) violations; Petroleum Bulk Storage (PBS) registration violations; Hunting Related Shooting Incident (HRSI) license revocation hearings
   -- Default hearing

G. Part 622 Appeals

1. Expedited Interlocutory Appeals: during proceedings, only by leave of the Commissioner, except motions for recusal of ALJ (see 6 NYCRR 622.10[d][2]; 6 NYCRR 622.6[e] [time periods]). Movant must demonstrate:
   a. failure to decide the appeal would be unduly prejudicial to one of the parties, or
   b. would result in significant inefficiency in hearing process (see 6 NYCRR 622.10[d][2][ii])

2. At conclusion of hearing (see 6 NYCRR 622.10[d][1])
   -- In final brief, if provided for
   -- By motion

III. PART 624 -- PERMIT HEARING PROCEDURES

A. General Background

1. Decision to invoke DEC's permit hearing procedure shifts decision making concerning permit issuance from Department staff to the Commissioner

2. Purpose -- To develop a record for informed decision making by the Commissioner

3. Scope -- To resolve issues concerning a proposed project's compliance with statutory and regulatory permit requirements

4. Applicability -- Applicable to virtually all permits administered by DEC. Governs permit issuance, renewal, modification, suspension and revocation, except where enforcement is involved (see 6 NYCRR 624.1)

5. Public participation component -- Pursuant to provisions of ECL 70-0119, designed for public participation and multiple parties. Legislative hearing and issues conference: unlike any other civil proceedings (but see Public Service Law article 10) Parties:
   -- Department staff
   -- Applicant/permittee
   -- Intervenors

6. Relationship to review under State Environmental Quality Review Act (ECL article 8 [SEQRA]) -- Review of SEQRA issues in hearing generally limited; review of sufficiency of draft environmental impact statement (DEIS), if one was prepared

B. Pre-Referral Administrative Procedures: Uniform Procedures Act (ECL article 70) and Regulations (6 NYCRR part 621)

1. Permit application submittal; SEQRA determination of significance; preparation of DEIS, if required; preparation of draft permit or letter indicating grounds for denial of permit

2. Hearing referral determination

   a. By staff: where staff review or public comments raises substantive and significant issues (see 6 NYCRR 621.8[b])
      -- Staff may use a Part 621 Legislative Hearing to determine whether to refer for adjudicatory hearings

   b. By applicant/permittee: Applicant may request a hearing based upon denial of permit, modification of project, or imposition of significant conditions (see 6 NYCRR 621.10[a][1], [2]; 621.11[g]; 621.13[d])

3. Hearings Request -- Submitted by staff to Chief ALJ, together with a copy of the filed application and supporting documents, the DEIS or negative declaration as appropriate, and a copy of filed correspondence from applicant and public

C. Post-Referral, Pre-Hearing Proceedings

1. Assignment of ALJ by Chief ALJ; Assignment Letter

2. Notice of Public Hearing (see 6 NYCRR 624.3)
   -- Published at least 21 to 30 days prior to hearing, depending on permit; establishes comment period and party-status petition deadline. Published in:
   a. Environmental Notice Bulletin (ENB; located at http://www.dec.ny.gov/enb/enb.html)
   b. At least one newspaper of general circulation in project area
   c. Sent to CEO of municipality in which project proposed
   d. Sent to persons who filed responses to notice of complete application, if any
   e. Sent to anyone believed to have an interest
   f. Hearing location usually in community where project proposed; cost born by applicant unless Department-initiated proceeding

3. Pre-Issues Conference Discovery: Absent extraordinary circumstances, limited to Freedom of Information Law (FOIL) requests (see 6 NYCRR 624.7[a])

D. Legislative Public Hearings: Opportunity for Public Comment (see 6 NYCRR 624.4[a])

1. Public comment on permit application -- not evidence, but may provide basis for further inquiry by ALJ during issues conference
2. Public comment on DEIS, if applicable
3. Written or oral comments accepted

E. Issues Conference: Identify Parties and Narrow Issues for Adjudication (see 6 NYCRR 624.4[b])

1. Purpose -- To limit and define subject matter of adjudicatory hearing; determine party status; identify factual issues requiring hearing; argue issues of law; determine pending motions (see 6 NYCRR 624.4[b][2]); similar to summary judgment, but without evidentiary proof (see Matter of Hyland Facility Assocs., Commissioner Third Interim Decision, Aug. 20, 1992, at 1-2)

2. Outcome: ALJ's Issues Ruling -- 30 days after close of issues conference record
   -- If no adjudicable issues, ALJ cancels hearing and directs staff to continue processing permit application

3. Adjudicable Issues -- Substantive and Significant Standard
   a. Adjudicable Issues -- An issue is adjudicable if:
      i. relates to a dispute between staff and applicant over a substantial term or condition of the draft permit;
      ii. relates to matter relied upon by staff as a basis to deny the permit and is contested by applicant; or
      iii. proposed by a potential party (intervenor) and is substantive and significant (see 6 NYCRR 624.4[c][1])

   b. Substantive – "sufficient doubt" about applicant's ability to meet statutory or regulatory criteria "such that a reasonable person would inquire further" (6 NYCRR 624.4[c][2])

   c. Significant – "has potential to result" in permit denial, major modification to proposed project, or imposition of significant permit

conditions in addition to those in the draft permit (6 NYCRR 624.4[c][3])

4. SEQRA Issues -- DEC lead agency or no coordinated review (see 6 NYCRR 624.4[c][6])
   a. Staff determination not to require preparation of EIS -- irrational or error of law standard (see Matter of Metro Recycling and Crushing, Inc., Decision of the Acting Commissioner, April 21, 2005, at 5-6).
   b. Sufficiency of DEIS
   c. Ability to make SEQRA findings as required by 6 NYCRR 617.11

5. Burdens of Persuasion
   a. Where staff and applicant disagree, issue by definition adjudicable

   b. Where staff finds component of applicant's project, as proposed or conditioned by draft permit, conforms to all applicable requirements of statute and regulations, burden of persuasion upon potential party proposing any issue related to that component to demonstrate that it is both substantive and significant (see 6 NYCRR 624.4[c][4])

   c. Offers of proof: Proposed intervenors seeking full party status must support their petition with an adequate offer of proof (see 6 NYCRR 624.5[b][2][ii]). Offer of proof should:
      -- specify witnesses and the nature of and bases for those witnesses' testimony

      -- identify documentary and other evidence to be presented

      -- see Matter of St. Lawrence Cement Co., LLC, Second Interim Decision of the Commissioner, Sept. 8, 2004, at 93-95 [discussing offers of expert testimony]; Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2; Matter of Hydra-Co. Generations Inc., Interim Decision of the Commissioner, April 1, 1988, at 2-3; Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2.

6. Party Status
   a. Staff and Applicant -- designated by regulations as full parties

   b. Other parties -- must apply for party status in writing by date established in notice of hearing.

i. Full party status -- successfully raise a substantial and significant issue for adjudication, or demonstrate an ability to contribute meaningfully to an issue raised by another party (see 6 NYCRR 624.5[d][1]). Full rights as party.
ii. Amicus status -- identify a legal or policy issue that needs to be resolved by the hearing (see NYCRR 624.5[d][2]). Right to file brief.
iii. Contents of petitions, see 6 NYCRR 624.5(b)

F. Expedited Appeals to Commissioner

1. Expedited Appeals as of right (see 6 NYCRR 624.8[d][2]; 624.6[e])
   a. ruling to include or exclude an issue for adjudication
   b. ruling on merits of legal issue as part of issues ruling
   c. ruling affecting party status
   d. denial of motion for recusal

2. Expedited Appeals by Leave -- discretionary with Commissioner (see 6 NYCRR 624.8[d][2][v])
   a. Any other ruling of the ALJ
   b. Movant must demonstrate:
      i. failure to decide the appeal would be unduly prejudicial to one of the parties, or
      ii. would result in significant inefficiency in hearing process

3. Appeals after completion of all testimony -- in final brief or by motion where no final brief provided for (see 6 NYCRR 624.8[d][1])

G. Other Pre-Hearing Proceedings
1. Post-issues conference discovery (see 6 NYCRR 624.7)
2. Pre-filed direct testimony (see 6 NYCRR 624.7[e])
3. Other motion practice (see 6 NYCRR 624.6[c])

H. Adjudicatory Hearings: Conduct of Hearing

1. ALJ has broad authority to conduct hearing, including subpoena power (see 6 NYCRR 624.8[b]; Matter of Suffolk County Water Authority, ALJ Ruling, Aug. 17, 2006, at 1-4 [subpoena duces tecum served on State or local government official])

2. Trial-like proceedings: Opening statements; presentation of witnesses and documentary evidence; direct and cross examination; closing statements (see 6 NYCRR 624.8[a]; 6 NYCRR 624.9[a])

3. Burden of Proof (see 6 NYCRR 624.9[b])
   -- Applicant has burden of proof demonstrating that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see Matter of Karta Corp., Decision of the Executive Deputy Commissioner, April 20, 2006, at 3-6)
   -- Where Department staff has initiated permit modification, suspension or revocation proceedings, staff has burden of proving modification, suspension or revocation is supported by a preponderance of the evidence
   -- On application for permit renewal, permittee has burden of proof -- a demonstration of no change in permitted activity is prima facie case for permittee
   -- Burden of proof on motions is on moving party
   -- For a discussion of the parties' burdens of proof, see Matter of Entergy Nuclear Indian Point 2, LLC, Interim Decision of the Assistant Commissioner, Aug. 13, 2008, at 50-52

4. Standard of Proof (see 6 NYCRR 624.9[c])
   -- preponderance of the evidence

5. Stipulations (see 6 NYCRR 624.12[b]; 6 NYCRR 624.13[d])
   -- Stipulation executed by all parties resolving any or all issues removes such issues from the proceeding

   -- Stipulation resolving all issues results in termination of hearing proceedings (see Organization and Delegation Memorandum 94-13, "Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings" [May 5, 1994])

I. Post-Hearing Proceedings

1. Closing Briefs and Replies: if allowed by ALJ (see 6 NYCRR 624.8[a][5], [6]) -- Opportunity to appeal rulings directly to Commissioner

2. Close of Record -- Upon ALJ's receipt of stenographic record, submission of additional materials agreed to at hearing, briefs or replies, whichever occurs last. ALJ notifies parties of closing of record by mail (see 6 NYCRR 624.8[a][5])

3. ALJ's Hearing Report -- 45 days after close of record. Usually not issued until Commissioner's decision. Contains findings of fact, conclusions of law, and recommendations on all issues before ALJ (see 6 NYCRR 624.13[a]).
   -- If SEQRA involved, ALJ's hearing report together with the DEIS constitutes the final EIS (see 6 NYCRR 624.13[c]).

4. Recommended Decision – ALJ's hearing report may be issued as recommended decision. Additional comment period (see 6 NYCRR 624.13[a]).

5. Commissioner's Decision -- 60 days after close of record, or 30 days after comments due on recommended decision if one issued. Commissioner's decision contains:
   a. Findings of fact and conclusions of law, or reasons for decision, determination or order (see SAPA § 307).
   b. SEQRA Findings -- if SEQRA involved (see 6 NYCRR 617.11[d])

6. Distribution of Decision

IV. CONCLUSION

A. Two different kinds of procedures for two different types of determinations:

1. Part 622 -- Determinations of liability, penalty and remedial obligations; limited parties; CPLR-like procedures

2. Part 624 -- Often complex permit issues; multiple parties; public participation

B. Research Tools

1. ECL, 6 NYCRR

2. LEXIS/Westlaw

3. DEC Website
   a. DEC Regulations
   b. DEC Guidance
   c. Environmental Notice Bulletin (ENB)

4. OHMS Website (located at http://www.dec.ny.gov/hearings/395.html and http://www.dec.ny.gov/regulations/2398.html)
   a. Decisions, Orders and Rulings
   b. Hearing Guides
   c. OHMS Docket
   d. Part 622 Annotations

C. Appendices: Regulations and Other Materials

Appendix A: Central and Regional Offices; DEC Organization Charts; OHMS Websites
Appendix B: 6 NYCRR Part 622
Appendix C: 6 NYCRR 621.13
Appendix D: 6 NYCRR Part 624

Article: Robert H. Feller, DEC's New Hearing Rules (April 1994), reprinted in 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 49.

SAPA and Fair Hearings: New York State Department of Environmental Conservation Permitting and Enforcement Hearings

Hon. James T. McClymonds
Chief Administrative Law Judge

SHORT OUTLINE
Revised 9/13/19

I. Overview of the State Administrative Procedure Act (SAPA) article 3 (15 minutes)

A. General Background
B. Elements of a Fair Hearing under SAPA article 3 and Their Implementation through DEC's Enforcement and Permit Hearings Procedures

II. 6 NYCRR Part 622 – DEC's Uniform Enforcement Hearing Procedures – Specific Topics (15 Minutes)

A. General Background
B. Initiation of Proceedings
C. Referral to OHMS
D. Conduct of Hearings
E. Post-Hearing Proceedings
F. Summary Procedures
G. Part 622 Appeals
H. Expedited / Calendar Call Procedures

III. 6 NYCRR Part 624 – DEC's Permit Hearing Procedures: Public Participation and Other Topics (15 Minutes)

A. General Background
B. Pre-Referral Administrative Procedures: Uniform Procedures Act (ECL article 70) and Regulations (6 NYCRR Part 621)

C. Post-Referral, Pre-Hearing Proceedings
D. Public Notice
E. Legislative Public Hearings
F. Issues Conference
G. Expedited Appeals to Commissioner
H. Other Pre-Hearing Proceedings
I. Adjudicatory Hearings
J. Post-Hearing Proceedings
K. Major Power Plant Siting Proceedings (Public Service Law article 10)

IV. Conclusions, Questions and Answers (5 minutes)

Total time: 50 minutes

Course Materials:

Administrative Hearings under the New York State Administrative Procedure Act Outline

State Administrative Procedure Act excerpts

DEC Hearing Procedures Outline

Appendix A: DEC Organization Charts; Regional Offices; OHMS Website

Appendix B: 6 NYCRR Part 622

Appendix C: 6 NYCRR 621.13

Appendix D: 6 NYCRR Part 624

Appendix E: Article: Robert H. Feller, DEC's New Hearing Rules (April 1994), reprinted in 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 49.

Administrative Hearings under the New York State Administrative Procedure Act

LONG OUTLINE
Revised 9/13/19

I. Introduction

A. State Administrative Procedure Act (SAPA) Generally -- Background

1. Genesis

a. Rise of administrative state; concerns about concentration of exec., legis., and judicial power in single agencies; lack of uniformity.

b. Legislative response -- Adopted Laws of 1975, chapter 167 (effective Sept. 1, 1976)

c. Hybrid of Federal Administrative Procedure Act and the 1946 and 1961 versions of the Model State Administrative Procedure Act promulgated by the Commissioners on Uniform State Laws (Gifford 1977).

2. Intent (SAPA § 102[1]) -- establish minimum standards and procedures governing agency activities. Incorporate separation of powers and other rule of law principles into agency proceedings.

3. Structure

a. Article 2 -- Rule Making
b. Article 3 -- Adjudicatory Proceedings
c. Article 4 -- Licenses

B. Adjudicatory Proceedings Defined

1. SAPA § 102(3): "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto

is required by law to be made only on a record and after an opportunity for a hearing. [Emphasis added]

2. Adjudicatory proceeding is exercise of an agency's quasi-judicial function.

3. Contrast to Rule Making -- SAPA § 102(2) -- agency statement, regulation or code of general applicability that implements or applies law, or the procedure or practice requirements of any agency -- quasi-legislative function of an agency.

C. Applicability of Article 3

1. SAPA does not specify when an adjudicatory hearing is required. To determine whether an adjudicatory hearing is required examine:
   a. Agency's implementing statute – if the statute requires that the determination be made "only on a record and after an opportunity for hearing," an adjudicatory hearing is required;
   b. In licensing context, when licensing is required by law to be preceded by "notice and opportunity for hearing" or "opportunity to be heard," an adjudicatory hearing is required (SAPA § 401[1]). Definition of license -- SAPA § 102(4) and (5);
   c. Due Process -- an administrative hearing prior to agency action may also be required by due process, even when a statute or regulation does not otherwise expressly require a hearing. Where the exercise of a statutory power adversely affects property rights, the requirement of notice and hearing may be implied, even where the statute is silent (see Hecht v Monaghan, 307 NY 461, 468 [1954]).

2. If a hearing is required by law, the provisions of SAPA article 3 apply.

D. Agency Subject to SAPA -- see SAPA § 102(1)
1. Some agencies expressly excluded, i.e. Division of State Police.

E. Summary

Where hearing required by law, SAPA article 3's minimum due process standards apply. The minimum due process requirements are:

1. a hearing before an impartial decision maker
2. with notice and an opportunity to be heard, and
3. a determination based upon and limited to a record.

II. Presiding Officer: Impartiality

A. Impartiality; Disqualification

1. "Hearings shall be conducted in an impartial manner" (SAPA § 303)

2. ALJ's factual findings be based exclusively on the record and on matters officially noticed (SAPA § 302[3])

3. ALJ may be disqualified upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification. The determination whether to disqualify the ALJ is part of the hearing record, and subject to judicial review at the conclusion of the adjudicatory proceeding. New ALJ may be assigned to continue case, unless "substantial prejudice" to a party will result. (SAPA § 303).

4. Grounds for disqualification not provided for in SAPA. Must look elsewhere:

   a. ALJ Disqualification -- Judiciary Law § 14

      i. Applicable to courts of record.

      ii. Rule: "[a] judge shall not sit as such in, or take any part in the decision of, . . . [a] proceeding to which he [or she] is a party, or in which he [or she] has been attorney or counsel, or in which he [or she] is interested, or if he [or she] is related by consanguinity or affinity to any party to the controversy within the sixth degree."

      iii. In Matter of Beer Garden, Inc. v New York State Liq. Auth., COA applied to agency head acting in adjudicatory role. Therefore, applicable to ALJs. Held: "[w]hile we recognize that this provision pertains only to courts of record, the common-law rule of disqualification embodied by the statute has been applied to administrative tribunals exercising quasi-judicial functions."

b. Former Prosecutor -- M/O Beer Garden, Inc. v New York State Liq. Auth. (79 NY2d 266 [1992]). Commissioner who was SLA counsel when charges against licensees filed and heard should have recused herself from final agency determination. Role as prosecutor inherently incompatible with subsequent role as judge.

c. Former Prosecutor -- M/O General Motors Corp. -- Delco Prods. Div. v Rosa (82 NY2d 183 [1993]). (State Div. of Hum. Rts.) Commissioner's two roles, first as General Counsel and then as Commissioner required recusal; Rule of Necessity did not apply.

d. Prejudgment of Facts -- M/O 1616 Second Ave. Rest. v New York State Liq. Auth. (75 NY2d 158 [1990]). (Preppy murder case.) Chairman of SLA testified before Senate Committee. Public statement suggesting prejudgment of facts grounds for disqualification. NOTE: mere familiarity with facts not a conflict. Predisposition on law and policy not a conflict.

e. Financial Interest in Outcome of Case -- New York Pub. Interest Research Group, Inc. v Williams (127 AD2d 512 [1st Dept 1987]). ALJ financial interest could be affected by outcome of the case; disqualified. Dual roles as adjudicator and investigator; ALJ advised DEC and private developers on energy projects; might derive benefit from decision. NOTE: being paid a fee no matter the outcome is not a conflict of interest.

5. Other bases:
   a. Public Officers Law § 73 (Ethics in Government Act); Public Officers Law § 74 (Code of Ethics)
   b. Code of Judicial Conduct (if adopted by agency)
   c. Model Code of Judicial Conduct for State Administrative Law Judges (NYSBA House of Delegates 2009)

6. Summary -- Specific grounds for disqualification are provided for by statute and decisional law. Same as for judges in judicial branch.

B. Ex Parte Communication Rule -- SAPA § 307(2)

1. Applies to members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding -- i.e. Commissioners, ALJs, etc.

2. Questions of Fact: “Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party” (SAPA 307[2]).

3. Questions of Law: Agency member or employee shall not communicate “with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case” (SAPA 307[2]).

C. Hearing Officer Independence (Executive Order No. 131)

1. In General

a. Adopted by Governor Mario Cuomo in 1989. Codified at 9 NYCRR 4.131. Continued by Govs. Pataki, Spitzer, Paterson, and Andrew Cuomo. Reaction to efforts to create a central panel of ALJs in NY.

b. Key feature: directive that every agency that conducts administrative adjudication develop administrative adjudication plan and adopt organizational structure that incorporates principles of administrative adjudication set forth in order.

2. Ex parte communications

a. Applicability expressly limited to ALJs and hearing officers; not applicable to agency heads or board or commission members. Slightly narrower rule than SAPA rule.

b. Rule: “Unless otherwise authorized by law . . . , a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate” (Exec Order 131, II[B][1]).

c. Notwithstanding the above prohibition, the order does allow ALJs to consult on questions of law with supervisors, agency attorneys or other ALJs not currently or previously engaged in the investigation or prosecution of the case or factually related cases. The ALJ may also consult with supervisors, other ALJs, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. (Exec Order 131, II[B][2]).

3. Limits on agency influence

a. Separate unit, physically separated from agency attorneys

b. Shall not report to any agency official other than the agency head, a supervisor of ALJs, or the general counsel.

c. Agency may not order or otherwise direct an ALJ to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal or other decision on the record of the proceeding. If agency head reverses or modifies an ALJ’s decision, must set forth in writing the reasons for the conflicting conclusion.

d. ALJ’s supervisor is not precluded, however, from giving legal advice or guidance to an ALJ where the supervisor determines that such advice or guidance is appropriate to assure the quality standards of the agency or to assure consistent or legally sound decisions.

e. The work of the ALJ is to be evaluated on general areas of performance, including competence, objectivity, fairness, productivity, diligence and temperament. Whether ALJ's decision favor or disfavor agency may not be considered for salary, promotion, and so on. Quotas are not allowed.

D. Powers of the Presiding Officers (SAPA § 304)

1. Presiding officers are authorized to:
   1. administer oaths and affirmations;
   2. sign and issue subpoenas in agency's name;
   3. provide for taking testimony by deposition;
   4. regulate the course of the hearing; and
   5. direct the parties to appear and confer regarding potential settlement.

2. Presiding officer are also authorized to exclude irrelevant or unduly repetitious evidence or cross-examination (SAPA § 306[1]).

3. Administrative Subpoenas (SAPA § 304; CPLR 2302)

a. Enabling statutes often grant to agencies the power to issue subpoenas. For agencies to whom a specific grant of subpoena power has been granted, their power to issue subpoenas is derived solely from such grant (Matter of Irwin v Board of Regents of Univ. of State of N.Y., 27 NY2d 292 [1970]). Statutes commonly grant agencies the power to issue two kinds of subpoenas: subpoenas ad testificandum (subpoenas requiring a witness to attend and testify) and subpoenas duces tecum (subpoenas requiring the recipient to turn over material evidence). Where an agency is granted the subpoena power, subpoenas that would require a court order under the CPLR, such as a subpoena duces tecum served on a department or bureau of a municipal corporation or of the State (see CPLR 2307), must be obtained from the agency, not the courts (Matter of Irwin, 27 NY2d at 297).

b. Challenges to subpoenas issued by an agency granted the subpoena power must be made to the agency in the first instance. Review of an agency's denial of a request to withdraw or modify a subpoena are reviewable in court pursuant to CPLR 2304 on motion to

quash, fix conditions, or modify the subpoena. On a CPLR 2304 motion, the agency must make a preliminary showing that the information sought in the subpoena is reasonably related to a proper subject of inquiry and that some basis for the inquisitorial action exists (Matter of Levin v Murawski, 59 NY2d 35 [1983]).

c. In the absence of a statutory grant of subpoena power to the agency, agency attorneys and attorneys of record for any party to the proceeding are granted the general subpoena power afforded attorneys under CPLR 2302.

III. Notice

A. Contents of Notice -- SAPA § 301(2)

1. See SAPA § 301(2) for contents:
   a. statement of place, time and nature of hearing;
   b. legal authority and jurisdiction for hearing;
   c. reference to particular statute and rules involved;
   d. short and plain statement of the matters asserted; and
   e. statement that interpreter services will be made available to deaf persons.

2. Notice need only be reasonably specific, in light of all relevant circumstances:
   a. To apprise a party whose rights are being determined of the charges against him or her;
   b. and to allow for the preparation of an adequate defense (Matter of Bloch v Ambach, 73 NY2d 323 [1989]).

3. Motion for more definite and detailed statement -- SAPA § 301(2).

B. Time and place of hearing -- convenience of the parties -- SAPA § 301(4)

IV. Opportunity To Be Heard

A. Opportunity to Participate

1. All parties afforded opportunity to present written argument on issues of law, and evidence and argument on issues of fact -- SAPA § 301(4)

2. Interpreter Services for Deaf Persons -- SAPA § 301(6)
   a. Cost charged to the agency

3. Interpreter Services for Limited English Proficiency (LEP) Persons -- not required by SAPA
   a. Executive Order No. 26 (Cuomo 2011)
   b. Required by title VI of the federal Civil Rights Act of 1964 -- form of national origin discrimination (Lau v Nichols, 414 US 563 [1974]).
   c. DOJ guidance (67 Fed Reg 421455 [2002]) requires interpreter services in administrative hearings to allow LEP person to "meaningfully participate."

B. Right to Counsel -- SAPA § 501

1. Courts have essentially held that appearing before an agency is not the practice of law (see Matter of Board of Educ. v NYS PERB, 233 AD2d 602 [3d Dept 1996]). Accordingly, a party to an adjudicatory hearing may be represented by someone other than an attorney.

C. Timing/Unreasonable Agency Delay – SAPA § 301(1)

1. Some agency statutes and regulation establish time frames for the commencement of hearings.

2. Unless otherwise provided by statute or regulation, hearing to be held "within reasonable time."

3. "Unreasonable agency delay" Cortlandt factors -- actual prejudice in the defense of the proceeding (Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169 [1980], cert denied 476 US 1115 [1986])

   a. To warrant dismissal of an administrative proceeding under Cortlandt, respondents must establish substantial actual prejudice resulting from the Department's delay in convening the hearing (see Cortlandt, 66 NY2d at 177-178; Matter of Diaz Chemical

Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]). The mere lapse of time in rendering an administrative determination does not, standing alone, constitute prejudice (see Matter of Louis Harris and Assocs., Inc. v deLeon, 84 NY2d 698, 702 [1994]). Thus, no fixed period exists after which delay becomes unreasonable as a matter of law (see id. [6 year delay before probable cause hearing and over 7 years before final determination not unreasonable as a matter of law]; Diaz, 91 NY2d at 933 [11 year delay before holding hearing and 3 year delay in issuing order not unreasonable]; Matter of Hansen v New York State Dept. of Envtl. Conservation, 288 AD2d 473 [2d Dept 2001] [9 year delay in bringing complaint not unreasonable]; St. Joseph's Hosp. Health Ctr. v Department of Health, 247 AD2d 136, 151-152 [4th Dept 1998], lv denied 93 NY2d 803 [1999] [10 year delay not unreasonable]).

b. To determine whether a period of delay is reasonable within the meaning of SAPA § 301(1), agencies and reviewing courts weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation (see Cortlandt, 66 NY2d at 177-178; see also Matter of Hansen, ALJ Hearing Report, at 4-5, adopted by Commissioner Order, Jan. 3, 2000, confirmed on judicial review 288 AD2d 473 [Dept. of Envtl. Conservation]). “Contrary to the ALJ's conclusion, ‘close scrutiny’ of the record here fails to reveal substantial actual prejudice to respondents due to the four and one-half year delay in holding the penalty hearing” (Matter of Giambrone, Decision and Order of the Commissioner, March 17, 2010, at 11-12 [citing Diaz, 91 NY2d at 993; Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 626 (1994)], modified on other grounds sub nom. Matter of Giambrone v Grannis, 88 AD3d 1271 [4th Dept 2011]).

D. Discovery

1. Discovery not required -- SAPA § 305 -- Agency may determine no discovery allowed.

2. Exception -- When agency seeks to revoke a license or permit previously granted -- SAPA § 401(4)

3. Exception -- Fair hearing may require access to complaints against a party (see Matter of McBarnette v Sobol, 83 NY2d 333 [1994] [physician disciplinary proceeding – author of complaints testified and known to physician])

4. Freedom of Information Law (FOIL) (Public Officers Law article 6) -- Some exemptions apply; agency records otherwise presumptively available

E. Presentation of Evidence/Right of Cross Examination

1. All parties afforded opportunity to present written argument on issues of law, and evidence and argument on issues of fact -- SAPA § 301(4)

2. All parties have the right of cross-examination -- SAPA § 306(3)

3. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record (SAPA § 306[2]). Documentary evidence may be received in the form of copies or incorporated by reference (id.).

F. Intervention

1. SAPA does not address third-party intervention. Left to the agencies. However, at least one court has recognized a party's right to intervene in an agency proceeding even though the governing statute and regulations did not expressly provide for it (see Matter of Village of Pleasantville v Lisa's Cocktail Lounge, 37 AD2d 848 [2d Dept 1971], lv denied 30 NY2d 483 [1972]).

G. Streamlined Proceedings for Small Business

1. The statute allows agencies to adopt regulations providing an option for small businesses to participate in adjudicatory hearings by mail, electronic mail, telephone conference or video conference (SAPA § 308).

2. Under SAPA § 102(8), a small business means any business which is resident in New York, independently owned and operated, and employs one hundred or less individuals.

V. Record

A. Decisional Record

1. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding (SAPA § 306[1]).

2. Findings of fact shall be based exclusively on the evidence and on matters official noticed (SAPA § 302[3]).

3. Contents of the Record -- SAPA § 302(1) -- includes:
(a) all notices, pleadings, motions, intermediate rulings;
(b) evidence presented;
(c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose;
(d) questions and offers of proof, objections thereto, and rulings thereon;
(e) proposed findings and exceptions, if any;
(f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and
(g) any decision, determination, opinion, order, or report rendered.

B. Record of Proceedings -- SAPA § 302(2)

1. Agency shall make a complete record of the adjudicatory proceeding.

2. Unless required by statute, agency may use stenographic transcripts, electronic recording devices, or other means it deems necessary.

3. Upon request of party, within a reasonable amount of time, must produce a copy of the record and transcript. May charge cost to requester.

C. Rules of Evidence

1. Unless otherwise provided by statute, an agency need not observe the rules of evidence observed by courts (SAPA § 306[1]).

2. Thus, hearsay evidence is not per se inadmissible in SAPA hearings and can be the basis of an administrative enforcement determination (see SAPA § 306[1][agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; Matter of Gray v Adduci, 73 NY2d 741, 742 [1988]; People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]).

3. Although hearsay evidence is admissible in administrative adjudicatory proceedings, it must nonetheless be sufficiently reliable, relevant and probative to provide a basis for the agency's determination (see Matter of Dadson Plumbing Corp. v Goldin, 104 AD2d 346 [1st Dept 1984], affd as modified on other grounds 66 NY2d 713 [1985]). The fact that evidence is hearsay goes to its weight.

4. Agencies are required to give effect to the rules of privilege recognized by law (SAPA § 306[1]).

5. Evidence obtained in violation of the Fourth Amendment is not per se excludable from an administrative proceeding. In New York, the exclusionary rule is subject to a “balancing approach,” in which the probable deterrent effect of the exclusionary rule is balanced against the detrimental impact on the truth-finding process (see Matter of Boyd v Constantine, 81 NY2d 189 [1993] [Buffalo city police not working for Div. of State Police when conducting search; contraband seized during search admissible at State Police disciplinary hearing]).

D. Official Notice -- SAPA § 306(4)

1. Official Notice may be taken of all facts of which judicial notice could be taken, and of other facts "within the specialized knowledge of the agency" (SAPA § 306[4]).

2. When official notice is taken of a material fact not appearing in evidence in the record and of which judicial notice could not be taken, notice and opportunity to be heard prior to decision.

E. Burden of Proof/Standard of Proof

1. Unless otherwise provided by statute, burden of proof is on the party who initiated the proceeding (SAPA 306[1]).

2. Standard of Proof

a. SAPA requires that an agency decision must be "supported by and in accordance with substantial evidence" (SAPA § 306[1]). Substantial evidence test -- whether the factual "'finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' . . . Put another way, substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (People ex rel. Vega v Smith, 66 NY2d 130, 139 [citations omitted]; see also 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978] ["substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably -- probatively and logically"]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and a challenger must demonstrate that the agency's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d

494, 499 [2011] [internal quotation marks and citations omitted]).

b. Courts have recognized that due process may require proof by a preponderance of evidence in some cases (see Matter of Miller v DeBuono, 90 NY2d 783, 794 [1997]). Many agencies apply the preponderance of evidence evidentiary standard by regulation.

F. Hearing Costs

1. General Rule: The general rule in New York is that an agency may not impose administrative hearing costs upon the applicant for a permit, license or other agency approval absent express statutory authority (see Matter of Spears v Berle, 63 AD2d 372, 381 [3d Dept 1978], revd on other grounds 48 NY2d 254 [1979], citing Jewish Reconstructionist Synagogue of North Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 165 [1976]). Where no express statutory authorization exists, an agency's authority to impose costs may be implied, but only for expenditures necessary to carry out an express statutory mandate, and not for the mere convenience of the agency (see id.). If neither express nor implied authority exists, an agency may not apply a regulation imposing hearing costs on an applicant (see id.).

2. In the absence of express statutory authority to impose hearing costs on an applicant, the courts have held that cost of the hearing room and the preparation of a hearing transcript may not be imposed upon an applicant (see Spears, 63 AD2d at 381; Jewish Reconstructionist Synagogue, 40 NY2d at 165). These costs do not represent necessary expenditures, but rather conveniences to the agency (see id.).

3. With respect to transcription costs, absent express statutory authorization, the agency must bear the cost of the original stenographic record, the original transcript, and the agency's copies (see Spears, 63 AD2d at 381). Only where the applicant requests its own copy of the transcript may the agency charge the applicant the cost of preparing and furnishing the copy to the applicant (see SAPA § 302[2]).

4. With respect to hearing notices, however, the Court of Appeals has concluded that where a statute requires public notice, the costs of publication may be imposed upon an applicant (see Jewish Reconstructionist Synagogue, 40 NY2d at 165). Where public notice is required by statute, the cost of publication is viewed as necessary to carry out the statutory mandate and, thus, the agency has the implied authority to impose publication costs on the applicant (see id.).

VI. Decisions and Intra-Agency Appeals

A. Statement of Decision -- SAPA § 307(1)

1. Final decision must be in writing or stated on the record
2. Shall include findings of fact and conclusions of law or reasons for the decision
3. Copy of decision must be delivered or mailed to each party and the party's attorney of record.

B. Findings of Fact Limited to Record (SAPA § 302[3])

C. Intra-Agency Appeals; Review of Hearing Officer's Decision

1. SAPA does not expressly require administrative appeal process, but contemplates that such a process might be used by an agency. Left to statute or agency regulation.

2. Final agency decision makers review of hearing officer's report is de novo; no deference required to be given to hearing officer's findings of fact.

3. If agency head reverses or modifies an ALJ's decision, must set forth in writing the reasons for the conflicting conclusion (see Executive Order No. 131). Moreover, if final decision maker reverses a hearing officer's findings of fact, the agency is required to make new findings and identify the basis for them (see Matter of Simpson v Wolansky, 38 NY2d 391, 394 [1975]).

D. Agency Duty to Decide Consistently

1. When agencies adjudicate, they are required to decide factually similar cases consistently, or offer a reasoned explanation for departures from precedent (see Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516 [1985]).

VII. Licensing

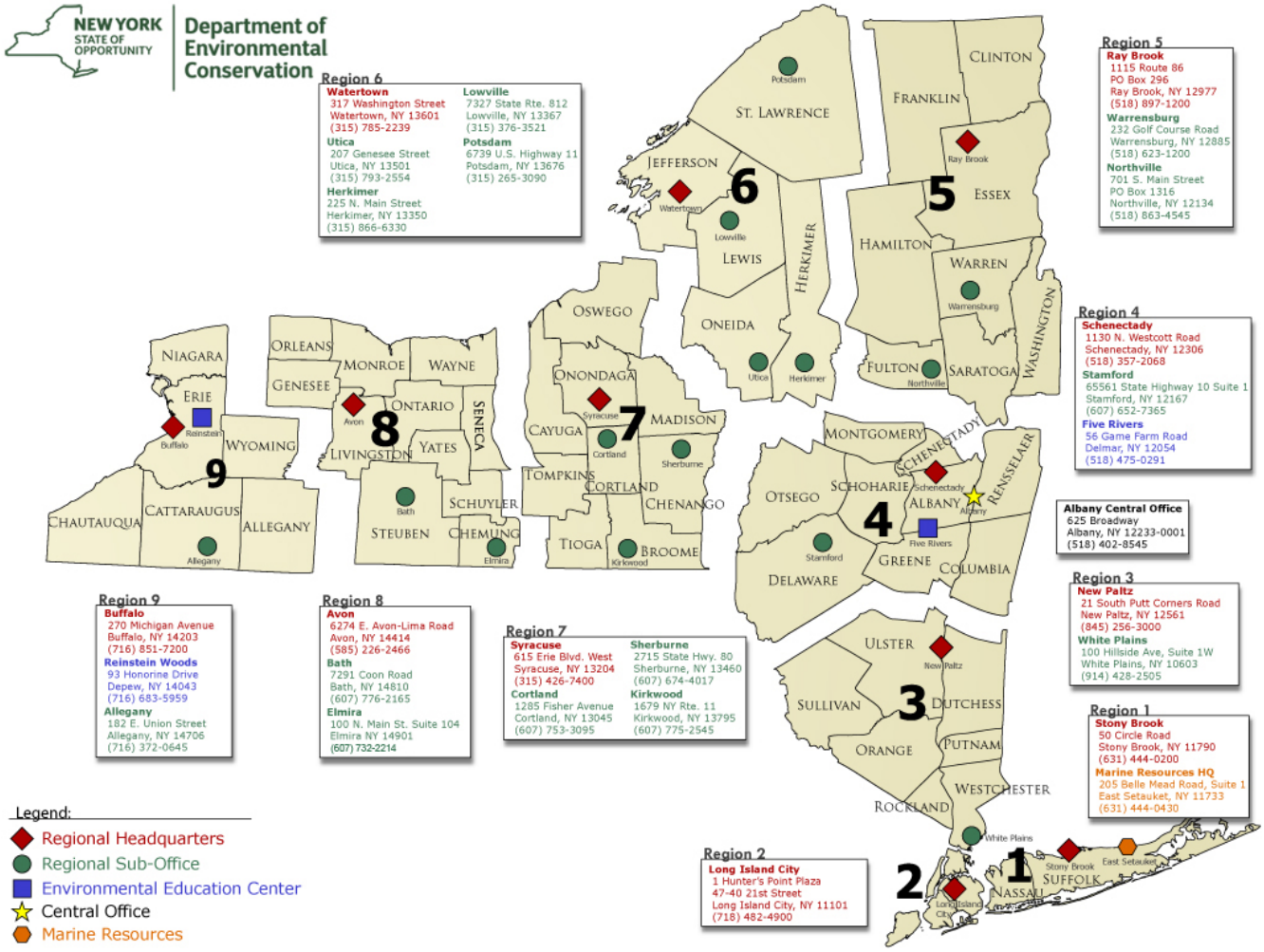
A. SAPA license extension -- SAPA § 401(2) – upon a timely and sufficient application for renewal of a license or a new license for activities of a "continuing nature," the existing license does not expire until the application has been finally determined by the agency.

B. Summary suspension of a license -- SAPA § 401(3) -- based upon finding that "public health, safety, or welfare imperatively require emergency action," an agency may issue an order summarily suspending a license before a hearing. The hearing must be promptly instituted and determined.

VIII. Conclusion

SAPA article 3 provides the minimum procedural due process requirements for agency adjudications subject to the article. Those minimum requirements include:

1. a proceeding before an impartial decision maker
2. with notice and opportunity to be heard; and
3. a determination based upon and limited to a record.



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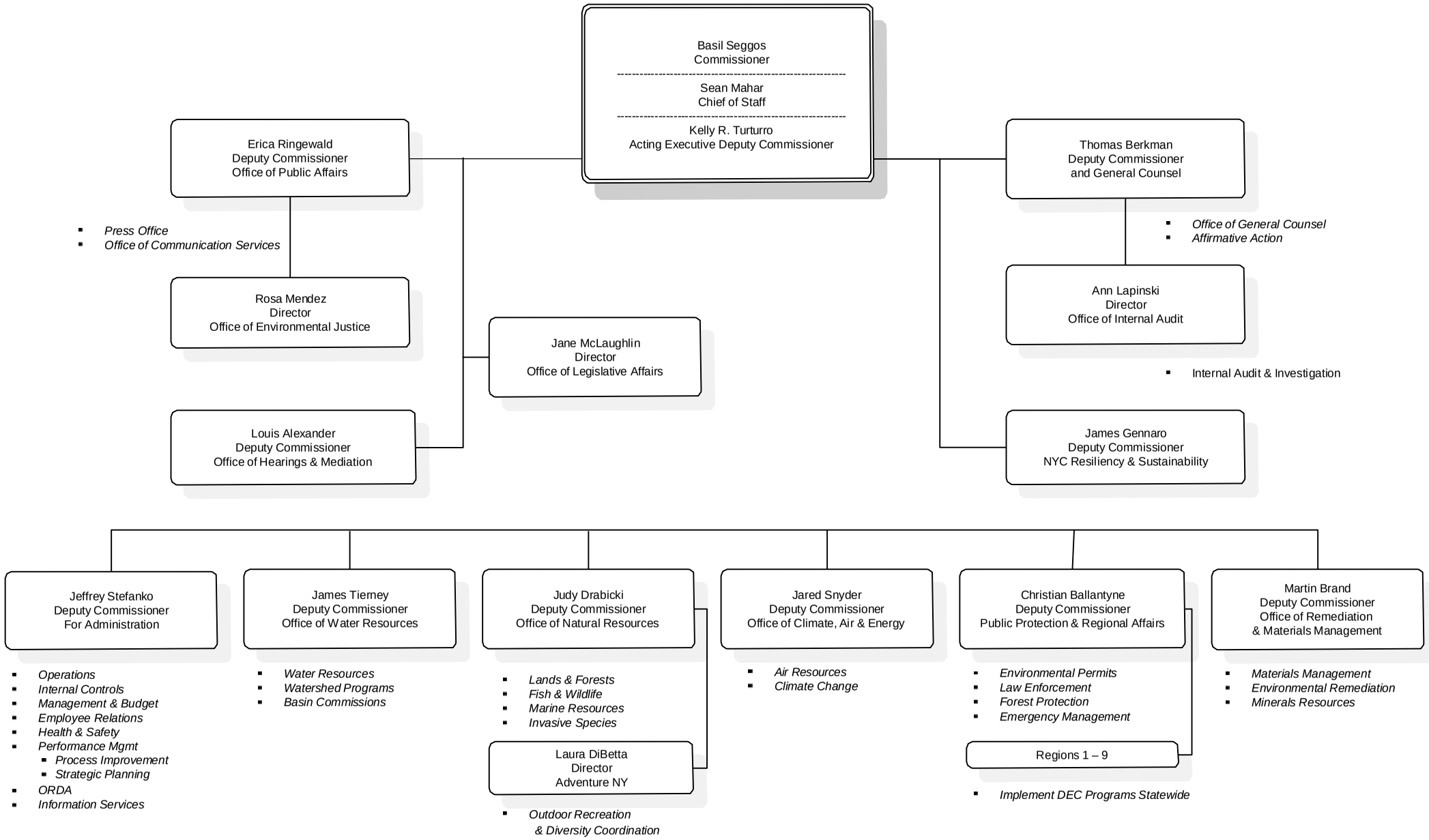
Executive Organization – June 2019



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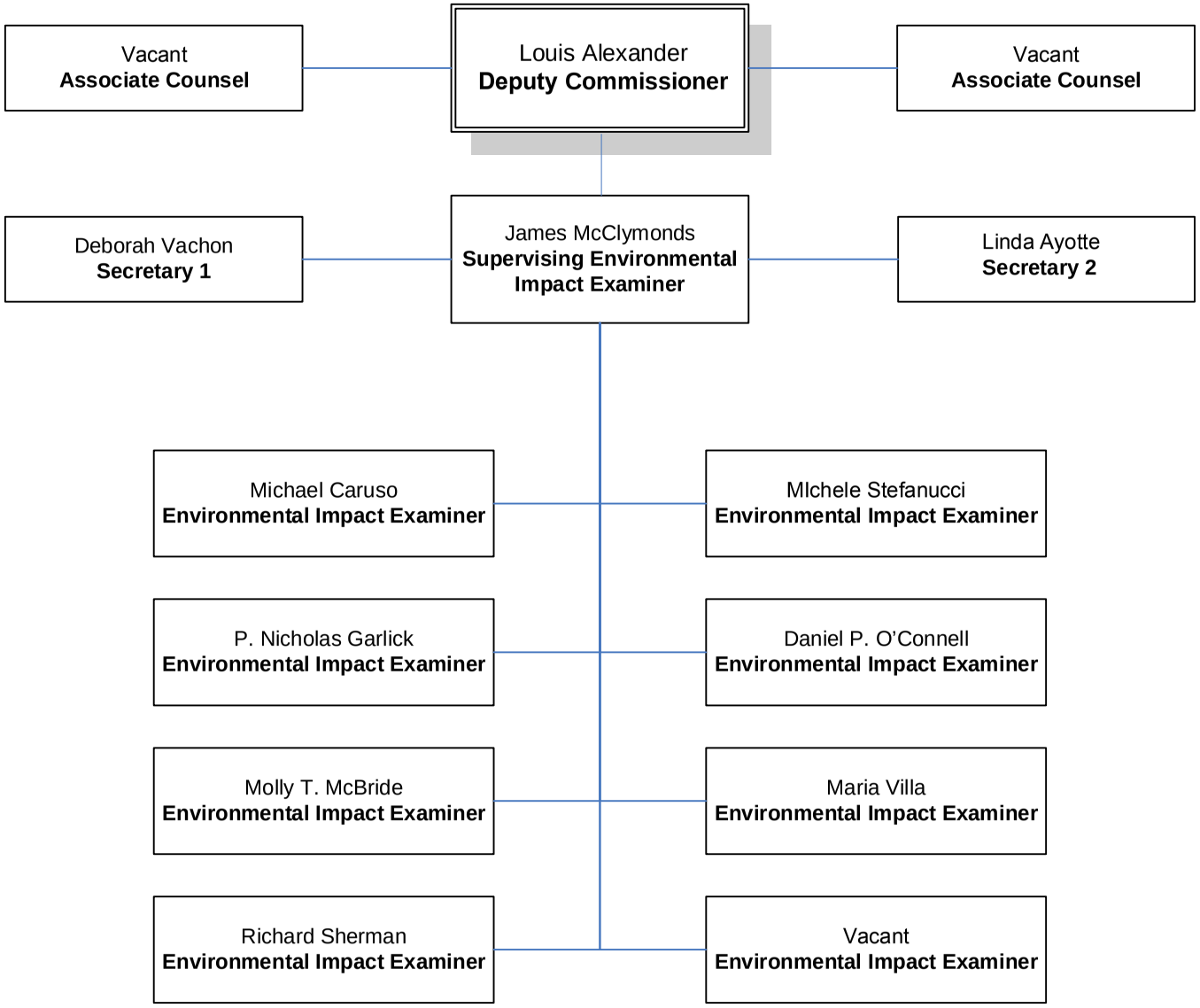
OFFICE OF HEARINGS AND MEDIATION SERVICES



Updated on 9/19

Hearings and Decisions

This website provides information about the Office of Hearings docket and hearing outcomes, including Decisions and Orders by the Commissioner, as well as Administrative Law Judge (ALJ) rulings and hearing reports. The list of Decisions, Orders, rulings, and hearing reports dates from 1992, and is updated regularly. The documents posted on the website are listed alphabetically.

Also available here are links to DEC guidance documents for people who are participating in permit or enforcement hearings.

Now you can search all of DEC's ENB notices and hearing decisions together in one place:

Search ENB notices and hearing decisions

Docket Management System

The docket management system is a database of cases that have been referred to the Office of Hearings and Mediation Services (OHMS) for public hearings or other action by an administrative law judge and a decision by the Commissioner of the New York State Department of Environmental Conservation. The docket contains cases that have closed on or after January 1, 2005. For cases that closed before January 1, 2005, contact OHMS at 518-402-9003 or send an e-mail to the Hearings Office.

More about Hearings and Decisions:

Recent Decisions - List of 10 Most Recent Decisions

Hearing Decisions from A to C - NYS DEC Hearing Decisions from A to C

Hearing Decisions from D to G - NYS DEC Hearing Decisions from D to G

Hearing Decisions from H to L - NYS DEC Hearing Decisions from H to L

Hearing Decisions from M to N - NYS DEC Hearing Decisions from M to N

Hearing Decisions from O to R - NYS DEC Hearing Decisions from O to R

Hearing Decisions of S - NYS DEC Hearing Decisions for S

Hearing Decisions from T to Z - NYS DEC Hearing Decisions from T to Z

Adirondack Park Agency Hearing Decisions Index - Adirondack Park Agency Hearing Decisions Index

Lake George Park Commission Hearing Decisions Index - List of Lake George Park Commission Rulings

Hearing Office Guidance Documents

Guide to Permit Hearings

- Guide to Permit Hearings - A permit hearing offers the public an opportunity to participate in DEC project review. This document gives an overview of the DEC permit hearing process.
- Guide to Permit Hearings (Spanish) - Una audiencia para obtener permiso ofrece al público una oportunidad de participar en el análisis del proyecto de DEC. Este documento ofrece una perspectiva general del proceso de audiencia de DEC para obtener un permiso.

Guide to Enforcement Hearings

- Guide to Enforcement Hearings - This guide was written to help you understand the enforcement hearing procedure used by the New York State Department of Environmental Conservation (DEC). It explains the hearing process from when the charges are made to the Decision by the Commissioner.
- Guide to Enforcement Hearings (Spanish) - Esta guía tiene como objeto facilitar la comprensión del procedimiento utilizado en las audiencias ejecutorias del Departamento de Conservación Ambiental del Estado de Nueva York (DEC, por sus siglas en inglés).

Guide to Mediation

- Guide to Mediation - This guide will help answer your questions about mediation services provided by DEC's Office of Hearings and Mediation Services (OHMS).
- Guide to Mediation (Spanish) - Esta guía ayudará a responder sus preguntas acerca de los servicios ADR proporcionados por la Oficina de Audiencias y Servicios de Intermediación de DEC.

Guidance Memoranda

Several of the Organization & Delegation ("O&D") Memoranda continue to provide guidance with respect to hearing procedures in the Office of Hearings and Mediation Services. These include the following:

- O&D Memo #84-10 March 22, 1984 "Adjudicatory Hearings: Avoiding Ex Parte Communications within the Department (PDF)"
- O&D Memo #85-06 February 11, 1985 "Development and Use of Draft Permit Conditions in Permit Hearings (PDF)"
- O&D Memo #90-04 February 13, 1990 "Governor's New Executive Order on Administrative Adjudication (PDF)"
- O&D Memo #94-13 May 5, 1994 "Effect of Stipulations on Decision-Making in Permit and Enforcement Hearings (PDF)" (supercedes O&D Memo #85-13)
- O&D Memo #95-30 November 7, 1995 "The Conduct of Legislative Hearings (PDF)"

December 1993 Comments/Response Document

In 1994, the Department substantially revised the regulations governing administrative enforcement proceedings (6 NYCRR part 622) and permit hearing proceedings (6 NYCRR part 624). As part of the regulatory amendment process, the Department issued in December 1993 a Comments/Response Document (PDF) which provides further details and elaboration on the regulatory revisions.

More about Hearing Office Guidance Documents:

Part 622 Annotations - Annotations from selected Commissioner orders and decisions and ALJ rulings from 2003 to the present. Please refer to the Office of Hearings and Mediation Services's Hearings and Decisions website page for the full text of the orders, decisions and rulings that are referenced in the annotations.

Guide to Mediation - Mediation and other forms of alternative dispute resolution (ADR): (1) reduce litigation costs; (2) avoid delays associated with litigation; (3) recognize the need to cooperate and communicate; and (4) shift the focus of decision-making from others to you.

Guide to Mediation in Spanish - Beneficios de la intermediación y otras formas alternativas de resolución de disputas (ADR) Reduce los costos de litigios Evita retrasos ocasionados por los litigios Reconoce la necesidad de cooperar y comunicarse Cambia el enfoque de la toma de decisiones de otros a usted

6 NYCRR PART 622
Uniform Enforcement Hearing Procedures

(Statutory authority: Environmental Conservation Law, 3-0301, 15 -0901, 17-0303, 17-1709, 19-0301, 23-0305, 71-0301, 33-0303 and State Administrative Procedure Act Article 3)

[Effective date: January 9, 1994; as amended effective September 6, 2006]

Sec.

§622.1 Applicability

(a) This Part is applicable to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted.

(1) all administrative enforcement proceedings brought pursuant to the Environmental Conservation Law (ECL) or other law administered by the commissioner;

(2) any proceeding brought pursuant to ECL 71-0301 (summary abatement) or ECL 71-1709 except to the extent inconsistent with the provisions of Part 620 of this Title;

(3) any proceeding brought pursuant to SAPA 401(3);

(4) any proceeding brought pursuant to ECL 15-0511 (unsafe dams);

(5) any proceeding brought pursuant to ECL 27-1313 (inactive hazardous waste disposal site remedial programs) unless superseded by Part 375 of this Title;

(6) a request for a hearing made by a permittee pursuant to provisions of section 621.13 of this Title (permit modifications, suspensions or revocations by the department) or any other department initiated modification, suspension or revocation where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL, its implementing regulations or an order, permit, license or other entitlement issued by the department;

(7) proceedings on termination of appointment pursuant to Parts 183 and 184 of this Title and denial of state operation and maintenance aid for municipal sewage treatment plants; and

(8) any other proceeding which is either enforcement or disciplinary in character.

(b) The provisions of this Part do not apply to the determination of disputed environmental regulatory program fees and penalties that are assessed pursuant to ECL Article 72. Enforcement proceedings arising out of a failure to comply with a final determination as to such fees and penalties issued pursuant to procedures set forth in ECL Article 72 or its implementing regulations are governed by this Part.

(c) Provisions of this Part apply to those proceedings commenced on or after the effective date of these regulations.

§622.2 Definitions

Whenever used in this Part, unless otherwise expressly stated, the following terms will have the meanings indicated in this section. The definitions of this section are not intended to change any statutory or common law meaning of these terms, but are merely plain language explanations of legal terms.

(a) *Administrative Law Judge* or *ALJ* means the commissioner's representative who conducts the hearing.

(b) *Commissioner* means the Commissioner of Environmental Conservation of the State of New York or the commissioner's designee.

(c) *CPLR* means the New York State Civil Practice Law and Rules.

(d) *Department* means the Department of Environmental Conservation of the State of New York.

(e) *Department staff* means those department personnel participating in the hearing, but does not include the commissioner, any personnel of the Office of Hearings, the ALJ or those advising them.

(f) *Discovery* means disclosure of facts, titles, documents, or other things which are in the exclusive knowledge or possession of a party and which are necessary to the person requesting the discovery as a part of the requester's case.

(g) *ECL* means the New York State Environmental Conservation Law.

(h) *Evidence* means sworn testimony of a witness, physical objects, documents, records or photographs representative of facts which have been admitted into the record by the ALJ.

(i) *Hearsay* means a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted.

(j) *Interrogatories* means written questions regarding the case which are served by a party on an adversarial party, which the adversary must then answer in writing and under oath.

(k) *Motion* means a request for a ruling or an order.

(l) *Office of Hearings* means the office within the department principally responsible for conducting adjudicatory hearings.

(m) *Party* means the department staff, all persons designated respondent and any party granted intervenor status pursuant to subdivision 622.10(f) of this Part but does not include the commissioner or the Office of Hearings.

(n) *Permit* means any permit, certificate, license or other form of department approval, other than an enforcement order, issued in connection with any regulatory program administered by the department.

(o) *Person* means any individual, public or private corporation, bistate authority, political subdivision, government agency, department or bureau of the State, municipality, industry copartnership, association, firm, trust, estate or any legal entity whatsoever.

(p) *Protective Order* means an order denying, limiting, conditioning or regulating the use of material requested through discovery.

(q) *Relevant* means tending to support or refute the existence of any fact that is of consequence or material to the commissioner's decision.

(r) *Report* means the ALJ's summary of the hearing record including the ALJ's findings of fact and conclusions.

(s) *Respondent* means the person charged with one or more violations of the ECL, rules and regulations promulgated thereunder or any permit, certificate or order issued thereunder or a person alleged by staff to be a responsible party for the relief sought.

(t) *SAPA* means the New York State Administrative Procedures Act.

(u) *Service* means the delivery of a document to a party by authorized means and, where applicable, the filing of a document with the ALJ, Office of Hearings or the commissioner.

(v) *Stipulation* means an agreement between two or more parties to a hearing, and entered into the hearing record, concerning one or more issues of fact or law which are the subject of the hearing.

(w) *Subpoena* means a legal document that requires a person to appear at a hearing and testify and/or bring documents or physical objects.

§622.3 Commencement of a proceeding

(a) *Notice of hearing and complaint.*

(1) The department staff may commence an administrative proceeding by the service of a notice of hearing. If the action is commenced by a notice of hearing it must be accompanied by a complaint. The complaint must contain:

(i) a statement of the legal authority and jurisdiction under which the proceeding is to be held;

(ii) a reference to the particular sections of the statutes, rules and regulations involved; and

(iii) a concise statement of the matters asserted.

(2) The notice of hearing must state that a hearing date will be set by the Office of Hearings upon the filing of a Statement of Readiness for Adjudicatory Hearing as set forth in section 622.9 of this Part. The notice of hearing must also contain a statement that any affirmative defenses, including exemptions to permit requirements, will be waived unless raised in the answer and may set forth the date, time and place of a pre-hearing conference. The notice must contain a statement that the failure to answer or failure to attend a pre-hearing conference will result in a default and a waiver of respondent's right to a hearing.

(3) Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received. If personal service and service by certified mail is impracticable, upon application by the staff the ALJ may provide for an alternative method of service consistent with CPLR section 308.5.

(b) *Other methods for commencing a proceeding*.

(1) Proceedings may be commenced pursuant to sections 622.12 and 622.14 of this Part.

(2) Where a proceeding arises out of department staff's notification of intent to take specified action which will become final unless a hearing is requested, such notification shall take the place of a complaint. Service of the notice of intent shall be in the same manner as prescribed in subdivision (a) of this section. In these cases, the request for a hearing shall take the place of an answer.

§622.4 Answer

(a) Within 20 days of receiving the notice of hearing and complaint or an amended complaint, the respondent must serve on the department staff an answer signed by respondent, respondent's attorney or other authorized representative. The time to answer may be extended by consent of staff or by a ruling of the ALJ. Failure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing.

(b) The respondent must specify in its answer which allegations it admits, which allegations it denies and which allegations it has insufficient information upon which to form an opinion regarding the allegation.

(c) The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.

(d) Affirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the ALJ. The ALJ shall only allow such defense upon the filing of a satisfactory explanation as to why the defense was not pled in the answer and a showing that such affirmative defense is likely to be meritorious.

(e) The respondent may move for a more definite statement of the complaint within 10 days of completion of service on the grounds that the complaint is so vague or ambiguous that respondent cannot reasonably be required to frame an answer.

(1) If the motion is denied, respondent must answer within 10 days of receipt of notice that the motion is denied.

(2) If the motion is granted, the department staff must serve an amended complaint within 15 days of receipt of notice that the motion is granted and respondent must serve an answer within 20 days of the receipt of the amended complaint.

(f) The department staff may move for clarification of affirmative defenses within 10 days of completion of service of the answer on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based.

§622.5 Amendment of pleadings

(a) A party may amend its pleading once without permission at any time before the period for responding expires or, if no responsive pleading is required, at least 20 days prior to commencement of the hearing.

(b) Consistent with the CPLR a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond.

§622.6 General rules of practice

(a) *Service of papers.*

(1) Rule 2103 of the CPLR will govern service of papers except that service upon the respondent's duly authorized representative may be made by the same means as provided for service upon an attorney.

(2) Any required filing or proof of service must be made with the Office of Hearings.

(b) *Computation of time limits*.

(1) Computation of time will be according to the rules of the New York State General Construction Law.

(2) If a period of time prescribed under this Part is measured from the date of the ruling, pleading, motion, appeal, decision or other communication instead of the date of service,

(i) five days will be added to the prescribed period if notification is by ordinary mail; and

(ii) one day will be added to the prescribed period if notification is by express mail or other overnight delivery.

(c) *Motion practice*.

(1) Motions and requests made at any time must be part of the record. Motions and requests made prior to the hearing must be filed in writing with the ALJ and served upon all parties. During the course of the hearing, motions may be made orally except where otherwise directed by the ALJ. If no ALJ has been assigned to the case, the motion must be filed with the Chief ALJ.

(2) Every motion must clearly state its objective and the facts upon which it is based and may present legal argument in support of the motion.

(3) All parties have five days after a motion is served to serve a response. Thereafter, no further responsive pleadings will be allowed without permission of the ALJ.

(4) The ALJ should rule on a motion within five days after a response has been served or the time to serve a response has expired. The ALJ must rule on all pending motions prior to the completion of testimony. Any motions not ruled upon at that time will be deemed denied.

(d) *Office of Hearings*.

(1) Prior to the appointment of an ALJ to hear a particular case, the commissioner or the commissioner's designee from the Office of Hearings may take any action which an ALJ is authorized to take.

(2) The Office of Hearings may establish a schedule for hearing pretrial motions and other matters for cases which have no assigned ALJ.

(e) *Expedited Appeals*. The time periods for expedited appeals filed pursuant to section 622.10 of this Part are as follows:

(1) Expedited appeals or applications for leave to appeal must be filed with the commissioner in writing within five days of the disputed ruling.

(2) Upon being granted leave to appeal, appellant must file the appeal in writing within five days if it has not already been filed as part of appellant's motion papers. Thereafter the other parties may file briefs or other arguments in support of or in opposition to the appealed issues within five days.

(3) Notice of the appeal and a copy of all briefs must be filed with the ALJ and served on all parties to the hearing. Upon receipt of notice of any appeal, the ALJ may adjourn or continue the hearing or make such other order protecting the interests of the parties.

(f) To avoid prejudice to any of the parties, all rules of practice involving time periods may be modified by direction of the ALJ and, for the same reasons, any other rule may be modified by the commissioner upon recommendation of the ALJ or upon his own initiative.

(g) Tape recording or televising of the adjudicatory hearing for rebroadcast is prohibited by section 52 of the New York State Civil Rights Law.

§622.7 Discovery

(a) *Scope*. The scope of discovery must be as broad as that provided under article 31 of the CPLR.

(b) *Discovery devices.*

(1) Except as noted below, the parties may employ any disclosure device contained in article 31 of the CPLR. Where production and inspection of documents is sought, the requested documents must be furnished within 10 days of receipt of the discovery request unless a motion for a protective order is made.

(2) Depositions and written interrogatories will only be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding.

(3) Bills of particulars are not permitted.

(c) *Protective order and motion to compel.*

(1) A party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR section 3103, to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such a motion must be filed within 10 days of the discovery demand and must be accompanied by an affidavit of counsel, or by the moving party if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the ALJ to compel disclosure.

(3) Sanctions. The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

(d) *Subpoenas.* Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas. A party not represented by an attorney admitted to practice in New York may request the ALJ to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. This Part does not affect the authority of an attorney of record for any party to issue subpoenas under the provisions of section 2302 of the CPLR, except that all subpoenas shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR article 23.

(e) When the hearing seeks the revocation of a license or permit previously granted by the department, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

§622.8 The pre-hearing conference

(a) A pre-hearing conference must be held when notice thereof is provided in the notice of hearing. A pre-hearing conference may not be held when a proceeding is commenced by motion for an order without hearing. In any situation where provisional relief is imposed prior to the opportunity for a hearing or where the respondent is entitled by law or regulation to a hearing within a stated period of time, a pre-hearing conference may only be permitted with the consent of the respondent.

(b) The purpose of the conference is to resolve, define and clarify issues between the parties prior to the hearing.

(c) The conference must be attended by the department staff and the respondent(s). No ALJ will be present at the conference but the parties may consult by conference call with the Office of Hearings during the conference. Attendance at the conference is mandatory and failure to attend constitutes a default and a waiver of the opportunity for a hearing.

(d) No stenographic record of the conference will be made.

(e) At the conclusion of the conference, the parties will notify the Office of Hearings of any resulting agreement or stipulation.

§622.9 Statement of readiness for adjudicatory hearing

(a) *General.* A case will be placed on the hearing calendar upon department staff filing a statement of readiness for adjudicatory hearing with the Office of Hearings. Such statement must be in a form established by the department and must be served on all parties to the hearing. However, wherever the respondent is entitled by law or regulation to a hearing within a stated period of time, the case will be placed on the hearing calendar upon the filing of a copy of the answer with the Office of Hearing.

(b) *Contents.* The statement of readiness for adjudicatory hearing must include:

(1) the name, address and telephone number of each of the parties and their attorneys;

(2) a statement that discovery is complete or has been waived or an explanation as to why it hasn't been completed;

(3) an affirmative assertion that a reasonable attempt has been made to settle, and that the case is ready for adjudication; and

(4) a request for the setting of a hearing date.

(c) The accuracy and sufficiency of the statement of readiness will not be subject to motion practice or any form of adjudication.

(d) On receipt of a statement of readiness for adjudicatory hearing that conforms to the requirements of this section, the Office of Hearings will assign an ALJ to hear the case and will schedule a hearing date.

(e) The ALJ will notify all parties to the hearing in writing of the time, date and place of the hearing. Such notification shall also contain a statement that the failure to appear at the hearing constitutes a default and a waiver of respondent's right to a hearing.

§622.10 Conduct of the hearing

(a) *Order of events*.

(1) Before any evidence is offered the department staff and then the respondent may make an opening statement.

(2) The ALJ will determine the order in which parties present evidence but will generally require that the party with the burden of proof present its case first. Department staff may present a rebuttal case with respect to any affirmative defenses presented by the respondent. At the discretion of the ALJ, rebuttal cases may be allowed in other situations.

(3) Each witness will first be questioned by the party calling the witness (direct examination) and then examined by the opposing party (cross examination). These examinations may be followed by re-direct and re-cross examinations.

(4) The ALJ will determine the sequence in which the issues will be tried and otherwise regulate the conduct of the hearing in order to achieve a speedy and fair disposition of the matters at issue.

(5) At the conclusion of the evidentiary hearing the ALJ may give the parties an opportunity to make closing statements or to file briefs.

(6) A hearing shall be conducted as nearly as practicable in the manner of a trial by court.

(b) *The ALJ*.

(1) The ALJ has the power to:

(i) rule upon motions and requests, including those that decide the ultimate merits of the proceeding;

(ii) set the time and the place of hearing, recesses and adjournments;

(iii) administer oaths and affirmations;

(iv) issue subpoenas upon request of a party not represented by counsel admitted to practice in New York State;

(v) upon the request of a party, issue, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested;

(vi) summon and examine witnesses;

(vii) admit or exclude evidence;

(viii) allow oral argument, so long as it is recorded;

(ix) hear and determine argument on facts and law;

(x) do all acts and take all measures necessary for the maintenance of order and efficient conduct of the hearing;

(xi) direct the convening of any conference required for administrative efficiency;

(xii) preclude irrelevant or unduly repetitious, tangential or speculative testimony or argument;

(xiii) issue orders limiting the length of cross-examination, size of briefs and similar matters; and

(xiv) exercise any other authority available to ALJs under this Part or presiding officers under article 3 of the SAPA.

(2) Impartiality of the ALJ and motions for recusal:

(i) The ALJ will conduct the hearing in a fair and impartial manner.

(ii) An ALJ must not be assigned to any proceeding in which the ALJ has a personal interest.

(iii) Any party may file with the ALJ a motion in conformance with section 622.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. Such motions will be determined as part of the record of the hearing.

(iv) Upon being notified that an ALJ declines or fails to serve, or in the case of the ALJ's death, illness, resignation, removal or recusal, the Chief ALJ must designate a successor.

(3) The designation of an ALJ as the commissioner's representative must be in writing and filed in the Office of Hearings.

(c) *Appearances*.

(1) A party may appear in person or by counsel.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show his or her authority to act in such capacity and must file a notice of appearance with the ALJ.

(d) *Appeals of ALJ rulings.*

(1) Any ruling of an ALJ may be appealed to the commissioner after the completion of all testimony as part of a party's final brief or by motion where no final brief is provided for.

(2) During the course of the hearing, the following rulings may be appealed to the commissioner on an expedited basis:

(i) any ruling in which the ALJ has denied a motion for recusal.

(ii) by seeking leave to file an expedited appeal, any other ruling of the ALJ where it is demonstrated that the failure to decide such an appeal on an expedited basis would be unduly prejudicial to one of the parties, or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary.

(3) A motion for leave to file an expedited appeal must demonstrate that the ruling in question falls within one of the categories set forth in subparagraph 2(ii) of this subdivision.

(4) The commissioner may review any ruling of the ALJ on an expedited basis upon the commissioner's own initiative or upon a determination by the ALJ that the ruling should be appealable.

(5) Whenever the commissioner grants leave to file an expedited appeal, the parties must be so notified and provided with an opportunity to file a response to the appeal.

(6) Failure to file an appeal will not preclude appealing the ruling to the commissioner after the hearing.

(7) There will be no adjournment of the hearing while an appeal is pending except by permission of the ALJ or the commissioner.

(e) *Consolidation and severance.*

(1) In proceedings which involve common questions of fact, the Chief ALJ upon the ALJ's own initiative or upon motion of any party, may order a consolidation of proceedings or a joint hearing of any or all issues.

(2) The ALJ, upon the ALJ's own initiative or upon request of any party, in order to avoid prejudice or to achieve administrative efficiency, may order a severance of the hearing and hear separately any issue or any party to the proceeding.

(f) *Intervention.*

(1) At any time after the institution of a proceeding, the commissioner or the ALJ, upon receipt of a verified petition in writing and for good cause shown, may permit a person to intervene as a party.

(2) The petition of any person desiring to intervene as a party must state with preciseness and particularity:

(i) the petitioner's relationship to the matters involved;

(ii) the nature of the material petitioner intends to present in evidence;

(iii) the nature of the argument petitioner intends to make; and

(iv) any other reason that the petitioner should be allowed to intervene.

(3) Intervention will only be granted where it is demonstrated that there is a reasonable likelihood that the petitioner's private rights would be substantially adversely affected by the relief requested and that those rights cannot be adequately represented by the parties to the hearing.

(g) *Adjournment*. After a date has been set for the hearing adjournments will be granted only for good cause and with the permission of the ALJ. A request for an adjournment prior to the commencement of the hearing must be in writing and must be filed with the ALJ prior to the hearing. Adjournments must specify the time, day and place when the hearing will resume or specify the time and day on which the parties will advise the ALJ of the status of the case.

§622.11 Evidence, burden of proof and standard of proof

(a) *Evidence.*

(1) Before testifying, each witness must be sworn or make an affirmation.

(2) When necessary, in order to prevent undue prolongation of the hearing, the ALJ may limit the repetitious examination or cross-examination of witnesses or the amount of corroborative or cumulative testimony.

(3) The rules of evidence need not be strictly applied; provided, however, the ALJ will exclude irrelevant, immaterial or unduly repetitious evidence and must give effect to the rules of privilege recognized by New York State law.

(4) Every party must have the right to present evidence and cross-examine witnesses.

(5) Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to the final decision of the commissioner to dispute the fact or its materiality.

(6) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, must be admissible in evidence in proof of that act, transaction, occurrence or event, if the ALJ finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record including lack of personal knowledge by the maker, may be proved to affect its weight, but they will not affect its admissibility. The term *business* includes a business, profession, occupation and calling of every kind.

(7) Where a public officer is required or authorized by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed by him in the course of his official duty, and to file or deposit it in a public office of the State, the certificate or affidavit so filed or deposited is *prima facie* evidence of the facts stated.

(8) A statement signed by an officer or a qualified agent or representative having legal custody of specified official records of the United States or of any state, country, town, village or city or of any court thereof, or kept in any public office thereof, that he has made diligent search of the records and has found no record or entry of a specified nature, is *prima facie* evidence that the records contain no such record or entry, but only if the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person. The certification must be made by a person described in rule 4540 of the CPLR.

(9) All maps, surveys and official records affecting real property, which are on file in the State in the office of the registrar of any county, any county clerk, any court of record or any department of the State or City of New York are *prima facie* evidence of their contents.

(10) Samples may be displayed at the hearing and may be described for purposes of the record, but need not be admitted in evidence as exhibits.

(11) All written statements, charts, tabulations and similar data offered in evidence at the hearing must, upon a showing satisfactory to the ALJ of their authenticity, relevancy and materiality, be received in evidence and constitute a part of the record.

(12) Where the testimony of a witness refers to a statute, a report or a document, the ALJ must, after being satisfied of the identity of such statute, report or document, determine whether it will be produced at the hearing and physically made a part of the record or of it will be incorporated in the record by reference.

(b) *Burden of proof.*

(1) The department staff bears the burden of proof on all charges and matters which they affirmatively assert in the instrument which initiated the proceeding.

(2) The respondent bears the burden of proof regarding all affirmative defenses.

(3) The party making a motion bears the burden of proof on that motion.

(c) *Standard of proof.* Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR article 78.

§622.12 Motion for order without hearing

(a) In lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence. Simultaneously with the service of the motion for order without hearing or as soon as practical thereafter, department staff shall send a copy of the motion and supporting papers to the Chief ALJ together with proof of service on the respondent.

(b) The motion shall include a statement that a response must be filed with the Chief ALJ within 20 days after the receipt of the motion and that the failure to answer constitutes a default.

(c) Within 20 days of receipt of such motion, the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence. When it appears from affidavits and documentary evidence filed in opposition to the motion, that facts essential to justify opposition may exist but cannot then be stated, the assigned ALJ may deny the motion or order a continuance to permit the submission of such essential facts and make such other orders as may be just.

(d) A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. Likewise, where the motion includes several causes of actions, the motion may be granted in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established. Upon determining that the motion should be granted, in whole or in part, the ALJ will prepare a report and submit it to the commissioner pursuant to section 622.18 of this Part.

(e) The motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing. If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel and/or directing a conference. The ALJ will thereupon make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing. Upon the issuance of such a ruling, the moving and responsive papers will be deemed the complaint and answer, respectively, and the hearing will proceed pursuant to this rule.

(f) The existence of a triable issue of fact regarding the amount of civil penalties which should be imposed will not bar the granting of a motion for an order without hearing. If this issue is the only triable issue of fact presented, the ALJ must immediately convene a hearing to assess the amount of penalties to be recommended to the commissioner.

§622.13 Expedited fact finding

Where a complaint includes the allegation that a respondent is unlawfully conducting an activity without a permit, the ALJ must, upon motion from staff or respondent, sever this issue from the other allegations for expedited adjudication. Upon completion of the expedited adjudication, the ALJ will submit a report to the commissioner containing findings of fact, conclusions of law and recommendations limited to the issue of whether or not the respondent is unlawfully conducting an activity which requires a permit. The commissioner may issue an order to desist upon finding that respondent is conducting such an unpermitted activity. All remaining issues, including the assessment of civil penalties, must be heard and resolved as part of the original proceeding.

§622.14 Summary abatement and summary suspension orders

(a) The department staff may commence a proceeding by serving upon a person a summary abatement order pursuant to ECL 71-0301 and 71-1709 or a summary suspension order pursuant to SAPA 401(3). Any such order must provide a clear statement of its basis and of the opportunity for a hearing. The date for the hearing must be set in the order and the order shall also contain a statement that the failure to appear at the hearing constitutes a default and the waiver of the right to a hearing.

(b) Sections 622.3, 622.4, 622.8, 622.9 and 622.13 of this Part are not applicable to proceedings brought pursuant to this section.

(c) In a summary abatement proceeding, the provisions of Part 620 of this Title also apply and supersede any inconsistent provision of this Part.

(d) Where a person is served with a summary abatement order or a summary suspension order, such person may also be served with a complaint as provided in section 622.3 of this Part. Whenever possible, but without prejudice to the respondent's rights, the matters that are the subject of the complaint may be heard together with those that are the subject of the summary abatement or summary suspension order.

§622.15 Default procedures

(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record or in writing and must contain:

(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;

(2) proof of the respondent's failure to appear or failure to file a timely answer; and

(3) a proposed order.

(c) Upon a finding by the ALJ that the requirements of subdivision (b) of this section have been adequately met, the ALJ will submit a summary report, which will be limited to a description of the circumstances of the default, and the proposed order to the commissioner.

(d) Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists.

(e) The defaulting party must be served with a copy of the final determination and order of the commissioner.

§622.16 Ex parte rule

(a) Except as provided below, an ALJ must not communicate, directly or through a representative, with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.

(b) An ALJ may consult on questions of law or procedure with supervisors and other staff of the Office of Hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) ALJs may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

(d) Parties or their representatives must not communicate with the ALJ or the commissioner, or any person advising or consulting with either of them, in connection with any issue without providing proper notice to all the other parties.

§622.17 Record of the hearing

(a) Testimony given and other proceedings at a hearing must be recorded verbatim. For this purpose and consistent with respondent's rights, the ALJ may use whatever means the ALJ deems appropriate, including but not limited to the use of stenographic transcriptions or recording devices. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.

(b) The record of the hearing must include: the notice of hearing, complaint and any other pleadings; motions and requests filed, and rulings thereon; the transcript or recording of the testimony taken at the hearing; exhibits submitted and filed; stipulations, if any; a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; the hearing report; and briefs as may have been filed including any comments to the hearing report filed pursuant to section 622.18(a)(3) of this Part.

(c) A copy of the stenographic transcript of the hearing, or if the hearing is recorded, a copy of the tape, or a transcript of the recording will be available to any party upon request to the stenographer or department, as appropriate, and upon payment of the fees allowed by law.

§622.18 Final decision

(a) *Hearing report*.

(1) The ALJ will submit a hearing report to the commissioner within 45 days after the close of the record. The report must include findings of fact, conclusions of law and recommendations on all issues before the ALJ.

(2) The hearing report may be circulated to the parties as a recommended decision when:

(i) required by law; or

(ii) directed by the commissioner.

(3) All parties to the hearing must have 14 days after receipt of the recommended decision to file comments to the commissioner, unless such time is varied by the ALJ or the commissioner.

(b) *Final decisions*.

(1) Where a recommended decision has not been issued, the final decision of the commissioner, together with the hearing report of the ALJ will be issued 60 days after the close of the record.

(2) Where a recommended decision has been issued, the final decision of the commissioner will be issued within 30 days after the close of the record, such event occurring at the expiration of the time allowed for comment on the recommended decision.

(c) *Stipulations.* Any time prior to receipt of the ALJ's report or recommended decision, the department and respondent may enter into a stipulation on any matter. Where a stipulation is reached on all charges the hearing will be canceled and no further action of the commissioner will be required.

(d) *Reopening the record*. At any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

(e) The final determination will be embodied in an order which must contain findings of fact and conclusions of law or reasons for the final determination and may provide for:

(1) a finding of liability or the dismissal of the charges;

(2) assessment of penalties or other sanctions consistent with the applicable provisions of the ECL;

(3) direction for abatement or restoration or provision for financial security;

(4) a combination of any or all of the foregoing; and

(5) any determination deemed appropriate under the circumstances, and consistent with applicable provisions of the Environmental Conservation Law or the rules and regulations promulgated thereunder.

(f) A copy of the final determination and order will be served on the parties in the same manner as is provided for the service of notice of hearing by these rules.

Official Compilation of Codes, Rules and Regulations of the State of New York,
Title 6. Department of Environmental Conservation
Part 621. Uniform Procedures

As amended effective Sept. 6, 2006

Section 621.13 Permit modifications, suspensions or revocations by the department.

(a) Permits may be modified, suspended or revoked at any time by the department on the basis of any ground set forth in paragraphs (1) through (6) below:

(1) materially false or inaccurate statements in the permit application or supporting papers;

(2) failure by the permittee to comply with any terms or conditions of the permit;

(3) exceeding the scope of the project as described in the permit application;

(4) newly discovered material information or a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit;

(5) noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the Environmental Conservation Law or regulations of the department related to the permitted activity; or

(6) for SPDES permits, in addition to paragraphs (1) through (5) above, any of the reasons listed in Part 750-1.18 (b)(1) through (7) of this Title.

(b) The department may consider requests from any interested party for modification, suspension or revocation of permits based on reasons given in paragraphs 621.13(a)

(1) through (6) above. Requests must be in writing, contain facts or reasons supporting the request and be sent to the regional permit administrator as listed in section 621.19 of this Part. The department must decide whether the request is justified and the action to be taken in response to the request. A brief response giving the reason(s) for the department's decision must be sent to the party making the request. Rejection of interested party requests for modification, suspension or revocation are not subject to public notice, comment or hearings.

(c) The department must send a notice of intent to modify, suspend or revoke a permit to the permittee by certified mail return receipt requested or personal service. The notice must state the alleged facts or conduct which appear to warrant the intended action and must state the effective date, contingent upon administrative appeals, of the modification, suspension or revocation.

(d) Within 15 calendar days of mailing a notice of intent, the permittee may submit a written statement to the regional permit administrator or chief permit administrator, as directed, giving reasons why the permit should not be modified, suspended or revoked,

or requesting a hearing, or both. Failure by the permittee to timely submit a statement will result in department's action becoming effective on the date specified in the notice of intent.

(e) Where the department proposes to modify, suspend or revoke a permit and the permittee requests a hearing on the proposed modification or change in permit status, the original permit conditions or permit status will remain in effect until a decision is issued by the commissioner pursuant to subdivision (h) of this section. At such time, the permit conditions or permit status supported by the commissioner's decision will take effect.

(f) For delegated permits, a modification which would result in less stringent regulatory standards in the permit or is initiated following a SPDES Environmental Benefits Permit Strategy full technical review will be processed as a new application for a permit pursuant to this Part. For purposes of this subdivision the date of transmittal of the notice and modified draft permit will be considered the completeness date.

(g) Within 15 calendar days of receipt of the permittee's statement, the department will either:

(1) rescind or confirm the notice of intent based on a review of the information provided by the permittee, if a statement without a request for a hearing is submitted; or

(2) notify the permittee of a date and place for a hearing, if a statement with a request for a hearing has been submitted, to be commenced not later than 60 calendar days from this notification, except for a SPDES permit, the hearing must not commence earlier than 30 days from notification.

(h) In the event such a hearing is held, the commissioner must, within 30 calendar days of receipt of the complete record, issue a decision which:

(1) continues the permit in effect as originally issued;

(2) modifies the permit, or suspends it for a stated period of time or upon stated conditions; or

(3) revokes the permit; including, where ordered by the commissioner, removal or modification of all or any portion of a project, whether completed or not.

Notice of such decision, stating the findings and reasons therefor, must be provided under the procedures of section 621.10 of this Part.

(i) Revocation or suspension of Waste Transporter permits that were issued pursuant to Part 364 of this Title requires the department to publish a public notice of the revocation or suspension in the Environmental Notice Bulletin and a newspaper or newspapers having a general circulation in the area or areas served by the permittee. The notice must include a statement that the permittee is no longer permitted to handle such waste. The notice must be published once each week for two consecutive weeks. The first notice must be published within fifteen days following the revocation or suspension.

(j) Nothing in this Part shall preclude or affect the commissioner's authority to issue summary abatement orders under section 71-0301 of the Environmental Conservation Law, or to take emergency actions summarily suspending a permit under section 401(3) of the State Administrative Procedure Act.

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

6 NYCRR PART 624
Permit Hearing Procedures

(Statutory authority: Environmental Conservation Law, §70-0107[1] and State Administrative Procedure Act, Article 3)

[Effective date: January 9, 1994; as amended effective July 12, 2000; as amended effective September 6, 2006]

Sec.

Introduction

Note: This Part provides a detailed explanation of the public hearing process which is sometimes necessary to make a determination on permit applications submitted to the department, and on which agreement among parties involved cannot be reached otherwise. The principal function of the hearing is to resolve disputed issues of fact. It is the policy of the department to ensure that the public hearings it conducts provide a fair and efficient mechanism for the development of a factual record for the decision on a permit and, to that end, that all statements and testimony be relevant and directed toward achieving that goal. The process described in the following text may involve a legislative hearing session on a draft environmental impact statement, an adjudicatory hearing session with sworn testimony and cross-examination, formal filing of documents, and expenses to the applicant for a hearing room, stenographic services and public notice. This Part also contains provisions for subpoenas, stipulations, conferences, standards and evidence, and exchange of information by parties.

§624.1 Applicability

(a) This Part is applicable to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted.

(1) a determination by the department staff to hold an adjudicatory hearing pursuant to section 621.8(b) of this Title (on identification by department staff of substantive and significant issues);

(2) a request made by an applicant in conformance with the provisions of section 621.10(a)(1) and (2) of this Title (based on department staff's denial of permit or attachment of significant conditions);

(3) a determination made by department staff to hold an adjudicatory hearing pursuant to 621.15(f) of this Title (conceptual review);

(4) a request made by an applicant in conformance with the provisions of section 621.11(g) of this Title (based on department staff's denial or conditioning of a permit in response to an application to renew or modify);

(5) a request made by a permittee in conformance with the provisions of section 621.13(d) of this Title (based on department staff's proposed modification, suspension or revocation of a permit); except, where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a

violation of the ECL, its implementing regulations, an order, permit, license or other entitlement issued by the department. In such cases the provisions of Part 622 of this Title govern;

(6) any circumstance comparable to those set forth in paragraph (1), (2), (3), (4) or (5) of this subdivision which arises out of permits, licenses or other entitlements that are not subject to ECL article 70 or Part 621 of this Title. The circumstances where this Part applies include, but are not limited to, permits for aquatic pesticide applications, the registration of pesticides, oil and gas well spacing variances, oil facility certifications and water supply rate disputes.

(b) The provisions of this Part do not apply to the conduct of legislative hearings except those that are included in a notice of hearing issued pursuant to section 624.3 of this Part.

(c) The provisions of this Part do not apply to the determination of disputed environmental regulatory program fees and penalties that are assessed pursuant to ECL article 72.

(d) The provisions of this Part apply to those proceedings in which the determination to hold an adjudicatory hearing was made on or after the effective date [January 9, 1994] of these regulations.

§624.2 Definitions

Whenever used, in this Part, unless otherwise expressly stated, the following terms will have the meanings indicated below. The definitions of this section are not intended to change any statutory or common law meaning of these terms, but are merely plain language explanations of legal terms.

(a) *Adjudicatory hearing* means a hearing, held pursuant to ECL section 70-0119 or SAPA article 3, where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the commissioner's rendering of a decision on the merits, but does not include legislative hearings.

(b) *Administrative law judge* or *(ALJ)* means the commissioner's representative who conducts the hearing.

(c) *Amicus status* means a person who is not otherwise eligible for party status but who is allowed to introduce written argument upon one or more specific issues.

(d) *Applicant* means the person who has applied for one or more permits from the department or the modification or renewal of such permit(s). In the case of a water supply rate dispute, the petitioning party shall be the applicant.

(e) *Argument* means opinions or viewpoints, as distinguished from evidence.

(f) *Commissioner* means the Commissioner of the Department of Environmental Conservation or the commissioner's designee.

(g) *CPLR* means the New York State Civil Practice Laws and Rules.

(h) *DEIS* means the draft environmental impact statement prepared in response to the requirements of article 8 of the ECL.

(i) *Delegated permit* (as further defined under Part 621 of this Title) means a permit issued by the department which substitutes for a comparable permit required by Federal law and is recognized by the Federal agency responsible for administering the Federal program.

(j) *Department* means the Department of Environmental Conservation of the State of New York.

(k) *Department staff* means those department personnel participating in the hearing, but does not include the commissioner, any personnel of the Office of Hearings, the ALJ or those advising them.

(l) *Discovery* means the disclosure of facts, titles, documents, or other things which are in the exclusive knowledge or possession of a party and which are necessary to the person requesting the discovery as a part of the requester's case.

(m) *Draft permit* means a document prepared by department staff which contains terms and conditions staff find are adequate to meet all legal requirements associated with such a permit, but is subject to modification as a result of public comments or an adjudicatory hearing.

(n) *ECL* means the New York State Environmental Conservation Law.

(o) *ENB (Environmental Notice Bulletin)* means the publication of the department published pursuant to section 3-0306 of the ECL, and accessible on the department's internet web site at http://www.dec.ny.gov.

(p) *Evidence* means sworn testimony of a witness, physical objects, documents or records or photographs representative of facts which have been admitted into the record by the ALJ.

(q) *FEIS* means the final environmental impact statement prepared pursuant to the requirements of article 8 of the ECL.

(r) *Hearsay* means a statement, other than one made by a witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted.

(s) *Interrogatories* means written questions regarding the case which are served by a party on an adversarial party, which the adversary must then answer in writing and under oath.

(t) *Legislative hearing* means the portion of the hearing process during which unsworn statements are received from the public and the parties.

(u) *Motion* means a request for a ruling or an order.

(v) *Office of Hearings* means the office within the department principally responsible for conducting adjudicatory hearings.

(w) *Party* means any person granted full party status or *amicus* status in the adjudicatory portion of the hearing according to the procedures and standards set forth in section 624.5 of this Part but does not include the ALJ, the Office of Hearings, or the commissioner.

(x) *Permit* means any permit, certificate, license or other form of department approval, other than an enforcement order, issued in connection with any regulatory program administered by the department.

(y) *Person* means any individual, public or private corporation, bistate authority, political subdivision, government agency, department or bureau of the State, municipality, industry copartnership, association, firm, trust, estate or any legal entity whatsoever.

(z) *Potential party* means any person who has filed a petition pursuant to section 624.5 of this Part whose petition has not received either final denial or acceptance.

(aa) *Project* means the physical activity or undertaking for which one or more permits are required from the department.

(bb) *Protective order* means an order denying, limiting, conditioning or regulating the use of material requested through discovery.

(cc) *Relevant* means tending to support or refute the existence of any fact that is of consequence or material to the commissioner's decision on a permit.

(dd) *Report* means the ALJ's summary of the hearing record including findings of fact and conclusions.

(ee) *SAPA* means the New York State Administrative Procedure Act.

(ff) *SEQRA* means the New York State Environmental Quality Review Act, article 8 of the ECL.

(gg) *Service* means the delivery of a document to a party or potential party by authorized means or the filing of a document with the ALJ, the Office of Hearings or the commissioner.

(hh) *Statement of intent to deny* means a document prepared by staff which identifies the reasons why the permit(s) for the project may not be issued as proposed or conditionally.

(ii) *Stipulation* means an agreement between two or more parties to a hearing, and entered into the hearing record, concerning one or more issues of fact or law which are the subject of the hearing.

(jj) *Subpoena* means a legal document that requires a person to appear at a hearing and testify and/or bring documents or physical objects.

(kk) *UPA* means the New York State Uniform Procedures Act, article 70 of the ECL.

§624.3 Notice of hearing

(a) *When notice is required.* Unless otherwise provided by statute or regulation, the Office of Hearings must publish notice of the hearing in the ENB, and provide notice to the applicant and to persons who have made written request to participate. The applicant must provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located. The notices in the ENB and the newspaper must be published at least once and not less than 21 calendar days prior to the hearing date. In the case of applications involving State Pollutant Discharge Elimination System (SPDES) permits, revisions to the State implementation plan, federally delegated air permits, and Hazardous Waste Management Facility (HWMF) permits, and Remedial Action Plans (RAPs), the notice must be published at least 30 days prior to the hearing date. In addition, public notice by means of radio is required for hearings on all HWMF permits or RAP applications. These requirements are minimums and the ALJ shall direct the applicant to provide additional notice or to provide the notice further in advance of the hearing where the ALJ finds it necessary to do so in order to adequately inform the potentially affected public about the hearing. Where the ALJ finds that a large segment of the potentially affected public has a principal language other than English, he or she shall direct the publication of the notice in a foreign language newspaper(s) serving such people. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in UPA without the applicant's consent.

(b) *Required contents of notice.* The notice must be in the form specified by the Office of Hearings and must contain the following information:

(1) the date of issuance of the notice of hearing and the date of the notice of complete application.

(2) the date, time, location and purpose of the hearing and any pre-hearing conference, if scheduled. The location must be in the town, village or city in which the project is located, as reasonably near the project site as practicable, depending upon the availability of suitable facilities. However, another location may be selected based on the convenience of parties and witnesses at the discretion of the ALJ;

(3) the name and address of the applicant or permittee;

(4) the permits, approvals or action sought together with citations to applicable statutes and regulations;

(5) a description of the project;

(6) the accessibility and location for review, and a list of the available application materials, including, if available at the time of issuance of the notice of hearing, the staff's draft permit or statement of intent to deny;

(7) the status of the action under SEQRA and, where the department is lead agency pursuant to SEQRA and Part 617 of this Title and a DEIS has been prepared, an indication that comments on the DEIS may be received at the legislative hearing and of the provisions for their review;

(8) instructions for filing a petition for party status (see generally section 624.5 of this Part); and

(9) other notices required pursuant to any delegated permit program.

(c) *Optional contents.* The notice may also specify the issues of concern to the department and the public.

(d) *Service on specific persons.* Not less than 21 calendar days prior to the hearing date, individual copies of the notice must be sent to the chief executive officer of any municipality in which the project is located and such other persons as the department deems to have an interest in the application. In the case of applications for delegated permits, as defined by section 621.2(g) of this Title, notice of the type specified in this section must be sent to those persons specified in section 621.7(a) of this Title not less than 30 calendar days prior to the hearing date. The ALJ shall direct the applicant to provide notice further in advance of the hearing to those persons specified in this subdivision where the ALJ finds it necessary to do so in order to adequately inform them about the hearing. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in UPA without the applicant's consent.

§624.4 Legislative hearing and issues conference

(a) *Legislative hearing.*

(1) The ALJ will hear and receive the unsworn statements of parties and non-parties relating to the permit applications. A stenographic transcript of such statements will be made but will not be part of the record of the proceeding, as defined by section 624.12 of this Part (except as described in paragraph [3] of this subdivision or as otherwise admitted into evidence).

(2) The ALJ may require that lengthy statements be submitted in writing and summarized for oral presentation.

(3) Whenever a DEIS accompanies the application and the department is the lead agency as defined in Part 617 of this Title, all statements made at the legislative hearing will constitute comments on the DEIS and all substantive comments must be addressed pursuant to the procedures set forth in section 617.14 of this Title.

(4) The statements made at the legislative hearing do not constitute evidence but may be used by the ALJ as a basis to inquire further of the parties and potential parties at the issues conference.

(b) *Issues conference*.

(1) Following the legislative hearing, the ALJ will schedule an issues conference (if one was not scheduled in the hearing notice) which will be held in advance of the adjudicatory hearing. At the ALJ's discretion, the issues conference may be reconvened at any time to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues conference. Upon a demonstration that the public review period for the application prior to the issues conference was insufficient to allow prospective parties to adequately prepare for the issues conference, the ALJ shall adjourn the issues conference, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the prospective parties.

(2) The purpose of the issues conference is:

(i) to hear argument on whether party status should be granted to any petitioner;

(ii) to narrow or resolve disputed issues of fact without resort to taking testimony;

(iii) to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues set forth in subdivision (c) of this section;

(i) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues; and

(ii) to decide any pending motions.

(2) The ALJ will preside over the issues conference and the participants will be department staff, the applicant and any person who has filed a petition for party status pursuant to section 624.5 of this Part.

(3) The ALJ may require the submission of written argument to supplement the record of the issues conference.

(4) Upon the completion of the issues conference or as soon as practicable thereafter, but in no event later than 30 days after the issues conference or the receipt of written submissions thereafter, the ALJ will:

(i) determine which persons will be granted party status;

(ii) determine which issues satisfy the requirements of adjudicable issues as set forth in subdivision (c) of this section and define those issues as precisely as possible;

(iii) rule on the merits of any legal issue where ruling does not depend on the resolution of disputed issues of fact; and

(iv) decide any pending motions to the extent practicable.

(c) *Standards for adjudicable issues*.

(1) Generally applicable rules. Subject to the limitations set forth in paragraphs (6), (7) and (8) of this subdivision, an issue is adjudicable if:

(i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;

(ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant; or

(iii) it is proposed by a potential party and is both substantive and significant.

(2) An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and

related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.

(3) An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.

(4) In situations where the department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.

(5) If the ALJ determines that there are no adjudicable issues, the ALJ will direct that the hearing be canceled and that the staff continue processing the application to issue the requested permit.

(6) SEQRA Issues.

(i) Department is the lead agency or there has been no coordinated review.

(a) As part of the issues ruling, the ALJ may review a determination by staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the determination must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb the staff's determination.

(b) Whenever the department, as lead agency, has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the department to make the findings required pursuant to section 617.9 of this Title will be made according to the standards set forth in paragraph (1) of this subdivision.

(ii) Another agency serves as the lead agency.

(a) Whenever the lead agency has determined that the proposed action does not require the preparation of a DEIS, the ALJ will not entertain any issues related to SEQRA. Such issues may be considered, however, if lead agency status is re-established with the department pursuant to the provisions in section 617.6(f) of this Title.

(b) Whenever the lead agency has required the preparation of a DEIS, no issue that is based solely on compliance with SEQRA and not otherwise subject to the department's jurisdiction will be considered for adjudication unless:

(1) the department notified the lead agency during the comment period on the DEIS that the DEIS was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond; or

(2) the department is serving as lead agency for purposes of supplementing the FEIS. In such case, only issues that are the subject of the supplementation will be considered for adjudication.

(3) whenever issues addressed in this subparagraph are eligible for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

(7) UPA Issues. The completeness of an application, as defined in section 621.2(f) of this Title, will not be an issue for adjudication. The ALJ may require the submission of additional information pursuant to section 621.14(b) of this Title.

(8) Department initiated modifications, suspensions or revocations. The only issues that may be adjudicated are those related to the basis for modification, suspension or revocation cited in the department's notice to the permittee. Whenever such issues are proposed for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

§624.5 Hearing participation

Participation in the hearing may be as a full party or as *amicus*, depending upon the demonstrated compliance with the criteria set forth in subdivisions (b) through (d) of this section. Non-parties who wish to have their comments recorded will be permitted to submit oral or written comments during the legislative portion of the hearing, or as otherwise provided by the ALJ, as set forth above at section 624.4 of this Part. Such statements will not constitute evidence in the adjudicatory hearing, but will constitute comments on the DEIS, if one exists, and may be used by the ALJ as a basis to inquire further of all parties and potential parties at the issues conference.

(a) *Mandatory parties.* The applicant and assigned department staff are automatically full parties to the proceeding. However, in the case of a water supply rate dispute only the municipalities involved in the dispute are mandatory parties.

(b) *Other parties.* By the date set in the notice of hearing, a person desiring party status must file a petition in writing which includes the requirements of either paragraphs (1) and (2) or paragraphs (1) and (3) of this subdivision.

(1) Required contents of petition for party status:

(i) fully identify the proposed party together with the name(s) of the person or persons who will act as representative of the party;

(ii) identify petitioner's environmental interest in the proceeding;

(iii) identify any interest relating to statutes administered by the department relevant to the project;

(iv) identify whether the petition is for full party or *amicus* status;

(v) identify the precise grounds for opposition or support.

(2) Additional contents required for petitions for full party status:

(i) identify an issue for adjudication which meets the criteria of section 624.4(c) of this Part; and

(ii) present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue.

(3) Additional contents required for petitions for *amicus* status:

(i) identify the nature of the legal or policy issue(s) to be briefed which meets the criteria of section 624.4(c) of this Part; and

(ii) provide a statement explaining why the proposed party is in a special position with respect to that issue.

(4) Inadequate petition. If a potential party fails to file a petition in the form set forth above, the ALJ may deny party status or may require additional information from the filer.

(5) Supplementation of petitions. Where the ALJ finds that a prospective party did not have adequate time to prepare its petition for party status, the ALJ shall provide an opportunity for supplementation of the petition.

(c) *Late filed petitions for party status.*

(1) Petitions filed after the date set in the notice of hearing will not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision.

(2) In addition to the required contents of a petition for party status, a petition filed late must include the following in order to receive any consideration:

(i) a demonstration that there is good cause for the late filing;

(ii) a demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and

(iii) a demonstration that participation will materially assist in the determination of issues raised in the proceeding.

(d) *Rulings on party status.* Rulings on party status will be made by the ALJ after the deadline for receipt of petitions for party status and will be set forth in the rulings on issues provided for in section 624.4 of this Part.

(1) Full party status. The ALJ's ruling of entitlement to full party status will be based upon:

(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (2) of this section;

(ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and

(iii) a demonstration of adequate environmental interest.

(2) Amicus status. The ALJ's ruling of entitlement to *amicus* status must be based upon:

(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (3) of this section;

(ii) a finding that the petitioner has identified a legal or policy issue which needs to be resolved by the hearing; and

(iii) a finding that the petitioner has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.

(e) *Rights of parties.*

(1) A full party has the right to:

(i) participate at the hearing in person or through an authorized representative;

(ii) present relevant evidence and to cross-examine witnesses of other parties;

(iii) present argument on issues of law and fact;

(iv) initiate motions, requests, briefs or other written material in connection with the hearing, and receive all correspondence to and from the ALJ and to and from all other parties which is circulated to the parties generally;

(v) appeal adverse rulings of the ALJ; and

(vi) exercise any other right conferred on parties by this Part or SAPA.

(2) A party with *amicus* status has the right to file a brief and, at the discretion of the ALJ, present oral argument on the issue(s) identified in the ALJ's ruling on its party status but does not have any other rights of participation or submission.

(3) A potential party has the same rights it would be entitled to if its petition for party status were granted.

(f) *Loss of party status.* Upon determining that the party or its representative has failed to comply with the applicable laws, rules or directives of the ALJ and has substantially disrupted the hearing process or prejudiced the rights of another party to the proceeding, the ALJ may revoke the party status of the offending party.

§624.6 General rules of practice

(a) *Service*.

(1) Rule 2103 of the CPLR will govern service of papers except that service upon the party's duly authorized representative may be made by the same means as provided for service upon an attorney.

(2) Proof of service must be made in the same manner as under the CPLR. Any required filing or proof of service must be with the Office of Hearings.

(b) *Computation of time limits*.

(1) Computation of time will be according to the rules of the New York State General Construction Law.

(2) if a period of time prescribed under this Part is measured from the date of the ruling, pleading, motion, appeal, decision or other communication instead of the date of service,

(i) five days will be added to the prescribed period if notification is by ordinary mail; and

(ii) one day will be added to the prescribed period if notification is by express mail or other overnight delivery.

(c) *Motion practice*.

(1) Motions and requests made at any time are part of the record. Motions and requests prior to the hearing must be filed in writing with the ALJ and must be served upon all parties. During the course of the hearing, motions may be made orally except where otherwise directed by the ALJ. If no ALJ has been assigned to the case, the motion must be filed with the Chief ALJ of the Office of Hearings.

(2) Every motion must clearly state its objective, the facts on which it is based, and may present legal argument in support of the motion.

(3) All parties have five days after a motion is served to serve a response. Thereafter no further responsive pleadings will be allowed without permission of the ALJ.

(4) The ALJ should rule on a motion within five days after a response has been served or the time to serve a response has expired. The ALJ must rule on all pending motions prior to the completion of testimony. Any motion not ruled upon prior to the completion of testimony must be deemed denied.

(d) *Office of Hearings*.

(1) Prior to the appointment of an ALJ to hear a particular case, the commissioner or the commissioner's designee from the Office of Hearings may take any action which an ALJ is authorized to take.

(2) The Office of Hearings may establish a schedule for hearing pretrial motions and other matters for cases which have no assigned ALJ.

(e) *Expedited Appeals*. The time periods for expedited appeals filed pursuant to section 624.8(d) of this Part are as follows:

(1) Expedited appeals or applications for leave to appeal must be filed to the commissioner in writing within five days of the disputed ruling.

(2) Upon being granted leave to appeal, a party must file the appeal in writing within five days if it has not already been filed. Thereupon the other parties may submit briefs or other arguments in support of or in opposition to the appealed issues within five days.

(3) Notice of the appeal and a copy of all briefs must be filed with the ALJ and served on all parties to the hearing. Upon receipt of notice of any appeal, the ALJ may adjourn or continue the hearing or make such other order protecting the interests of the parties.

(f) Tape recording or televising the adjudicatory hearing for rebroadcast is prohibited by section 52 of the New York State Civil Rights Law.

(g) To avoid prejudice to any party, all rules of practice involving time frames may be modified by direction of the ALJ and, for the same reasons, any other rule may be modified by the commissioner upon recommendation of the ALJ or upon the commissioner's initiative.

§624.7 Discovery

(a) *Prior to the issues conference.* Discovery is limited to what is afforded under Part 616 of this Title (Access to Records). In the absence of extraordinary circumstances the ALJ will not grant petitions for further discovery. This provision does not alter the rights of any person under Part 616 of this Title nor does it limit the ability of any party to seek disclosure after the issues conference.

(b) *Without permission of the ALJ.* Within 10 days after service of the final designation of the issues any party has the right to serve a discovery demand upon any other party demanding that party provide:

(1) documents, in general conformance with CPLR 3120(a)(1)(i);

(2) a list of witnesses to be called, their addresses, and the scope and content of each witness's proposed testimony, and the qualifications and published works of each, in general conformance with CPLR 3101(d)(1), except that disclosure of fact witnesses as well as expert witnesses may be demanded;

(3) an inspection of property, in general conformance with CPLR 3120(a)(1)(ii), except that drilling and other intrusive sampling and testing is not provided as of right;

(4) a request for admission, in general conformance with CPLR 3123; or

(5) lists of documentary or physical evidence to be offered at the hearing.

(c) *By permission.* With permission of the ALJ, a party may:

(1) obtain discovery prior to the issues conference;

(2) use discovery devices from the CPLR not provided for in subdivision (b) of this section;

(3) submit late requests for discovery or vary the time for responding to requests; and

(4) access real property in the custody or control of another for the purpose of conducting drilling or other sampling or testing. In such instance, all parties must be given notice of such activities and be allowed to observe and to take split samples or use other specified methods of verification.

(d) *Protective order and motion to compel.*

(1) A party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR Section 3103 to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such a motion must be submitted within 10 days of the discovery demand and must be accompanied by an affidavit of counsel, or by the moving party or other authorized representative if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a discovery demand without having made a timely objection, the proponent of discovery demand may apply to the ALJ to compel disclosure. The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

(e) *Prefiled testimony.* The ALJ may require the submission of prefiled written testimony for expert witnesses. Such testimony must be attested to at the hearing and the witness must be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ. Whenever the ALJ requires the submission of prefiled testimony, the testimony must provide, or must be accompanied by a technical report which provides, a full explanation of the basis for the views set forth therein, including data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography of reports,

studies and other documents relied upon. Upon 10 days notice (which time may be shortened or extended by the ALJ) the party submitting prefiled testimony may also be required to make available all raw data, well logs, laboratory notes, and other basic materials, as well as all items on the bibliography provided. Whenever prefiled testimony is not required, any party may demand, from any other party or the department propounding an expert witness, all backup information that would be required in connection with prefiled testimony.

(f) *Subpoenas.* Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas. A party who is not represented by an attorney admitted to practice in New York State may request the ALJ to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. A subpoena must give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR article 23. This Part does not affect the authority of an attorney of record for any party to issue subpoenas under the provisions of section 2302 of the CPLR.

(g) When the hearing seeks the revocation of a license or permit previously granted by the department, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

§624.8 Conduct of the adjudicatory hearing

(a) *Order of events.* The ALJ has discretion to determine and adjust the order of events and presentation of evidence, and to establish procedures to promote the conduct of a fair and efficient hearing. In general, the order of events at a hearing will be as follows:

(1) Formal opening. The ALJ will convene the hearing by opening the record, identifying the applications involved, and making appropriate procedural announcements.

(2) Noting appearances. The ALJ will call the name of each person who has been granted status as a party.

(3) Opening statements. Prior to the commencement of the adjudicatory sessions each party will be called upon to offer a brief opening statement of position on the application.

(4) Admission of evidence. The applicant will present its direct case first and will start by identifying all documents which constitute the application and the DEIS (where applicable) and all supporting documents which are relevant to the issues to be adjudicated. A panel of witnesses may be used for presenting testimony or for cross-examination at the ALJ's discretion. Cross-examination will be conducted by parties in a sequence to be established by the ALJ, which normally will be the sequence in which the parties will present their direct cases. The evidence will be confined to that which is relevant to issues identified in the ALJ's determination following the issues conference.

(5) Close of record. Closing statements of position will be dealt with in the same manner as opening statements. At the concluding session of the hearing, the ALJ will determine whether to allow the submission of written post-hearing briefs. The hearing record will be officially closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, or the submission of briefs and reply briefs, conclusions of law, memoranda, and exceptions, if any, by the various parties, whichever occurs last. The ALJ must notify the applicant by certified mail, and all other parties by regular mail, immediately upon official closing of the hearing record.

(6) Where the ALJ permits the filing of briefs, the ALJ will also determine whether replies will be permitted and the schedule for filing. Simultaneous filing will normally be required. A party must give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief. Briefs will be considered only as argument and must not refer to or contain any evidentiary material outside of the record.

(b) *The ALJ.*

(1) The ALJ has power to:

(i) rule upon all motions and requests, including those that decide the ultimate merits of the case;

(ii) set the time and place of the hearing, recesses and adjournments;

(iii) administer oaths and affirmations;

(iv) issue subpoenas upon request of a party not represented by counsel admitted to practice in New York State;

(v) upon the request of a party, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested;

(vi) summon and examine witnesses;

(vii) establish rules for and direct disclosure at the request of any party or upon the ALJ's own motion pursuant to the procedures set out in section 624.7 of this Part;

(viii) admit or exclude evidence including the exclusion of evidence on grounds of privilege or confidentiality;

(ix) hear and determine arguments on fact or law, except that a purely legal issue involving no factual dispute and which is a matter of first impression or is precedential in nature may be referred to the General Counsel for a determination in accordance with Part 619 of this Title (declaratory ruling) upon motion by any party or upon the ALJ's own initiative;

(x) preclude irrelevant or unduly repetitious, tangential or speculative testimony or argument;

(xi) direct the consolidation of parties with similar viewpoints and input;

(xii) limit the number of witnesses;

(xiii) utilize a panel of witnesses for purposes of direct testimony or cross-examination;

(xiv) allow oral argument, so long as it is recorded;

(xv) take any measures necessary for maintaining order and the efficient conduct of the hearing;

(xvi) take any measures necessary to ensure compliance with SEQRA and UPA not inconsistent with section 624.4 of this Part;

(xvii) in the case of water supply rate disputes, issue directives modifying any incompatible provisions of this Part, consistent with the spirit and intent of these regulations;

(xviii) issue orders limiting the length of cross-examination, size of briefs and similar matters;

(xix) order a site visit, on notice to all parties;

(xx) exercise any other authority available to ALJs under this Part or to presiding officers under article 3 of the SAPA.

(2) Impartiality of the ALJ and motions for recusal.

(i) The ALJ will conduct the hearing in a fair and impartial manner.

(ii) An ALJ must not be assigned to any proceeding in which the ALJ has a personal interest.

(iii) Any party may file with the ALJ a motion in conformance with section 624.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. Such motions will be determined as part of the record of the hearing.

(iv) Upon being notified that an ALJ declines or fails to serve, or in the case of the ALJ's death, illness, resignation, removal or recusal, the Chief ALJ must designate a successor.

(3) The designation of an ALJ as the Commissioner's representative must be in writing and filed in the Office of Hearings.

(c) *Appearances.*

(1) A party may appear in person or be represented by an attorney licensed in New York State or any other jurisdiction, or by a non-attorney chosen by the party. Any representative of a party who is other than an attorney licensed to practice in New York State must disclose his or her qualifications to the party. Nothing in this paragraph authorizes a non-lawyer to engage in the practice of law.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show his or her authority to act in such capacity and must file a notice of appearance with the ALJ.

(d) *Appeals of ALJ rulings.*

(1) Any ALJ ruling may be appealed to the commissioner after the completion of all testimony as part of a party's final brief or by motion where no final brief is provided for.

(2) During the course of the hearing, the following rulings may be appealed to the commissioner on an expedited basis:

(i) a ruling to include or exclude any issue for adjudication;

(ii) a ruling on the merits of any legal issue made as part of an issues ruling;

(iii) a ruling affecting party status; or

(iv) any ruling in which the ALJ has denied a motion for recusal.

(v) by seeking leave to file an expedited appeal, any other ruling of the ALJ may be appealed on an expedited basis where it is demonstrated that the failure to decide such an appeal would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary.

(3) A motion for leave to file an expedited appeal must demonstrate that the ruling in question falls within one of the categories set forth in subparagraph (2)(v) of this subdivision.

(4) The commissioner may review any ruling of the ALJ on an expedited basis upon the commissioner's determination or upon a determination by the ALJ that the ruling should be appealable.

(5) Whenever the commissioner grants leave to file an expedited appeal, the parties must be so notified and provided with an opportunity to file a response to the appeal.

(6) Failure to file an appeal will not preclude appealing the ruling to the commissioner after the hearing.

(7) There will be no adjournment of the hearing during appeal except by permission of the ALJ.

(e) *Joint hearings.* A project may require submission of applications for more than one permit, or to more than one government agency, and public hearings may be required for more than one purpose. Whenever practicable, all such hearings will be consolidated into a single public hearing.

(f) If the department is the lead agency for purposes of SEQRA, the permit hearing shall be consolidated with the hearing on the DEIS.

§624.9 Evidence, burden of proof and standard of proof

(a) *Evidence.*

(1) All evidence submitted must be relevant and all rules of privilege will be observed. However, other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if a reasonable degree of reliability is shown.

(2) Although relevant, evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of repetitious or duplicative evidence.

(3) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence.

(4) Whenever possible, an object that is the subject of testimony will be exhibited at the hearing. It must be properly identified as relevant, and it must be shown that it has not changed substantially due to the passage of time or any other reason.

(5) Each witness must be sworn or make an affirmation before testifying. Opening, closing and other unsworn statements are not evidence but will be considered as arguments bearing on evidence.

(6) The ALJ or the commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party must be given notice thereof and, on timely request, be afforded an opportunity, prior to decision, to dispute the fact or its materiality.

(b) *Burden of proof.*

(1) The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department.

(2) Where the department has initiated modification, suspension or revocation proceedings, the department staff bears the burden of proof to show that the modification, suspension or revocation is supported by the preponderance of the evidence.

(3) Where an application is made for permit renewal, the permittee has the burden of proof to demonstrate that the permitted activity is in compliance with all applicable laws and regulations administered by the department. A demonstration by the permittee that the there is no change in permitted activity, environmental conditions or applicable law and regulations constitutes a prima facie case for the permittee.

(4) The burden of proof to sustain a motion will be on the party making the motion.

(c) *Standard of proof*. Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR article 78.

§624.10 Ex parte rule

(a) Except as provided below an ALJ must not directly or through a representative, communicate with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.

(b) An ALJ may consult on questions of law or procedures with supervisors or other staff of the Office of Hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) ALJs may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

(d) Parties or their representatives must not communicate with the ALJ or the commissioner in connection with any issue without providing proper notice to all the other parties.

§624.11 Payment of hearing costs

(a) Within 30 days of the last day at which testimony is taken, the applicant must pay for the cost of: physical accommodations, if not held in department facilities; publishing any required notices; and any necessary stenographic transcriptions. Except that, when a hearing is held pursuant to a department initiated modification, suspension or revocation, the department will be responsible for the costs listed above.

(b) The ALJ may require that the applicant post a bond or other acceptable financial guarantee for the costs of the hearing. Such guarantee must be provided to the department prior to commencing the hearing or the hearing will be adjourned until the guarantee is made available.

(c) A final decision will not be issued until the applicant has paid the costs of the hearing referred to in subdivision (a) of this section.

§624.12 Record of the hearing

(a) All proceedings at a hearing must be stenographically reported. The ALJ may arrange for a certified reporter to produce a stenographic transcript of the hearing, or may permit the applicant to make such arrangements. When a stenographic transcript is made, an original and two copies of the transcript must be delivered to the ALJ at the expense of the applicant. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.

(b) The record of the hearing must include the application (including the DEIS where applicable) and all notices (including the notice of hearing) and motions; any affidavit of publication of the notice of hearing; the transcript of the testimony taken at the hearing, the exhibits entered into evidence; any motions, appeals or petitions; where applicable, comments on the DEIS and responses thereto; any admissions, agreements or stipulations; a statement of matters officially noticed; offers of proof, objections thereto and rulings thereon; proposed findings; and the hearing report; and briefs as may have been filed including any comments on the hearing report filed pursuant to section 624.13(a)(3) of this Part.

(c) As soon as the record becomes available the ALJ shall assure that a complete and current copy of the record is placed in an accessible location for the parties' reference and/or copying.

§624.13 Final decision

(a) *Hearing report.*

(1) The ALJ will submit a hearing report to the commissioner within 45 days after the close of the record. The report must include findings of fact, conclusions of law and recommendations on all issues before the ALJ.

(2) The hearing report may be circulated to the parties as a recommended decision when:

(i) required by law; or

(ii) directed by the commissioner.

(3) All parties to the hearing have fourteen days after receipt of the recommended decision to submit comments to the commissioner.

(b) *Final decisions.*

(1) Where a recommended decision has not been issued, the final decision of the commissioner, together with the hearing report of the ALJ will be issued 60 days after the close of the record.

(2) Where a recommended decision has been issued, the final decision of the commissioner will be issued within 30 days after the close of the record, such event occurring at the expiration of the time allowed for comment on the recommended decision.

(c) *Actions involving a DEIS.* Where a DEIS has been the subject of the hearing, the hearing report together with the DEIS will constitute the FEIS.

(d) *Stipulations*. A stipulation executed by all parties resolving any or all issues removes such issue(s) from further consideration in the hearing.

(e) *Reopening the record.* At any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

DEC'S NEW HEARING RULES

- By -

Robert H. Feller

On January 10, 1994, a set of new regulations that govern virtually all hearings conducted by the New York State Department of Environmental Conservation ("DEC") became effective. The rules are applicable to all administrative enforcement proceedings that were commenced after that date [6 NYCRR 622.1(c)] and to all permit proceedings where the decision to hold an adjudicatory hearing was made after that date [6 NYCRR 624.1(d)].

The purpose of this article is to review, from DEC's perspective, both the major principles underlying these new rules and some of the more important specific provisions.

Philosophy of new rules

There are two principles that are basic to the philosophy of the changes. First is a commitment to assure that the due process rights of all parties are adequately protected. Second is the desire to ensure efficiency of process.

The minimum amount of due process that agencies must provide in adjudicatory hearings is established by the provisions of Article 3 of the State Administrative Procedures Act ("SAPA") and Executive Order No. 131 ("EO-l3l") . However, over the last ten years, the stakes have steadily increased in both licensing and enforcement proceedings. In enforcement cases, respondents face increased civil fines. In permit cases, applicants risk economic loss through delay, imposition of additional permit conditions or even permit denial while intervening groups face contending with unwanted projects for years to come. With this trend in mind, DEC examined each element of its rules to see if greater protection of process was warranted.

The DEC is also eager to ensure that hearings are conducted as efficiently as possible. The agency recognizes the right of all parties to timely decisions. It further believes that the relative advantages of parties with greater resources should be minimized through efficiency of process.

The DEC's strategy to accomplish these objectives was implemented in several ways:

1. Better definition of standards. The new regulations better define the standards upone which the procedural decisions would be based. Rather than require participants in the process to rely on interpretation of prior decisions, standards were incorporated into the text of the rules. The careful articulation

of many of these standards forced the agency to think through the meaning and value of prior precedent in an effort to provide the public with a workable rule.

2. Preservation of ALJ's flexibility. The rules attempt to define standards in a way that preserves a great deal of discretion in the Administrative Law Judges ("ALJ's"). The ALJs must have the flexibility to deal with particular situations that arise in a way that preserves the overall fairness of the process. As a *quid pro quo* for greater discretion, the rules provide additional opportunities to appeal ALJ rulings on an interlocutory basis. Such appeals are intended as a safety valve and it is hoped that they are not often used.

3. Amplification of rights. The rules not only define the rights of parties but amplify them in situations where necessary to ensure meaningful participation. The rules take great pains to make it clear that the ALJs must take the measures that are necessary to ensure that the parties' rights are not inappropriately abridged. By the same token, the ALJs must ensure that the exercise of those rights is done in a way that is not abusive of the process and does not impinge on the rights of others.

4. "Default" rulings. The rules also establish a set of "default" rulings for commonly occurring situations. These essentially increase the predictability of the proceeding. The ALJs are given the authority to vary these "default" rulings upon the motion of any party for good cause shown.

With the general philosophy of the rules understood, the remainder of this article now examines the specifics of the revisions to 6 NYCRR Parts 622 and 624 ("Part 622" and "Part 624").

Matters in Common to Both Rules

Applicability

EO-l3l requires that any hearing that an agency conducts be governed by a set of regulations that are duly promulgated pursuant to SAPA. Anyone familiar with the Environmental Conservation Law ("ECL") knows that there are innumerable opportunities for adjudicatory hearings. Quite frequently when the Legislature assigns another regulatory function to the DEC, it accompanies it with an opportunity for an adjudicatory hearing to an aggrieved party. It is impractical for the DEC to promulgate a set of rules for each different hearing opportunity in the ECL. Therefore, the decision was made in the new regulations to divide the universe of hearings into two. Hearings that were enforcement in character would fall under Part 622 and those that were licensing in nature

would fall under Part 624.[1]

Because the same rules will apply to a wide variety of hearings, the oversight of the ALJ becomes crucial. While the exercise of a wide range of rights may be appropriate for complex hearings, the attempt to exercise those same rights in a different context may be abusive. Consider, for instance, the specter of extensive motion practice in a very simple case. This is the danger of the one rule fits all approach.

General Rules of Practice

The DEC promulgated a set of rules designed to address service of papers, computation of time limits, motion practice, the role of the Office of Hearings and expedited (interlocutory) appeals. The purpose was to have a basic set of rules that would create uniform expectations among litigants about the conduct of the proceedings in these areas. It also dispenses with the need for ALJ intervention except in unusual cases. For instance, in the absence of any ruling specifying how long a party has to respond to a motion, the general rules of practice provide the party with the required time limits.

These rules generally follow the CPLR. They are not intended to provide substantive standards for any rights held by parties, but merely to state the procedural rules for exercising those rights. For instance, the rules establish procedures for filing an interlocutory appeal, but the substantive bases for considering appeals on an interlocutory basis is found elsewhere.

Following the philosophy discussed above, in order to avoid prejudice to any of the parties, the rules provide ALJs with the authority to modify any of the time periods set out in the general rules. Other modifications can only be made with the approval of the Commissioner.

Expedited (Interlocutory) Appeals

Under past practice of the DEC, the only interlocutory appeals that were explicitly provided for were those that involved appeals of the rulings of the ALJ on issues and party status that were made as a result of the issues conference held for permit proceedings. No provision was made under Part 622 for any interlocutory appeal.

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[1]The only hearings that are not covered by these rules are - regulatory fee hearings governed by 6 NYCRR Part 481; inactive hazardous waste site hearings governed by 6 NYCRR Part 375 (although the Department Staff can elect to proceed under Part 622); and summary abatement hearings, which are jointly governed by 6 NYCRR Part 620 and the new Part 622.

During the course of the 12 years during which these rules were in effect, interlocutory appeals were filed in other situations. Examining the situations in which these appeals arose, the Commissioner found that, although interlocutory appeals of the ALJ rulings were cumbersome and disruptive to the process, there were a few situations where resolving those appeals would have a salutary effect. In fact, the Commissioner asserted an inherent right to entertain such appeals on a discretionary basis and was upheld in a subsequent court challenge (In the Matter of Universal Waste. Inc. v. NYS Department of Environmental Conservation, Index No. 9234-87, Supreme Ct. Albany Court, 1988).

With the dual emphasis on due process and efficiency, the DEC concluded that a specific provision allowing both as-of-right and discretionary interlocutory appeals should be included in the new rules. The rules also contain standards for when the discretion would be exercised.

As a point of departure, the new rules make it clear that all rulings of the ALJ are appealable to the Commissioner [6 NYCRR 622.10(d) (1) and 624.8(d)(l)]. The only issue is the timing. The new rules maintain the opportunity to file an interlocutory appeal as-of-right of any ruling on issues or party status under the Part 624 rules. In addition, interlocutory appeals will be allowed as-of-right regarding the merits of any legal issue that is resolved as part of the ruling on issues (see discussion below) . The only other situation where interlocutory appeals as-of-right are provided for is where an ALJ, in the context of either a Part 622 or Part 624 proceeding, has denied a motion for recusal.

Thus interlocutory appeals are provided for as-of-right where the potential for disruption is outweighed by the potential for prejudice to the parties or for inefficiency of process. For instance, it would be grossly inefficient to adjudicate issues that the Commissioner concludes have no potential to affect the permit decision. Hence, the parties must have the right to appeal an issues ruling on an interlocutory basis.

Other appeals can be made on an interlocutory basis if they meet the same criteria. A party seeking to make such an appeal must file a motion with the ALJ for leave to appeal and demonstrate either undue prejudice or a significant inefficiency in the hearing process. Historically, even when interlocutory appeals were filed under the old rules, except where there was explicit provision to file such an appeal, they were rarely entertained. Although the new rules provide the same safety valve, parties should not expect that this avenue will often yield positive results.

Separation of Functions within the Agency

An issue that has received attention in the field of administrative law is the separation of functions between agency

personnel assigned to regulate, investigate and prosecute, on the one hand, and those who are assigned to act as arbiters of disputes between the agency and outside parties, on the other hand. This distinction has been the focus of a great deal of debate within New York. It was addressed in EO-13l and has also been the subject of a number of pieces of proposed legislation over the past six years.

Although the new rules do not make any fundamental institutional changes, there is a heightened recognition in the new rules of the distinction and of the need to maintain the distinction as unambiguously as possible. The new rules define the terms "Department Staff" and "Office of Hearings" in mutually exclusive terms [6 NYCRR 622.2(e) and 624.2(k)].

Both sets of new rules also make a comprehensive statement of the ex *parte* rule in SAPA as modified by E0-131. Under this rule, ALJs may only consult with supervisors or other members of the Office of Hearings and may do so only on questions of law and procedure. In deciding matters under adjudication, the Commissioner may consult with any staff within the agency so long as any such staff person had no prior involvement in the case. Where uninvolved staff is involved in consultations with the Commissioner, the ex *parte* rule would apply to them as well.

Recommended Decisions

The DEC has included provision for the Commissioner to issue the hearing report as a recommended decision. The Commissioner’s final determination would be reserved until the parties have an opportunity to file comments on the hearing report. In such a situation, the circulation of the hearing report would reopen the record and the Commissioner would have 60 days after the receipt of all comments to make a final decision.

While the recommended decision practice is used routinely in other agencies (e.g., hearings held by the Public Service Commission and the Department of Health), it was only used in DEC practice in the single situation where it is currently required by law, under ECL Article 27 Title 11 - the Siting of New Industrial Hazardous Waste Management Facilities. Under the new rules, the use of this procedure is discretionary with the Commissioner. While it is anticipated that the procedure would, in some circumstances, tend to improve the decision, whether the additional time and process are offset by such an improvement must be looked at on a case-by-case basis. Highly complex cases, those involving novel questions and those where the ALJ recommends an outcome unanticipated by any of the parties, will be considered to determine whether they are appropriate candidates for this treatment.

Standard of Proof

The new rules confirm the Department's view that the preponderance of the evidence standard is the trial-level standard for all cases. The substantial evidence standard referenced in SAPA is, in our view, only intended to apply to judicial review of administrative decisions. This does not change the substantial evidence standard which SAPA sets for judicial review of administrative decisions [6 NYCRR 622.11(c) and 624.9(c)].

Changes Specific to Part 622

Initial Pleadings

Since the new rules expand coverage beyond actions that are commenced by a notice of hearing and complaint, provision is made to cover actions that are commenced through other mechanisms. For instance, where the Department seeks to modify a permit based on an alleged violation, a notice of intent to modify commences the action [6 NYCRR 622.3(b)(2)]. In such cases, the request for a hearing constitutes the answer.

As before, the answer is required to contain a statement of any affirmative defenses asserted. The new rules clarify that a defense based upon the inapplicability of a permit requirement to the complained of activity must be pled as an affirmative defense.

Significantly, the new rules provide that the failure to answer constitutes a default and a waiver of the right to a hearing. Formerly, filing an answer or appearing at the designated date was sufficient to avoid a default. Complaints will now be required to carry a notice that failure to answer is grounds for a default.

Defaults

The new regulations provide for granting defaults upon the motion of the Department Staff. This motion would be made, on notice, to the assigned ALJ or, if none, to the Chief ALJ.

When a respondent has taken any action (or non-action) which constitutes a default under the rules, the Staff has the opportunity to move for a default by providing documentation of proper service and of the circumstances that constitute the default. The Staff would also accompany the motion with a proposed order. No proof of the substance of the allegations is required.

Respondents can move to reopen a default consistent with CPLR '5015. They are required to demonstrate that a meritorious defense exists and that there was good cause for the default.

Prehearing Conference and Statement of Readiness

The new rules add two procedural devices intended to ensure efficiency in the use of judicial resources.

Respondents frequently resist confronting alleged violations in a meaningful way until an ALJ is formally involved, even where settlement is likely. The involvement of an ALJ, particularly when travel to the hearing location is considered, can create a drain on resources. To avoid this undesirable result, the new rules authorize the Staff to schedule a prehearing conference as part of the original notice of hearing. Appearance at such a conference is mandatory and the failure to do so constitutes grounds for a default. The conference is intended as an opportunity to settle matters before they are placed on the hearing docket.

The second device is the statement of readiness for adjudicatory hearing. Principally, it consists of a statement from the Department Staff that discovery is complete or waived, or an explanation as to why it has not been completed, and an affirmative representation that an attempt was made to settle the case. This device is intended to serve as a gatekeeper for cases that are not ready for hearing.

Accelerated Proceedings

The new rules provide for three different types of proceedings that are intended to be decided on an expedited basis. Two of them, the motion for order without hearing (formerly motion for summary order) and the summary abatement/summary suspension orders are carryovers from the prior rules. The rules for these two proceedings have been adapted to conform with the revisions but they remain substantially the same.

A new proceeding, called "expedited fact finding," addresses situations where it is alleged, among other charges, that a respondent is unlawfully conducting an activity without a permit. Upon the request of Department Staff, this charge would be severed and tried first. Since most such allegations will involve few issues of fact, is anticipated that they will be resolved quickly. Following the resolution, an order to desist the activity can be issued, when appropriate, and the remainder of the case can be heard. This allows DEC to address charges with great potential for environmental harm on a prioritized basis.

Discovery

The rules for discovery remain unchanged for the most part. Discovery is as broad as under the CPLR, though discovery devices are more limited. Bills of particulars are not permitted and depositions and written interrogatories require the permission of the ALJ.

The new rules provide the ALJ with some devices to enforce discovery against recalcitrant parties. The ALJ may preclude the introduction of the material demanded or take inferences about the materials that were not released that are unfavorable to the offending party.

The new rules also incorporate decisional law, which has held that the ALJs have the authority to quash or modify attorney-issued subpoenas that arise in the context of the hearing [6 NYCRR 622.10(b) (1) (v); In the matter of Moore v. Sunshine. 126 Misc.2d 284, 286, Supreme Ct., Nassau County, 1984).

Intervention

The new rules establish a standard for admission of third party intervenors to enforcement hearings. Third parties will not be permitted to intervene in order to fulfill a prosecutorial-like role. Only where a petitioning party can show that it has a private interest which is not adequately represented by the Staff will intervention be allowed. Such situations could arise if, for instance, the proposed remediation of a site where violations had allegedly occurred could affect the private property rights of an adjacent landowner.

Changes Specific to Part 624

Revisions to Party Status

Party status is divided into two categories - full parties and amicus. Full party status carries with it the right to participate in all aspects of the hearing. This includes the right to present evidence and cross-examine witnesses; to present arguments on issues of law and fact; to make motions and other similar requests; to receive copies of correspondence sent by the parties or the ALJ; and to appeal adverse rulings of the ALJ [see 6 NYCRR 624.5(e)].

Previously, the rules provided for full party status and limited party status. Full parties had essentially the same rights as those listed above and limited parties had those rights but limited to particular issues. The new rules dispense with any limitation on party status based on a restricted focus in a party’s filing.

The new rules also provide for a new type of participation not previously available, amicus status. This status is intended for interest groups who do not intend to contribute to the evidentiary record but want the opportunity to argue a point of law or policy that might be precedential or otherwise important, Amici will be permitted to file briefs or other forms of argument regarding such matters. To qualify, a group must demonstrate that it has sufficient interest in the resolution of a legal or policy issue

and that its expertise, special knowledge or unique perspective may materially contribute to deciding that issue.

Public Participation

Aside from increasing the opportunities to participate as a party, the new rules also enhance the public noticing which hearings will receive and also provide greater assurances that potential parties will be afforded adequate opportunities to prepare their case.

Provisions are made for the ALJ to direct the publication of additional notices or to provide notice further in advance than the statutory minimums whenever necessary to adequately inform the affected public. There is also direction to publish the notice of hearing in foreign language newspapers when a large segment of the affected public has a principal language other than English.

Issues Conference

The issues conference has traditionally been used as a mechanism to narrow the scope of the hearing to substantive and significant disputes. The issues conference has also been used as an opportunity to determine party status.

The new rules incorporate prior decisional precedent to define the terms "substantive" and "significant." Substantive is defined as "An issue is substantive if there is sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ." Significant is defined as "An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.

The rules also distinguish between issues that are proposed by third party intervenors and those that arise out of differences between the staff and the applicant. The former must meet the substantive and significant test. The latter need not meet that test since applicants have a right to a hearing under the Uniform Procedures Act ("UPA") regarding any dispute with staff over a substantial term or condition of the permit or over the potential denial of the permit [6 NYCRR 624.4(c) (1) (i) and (ii)].

The new rules also establish limitations on adjudicable issues that relate to SEQRA and UPA. The rules are also explicit that the

ALJ may review a negative determination that Staff issued pursuant to SEQRA. Where the ALJ finds that staff's determination was irrational or otherwise affected by an error of law, he or she has the authority to remand the determination to staff with instructions for a redetermination. The Department did not find it appropriate to allow the ALJ to substitute his or her judgment for that of the staff because the ALJ's determination would necessarily be based on offers of proof and not on a full evidentiary record. The greater technical resources available to staff were the principal reason that the rules provide for remanding the defective SEQRA determination back to staff rather than permitting the ALJ to revise it.

No limitation is placed on SEQRA issues where the Department serves as the lead agency. Where another agency fulfills the role of lead agency, the potential SEQRA issues for the hearing are limited to those where the Department notified the lead agency during the comment period of an inadequacy or deficiency and where such problem was not subsequently corrected. The decision to so restrict adjudicable issues is based on a desire to promote the coordination of the SEQRA process by the lead agency.

The new regulations provide that the completeness of an application, as used in the context of the UPA, cannot be an issue for adjudication. That determination triggers an applicant's right to get decisions made within specified time frameworks, but it does not preclude requiring the production of additional supporting documentation for the proposal. Similarly, whether there is adequate information for decisionmaking purposes can be the source of adjudicable issues as well.

Finally, the rules incorporate the principle established in decisional law that all issues in proceedings that arise out of Department-initiated modifications, suspensions or revocations must relate to the bases cited by the Department for taking such action (cite). Pursuant to 6 NYCRR '621.14, the Department is the ultimate arbiter of which modification, suspension and revocation requests are processed, and therefore allowing the adjudication of other issues would be inconsistent with that principle.

Discovery

The rules also provide greater discipline for the discovery process. Until the issues that are to be adjudicated are determined, discovery is limited to what is available under the Freedom of Information Law. Exceptions to this rule may be granted by the ALJ. However, since in raising issues the parties need only show that there is a substantial question (they need not show that there is a likelihood of prevailing on the merits) such a limitation is justified and promotes efficiency.

After the issues are determined, broad discovery is permitted

with respect to those issues. Parties have the right to make a demand for documents, request a list of witnesses including a statement of the content and scope of their testimony, make non-intrusive inspections of property, and request admissions and a list of evidence to be offered at the hearing. With permission of the ALJ, parties may use other CPLR discovery devices (such as interrogatories) and may request intrusive inspections of property, such as for purposes of taking samples.

Conclusion

The new rules do not represent a dramatic departure from their predecessors. However, DEC expects them to perform better because the rights and obligations of all parties will be better defined within limits, creating increased certainty in the process. The rules invest a high degree of discretion in the ALJs in order to ensure that the circumstances of each case can be addressed flexibly within these defined limits. It is expected that this approach will result in the desired improvements in fairness and efficiency.

State Administrative Procedure Act

Laws 1975, Chapter 167, § 1

Effective September 1, 1976

ARTICLE 1--GENERAL PROVISIONS

Section

§ 100. Legislative intent.

The legislature hereby finds and declares that the administrative rulemaking, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public. In order to provide the people with simple, uniform administrative procedures, an administrative procedure act is hereby enacted. This act guarantees that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. It insures that equitable practices will be provided to meet the public interest.

It is further found that in the public interest it is desirable for state agencies to meet the requirements imposed by the administrative procedure act. Those agencies which will not have to conform to this act have been exempted from the act, either specifically by name or impliedly by definition.

§ 101. Short title.

This chapter shall be known and may be cited as the "State Administrative Procedure Act."

§ 102. Definitions.

As used in this chapter,

1. "Agency" means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is

appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interstate compact or international agreement, the division of military and naval affairs to the extent it exercises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the state insurance fund, the unemployment insurance appeal board, and except for purposes of subdivision one of section two hundred two-d of this chapter, the workers' compensation board and except for purposes of article two of this chapter, the department of corrections and community supervision.

2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

(b) Not included within paragraph (a) of this subdivision are:

(i) rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public;

(ii) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(iii) rulings issued under section two hundred four or two hundred five of this chapter;

(iv) forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory;

(v) rules promulgated to implement agreements pursuant to article fourteen of the civil service law;

(vi) rates of interest prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law;

(vii) rules relating to the approval or disapproval of subscriber rates contained in an application to the public service commission, after public hearing and approval by the applicable municipality for a certificate of confirmation or an amendment to a franchise agreement;

(viii) state equalization rates, class ratios, special equalization rates and special equalization ratios established pursuant to the real property tax law;

(ix) rates subject to prior approval by the superintendent of financial services or to section two thousand three hundred forty-four of the insurance law;

(x) any regulation promulgating an interim price and any final marketing order made by the commissioner of agriculture and markets pursuant to section two hundred fifty-eight-m of the agriculture and markets law;

(xi) any fee which is:
(1) set by statute;
(2) less than one hundred dollars;
(3) one hundred dollars or more and can reasonably be expected to result in an annual aggregate collection of not more than one thousand dollars;
(4) established through negotiation, written agreement or competitive bidding, including, but not limited to, contracts, leases, charges, permits for space use, prices, royalties or commissions; or
(5) a charge or assessment levied by an agency upon another agency or by an agency upon another unit of state government.
(xii) changes in a schedule filed by a telephone corporation subject to the jurisdiction of the public service commission;
(xiii) rules relating to requests for authority by a telephone corporation subject to the jurisdiction of the public service commission under sections ninety-nine, one hundred and one hundred one of the public service law and by a public utility subject to the jurisdiction of the public service commission under section one hundred seven of the public service law;
(xiv) any regulation comprised solely of one or more additions to the list of nonprescription drugs reimbursable under the medicaid program pursuant to paragraph (a) of subdivision four of section three hundred sixty-five-a of the social services law.

3. "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

4. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

5. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

6. "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency engaged in the particular rule making, declaratory ruling, or adjudication.

7. "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

8. "Small business" means any business which is resident in this state, independently owned and operated, and employs one hundred or less individuals.

9. "Substantial revision" means any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register; provided, however, if a notice of revised rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published.

10. "Rural area" means those portions of the state so defined by subdivision seven of section four hundred eighty-one of the executive law.

11. "Consensus rule" means a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely (a) repeals regulatory provisions which are no longer applicable to any person, (b) implements or conforms to non-discretionary statutory provisions, or (c) makes technical changes or is otherwise non-controversial.

13. "Data" means written information or material, including, but not limited to, statistics or measurements used as the basis for reasoning, calculations or conclusions in a study.

14. "Guidance document" means any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement, but shall not include documents that concern only the internal management of the agency or declaratory rulings issued pursuant to section two hundred four of this chapter.

§ 102-a. Small business regulation guides.

For each rule or group of related rules which significantly impact a substantial number of small businesses, the agency which adopted the rule shall post on its website one or more guides explaining the actions a small business may take to comply with such rule or group of rules if the agency determines that such guide or guides will assist small businesses in complying with the rule, and shall designate each such posting as a "small business regulation guide". The guide shall explain the actions a small business may take to comply with a rule or group of rules. The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language that it is likely to be understood by affected small businesses. Agencies shall cooperate with other state agencies in developing such guides.

§ 103. Construction; severability.

1. (a) Except with respect to the provisions of paragraph (c) of this subdivision, or of paragraph (b) of subdivision one and subdivision six of section two hundred two of this chapter, the provisions of this chapter shall not be construed to limit or repeal additional requirements imposed by statute or otherwise.

(b) The provisions of section two hundred two of this chapter shall not relieve any agency from compliance with any statute requiring that its rules be filed with or approved by designated persons or bodies before such rules become effective.

(c) Notwithstanding the requirements of any statute, when adopting a consensus rule as defined in this chapter, an agency may in its discretion dispense with any statutory requirement for public hearing or publication of a notice in any newspaper or publication other than the state register, unless such requirement is explicitly directed at the rule which is being adopted.

2. The provisions of this chapter shall not be deemed to repeal section six hundred fifty-nine of the labor law.

3. The provisions of this chapter shall apply only to rule making, adjudicatory and licensing proceedings commencing on or after the effective date of this chapter.

4. If any provision of this chapter or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the chapter or the application thereof to other persons and circumstances.

§ 104. Access to studies and data.

1. An agency, upon request, shall, within thirty days, make available for inspection and copying any scientific or statistical study, report or analysis, including any such study, report or analysis prepared by a person or entity pursuant to a contract with the agency or funded in whole or in part through a grant from the agency that is used as the basis of a proposed rule and any supporting data; provided, however, that the agency shall provide for inspection only of any such study, report or analysis due to copyright restrictions.

2. An agency that contracts with a person or entity for the performance of a study or awards a grant for such purpose shall require as a condition or term of such contract or grant that the person or entity shall provide to the agency the study, any data supporting the study, and identity of the principal person or persons who performed such study for disclosure in accordance with the provisions of this section and of article six of the public officers law.

ARTICLE 3--ADJUDICATORY PROCEEDINGS

Section

§ 301. Hearings.

1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.

2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for violation of the laws, rules or orders enforced by the agency.

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.

5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

§ 302. Record.

1. The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.

2. The agency shall make a complete record of all adjudicatory proceedings conducted before it. For this purpose, unless otherwise required by statute, the agency may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices. Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor.

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 303. Presiding officers.

Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

§ 304. Powers of presiding officers.

Except as otherwise provided by statute, presiding officers are authorized to:

1. Administer oaths and affirmations.

2. Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules.

3. Provide for the taking of testimony by deposition.

4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

5. Direct the parties to appear and confer to consider the simplification of the issues by consent of the parties.

6. Recommend to the agency that a stay be granted in accordance with section three hundred four, three hundred six or three hundred seven of the military law.

§ 305. Disclosure.

Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

§ 306. Evidence.

1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.

3. A party shall have the right of cross-examination.

4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

§ 307. Decisions, determinations and orders.

1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than a rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

(b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

§ 308. Streamlined optional adjudicatory proceedings for small businesses.

Unless otherwise prohibited by law, an agency may adopt regulations providing for use at the option of a small business of streamlined adjudicatory proceedings conducted by mail, electronic mail, telephone conference or videoconference. In adopting such regulations, the agency shall:

1. consider the types of programs and issues for which such streamlined proceedings may reasonably be conducted, taking into account (a) the complexity of the matters to be resolved in the proceeding, (b) the severity of potential sanctions, (c) any necessity for personal appearances, including but not limited to requirements for sworn testimony or cross-examination, and (d) any potential reduction in the costs and burdens of participating in the proceeding for the agency and for other parties, and shall appropriately limit the availability of streamlined proceedings to programs and issues in which the public interest in fair outcomes can continue to be assured;

2. ensure that a streamlined proceeding may only be used at the option of the respondent small business with the consent of the agency and any other necessary party to the proceeding, and that the rights of respondents and other parties will not be diminished in any respect by virtue of participation in a streamlined proceeding;

3. specify the format or formats for remote conduct of streamlined proceedings;

4. establish procedures for requesting and scheduling such proceedings, for the conduct of such proceedings, and for the development of a complete record as provided in section three hundred two of this article; and

5. provide that, in the event that it becomes impractical or inappropriate to continue a proceeding commenced pursuant to this section as a streamlined proceeding, such proceeding may be rescheduled as an adjudicatory proceeding pursuant to section three hundred one of this article without prejudice to any party.

ARTICLE 4--LICENSES

Section

§ 401. Licenses.

1. When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard.

2. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license.

3. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

4. When the hearing seeks the revocation of a license or permit previously granted by the agency, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

ARTICLE 5--REPRESENTATION

Section

§ 501. Representation.

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency.