



6 NYCRR PART 624

PERMIT HEARING PROCEDURES

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PART 624

PERMIT HEARING PROCEDURES

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

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§ 624.1 Applicability and Definitions.

- (a) This Part applies to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted.
- (1) a determination pursuant to subdivision 621.8(b) of this Title by department staff to refer a matter to the Office of Hearings and Mediation Services for an adjudicatory proceeding (on identification by department staff of potential substantive and significant issues);
 - (2) a request made by an applicant in conformance with the provisions of subdivision 621.10(h) of this Title (based on department staff's denial of permit or attachment of significant conditions);
 - (3) a determination made by department staff to refer a matter to Office of Hearings and Mediation Services for an adjudicatory proceeding pursuant to subdivision 621.15(f) of this Title (conceptual review);
 - (4) a request made by an applicant in conformance with the provisions of subdivision 621.11(g) of this Title (based on department staff's denial or conditioning of a permit in response to an application to renew or modify);
 - (5) a request made by a permittee in conformance with the provisions of subdivision 621.13(d) of this Title (based on department staff's proposed modification, suspension or revocation of a permit). However, where the basis for modification, suspension or revocation pursuant to section 621.13 is founded on matters that, in whole or in substantial part, constitute a violation of the Environmental Conservation Law (ECL), its implementing regulations, an order or permit, as defined in subdivision (e) of this section, issued by the department, the provisions of Part 622 of this Title govern;
 - (6) any circumstance comparable to those set forth in paragraphs (1), (2), (3), (4) or (5) of this subdivision that arises out of any permit, as defined in subdivision (e) this section, that is not subject to ECL article 70 or Part 621 of this Title. The circumstances where this Part applies include, but are not limited to, permits for aquatic pesticide applications, the registration of pesticides, oil and gas well spacing and integration proceedings, oil facility certifications and water supply rate disputes.
- (b) The provisions of this Part do not apply to the conduct of public comment hearings except those that are included in a notice of hearing issued pursuant to section 624.3 of this Part.
- (c) The provisions of this Part do not apply to the determination of disputed environmental regulatory program fees and penalties that are assessed pursuant to ECL article 72.

- (d) The provisions of this Part apply to those proceedings in which the determination to hold an adjudicatory proceeding was made on or after the effective date of these regulations.
- (e) Definitions. Whenever used, in this Part, unless otherwise expressly stated, the following terms have the meanings indicated in this subdivision. The definitions in this subdivision are not intended to change any statutory or common law meaning of these terms.
- (1) *Adjudicatory proceeding or proceeding* means a proceeding conducted pursuant to ECL section 70-0119 and article 3 of the State Administrative Procedure Act and this Part. The adjudicatory proceeding is presided over by an administrative law judge and may include public comment hearings, issues conferences, and evidentiary hearings held pursuant to this Part to determine the legal rights, duties or privileges of the named parties and potential parties on a record and after an opportunity for a hearing.
 - (2) *Administrative law judge or ALJ* means the commissioner's representative who conducts the proceeding.
 - (3) *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.
 - (4) *Affirmation of an attorney* means the statement of an attorney admitted to practice in the courts of this 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.
 - (5) *Amicus status* means a person who is not otherwise eligible for full party status but who is allowed to file a brief and, at the discretion of the ALJ, present oral argument, but does not have any other rights of participation or submission.
 - (6) *Applicant* means the person or permittee who has applied for one or more permits from the department or the modification or renewal of the permit(s). In the case of a water supply rate dispute, the petitioning party will be the applicant.
 - (7) *Argument* means opinions or viewpoints, as distinguished from evidence.
 - (8) *Commissioner* means the Commissioner of Environmental Conservation or the commissioner's designee.
 - (9) *CPLR* means the Civil Practice Law and Rules.
 - (10) *Day or days* means calendar days, as defined in section 19 of the General Construction Law, unless otherwise specified in this Part.
 - (11) *DEIS* means the draft environmental impact statement prepared in response to the requirements of article 8 of the ECL.

- (12) *Delegated permit* means delegated permit as defined in Part 621 of this Title.
- (13) *Department* means the Department of Environmental Conservation of the State of New York.
- (14) *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.
- (15) *Disclosure* means the disclosure of facts, documents, or other things that are known by or in the possession of a person and that are material and necessary to the person requesting the disclosure as a part of the requester's case.
- (16) *Draft permit* means a document prepared by department staff that contains terms and conditions staff finds are adequate to meet all legal requirements associated with the permit, but is subject to modification as a result of public comments or an adjudicatory proceeding.
- (17) *ECL* means the Environmental Conservation Law.
- (18) *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.
- (19) *ENB (Environmental Notice Bulletin)* means the publication of the department published pursuant to section 3-0306 of the ECL, and accessible on the department's internet web site at <http://www.dec.ny.gov>.
- (20) *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.
- (21) *Evidentiary hearing* means that part of an adjudicatory proceeding that involves the taking of evidence, examination of witnesses, and presentation of argument on issues

of law and fact prior to the commissioner's rendering of a decision on the merits, but does not include public comment hearings or the issues conference.

- (22) *FEIS* means the final environmental impact statement prepared pursuant to the requirements of article 8 of the ECL.
- (23) *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.
- (24) *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.
- (25) *Issues Conference* means that portion of an adjudicatory proceeding conducted, in part, to: i) identify, narrow and potentially resolve the issues raised by the issues conference participants without resort to taking testimony; ii) hear argument on whether unresolved issues of fact meet the standard for adjudication; iii) determine whether legal issues exist whose resolution is not dependent upon disputed facts and hear argument on those legal issues; iv) determine party status; and v) decide pending motions.
- (26) *Mediation* means a voluntary discussion between department staff, the applicant and parties or potential parties concerning the issues proposed in a permit proceeding, facilitated by an ALJ assigned as mediator. The mediation may address all or only some of the issues raised in the permit proceeding, or involve all or only some of the parties or potential parties.
- (27) *Motion* means a request for a ruling or an order.
- (28) *Notice of intent or decision notification* means a document prepared by department staff pursuant to sections 621.7, 621.10, 621.11 or 621.13 of this Title that identifies the reasons why: the permit(s) for the project may not be issued as proposed or with conditions; the permit(s) for the project are proposed to be modified, suspended or revoked; or the permit(s) for the project are denied.
- (29) *Office of Hearings and Mediation Services* means the office within the department principally responsible for conducting adjudicatory proceedings and providing mediation services.
- (30) *Party* means any person granted full party status or *amicus* status in the proceeding according to the procedures and standards set forth in section 624.5 of this Part 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.

- (31) *Permit* means any permit, variance, 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.
- (32) *Permittee* means a person authorized to undertake an activity regulated under a department permit.
- (33) *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.
- (34) *Potential party* means any person who has filed a petition pursuant to section 624.5 of this Part whose petition has not received either final denial or acceptance.
- (35) *Project* means the action, activity, or undertaking for which one or more permits are required from the department.
- (36) *Proof of service* means an affirmation or affidavit 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.
- (37) *Protective order* means an order denying, limiting, conditioning or regulating the use of material requested through disclosure.
- (38) *Public comment hearing* means the portion of the adjudicatory proceeding during which unsworn statements are received from the public and the parties.
- (39) *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.
- (40) *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.
- (41) *SAPA* means the State Administrative Procedure Act.
- (42) *SEQRA* means the State Environmental Quality Review Act, article 8 of the ECL.
- (43) *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.
- (44) *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.
- (45) *Subpoena* means a legal document that requires a person to appear at an evidentiary hearing and testify, to produce documents or physical objects, or both.
- (46) *UPA* means the Uniform Procedures Act, article 70 of the ECL.

§ 624.2 Requests for an adjudicatory proceeding.

- (a) In addition to the provisions of this Part, this section applies to a request for an adjudicatory proceeding pursuant to sections 621.10, 621.11 or 621.13 of this Title when a permit decision notification or notice of intent has been issued for a delegated permit and for a project requiring both delegated and other permits, and the permit application was not the subject of an adjudicatory proceeding pursuant to this Part. At the discretion of the ALJ, the requirements of this section may be applied to requests for an adjudicatory proceeding involving permit decisions and notices of intent for other permits. Section 750-1.26 of this Title contains additional procedural requirements for adjudicatory proceedings only applicable to the State Pollution Discharge Elimination System (SPDES) program.
- (b) An applicant requesting an adjudicatory proceeding must, within the time frames set out in sections 621.10, 621.11 and 621.13 of this Title for making such requests, submit a request for an adjudicatory proceeding. A copy of the request for an adjudicatory proceeding must be submitted in writing to the Chief ALJ of the Office of Hearings and Mediation Services pursuant to subdivisions 621.10(h), 621.11(g) and 621.13(d) of Part 621 of this Title. An applicant requesting an adjudicatory proceeding on a SPDES permit covered by section 750-1.26 of this Title must also comply with that section within the time frames set out in sections 621.10, 621.11 and 621.13 of this Title for making such requests for an adjudicatory proceeding.
- (c) *Statement of issues.* Applicant must submit a statement of issues the applicant intends to raise with respect to any determination of the department at the same time as petitions for party status are due or an earlier date set in the exercise of the ALJ's discretion. The statement of issues must:
 - (1) identify issues for adjudication that meet the criteria of subdivision 624.4(c) of this Part;
 - (2) present a statement of material facts sought to be adjudicated at the evidentiary hearing and an offer of proof specifying the witness(es), each witness's qualifications, the nature of the evidence the applicant expects to present at the evidentiary hearing and the grounds upon which the assertion is made with respect to each issue;
 - (3) for requests for an adjudicatory proceeding that involve a draft permit, include a demonstration that the applicant raised its objections to the draft permit prior to the request for an adjudicatory proceeding; and
 - (4) identify the permit conditions that are contested.
- (d) Within twenty (20) days of receipt of applicant's request for an adjudicatory proceeding, department staff must refer the permit application and permit decision notification or notice of intent to the Office of Hearings and Mediation Services with a completed referral form.

The referral must include the administrative record. The referral must be served on the applicant pursuant to subdivision 624.6(a) of this Part.

§ 624.3 Notice of hearing.

- (a) *When notice is required.* Unless otherwise provided by statute or regulation, the Office of Hearings and Mediation Services must publish notice of any public comment hearing or issues conference in the ENB, and provide notice to the applicant and to persons who have made written request to participate. The applicant must provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located. The notices in the ENB and the newspaper must be published at least once and not less than twenty-one (21) days prior to the public comment hearing or issues conference date. In the case of applications involving SPDES permits, revisions to the State implementation plan, federally delegated air permits, Hazardous Waste Management Facility (HWMF) permits, and Remedial Action Plans (RAPs), the notice must be published at least thirty (30) days prior to the public comment hearing or issues conference date. In addition, public notice by means of radio is required for public comment hearings or issues conferences on all HWMF permits or RAP applications. These requirements are minimums and the ALJ will direct the applicant to provide additional notice or to provide the notice further in advance of the public comment hearing or issues conference where the ALJ finds it necessary to do so in order to adequately inform the potentially affected public about the public comment hearing or issues conference. Where the ALJ finds that a large segment of the potentially affected public has a principal language other than English, the ALJ will direct the publication of the notice in a foreign language newspaper(s) serving the affected public. Nothing in this subdivision authorizes the ALJ to delay the commencement of the public comment hearing or issues conference beyond the deadlines established in UPA without the applicant's consent. At the discretion of the ALJ or where required by law, notice of an evidentiary hearing will be published pursuant to this subdivision or as otherwise directed by the ALJ.
- (b) *Required contents of notice.* The notice must be in the form specified by the Office of Hearings and Mediation Services and must contain the following information:
- (1) the date of issuance of the notice of hearing or issues conference, and the date of the notice of complete application;
 - (2) the date, time, location and purpose of the public comment hearing or issues conference. The location should be in the town, village or city in which the project is located, as reasonably near the project site as practicable, depending upon the availability of suitable facilities. However, at the discretion of the ALJ, another location, including a public comment hearing or issues conference conducted by video conference, telephone conference, or other similar service allowing for

attendance from remote locations, may be selected upon request of the public, parties or witnesses, upon good cause shown, or upon the ALJ's own initiative. Such a public comment hearing or issues conference is deemed to be located in the town, village or city in which the project is located provided that members of the public located in the municipality are provided reasonable access to the hearing or issues conference, and in the case of a public comment hearing, the public has the ability to participate;

- (3) the name and address of the applicant or permittee;
 - (4) the permits, approvals or action sought together with citations to applicable statutes and regulations;
 - (5) a description of the project;
 - (6) the accessibility and location for review of the permit application and related documents, and a list of the available application materials, including, if available at the time of issuance of the notice of hearing, department staff's permit, draft permit or notice of intent to deny;
 - (7) the status of the action under SEQRA and, where the department is lead agency pursuant to SEQRA and Part 617 of this Title and a DEIS has been prepared, the accessibility and location for review of the DEIS, and an indication that comments on the DEIS may be received at the public comment hearing;
 - (8) instructions for filing a petition for party status (see generally section 624.5 of this Part); and
 - (9) other notices required pursuant to any delegated permit program.
- (c) *Optional contents.* The notice may also specify the matters of concern to the department and the public.
- (d) *Service on specific persons.* Not less than twenty-one (21) days prior to the public comment hearing or issues conference date, individual copies of the notice must be sent to the chief executive officer of any municipality in which the project is located and any other person the department deems to have an interest in the application. In the case of applications for delegated permits, as defined by Part 621 of this Title, notice of the type specified in this section must be sent to those persons specified in subdivision 621.7(a) of this Title not less than thirty (30) days prior to the public comment hearing or issues conference date. The ALJ will direct the applicant to provide notice further in advance of the public comment hearing or issues conference to those persons specified in this subdivision where the ALJ finds it necessary to do so in order to adequately inform them about the public comment hearing or issues conference. Nothing in this subdivision authorizes the ALJ to delay the commencement of the public comment hearing or issues conference beyond the deadlines established in UPA without the applicant's consent.

§ 624.4 Public comment hearing and issues conference.

(a) Public comment hearing.

- (1) The ALJ will hear and receive the unsworn statements of parties and non-parties relating to the permit applications. A stenographic transcript of the statements will be made but will not be part of the record of the evidentiary hearing, as defined by section 624.12 of this Part (except as described in paragraph (3) of this subdivision or as otherwise admitted into evidence). At the ALJ's discretion, the public comment hearing may be conducted by video conference, telephone conference, or other similar service allowing for attendance from remote locations, upon request from department staff, the applicant or the public and good cause shown, or upon the ALJ's own initiative, provided that the public has the ability to participate in the public comment hearing.
- (2) The ALJ may require that lengthy statements be submitted in writing and summarized for oral presentation.
- (3) Whenever a DEIS accompanies the application and the department is the lead agency as defined in Part 617 of this Title, all statements made at the public comment hearing will constitute comments on the DEIS and all substantive comments must be addressed pursuant to the procedures set forth in section 617.9 of this Title, unless otherwise addressed pursuant to subdivision 624.13(c) of the Part.
- (4) The statements made at the public comment hearing do not constitute evidence but may be used by the ALJ as a basis to inquire further of the parties and potential parties at the issues conference.
- (5) When a public comment hearing presided over by an ALJ has been held pursuant to Part 621 of this Title before the permit application was referred to the Office of Hearings and Mediation Services for proceedings pursuant to this Part, at the discretion of the ALJ, the record of the Part 621 public comment hearing and any written comments received may be accepted by the ALJ and no further public comment hearing or written comment period will be required.

(b) Issues conference.

- (1) Following the public comment hearing, the ALJ will schedule an issues conference (if one was not scheduled in the hearing notice) that will be held in advance of the evidentiary hearing. At the discretion of the ALJ, the issues conference may be conducted solely on papers, orally or both. At the ALJ's discretion, the issues conference may be reconvened at any time to consider issues based on new information upon a showing that the new information was not reasonably available at the time of the issues conference. Upon a demonstration that the public review period

for the application prior to the issues conference was insufficient to allow potential parties to adequately prepare for the issues conference, the ALJ will adjourn the issues conference, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the potential parties.

(2) The purpose of the issues conference is:

(i) to hear argument on:

(a) whether party status should be granted to any petitioner; or

(b) whether applicant has raised issues for adjudication;

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

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

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

(v) to decide any pending motions.

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

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

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

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

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

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

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

(c) *Standards for adjudicable issues.*

(1) Generally applicable rules. Subject to the limitations set forth in paragraphs (6), (7), (8) and (9) of this subdivision, an issue is adjudicable if:

- (i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the permit or draft permit and the applicant has provided a statement of issues that complies with subdivision 624.2(c) or paragraph 624.5(a)(1) of this Part; however, with respect to SPDES permits subject to section 750-1.26 of this Title, only SPDES permit conditions that are stayed in accordance with paragraph 750-1.26(e)(2) of this Title may be considered for adjudication;
 - (ii) it relates to a matter cited by the department staff as a basis to deny the permit application and is contested by the applicant; or
 - (iii) it is proposed by a potential party and is both substantive and significant.
- (2) An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether that demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the permit or draft permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.
- (3) An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit.
- (4) In situations where department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.
- (5) If the ALJ determines that there are no fact issues to adjudicate and finally determines all legal issues raised by the parties, the ALJ will direct in writing that the evidentiary hearing be canceled and the matter remanded to department staff for further appropriate permit processing, including completing the SEQRA review, subject to any appeal pursuant to section 624.8 of this Part. For proceedings involving a DEIS, issues raised in petitions not addressed by the ALJ constitute comments on the DEIS.
- (6) SEQRA Issues.
 - (i) Department is the lead agency or there has been no coordinated review.
 - (a) As part of the issues ruling, the ALJ may review a determination by department staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the determination

must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb staff's determination.

(b) Whenever the department, as lead agency, has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the department to make the findings required pursuant to section 617.11 of this Title will be made according to the standards set forth in paragraph (1) of this subdivision.

(ii) Another agency serves as the lead agency.

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

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

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

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

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

(7) UPA Issues. The completeness of an application, as defined in Part 621 of this Title, will not be an issue for adjudication. The ALJ may require the submission of additional information pursuant to subdivision 621.14(b) of this Title.

(8) Department initiated modifications, suspensions or revocations. The only issues that may be adjudicated are those related to the basis for modification, suspension or revocation cited in the department's notice to the permittee. Whenever those issues

are proposed for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

(9) SPDES permits subject to section 750-1.26 of this Title. The only issues that may be adjudicated are those related to the SPDES permit conditions that are stayed in accordance with paragraph 750-1.26(e)(2) of this Title. Whenever those issues are proposed for adjudication, the determination to require adjudication will be made according to the standards set forth in paragraph (1) of this subdivision.

§ 624.5 Evidentiary hearing participation.

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

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

(1) Applicant's statement of issues.

(i) In matters referred to the Office of Hearings and Mediation Services pursuant to section 621.8 of this Title for adjudicatory proceedings pursuant to this Part, the applicant must file a statement of issues the applicant intends to raise with respect to any determination of the department no later than the date set forth in the notice of hearing for the filing of petitions for party status, or an earlier date set in the exercise of the ALJ's discretion.

(ii) Applicant's statement of issues must:

(a) identify issues for adjudication that meet the criteria of subdivision 624.4(c) of this Part;

(b) present a statement of material facts sought to be adjudicated at the evidentiary hearing and an offer of proof specifying the witness(es), each witness's qualifications, the nature of the evidence the applicant expects to present at the evidentiary hearing and the grounds upon which the assertion is made with respect to each issue; and

(c) identify the permit conditions that are contested.

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

(1) Required contents of petition for party status:

- (i) fully identify the proposed party together with the name(s) of the person or persons who will act as representative of the party;
- (ii) identify petitioner's environmental interest in the proceeding;
- (iii) identify any interest relating to statutes administered by the department relevant to the project;
- (iv) identify whether the petition is for full party or *amicus* status; and
- (v) identify the precise grounds for opposition or support.

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

- (i) identify an issue for adjudication that meets the criteria of subdivision 624.4(c) of this Part; and
- (ii) present a statement of material facts sought to be adjudicated at the evidentiary hearing and an offer of proof specifying the witness(es), each witness's qualifications, the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue.

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

- (i) identify the nature of the legal or policy issue(s) to be briefed that meets the criteria of subdivision 624.4(c) of this Part; and
- (ii) provide a statement explaining why the proposed party is in a special position with respect to that issue.

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

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

(6) At the discretion of the ALJ, Department staff and applicant may submit replies to petitions for party status as directed by the ALJ.

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

- (1) Petitions filed after the date set in the notice of hearing will not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision.
- (2) In addition to the required contents of a petition for party status, a petition filed late must include the following in order to receive any consideration:
 - (i) a demonstration that there is good cause for the late filing;
 - (ii) a demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
 - (iii) a demonstration that participation will materially assist in the determination of issues raised in the proceeding.

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

- (1) Full party status. The ALJ's ruling of entitlement to full party status will be based upon:
 - (i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (2) of this section;
 - (ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and
 - (iii) a demonstration of adequate environmental interest.
- (2) Amicus status. The ALJ's ruling of entitlement to *amicus* status must be based upon:
 - (i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (3) of this section;
 - (ii) a finding that the petitioner has identified a legal or policy issue that needs to be resolved by the hearing; and
 - (iii) a finding that the petitioner has a sufficient interest in the resolution of the identified legal or policy issue and through expertise, special knowledge or unique perspective may contribute materially to the record on that issue.

(e) *Rights of parties.*

- (1) A full party has the right to:
 - (i) participate at the evidentiary hearing in person or through an authorized representative;
 - (ii) present relevant evidence and to cross-examine witnesses of other parties;
 - (iii) present argument on issues of law and fact;

- (iv) initiate motions, requests, briefs or other written material in connection with the evidentiary hearing, and receive all correspondence to and from the ALJ and to and from all other parties that is circulated to the parties generally;
 - (v) appeal adverse rulings of the ALJ; and
 - (vi) exercise any other right conferred on parties by this Part or SAPA.
- (2) A party with *amicus* status has the right to file a brief and, at the discretion of the ALJ, present oral argument, but does not have any other rights of participation or submission.
 - (3) A potential party has the same rights it would be entitled to if its petition for party status were granted.
- (f) *Loss of party status.* Upon determining that the party or its representative has failed to comply with the applicable laws, rules or directives of the ALJ and has substantially disrupted the hearing process or prejudiced the rights of another party to the proceeding, the ALJ may revoke the party status of the offending party.

§ 624.6 General rules of practice.

(a) Service.

- (1) Rule 2103 of the CPLR will govern service of papers except that service upon the party's duly authorized representative may be made by the same means as provided for service upon an attorney. Notwithstanding any other rule to the contrary, service may be made by electronic means, such as email or facsimile, if agreed to in advance by the parties or authorized by the ALJ.
- (2) Proof of service must be made in the same manner as under the CPLR. Any required filing or proof of service must be with the Office of Hearings and Mediation Services.
- (3) When service of motion papers by electronic means, 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 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 notification is by first class mail;
- (ii) one (1) day is added to the prescribed period if notification 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 prior to the evidentiary hearing must be in writing. All motion papers must be filed with the ALJ by personal delivery or first class mail, together with proof of service of the motion on all parties and potential 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 evidentiary 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 with the Chief ALJ of the Office of Hearings and Mediation Services by personal delivery or first class mail.
- (2) Every motion must clearly state the relief requested, the legal arguments and any facts on which the motion is based, and include other supporting documents.
- (3) All parties have ten (10) 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 with the ALJ by personal delivery or first class mail, 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, provided that any motion not ruled upon prior to the completion of testimony must be deemed denied.

(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 that 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 624.8(d)(2) of this Part are as follows:
- (1)
 - (i) Interlocutory appeals pursuant to subparagraphs 624.8(d)(2)(i) and (ii) of this Part must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services, and served on all parties to the proceeding, in writing within ten (10) days of the date 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. Only the commissioner will determine whether further responsive pleadings after the responses will be allowed. 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 subparagraph 624.8(d)(2)(iii) of this Part must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services, and served on all parties to the proceeding, in writing within ten (10) days of the date 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 ten (10) days of service of the appeal.
- (f) Consistent with section 52 of the Civil Rights Law, the audio or visual recording, photographing, filming, televising, broadcasting, or streaming of the evidentiary hearing by use of any device or media is prohibited.
- (g) All rules of practice involving time frames may be modified at the discretion of the ALJ or the commissioner, and any other rule may be modified by the commissioner upon recommendation of the ALJ or upon the commissioner's initiative, for good cause shown and in the interests of justice.

§ 624.7 Disclosure.

- (a) *Prior to the issues conference*. Disclosure is limited to what is afforded under Part 616 of this Title (Access to Records). In the absence of extraordinary circumstances, the ALJ will not grant petitions for further disclosure. This provision does not alter the rights of any person

under Part 616 of this Title nor does it limit the ability of any party to seek disclosure after the issues conference.

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

- (1) documents, in general conformance with CPLR 3120(a)(1)(i);
- (2) a list of witnesses to be called, their addresses, and the scope and content of each witness's proposed testimony, and the qualifications and published works of each, in general conformance with CPLR 3101(d)(1), except that disclosure of fact witnesses as well as expert witnesses may be demanded;
- (3) an inspection of property, in general conformance with CPLR 3120(a)(1)(ii), except that drilling and other intrusive sampling and testing is not provided as of right;
- (4) a request for admission, in general conformance with CPLR 3123;
- (5) lists of documentary or physical evidence to be offered at the evidentiary hearing; or
- (6) potentially relevant electronically stored information (ESI) limited to active data only.

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

- (1) obtain disclosure prior to the issues conference;
- (2) use disclosure devices from the CPLR not provided for in subdivision (b) of this section;
- (3) submit late requests for disclosure or vary the time for responding to requests;
- (4) access real property in the custody or control of another for the purpose of conducting drilling or other sampling or testing. In that instance, all parties must be given notice of the proposed activities and be allowed to observe, and full parties allowed to take split samples or use other specified methods of verification; and
- (5) upon a demonstration of substantial prejudice, obtain disclosure of potentially relevant ESI not provided for in paragraph (b)(6) of this section, subject to any terms and conditions deemed appropriate by the ALJ. The motion for additional disclosure of potentially relevant ESI 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.

(d) *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 Section 3103, to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.

The motion must be submitted within ten (10) days of the disclosure demand and must be accompanied by an affirmation of an attorney, or an affidavit of the moving party or other authorized representative 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 apply to the ALJ to compel disclosure. The motion must be accompanied by an affirmation of an attorney, or an affidavit of the moving party or other authorized representative 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.

(e) *Pre-filed testimony.* The ALJ may require the submission of pre-filed written testimony for expert witnesses. Pre-filed written testimony must be attested to at the evidentiary hearing and the witness must be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ. Whenever the ALJ requires the submission of pre-filed testimony, the testimony must provide, or must be accompanied by a technical report that provides, a full explanation of the basis for the views set forth therein, including data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography of reports, studies and other documents relied upon. Upon ten (10) days notice (which time may be shortened or extended by the ALJ) the party submitting pre-filed testimony may also be required to make available all raw data, well logs, laboratory notes, and other basic materials, as well as all items on the bibliography provided. Whenever pre-filed testimony is not required, any party may demand, from any other party or the department propounding an expert witness, all backup information that would be required in connection with pre-filed testimony.

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

- (g) When department staff seeks the revocation of a license or permit previously granted by the department, either party must, upon demand and at least seven (7) days prior to the evidentiary hearing, disclose the evidence that the party intends to introduce at the evidentiary 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.

§ 624.8 Conduct of the adjudicatory proceeding.

- (a) *Order of events.* The ALJ has discretion to determine and adjust the order of events and presentation of evidence, and to establish procedures to promote the conduct of a fair and efficient proceeding. In general, the order of events at an evidentiary hearing will be as follows:
- (1) Formal opening. The ALJ will convene the evidentiary hearing by opening the record, identifying the applications involved, and making appropriate procedural announcements.
 - (2) Noting appearances. The ALJ will call the name of each person who has been granted status as a party.
 - (3) Opening statements. At the discretion of the ALJ, prior to the commencement of the evidentiary hearing each party will be provided with the opportunity to offer a brief opening statement of position on the application.
 - (4) Admission of evidence. The applicant will present its direct case first and will start by identifying all documents that constitute the application and the DEIS (where applicable) and all supporting documents that are relevant to the issues to be adjudicated. A panel of witnesses may be used for presenting testimony or for cross-examination at the ALJ's discretion. Cross-examination will be conducted by parties in a sequence to be established by the ALJ, which normally will be the sequence in which the parties will present their direct cases. The evidence will be confined to that which is relevant to issues identified in the ALJ's determination following the issues conference.

- (5) Close of record. Closing statements of position will be dealt with in the same manner as opening statements. At the concluding session of the evidentiary hearing, the ALJ will determine whether to allow the submission of written post-hearing briefs. The hearing record will be officially closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, receipt of a summary of substantive comments pursuant to subdivision 621.10(e) of this Title, or the submission of briefs and reply briefs, conclusions of law, memoranda, and exceptions, if any, by the various parties, whichever occurs last. The ALJ will notify the parties in writing, immediately upon official closing of the hearing record.
- (6) Where the ALJ permits the filing of briefs, the ALJ will also determine whether replies will be permitted and the schedule for filing. Simultaneous filing will normally be required. A party must give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief. Briefs will be considered only as argument and must not refer to or contain any evidentiary material outside of the record.

(b) *The ALJ.*

- (1) In proceedings pursuant to this Part, the ALJ has power to:
 - (i) rule upon all motions and requests, including those that decide the ultimate merits of the proceeding;
 - (ii) set the time and place of all hearings or issues conferences, recesses and adjournments, including conducting any public comment hearings, issues conferences or evidentiary hearings by video conference, telephone conference or other similar service allowing for attendance from remote locations;
 - (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, 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) establish rules for and direct disclosure at the request of any party or upon the ALJ's own motion pursuant to the procedures set out in section 624.7 of this Part;
- (ix) admit or exclude evidence including the exclusion of evidence on grounds of privilege or confidentiality;
- (x) hear and determine arguments on fact or law, except that a purely legal issue involving no factual dispute and which is a matter of first impression or is precedential in nature may be referred to the General Counsel for a determination in accordance with Part 619 of this Title (declaratory ruling) upon motion by any party or upon the ALJ's own initiative;
- (xi) preclude irrelevant, immaterial or unduly repetitious, tangential or speculative evidence, argument, examination or cross-examination;
- (xii) direct the consolidation of parties with similar viewpoints and input;
- (xiii) limit the number of witnesses;
- (xiv) utilize a panel of witnesses for purposes of direct testimony or cross-examination;
- (xv) allow oral argument, so long as it is recorded;
- (xvi) take any measures necessary for maintaining order and the efficient conduct of the proceeding;
- (xvii) take any measures necessary to ensure compliance with SEQRA and UPA not inconsistent with section 624.4 of this Part;
- (xviii) in the case of water supply rate disputes, issue directives modifying any incompatible provisions of this Part, consistent with the spirit and intent of these regulations;
- (xix) issue orders limiting the length of cross-examination, the form, length and content of motions and briefs and similar matters;
- (xx) order a site visit, on notice to all parties;
- (xxi) exercise any other authority available to ALJs under this Part or to presiding officers under SAPA article 3; and
- (xxii) when a request for an adjudicatory proceeding is made by an applicant for a permit not governed by the UPA based upon department staff's denial of a permit or permit renewal application, and unless otherwise required by law or unless a significant degree of public interest exists,
 - (a) limit participation at an evidentiary hearing to department staff and the applicant; and

(b) waive some or all of the provisions of sections 624.3, 624.4, 624.5 and 624.11 of this Part.

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

(i) The ALJ will conduct the adjudicatory 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 624.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. A motion requesting recusal will be determined as part of the record of the adjudicatory 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 be represented by an attorney licensed in New York State or any other jurisdiction, or by a non-attorney chosen by the party. Any representative of a party who is other than an attorney licensed to practice in New York State must disclose the representative's qualifications in writing to the party. Nothing in this paragraph authorizes a non-lawyer to engage in the practice of law.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show and state on the record the person's authority to act in a representative capacity and to file a written 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 written 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) (i) Any ALJ ruling, except a ruling denying party status, 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. Where no final brief has been authorized, the appellant must file

the notice of appeal and appeal within ten (10) days after service of the written notice that the hearing record is closed pursuant to paragraph 624.8(a)(5) of this Part.

- (ii) Any ALJ ruling pursuant to paragraph 624.4(c)(5) of this Part that finally resolves all issues in a proceeding may be appealed to the commissioner by notice of appeal and appeal. The appellant must file the notice of appeal and appeal within ten (10) days of the ALJ's ruling.
 - (iii) 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 after service of the written notice that the hearing record is closed. 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 ten (10) days of service of the notice of appeal. One original and three copies of the notice of appeal, appeal and responses must be filed with the commissioner c/o the deputy commissioner for hearings and mediation services. Only the commissioner will determine whether further responsive pleadings after the responses will be allowed.
- (2) During the course of the proceeding, in conformance with subdivision 624.6(e) of this Part, the following rulings may be appealed to the commissioner on an interlocutory basis:
- (i) a ruling denying party status; or
 - (ii) any ruling in which the ALJ has denied a motion for recusal; and
 - (iii) any other ruling of the ALJ that does not finally resolve all issues in the proceeding, by seeking permission to file an interlocutory appeal.
- (3) A motion for permission to file an interlocutory appeal, pursuant to subdivision 624.6(e) of this Part, must demonstrate that the failure to decide the 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 consider the appeal on an interlocutory basis is discretionary.
- (4) The commissioner may review any ruling of the ALJ on an interlocutory basis upon the commissioner's determination 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) Except for failure to file an interlocutory appeal from a ruling denying party status, 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 evidentiary hearing.
 - (7) The evidentiary hearing and any ruling of the ALJ will not be adjourned or stayed while an appeal or motion for permission to appeal is pending except by permission of the ALJ or the commissioner.
- (e) *Joint adjudicatory proceedings.* A project may require submission of applications for more than one permit, or to more than one government agency, and adjudicatory proceedings may be required for more than one purpose. Whenever practicable, all required proceedings will be consolidated into a single proceeding.
- (f) If the department is the lead agency for purposes of SEQRA, the permit hearing proceedings will be consolidated with the hearing on the DEIS.

§ 624.9 Evidence, burden of proof and standard of proof.

(a) *Evidence.*

- (1) All evidence submitted must be relevant and all rules of privilege will be observed. However, other rules of evidence need not be strictly applied.
- (2) Although relevant, evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of repetitious or duplicative evidence.
- (3) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence.
- (4) Whenever possible, an object that is the subject of testimony will be exhibited at the evidentiary hearing. It must be properly identified as relevant, and it must be shown that it has not changed substantially due to the passage of time or any other reason.
- (5) Each witness must be sworn or make an affirmation before testifying. Opening, closing and other unsworn statements are not evidence but will be considered as arguments bearing on evidence.
- (6) The ALJ or the commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party must be given notice thereof and, on timely request, be afforded an opportunity, prior to final decision, to dispute the fact or its materiality.

(7) 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, that 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 evidentiary 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.

(b) *Burden of proof.*

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

- (2) Where the department has initiated modification, suspension or revocation proceedings, the department staff bears the burden of proof to show that the modification, suspension or revocation is supported by the preponderance of the evidence.
 - (3) Where an application is made for permit renewal, the permittee has the burden of proof to demonstrate that the permitted activity is in compliance with all applicable laws and regulations administered by the department, including those renewal applications the department treats as new pursuant to Part 621 of this Title. A demonstration by the permittee that there is no change in permitted activity, environmental conditions or applicable law and regulations constitutes a prima facie case for the permittee.
 - (4) The burden of proof to sustain a motion will be on the party making the motion.
- (c) *Standard of proof.* Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR article 78.

§ 624.10 Ex parte rule.

- (a) Except as provided below, an ALJ must not directly or through a representative, communicate with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.
- (b) An ALJ may consult on questions of law or procedures with supervisors or other staff of the Office of Hearings 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 or issues conference.
- (d) Parties or their representatives must not communicate with the ALJ, the Chief ALJ, the commissioner or the deputy commissioner for hearings and mediation services in connection with any issue without providing proper notice to all the other parties.

§ 624.11 Payment of hearing and issues conference costs.

(a) Proceedings on permits governed by the UPA.

- (1) Within thirty (30) days of the last day at which testimony is taken, the applicant must pay for the cost of: physical accommodations, if not held in department facilities; publishing any required notices; and any necessary stenographic transcriptions, and interpreter and translation services. Except that, when an adjudicatory proceeding is held pursuant to a department initiated modification, suspension or revocation, the department will be responsible for the costs listed above.
- (2) The ALJ may require that the applicant post a bond or other acceptable financial guarantee for the costs of the adjudicatory proceeding. The financial guarantee must be provided to the department prior to commencing the adjudicatory proceeding or the proceeding will be adjourned until the guarantee is made available.
- (3) A final decision will not be issued until the applicant has paid the costs of the adjudicatory proceeding incurred by the department referred to in paragraph (1) of this subdivision. The ALJ will provide notice of any unpaid costs to the applicant at the close of the record.

(b) Proceedings on permits not governed by the UPA. Costs pursuant to subdivision (a) of this section will not be imposed unless authorized by statute or costs are necessary to fulfill a statutory mandate.

§ 624.12 Record.

- (a) All hearings and issues conferences must be stenographically reported verbatim. The ALJ may arrange for a certified court reporter to produce a stenographic transcript of the adjudicatory proceedings, or may permit the applicant to arrange for the court reporter. When a stenographic transcript is made, an original and two copies of the transcript, together with an electronic version in searchable format, must be delivered to the ALJ at the expense of the applicant.
- (b) The record of the evidentiary hearing must include: the application (including the DEIS where applicable) and all notices (including the notice of hearing) and motions; any affidavit of publication of the notice of hearing; the transcript of any issues conference or evidentiary hearing, and the exhibits entered into evidence; any motions, appeals or petitions and any rulings or decisions thereon; where applicable, comments on the DEIS and responses thereto; any admissions, agreements or stipulations; a statement of matters officially noticed; offers of proof, objections thereto and rulings thereon; proposed findings; and the hearing report; and briefs as may have been filed including any comments on the hearing report filed pursuant to paragraph 624.13(a)(3) of this Part.

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

§ 624.13 Final decision.

(a) *Hearing report.*

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

(b) *Final decisions.*

- (1) Where a recommended decision has not been issued, the final decision of the commissioner, together with the hearing report of the ALJ will be issued sixty (60) days after the close of the record.
- (2) Where a recommended decision has been issued, the final decision of the commissioner will be issued within 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) *Proceedings involving environmental impact statements.*

- (1) Where the department is the lead agency as defined in Part 617 of this Title and a DEIS has been the subject of the evidentiary hearing, the hearing report together with the DEIS will constitute the FEIS.
- (2) Where the department is the lead agency as defined in Part 617 of this Title and a DEIS has been the subject of the evidentiary hearing, the final decision of the commissioner will include a written findings statement required by section 617.11 of this Title. The final decision will not become effective until at least ten (10) days following the issuance of the final decision, hearing report and FEIS.
- (3) Where the department is an involved agency as defined in Part 617 of this Title and the action has been the subject of a FEIS, the final decision of the commissioner will include a findings statement pursuant to section 617.11 of this Title.

- (4) The commissioner's final decision and findings statement, hearing report and FEIS will be filed and distributed as required by section 617.12 of this Title.
- (d) *Stipulations.* A stipulation executed by all parties resolving any or all issues removes such issue(s) from further consideration in the adjudicatory proceeding. Within five (5) days of the execution of the stipulation, applicant must serve a copy of the fully executed stipulation on all parties and file a copy of the fully executed stipulation with the ALJ.
- (e) *Reopening the record.* At any time prior to issuing the final decision, the commissioner or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

§ 624.14 Mediation.

- (a) ALJs have the authority to mediate permit matters.
- (b) Mediation may be requested by the parties or potential parties at any time after referral of a permit matter to the Office of Hearings and Mediation Services for proceedings pursuant to this Part. 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 ALJ assigned to the adjudicatory proceeding will not be assigned to mediate the matter.
- (c) The adjudicatory proceeding may be adjourned, in whole or part, upon request and at the discretion 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 adjudicatory proceeding record, 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 issues;
 - (3) facilitate the resolution of the matters at issue in the permit 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.