



Adirondack Park Agency

SHERMAN CRAIG
Chairman

TERRY MARTINO
Executive Director

MEMORANDUM

TO: Terry Martino, Executive Director

FROM: James Townsend, Counsel

DATE: May 3, 2017

RE: Compliance with Executive Order #131 (1989), as continued by Governor Andrew M. Cuomo in Executive Order #2 (2011)

Executive Order #131 (1989), as continued by Governor Cuomo in Executive Order #2 (2011), requires all agencies including the APA to maintain a plan for the conduct of administrative adjudicatory hearings. APA's existing hearing plan was approved by former Chairman "Woody" Cole in December, 1989. Agency staff have prepared revisions to its plan in consultation with DEC's administrative law judge group. Staff seeks Board authorization to seek public comment on the attached draft of an updated version of APA's hearing plan.

APA's 1989 hearing plan contemplated the use of paid private attorneys as hearing officers. Since at least 1995, however, DEC's administrative law judges (ALJs) have presided over APA's adjudicatory hearings in project and enforcement matters. Their role, based on direction from the APA Board and the Executive Director, has been to conduct a hearing and to produce a record of testimony and evidence for the APA Board to consider in making decisions after those hearings. In a few cases DEC ALJs have also presided over variance hearings, which are quasi-judicial in nature. The APA and DEC follow a 1995 memorandum of understanding when engaging the services of a DEC ALJ. Staff have been consulting with DEC about improvements to the MOU and an updated version is attached for possible Board approval.

If the APA Board authorizes staff to seek public comment on the revised adjudicatory hearing plan, staff will provide notice of the proposed revised plan on APA's website, along with a 15-day opportunity for public comment on the draft. Staff will address any public comments that are received in a future recommendation for approval of an updated adjudicatory hearing plan.

The State Administrative Procedure Act and the Executive Orders on hearing plans also require agencies to prepare plain language summaries of their adjudicatory hearing processes, and to make the summaries available to the public. Drafts of updated summaries for APA, project, enforcement and permit modification adjudicatory hearings are attached for APA Board information and any feedback is welcome.

Please let me know if you have any questions.

JTT:mp
Attachments



SHERMAN CRAIG
Chairman

TERRY MARTINO
Executive Director

AMENDED ADMINISTRATIVE ADJUDICATION PLAN

[Issued pursuant to Executive Order No. 2 of Governor Andrew M. Cuomo (9 NYCRR § 8.2), Executive Order No. 9 of Governor David A. Paterson (9 NYCRR § 7.9), Executive Order No. 5 of Governor Eliot Spitzer (9 NYCRR § 6.5), Executive Order No. 3 of Governor George E. Pataki (9 NYCRR § 5.3) and Executive Order No. 131 of Governor Mario M. Cuomo (9 NYCRR § 4.131)]

The Adirondack Park Agency (Agency), adhering to the core principles of due process and the appearance of fairness in its administrative public hearings, hereby adopts an amended administrative adjudication plan (Plan) as follows:

APPLICABILITY

This Plan shall apply to quasi-judicial public hearings conducted pursuant to Executive Law § 809 and 9 NYCRR Parts 580 and 581.

HEARING OFFICERS

The Agency receives the services of administrative law judges from the Department of Environmental Conservation's Office of Hearings and Mediation Services to conduct hearings to which this Plan applies. Hearing officers are appointed by the Agency's executive director to conduct hearings pursuant to 9 NYCRR §§ 580.8 and 581-4.7.

CONDUCT OF HEARINGS

Hearing officers are expected to conduct hearings to which this Plan applies in a fair and impartial manner pursuant to 9 NYCRR §§ 580.14 and 581-4.14. At the conclusion of a hearing, the hearing officers provide and certify a record to the Agency that includes all relevant hearing materials and, if requested, findings of fact consistent with 9 NYCRR §§ 580.14, 581-4.14, and the Executive Director's appointment letter.

IMPARTIALITY OF HEARING OFFICERS

Agency rules direct hearing officers to conduct hearings in an impartial manner. Parties may challenge the appointment of a hearing officer by the Executive Director for grounds including bias pursuant to 9 NYCRR §§ 580.8 and 581-4.7. *Ex parte* contacts with hearing officers are prohibited by 9 NYCRR §§ 580.17, 581-4.12 and 587.4.

TRAINING OF HEARING OFFICERS

The administrative law judges the Agency uses for its hearings receive their training from the other agencies. The Executive Director's appointment letter provides specific guidance for hearing officers. The Agency's Counsel, who is not engaged in the prosecution of the adjudicatory proceedings to which this Plan applies, is made available to hearing officers for consultation during the hearing process.

SHARING OF RESOURCES

The Agency uses administrative law judges from other agencies for the hearings to which this Plan applies. Agency conference room and technology facilities are available to other agencies to use for public hearings.

TIMELY DISPOSITION

The Agency does not conduct more than 50 adjudicatory hearings a year and therefore is not subject to the requirement of a management system "intended to effect the timely disposition" of proceedings. The Executive Director's appointment letter and Agency rules support the goal of timely dispositions in all hearings to which this Plan applies.

ENFORCEMENT PROCEEDINGS

The Agency amended its enforcement process rules in 2003 to provide rules for the adjudication of alleged violations under the Freshwater Wetlands Act (ECL Article 24), or, upon the request of a permit holder, for the adjudication of Agency proposals to modify, suspend or revoke Agency permits.

CHANGES TO EXISTING ADJUDICATORY PROCEDURES

The Agency periodically reviews its rules governing adjudicatory procedures to ensure consistency with Executive Order No. 131 of Governor Mario M. Cuomo as continued by Executive Order No. 2 of Governor Andrew M. Cuomo. Summaries of the Agency's adjudicatory procedures are available to the public and posted on the Agency's website.

ATTESTATION

On behalf of the Adirondack Park Agency, I attest that the above Amended Administrative Adjudication Plan adheres to the principles of administrative adjudication set forth in section two of Executive Order No. 131 of Governor Mario M. Cuomo as continued by Executive Order No. 2 of Governor Andrew M. Cuomo.

Dated:

Sherman Craig
Chairman



Guide to APA Project Hearings

What is a project hearing?

This document provides an overview of the APA project hearing process. APA's rules for project hearings provide more detail on the project hearing process and can be found in Part 580 of Title 9 of New York's Official Compilation of Rules and Regulations (9 NYCRR).

Three phases. An APA project hearing may have three phases:

- A public information session to receive public comments.
- A pre-hearing conference to identify parties and define issues for the hearing.
- A hearing to adjudicate disputed issues.

A public information session may be held by APA depending on the level of public interest in a proposed project. A pre-hearing conference is also discretionary. The hearing is held to develop a record on significant issues related to the approvability of the proposed project. Project hearings provide the opportunity for parties to present evidence and argument on those issues before an impartial administrative law judge (ALJ). Evidence can be testimony, documents, photographs or other exhibits presented to the ALJ. The APA Board makes a final decision based on a project hearing record that includes the application, public comment and evidence presented at the hearing.

Who is a project sponsor?

Project sponsors may include any individual, corporation, partnership, association, trustee, municipality or other legal entity. Applications are submitted to APA's Division of Regulatory Programs. For information on project applications and how they are processed, please refer to APA's rules for reviewing projects in 9 NYCRR Part 572.

When is a project hearing necessary?

Project hearings are held at the direction of the APA Board. If the APA Board believes that a proposed project does not meet applicable legal standards for project approval, or that the project could only be approved if it is significantly modified or conditioned, it may require a hearing on the proposed project. No proposed project may be denied by APA without a hearing. If the APA Board requires a project hearing, it may also specify issues to be adjudicated at the hearing. The APA Board's decision to require a project hearing must be made within specific timeframes after APA staff determines that an application is complete for purposes of review.

How is notice of a project hearing provided?

At the direction of the APA Board, APA staff will provide public notice of a project hearing. Hearing notices are published in the Environmental Notice Bulletin and a local newspaper. The notices contain project and hearing information, and provide directions for the public to request party status in the project hearing. Hearing notices are also posted on the project site. Project hearing notices are required by law to be sent to:

- Project sponsors and all owners of the project site.
- Adirondack Park Local Government Review Board.
- Local municipalities where the project is located.
- Any county or regional planning board.
- Any town or village within 500 feet of the project site.
- All landowners within 500 feet of the project site.

Hearing locations. For the convenience of the public, hearings are generally held in a public building in the municipality where the project is located. All hearing sessions are open to the public.

What is a public information session?

Members of the public who do not seek to participate formally in the hearing but want to learn more about the proposed project and/or to provide written or oral comments on the project can do so at a public information session. Generally, the project sponsor will do a presentation on the proposed project first, followed by an opportunity for the public to comment. Comments offered during a public information session will be considered by the APA Board as public comment on the proposed project. Public information sessions are scheduled at locations and times with the goal of public accessibility.

What is a pre-hearing conference?

The ALJ who is appointed to preside over the hearing may convene a pre-hearing conference to identify the parties to the proceeding and the issues to be adjudicated. The ALJ may establish schedules for briefs, pre-filed testimony, or discovery procedures. Parties may also be asked to meet to try to resolve their differences.

Participation at the pre-hearing conference is limited to APA staff and to those who seek to be parties in the hearing. The project sponsor is a party. Anyone required to receive notice of the project hearing (see above) may also elect to be a party. Finally, other individuals or organizations may be granted party status as interveners after showing:

- An economic, social or environmental interest likely to be affected by an APA decision on the proposed project; and/or
- That granting party status is necessary to further the purpose of the hearing.

At the pre-hearing conference, the ALJ may ask questions of each party to clarify, consolidate or resolve potential issues. Project hearing issues include:

- Those identified by the APA Board.
- Other issues identified by the ALJ having the potential to result in denial or major modification of the project, or that would impose significant conditions on an approved or modified project.

To narrow the issues to be addressed in a hearing and to determine those facts which are not in dispute, the ALJ may require the parties to describe what evidence they would present at a hearing. Each party should be prepared to identify all documentation or other evidence it intends to present, the names of its witnesses and the nature of their proposed testimony, and all other information required by the ALJ to clarify what the party wants to address.

The ALJ will usually prepare written rulings determining party status and the issues to be adjudicated in the project hearing.

What are a hearing party's obligations?

There are a number of obligations that accompany party status. These include attending hearing sessions, presenting testimony when called upon, and questioning other parties' witnesses on a schedule determined by the ALJ.

A party may appear in person or through a representative who can demonstrate that he or she has been chosen by the party. A party may select an attorney as its representative, but this is not necessary.

Participants who do not attend a hearing session will lose the opportunity to cover material addressed at that session, unless otherwise provided by the ALJ.

How is a project hearing conducted?

The ALJ presides over the project hearing and sets its time, date and place. The ALJ has broad authority to control and maintain the efficiency of the hearing under APA's hearing process rules and Article 3 of the State Administrative Procedure Act.

Length of hearings. The length of a hearing depends upon the number of issues to be adjudicated and their complexity. Some hearings are concluded in a single day; a complex project can take several days or more. Hearings generally run from day to day, with up to four sessions per week. During the course of a long hearing, the ALJ may grant an adjournment to accommodate the parties and their witnesses. The ALJ will take into account the schedules of all of the parties and APA staff in determining a hearing schedule.

Are there restrictions on how information is passed to the ALJ?

Yes. Communications between individual parties, their representatives, APA staff and the ALJ, other than on ministerial matters such as scheduling, are prohibited as "ex parte" contacts. This means that ALJs cannot discuss other matters related to the proposed project or the hearing with any of the parties without providing an opportunity for all parties to participate in the discussion at the same time. If a party communicates with an ALJ in writing, the party must send a copy of the communication to all other parties at the same time. Likewise, the parties may not discuss the proposed project or the hearing with any member of the APA Board. The APA Board's information about a proposed project is limited to the hearing record as a matter of fairness to all parties involved in the hearing. Parties may confer among themselves at any time during the hearing process to resolve disputes and make the hearing process more efficient.

How do I challenge an ALJ's ruling?

Any ALJ's ruling may be appealed to the APA Board at the end of the hearing by motion of a party or as part of a closing statement. The APA Board may also decide to review an ALJ ruling during the hearing where the failure to decide an appeal immediately would unduly disadvantage one of the parties or would result in significant inefficiency in the hearing process. If the APA Board decides to hear the appeal, all parties will have an opportunity to be heard on whether the appeal should be granted or denied. The hearing will continue, unless the ALJ or the APA Board adjourns it, until the appeal is decided.

How is the case for each party presented?

The project sponsor is the first to proceed since it bears the burden of proof. The project sponsor presents its case through witnesses, who may include consulting engineers, biologists, or other technical experts.

Discovery or disclosure. It may be necessary for one party to get information from another party (this is called discovery or disclosure). The burden to supply the requested information is on the one who has the documents. Generally, there is full disclosure of all relevant evidence. The ALJ will make rulings on disclosure when objections or motions are filed.

Direct examination. The project sponsor will question each witness within that person's area of expertise and experience. Called direct examination, these questions usually relate to the role the witness had in the design and development of the project. Site plans and other documentation may be presented as exhibits.

Cross-examination. After direct examination, staff and each party are given an opportunity in a sequence established by the ALJ to ask the witness questions through

cross-examination. There are several reasons for the opposing parties to cross-examine each other's witnesses:

- To bring out information left untouched by the direct examination.
- To test the truthfulness and credibility of a witness.
- To test the accuracy and reliability of a witness's perception of observed events.
- To probe the basis of expert opinion.

After the applicant has called all of its witnesses, APA staff and the other parties present their cases through witnesses. Each party has an opportunity to counter or further the presentations of the others. The project sponsor, however, retains the burden to demonstrate that its proposed project will comply with all applicable standards.

Exhibits. Parties may also present and support their cases through the production of documents, photos, maps, etc. called "exhibits". Exhibits are usually presented by a witness who is familiar with them and who can explain what they are and mean. In some cases exhibits are presented simply upon the agreement of the parties, or based on some written certification that they are authentic.

APA staff's role. APA staff, while not a formal party, participates fully in a project hearing, represented by an APA attorney. APA staff testify and provide exhibits pertaining to staff's review of the proposed project as relevant to the issues identified for adjudication. Staff have the additional obligation of ensuring that a full and complete hearing record is developed for the APA Board's consideration.

Closing arguments. After all parties have concluded their cases, the ALJ will entertain oral closing arguments or set a time period for filing of written closing arguments.

Closing the record. The ALJ will close the hearing record according to a schedule he or she sets. After the record is closed, the ALJ will certify the completeness of the record to the APA Board. A public copy of the hearing record will be available for review at APA's headquarters and may also be obtained from APA pursuant to the Freedom of Information Law by e-mailing a request to APAFOIL@apa.ny.gov.

Costs and fees. There is no fee for participation in an APA project hearing. Costs of hearings, including hearing facilities, notice publications and a stenographic transcript, are paid by APA. If a party elects to hire an attorney or expert witnesses, however, it is responsible for all associated costs. Any party introducing documents is responsible for the costs of duplication and distribution to the other parties. Anyone may purchase copies of the stenographic transcript directly from the court reporter.

How is the APA Board's final decision made after a project hearing?

ALJ's review. If the APA Board has asked the ALJ to prepare a hearing report, the ALJ will conduct an impartial review of the stenographic record and all exhibits and written closing arguments, giving appropriate weight to each and to the testimony of each witness. All issues adjudicated during the hearing may then be addressed by the ALJ in a series of Findings of Fact and Conclusions contained within the ALJ's hearing report. The ALJ's report is part of the hearing record provided to the APA Board.

APA Board final decision. The APA Board considers the hearing record and makes a final decision based on its deliberations during a regular, public meeting of the APA Board. To assist the APA Board in its review of the record, the Board may have the aid and advice of APA staff who have not been involved in the review of the proposed project or the hearing. The APA Board's decision must be made within sixty calendar days of its receipt of a complete record from the ALJ unless the project sponsor agrees to an extension of that deadline.

The APA Board's final decision will:

- Approve the project as proposed, with or without conditions,
- Approve a modified project, with or without conditions, or
- Deny the proposed project.

Distribution of APA Board's final decision. Copies of the APA Board's final decision must be sent to the same individuals as the project hearing notice and to all parties to the hearing.

Can the final decision on a proposed project be appealed?

Yes. The APA Board's final decision may be appealed to state court pursuant to Article 78 of the Civil Practice Law and Rules.

Where can I get a copy of a final decision on a proposed project?

Copies of all APA Board final decisions are available for public review at the APA headquarters or may be requested by e-mail at APAFOIL@apa.ny.gov pursuant to the Freedom of Information Law.

Where can I obtain additional information about APA project hearings?

Contact the APA by telephone at (518) 891-4050 or in person at 1133 NYS Route 86, Ray Brook, New York. Also, visit APA's website at www.apa.ny.gov.



Guide to APA Permit Modification, Suspension, or Revocation Hearings

What is a permit modification, suspension or revocation hearing?

A permit modification, suspension or revocation hearing is convened at the request of a permit holder in response to a notice of intent to modify, suspend or revoke the permit holder's permit issued by APA staff. The hearing provides a record of testimony and exhibits that the APA Board can rely on to determine whether the grounds for permit modification, suspension or revocation alleged by staff are established and, if so, what an appropriate disposition should be.

What are the grounds for permit modification, suspension or revocation?

The grounds that may be alleged by APA staff in support of permit modification, suspension or revocation include:

- Materially false or inaccurate statements in the permit application or supporting papers or misleading testimony in an APA hearing on the application.
- Activities exceeding the scope of the project or varying the projects as described in the permit.
- Noncompliance with the permit or laws or rules related to the permitted activity.

How are these hearings conducted?

Permit modification, suspension or revocation hearings are conducted according to procedures provided in Subpart 581-4 of APA's rules located in Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Who participates in a permit modification, suspension, revocation hearing?

APA staff and the permit holder are the parties in the hearing. APA staff present the alleged grounds for modifying, suspending or revoking the permit holder's permit. The permit holder provides facts and argument in response to staff's allegations.

Who conducts the hearing?

All permit modification, suspension or revocation hearings are conducted by an impartial Administrative Law Judge (ALJ). The ALJ presides over the hearing to modify, suspend or revoke a permit.

How is a permit modification, suspension or revocation hearing started?

It starts with a written request from a permit holder for a hearing in response to APA staff's notice of intent to modify, suspend or revoke the permit holder's permit. The notice of intent initiates the process and explains the alleged grounds for staff's request to the APA Board. The notice advises the permit holder of the right to a hearing on staff's allegations and the procedural steps for exercising that right. The hearing will only be held if the permit holder requests it.

How do I respond to the notice of intent?

In addition to requesting a hearing, you (or your attorney) have the opportunity to respond in writing to the allegations made by APA staff. Your response should specify which allegations you admit, which ones you deny, and which ones you can't answer based on the information you have. You should also allege any affirmative defenses you believe excuse or mitigate APA staff's allegations against you. Affirmative defenses should be supported by facts or the law. Your answer must include all defenses you will make at the hearing; otherwise, you may be precluded from presenting them.

When do I serve my response?

You must mail or deliver your answer to APA staff within 30 days of the date of the notice of intent. You should seek any extensions you need before the 30 days expire. Requests for extensions should be made to APA staff. It is important to file your answer on time. Failure to do so may cost you your right to a requested hearing.

What if the notice of intent is unclear?

You may request a clarification of the charges against you if the complaint is so vague or ambiguous that you cannot reasonably be expected to answer it. Your request should be submitted to APA staff. Your response will then be due within 30 days of the date of the new notice of intent from APA staff.

How do I resolve the allegations against me?

APA staff may have the authority to resolve the allegations against you through an agreed-upon resolution. You are encouraged to contact APA staff to discuss possible resolutions of the allegations described in the notice of intent as soon as possible after you receive it.

How do I learn about APA staff's case against me?

The simplest way is by asking for information about the alleged violations from APA staff. While there are some exceptions, both staff and the permit holder have a general responsibility to disclose information relevant to the hearing to each other. A more

formal process, called discovery, is provided by section 581-4.10 of APA rules and may or may not require the involvement of the ALJ to provide direction to the parties. If necessary, the ALJ may set time frames for complying with discovery requests and may modify or deny discovery requests. If a party does not respond to a discovery request, the ALJ can require compliance. If that party fails to comply with the ALJ's directive, the APA Board may conclude that the information sought would be unfavorable to the party that did not disclose it.

When is the matter ready for hearing?

The case is ready for hearing when a statement of readiness is filed by the APA staff with the ALJ. The ALJ assigned to the case will set the date and place for hearing. The place for the hearing is usually in APA's headquarters in Ray Brook, New York.

What if I want the hearing date changed?

You should first discuss an adjournment and a new hearing date with APA staff. If a new date is agreed upon, the hearing can be adjourned to the new date by the ALJ. If APA staff does not agree to your request, you can ask the ALJ for an adjournment. Your request should be made well in advance of the scheduled hearing date. It should be in writing and include the reason you are requesting an adjournment and other dates that you are available.

Who will be at the hearing?

The assigned ALJ will be there, as will APA staff. The parties attend with any witnesses they want to have testify. In most cases there will be a stenographic court reporter who makes a word-for-word record of what is said at the hearing. In some cases there is no stenographer, and a tape recorder is used instead. Hearings are open to the public.

What is the hearing procedure?

APA hearing procedures are similar to those used in the civil trial courts. Opening statements, if necessary, explain APA's position followed by the permit holder's position. After giving opening statements, each party presents its case to the ALJ. APA staff has the burden of proving its allegations in the notice of intent. The permit holder has the burden of proving its affirmative defenses. APA staff proceeds first, followed by the permit holder. At the end of the hearing the ALJ may give each party an opportunity to make closing statements, either at the hearing or to be submitted later in writing. The closing statement is each party's argument about what was proven and how the case should be decided.

How do the parties present their cases to the ALJ?

The parties present their cases primarily through the testimony of witnesses. All witnesses are sworn under oath by the ALJ. First, the witness answers questions by the party calling him or her. This is called direct examination. Then the witness answers questions from the other parties. This is called cross-examination and is done to bring out information not provided during the direct examination, to test the truthfulness and credibility of the witness, to test the accuracy and reliability of the witness's perception of events, and to probe the bases of expert opinion. Parties may also present and support their cases through the production of documents, photos, maps, etc. called "exhibits". Exhibits are usually presented by a witness who is familiar with them and who can explain what they are and mean. In some cases exhibits are presented simply upon the agreement of the parties, or based on some written certification that they are authentic.

How do I get copies of documents submitted at the hearing?

The ALJ keeps all exhibits used at the hearing as part of the hearing record that is provided to the APA Board. A general rule is that copies of all exhibits must be made available to the opposing party at the time they are used in the hearing. In many instances you will already have seen the exhibits offered by APA staff or already have copies of them. You will need to supply copies of your exhibits to APA staff unless they already have copies. You can also request a copy of the stenographic transcript, at your expense, from the court reporter. A copy of the transcript can be made available to you for review at APA's headquarters during normal business hours.

How do I ensure my witnesses and documents will be at the hearing?

Each party has the obligation to gather the people and documents it wants to present. You should first ask if a person would be willing to testify on your behalf. If necessary, the parties may use subpoenas to compel witnesses to appear and documents to be produced on the hearing date. A party's attorney may issue a subpoena. A party not represented by an attorney may request a subpoena from the ALJ. It is the party's responsibility to serve the subpoena and to pay for any related costs. Subpoenas for documents are handled much the same way.

If I have no attorney, will the ALJ assist me at hearing?

The ALJ can explain the hearing procedure to you but cannot advise you on what to do. The ALJ cannot be an advocate of your position and must remain impartial. Permit holders make their own decisions about whether they will testify and what evidence they will offer. If a permit holder wants to testify but has no attorney, the ALJ will provide him or her with an opportunity to make a statement under oath. The ALJ may also ask questions to clarify what a witness has said.

What should a witness know about testifying?

Witnesses should always tell the truth. They should listen carefully to questions and respond to them directly. If they do not understand a question, they should ask for clarification. If they cannot answer a question, they should say so. If a party objects to a question, they should wait for the ALJ's ruling before answering. Finally, they should always speak loudly, slowly and clearly, as a record is being made of their testimony.

How does the ALJ control the hearing?

ALJs have broad authority to maintain hearing order and efficiency. The ALJ controls the hearing by ruling on motions and requests that are made by the parties. For instance, one party may object to certain evidence as irrelevant to the hearing issues. If the ALJ sustains the objection, the evidence is excluded from the hearing record. If the ALJ overrules the objection, the evidence is admitted. The length of a hearing depends upon the number of allegations and affirmative defenses to be adjudicated and their complexity. Some are concluded in a single day; a complex hearing can take several days or more. Hearings generally run from day to day, with up to four sessions per week. During the course of a long hearing, the ALJ may grant an adjournment to accommodate the parties and their witnesses.

Are there restrictions on how information is passed to the ALJ?

Yes. Communications to and from the ALJ are regulated by a prohibition on "ex parte" contact. This means that ALJs cannot discuss the merits of a case with any of the parties without providing an opportunity for all parties to participate in the discussion at the same time. If a communication to the ALJ is written, all parties must be sent a copy of the correspondence at the same time. Likewise, the parties may not discuss the matter with members of the APA Board. The APA Board's information about a case is limited to the hearing record as a matter of fairness to all parties involved in the hearing. Parties may confer among themselves at any time during the hearing process and are encouraged to do so to resolve disputes and make the hearing process more efficient.

How do I challenge an ALJ's ruling?

Any ALJ's ruling may be appealed to the APA Board at the end of the hearing by motion of a party or as part of a closing statement. The APA Board may also decide to review an ALJ ruling during the hearing where the failure to decide an appeal immediately would unduly disadvantage one of the parties or would result in significant inefficiency in the hearing process. If the APA Board decides to hear the appeal, all parties will have an opportunity to be heard on whether the appeal should be granted or denied. The hearing will continue, unless the ALJ or the APA Board adjourns it, until the appeal is decided.

What is the standard of proof?

The APA staff has the burden to prove its allegations. The permit holder has the burden to prove its affirmative defenses. Each party must prove their claims by a preponderance of the evidence. This means that their evidence must be more credible and convincing than the other side's evidence.

How is a final decision made by the APA Board?

The APA Board must make a final decision on an APA staff proposal to modify, suspend or revoke a permit within 60 days of receipt of the hearing record from the ALJ. In some cases, the APA Board may defer a final decision and return the matter to a hearing on issues to be further developed. To assist the APA Board in its review of the record, the Board may have the aid and advice of APA staff who have not been involved in the review of the proposed project or the hearing. The APA Board's final decision may include an order modifying, suspending or revoking the permit holder's permit, dismissing the notice of intent, or imposing such other relief as it deems appropriate.

Can the APA Board's final decision be appealed?

Yes. The APA Board's final decision may be appealed to state court pursuant to Article 78 of the Civil Practice Law and Rules.

Is there a public record of the APA Board's final decision?

Copies of the APA Board's final decision will be distributed to each of the parties and is available for public review at the APA headquarters or may be requested by e-mail at APAFOIL@apa.ny.gov pursuant to the Freedom of Information Law.

Where can I obtain additional information about APA permit modification, suspension or revocation hearings?

Contact the APA by telephone at (518) 891-4050 or in person at 1133 NYS Route 86, Ray Brook, New York. Also, visit APA's website at www.apa.ny.gov.



SHERMAN CRAIG
Chairman

TERRY MARTINO
Executive Director

Guide to APA Enforcement Hearings

What is an enforcement hearing?

An enforcement hearing is a means by which APA can resolve alleged violations of the Freshwater Wetlands Act (Environmental Conservation Law Article 24). The enforcement hearing provides a record of testimony and exhibits that the APA Board can rely on to determine whether alleged violations have occurred and, if so, what an appropriate disposition of those violations should be.

How are these hearings conducted?

Enforcement hearings are conducted according to procedures provided in Subpart 581-4 of APA's rules located in Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Who participates in an enforcement hearing?

APA staff and one or more persons who are charged with violations are the parties in an APA enforcement hearing. APA staff present the alleged violations. Persons who are charged with violations are called "Respondents" because they respond to the charges against them.

Who conducts the hearing?

All APA enforcement hearings are conducted by an impartial Administrative Law Judge (ALJ). The ALJ presides over the enforcement hearing.

How is an enforcement hearing started?

An enforcement hearing starts with the APA staff serving a notice of hearing and complaint upon a Respondent. The notice of hearing tells the Respondent the enforcement action has begun. The complaint explains the violations alleged by APA staff and the actions and/or penalties sought because of the alleged violations.

How do I respond to the complaint?

You (or your attorney) must file a written answer to the charges with APA staff. Your answer will specify which allegations you admit, which ones you deny, and which ones you can't answer based on the information you have. You must include as part of your answer any affirmative defenses you may have. They should be supported by facts or

the law. For example, if you claim you are exempt from obtaining a permit that APA staff say you need, that claim must be part of your answer. Your answer must include all defenses you will make at the hearing; otherwise you may be precluded from presenting them. Part of your answer should also include a statement of any mitigating circumstances. Mitigating circumstances will be considered by the APA Board in determining any relief that is ultimately granted. For example, the degree of cooperation with APA staff may be considered as a mitigating circumstance.

When do I serve my answer?

You must mail or deliver your answer to APA staff within 30 days of the date of the notice of hearing and complaint. You should seek any extensions you need before the 30 days expire. Requests for extensions should be made to APA staff. If you do not file your answer on time, you may lose your right to a hearing and be found responsible for the actions and/or penalties that is sought by APA staff in the complaint.

What if the complaint is unclear?

You may request a clarification of the charges against you if the complaint is so vague or ambiguous that you cannot reasonably be expected to answer it. Your request should be submitted to APA staff. Your response will then be due within 30 days of the date of the new complaint from APA staff.

How do I settle charges against me?

Alleged violations may be settled through discussions with APA staff. An agreement to resolve the alleged violations may be accomplished through a Settlement Agreement executed by both parties.

How do I learn more about APA staff's case against me?

The simplest way is by asking for information about the alleged violations from APA staff. While there are some exceptions, both staff and the permit holder have a general responsibility to disclose information relevant to the hearing to each other. A more formal process, called discovery, is provided by section 581-4.10 of APA rules and may or may not require the involvement of the ALJ to provide direction to the parties. If necessary, the ALJ may set time frames for complying with discovery requests and may modify or deny discovery requests. If a party does not respond to a discovery request, the ALJ can require compliance. If that party fails to comply with the ALJ's directive, the APA Board may conclude that the information sought would be unfavorable to the party that did not disclose it.

When is the case ready for hearing?

The case is ready for hearing when a statement of readiness is filed by the APA staff with the ALJ. The ALJ assigned to the case will set the date and place for hearing. The place for the hearing is usually in APA's headquarters in Ray Brook, New York.

What if I want the hearing date changed?

You should first discuss an adjournment and a new hearing date with APA staff. If a new date is agreed upon, the hearing can be adjourned to the new date by the ALJ. If APA staff does not agree to your request, you can ask the ALJ for an adjournment. Your request should be made well in advance of the scheduled hearing date. It should be in writing and include the reason you are requesting an adjournment and other dates that you are available.

What if I fail to appear?

If you fail to appear at the hearing on the scheduled date, you will waive your right to a hearing if you were properly served with the notice and complaint. Your failure to appear constitutes a default, which may make you responsible for the actions and/or penalties sought by APA staff in its complaint. Respondents should be careful not to default because of its serious consequences.

Who will be at the hearing?

The assigned ALJ will be there, as will APA staff. The parties attend with any witnesses they want to have testify. In most cases there will be a stenographic court reporter who makes a word-for-word record of what is said at the hearing. In some cases there is no stenographer, and a tape recorder is used instead. Hearings are open to the public.

What is the hearing procedure?

APA hearing procedures are similar to those used in the civil trial courts. Opening statements, if necessary, explain APA staff's position followed by the Respondent's position. After giving opening statements, each party presents its case to the ALJ. APA staff has the burden of proving its charges in the complaint. The permit holder has the burden of proving its affirmative defenses. APA staff proceeds first, followed by the Respondent. At the end of the hearing the ALJ may give each party an opportunity to make closing statements, either at the hearing or to be submitted later in writing. The closing statement is each party's argument about what was proven and how the case should be decided.

How do the parties present their cases to the ALJ?

The parties present their cases primarily through the testimony of witnesses. All witnesses are sworn under oath by the ALJ. First, the witness answers questions by the party calling him or her. This is called direct examination. Then the witness answers questions from the other parties. This is called cross-examination and is done to bring out information not provided during the direct examination, to test the truthfulness and credibility of the witness, to test the accuracy and reliability of the witness's perception of events, and to probe the bases of expert opinion. Parties may also present and support their cases through the production of documents, photos, maps, etc. called "exhibits". Exhibits are usually presented by a witness who is familiar with them and who can explain what they are and mean. In some cases exhibits are presented simply upon the agreement of the parties, or based on some written certification that they are authentic.

How do I get copies of exhibits submitted at the hearing?

The ALJ keeps all exhibits used at the hearing as part of the hearing record that is provided to the APA Board. A general rule is that copies of all exhibits must be made available to the opposing party at the time they are used in the hearing. In many instances you will already have seen the exhibits offered by APA staff or already have copies of them. You will need to supply copies of your exhibits to APA staff unless they already have copies. You can also request a copy of the stenographic transcript, at your expense, from the court reporter. A copy of the transcript can be made available to you for review at APA's headquarters during normal business hours.

How do I ensure my witnesses and exhibits will be at the hearing?

Each party has the obligation to gather the people and exhibits it wants to present. You should first ask if a person would be willing to testify on your behalf. If necessary, the parties may use subpoenas to compel witnesses to appear and documents to be produced on the hearing date. A party's attorney may issue a subpoena. A party not represented by an attorney may request a subpoena from the ALJ. It is the party's responsibility to serve the subpoena and to pay for any related costs. Subpoenas for documents are handled much the same way.

If I have no attorney, will the ALJ assist me at hearing?

The ALJ can explain the hearing procedure to you but cannot advise you on what to do. The ALJ cannot be an advocate of your position and must remain impartial. Respondents make their own decisions about whether they will testify and what evidence they will offer. If a Respondent wants to testify but has no attorney, the ALJ will provide the Respondent with an opportunity to make a statement under oath. The ALJ may also ask questions to clarify what a witness has said.

What should a witness know about testifying?

Witnesses should always tell the truth. They should listen carefully to questions and respond to them directly. If they do not understand a question, they should ask for clarification. If they cannot answer a question, they should say so. If a party objects to a question, they should wait for the ALJ's ruling before answering. Finally, they should always speak loudly, slowly and clearly, as a record is being made of their testimony.

How does the ALJ control the hearing?

ALJs have broad authority to maintain hearing order and efficiency. The ALJ controls the hearing by ruling on motions and requests that are made by the parties. For instance, one party may object to certain evidence as irrelevant to the hearing issues. If the ALJ sustains the objection, the evidence is excluded from the hearing record. If the ALJ overrules the objection, the evidence is admitted. The length of a hearing depends upon the number of alleged violations and affirmative defenses to be adjudicated and their complexity. Some hearings are concluded in a single day; a complex enforcement hearing can take several days or more. Hearings generally run from day to day, with up to four sessions per week. During the course of a long hearing, the ALJ may grant an adjournment to accommodate the parties and their witnesses.

Are there restrictions on how information is passed to the ALJ?

Yes. Communications to and from the ALJ are regulated by a prohibition on "ex parte" contact. This means that ALJs cannot discuss the merits of a case with any of the parties without providing an opportunity for all parties to participate in the discussion at the same time. If a communication to the ALJ is written, all parties must be sent a copy of the correspondence at the same time. Likewise, the parties may not discuss the merits of the case with the APA Board. The APA Board's information about a case is limited to the hearing record as a matter of fairness to all parties involved in the hearing. Parties may confer among themselves at any time during the hearing process and are encouraged to do so to resolve disputes and make the hearing process more efficient.

How do I challenge an ALJ's ruling?

Any ALJ's ruling may be appealed to the APA Board at the end of the hearing by motion of a party or as part of a closing statement. The APA Board may also decide to review an ALJ ruling during the hearing where the failure to decide an appeal immediately would unduly disadvantage one of the parties or would result in significant inefficiency in the hearing process. If the APA Board decides to hear the appeal, all parties will have an opportunity to be heard on whether the appeal should be granted or denied. The hearing will continue, unless the ALJ or the APA Board adjourns it, until the appeal is decided.

What is the standard of proof?

The APA staff has the burden to prove its charges. The Respondent has the burden to prove its affirmative defenses. Each party must prove their claims by a preponderance of the evidence. This means that their evidence must be more credible and convincing than the other side's evidence.

How is a final decision made by the APA Board?

The APA Board must make a final decision in the enforcement matter within 60 days of receipt of the hearing record from the ALJ. In some cases, the APA Board may defer a final decision and return the matter to a hearing on issues to be further developed. The Board's decision is based on the testimony, exhibits and argument in the hearing record. The hearing record may also include a hearing report from the ALJ if the Board requests one. To assist the APA Board in its review of the record, the Board may have the aid and advice of APA staff who have not been involved in the investigation or prosecution of the alleged violations. The APA Board's final decision may include a finding of violations or the dismissal of charges and, if the violations are found, may order appropriate actions and/or penalties or such other relief as it deems appropriate.

Can the APA Board's final decision be appealed?

Yes. The APA Board's final decision may be appealed to state court pursuant to Article 78 of the Civil Practice Law and Rules.

Is there a public record of the APA Board's final decision?

Copies of the APA Board's final decision will be distributed to each of the parties and is available for public review at the APA headquarters or may be requested by e-mail at APAFOIL@apa.ny.gov pursuant to the Freedom of Information Law.

Where can I obtain additional information about APA enforcement hearings?

Contact the APA by telephone at (518) 891-4050 or in person at 1133 NYS Route 86, Ray Brook, New York. Also, visit APA's website at www.apa.ny.gov.

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND
THE ADIRONDACK PARK AGENCY

THIS Memorandum of Understanding (MOU) (AM10539) by and between the New York State Department of Environmental Conservation, hereinafter referred to as the Department or DEC, having offices at 625 Broadway, Albany, NY 12233 and the Adirondack Park Agency, hereinafter referred to as the Agency, having offices at 1133 New York State Route 86, Ray Brook, NY 12977.

Witnesseth

WHEREAS, the Office of Hearings and Mediation Services (OHMS) is an independent office within the Department that conducts hearings related to the Department's permitting and enforcement activities under the Environmental Conservation Law, and helps to resolve disputes by employing less formal means, such as mediation; and

WHEREAS, the Agency periodically requires those same services for implementation of its regulatory and other responsibilities under the Adirondack Park Agency Act (Executive Law article 27) and the Environmental Conservation Law; and

WHEREAS, the Department has shared the services of the OHMS with the Agency pursuant to a 1995 memorandum of understanding, and is willing to continue to do so pursuant to this agreement, which shall supersede the prior memorandum; and

WHEREAS, the Department and the Agency declare they have authority to enter into this MOU and that it is to their mutual advantage to work together, consistent with Executive Order Number 131 (1989), as continued by Governor Andrew M. Cuomo in Executive Order Number 2 (2011), and make DEC Administrative Law Judges available to the Agency;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties agree as follows:

ARTICLE I. Term

This MOU will commence on April 1, 2017, and will remain in effect until March 31, 2022, with the option to amend or extend for up to three additional five-year periods upon mutual written consent of both parties.

Article II. Scope of Work

Both the Department and the Agency are in agreement that the Department will provide the Agency with DEC Administrative Law Judges (ALJs) to serve as hearing officers on permitting, enforcement, and other regulatory proceedings arising under the Adirondack Park Agency Act, the Environmental Conservation Law, and their implementing regulations. The Department and the Agency agree that each party's responsibilities are as follows:

Department Responsibilities

1. DEC ALJs designated as hearing officers for the Agency shall conduct hearings in accordance with the State Administrative Procedure Act, the Adirondack Park Agency Act, the Environmental Conservation Law, Parts 580 and 581 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and other statutes and regulations administered by the Agency. The DEC ALJ may consult on questions of law with Agency Counsel provided that such Counsel has not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.
2. The Department shall provide written confirmation of a written request for services of a DEC ALJ, after any necessary consultations with the Agency's Counsel, and shall identify the DEC ALJ assigned to provide the requested services to the Agency. The Department shall make every reasonable effort to accommodate the Agency's request.
3. Administrative Law Judge duties: The appointed DEC ALJ will provide services in a fair and impartial manner, consistent with the Executive Director's appointment letter. *Ex parte* contacts shall be prohibited, and the appointment of a DEC ALJ may be challenged by any party consistent with Agency rules and the State Administrative Procedure Act. Challenges to the appointment of a DEC ALJ shall be decided in accordance with Agency rules.
4. The Department will ensure that DEC ALJs designated as hearing officers for the Agency submit required reports within the time frames established by the Agency.
5. The appointed DEC ALJ will remain a Department employee while providing OHMS services on behalf of the Agency. Subject to availability as determined by the Department, the Department shall provide the services of designated hearing officers for no charge, except for those expenses authorized by item 3 under the heading "Agency Responsibilities" of this article. Where, at the Department's discretion, hearings and associated activities are conducted at facilities already available to the Department, they will be used without cost to the Agency.

Agency Responsibilities

1. Request for DEC ALJ services: The Agency shall make a written request for services of a DEC ALJ at least thirty days prior to the date on which the services are requested to commence. The request shall identify: (1) the title and nature of the matter; (2) any statutory or regulatory timeframes within which the services must commence; (3) the parties involved; (4) the estimated duration of the need for services; and (5) the scope of the services requested.
2. Appointment letter: Upon receipt of confirmation of the Agency's request for DEC ALJ services, the Agency's Executive Director shall provide the designated DEC ALJ with an appointment letter that details the agreed upon scope of services and timeframes, and provides contact information including telephone numbers and e-mail addresses for staff and other parties. The appointment letter will also identify the Agency's Counsel as a point of contact for questions of law and procedure that may arise during the course of the engagement of OHMS services, and provide an administrative contact for logistical questions and expenses reimbursement. Copies of the appointment letter shall be provided to staff, other parties, Agency Counsel and the Department's Chief Administrative Law Judge.

3. Administrative Law Judge expenses: Consistent with the most current version of the Office of the State Comptroller Travel Manual, the Agency will reimburse the DEC ALJ for all actual and necessary expenses incurred that are related to the provision of DEC ALJ services pursuant to the appointment letter. Actual and necessary expenses include transportation, lodging and meal costs incurred by the DEC ALJ.

4. The Agency agrees to provide, without cost to the Department, appropriate hearing rooms, recording devices or stenographic services, and work space, as needed, to conduct the work on behalf of the Agency.

ARTICLE III. Method of Payment

The DEC ALJ shall request reimbursement pursuant to Article II, Scope of Work, Agency Responsibilities, item 3, within thirty days of incurring any such expenses. Reimbursement requests and questions about reimbursement shall be directed to the administrative contact identified in the Executive Director’s appointment letter.

ARTICLE IV. Representations

The Agency’s Counsel and the Department’s Chief Administrative Law Judge shall be the authorized representatives and will be responsible for the administration of this Memorandum of Understanding. The mailing address and phone number for each is:

Agency Counsel
Adirondack Park Agency
P.O. Box 99
Ray Brook, New York 12977
(518) 891-4050

Chief Administrative Law Judge
Department of Environmental Conservation
625 Broadway, First Floor
Albany, New York 12233-1550
(518) 402-9003

ARTICLE V. Termination

This MOU may be terminated by either party giving the other 30 days advanced written notice of such intent and the reasons thereof. Neither party shall enter into or otherwise create new obligations relative to this MOU following receipt of such notice, without the written consent of the other party. Both parties agree to enter into good faith negotiations to resolve any differences and provide for an orderly closure of this MOU if agreement cannot be reached. Termination will be effective only after agreement has been reached with respect to the amount of equitable reimbursement and payment for all outstanding commitments.

ARTICLE VI. Executory Clause

In accordance with Section 41 of the State Finance Law, the Department shall have no liability under this MOU to the Agency or to anyone else beyond funds available for this MOU.

MOU NO. AM10539

In **WITNESS WHEREOF**, the individuals listed below are authorized to sign and execute this MOU between their respective Executive Department Agencies, on the date appearing below their respective signatures.

New York State Department
of Environmental Conservation

By _____

Basil Seggos

Commissioner

Dated: _____

Adirondack Park Agency

By _____

Sherman Craig

Chairman

Dated: _____