COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Enforcement Guidance Memorandum No. 2-2007
Department of Environmental Quality Formal Hearing Procedures

To: Regional Directors, Division Directors

From: Michael G. Dowd, Director
Division of Enforcement

Date: December 20, 2007

Copies: Rick Weeks, James Golden, Deputy Regional Directors, Regional Enforcement Managers and Representatives, Central Office Enforcement Managers, Cindy Berndt, Rick Linker, Angie Jenkins, Sharon Baxter, Sharon Brown

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Summary and Purpose

In 2005, the General Assembly passed legislation that provided the Department of Environmental Quality ("DEQ") with additional enforcement powers. Chapter 706, 2005 Acts of Assembly (S.B. 1089) authorized the State Water Control Board, the Virginia Waste Management Board and the State Air Pollution Control Board ("Boards") to issue special orders assessing civil penalties of up to $32,500 per violation, up to $100,000 per order, if specified conditions are met. These requirements have been codified at Va. Code §§ 10.1-1309 and 10.1-1316 (air); 10.1-1455 (waste); and 62.1-44.15, 62.1-44.32 and 62.1-44.34:20 (water). The legislation also required DEQ to develop uniform procedures to govern the formal hearings conducted pursuant to these sections to ensure they are conducted in accordance with the Administrative Process Act, any policies adopted by the Boards and to ensure that facility owners and operators have access to information on how such hearings will be conducted. In response, DEQ has developed these Department of Environmental Quality Formal Hearing Procedures ("Procedures").

These Procedures are intended for use by Supreme Court hearing officers conducting formal hearings for DEQ and its three regulatory boards pursuant to Va. Code § 2.2-4020. Although prompted by the legislature's directive to develop procedures for formal hearings pursuant to Va. Code §§ 10.1-1309, 10.1-1455, and 62.1-44.15, it is recommended that these Procedures be used for any formal hearing conducted for DEQ. These Procedures are effective on the date of issuance and may be changed or supplemented from time to time.

These Procedures are based on the Hearing Officer Deskbook published by the Office of the Executive Secretary of the Supreme Court of Virginia and the Administrative Law Advisory Committee of the Virginia State Bar. These Procedures should be read in conjunction with applicable laws and regulations; in the event of an inconsistency, a statute or regulation shall supersede these Procedures. These suggested Procedures should not be considered as having the force of law[1].

A copy of the Procedures is attached.

Electronic Copy

An electronic copy of this guidance is available on DEQ's website, under Enforcement, at http://www.deq.virginia.gov/

Contact Information

Questions regarding this guidance or its application should be directed to Central Office enforcement staff.

[1]Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. *See* Va. Code § 2.2-4001. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations and policies of the Commonwealth to case-specific facts.

DEPARTMENT OF ENVIRONMENTAL QUALITY
FORMAL HEARING PROCEDURES

INTRODUCTION

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These Procedures are based on the Hearing Officer Deskbook published by the Office of the Executive Secretary of the Supreme Court of Virginia and the Administrative Law Advisory Committee of the Virginia State Bar. These Procedures are effective on the date of issuance and may be changed or supplemented from time to time. These suggested Procedures should not be considered as having the force of law[2].

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I. HEARING OFFICERS

A. RESPONSIBILITIES

The Executive Secretary of the Supreme Court of Virginia maintains a list of hearing officers who may preside over formal hearings. At an agency's request, the Executive Secretary will name a hearing officer from this list, selected on a rotation system maintained by the Executive Secretary. A hearing officer's responsibilities include the following:

1. Establish the date and place of the hearing and provide notice of these to the parties, if a notice of hearing has not been sent by the agency.

2. Manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and the identity of the witnesses who may be called.

3. Establish the hearing procedure to be used and communicate this to the parties so they will know what to expect. This should be done during a pre-hearing conference.

4. Maintain custody of the transcript and record of the case.

5. On a timely basis, make a recommendation to the decisionmaker.[3]

The parties have a right to be treated professionally by the hearing officer and to receive a cogent decision in a timely manner. The hearing officer's highest responsibility is to issue a recommendation. It is incumbent upon the hearing officer to control the hearing and the parties in a professional manner. This includes creating a setting that enables the parties to provide the hearing officer with the evidence needed to make a recommendation. Accordingly, the hearing officer must be prepared to deal with and make any necessary accommodations for parties with special needs because of impaired sight, physical abilities or language difficulties. The hearing officer must also manage the attendance and participation of third parties as appropriate.

It is also the hearing officer's responsibility to manage the record. The record should be clear, complete, and orderly so that anyone reading the hearing officer's report may ascertain the evidence and testimony upon which the hearing officer relied in making a recommendation to the decisionmaker.

If a hearing officer fails to perform these responsibilities in a professional and ethical manner, the hearing officer may be removed or disqualified pursuant to the Hearing Officer System Rules of Administration.

[3] *See* Section II.A.7.

Comment

The Supreme Court's Hearing Officer System Rules of Administration require hearing officers to have prior experience with administrative hearings or knowledge of administrative law, demonstrated legal writing ability, and a willingness to travel to any area of the state to conduct hearings.

B. ACCEPTANCE OF AN ASSIGNMENT

1. A hearing officer should never accept an assignment that would create a conflict of interest.

2. A hearing officer who has a pending assignment with DEQ should not accept another assignment involving DEQ. Further, a hearing officer who has a pending assignment with DEQ should not represent a client in an adversarial position to DEQ, and vice versa.

3. In deciding whether to accept an assignment, a hearing officer should consider other commitments, potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator. Hearing officers should be aware that they may need to conduct an on-site visit in order to fully evaluate the information before them.

Comment

For more information regarding conflicts of interest, see the "Recusal and Disqualification" section of these Procedures[4] and the Supreme Court's Hearing Officer System Rules of Administration. For further guidance on potential conflicts, see the Legal Ethics and Unauthorized Practice of Law volumes of the Code of Virginia.

II. PRE-HEARING ISSUES

A. SCHEDULING, NOTICE, AND LOCATION

1. Absent instructions from DEQ to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties. Even if the hearing officer is not responsible for scheduling the hearing, he or she should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.

2. Hearings should be scheduled at a time and manner convenient to all parties. The APA requires that the parties shall be given reasonable notice of the time, place, and nature of the proceeding. Va. Code § 2.2-4020 B. If the parties agree, the hearing can be held sooner than indicated on the notice. The hearing officer may grant a change in time, place or date in order to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party.

[4] *See* Section III. H.

3. The APA also requires reasonable notice to the parties of the basic law or laws[5] under which the agency contemplates its possible exercise of authority and the matters of fact and law asserted or questioned by the agency. Va. Code § 2.2-4020 B.

4. Unless previously specified by DEQ, the place at which the hearing will be held shall be determined by the hearing officer. The hearing should be held at a place that satisfies venue[6] requirements and is convenient to the parties.

5. The parties are entitled to be accompanied by and represented by counsel. Va. Code § 2.2-4020 C.

6. Unless otherwise stated, "day" refers to a calendar day. Whenever the last day specified for the filing of any document or the performance of any act falls on a day on which DEQ is officially closed, the due date will be extended to the next day that DEQ is officially open. It is presumed that DEQ mails a document on the date noted on the document, and it is presumed that a party receives an item mailed to its last known address within three (3) days of mailing. Whenever a document is to be submitted by mail, an additional three (3) days will be added to the time limit for submission.

7. Hearing officers should bear in mind that, absent an agreement to the contrary, the deadline for issuing a recommendation runs from the date the hearing was held. The APA imposes a deadline of 90 days for issuing a recommendation once a case has been heard. *See* Va. Code §§ 2.2-4021 and 2.2-4024. The decisionmaker must render a decision within thirty (30) days from the date that the agency receives the hearing officer's recommendation.

Comments

What is considered "reasonable" notice for most formal hearings depends on the circumstances and cannot be determined in a vacuum. In most cases, 30 days prior to the date scheduled for the hearing should be considered reasonable.[7] However, an agency's governing law or circumstances may indicate a shorter period, such as a hearing following the issuance of an emergency order.

The hearing officer should be as flexible as possible in scheduling hearings.

B. EXCHANGE OF INFORMATION

1. The Administrative Process Act ("APA") does not authorize discovery proceedings; however, there are certain procedures available to procure relevant information by subpoena. *See* II.D.; Va. Code § 2.2-4022.

[5]Under the APA, the basic law "means provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases or containing procedural requirements therefor." Va. Code § 2.2-4001.

[6] *See* Va. Code § 2.2-4003.

[7] *See* Procedural Rule No. 1 (9 VAC 25-230-100 to 9 VAC 25-230-180), regarding requirements for formal hearings with respect to a permit or arising from public hearing procedures outlined therein.

2. The hearing officer can prevent surprises and ensure that the hearing operates smoothly by requiring all parties to exchange the information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be entered into evidence. The hearing officer may also require that copies of all such documents be sent to him or her in order to prepare for the hearing. A copy of any document submitted to the hearing officer must be provided to all parties. The hearing officer should set a date for the exchange of information that will provide the parties with adequate time to prepare for the hearing and object to admissibility of evidence. The hearing officer may grant an extension of time for the exchange of information upon the showing of good cause. To ensure compliance, the hearing officer should advise the parties that they may not call any witnesses or enter any evidence not exchanged beforehand.

3. A party may file an objection to the admissibility of documentary evidence. It is recommended that any objections be filed within seven (7) days of the identification or submission of the documentary evidence and that the hearing officer rule on the objections prior to the hearing.

4. When it is desirable to have an advance written exchange of confidential or proprietary information, the hearing officer can use safeguards to ensure confidentiality in accordance with Virginia law.

C. PRE-HEARING CONFERENCES AND STATEMENTS

1. The hearing officer should schedule a pre-hearing conference. DEQ recommends that a pre-hearing conference be held within 10 days of accepting a case assignment. The pre-hearing conference is to be scheduled with due regard for the convenience of all parties, and should allow reasonable notice of the time and purpose of the conference to all parties. The pre-hearing conference may be held by telephone. Among the topics that should be included in a pre-hearing conference are:

    a. Identification, clarification and limitation of the issues;
    b. Explanation of procedures, establishment of dates and deadlines (i.e., submission of documents), and explanation of the roles of the parties, representatives, and hearing officer;
    c. Stipulations and admissions of fact and of the content and authenticity of documents;
    d. Exchange of witness lists;
    e. Discussion of confidential business information, if applicable;
    f. Procedures for written testimony, if applicable;
    g. The estimated time required for presentation of the case;
    h. Extent of settlement negotiations and exploration of the possibility of settlement; and
    i. Such other matters as shall promote the orderly and prompt conduct of the hearing.

2. A party who fails after proper notice to attend a pre-hearing conference should be notified of any rulings made during the conference and provided the opportunity to object.

3. A hearing officer should require all parties to prepare pre-hearing statements at a time and in a manner established by the hearing officer. DEQ recommends that the pre-hearing statement should be in the form of proposed findings of fact and conclusions of law and submitted no less than 14 days prior to the hearing. Among the topics to be included in a pre-hearing statement are:

   a. Issues involved in the case;
   b. Burden of proof;
   c. Stipulated facts (including a statement that the parties have communicated in a good faith effort to reach stipulations);
   d. Facts in dispute;
   e. A list of witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
   f. A brief statement of applicable law;
   g. The conclusion to be drawn.

4. The hearing officer may require the parties to file any pre-hearing motions at the same time as the pre-hearing statement, or at such other time as determined by the hearing officer.

5. Early, informal resolution of disputes is encouraged; however, the hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions should not be made a part of the record. Upon request of both parties, the hearing should be re-scheduled to allow the parties to pursue alternative dispute resolution.

Comment

After the pre-hearing conference, the hearing officer should summarize the conference and any agreements reached and mail this summary to all parties.

D. SUBPOENAS

1. The APA provides that "[t]he agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence." Va. Code § 2.2-4022. The APA also provides that "[d]epositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefore may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings." *See id.*

2. Except as addressed below, hearing officers are not presumed to have subpoena power. If a party requests a subpoena, the hearing officer should prepare the subpoena and forward the subpoena to the Director of DEQ. The Director or his or her designee will determine

whether the subpoena will be issued based on the relevance and admissibility of the evidence. *See id.*

3. However, with respect to water permitting appeals, 9 VAC 25-230-150 provides that the hearing officer has the power to issue subpoenas.

4. Any person who is subpoenaed may petition the Director or hearing officer to quash or modify the subpoena. In order to quash or modify a subpoena, the petitioner must affirmatively show that the evidence sought is irrelevant or inadmissible. If a party refuses to comply with a subpoena, the hearing officer should ask DEQ to procure enforcement from the circuit court. The appropriate circuit court is determined by Va. Code § 2.2-4003.

Comment

The statutory right to a subpoena duces tecum is not unlimited. Va. Code § 2.2-4022 creates a right for the parties to subpoena only evidence that is relevant and admissible as evidence in the administrative proceeding. *See State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 70 (1992).

E. EX PARTE COMMUNICATIONS

1. In order to ensure an impartial and fair proceeding, ex parte communications with any party, counsel, or other interested person should be avoided from the outset. If intervention is available under applicable law or regulations, the hearing officer should schedule a conference to address the matter.

2. In the event that a third party approaches the hearing officer regarding becoming a party to the proceeding, the hearing officer must determine whether intervention is available under applicable law or regulations. If intervention is available, the hearing officer should schedule a conference with the parties to the hearing and the third party.

3. Upon receiving an ex parte communication, the hearing officer should promptly make note of that communication for the record and bring it to the attention of all the parties involved. All parties should be afforded adequate opportunity to comment on the record regarding the communication.

Comment

Communications between the hearing officer and one party without the presence of the other party are always suspect. Some ex parte communications are innocent in the sense that the person approaching the hearing officer is unaware that this action is improper. When such an incident occurs, the hearing officer should prepare a written memorandum describing the communication and file it in the record. Some communications may not be related to the merits of the case, but still generate controversy. For example, although a request for a postponement is not about the merits of the case, the request should not be granted without consulting the other parties. It is usually best to do one's utmost to remove any doubt about the

propriety of the matter. If the hearing officer believes the communication has no bearing on the case, it does not need to be recorded. However, these are rare instances, reserved for telephone calls confirming the date of a hearing and the like, and a hearing officer should err on the side of recording every communication to prevent any appearance of impropriety.

III. THE HEARING

A. FAILURE TO ATTEND

1. In the absence of a party who, after proper notice and without good cause, fails to attend the hearing, the hearing officer may proceed with the hearing and render a recommendation. A hearing officer may briefly delay the hearing while trying to locate an absent party.

2. The hearing officer may, under extraordinary circumstances, recommend to the Director of DEQ that a hearing be reconvened. A party failing to attend a scheduled hearing should contact the hearing officer as immediately as possible to explain the reason for the party's absence. A determination of extraordinary circumstances should not be made ex parte. It is within the discretion of the Director of DEQ to determine whether to reconvene a hearing in which evidence has been presented.

3. In the event that the absent party asserts it did not receive notice of the hearing, the hearing officer should make a determination of the sufficiency of the notice provided by DEQ.

B. CONTINUANCES

At the discretion of the hearing officer, the parties may agree to re-schedule a hearing or to continue a hearing after the hearing has commenced. The hearing officer should be mindful of any statutory or regulatory timeframes. A continuance may be conditioned upon an agreement to postpone the due date for the hearing officer's recommendation. If a continuance is granted, the hearing should be re-scheduled or continued to a time and place acceptable to all parties.

C. CONDUCT OF THE HEARING

1. The hearing officer will introduce the case and make whatever introductory comments he or she deems appropriate. Counsel and parties appearing *pro* se shall at all times conduct themselves with dignity and respect for witnesses, opposing counsel, agency representatives and the hearing officer. The hearing officer is expected to promote and maintain decorum at all times.

2. The party with the burden of proof ("the proponent") will make an opening statement, which will be followed by the opposing party's opening statement.

   Generally, the standard of proof in administrative hearings is a preponderance of the evidence. In enforcement proceedings, DEQ bears the burden of proof. In a permitting appeal, the Petitioner bears the burden of proof.

3. The proponent will then present its case. Witnesses shall be placed under oath prior to rendering testimony. After the proponent has completed its case, the opposing party will present its case.

4. Each party will be allowed to make a closing argument at the end of the hearing. The proponent will speak first. A party may waive a closing argument and rely on written findings of fact and conclusions of law in lieu thereof.

D. EVIDENCE

1. The APA provides that the parties are entitled to submit oral and documentary evidence and rebuttal proofs and to conduct such cross-examination as may elicit a full and fair disclosure of the facts. The hearing officer may receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination and rule upon offers of proof. Va. Code § 2.2-4020 C.

2. Formal rules of evidence do not apply to administrative hearings, and evidence which would not be admissible in a court may be admitted and considered by the hearing officer. The Virginia Supreme Court has stated that the rules of evidence are relaxed in administrative proceedings and that the findings of administrative agencies will not be reversed solely because evidence was received which would have been inadmissible in court[8]. Admission of hearsay evidence is not, in and of itself, error, if the decision is not based solely on uncorroborated hearsay.[9] Unless a statute or agency regulation requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

3. A foundation must be laid for documentary evidence and such evidence must be authenticated by the custodian of the record or by a witness who can testify that the document is genuine. Documentary evidence should be marked for identification and the exhibit number referred to whenever the document is mentioned.

4. The hearing officer may direct that written evidence be orally summarized, but written testimony should not otherwise be read aloud except under extraordinary circumstances as determined by the hearing officer. If the hearing officer elects to allow the written statement of a witness to be admitted into the record, the hearing officer should direct the parties to exchange all written statements in a reasonable time before the hearing. Prior exchange of written statements allows parties to subpoena those submitting the statements for cross-examination, or to object to the introduction of the written statement.

Comments

The probative weight of hearsay evidence is left to the hearing officer's discretion.

[8] *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 270, 308 S.E. 2d 123, 126 (1983).
[9] *Williams v. Fuqua*, 199 Va. 709, 101 S.E. 2d 562 (1958).

In order to address comparability or credibility issues, the hearing officer may wish to establish procedures for the submission of written testimony prior to the hearing. Preparation and exchange of written statements can be very beneficial, especially in complex cases. In proceedings where written statements are involved, the hearing officer should require such information to be exchanged as part of the pre-hearing development of a case in order to allow parties an opportunity to subpoena witnesses for cross-examination. However, for credibility and cross-examination purposes, it is always preferable that a witness be present and testify at a hearing. The probative weight of a written statement is left to the hearing officer's discretion.

E. EXPERTS

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the hearing officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing officers are not bound by expert opinions presented to them, and it is up to the hearing officer to weigh the credibility of expert testimonies.

Comment

Information about expert witnesses should be exchanged during the pre-hearing exchange of information described in Section II. C.

F. THE HEARING RECORD AND TRANSCRIPT

1. The record usually consists of:

    a. A letter of appointment.
    b. DEQ's Notice of Formal Hearing or the named party's request for a hearing.
    c. Any rulings by the agency.
    d. Notices of all proceedings.
    e. Any pre-hearing orders.
    f. Any motions, briefs, pleadings, petitions and intermediate rulings.
    g. All evidence produced, whether admitted or rejected.
    h. A statement of all matters officially noticed.
    i. Proffers of proof and objections and rulings thereon.
    j. Proposed findings, requested orders and exceptions.
    k. A transcript or recording of the hearing.
    l. Any initial order, final order or order on reconsideration.
    m. Matters placed on the record after an ex parte communication.
    n. Agency submissions to the hearing officer.

2. The record should be organized, indexed, tabbed, or otherwise assembled so that easy reference to the record can be made and readily cited.

The hearing officer's responsibility for assembling and preserving the record begins on acceptance of a case assignment. It continues for so long as it takes the hearing officer to submit a recommendation.

Comment

In most cases, DEQ will retain a court reporter who will provide the hearing officer with a copy of the hearing transcript. Each party shall bear the cost of its copy of the transcript. It is the hearing officer's responsibility to ensure that either a transcript or a recording of the hearing is made. If the hearing is to be tape-recorded, the hearing officer should test the equipment before the hearing to ensure that it is operating correctly and that the recording will be audible.

G. OPEN MEETINGS AND THE NEWS MEDIA

1. In the absence of a statute or agency regulation to the contrary, DEQ hearings are open to the public.

2. During the course of a hearing, the hearing officer may be called upon to make decisions whether to sequester witnesses or to limit the distribution of evidence. The hearing officer should take measures to protect confidential business information in accordance with Virginia law.

3. The hearing officer has a duty to control media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.

H. RECUSAL/DISQUALIFICATION

1. The APA requires that a hearing officer who may be unable to act fairly and impartially must withdraw from the case. Va. Code § 2.2-4024 C.

2. Any party may request the disqualification of the hearing officer by filing an affidavit with the appointing authority promptly upon discovering a reason for disqualification.

3. Possible reasons for recusal or disqualification include, but are not limited to:

    a. Conflict of interest, including:
        i. having a financial interest in the outcome of the case;
        ii. hearing a case in which the hearing officer's firm represents one of the parties involved;
        iii. hearing a case in which a member of the hearing officer's family is employed by one of the parties involved;
    b. Bias toward or against one of the parties involved;
    c. Prejudgment of one or more of the issues involved; or

d. Disability[10].

Comments

An impartial decision-maker is essential. While no one is totally free from all possible forms of bias or prejudice, the hearing officer must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite a hearing officer's subjective good faith, a hearing officer who has a financial interest in the outcome of the case should not render a recommendation as to that case.

When a hearing officer questions whether or not to recuse himself or herself, it is preferable to choose recusal. If grounds for finding bias truly exist, then recusal is preferable to risking a later reversal and jeopardizing the validity of the whole proceeding. A hearing officer's unreasonable failure to recuse himself or herself may lead to permanent removal from the Supreme Court list of hearing officers. Requests to remove a hearing officer from a case should be made before the hearing.

IV. POST-HEARING ISSUES

A. DURATION OF A HEARING OFFICER'S AUTHORITY

1. A hearing officer's authority begins with acceptance of the case assignment.

2. Subject to statute or agency regulation, a hearing officer has authority over a proceeding until:

    a. the agency revokes such authority, or
    b. a recommendation has been rendered and the appropriate period for appeal or reconsideration has expired.

B. POST-HEARING SUBMISSIONS

The APA provides that the parties may submit proposed findings and conclusions. *See* Va. Code § 2.2-4020 D. The parties may also file other documents with the hearing officer, including corrections to the transcript, memorandum of law in support of proposed conclusions of law, and a reply to the opposition's proposed findings and conclusions. The parties are encouraged to submit their findings in written and electronic form.

The hearing officer determines the date such filings are due, which is usually done at the conclusion of the formal hearing.

[10] *See* Va. Code § 2.2-4021D.

V. THE RECOMMENDATION

The hearing officer's recommendation should include findings of fact and conclusions of law on all material issues of fact and law presented on the record, including specific citations to the applicable portions of the record. The findings of fact should be linked to the testimony and give a basis for the conclusion drawn.

Hearing officers should make it clear in cases in which they give recommendations that the recommendations are specifically referenced as such.

1. In reaching a recommendation, the hearing officer ought to consider the whole record, and refer frequently to specific evidence in the record in the recommendation.

2. The recommendation should be written as soon after the conclusion of the hearing as possible, while all evidence and testimony are fresh in the hearing officer's mind.

3. The hearing officer should submit a recommendation within the statutory timeframe, unless otherwise requested by DEQ in the hearing officer's engagement letter[11].

4. The hearing officer should submit the recommendation to DEQ in written and electronic form and deliver the record as directed by the agency.

5. Upon receipt of the hearing officer's recommendation, DEQ will notify all parties in writing that any written exceptions to the hearing officer's recommendation should be filed within seven (7) days of receipt of the notice that exceptions are due, or such other time as stated therein.

The final decision will be issued by the Director of DEQ, the Director's designee, or the applicable Board and will include:

a. An order as to the final disposition of the case, including relief, if appropriate;

b. The date upon which the decision will become effective, subject to further appeal;

c. A statement of the right to appeal, including any deadlines for appeal under Rule 2A:2.

DEQ mails copies of all case decisions and orders to the parties, by certified mail, return receipt requested. A copy will be sent to the party's attorney via regular mail.

[11] For example, a hearing held following the issuance of an emergency order.