

**100 Office of the Secretary**

**105 Environmental Appeals Board Regulations**

The following regulations of the Delaware Environmental Appeals Board, the authority for which is contained in 7 Del.C. Ch. 60, and Amendments thereto, are procedural regulations. The Board has authority to draft these regulations pursuant to 7 Del.C. §6007(f).

**1.0 Authority**

- 1.1 Pursuant to 7 Del.C. §6008, any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within twenty (20) days after the Secretary has announced the decision.
- 1.2 The Board has the authority to affirm, modify or reverse the decision of the Secretary.

**2.0 Statement Of Appeal**

- 2.1 The request for an appeal shall be submitted in the form of a written statement. The statement shall set forth clearly and concisely the following:
  - 2.1.1 the interest which has been substantially affected;
  - 2.1.2 an allegation that the decision is improper; and
  - 2.1.3 the reasons why the decision is improper.

The request for appeal should be stated with sufficient specificity to notify the Board and the Department of Natural Resources of the reasons for the appeal.

- 2.2 The written statement shall also set forth an estimate of the number of witnesses and the time involved in presenting the appeal at the public hearing.
- 2.3 A \$50.00 deposit for costs shall accompany the statement of appeal. The Board may refund all or a portion of the deposit in the event that the appeal is withdrawn prior to notice of the appeal. In the event that a person desiring to make an appeal is unable, because of financial hardship, to make the \$50.00 deposit, such person shall specify circumstances and reasons in the statement of appeal for not submitting the deposit.
- 2.4 All written statements shall be completed and addressed to the Environmental Appeals Board, 89 Kings Highway, Dover, DE 19901, Attention: Administrative Assistant to the Environmental Appeals Board. Incomplete written statements will be returned to the appellant with a letter indicating the deficiencies and may be subject to dismissal.

**3.0 Pre-hearing Conference**

- 3.1 At least twenty (20) days prior to the hearing date, the attorney to the Board shall conduct a pre-hearing conference by telephone or in person.

The purpose of the conference is to:

- 3.1.1 Determine the extent to which the appellant and the Department may agree about facts in the appeal;

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- 3.1.2 Identify the witnesses each party will call at the hearing and to receive a brief summary of the testimony the witnesses will present;
  - 3.1.3 Identify all documents which the parties intend to introduce at the hearing;
  - 3.1.4 Resolve any and all procedural matters;
  - 3.1.5 Generally inform the Board and the parties about the substance of the hearing; and
  - 3.1.6 Identify issues.
- 3.2 No fewer than ten (10) days prior to the date set for the pre-hearing conference, the Department of Natural Resources and the appellant shall submit to the Board's attorney and to each other, a list of the witnesses they intend to call at the hearing and a list of the documents, including relevant portions of those documents, and other evidence which they intend to submit into evidence at the hearing. These lists shall be finalized at the pre-hearing conference.
- 3.3 The parties shall submit final witness and document lists and shall raise all objections to such witnesses and documents at the pre-hearing conference.
- 3.4 Witnesses not identified at the pre-hearing conference shall be permitted to testify only upon showing a reasonable cause for such omission. Documents and other evidence not identified at the pre-hearing conference will not be allowed at the hearing unless the party offering the document or other evidence makes a showing of reasonable cause for failure to identify the document or other evidence. Provided, however, that documents, testimony, and other evidence not identified at the pre-hearing conference may be introduced for purposes of rebuttal and surrebuttal only, at the discretion of the Board.
- 3.5 After the pre-hearing conference, the Board's attorney may provide the Board members with the list of witnesses, documents, as well as a memo summarizing the issues on appeal.
- 3.6 The Board may issue subpoenas to 7 Del.C. §6006(3). If either party wishes the Board to issue a subpoena to compel the attendance of a witness for the hearing, such party shall provide the Board's Administrative Assistant with the names and addresses of potential witnesses or documents no later than fifteen (15) days before the date of the hearing. The Board will subpoena witnesses and documents only upon a timely receipt of a subpoena request.
- 3.7 No other discovery shall be taken except by consent of all of the parties.

**4.0 Chronology**

- 4.1 No later than twenty (20) days after the filing of the appeal, the Department shall prepare and file with the Environmental Appeals Board Administrative Assistant the following documents to be included in the Chronology:
- 4.1.1 Final letter or other document indicating action of the Secretary from which the appeal is taken;
  - 4.1.2 Permit, if applicable, from which the appeal is taken;
  - 4.1.3 Copy of the hearing officer's report if applicable;
  - 4.1.4 Copy of the transcript of the hearing before the Secretary, unless the Board determines that it is impracticable to provide such transcript. In that case, relevant portions of the transcript shall be designated by the parties, and provided to the Board.

- 4.2 The Board's administrative assistant shall prepare the Chronology and have it available for copying by the parties no later than five (5) days before the pre-hearing conference. The Chronology shall contain all of the items listed in Section 104(a), and all statements of appeal.
- 4.3 The Chronology, any documentary evidence to which the parties are able to stipulate as admissible at the pre-hearing conference and any memoranda submitted to the Board's attorney (if such documentary evidence and/or memoranda are timely received) will be provided to the Board members prior to the hearing.

### **5.0 Hearings Before the Board**

- 5.1 The Board's Administrative Assistant shall schedule the appeal for the first available date which allows for the 20 days notice required in 7 **Del.C.** §6006. The Board will conduct hearings on the second and fourth Tuesday of each month.
- 5.2 A verbatim record of the proceedings before the Board shall be taken by an electronic recording instrument or by a court stenographer. All testimony shall be taken under oath. The Chairman of the Environmental appeals Board or another designated Board member shall preside over the hearing. The names and addresses of all interested parties present shall be noted on the official record of the hearing.
- 5.3 The record before the Board includes the entire record before the Secretary. Any party may present any competent evidence in its behalf and request subpoenas for testimony or production of documents and other tangible evidence. Non parties shall not present evidence. Appellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary. The Board is not required to re-hear testimony which has already been given before the Secretary, but may do so if, within its discretion, it determines that the evidence would be helpful.
- 5.4 Strict rules of evidence shall not apply. All evidence having probative value commonly accepted by a reasonably prudent person in the conduct of his or her affairs shall be admitted. Objections to the admission or the exclusion of evidence shall be brief and shall state the ground for objection.
- 5.5 The Board may exclude any evidence which is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive.
- 5.6 An offer of proof made in connection with any objection taken to any admission or exclusion of evidence shall consist of a statement of that which the offeror contends would be adduced by such testimony or document. Where the offer concerns a document, a copy of such evidence shall be marked for identification.
- 5.7 The appellant shall appear personally or be represented by counsel. The hearing shall open with a brief statement from each party of what such party intends to establish at the hearing. Comments will begin with the appellant.
- 5.8 Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first followed by the Department and then followed by the Permittee if any. After initial testimony and cross-examination by the parties, any witness may be examined by any member of the Board. Following the presentation of the main case, the appellant shall have an opportunity to produce rebuttal evidence, subject to cross-examination. Following the presentation of the rebuttal evidence, the parties opposing the appellant shall have an opportunity to present surrebuttal evidence, subject to cross-examination.

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- 5.9 The record of the hearing shall not be transcribed unless in the opinion of the Board, the transcript is necessary for the Board to reach a decision. However, any person who pays the cost for transcription may obtain a copy of the transcript.

**6.0 Procedure Not Otherwise Specified**

If no procedure is specifically prescribed by these Rules, the Board may proceed in a manner not inconsistent with these Rules. The Board may waive any of these regulations if it is necessary to do so to carry out its duties under 7 **Del.C.** Ch. 60.

**7.0 Ex Parte Communications Prohibited**

Subsequent to the filing of the appeal, no party shall discuss or communicate, directly or indirectly, with any Board member respecting any issue of fact or law pending upon such appeal, except upon notice to and opportunity for all parties to participate, unless such communications are required for the disposition of ex parte matters authorized by law.