

The Prehearing Exchange

The Department's Rules of Practice require a permit applicant to provide certain information to the hearing officer and to the other parties in advance of the hearing. To promote a fair and open process, the hearing officer is authorized to require all parties to provide similar information in advance. Therefore, the prehearing exchange of information typically involves all parties, including DEEP staff. These guidelines are intended to assist all parties in preparing the prehearing exchange of information and to provide direction on how to comply procedurally with prehearing exchange requirements.

What is required?

On a date set by the hearing officer (typically three to five weeks prior to the hearing), all the parties, including DEEP staff, must file the following information with the hearing officer and with the other parties or intervenors. (Staff will therefore receive this information from the other parties.)

- (1) A *list of the legal issues* the party believes must be resolved;
- (2) A *list of proposed witnesses* with a summary of their proposed testimony, and, for each expert witness, a statement of credentials to support that witness' qualifications as an expert on the subject on which he or she will be testifying (e.g., a résumé or CV);
- (3) A *list of exhibits* that will be offered at the hearing; and
- (4) If directed by the hearing officer, the *originals of all exhibits* marked with a yellow exhibit label and numbered (i.e., DEEP-1, DEEP-2, etc.).

The information in items (1) – (3) is best presented in a memo format. It is strongly recommended that parties provide the lists of witnesses and exhibits on separate pages in case those lists need to be updated as the hearing progresses. Lists of exhibits should also describe exhibits with enough detail to sufficiently identify that exhibit. (E.g. "October 3, 2010 letter from John Smith to DEEP re: Flooding Concerns," not "October 3, 2010 letter.")

The list of exhibits should include any documents that the party intends to refer to during the course of the evidentiary hearing. (It may be helpful to think in terms of "what the hearing officer will need to make his or her decision," such as a report to show compliance with a statutory criterion.) It is not necessary to include current statutes, regulations or cases in a list of exhibits. The parties, especially the applicant and DEEP staff should have discussions before submitting exhibit lists to avoid unnecessary duplicates.

While the Office of Adjudications cannot prevent a party from offering an exhibit for inclusion in the record, the following submittals are recommended:

1. DEEP Staff should present as part of its exhibits:

- a. the permit application (unless a version acceptable to staff is provided by the applicant),
 - b. the proposed draft permit,
 - c. the notice of tentative determination and accompanying evidence of publication,
 - d. the notice of hearing and accompanying evidence of publication,
 - e. any staff-generated memos or letters to the applicant regarding the application review, and
 - f. any submissions from the applicant that supplement/correct portions of the initial application in response to staff's questions/comments.
2. The applicant should submit:
- a. any information collected or otherwise received in response to comments that arise during the comment period on the notice of tentative determination
 - b. any additional reports or studies generated by experts for the purpose of the hearing.
3. The intervening party (if in opposition) should submit:
- a. any independent analysis of the application or of resources allegedly impacted by the proposed activity
 - b. any scientific evidence supporting its allegations.

All documents offered as exhibits are not necessarily admitted into evidence. A hearing officer will not admit evidence that is irrelevant, immaterial, unduly repetitious, untrustworthy, or unreliable.

Pre-filed testimony

Recent legislation (P.A. 10-158) requires the utilization of pre-filed testimony where it would expedite the hearing process or otherwise improve efficiency. The hearing officer may require the pre-hearing submission of direct testimony by all parties in a narrative or other acceptable format. This testimony will likely be required as part of the pre-hearing exchange and should be labeled with an exhibit number.

Electronic Service of Pre-Hearing Exchange Information

The Office of Adjudications has adopted a [policy](#) for the electronic service of documents.

In accordance with this policy, the parties to a matter may serve other parties with their pre-hearing exchange information via e-mail to comply with the service deadline. This includes the exchange of exhibits. The ability to serve other parties with this information electronically does not excuse a party from providing these documents in their original format to the hearing officer or as copies to the other parties. The hearing officer will typically permit submission of paper copies of the proposed exhibits at the Pre-Hearing Conference.

Failure to participate in Pre-Hearing Exchange

Any party that fails to provide a list of exhibits, a list of witnesses, witness credentials, or actual exhibits by the deadline imposed by the hearing officer may not be permitted to present direct evidence or portions thereof during the course of the hearing unless good cause is shown why this information was not offered in advance. Intervening in a matter after the previously scheduled prehearing exchange deadline may prevent such an intervening party from presenting direct evidence. The Rules of Practice provide that an intervening party takes the record as they find it. Any individual or entity planning to intervene should plan accordingly to comply with any announced deadlines.