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TO: Executive Staff, Division and Regional Directors

FROM: Hank Williams 

RE: Organization and Delegation Memorandum #85-06
Development and Use of Draft Permit Conditions in Permit Hearings

Background

Since the initiation of the Department's Hearing Reform Program in 1980, there has been a concerted effort on the part of Department Staff to narrow the issues which must be adjudicated in the Department's permit hearings. These efforts have been successful in shortening the length of adjudicatory hearings as well as improving the quality of the environmental record relied upon for decision making.

The Department's Permit Hearing Procedures, 6 NYCRR Part 624, utilize the pre-hearing issues conference as the mechanism to focus the concerns of the parties to the proceeding and thus scope the issues for adjudication. This conference is frequently the first formal opportunity for the applicant, the Department Staff and intervening parties to the proceeding to meet together to discuss their concerns about a proposed project. Normally, the Department Staff will have met with an applicant in advance of the conference to discuss proposed modifications to the project or proposed permit conditions to bring the project into conformity with the Department's regulatory standards and criteria. However, intervening parties are less likely to have studied the project in detail and thus often express their objections to issuance of a permit on the basis of more generalized environmental concerns. One of the functions of the conference is to translate the general concerns into specific proposals for project modification or permit conditions which address these concerns. The Administrative Law Judge and Department Staff each play a critical role in this educational process. Where an applicant agrees to the Department's proposed permit conditions and the intervening parties agree that their concerns are satisfied, the need to actually proceed with the adjudicatory hearing may be obviated. Even if all issues cannot be resolved, the adjudicatory hearing then need only address the remaining issues in dispute.

Where the Department Staff's draft permit conditions are made available to the intervening parties in advance of the permit hearing, many, if not all, of the intervenors' concerns may be satisfactorily resolved. Intervenors can play an important role in reducing a project's adverse environmental impacts by helping to shape the proposed permit conditions. Moreover, an intervenor's review of proposed permit conditions may reveal matters which have been inadvertently omitted or excluded on the basis of misinformation. However, care must be taken to explain to intervenors the preliminary or tentative nature of the proposed conditions, in order to avoid the misinterpretation that the Department "has made its decision" on the application or that different or additional permit conditions are precluded from consideration. The Department Staff has an obligation to modify its proposed permit conditions when new or different information reveals that such changes are necessary to assure a project's compliance with the environmental laws.

Development of draft permit conditions can assist the Department's environmental assessment of a project's impacts and help structure the case to be presented by the Department Staff. The earlier in the proceeding this effort can be initiated, the more time that is available for preparation of testimony, as well as meaningful negotiations with the other parties.

From an applicant's perspective, the availability of proposed permit conditions provides a true picture of its project's scope and cost, as modified to meet statutory and regulatory requirements. The early availability of proposed permit conditions enables an applicant to assess whether it has a basis to challenge any of the conditions as being unreasonable or whether such conditions would make a project infeasible.

Use of Draft Permit Conditions

Effective immediately, Department Staff is directed to prepare draft permit conditions for all permits which are or likely to be the subject of a Department permit hearing. Except in the circumstances outlined below, the draft permit conditions should be available for public review by the time of publication of the notice of hearing or, at the latest, by the start of the pre-hearing issues conference. Where draft permit conditions are available, the notice of hearing should reflect their availability for public review. For certain federally delegated permit programs, such as SPDES, RCRA and PSD, the development and availability of draft permit conditions is already required as part of the initial completeness determination.

The drafting of permit conditions is frequently a multi-disciplinary process calling for the expertise of several units often in both the regional and central office. Accordingly, cooperation and team work is essential if proposed conditions are to be produced in a timely manner. The Regional Permit Administrator or if appointed, the project manager and the project attorney have overall responsibility for preparing the draft permit conditions and assuring their timely availability for permit hearings. Program staff (both regional and central office) are likely to be called upon to actually draft the language of the conditions. Accordingly, program staff must complete their work in a timely manner so that the conditions are available for review by the project attorney and the project manager prior to their release for public review in advance of the scheduled hearing. The project attorney (whether Regional Attorney or other counsel, as assigned) is to assure the draft conditions satisfy all substantive environmental legal requirements, including SEQRA and are of sufficient clarity and precision to be enforceable in court.

When public comments are received on an application they should be considered when drafting permit conditions. Creativity in fashioning reasonable conditions which address the public's substantive environmental concerns is encouraged. The Environmental Conservation Law ("ECL") provides ample authority to attach reasonable permit conditions which mitigate adverse impacts of a project for all permit programs. In addition, ECL Article 8, SEQRA, and ECL §3-0301.1(b) (cumulative impact) provide additional authority to impose conditions which address a broad range of project impacts. Regardless of the substantive authority relied upon, all conditions must be reasonable and necessary to assure a project's compliance with regulatory requirements.

In certain cases, the information presented by an applicant may not provide a sufficient technical basis to prepare proposed conditions to bring a project into conformance with all statutory and regulatory requirements. In such cases Department Staff should attempt to formulate proposed conditions to the extent possible, reserving their right to modify or supplement the conditions based upon the receipt of additional information. The nature of the defect should be clearly explained to the applicant.

In exceptional cases, the Department Staff may believe that a particular project should not be approved under any circumstances. When developing a strategy to assert this position, Department Staff should give consideration to the possibility that its position may not ultimately prevail on the merits and that a permit might nevertheless be issued. In the event of such a circumstance, the Administrative Law Judge and Commissioner would benefit from the suggestions of Department

Staff regarding appropriate permit conditions to minimize adverse environmental impacts to the maximum extent practical.

Deputy Commissioner and General Counsel, Janice Corr, and Director of the Division of Regulatory Affairs, Louis Concra, are directed to examine existing procedures regarding Department Staff participation in permit hearings and institute such changes as are necessary to expeditiously implement this directive. Program Division Directors are directed to assist Louis Concra in the development of comprehensive lists of special permit conditions which can be made available to regional regulatory staffs in their review of projects.