

June 25, 2020

Delaware Department of Natural Resources and Environmental Control  
Division of Air Quality  
State Street Commons, Suite 6A  
100 W. Water Street  
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Via Email to [daqpermittinginfo@delaware.gov](mailto:daqpermittinginfo@delaware.gov) and [DNRECHearingComments@delaware.gov](mailto:DNRECHearingComments@delaware.gov)

**Re: Request for a Valid Public Hearing on Draft Title V Renewal Permit for Delaware City Refining Company (Permit No. AQM-003/00016 - Part 1 (Renewal 3), Part 2 (Renewal 2), and Part 3 (Renewal 3)) To Be Scheduled With At Least 30 Days' Public Notice**

On May 22, 2020, the undersigned organizations requested a public hearing under Title V of the Clean Air Act to raise concerns regarding the renewal of the Delaware City Refining Company (DCRC)'s Title V permit. The Delaware Department of Natural Resources and Environmental Control (DNREC) has issued a notice for a "public hearing."<sup>1</sup> However, the "hearing" does not allow for live comments from the public or any other meaningful public participation.<sup>2</sup> As currently noticed, the hearing will not engage the public effectively, fails to satisfy Title V of the Clean Air Act or Delaware's implementing regulations, and fails to advance core objectives of environmental justice. If DNREC does not grant a valid public hearing, EPA must object pursuant to the Act, and to satisfy its obligations under Executive Order 12898.<sup>3</sup> Thus, DNREC should re-notice the hearing and provide details on how it will provide the meaningful public participation (including live comments) required under the Act and relevant regulations.

**I. A VALID PUBLIC HEARING UNDER THE LAW REQUIRES MEANINGFUL PUBLIC ENGAGEMENT**

The community exposed to pollution from the Delaware City Refinery needs a valid public hearing, as required by law. As COVID-19 makes it unsafe to hold the hearing in person, DNREC must replicate a typical public hearing to the greatest extent possible through a virtual platform. An adequate virtual hearing must assure the public can participate and provide oral comments in real time by phone and video online. However, DNREC has explicitly stated the event it is holding will not allow this. DNREC's notice states that "live comments will not be accepted during the virtual hearing."<sup>4</sup> Not providing an opportunity for the public to speak denies the opportunity for a valid public hearing, and is a violation of Title V and contrary to core principles of environmental

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<sup>1</sup> Notice of Virtual Public Hearing: Delaware City Refining Company, DNREC, <https://dnrec.alpha.delaware.gov/events/703/virtual-public-hearing-delaware-city-refining-company/>, (last visited Jun. 17, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629, 7630 (Feb. 16, 1994) (stating "Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.").

<sup>4</sup> Notice of Virtual Public Hearing, *supra* note 1.

justice.<sup>5</sup> Further, studies have shown that air pollution exacerbates cases of COVID-19, resulting in an increase of deaths around the country, including in Delaware.<sup>6</sup> Therefore, DNREC must ensure that communities and individuals affected by DCRC’s pollution have a say in the permitting decision directly affecting their quality of life.

- a. Title V of the Clean Air Act and its implementing regulations require DNREC to provide an opportunity for the public to be heard.

DNREC can only satisfy the Act by holding a hearing where the public can actually be heard. Title V and applicable regulations require DNREC to provide the opportunity for a public hearing. Title V requires DNREC to “offer[] an opportunity for public comment *and a hearing.*” 42 U.S.C. § 7661a(b)(6) (emphasis added) (requiring permitting regulations to include “public notice, including offering an opportunity for public comment and a hearing”). The law does not say only public comment. The “and” in the statute makes crystal clear that DNREC must provide a valid public hearing as well. *Id.* Further, 40 C.F.R. § 70.7(h) directs that the permitting authority “shall provide adequate procedures for public notice including offering an opportunity for public comment *and a hearing.*” *Id.* (emphasis added). 40 C.F.R. § 70.7(h)(5) mandates that the “permitting authority shall keep a record of the commenters and of the issues raised during the public participation process.” And § 70.7(h)(6) provides that DNREC “must respond in writing to all significant comments raised during the public participation process, including ... any such comments raised *during any public hearing* on the permit.” *Id.* (emphasis added). DNREC’s governing regulations further direct that “public participation” includes providing a public hearing that allows “interested persons to appear and submit written *or oral comments* on the air quality impact of the proposed action.” 7 Del. C. Ch. 1102 § 12.2, 12.24; *see also* 7 Del. C. Ch. 1130 § 7.10.2 (requiring DNREC to provide an opportunity for *both* “the submission of written comments and hearing requests”); § 7.10.3 (requiring opportunity for public hearing on Title V permits); *id.* § 7.10.7 (requiring DNREC to consider “all comments received” in reaching its final determination and issuing a proposed permit, modification, or renewal for EPA review).

Although DNREC has paid lip service to this requirement by scheduling an event labeled a “public hearing,” as of now, DNREC’s scheduled hearing fails to meet the requirements of the

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<sup>5</sup> According to Title V of the Clean Air Act, DNREC must keep the public informed and allow for public participation when it comes to a facility obtaining or renewing its permit. *See* Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (Stating a Title V permit should “enable the source, States, EPA, and the *Public* to understand better the requirements to which the source is subject, and whether the source is meeting those requirements” (emphasis added).”); *see* Principles of Environmental Justice, First Nat’l People of Color Env’tl. Leadership Summit (1991), <https://www.ejnet.org/ej/principles.html> (stating core principle 7 as “*Environmental Justice* demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation”).

<sup>6</sup> *See* Delaware Coronavirus Map and Case Count, N.Y. TIMES (last accessed June 17, 2020), <https://www.nytimes.com/interactive/2020/us/delaware-coronavirus-cases.html>; *see, e.g.*, Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (updated Apr. 17, 2020) (quoting Francesca Dominici: “This study provides evidence that counties that have more polluted air will experience higher risks of death for Covid-19”), <https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html>; *see, e.g.*, Xiao Wu et al., *Exposure to Air Pollution and COVID-19 Mortality in the United States* (Apr. 24, 2020) (preprint), <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2> (concluding “A small increase in long-term exposure to PM<sub>2.5</sub> leads to a large increase in the COVID-19 death rate”).

Act and its implementing regulations—the hearing DNREC states it has granted is not actually a meeting where the public can be heard at all. In fact, the public is forbidden from speaking or providing any oral comments during the hearing.<sup>7</sup> DNREC’s exclusion of the community’s live input is unacceptable for a renewal of a Title V permit, which is intended to be a “source-specific bible for Clean Air Act compliance.” *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). This is ever more important given that Title V permits come up for renewal only once every five years. Further, a worthwhile opportunity for public input is especially necessary here given the myriad of serious problems with the draft permit for this refinery (as discussed in our May 22, 2020 comments) and the fact that the Delaware City Refinery has been a “High Priority Violator” for the past nine quarters.<sup>8</sup> As courts have recognized, public participation is a means to ensure community residents have a voice in decisions that directly affect them.<sup>9</sup> Therefore, DNREC should not renew this permit without meaningful input—including at a hearing with an opportunity for oral comments and testimony—from those individuals who, under the Clean Air Act and implementing regulations, DNREC must include and protect. Their voices must be heard, and DNREC’s plan for written comments only does not satisfy legal requirements.

Effective public participation requires a two-way communication between the agency and those who have an interest or concern about the agency’s decision. That is why limiting individuals directly affected from participating at all in a hearing—one of the few places they are able to express concerns—is contrary to the Clean Air Act’s public participation requirements and principles of environmental justice.<sup>10</sup> Thus, individuals and communities exposed to a disproportionate amount of toxic air pollution from the Delaware City Refinery should have a direct say in DNREC’s decision as it directly affects their health and welfare.

Providing an opportunity to submit online written comments, alone, is insufficient and does not satisfy the additional and separate public hearing requirement. As cited above, the Act and DNREC regulations require an opportunity for *both* public comment *and a hearing*. *See, e.g.*, 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h); *see e.g.*, 7 Del. C. Ch. 1130 § 7.10.2, 7.10.3; 7 Del. C. Ch. 1102 § 12.2, 12.24. Title V requires DNREC to consider and respond to public input provided both in written comments and orally in a public hearing. *See, e.g.*, 40 C.F.R. 70.7(h)(5); 40 C.F.R. § 70.7(h)(6); 7 Del C. Ch. 1130 §7.10.7.

DNREC is well aware of this because it has long recognized the need to grant in-person public hearings that allow for oral comments. If providing an opportunity for only written comments satisfied the legal requirements, then the permitting agency would never need to hold a live public hearing where the public could participate. During the prior renewal process on this very permit, DNREC heard testimony from many members of the public in person, and the

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<sup>7</sup> Notice for Virtual Public Hearing, *supra* note 1.

<sup>8</sup> Detailed Facility Report: Delaware City Refinery, EPA (last accessed June 15, 2020), <https://echo.epa.gov/detailed-facility-report?fid=110001148598>.

<sup>9</sup> *See, e.g., Highway J Citizens Group v. U.S. Dep’t of Transp.*, 656 F. Supp. 2d 868, 896 (E.D. Wis. 2009) (holding that under the Federal Aid Highway Act “a public hearing must allow citizens an opportunity to express their views in front of agency representatives and other citizens.”); *see also D.C. Federation of Civic Ass’ns v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970) (stating the Federal Aid Highway Act “hearing requirement was a crucial means for citizens, particularly those in D.C., to participate in decisions that could have direct impacts on their lives.”).

<sup>10</sup> 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h); *See Principles of Environmental Justice*, First Nat’l People of Color Envntl. Leadership Summit (1991), <https://www.ejnet.org/ej/principles.html>.

community needs a similar opportunity to convey concerns during this proceeding.<sup>11</sup> The fact that, in a non-COVID-19 world, people have always been able to speak at public hearings and this tends to provide an opportunity for a much greater number of community members to have input than otherwise would, illustrates that such an outlet provides a certain kind of public input that written comments do not allow. Not everyone can write up their concerns and submit them. That is precisely why people choose to attend a meeting to ask questions and share comments orally. Without that channel being available, the public participation process under Title V is incomplete in both letter and spirit.

Therefore, the undersigned groups call on DNREC to provide both a call-in number and video online access option for the public to participate in a public hearing on the DCRC's Title V permit. Additionally, the groups request language access for the virtual hearing - i.e., interpreter services and relay services as more than 3% of Delaware City's population speaks a different language than English and/or reports having a hearing disability.<sup>12</sup> Failing to provide telephone and video comment opportunities as well as interpreting and relay services during the hearing will violate Title V and implementing regulations.

- b. Executive Order 12898 and principles of environmental justice require a meaningful opportunity for public participation during DNREC permitting decision.

In reviewing DNREC's proposed permit for DCRC, EPA has the authority to and should object to this permitting process under the 1994 environmental justice order and its own guidelines on environmental justice if DNREC fails to provide a valid public hearing.<sup>13</sup> EPA has recognized the importance of implementing this order, which directs federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>14</sup> In implementing this order through its own actions and guidelines, EPA has recognized that environmental justice means "the fair treatment *and meaningful involvement* of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."<sup>15</sup> For involvement to be "meaningful," EPA has acknowledged that community members must "have an opportunity to participate in decisions

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<sup>11</sup> DNREC Sec'y Order No. 2015-A-0005, *Re: Application of Del. City Refining Co. LLC to Renew Regulation 1130 Air Quality Management Title V State Operating Permit*, 4-5 (Apr. 10, 2015) (stating "The department shares many of the concerns raised by the public comments on the Facility's impact on the environment, public health and the economy. . . all persons who wanted to comment were provided sufficient opportunity to comment on the record, either at the public hearing or in written comments . . .").

<sup>12</sup> *See American Community Survey: Delaware City Language Spoken at Home tbl.*, U.S. CENSUS BUREAU (2018) (last accessed June 18, 2020), <https://data.census.gov/cedsci/table?g=1600000USundefined.1019730&tid=ACSST5Y2018.S1601&hidePreview=true&moe=false>; see also *Disability Statistics, Delaware*, CORNELL UNIV. DISABILITY STATISTICS (2017) (last accessed June 22, 2020), <https://www.disabilitystatistics.org/reports/acs.cfm?statistic=1>.

<sup>13</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629, 7630 (Feb. 16, 1994).

<sup>14</sup> *Id.* § 1-101.

<sup>15</sup> EPA, *Learn about Environmental Justice*, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=President%20Clinton%20signing%20the%20EJ,environmental%20laws%2C%20regulations%20and%20policies> (emphasis added).

about activities that may affect their environment and/or health,” and must have the ability to “influence the regulatory agency’s decision,” and have concerns “considered in the decision making process,” meaning “[d]ecision makers will seek out and facilitate the involvement of those potentially affected.”<sup>16</sup> DNREC’s refusal to provide an opportunity for the public to comment orally by phone and video during the meeting scheduled fails to satisfy the basic components of meaningful involvement that form a core part of environmental justice objectives.

DNREC should recognize the need to follow core principles of environmental justice in this permitting process, regardless whether EPA will object on these grounds, as inadequate permitting of the refinery would cause disproportionate harm based on race and income as discussed in our initial comments.<sup>17</sup>

The principles of environmental justice require meaningful public participation at every level of agency decision-making.<sup>18</sup> Therefore, DNREC must fully engage with the public in its decision-making activities, including the renewal of the Delaware City Refinery’s permit. This is underscored by recent action by the state of Delaware, which has created a Community Involvement Advisory Council (CIAC) and tasked it with “represent[ing] communities that potentially may be adversely impacted by environmental factors or conditions.”<sup>19</sup> The Council’s purpose is stated as “serv[ing] in an advisory capacity to the Secretary of the [DNREC] . . . and shall consider such matters as . . . public participation in the decision-making processes of the Department, ensuring, to the extent practicable, that no community in the State is disparately affected by environmental impacts. . . .”<sup>20</sup> With this action, the state showed DNREC must focus on and improve public participation and strive to “ensur[e] . . . that no community in the State is disparately affected by environmental impacts.”<sup>21</sup> If DNREC fails to meet the requirements of public participation under the Clean Air Act and principles of environmental justice pursuant to Executive Order 12898, this is a matter where the CIAC should intervene, and where EPA will need to object pursuant to 40 C.F.R. § 70.8(c)(3)(iii).<sup>22</sup>

The people living near the Delaware City Refinery, including Commenters’ members, have relevant experience and input that needs to be considered in the permit renewal proceeding. Refusing to hold a public hearing where the public can actually speak literally silences the community’s voices, particularly for people for whom providing an oral comment may be the only accessible way to participate in this process.<sup>23</sup> Moreover, the EPA’s Public Participation Toolkit highlights the importance of community engagement, and DNREC should follow it. The toolkit states community input leads to better decision-making on behalf of permitting authorities and the

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<sup>16</sup> *Id.*

<sup>17</sup> See Comments of May 22, 2020 at 4-6.

<sup>18</sup> Principles of Environmental Justice, First Nat’l People of Color Env’tl. Leadership Summit (1991), <https://www.ejnet.org/ej/principles.html>.

<sup>19</sup> 29 Del. C. Ch. 80 § 8016A(c); <https://dnrec.alpha.delaware.gov/community-services/advisory-council/>.

<sup>20</sup> *Id.* § 8016A(b).

<sup>21</sup> *Id.*

<sup>22</sup> 40 C.F.R. §70.8(c)(3) (stating “Failure of the permitting authority to do any of the following also shall constitute grounds for an objection. . . .Process the permit under the procedures approved to meet § 70.7(h) of this part except for minor permit modifications.”).

<sup>23</sup> See *supra* note 13.

EPA, as it brings to light additional facts, values, and perspectives on life-impacting decisions.<sup>24</sup> By limiting the community's participation, DNREC is not only denying the public an opportunity to speak and provide input on this permitting decision, it is missing important information that would make DNREC's decision-making better.

c. COVID-19 does not give DNREC the right to depart from public participation requirements.

These are unprecedented times, and Commenters agree with the decision not to hold an in-person public hearing at this time during the COVID-19 pandemic, when new cases are still being reported each day and there is no vaccine.<sup>25</sup> However, if anything, COVID-19 warrants ensuring an accessible, valid public hearing, not denying the public an opportunity to participate. Where public in-person meetings have been appropriately suspended due to social distancing, an online forum can and should still offer individuals the ability to fully participate in decisions that affect them directly. It is unfair and unjust to deny affected people the ability to speak or ask questions during a hearing, at a time when community members need clean air more than ever. As a Harvard study showed, “even moderately higher long-term levels of fine particulate pollution correspond to an eight percent higher death rate from COVID-19.”<sup>26</sup> Additionally, the World Health Organization cautioned “countries [with] polluted areas may be hit harder by the COVID-19 outbreak,”<sup>27</sup> and an English study “showed that particulate matter contributes to increased infectivity.”<sup>28</sup> Thus, during these times, it is DNREC's burden to actively and meaningfully create an opportunity for the public to participate, as the law requires.<sup>29</sup>

Importantly, there are steps that DNREC can and should take—even during COVID-19—to meaningfully engage the public and communities who experience the impact of DCRC's pollution.<sup>30</sup> As the CIAC Report states, “community involvement results when government agencies: acknowledge that people living in neighborhoods are a significant constituency; invest in long term relationship building; dedicate adequate time, financial and technical resources to help educate and train communities; and partner in positioning them to engage in the decision process and influence environmental outcomes.”<sup>31</sup> DNREC therefore should actively provide the community with opportunity to participate during a public hearing on this permit, at least through telephone and online video participation.

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<sup>24</sup> EPA, *Introduction to the Public Participation Toolkit*, 1, 4 (last accessed June 15, 2020), [https://www.epa.gov/sites/production/files/2014-05/documents/ppg\\_english\\_full-2.pdf](https://www.epa.gov/sites/production/files/2014-05/documents/ppg_english_full-2.pdf).

<sup>25</sup> See Delaware Coronavirus Map, *supra* note 6.; See also, Delaware News, DEL. GOV'T. (June 17, 2020), <https://news.delaware.gov/2020/06/17/public-health-announces-41-additional-positive-covid-19-cases-among-delawareans-2-new-deaths/> (declaring 41 additional new COVID-19 cases).

<sup>26</sup> See, Xiao Wu et al., *Exposure to Air Pollution and COVID-19 Mortality in the United States* (Apr. 27, 2020) (preprint), <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2>.

<sup>27</sup> Elizabeth Ridlington, *COVID-19 is Bad. Dirty Air Makes it Worse*, FRONTIER GRP. (Jun. 8, 2020), <https://frontiergroup.org/blogs/blog/fg/covid-19-bad-dirty-air-makes-it-worse>.

<sup>28</sup> See Marco Travaglio et al., *Links between air pollution and COVID-19 in England* (Jun. 6 2020) (preprint), <https://www.medrxiv.org/content/10.1101/2020.04.16.20067405v5.full.pdf+html>.

<sup>29</sup> Exec. Order No. 12898, *supra* Note 3.

<sup>30</sup> Report of the Community Involvement Advisory Committee, DEL. DEP'T OF NAT. RES. & ENVTL. CONTROL, 2 (Mar. 22, 2001), <http://www.dnrec.delaware.gov/CIAC/Documents/ciacreport.pdf>.

<sup>31</sup> *Id.*

Moreover, EPA must ensure *both* a phone and video online option for comment. Limiting the community’s ability to engage during the virtual hearing and making it dependent on access to internet alone would have dire environmental justice consequences. Approximately ten percent of adults across the country lack any way to access the internet, with a significant impact on black, Hispanic, and low-income populations.<sup>32</sup> Therefore, given the circumstances of COVID-19 and the stark data of who lacks internet access around the country—including more than 1,000 individuals specifically surrounding the Delaware City Refinery<sup>33</sup>—it is ever more important that DNREC allow for concrete and meaningful participation for those who are able to join the virtual meeting. Anything but active participation from the public sends the message that DNREC is merely checking a box and is not actually interested in public engagement, even though it is required by law.

d. DNREC can provide no legal or rational justification for refusing the public the ability to participate during the hearing.

DNREC has not yet failed to fulfill its obligation to engage in meaningful public participation, and DNREC does have the opportunity to make the best of an unprecedented situation arising out of a global pandemic. DNREC has provided no legal or rational justification for refusing to allow the public to participate in the hearing via phone and video. Community members must have the ability to state their piece and be heard. The only way DNREC can satisfy its obligation to provide meaningful public participation is to assure that people who bear long-term effects and consequences of the decision makers can speak during the public hearing. DNREC itself is already participating in two-way Zoom sessions during COVID-19 so it clearly has the capacity and experience of doing this.<sup>34</sup> The notice for July 14 shows that DNREC will employ “WebEx” to allow phone or webinar observation.<sup>35</sup> WebEx is a technology that allows for two-way participation, and even allows for participatory accessibility for people who are deaf or hard of hearing.<sup>36</sup>

Other states have shown it is quite possible to hold a virtual public hearing that allows the public to participate by phone and video online. DNREC has no excuse not to follow their lead. Commenters found a number of examples from other states that have implemented virtual hearings

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<sup>32</sup> Monica Anderson et al., *10% of Americans don’t use the internet. Who are they?*, PEW RES. CTR. (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>.

<sup>33</sup> See Section 706 Fixed Broadband Deployment Map, FCC, (last accessed Jun. 15, 2020), <https://www.fcc.gov/reports-research/maps/section-706-fixed-broadband-deployment-map/>.

<sup>34</sup> See, e.g., B. Hooper, *All Quiet On Fenwick State Park Project, Officials Say*, MD COAST DISPATCH (June 4, 2020), <https://mdcoastdispatch.com/2020/06/04/all-quiet-on-fenwick-state-park-project-officials-say/> (quoting a mayor as asking a question of DNREC “face to face” during a “Zoom call”).

<sup>35</sup> Event Information: DCRC Public Hearing, CISCO WEBEX, (last accessed June 19, 2020), [https://stateofdelaware.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=stateofdelaware&service=6&rnd=0.21257760434051065&main\\_url=https%3A%2F%2Fstateofdelaware.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b00000004199c7f0c52032d46d3334a29d0768e9216388bdfcb157108d111bce6676367c2%26siteurl%3Dstateofdelaware%26confViewID%3D163135831702278780%26encryptTicket%3DSDJTSwAAAASUNTcS6cDcEGXNrXqA796zfHFRF3CsPyWucm8QGmktFGQ2%26](https://stateofdelaware.webex.com/mw3300/mywebex/default.do?nomenu=true&siteurl=stateofdelaware&service=6&rnd=0.21257760434051065&main_url=https%3A%2F%2Fstateofdelaware.webex.com%2Fec3300%2Feventcenter%2Fevent%2FeventAction.do%3FtheAction%3Ddetail%26%26%26EMK%3D4832534b00000004199c7f0c52032d46d3334a29d0768e9216388bdfcb157108d111bce6676367c2%26siteurl%3Dstateofdelaware%26confViewID%3D163135831702278780%26encryptTicket%3DSDJTSwAAAASUNTcS6cDcEGXNrXqA796zfHFRF3CsPyWucm8QGmktFGQ2%26).

<sup>36</sup> Accessibility, CISCO WEBEX (last accessed June 19, 2020), <https://www.webex.com/accessibility.html>.

and have allowed public commentary to be live via video or by phone.<sup>37</sup> New Jersey and Texas are among some states that are hosting virtual hearings where the public can actively participate either by phone or video with guidelines such as “[m]embers of the public who would like to ask questions or provide comments during the meeting may access the meeting via webcast by following [the] link.”<sup>38</sup> Further, the Texas Commission on Environmental Quality highlights that the purpose behind a hearing is “to provide the opportunity to submit comments or to ask questions about the application.”<sup>39</sup> That can only be achieved if the public is able to participate, in real time during the hearing, and DNREC has no excuse not to provide a hearing that allows the public to speak.

Therefore, DNREC must provide the public a meaningful public hearing. In a First Amendment case, the Supreme Court recognized that “direct one-on-one communication” is the “most effective, fundamental, and perhaps economical avenue of political discourse.”<sup>40</sup> DNREC should provide this to the community impacted by the Delaware City Refinery by granting the opportunity for the individuals and community to voice their concerns through video and phone during the virtual hearing. To be able to prepare to do so effectively, the public must be given notice that web or phone access will be provided along with an explanation on how the public can join in an adequate manner that implements language access best practices, including translation and interpretation services throughout the process. DNREC itself in its public participation web page states “[y]our voice is important,”<sup>41</sup> therefore implying individuals should be able to fully engage in discourse and be heard. Thus, the hearing should be conducted in a manner where people can have a say and actually be heard on the refinery impacts and draft permit.

## II. CONCLUSION

During a global pandemic that targets the respiratory system, assuring healthy air quality for Delaware residents has paramount importance. This permit decision is an essential moment for DNREC to assure adequate health protection for the community near the Delaware City Refinery.

DNREC must fulfill its legal and moral responsibility to protect individuals from harm resulting from pollution and to hear each Delaware resident’s concerns and not cut out community voices. Thus, DNREC should provide advance public notice that it will hold a valid, virtual hearing that allows community members to listen, ask questions, speak, and offer oral comments by phone and video, and thus fully and meaningfully engage in the process.

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<sup>37</sup> See. *Pub. Hearing for Delaware River Partners*, NJ DEP’T. OF ENVTL. PROT. (May 8, 2020), <https://www.youtube.com/watch?v=tc6-h9EZkVo&feature=youtu.be>; see also, Notice of opportunity for public comment, NJ DEP’T. OF ENVTL. PROT. (Apr. 8, 2020), <https://www.state.nj.us/dep/aqpp/downloads/publicnotpost/drppn.pdf>. (stating “If you are interested in joining the virtual public hearing, please email the Department . . . name, telephone number, and email address and whether you intend to provide oral testimony or not.”).

<sup>38</sup> *Id.*; *Notice of Public Meeting for Water Quality Land Application Permit for Municipal Wastewater New Proposed Permit No. WQ0015835001*, TEX. COMM’N ON ENVTL QUALITY (May 4, 2020), [https://www.tceq.texas.gov/assets/public/comm\\_exec/pm-ph/notices/2020/2020-06-09-silesia-properties-lp-wq0015835001-pm.pdf](https://www.tceq.texas.gov/assets/public/comm_exec/pm-ph/notices/2020/2020-06-09-silesia-properties-lp-wq0015835001-pm.pdf).

<sup>39</sup> *Id.*

<sup>40</sup> *Meyer v. Grant*, 486 US. 414, 424 (1988).

<sup>41</sup> *Public Participation & Partnerships*, DNREC: ENVTL. PERSPECTIVES (last accessed June 15, 2020), <https://perspectives.dnrec.delaware.gov/stories/s/Community-Connection-Participation-Partnerships/kmpv-pg92/>.

Please contact us to confirm that you will schedule a valid virtual public hearing that includes telephone and videoconference options for the public. DNREC must also provide at least 30 days' public notice in advance of this hearing, with information for the public on how to register to be able to provide comment orally by telephone and video.

Thank you for your time and assistance with this matter.

Sincerely,

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