

SUBMITTED via DNREC ONLINE PORTAL

TO: Lisa Vest, Hearing Officer

DATE: July 23, 2020

RE: Public Comment on Docket # 2020-P-A-0018 (Application of Croda for a Construction Permit)

I am submitting the following public comment in the above captioned Docket:

Comment 1. DNREC's Public Hearings Without Contemporaneous Oral Public Comment Violate The Governor's 3/12/20 Declaration Of A State of Emergency on COVID-19

On March 12, 2020, Governor Carney issued his *Declaration Of A State of Emergency For The State Of Delaware Due To A Public Health Threat* (the "3/12/20 Order"). The Order has (so far) been extended four different times, the most recent of which was on July 6, 2020. Thus, the Order was in effect at the time of the July 21, 2020 public hearing in this Docket.

Paragraph 5 of the 3/12/20 Order states in pertinent part:

As of Friday, March 13, 2020 at 8:00 a.m. E.S.T., all public meetings of executive branch public bodies governed by 29 Del. C. §§ 10001 et. seq. (including boards, commissions, task forces, and any other similar public body) may be conducted electronically, either by means of telephone conference call or video-conference call. The technology used must permit members of the public body to hear the comments of and speak to all those participating, and members of the public to hear the comments of and speak to such members of the public body contemporaneously.

In the 23 modifications of the 3/12/20 Order, these contents of paragraph 5 have not been altered, removed, or superseded. The Twentieth Modification (issued 5/31/20), did allow "public meetings of public bodies governed by 29 Del. C. §§ 10001 et. seq. (including boards, commissions, task forces, and any other similar public body)" to be held in person in public buildings (with safe social distancing), but specifically "encouraged" public bodies "to conduct meetings electronically, either by means of telephone conference call or video conference call, as permitted by Paragraph 5 of the Declaration of the State of Emergency." (Twentieth Modification ¶ E.1). The Twentieth Modification explicitly states that "This Order has the force and effect of law. Any failure to comply with the provisions contained in a Declaration of a State of Emergency or any modification to a Declaration of the State of Emergency may constitute a criminal offense."

DNREC is a “public body” governed by 29 Del. C. §§ 10001 *et. seq.* DNREC is subject to, and for many years has acted in response to, the FOIA requirements in that Chapter. Separate and apart from this concession by DNREC’s actions, hearings conducted by DNREC via a Hearing Officer fit the definitions of the Chapter. DNREC is a “public body,” defined in 29 Del. C. § 10002(h) as

“Public body” means, unless specifically excluded, any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

Hearing Officers—who are “appointed” by the Secretary (a “public official of the State”) to produce a Hearing Officer Report and a Recommendation on pending permit applications—specifically fall within sub-¶ 3.

A public hearing held by a Hearing Officer on a permit application falls within the definition of “meeting,” defined in 29 Del. C. § 10002(g) as

“Meeting” means the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing.

A public hearing on a permit application involves both “discussion” of DNREC’s business of reviewing permit applications and “taking action” to meet the public hearing and public comment components of DNREC/s permitting job. Thus, hearings conducted by a DNREC Hearing Officer (appointed by the Secretary of DNREC) are “public meetings” of an “executive branch public bod[y] governed by 29 Del. C. §§ 10001 *et. seq.*” and are therefore subject to the requirements of the 3/12/20 Order.

Public hearings on permit applications have been held by DNREC via videoconference since the issuance of the 3/12/20 Order and its extensions. Like the other post-3/12/20 Order DNREC public hearings, the public hearing is the above-captioned Docket did not allow for oral comment during the hearing. This violates the specific requirement of ¶ 5 of the 3/12/20 Order that “[t]he technology used must permit members of the public body to hear the comments of and speak to all those participating, and **members of the public to hear the comments of and speak to such members of the public body**

contemporaneously” (emphasis supplied). Therefore, the public hearing was in violation of the “law” created by the 3/12/20 Order.

Comment 2. DNREC’s Public Hearings Without Contemporaneous Oral Public Comment Violate Chapter 100 Of Title 29 Of The Delaware Code

The Paragraph 5 requirements in the Governor’s 3/12/20 Order did not appear out of thin air. 29 Del. C. § 10006 allows for public meetings to be held via video-conferencing under certain conditions, and states in relevant part:

During meetings where video-conferencing is used, each member must be identified, **all participants shall be able to communicate with each other at the same time**, and members of the public attending at the noticed public location or locations of the meeting must be able to hear and view the communication among all members of the public body participating by video-conference.

(emphasis supplied). As noted above, DNREC public hearings on permits fall within the purview of Chapter 100. The failure of DNREC to allow members of the public to speak and submit oral comments at its video conference public hearings—including the public hearing in the above-listed Docket—means that the public hearing was held in violation of 29 Del. C. § 10006.

Comment 3. DNREC’s Public Hearings on Air Permits Without Contemporaneous Oral Public Comment Violate DNREC’s Regulations

DNREC has issued Regulations governing the Public Participation component of its issuance of air permits. 7 Del. Admin. C. 1102 § 12.2 specifically states that

“[u]pon receipt of ... a permit application, in proper form, the Department shall provide for public participation and comment by . . .

12.2.4 Holding, if the Department receives a meritorious request for a hearing within 15 calendar days of the date of the advertisement described in 12.2.2 of this regulation, or if the Department deems it to be in the best interest of the State to do so, a public hearing on an application **for interested persons to appear and submit written or oral comments** on the air quality impact of the proposed action.

(emphasis added). Thus, by DNREC’s own regulations, when a public hearing is held on an application for an air permit, interested persons must be allowed to appear and submit oral comments.

Delaware law holds that “once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid.” *Hanson v. Delaware State Public Integrity Com’n*, 2012 WL 3860732 (Super. Ct. Aug. 30, 2012), citing *Dugan v. Delaware Harness Racing Commission*, 752 A.2d 529 (Del.2000); *Mumford & Miller Concrete, Inc. v. Dept of Labor*, 2011 WL 2083940 at *6 (Super. Ct. April 19, 2011) (same).

Thus, the very language of 7 Del. Admin. C. 1102 § 12.2.4 requires that DNREC provide an opportunity for oral comment at a public hearing on an air permit application.

DNREC's conduct of public hearings on air permit applications without allowing for members of the public to make oral comment during the hearing means that DNREC is violating its own regulations, and any permit issued despite such violation is invalid and subject to reversal. Thus, the public hearing in the above-referenced Docket was invalid and any permit issued relying on it will be subject to reversal.

Thank you for the opportunity to submit these Public Comments.

Sincerely,

A handwritten signature in blue ink that reads "Kenneth T. Kristl". The signature is fluid and cursive, with the first and last names being more prominent than the middle initial.

Kenneth T. Kristl, Esq.