



Adirondack Park Agency

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Guide to APA Enforcement Hearings

What is an enforcement hearing?

An enforcement hearing is a means by which APA can resolve alleged violations of the Freshwater Wetlands Act (Environmental Conservation Law Article 24). The enforcement hearing provides a record of testimony and exhibits that the APA Board can rely on to determine whether alleged violations have occurred and, if so, what an appropriate disposition of those violations should be.

How are these hearings conducted?

Enforcement hearings are conducted according to procedures provided in Subpart 581-4 of APA's rules located in Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Who participates in an enforcement hearing?

APA staff and one or more persons who are charged with violations are the parties in an APA enforcement hearing. APA staff present the alleged violations. Persons who are charged with violations are called "Respondents" because they respond to the charges against them.

Who conducts the hearing?

All APA enforcement hearings are conducted by an impartial Administrative Law Judge (ALJ). The ALJ presides over the enforcement hearing.

How is an enforcement hearing started?

An enforcement hearing starts with the APA staff serving a notice of hearing and complaint upon a Respondent. The notice of hearing tells the Respondent the enforcement action has begun. The complaint explains the violations alleged by APA staff and the actions and/or penalties sought because of the alleged violations.

How do I respond to the complaint?

You (or your attorney) must file a written answer to the charges with APA staff. Your answer will specify which allegations you admit, which ones you deny, and which ones you can't answer based on the information you have. You must include as part of your answer any affirmative defenses you may have. They should be supported by facts or

the law. For example, if you claim you are exempt from obtaining a permit that APA staff say you need, that claim must be part of your answer. Your answer must include all defenses you will make at the hearing; otherwise you may be precluded from presenting them. Part of your answer should also include a statement of any mitigating circumstances. Mitigating circumstances will be considered by the APA Board in determining any relief that is ultimately granted. For example, the degree of cooperation with APA staff may be considered as a mitigating circumstance.

When do I serve my answer?

You must mail or deliver your answer to APA staff within 30 days of the date of the notice of hearing and complaint. You should seek any extensions you need before the 30 days expire. Requests for extensions should be made to APA staff. If you do not file your answer on time, you may lose your right to a hearing and be found responsible for the actions and/or penalties that is sought by APA staff in the complaint.

What if the complaint is unclear?

You may request a clarification of the charges against you if the complaint is so vague or ambiguous that you cannot reasonably be expected to answer it. Your request should be submitted to APA staff. Your response will then be due within 30 days of the date of the new complaint from APA staff.

How do I settle charges against me?

Alleged violations may be settled through discussions with APA staff. An agreement to resolve the alleged violations may be accomplished through a Settlement Agreement executed by both parties.

How do I learn more about APA staff's case against me?

The simplest way is by asking for information about the alleged violations from APA staff. While there are some exceptions, both staff and the permit holder have a general responsibility to disclose information relevant to the hearing to each other. A more formal process, called discovery, is provided by section 581-4.10 of APA rules and may or may not require the involvement of the ALJ to provide direction to the parties. If necessary, the ALJ may set time frames for complying with discovery requests and may modify or deny discovery requests. If a party does not respond to a discovery request, the ALJ can require compliance. If that party fails to comply with the ALJ's directive, the APA Board may conclude that the information sought would be unfavorable to the party that did not disclose it.

When is the case ready for hearing?

The case is ready for hearing when a statement of readiness is filed by the APA staff with the ALJ. The ALJ assigned to the case will set the date and place for hearing. The place for the hearing is usually in APA's headquarters in Ray Brook, New York.

What if I want the hearing date changed?

You should first discuss an adjournment and a new hearing date with APA staff. If a new date is agreed upon, the hearing can be adjourned to the new date by the ALJ. If APA staff does not agree to your request, you can ask the ALJ for an adjournment. Your request should be made well in advance of the scheduled hearing date. It should be in writing and include the reason you are requesting an adjournment and other dates that you are available.

What if I fail to appear?

If you fail to appear at the hearing on the scheduled date, you will waive your right to a hearing if you were properly served with the notice and complaint. Your failure to appear constitutes a default, which may make you responsible for the actions and/or penalties sought by APA staff in its complaint. Respondents should be careful not to default because of its serious consequences.

Who will be at the hearing?

The assigned ALJ will be there, as will APA staff. The parties attend with any witnesses they want to have testify. In most cases there will be a stenographic court reporter who makes a word-for-word record of what is said at the hearing. In some cases there is no stenographer, and a tape recorder is used instead. Hearings are open to the public.

What is the hearing procedure?

APA hearing procedures are similar to those used in the civil trial courts. Opening statements, if necessary, explain APA staff's position followed by the Respondent's position. After giving opening statements, each party presents its case to the ALJ. APA staff has the burden of proving its charges in the complaint. The Respondent has the burden of proving its affirmative defenses. APA staff proceeds first, followed by the Respondent. At the end of the hearing the ALJ may give each party an opportunity to make closing statements, either at the hearing or to be submitted later in writing. The closing statement is each party's argument about what was proven and how the case should be decided.

How do the parties present their cases to the ALJ?

The parties present their cases primarily through the testimony of witnesses. All witnesses are sworn under oath by the ALJ. First, the witness answers questions by the party calling him or her. This is called direct examination. Then the witness answers questions from the other parties. This is called cross-examination and is done to bring out information not provided during the direct examination, to test the truthfulness and credibility of the witness, to test the accuracy and reliability of the witness's perception of events, and to probe the bases of expert opinion. Parties may also present and support their cases through the production of documents, photos, maps, etc. called "exhibits". Exhibits are usually presented by a witness who is familiar with them and who can explain what they are and mean. In some cases exhibits are presented simply upon the agreement of the parties, or based on some written certification that they are authentic.

How do I get copies of exhibits submitted at the hearing?

The ALJ keeps all exhibits used at the hearing as part of the hearing record that is provided to the APA Board. A general rule is that copies of all exhibits must be made available to the opposing party at the time they are used in the hearing. In many instances you will already have seen the exhibits offered by APA staff or already have copies of them. You will need to supply copies of your exhibits to APA staff unless they already have copies. You can also request a copy of the stenographic transcript, at your expense, from the court reporter, or of the tape recording, if there is no stenographer. If there is a transcript, a copy can be made available to you for review at APA's headquarters during normal business hours.

How do I ensure my witnesses and exhibits will be at the hearing?

Each party has the obligation to gather the people and exhibits it wants to present. You should first ask if a person would be willing to testify on your behalf. If necessary, the parties may use subpoenas to compel witnesses to appear and documents to be produced on the hearing date. A party's attorney may issue a subpoena. A party not represented by an attorney may request a subpoena from the ALJ. It is the party's responsibility to serve the subpoena and to pay for any related costs. Subpoenas for documents are handled much the same way.

If I have no attorney, will the ALJ assist me at hearing?

The ALJ can explain the hearing procedure to you but cannot advise you on what to do. The ALJ cannot be an advocate of your position and must remain impartial. Respondents make their own decisions about whether they will testify and what evidence they will offer. If a Respondent wants to testify but has no attorney, the ALJ will provide the Respondent with an opportunity to make a statement under oath. The ALJ may also ask questions to clarify what a witness has said.

What should a witness know about testifying?

Witnesses should always tell the truth. They should listen carefully to questions and respond to them directly. If they do not understand a question, they should ask for clarification. If they cannot answer a question, they should say so. If a party objects to a question, they should wait for the ALJ's ruling before answering. Finally, they should always speak loudly, slowly and clearly, as a record is being made of their testimony.

How does the ALJ control the hearing?

ALJs have broad authority to maintain hearing order and efficiency. The ALJ controls the hearing by ruling on motions and requests that are made by the parties. For instance, one party may object to certain evidence as irrelevant to the hearing issues. If the ALJ sustains the objection, the evidence is excluded from the hearing record. If the ALJ overrules the objection, the evidence is admitted. The length of a hearing depends upon the number of alleged violations and affirmative defenses to be adjudicated and their complexity. Some hearings are concluded in a single day; a complex enforcement hearing can take several days or more. Hearings generally run from day to day, with up to four sessions per week. During the course of a long hearing, the ALJ may grant an adjournment to accommodate the parties and their witnesses.

Are there restrictions on how information is passed to the ALJ?

Yes. Communications to and from the ALJ are regulated by a prohibition on "ex parte" contact. This means that ALJs cannot discuss the merits of a case with any of the parties without providing an opportunity for all parties to participate in the discussion at the same time. If a communication to the ALJ is written, all parties must be sent a copy of the correspondence at the same time. Likewise, the parties may not discuss the merits of the case with the APA Board. The APA Board's information about a case is limited to the hearing record as a matter of fairness to all parties involved in the hearing. Parties may confer among themselves at any time during the hearing process and are encouraged to do so to resolve disputes and make the hearing process more efficient.

How do I challenge an ALJ's ruling?

An ALJ's ruling may be appealed to the APA Board at the end of the hearing by motion of a party or as part of a closing statement. The APA Board may also decide to review an ALJ ruling during the hearing where the failure to decide an appeal immediately would unduly disadvantage one of the parties or would result in significant inefficiency in the hearing process. If the APA Board decides to hear the appeal, all parties will have an opportunity to be heard on whether the appeal should be granted or denied. The hearing will continue, unless the ALJ or the APA Board adjourns it, until the appeal is decided.

What is the standard of proof?

The APA staff has the burden to prove its charges. The Respondent has the burden to prove its affirmative defenses. Each party must prove their claims by a preponderance of the evidence. This means that their evidence must be more credible and convincing than the other side's evidence.

How is a final decision made by the APA Board?

The APA Board must make a final decision in the enforcement matter within 60 days of receipt of the hearing record from the ALJ. In some cases, the APA Board may defer a final decision and return the matter to a hearing on issues to be further developed. The Board's decision is based on the testimony, exhibits and argument in the hearing record. The hearing record may also include a hearing report from the ALJ if the Board requests one. To assist the APA Board in its review of the record, the Board may have the aid and advice of APA staff who have not been involved in the investigation or prosecution of the alleged violations. The APA Board's final decision may include a finding of violation(s) or the dismissal of charges and, if any violations are found, may order appropriate actions and/or penalties or such other relief as it deems appropriate.

Can the APA Board's final decision be appealed?

Yes. The APA Board's final decision may be appealed to state court pursuant to Article 78 of the Civil Practice Law and Rules.

Is there a public record of the APA Board's final decision?

Copies of the APA Board's final decision will be distributed to each of the parties and is available for public review at the APA headquarters or may be requested by e-mail at APAFOIL@apa.ny.gov pursuant to the Freedom of Information Law.

Where can I obtain additional information about APA enforcement hearings?

Contact the APA by telephone at (518) 891-4050 or in person at 1133 NYS Route 86, Ray Brook, New York. Also, visit APA's website at www.apa.ny.gov.