



**DEPARTMENT OF ENVIRONMENTAL QUALITY
POLICY AND PROCEDURES**

**SUBJECT: Public Involvement in the Contested
Case Process**

Number: 09-008

Date: December 15, 2004

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Revised: September 22, 2006

ISSUE

In February 2004, the Environmental Advisory Council (EAC) made recommendations for improving public involvement in Department of Environmental Quality (DEQ) activities. Recommendation B.11.1 advises the DEQ to develop a policy for notifying the public of contested cases and proposed settlements in contested case proceedings involving controversial applications of public interest that have been previously denied a permit. This policy implements that recommendation in the broader context of public notices in the contested case process generally.

POLICY

The administrative rules promulgated under 1969 PA 306 (the Michigan Administrative Procedures Act) require that a petition for a contested case be filed within 60 days from the date of the DEQ's decision. Following receipt of a petition, the State Office of Administrative Hearings and Rules (SOAHR) places the case on its docket, notifies the parties of the petition, and recommends to the parties that they attempt to resolve the case via settlement negotiations. Those cases that do not settle generally require a formal hearing conducted by an administrative law examiner resulting in a Proposal for Decision (PFD). The parties have an opportunity to file exceptions to the PFD and it is subsequently forwarded to the director for issuance of a final order and determination. The majority of contested cases, however, are settled without going through the formal hearing process.

Although the DEQ agrees with the EAC's recommendation, there are inherent limitations in the administrative appeals process that must be considered in implementing this policy. Public notice of contested case settlements, PFDs, and director's final orders may create an inaccurate expectation among the general public about how they can participate in the contested case process (i.e., influence a director's final order or directly participate in settlement negotiations). Only the parties to a contested case can participate in the hearing. There are two ways that a person can become a party to a contested case: (1) File a petition within 60 days of the DEQ's decision on a permit application, or (2) File a motion to intervene. There are limitations to this involvement. To qualify as a party to a contested case, a person must be able to show that he or she has standing (i.e., has suffered, or could suffer, an injury as a result

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of the decision). Further, a motion to intervene must be timely and cannot result in prejudice to the existing parties. While participation in settlement negotiations is not legally limited to the parties, practical considerations necessarily limit participation to persons directly involved in the case.

As outlined above, a case that goes through the formal hearing process results in a PFD submitted by the SOAHR to the director. The PFD is based only on the administrative record, including testimony and exhibits presented during the hearing. The director must consider only the information on the record in making a final determination. He is prohibited by law from considering information that is not part of the record. In addition, the director should not engage in "ex parte" communication. This means that the director should avoid communicating about the substance of the matter on appeal with non-parties and parties, outside of the formal hearing process or in the absence of the other party(ies).

PROCEDURE FOR PUBLIC NOTIFICATION

Given the constraints on direct public involvement in the contested case process, the DEQ will undertake the following to provide public notice of contested cases and settlements in contested cases.

1. Staff conducting a public hearing on permit applications subject to administrative appeals will:
 - a. Clearly explain how a contested case can arise as the result of a DEQ decision on the application and that if a petition is filed, information regarding the contested case will be available online. Staff will also provide the DEQ Web site address for the information.
 - b. Distribute an information sheet to public hearing attendees that explains the contested case process in detail and provides instructions on how to obtain case-specific information electronically via the DEQ internet Web site.
2. The DEQ will post SOAHR's docket of pending DEQ contested cases on the DEQ Web site for public access. This information will be updated as petitions are received. This, and other steps related to the SOAHR in this policy, applies to all, and only, DEQ contested cases.
3. When a public hearing was previously held on a permit application, a proposed settlement of the contested case will be posted in the DEQ Calendar on Web site for 30 days prior to the DEQ making a decision. The Web site posting will

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include an electronic link to a "Proposed Settlement Summary" that explains the terms of and rationale for the proposed settlement. The lead division is responsible for preparing and noticing the proposed settlement summary. Upon rendering a decision in settlement of the case, the lead division shall notify the SOAHR in a status report so that an order of dismissal may be entered by the SOAHR.

4. The DEQ will post all PFDs SOAHR issues on the DEQ Web site for public access. The PFD is not subject to public comment and the posting will include the following statement:

"This information is provided for informational purposes only. Participation in the administrative appeals process is limited by law to those who are formally identified as parties to it. The administrative appeals process does not include the opportunity for public comment on a proposal for decision. The decision-maker is required by law to consider only the administrative record created by the parties in rendering a final decision."

5. The DEQ will post all interlocutory and final orders issued by SOAHR or the DEQ on the DEQ Web site for public access.

Approved: _____



Date: _____

9-25-06