
# 6 NYCRR PART 622

# UNIFORM ENFORCEMENT HEARING PROCEDURES

**(effective September 16, 2020; amended August 21, 2024)**

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**PART 622**
**UNIFORM ENFORCEMENT HEARING PROCEDURES**

(Statutory Authority: Environmental Conservation Law sections 3-0301, 15-0901, 17-0303, 19-0301, 23-0305, 33-0303, 70-0107, 71-0301, 71-1709 and 71-1719, and State Administrative Procedure Act, Article 3)

**§ 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 laws administered by the commissioner;

(2) any proceeding brought pursuant to ECL 71-0301 (summary abatement) or ECL 71-1709 and 71-1719 (summary action) except to the extent inconsistent with the provisions of Part 620 of this Title;

(3) any proceeding brought pursuant to State Administrative Procedure Act (SAPA) section 401(3);

(4) any proceeding brought pursuant to ECL 15-0507 or ECL 15-0511 (dam safety);

(5) any proceeding brought pursuant to ECL 27-1313 (inactive hazardous waste disposal site remedial programs) unless superseded by Part 375 of this Title;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 providing notice and the opportunity to be heard consistent with section 621.13 of this Title, 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 or permit, as defined herein, issued by the department;

(7) any expedited proceeding brought pursuant to paragraph 613-5.4(a)(3) (petroleum delivery prohibition) of this Title except to the extent inconsistent with the provisions of that paragraph;

(8) 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

(9) any other proceeding that 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 the 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 have the meanings indicated in this section. The definitions in this section are not intended to change any statutory or common law meaning of these terms.

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

(b) *Affidavit* means a voluntary written declaration or statement of facts made by a declarant with personal knowledge of the facts, and confirmed by the oath of the declarant before a person having authority to administer the oath, such as a notary public. A pleading verified in accordance with CPLR 3020 and 3021 may be used as an affidavit of the facts constituting the claim whenever the latter is required.

(c) *Affirmation of an attorney* means the statement of an attorney admitted to practice in the courts of the State, who is not a party to a proceeding, subscribed and affirmed by the attorney to be true under the penalties of perjury. An affirmation may be served or filed in a proceeding in lieu of and with the same force and effect as an affidavit.

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

(e) *CPLR* means the Civil Practice Law and Rules.

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

(g) *Department staff* means those department personnel participating in the proceeding, but does not include the commissioner, any personnel of the Office of Hearings and Mediation Services, the ALJ or any person advising or consulting with the commissioner or ALJ.

(h) *Disclosure* means disclosure of facts, documents, or other things that are known by or in the possession of a person and that are material and necessary in the prosecution or defense of the proceeding regardless of the burden of proof.

(i) *ECL* means the Environmental Conservation Law.

(j) *Electronically stored information* or *ESI* means any potentially relevant information that is created, stored or utilized with technology of any type. ESI includes, but is not limited to, voice mail, instant messaging and other electronic communications, text files, hard drives, graphics, databases, calendars, telephone logs, transaction logs, internet usage files, offline storage or information on removable media, information contained on laptops or other portable devices and network access information and back up materials, native files and the corresponding metadata which is ordinarily maintained, word-processing files, audio files, video files, spreadsheets, images, emails and attachments and other electronic messaging information that are stored electronically. *Active data* means potentially relevant ESI that is located in a computer's memory or in storage media (including servers, desktop or laptop

computers, tablets, cellphones, hard drives, flash drives, compact discs, digital video discs, and portable media players) that is immediately available in the normal course of business.

(k) *Evidence* means sworn or affirmed testimony of witnesses, and physical objects, documents, records, or photographs that tend to prove or disprove the existence of an alleged fact.

(l) *Hearing* means that part of the proceeding that involves the taking of evidence, examination of witnesses, and such other steps as are necessary in the prosecution or defense of the proceeding.

(m) *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.

(n) *Interrogatories* means written questions regarding the proceeding that are served by a party on an adversarial party. Answers to interrogatories must be in writing and made under oath.

(o) *Mediation* means a voluntary discussion between department staff and respondent concerning the violations alleged in an enforcement proceeding, facilitated by an ALJ assigned as mediator. The mediation may address all or only some of the allegations raised in the enforcement proceeding, or involve all or only some of the respondents.

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

(q) *Office of Hearings and Mediation Services* means the office within the department principally responsible for conducting adjudicatory proceedings and providing mediation services.

(r) *Party* means department staff, all persons designated respondent and any person granted intervenor status pursuant to subdivision 622.10(f) of this Part, but does not include the commissioner, the Office of Hearings and Mediation Services, the ALJ or any person advising or consulting with the commissioner or ALJ.

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

(t) *Person* means any individual, public or private corporation, limited liability company, bi-state authority, political subdivision, government agency, department or bureau of the State, municipality, industry, partnership, association, firm, trust, estate or any legal entity whatsoever.

(u) *Proceeding* means an adjudicatory enforcement proceeding before an administrative law judge in which a determination of the legal rights, duties or privileges of named parties thereto is determined on a record and after an opportunity for a hearing.

(v) *Proof of service* means an affirmation of an attorney or affidavit if made by any other person specifying the papers served, the person served, and the date and manner of service, and

setting forth facts showing that service was made by an authorized person and in an authorized manner.

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

(x) *Relevant* means tending to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable.

(y) *Report* means the ALJ's summary of the proceeding, including the ALJ's findings of fact, conclusions of law and recommendations for the commissioner's consideration.

(z) *Respondent* means the person or persons charged with one or more violations of the ECL or other laws administered by the commissioner, rules and regulations promulgated thereunder or any permit or order issued thereunder, or a person or persons alleged by department staff to be responsible for the relief sought.

(aa) *SAPA* means the State Administrative Procedure Act.

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

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

(dd) *Subpoena* means a legal document that requires a person to appear at a hearing and testify, to produce documents or physical objects, or both.

**§ 622.3 Commencement of a proceeding.**

(a) *Notice of hearing and complaint*.

(1) Department staff may commence an administrative proceeding by the service of a notice of hearing. If the proceeding is commenced by a notice of hearing, it must be accompanied by a complaint. The complaint must be signed and dated by a department attorney and 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, subsections, paragraphs and subparagraphs of the statutes, rules and regulations alleged to have been violated;

(iii) a plain and concise statement of the matters asserted in consecutively numbered paragraphs. Each cause of action must be separately stated and numbered;

(iv) a demand for the relief sought, which may include relief in the alternative or

different types of relief; and

(v) the name, mailing address and telephone number of the department attorney.

(vi) The complaint will be considered to have been signed by a department attorney if it bears:

(*a*) the physical signature of the attorney; or

(*b*) the attorney's signature scanned into an electronic format that reproduces the signature, provided the signatory affixed the digital image of his or her signature to the complaint.

(2) The notice of hearing must state that a hearing date will be set by the Office of Hearings and Mediation Services 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, failure to attend a pre-hearing conference, or failure to attend the hearing 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 is complete when the notice of hearing and complaint is received. If personal service and service by certified mail is impracticable, upon application by department staff, the ALJ may provide for an alternative method of service consistent with CPLR 308(5).

(4) If a notice of hearing is served with a complaint and statement of readiness, the notice must state the date, time and place of the hearing set by the Office of Hearings and Mediation Services.

(b) *Other methods of 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 that will become final unless a hearing is requested, the notification takes the place of a complaint. Service of the notice of intent must be in the same manner as prescribed in paragraph (a)(3) of this section. A request for a hearing takes the place of an answer.

(3) Where a proceeding arises out of department staff's notice of expedited hearing issued pursuant to paragraph 613-5.4(a)(3) of this Title together with a written notification of any petroleum delivery prohibition, the notice of expedited hearing

must state that the failure of the facility to appear at the time and place scheduled for the expedited hearing constitutes a waiver of the opportunity for an expedited hearing. Service of the notice of expedited hearing and written notification of any petroleum delivery prohibition must be in the same manner as prescribed in paragraph (a)(3) of this section. The facility may answer at any time up to and including the date of the expedited hearing. The notification of any petroleum delivery prohibition:

(i) takes the place of a complaint; and

(ii) must state the alleged facts or relevant conditions that are the basis for the delivery prohibition.

**§ 622.4 Answer.**

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

(b) Respondent must specify in the answer each allegation of the complaint respondent admits, each allegation respondent denies, and each allegation as to which respondent lacks information sufficient to form a belief as to the truth or accuracy of the allegation.

(c) Respondent's answer must explicitly assert any affirmative defenses including those listed in CPLR 3018 together with a statement of the facts as may be necessary to provide notice 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 constitutes an affirmative defense. Inability to pay constitutes an affirmative defense, but only to department staff's request for a penalty and not as a defense to liability.

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

(e) Respondent may move for a more definite statement of the complaint within ten (10) days of receipt of the complaint 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 ten (10) days of receipt of notice that the motion is denied.

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

(f) Department staff may move for a more definite statement of affirmative defenses within ten (10) days of completion of service of the answer on the grounds that the affirmative defenses pleaded in the answer are vague or ambiguous and that department 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, within twenty (20) days after service of the pleading.

(b) Consistent with CPLR 3025, a party may amend its pleading at any time prior to the final order 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) CPLR 2103 governs service of papers except that papers may be served by a party and service upon respondent's duly authorized representative may be made by the same means as provided for service upon an attorney. Notwithstanding any other rule to the contrary, service may be made by transmission of papers by electronic transmission, such as email or facsimile, if agreed to in advance by the parties or authorized by the ALJ.

(2) Any required filing or proof of service must be filed with the Office of Hearings and Mediation Services.

(3) When service of motion papers by electronic transmission, such as facsimile or email, is agreed to in advance by the parties or authorized by the ALJ, the ALJ may direct the parties to send a copy of the papers transmitted electronically to the recipient by first class mail.

(b) *Computation of time limits*.

(1) The rules of General Construction Law sections 20 and 25-a govern the computation of time limits.

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

(i) five (5) days is added to the prescribed period if service or issuance is by first class mail;

(ii) one (1) day is added to the prescribed period if service or issuance is by overnight delivery;

(iii) if service or issuance is by facsimile transmission only, as agreed to or authorized pursuant to paragraph (a)(1) of this section, the service is complete upon the receipt by the sender of a signal from the equipment of the party served that the transmission was received; and

(iv) if service or issuance is by email only, as agreed to or authorized pursuant to paragraph (a)(1) of this section, the service is complete upon transmission. Service by email is not complete upon transmission if the serving party receives notification that the papers sent by email did not reach the person to be served.

(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 in writing. All motion papers must be filed by personal delivery or first class mail with the ALJ, together with proof of service of the motion on all parties. In addition to filing by personal delivery or mail, an ALJ may authorize the parties to file additional copies of motions by electronic means. 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 proceeding, the motion must be filed by personal delivery or first class mail with the Chief ALJ.

(2) Every motion must clearly state the relief requested, and the legal arguments and any facts upon which the motion is based. The motion must also include other supporting materials upon which the motion is based.

(3) All parties have five (5) days after a motion is served to serve a response. Thereafter, no further responsive papers will be allowed without permission of the ALJ. All responsive papers must be filed by personal delivery or first class mail with the ALJ, together with proof of service on all parties. An ALJ may authorize the parties to file additional copies of the responsive papers by electronic means.

(4) The ALJ should rule on a motion within five (5) 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.

(5) Where a standard of review applicable to a motion or request is not otherwise provided for in this Part, other sources of standards, including statutory law such as SAPA and the CPLR, case law, and administrative precedent, may be consulted.

(d) *Office of Hearings and Mediation Services*.

(1) Prior to the appointment of an ALJ to hear a particular proceeding, the Chief ALJ may take any action which an ALJ is authorized to take.

(2) The Chief ALJ may establish a schedule for hearing pretrial motions and other matters for proceedings that have no assigned ALJ.

(e) *Interlocutory Appeals*. The time periods for interlocutory appeals filed pursuant to paragraph 622.10(d)(2) of this Part are as follows:

(1) (i) Interlocutory appeals pursuant to subparagraph 622.10(d)(2)(i) of this Part must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services in writing within ten (10) days of the disputed ruling. All parties have ten (10) days after a notice of interlocutory appeal is served to serve a response to the appeal. The parties must file one original and three copies of any papers filed pursuant to this subparagraph.

(ii) Motions for permission to appeal pursuant to 622.10(d)(2)(ii) of this Part must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services in writing within ten (10) days of the disputed ruling. All parties have ten (10) days after a motion for permission to appeal is served to serve a response to the motion. The parties must file one original and three copies of any papers filed pursuant to this subparagraph.

(2) Upon being granted permission to appeal, appellant must file and serve the appeal in writing within ten (10) days of permission being granted. Thereafter the other parties may file a response in support of or in opposition to the appeal within five (5) days of service of the appeal.

(f) All rules of practice involving time periods may be modified by direction of the ALJ or commissioner and, for the same reasons, any other rule may be modified by the commissioner upon recommendation of the ALJ or upon the commissioner's own initiative.

**§ 622.7 Disclosure.**

(a) *Scope*.

(1) Except as noted below, the scope of disclosure is as broad as the scope of disclosure under CPLR Article 31.

(2) Potentially relevant electronically stored information (ESI).

(i) Unless authorized by the ALJ, disclosure of ESI is limited to active data only.

(ii) Upon motion of any party demonstrating substantial prejudice, the ALJ may order additional disclosure of potentially relevant ESI, subject to any terms and conditions deemed appropriate by the ALJ. Such a motion must be accompanied by an affirmation of an attorney, or an affidavit of the moving party if not represented by an attorney, describing the good faith efforts to resolve the dispute without resort to a motion.

(b) *Disclosure devices*.

(1) Except as noted below, the parties may employ any disclosure device contained in CPLR Article 31. Where production and inspection of documents is sought, the requested documents must be furnished within twenty (20) days of receipt of the disclosure demand unless a motion for a protective order is made.

(2) Depositions and written interrogatories will only be allowed by 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 disclosure is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR 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 twenty (20) days of the receipt of the disclosure demand and must be accompanied by an affirmation of an attorney, or an affidavit of the moving party if not represented by an attorney, describing the good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a disclosure demand without having made a timely objection, the proponent of the disclosure demand may make a motion to the ALJ to compel disclosure. Such a motion must be accompanied by an affirmation of an attorney, or an affidavit of the moving party if not represented by an attorney, describing the good faith efforts to resolve the dispute without resort to a motion.

(3) Sanctions. Upon failure by a party to comply with a ruling or order by the ALJ or the commissioner to produce material or information demanded in disclosure, the ALJ or commissioner may exclude the material or information. In addition, the ALJ or the commissioner may draw an adverse inference regarding the non-producing party with respect to the material or information the party did not produce or grant other appropriate relief consistent with CPLR 3126. The award of attorneys' fees or other costs is not authorized.

(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 or, if no ALJ has been assigned to the proceeding, the Chief 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 CPLR 2302, except that all subpoenas must give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23. A subpoena duces tecum to be served upon a library, other department or bureau of a municipal corporation or of the State, or an officer thereof, requiring the production of any books, papers or other things, may be issued consistent with CPLR 2307 by the ALJ assigned to the proceeding or, if no ALJ has been assigned to the proceeding, the Chief ALJ.

(e) When department staff seeks the revocation of a permit previously granted by the department, either party must, upon demand, and at least seven (7) 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 do not 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 the disclosure, a party determines to rely upon other witnesses or documentary evidence, the party must, as soon as practicable, supplement its disclosure by providing the names of the witnesses or the documentary evidence.

**§ 622.8 The pre-hearing conference.**

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

(b) The purpose of the pre-hearing conference is to resolve, define and clarify issues between the parties prior to the hearing. The parties may request that the matter be mediated pursuant to section 622.19 of this Part. No stenographic transcriptions or recordings of the conference will be made.

(c) Department staff and respondent must attend the pre-hearing conference. If an ALJ is not present at the pre-hearing conference, the parties may consult by conference call or in person with the Office of Hearings and Mediation Services. Attendance at the conference is mandatory, and failure to attend the pre-hearing conference constitutes a default and a waiver of the opportunity for a hearing if, at the time of the conference, respondent's time to answer has expired.

(d) If respondent fails to appear at the pre-hearing conference and an ALJ is present, department staff may request that a hearing record be opened at the time of the pre-hearing conference, note respondent's failure to appear and move for a default on the record and proceed with the hearing, if:

(1) department staff provided notice to respondent that failure to appear at the pre-hearing conference will constitute a default and a waiver of respondent's right to a hearing, and staff may proceed in respondent's absence; and

(2) respondent's time to answer has expired.

**§ 622.9 Statement of readiness for adjudicatory hearing and notice of enforcement hearing.**

(a) *General*. Upon department staff's filing of a statement of readiness for adjudicatory hearing and a copy of the pleadings with the Chief ALJ and ALJ, if one has been assigned, a proceeding will be scheduled for hearing. The statement of readiness must be in a form established by the department and must be served on all parties to the hearing. However, wherever respondent is entitled by law or regulation to a hearing within a stated period of time, the proceeding will be scheduled for hearing upon the filing of a copy of the answer with the Office of Hearings and Mediation Services.

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

(1) the name, address and telephone number of each party and the party's attorney or authorized representative;

(2) a statement that disclosure is complete or has been waived or an explanation as to why disclosure has not been completed;

(3) a statement that a reasonable attempt has been made to settle, and that the proceeding is ready for adjudication; and

(4) a request for 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) Unless an ALJ is already assigned to a proceeding, the Chief ALJ will, upon receipt of a statement of readiness for adjudicatory hearing that conforms to the requirements of this section, assign an ALJ to the proceeding. The ALJ will thereafter schedule a hearing date.

(e) The ALJ will cause a written notice of enforcement hearing to be served on all parties to the proceeding. The notice must:

(1) set forth the time, date and place of the hearing;

(2) contain a statement that the failure to appear at the hearing constitutes a default and a waiver of respondent's right to a hearing; and

(3) notify the parties that a plain language summary of this Part is available from the Office of Hearings and Mediation Services.

**§ 622.10 Conduct of the proceeding.**

(a) *Order of events at the hearing*.

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

(2) The ALJ will determine the order in which parties present evidence but will generally require the party with the burden of proof to present its case first. Department staff may present a rebuttal case with respect to any affirmative defenses presented by 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 will be conducted as nearly as practicable in the manner of a civil judicial proceeding.

(b) *The ALJ*.

(1) In proceedings pursuant to this Part, 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 an attorney admitted to practice in New York State;

(v) upon the request of a party, issue a subpoena duces tecum to be served upon a library, other department or bureau of a municipal corporation or of the State, or an officer thereof, requiring the production of any books, papers or other things;

(vi) 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;

(vii) summon and examine witnesses;

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

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

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

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

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

(xiii) preclude irrelevant, immaterial or unduly repetitious, tangential or speculative evidence, argument, examination or cross-examination;

(xiv) issue orders limiting the length of cross-examination, the form, length and content of motions and briefs, and similar matters; and

(xv) exercise any other authority available to ALJs under this Part or presiding officers under SAPA Article 3.

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

(i) The ALJ will conduct the proceeding 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 proceeding.

(iv) Upon being notified that an ALJ declines or fails to serve, or in the case of the ALJ's death, illness, resignation, retirement, removal or recusal, the Chief ALJ must designate a successor within thirty (30) days of being notified.

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

(c) *Appearances*.

(1) A party may appear in person or by an attorney or other authorized representative.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show and state on the record the person's authority to act in such capacity and to file a notice of appearance with the ALJ.

(3) If there is a change or withdrawal of a party's attorney or authorized representative, the party must provide notice of the change or withdrawal to the ALJ and the attorneys or authorized representatives of all other parties, or, if a party appears without an attorney or authorized representative, to the party within ten (10) days of the change or withdrawal.

(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 notice of appeal and appeal where no final brief has been authorized. The notice of appeal and appeal must be served on all parties and filed with the commissioner c/o the deputy commissioner for hearings and mediation services within ten (10) days of receipt of written notice that the hearing record is closed pursuant to subdivision 622.17(d) of this Part. Responses to a notice of appeal and appeal must be served on all parties and filed with the commissioner c/o the deputy commissioner for hearings and mediation services within five (5) days of receipt of the notice of appeal. One original and three copies of the notice of appeal, appeal and responsive papers must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services.

(2) During the course of the proceeding, in conformance with subdivision 622.6(e) of this Part, the following rulings may be appealed to the commissioner on an interlocutory basis:

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

(ii) any other ruling of the ALJ by seeking permission to file an interlocutory appeal, upon a demonstration that the failure to decide such an appeal on an interlocutory 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 on an interlocutory basis is discretionary.

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

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

(5) Whenever the commissioner grants permission to file an interlocutory appeal, the parties must be notified. The appellant must be provided the opportunity to file a brief on appeal and the other parties must be provided with the opportunity to file a response to the appeal.

(6) Failure to file an interlocutory appeal or the denial of permission to file an interlocutory appeal will not preclude an appeal from the ruling to the commissioner after the hearing.

(7) The hearing will not be adjourned while an appeal is pending except by permission of the ALJ or the commissioner.

(e) *Consolidation and severance*.

(1) In proceedings that involve common questions of fact, the Chief ALJ upon the Chief 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 commencement of a proceeding, the commissioner or the ALJ, upon receipt of a petition verified consistent with CPLR 3020 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:

(i) the petitioner's interest in the matters involved;

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

(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 upon a showing of 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 and served on all parties 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 proceeding.

(h) Consistent with section 52 of the Civil Rights Law, the audio or visual recording, photographing, filming, televising, broadcasting, or streaming of the adjudicatory hearing by use of any device or media is prohibited.

**§ 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) In order to ensure a fair and efficient hearing process, 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 give effect to the rules of privilege recognized by New York State law.

(4) Every party has 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 must be given notice thereof and must on timely request be afforded an opportunity prior to the final order of the commissioner to dispute the fact or its materiality.

(6) Hearsay. The proponents of hearsay evidence must demonstrate that the evidence offered falls within one of the following exceptions:

(i) 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, if the ALJ finds that it was made in the regular course of any business and that it was the regular course of the 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 will not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind;

(ii) 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 the officer in the course of the officer's 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;

(iii) 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, county, town, village or city or of any court thereof, or kept in any public office thereof, that a diligent search of the records was made and no record or entry of a specified nature was found, is prima facie evidence that the records contain no such record or entry, but only if the statement is accompanied by a certification that legal custody of the specified official records belongs to that person. The certification must be made by a person described in CPLR 4540;

(iv) 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;

(v) All written statements, charts, tabulations and similar data offered in evidence at the hearing, upon a showing that the evidence offered is reliable, relevant and probative;

(vi) Exceptions provided by CPLR Article 45 or other law; or

(vii) The evidence offered is shown to be reliable, relevant and probative.

(7) By permission of the ALJ, 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.

(8) 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 the statute, report or document, determine whether it will be produced at the hearing and physically made a part of the record or if it will be incorporated in the record by reference.

(b) *Burden of proof*.

(1) Department staff bears the burden of proof on all violations alleged and matters affirmatively asserted in the document that commenced the proceeding.

(2) 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, department staff may serve 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 must file with the Chief ALJ a copy of the motion and supporting papers together with proof of service on each respondent.

(1) A motion for order without hearing in lieu of complaint must be served in the manner prescribed in paragraph 622.3(a)(3) of this Part and comply with the requirements of paragraph 622.3(a)(1) of this Part.

(2) A motion for order without hearing served after jurisdiction has been obtained over respondent by service of a notice of hearing and complaint must be served in the manner prescribed in subdivision 622.6(a) of this Part.

(3) A motion for order without hearing served after service of a notice of hearing and complaint may amend the pleadings subject to the requirements of section 622.5 of this Part.

(b) A motion for order without hearing in lieu of complaint must include a statement that a response must be filed with the assigned ALJ, or if no ALJ has been assigned to the proceeding, the Chief ALJ, within twenty (20) days after each respondent's receipt of the motion, and that the failure to respond to the motion constitutes a default.

(c) Within twenty (20) days of receipt of a motion for order without hearing, each respondent must file with the assigned ALJ, or if no ALJ has been assigned to the proceeding, the Chief ALJ and serve on department staff a response to the motion, which must include supporting affidavits and other available documentary evidence. A response to a motion for order without hearing in lieu of complaint must explicitly assert any affirmative defenses consistent with subdivision 622.4(c) of this Title. 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 the essential facts, and may make such other rulings as may be just and proper.

(d) A 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 action, the motion may be granted in part as to one or more causes of action or any defense thereto if it is determined the cause of action or defense is established sufficiently to warrant the grant of summary judgment. 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) A motion for order without hearing will be denied with respect to particular causes of action if any party shows the existence of one or more triable issues of fact requiring 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 established as a matter of law by examining the evidence filed, interrogating a party or a party's attorney or representative, or directing a conference. The ALJ will thereupon make a ruling denying the motion and specifying those facts, if any, that will be deemed established for all purposes in the hearing. Where the motion for order without hearing is in lieu of complaint, 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 Part.

(f) The existence of a triable issue of fact regarding the amount of civil penalties or remedial relief requested will not bar the granting of a motion for an order without hearing on liability. If the only triable issues of fact arising on a motion for order without hearing relate to the amount of civil penalties or remedial relief requested, the ALJ will schedule the matter for a hearing to determine the amount of civil penalties or appropriate remedial relief 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 department 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 whether respondent is unlawfully conducting an activity without a permit. Upon determining that respondent is conducting the unpermitted activity, the commissioner may issue an order directing respondent to discontinue the 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) Department staff may commence a proceeding by serving upon a person a summary abatement order pursuant to ECL 71-0301 and 71-1719 or a summary suspension order pursuant to SAPA section 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 must 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, the person may also be served with a complaint as provided in section 622.3 of this Part. Whenever possible, but without prejudice to 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 a respondent fails to answer or to appear, 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 respondent of the notice of hearing and complaint or such other document which commenced the proceeding;

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

(3) consistent with CPLR 3215(f), proof of the facts sufficient to support the violations alleged and enable the ALJ and commissioner to determine that staff has a viable claim;

(4) a concise statement of the relief requested;

(5) a statement of authority and support for any penalty or relief requested; and

(6) proof of mailing the notice required by subdivision (d) of this section, where applicable.

(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 address the circumstances of the default as well as the matters set forth in subdivision (b) of this section, and provide recommendations to the commissioner.

(d) Notice.

(1) Except as otherwise provided with respect to specific proceedings, whenever a written motion for a default judgment is made to the ALJ or Office of Hearings and Mediation Services, department staff must serve the motion and supporting papers on respondent, pursuant to section 622.6 of this Part. This notice requirement does not apply to matters that have been scheduled for hearing where:

(i) respondent was served the notice of hearing;

(ii) department staff appears at the hearing ready to proceed;

(iii) respondent fails to appear at the hearing; and

(iv) due to respondent's failure to appear at the hearing, department staff makes an oral motion for a default judgment and provides to the ALJ at the hearing the other proof required by subdivision (b) of this section.

(2) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation that has been served process pursuant to paragraph (b) of section 306 of the Business Corporation Law, a domestic or authorized foreign limited liability company that has been served process pursuant to paragraph (a) of section 303 of the Limited Liability Company Law, or a not-for-profit corporation that has been served process pursuant paragraph (b) of section 306 of the Not-For-Profit Corporation Law, department staff must provide respondent the additional notice required by CPLR 3215(g)(4).

(e) Where the ALJ concludes that the motion for default judgment should be denied, the ALJ will issue a ruling stating the reasons for the denial.

(f) Any motion for a default judgment or motion to reopen a default filed prior to the issuance of the final order of the commissioner must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense to the alleged violations is likely to exist and that good cause for reopening the default exists.

(g) The defaulting party must be served with a copy of the final 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 and Mediation Services, provided that the 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) An ALJ, the Chief ALJ and the deputy commissioner for hearings and mediation services 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, Chief ALJ, deputy commissioner for hearings and mediation services or the commissioner, or any person

advising or consulting with any of them, in connection with any issue without providing proper notice to all the other parties.

**§ 622.17 Record.**

(a) 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.

(b) The record of the proceeding must include: the notice of hearing, complaint and any other documents commencing the proceeding; motions and requests filed, and rulings thereon; the transcript or recording of the testimony taken at the hearing; exhibits submitted and received; 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 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 media on which the recording is saved, such as tape, hard drive or disc, 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.

(d) At the conclusion of the hearing, the ALJ will determine whether to allow the submission of written post-hearing briefs. The hearing record will be closed upon the close of the hearing; the receipt by the ALJ of the stenographic transcript, if one was made; 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, and memoranda, if any, by the various parties, whichever occurs last. The ALJ will notify the parties in writing upon the closing of the hearing record.

**§ 622.18 Final order.**

(a) *Hearing report*.

(1) The ALJ will submit a hearing report to the commissioner within forty-five (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 will 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 fourteen (14) days after receipt of the recommended decision to file comments to the commissioner, unless the time is shortened or lengthened by the ALJ or the commissioner.

(b) *Final orders*.

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

(2) Where a recommended decision has been issued, the final order of the commissioner will be issued within thirty (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*. At any time prior to a final order, the department and respondent may enter into a stipulation on any matter. Where a stipulation is reached on all violations alleged against all respondents, any hearing will be canceled and no further action of the commissioner will be required. Within five (5) days of the execution of the stipulation, department staff must serve a copy of the fully executed stipulation on all parties and file a copy of the fully executed stipulation with the ALJ. Upon receipt of the executed stipulation, the ALJ will close the matter.

(d) *Reopening the record*. At any time prior to issuing the final order, 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 alleged violations;

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

(3) direction for abatement, restoration or other remedial activity, 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 ECL or other laws administered by the commissioner, or the rules and regulations promulgated thereunder.

(f) A copy of the final order will be served on the parties in the same manner as prescribed in paragraph 622.3(a)(3) of this Part.

**§ 622.19 Mediation.**

(a) ALJs have the authority to mediate enforcement matters.

(b) Mediation may be requested by the parties at any time after commencement of an enforcement proceeding. The request must be made to the assigned hearing ALJ or to the

Chief ALJ if an ALJ has not been assigned to the matter. Upon consent of all parties, the matter will be set down for mediation and an ALJ will be assigned to mediate the matter. The assigned hearing ALJ will not be assigned to mediate the matter.

(c) The hearing will not be adjourned, in whole or part, without permission of the assigned hearing ALJ or the Chief ALJ if an ALJ has not been assigned to the proceeding.

(d) The assigned mediator must not discuss the merits of the matter with the assigned hearing ALJ or other members of the Office of Hearings and Mediation Services involved in the adjudication of the matter. The use of any records, notes or memoranda of the mediation and offers of settlement, compromise or similar disclosures made during the mediation must not be introduced into the record of the proceeding, without the consent of the parties unless authorized under CPLR 4547.

(e) The ALJ assigned as mediator has the power to:

(1) conduct the mediation and direct any adjournments or continuances thereof;

(2) offer opinions on the relative merits of the parties' positions and defenses;

(3) facilitate the resolution of the matters at issue in the enforcement proceeding;

(4) in furtherance of the objectives of paragraphs (2) and (3) of this subdivision, caucus separately with the parties; and

(5) close the mediation if no reasonable progress towards resolution is being made.