

## **CHAPTER SIX**

### **APA ADVERSARIAL PROCEEDINGS**

The Virginia Administrative Process Act (“APA”), Code §§ 9-6.14:1 *et seq.*, provides for two types of proceedings that agencies can use to make case decisions. They are: (1) Informal Factfindings as provided in Code § 9-6.14:11 (“:11”) and (2) Formal Hearings as provided in Code § 9-6.14:12 (“:12”). The DEQ statute at §10.1-1186 also provides for the issuance of special orders by the Director of DEQ pursuant to a :11 Informal Factfinding.

The following procedures address how to prepare for and conduct these proceedings. At all times, the APA must be consulted to ensure full compliance with the APA. In addition, the Regional Offices are to consult with the Office of Enforcement Coordination and the Office of the Attorney General in pursuing one of these enforcement actions.

#### **I. INFORMAL FACTFINDINGS AND 1186 SPECIAL ORDERS**

After an NOV is issued, the enforcement staff may decide to hold an Informal Factfinding proceeding in accordance with § 9-6.14:11 of the APA to make a case decision regarding a contested issue. The intent of the adversarial Informal Factfinding proceeding is to make a required or necessary case decision without holding a :12 Formal Hearing and, in some cases, to impose an order requiring a facility to take certain actions or refrain from taking certain actions. These case decisions and orders are not rendered and entered into by consent. Unlike Consent Orders that may include agreed-to civil charges, orders issued pursuant to an adversarial :11 proceeding cannot include civil charges or penalties unless the proceeding is a § 10.1-1186 Special Order proceeding.

There are two type of adversarial :11 proceedings available to the Department which essentially differ only in the remedies available to address the noncompliance situation. The first type is the standard Informal Factfinding proceeding provided for in § 9-6.14:11 and the second is a :11 proceeding that results in the issuance of a “1186 Special Order” as provided in § 10.1-1186 of the Code. The other difference between the two is that 1186 Special Orders are orders of the Director, whereas the case decision and order issued pursuant to a standard :11 proceeding are issued on behalf of the particular Board. For the most part, the following procedures apply to both types of proceedings with differences noted where necessary.

#### **A. STANDARD INFORMAL FACTFINDING PROCEEDINGS**

The purpose of the standard Informal Factfinding proceeding varies from media to media. Under both the Water and Waste Laws, Informal Factfindings can be used only to make a case decision; they cannot be used to issue orders directing a facility to take an action or refrain from acting. For example, an Informal Factfinding proceeding can be used to determine whether a facility is in fact an owner or operator liable for the correction of a non-compliant situation.

Under the Air Law, however, orders directing a facility to act or refrain from acting are permitted. Thus, an order can be issued on behalf of the Air Board ordering a source to undertake corrective action.

## **B. 1186 SPECIAL ORDER PROCEEDINGS**

Section 10.1-1186(10) of the Code authorizes the Director to issue “1186 Special Orders” following an informal :11 proceeding. An 1186 Special Order is “an administrative order issued to any party that has a stated duration of not more than twelve months and that may impose a civil penalty of no more than \$10,000.” Only the Director can impose civil penalties in an 1186 Special Order, and that authority by law cannot be delegated.

This enforcement action should be pursued only if (i) the relief sought can be achieved within twelve months and (ii) a maximum penalty of \$10,000 is adequate.

As provided in § 10.1-1186(10), 1186 Special Orders may be issued to any person to comply with:

- The provisions of any law administered by the Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board (collectively, the “Boards”), the Director, or the Department.
- Any condition of a permit or certification.
- Any regulation of the Boards.
- Any case decision of the Boards or the Director.

## **C. PRE-PROCEEDING MATTERS**

### **1. Statutory Rights of the Parties**

Code § 9-6.14:11(A) provides that parties to a :11 informal proceeding have the right to:

- Have reasonable notice of the conference;
- Appear in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof;
- Have notice of any contrary fact, basis or information in the possession of the agency which can be relied upon in making an adverse decision;
- Receive a prompt decision;
- Be informed, briefly and generally in writing, of any factual or procedural basis for an adverse decision; and
- Be notified that DEQ intends to consider public data, documents or information.

## **2. The Notice of the Proceeding**

The Notice of the proceeding lays out the basis for the entire case against a party, which forces the staff to put the case down on paper and think through whether there is sufficient evidence to support and prove all of the alleged violations. Where appropriate, the Notice can be combined with the NOV if the decision to hold the :11 proceeding is made at that stage of enforcement.

The Notice must be in writing and contain:

- A recitation of the rights of the party found in § 9-6.14:11 and set forth above.
- The date and time set for the proceeding and the place where it will be held.
- The nature of the proceeding. For example, is the proceeding being held to decide whether or not solid waste has been illegally disposed of? Is it being held with the intent to issue an 1186 Special Order containing penalties?
- The basic law or laws under which the agency intends to exercise its authority. If the Department intends to seek an 1186 Special Order, § 10.1-1186 needs to be cited.
- The facts and pertinent law or regulations implicated for each alleged violation.
- What type of remedy will be sought, to include an 1186 Special Order and civil penalties if applicable.
- Any public data, document and information upon which the agency plans to rely, as provided in § 9-6.14:11(B).

The Notice must be delivered to the named party by one of the following methods: (i) by certified mail, return receipt requested; (ii) by hand-delivery; (iii) by express mail; (iv) or by service of process. Although not provided in the statute, it is recommended that the Notice be sent out 30 days before the proceeding is held. The parties can also agree to a date to be included in the Notice.

## **3. Presiding Officer**

The :11 proceeding may be conducted before "the agency or its subordinates" or before a "Hearing Officer" as defined in Code § 9-6.14:14.1. When a subordinate is used, the appropriate Regional Director appoints the Presiding Officer from among the Department staff.

The Presiding Officer should have some knowledge of the laws and regulations involved in the case. No one who has been substantively involved with the matter may serve as a Presiding Officer or serve in a supervisory role to the Presiding Officer. Mere knowledge of the case or peripheral involvement would not disqualify an employee from acting in this role. Where appropriate, the Presiding Officer may be appointed from the Central Office or another Regional Office.

## **D. CONDUCTING THE PROCEEDING**

The proceeding is conducted to ensure that each party has a fair and adequate opportunity to present data, views, and argument. Section 9-6.14:11 does not provide for cross examination of witnesses. The presiding officer, however, is free to ask any questions necessary to make sure the record is complete and sufficient to base a decision.

### **1. Venue**

The proceeding is conducted in the county or city where the respondent either (i) resides; (ii) regularly or systematically conducts affairs or business activity; (iii) has any property affected by the administrative action; (iv) if the preceding do not apply, in the county or city where the violations are alleged to have occurred; or (v) in another location if all parties agree.

The Regional Office will provide adequate equipment and adequate rooms in which to conduct the proceeding and to accommodate potential witnesses.

### **2. Recording the Proceeding**

Although a transcript is not required by law, it is recommended that a court reporter or other reliable means, such as audio tapes, be used. An accurate record of the proceedings is essential if the case is appealed. The Presiding Officer must also prepare a summary of the proceeding to be included in the Recommendation Packet discussed below.

## **E. POST-PROCEEDING MATTERS**

### **1. Time Restrictions on Rendering Case Decisions**

Where an agency subordinate (*i.e.*, Presiding Officer) is used to recommend a decision, the agency decisionmaker must render the decision within 90 days of the Informal Factfinding or a later date as agreed by the party and the agency. Code § 9-6.14:11(D). This includes the time taken by the Presiding Officer to make a recommendation and by the ultimate decisionmaker to issue a decision and order. The APA must be consulted for the pertinent time restriction when a Hearing Officer is used.

All personnel must recognize that the case may automatically be decided against the agency if the time frames in the APA are not followed. If the agency does not make a decision within 90 days, the party may notify the agency in writing that a decision is due. Code § 9-6.14:11(D). If the agency does not make the decision within 30 days of receiving the notice, the decision is deemed in favor of the named party (*i.e.*, default decision). Provisions are made in the APA for situations where the agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency.

The APA provision for a default decision, noted above, does not apply to the following case decisions:

- Before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act. Code § 9-6.14:11(D).
- Before the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act. Code § 9-6.14:11(D).

In some cases, the parties may wish to submit proposed findings of fact and conclusions of law, briefs, or other post-proceeding documents. If they do, the parties should agree in writing that the time limits for rendering a decision should not begin to run until all such post-proceeding activities are completed. Because the law on this issue is uncertain, written assent to the later starting of the 90-day period is essential.

## **2. Recommendation of the Presiding Officer**

At the conclusion of the proceeding, the Presiding Officer prepares a Recommendation Packet for the ultimate decisionmaker's consideration. The recommendation itself must contain an accurate summary of the issues to include the pertinent facts and the relevant law and should be put in the form of Findings of Fact and Conclusions of Law. The Presiding Officer's recommended action would be included in the Conclusion section of the document. The packet must also contain the complete record of the proceeding, to include all submittals by the parties. It may also include a draft order or 1186 Special Order if recommended.

In order to give the Director adequate time to make a decision within the required 90 days, the Presiding Officer must finalize the recommendation and Findings of Fact and Conclusions of Law no later than 45 days after concluding the proceeding and forward the complete Recommendation Packet to the final decisionmaker during the same time.

## **3. The Case Decision and Order**

The named party to the proceeding is entitled to be informed briefly and generally in writing of the factual or procedural basis for an adverse decision in any case. Code § 9-6.14:11(A)(v). If the decision is in the favor of the named party, the case decision need only indicate that fact. An adverse decision, however, must contain:

- The legal authority for the agency action.
- A recitation of the facts that form the basis for the decision.
- A recitation of the procedural events leading to the informal proceeding.
- The factual basis for the decision, including any statements as to the credibility of witnesses.
- The conclusion as to what violations if any, have occurred.
- A statement when it is effective.
- The party's rights to appeal pursuant to Virginia Supreme Court Rule 2A:2. See section below on Rule 2A:2: Party's Rights of Appeal.

- The Order:
  - The relief must be within that authorized by the basic law such as compliance with regulations, cessation of unlawful discharge, etc.
  - The relief must be within that authorized by regulations.
  - The relief must make sense in the factual setting.
  - The relief must be possible.
  - Signature of the responsible decisionmaker. All USO's containing civil penalties can be signed only by the Director of DEQ.

The ultimate decisionmaker will approve, disapprove or modify the recommendations of the Presiding Officer within the remaining days provided by statute. Where appropriate the decisionmaker can adopt the Department's or the opposing side's Findings of Fact and Conclusions of Law. All proposed case decision and orders and 1186 Special Orders must be reviewed by the Central Office staff and the Attorney General's Office before they are finalized. Thus, it is important to contact these Offices early on and discuss the course of action being contemplated.

#### **4. Rule 2A:2: Party's Rights of Appeal**

The following language must be included in any final agency decision made by a Board, the Director, or the Department pursuant to either an adversarial informal proceeding, Code § 10.1-1186 special order proceeding, or a formal hearing:

As provided by Rule 2A:2 of the Rules of the Supreme Court of Virginia, you have 30 days from the date of service of this decision (the date you actually received this decision or the date on which it was mailed to you, whichever occurred first) within which to initiate an appeal of this decision by filing a Notice of Appeal with:

[Name], Director  
 Department of Environmental Quality  
 629 East Main Street  
 Richmond, Virginia 23219

In the event that this decision is served on you by mail, 3 days are added to that period. Refer to Part Two A of the Rules of the Supreme Court of Virginia, which describes the required contents of the Notice of Appeal and additional requirements governing appeals from the decisions of administrative agencies.

This language may be included at the end of the case decision or the order or in the cover letter to the case decision and/or order.

#### **5. Service of Case Decision and Order**

The case decision and order must be served by mail within five days of the decision being rendered unless service by another means is acknowledged by the named party in writing. All case decision and orders are to be mailed by certified mail, return receipt requested. The certified copy must always be mailed to the party even if represented by counsel.

The signed originals of the case decision and order remain in the custody of the Department, thus only copies are mailed to the named party. A copy is provided to the Central Office for management tracking purposes, and the original is retained in the Regional Office for compliance tracking. 1186 Special Orders are tracked for the same purposes using the same systems as Consent Orders and Consent Special Orders, but are considered a separate category of orders.

## **6. Appeals**

Statutes governing appeals from case decisions are provided for in each media-specific basic law.

## **II. FORMAL HEARINGS**

The basic laws governing air, water, and waste each provide that the appropriate board may issue an order to a party without that party's consent following "notice and hearing." The requirement for notice and hearing means a "Formal Hearing" in accordance with § 9-6.14:12 of the APA ("12"). A Formal Hearing is defined in § 9-6.14:12 as "the formal taking of evidence upon relevant fact issues." Formal Hearings are used whenever the basic law expressly requires that a decision be made upon or after a Formal Hearing and to issue orders. The party has a right to be represented by counsel, but may also represent him or herself. The Department may elect to use a Formal Hearing in the event that a :11 proceeding has not been conducted or where a case has not been resolved by consent. According to the APA, a :11 proceeding must be held before the Formal Hearing unless all parties agree to waive it.

A checklist of steps necessary to prepare for and hold a Formal Hearing is attached to this Chapter.

### **A. WHEN TO HOLD A FORMAL HEARING**

Situations best addressed by a Formal Hearing include those:

- When the agency seeks to revoke a permit, license, or similar grant of a right.
- When the agency seeks to require compliance with a statute, regulation, permit, certification, or case decision.
- When there is a cooperative party, and all parties want a full airing of the issues with cross examination of witnesses, heard by an impartial hearing officer who sorts through the facts and makes an independent recommendation to the agency Director.

- When pursuing persons sensitive to publicity (e.g., municipalities) and persons who are likely to comply with administrative orders.
- When required by statute, including when confirming an emergency order.
- When the agency seeks to compel corrective action under Part IV of the Virginia Solid Waste Management Regulations.

There is usually little value in holding a Formal Hearing when enforcing against a completely uncooperative party unless there is benefit in creating a record before going to court. Formal Hearings can never be held to impose civil charges or penalties because the relevant statutes do not provide for the imposition of penalties following a Formal Hearing.

## **B. PREHEARING MATTERS**

### **1. Statutory Rights of the Parties**

Code § 9-6.14:12 provides that parties to a :12 formal hearing have the right to:

- Have reasonable notice of the hearing.
- Be represented by counsel.
- Submit oral and documentary evidence and rebuttal proofs.
- Conduct such examination as may elicit a full and fair disclosure of the facts.
- Have the proceedings completed and a decision made with dispatch.
- Submit in writing for the record proposed findings and conclusions, and statements of reasons therefor
- Engage in oral argument before the fact-finder.
- Be served with the decision or the recommended decision.

### **2. The Notice**

The Formal Hearing Notice must be in writing and should always be sent by certified mail, return receipt requested. Where appropriate, the Notice can be combined with an NOV if the decision to hold the Formal Hearing is made at that stage of enforcement. The Notice must contain:

- A recitation of the rights of the party found in § 9-6.14:12 and set forth above.
- The date and time set for the proceeding and the place where it will be held.
- The nature of the proceeding. For example, is the proceeding being held to revoke a permit?



- The basic law or laws under which the agency intends to exercise its authority.
- For each alleged violation, the facts and pertinent law or regulations implicated.
- What type of remedy will be sought.

Both the State Water Control Law and the Waste Management Act require that owners be given a 30-day notice of the hearing. While not required by law, the same notice should be given for Formal Hearings conducted pursuant to the Air Pollution Control Law.

### **3. Hearing Officer**

For waste cases, Formal Hearings may be conducted by a Hearing Officer, a quorum of the Waste Board, or by the Director if the Board is not in session. For air cases, Formal Hearings may be conducted by one of the Air Board members, the Director, a staff assistant or a Hearing Officer. For water cases, Formal Hearings may be conducted by either a quorum of the Water Board at a regular or a special meeting, or by a Hearing Officer.

Code § 9-6.14:14.1 governs the use of Hearing Officers. The Executive Secretary of the Virginia Supreme Court maintains a list of all Hearing Officers who can preside over Formal Hearings. The DEQ Director must make a request to the Executive Secretary for appointment of an officer.

## **C. CONDUCTING THE PROCEEDING**

### **1. Venue**

Venue considerations are the same for Formal Hearings as for Informal Factfindings. See previous section on Informal Factfindings.

### **2. Recording the Proceeding**

In a Formal Hearing, the Hearing Officer is empowered under the APA to oversee an accurate verbatim recording of the evidence. In the Water Law, a verbatim record is required by statute. In all other cases, it is recommended that all formal Hearings be recorded in this manner, preferably by a court reporter, to ensure clarity and accuracy.

### **3. Power and Duties of the Hearing Officer**

Pursuant to Code § 9-6.14:12(C), Hearing Officers have the following powers:

- Administer oaths and affirmations.
- Receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proof, rebuttal or cross examination.

- Rule on offers of proof.
- Hold settlement conferences.
- Hold conferences to simplify the issues by consent.
- Dispose of procedural requests.
- Regulate and expedite the course of the proceeding.

## **D. POST-PROCEEDING MATTERS**

### **1. Time Restrictions on Rendering Case Decisions**

Decisions must be rendered within the timeframes required by the APA at § 9-6.14:12(G) or else the decision is deemed to be in favor of the named party (*i.e.*, default decision). The APA provision for default decision does not apply to the following case decisions:

- Before the State Water Control Board or DEQ to the extent necessary to comply with the federal Clean Water Act. Code § 9-6.14:11(D).
- Before the State Air Pollution Control Board or DEQ to the extent necessary to comply with the federal Clean Air Act. Code § 9-6.14:11(D).

### **2. Recommendation of the Hearing Officer**

For Waste and Air, the Director of the Department or the Board makes the final decision from a Formal Hearing unless the Department provides that the Hearing Officer shall make findings and an initial decision subject to reconsideration. For Water, the Board must make the final decision.

Before the final decision is rendered, several documents may be filed by the parties, including suggested findings of fact and conclusions of law, corrections to the transcript, a memorandum of law in support of proposed conclusions of law, and a reply to the opposition's proposed findings of fact and conclusions of law. Finally, in certain cases, exceptions may be filed with the Department after the Hearing Officer makes his recommendation or decision to the ultimate agency decisionmaker.

The final decision must make sufficient findings of fact necessary to support each of the conclusions of law set forth in the decision. Where appropriate, the decision can adopt either the Department's or the opposing side's findings of fact.

The final decision must state when it is effective and that it is appealable and must set forth the party's rights to appeal pursuant to Virginia Supreme Court Rule 2A:2. See Section I.E on Rule 2A:2: Party's Rights of Appeal.

### **3. Effective Dates and Service**

Waste Special Orders issued under the law are to be effective not less than 15 days after the mailing of the order. The order is to be sent certified mail. The 15-day period is counted from the date of mailing.

Air Special Orders issued under the statute are effective not less than five days after the service. The order is to be sent by certified mail, return receipt requested or may be delivered by the Board's agent. The five-day time period is counted from the date of receipt of the order.

The Water Law is silent on this provision.

#### **4. Appeals**

Statutes governing appeals from case decisions are provided for in each media-specific basic law and in the APA.

## CHECKLIST FOR FORMAL HEARINGS

The following is a checklist covering many of the tasks you will need to undertake whenever a formal hearing is contemplated and held.

### PRE-NOTICE MATTERS

- \_\_\_ Call AG's Office and let media lawyer know that you are contemplating a formal hearing and provide outline of violations and supporting facts
- \_\_\_ Decide who will conduct the hearing. Is that person authorized?
- \_\_\_ Prepare Notice of Formal Hearing
  - \_\_\_ State date, time, and place of hearing
  - \_\_\_ State nature of the case (revocation, suspension, etc.)
  - \_\_\_ State statutory and regulatory authority for taking this action
  - \_\_\_ Set forth each alleged violation by identifying statutes and regulations allegedly violated and the facts to support those alleged violations
    - \_\_\_ Include statement on the rights of the parties, that the hearing will be held pursuant to the APA, and who will be the Hearing Officer
    - \_\_\_ State who will represent the Department, and provide that person's telephone number
  - \_\_\_ Offer to discuss settlement within so many days of Notice
  - \_\_\_ Indicate copies being sent to Hearing Office and OAG
- \_\_\_ Line up your witnesses and make sure they can support your case
- \_\_\_ Call AG's Office and forward draft Notice to media lawyer; agree ready to call for a hearing officer
- \_\_\_ Call Virginia Supreme Court to get Hearing Officer appointed
- \_\_\_ Contact Hearing Officer and found out available dates
- \_\_\_ After receiving OAG's comments, finalize and send Notice **by certified mail, return receipt requested**. Copy OAG and Hearing Officer.

**PRE-HEARING MATTERS**

- \_\_\_ Prepare and mail letter and professional services contract to Hearing Officer.
- \_\_\_ Prepare and mail a proposed pre-hearing order to Hearing Officer. Copy all parties and OAG.
- \_\_\_ Prepare your case
  - \_\_\_ Organize order of presenting your case
  - \_\_\_ Identify all documents and organize as will be used to present case
  - \_\_\_ Prepare your witnesses
  - \_\_\_ Prepare opening statement
- \_\_\_ Prepare any request for production of documents, and serve
- \_\_\_ Employ a court reporter
- \_\_\_ Make sure room for hearing is adequate in size and has enough chairs and tables
- \_\_\_ Sketch out proposed findings of fact and conclusions of law
- \_\_\_ Have extra copies of statute, regulations, and any cases available
- \_\_\_ Arrange for someone to assist you at hearing (keep track of exhibits, last minute needs)
- \_\_\_ Put on case as planned, but be prepared for surprises

**HEARING**

- \_\_\_ Keep track of exhibits, make sure entered as evidence
- \_\_\_ Make sure you put in evidence (documents or oral) on each fact you need to prove
- \_\_\_ Summarize case in closing argument

**POST-HEARING MATTERS**

- \_\_\_ Prepare proposed findings of fact and conclusions of law
- \_\_\_ Prepare other post-hearing documents as necessary