OFFICE OF HEARINGS
STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
50 Wolf Road
Albany, New York 12233-1550

PART 622

Uniform Enforcement Hearing Procedures

PART 624

Permit Hearing Procedures

COMMENTS/RESPONSE DOCUMENT

December 1993

PART 622 PUBLIC COMMENT RESPONSIVENESS DOCUMENT

GENERAL COMMENTS

COMMENT Consistency With Other Laws - Section 622.16 of the existing regulations provides that nothing in Part 622 is intended to limit the rights of any party in an enforcement hearing pursuant to the Environmental Conservation Law and that the Environmental Conservation Law and the State Administrative Procedure Act control over any inconsistent provision of the Part 622 regulations. This provision should be retained in the revised Part 622 regulations. Existing Section 622.16 puts parties on notice of their rights under applicable statutes and expressly recognizes the fact that such rights are not withdrawn by virtue of any provision of Part 622.

RESPONSE *The suggested language is unnecessary since, as a matter of law, the statute controls in any conflict.*

COMMENT The Part 622 and 624 regulations should reiterate the requirements of SAPA §401(4).

RESPONSE *The requirements will be incorporated at 622.7(e) and 624.7(g).*

622.1 APPLICABILITY

COMMENT 622.1(b) - Comma after §71-1709. 622.2(e) - "Discovery means", not "Discovery and ..."

RESPONSE *The text has been revised. Grammatical changes made.*

COMMENT 622.1(g) - 6 NYCRR Parts 42 and 175 authorize the Department to revoke or suspend, after a hearing, certain special licenses and permits issued by fish and wildlife. Recent amendments to these Parts shift the decision-making authority from the Division of Law Enforcement to the Division of Marine Resources. If Part 622 were to apply to such hearings, Parts 42 and 175 would be effectively superseded. Will shellfish hearings be brought under Part 622?

RESPONSE *Yes. Hearings under Parts 42 and 175 will be conducted in accordance with the applicable Part 622 procedures.*

COMMENT 622.1(a)(6) - Enforcement hearing regulations should be made applicable to permit-renewal hearings which result from the Department's failure to renew a permit on the grounds of an unadjudicated violation. SAPA makes permit renewal a vested right, allowing the permitted activity to continue pending agency determination of a hearing on the renewal. There is little practical difference between an agency revoking a permit for an alleged violation and not renewing a permit for an alleged violation -- either way, a right of the permittee will be lost. Logically, the same rules should be applied in both situations.

RESPONSE *The revised regulations make it clear that the Part 622 enforcement hearing regulations do apply in such situations.*

622.2 DEFINITIONS

COMMENT 622.2(q) - a more common understanding of the term relevant is evidence "tending to support or refute the existence of any fact".

- Delete "on a permit"

RESPONSE *The text has been revised in the following manner: "(q) Relevant means [supporting or refuting the] tending to support or refute the existence of any fact that is of consequence or material to the commissioner's decision [on a permit]."*

COMMENT 622.2(u) - Defining filing with the ALJ as a "service" may cause confusion. (Respondent could file with office of hearings, not on DEC Staff, and claim sufficient service); add "and where applicable" after "means".

RESPONSE *The text has been revised in the following manner: "(t) Service means the delivery of a document to a party by authorized means [or] and, where applicable, the filing of a document with the ALJ, Office of Hearings or the commissioner."*

622.3 COMMENCEMENT OF A PROCEEDING:

COMMENT 622.3 - The notice, or complaint, or motion for an order without a hearing (like a summons in a civil suit) should clearly state what constitutes a "default" and what the consequences of a default will be -- otherwise determinations resulting therefrom could be vulnerable in a court challenge on the basis of lack of notice. Penalty amounts and other relief sought should be clearly

stated (like damages are required to be stated in summonses) and not require a respondent to speculate on what the ultimate total penalty amount or other relief could be. The notice should also contain a warning on what the department regards to be affirmative defenses, and that respondents are required to plead them in their answer.

RESPONSE *The language has been modified at 622.3(a)(2) to warn that ". . . affirmative defenses, including exemptions to permit requirements, will be waived unless raised in the answer and that the failure to answer will result in a default and a waiver of respondent's right to a hearing. 622.12(b) includes a similar requirement for a motion for order without hearing.*

COMMENT 622.3(a)(1)(iii) - The Complaint should be required to be as detailed as the Answer is required to be, and should be required to include recitation of the facts constituting the violation charged in non-statutory/regulatory terms. [The latter requirement would be similar to what is required in Family Court on Juvenile Delinquency petitions -- Apparently that court had problems with the adequacy of notice when only statutory terminology was used to describe the violating behavior. Concern over adequacy of notice should apply equally to DEC proceedings, particularly because regulatory terminology is often technical, or can take on meanings different from common understanding. In the latter situation, a respondent might not even realize his need for a clarification.]

RESPONSE *The regulations incorporate this requirement by mandating that the complaint contain a "concise statement of the matters asserted." This is the same requirement as SAPA §301(2)(d).*

COMMENT 622.3(a)(3) - The usual court test of the adequacy of service is whether the chosen method is reasonably calculated to result in actual notice of the proceeding. For this reason, personal service is the preferred method under the CPLR. The current regulations are not as stringent as the CPLR since they allow for service by certified mail -- yet, they meet the court test because service is defined to be complete on actual receipt (Current 622.3(c)). The proposed regulations do away with the "actual receipt" requirement by making service automatically complete 5 days after mailing -- regardless of whether or not the notice was actually received.

RESPONSE *622.3(a)(3) has been modified to read as follows: "Where service is by certified mail, service [must] shall be complete [five days after] when the notice of hearing and complaint [(or motion for order without hearing)] is [sent] received. If personal service and service by certified mail is impracticable, [U]upon application by the staff the ALJ may provide for an alternative method of service consistent with CPLR section 308.5." The*

reference to CPLR Section 308.5 has been retained since the section and the cases thereunder contain invaluable guidance regarding appropriate alternative methods and the applicable due process considerations.

622.4 ANSWER

COMMENT 622.4(a) - The regulations should make it clear that a respondent may be represented by a person other than an attorney if so desired.

RESPONSE *The text has been revised in the following manner to adopt the suggestions: ". . . the respondent must serve on the department staff an answer signed by respondent, [or] respondent's attorney or other authorized representative. [failure to timely serve such an answer must constitute a waiver of the respondent's right to a hearing except that the time to answer may be extended by consent of staff or ruling of the ALJ] The time to answer may be extended by consent of staff or by a ruling of the ALJ. Failure to make timely service of an answer shall constitute a waiver of the respondent's right to a hearing."*

COMMENT 622.4(b) - "..form an opinion **regarding** the allegation.."

RESPONSE *The text has been revised to read: ". . . form an opinion [as to] regarding the allegation."*

COMMENT 622.4(c) - It should be made clear in the regulations that the "Affirmative Defense" concept in DEC proceedings is different from and broader than the affirmative defense concept in common law -- particularly since this redefinition of affirmative defense can be viewed as shifting the burden of proof to the accused. Where the regulations purport to regulate all activities of a certain class (e.g., part 360), and then carve out broad exemptions for situations not considered to be of regulatory importance, Respondents should be warned in the hearing notice that exemptions exist and that it is the respondent's responsibility to determine which exemptions, if any, may apply to their situation, assert same as an "affirmative defense" in their answer, and then prove their entitlement to same at hearing. A warning is needed because exemptions usually are provided for the "small" operator, someone the agency does not consider important enough to be regulated, and, therefore, probably someone not sophisticated enough to know the intricacies of the rulebook.

RESPONSE *This has been done at 622.3(a)(2) by the requiring the notice of hearing to include the language "including exemptions to permit requirements".*

COMMENT 622.4(c) - "...to the activity **shall** constitute..."

RESPONSE *The text has been revised to read: "...to the activity [must] shall constitute..."*

COMMENT 622.4(e) - provision should be made in Part 622 to specifically allow staff to seek a more definite statement of affirmative defenses on the grounds that such defenses are vague and ambiguous. Especially important since bills of particulars are specifically not permitted by Part 622 - Respondent's tool for obtaining such information).

RESPONSE *The following new language has been added to address this concern.*

"(f) The department staff may move for clarification of affirmative defenses within ten days of completion of service of the answer on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based."

622.5 AMENDMENT OF PLEADINGS

COMMENT 622.5(b) - comma after CPLR; "the ability of the **other** party..."

RESPONSE *The text has been revised to read: "the ability of [the] any other party to respond."*

622.6 GENERAL RULES OF PRACTICE

COMMENT 622.6(a)(1) - all references to CPLR and other statutory requirements should be spelled out where practicable, to make 622 as self-contained and understandable.

RESPONSE *The references to the CPLR and other statutes are being retained for the facility of understanding and interpretation*

gained through the body of cases defining methodology and rights attendant on these procedures (see the response to comments on 622.3(c)).

COMMENT 622.6(b) - General Construction Law §25-a is relevant as to computing time limits, and should also be cited with GCL §20.

RESPONSE *The text has been revised in the following manner to address this concern: "(1) Computation of time will be according to the rules of [section 20 of] the New York State General Construction Law."*

622.7 DISCOVERY

COMMENT 622.7(b)(1) - conform to CPLR 3120, 20 day period.

RESPONSE *The time-frames have been intentionally shortened due to the accelerated nature of administrative proceedings over civil proceedings.*

COMMENT 622.7(b)(2) - Depositions and written interrogatories should not be allowed at all.

622.7(b)(2) - delete "not", add "only" after "allowed".

RESPONSE *This does not change our procedures regarding interrogatories (see the current 622.8(e)); as to whether depositions should be allowed, see SAPA §304(3) which authorizes their use. To correct the error, the text has been revised in the following manner: "(2) Depositions and written interrogatories will [not] only be allowed with permission of the ALJ . . . "*

COMMENT 622.7(d) - add "This part does not affect... of the CPLR; except that all subpoenas shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23."

RESPONSE *The text has been revised and the language clarified in the following manner: "A party not represented by an attorney admitted to practice in New York may request the ALJ to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. [A subpoena must give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23.] This part does not affect the authority of*

an attorney of record for any party to issue subpoenas under the provisions of section 2302 of the CPLR, except that all subpoenas shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23."

622.8 PRE-HEARING CONFERENCE

COMMENT Where enforcement proceedings are resolved by consent order or stipulation, those documents should be subject to public notice and comment before being accepted by the Commissioner.

RESPONSE *The noticing and accepting of comments on all resolved enforcement matters is impractical, inefficient and would not yield a significant improvement in most cases. The department currently publishes a few consent orders prior to finalization on a case-by-case basis, based on public interest and involvement in the case prior to the consent order's development, expected impact on the public of the order and other considerations which convince the case manager that more input from the public would be useful.*

622.10 CONDUCT OF THE HEARING

COMMENT 622.10(b) - The ALJ should have the authority to require opening statements. This will help narrow and focus issues. It is helpful to know at the outset what the parties intend to prove, how they intend to prove it and who the prospective witnessess are.

RESPONSE *The ALJ, under the powers set forth at 622.10(b)(1) has the authority to require the parties to further clarify their respective positions if, in the ALJ's determination, it is necessary for the efficient conduct of the hearing.*

COMMENT 622.10(e)(2) - "...of any party, in order to avoid..." Also, ..."for convenience...": seems a poor excuse.

RESPONSE *The text has been revised in the following manner: "The ALJ, upon the ALJ's own initiative or upon request of any party, in order to avoid prejudice or [for convenience] to achieve administrative efficiency, may order . . ."*

COMMENT Sections 622.12(e)(12) (Oral Argument) and 622.12(e)(15) (Conducting Hearing in the Manner of a Trial) of the existing Part 622 regulations should be included in the revised Part 622. These

provisions provide that oral argument may be permitted and shall be recorded, and that a hearing shall be conducted as nearly as practicable in the manner of a trial by court. In the enforcement context, providing such protections for a respondent is an appropriate measure to protect a respondent's due process rights.

RESPONSE *The revised regulations have been modified to read at 622.10(a):*

> *(6) A hearing shall be conducted as nearly as practicable in the manner of a trial by court.*

and at 622.10(b)

> *(viii) allow oral argument, so long as it is recorded;*

COMMENT 622.10(f) limits intervention to persons with affected private rights. This should be revised to allow organizations to intervene.

RESPONSE *Organizations already have the ability to intervene since organizations are "persons" within the meaning of the definition of person at 622.2(o).*

COMMENT 622.10(f) - The limitation on intervention is subjective and severely restrictive. Participation by municipalities or members of the public as parties is more difficult to obtain in enforcement hearings than in hearings on permits. The standard of intervention is too high and cuts out public participation. Section 622.10(f) should provide that any municipality within which any activity that is the subject of enforcement proceeding takes place may intervene and become a party in the enforcement proceeding, and that any party including neighborhood, civic, environmental, taxpayer, and public interest groups, taxpayer groups, etc. may intervene on a reasonable showing.

Provisions require that an intervenor have private rights which would be substantially adversely affected, and must demonstrate that their interests cannot be adequately represented by other parties to the hearing. This specifically excludes participation by the general public, neighbors, environmental organizations and municipalities and municipal officials.

RESPONSE *The agency is sensitive to the public's concerns and will evaluate each intervention request carefully. Where a person's interest is likely to be affected by the adjudication and will not be adequately represented by the parties then intervention is appropriate and will be granted. Staff, however, has the primary legal obligation to prosecute violators of the ECL. Public participation in enforcement matters is available through*

interaction with DEC Staff. Citizens, municipalities and citizen organizations may pursue their objectives by registering complaints with Staff, volunteering to be witnesses and otherwise assisting in Staff's prosecution. This is similar to the way citizen concerns with criminal violations must be presented. The reasons are also similar. DEC's resources are limited, both in fiscal funding for initiating actions and personnel available to prosecute those actions. To efficiently fulfill DEC statutory obligations prosecutors must be free to allocate department resources on a case-by-case basis.

COMMENT In the interests of efficiency adjournments should also be allowed pending set report dates at which the parties will advise the ALJ of the case's status. This is appropriate where matters have been adjourned for settlement purposes. Reporting can be done by memo to the judge or by telephone conference call. Adjourning hearings only to set hearing dates forces the Department to reserve a hearing room and reporter and the parties to reserve dates on their calendars for hearings that, in most cases, never occur due to the eventual execution of consent orders.

RESPONSE *The following language has been included at 622.10(g) to address this concern: ". . . Adjournments must specify the time, day and place when the hearing will resume or specify the time and day on which the parties will advise the ALJ of the status of the case.*

COMMENT 622.10(g) - the adjournment process is too cumbersome.

RESPONSE *No complexities have been added to the present process. It has been our experience that the existing process of requesting and being granted an adjournment has operated satisfactorily in addressing the concerns of the public and the parties and does not need revision.*

622.11 EVIDENCE AND BURDEN OF PROOF

COMMENT Regarding (a)(5), this provision dealing with official notice should be revised by including the second sentence in Section 622.12(e)(6) of the existing regulations. This sentence allows a party to dispute an officially noticed fact.

RESPONSE *We are replacing the provision with language consistent with SAPA 306(4): "Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the Department. When official notice is taken of a material fact not appearing in the evidence in the*

record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to the final decision of the commissioner to dispute the fact or its materiality."

622.12 MOTION FOR ORDER WITHOUT HEARING

COMMENT 622.12(c) - "hearing report": don't call it a hearing report if there is no hearing. Possibly - "summary order report", or just "report."

RESPONSE *The text has been revised to simply read "report".*

622.14 SUMMARY ABATEMENT ORDER

COMMENT 622.14(a) should read "Sections 71-0301 and 71-1709", not "Sections 71-1709 and 71-0301." (b) - change "must not be" to "are not." (c) - delete "must."

RESPONSE *The text has been revised, incorporating the grammatical and format improvements suggested by the comment.*

622.15 DEFAULT PROCEDURES

COMMENT Section 622.15 of the existing regulations provides that any of the Part 622 rules may be waived by stipulation and with consent of the Commissioner or Hearing Officer. This provision should be retained in the revised regulation to facilitate the hearing process and cooperation among parties.

RESPONSE *This authority already exists under the new regulations (see 622.6(f) and 622.10(b)(1)(x)).*

COMMENT 622.15(c) - If it is intended that Staff "wins" upon respondent's default (which would be similar to what occurs in civil court), this section should explicitly say so since it is a change from current practice which requires the ALJ to review the record to make findings, conclusions and recommendations (i.e., the summary hearing report mentioned in this provision should only involve a summary of the proceedings and recommendations on the proposed Order - no "findings" on the merits of the case.

RESPONSE *It is intended. 622.15(c) has been modified to read ". . . the ALJ will submit a summary report, which will be limited to a description of the circumstances of the default, and the proposed order to the commissioner.*

COMMENT The phrase "good cause" as it appears in 6 NYCRR 622.15(d), concerning default judgments and motions to reopen default judgments is vague, and should be deleted. Following is a proposed revision: "(d) Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR §5015."

RESPONSE *The language of 622.15(d), beginning with the second sentence, has been modified to read: "**A motion to reopen a default judgment may be granted consistent with CPLR Section 5015.** The ALJ may [only] grant a motion to reopen a default upon a showing that a meritorious defense [to the action] is likely to exist." The new language is consistent with CPLR Section 5015 and the court decisions under that rule, and also references the statute.*

PART 624 PUBLIC COMMENT RESPONSIVENESS DOCUMENT

GENERAL COMMENTS

COMMENT DEC should introduce an alternate dispute mediation process, in appropriate cases, before going forward with the adjudicatory public hearing process.

RESPONSE *Some procedures such as this have existed for some time e.g.: the Part 621 Settlement Conference). Under Part 622 the new regulations introduce a mandatory pre-hearing conference, which requires the respondent to meet with DEC staff under certain circumstances. The ability to bind the parties and hence the effectiveness of such procedures in a permit proceeding is limited, however, because of the rights guaranteed by UPA and SAPA.*

COMMENT The rules need to accommodate the needs of volunteers and pro bono counsel when it comes to all scheduling, formalities and informal matters. The rules must also address the general principle that no party be disadvantaged in any manner because of their volunteer status. Because the public is often made up of volunteers, hearing schedules and formal meetings should be in the evenings whenever possible.

RESPONSE *As a matter of policy DEC has and will continue to accommodate the special needs of volunteers and other members of the public wherever possible. We believe that the revision of the regulations is another positive step toward protecting the stated concerns.*

COMMENT The proposed regulation should address rules to prevent the applicant, Department and other parties from reaching a settlement on an issue which settlement one party does not agree to.

RESPONSE *Parties are, and always have been, encouraged to reach agreement on the issues, both before and after adjudicable issues have been determined. However, as long as there is one hold-out on a certified issue, that issue must be adjudicated and the Commissioner must make the ultimate decision.*

COMMENT Uniform procedures, Part 621 needs to be viewed part and parcel with changes to Parts 624 and 622. I am adamantly opposed to the disservice of making changes to Parts 624 and 622 without concurrent changes to Part 621. The public does not have adequate access to the application procedures prior to public notice of complete application or legislative hearing. Absence of meaningful public involvement prior to opportunity for adjudicatory hearing undermines the appropriateness and effectiveness of the

adjudicatory hearing procedures. Applicants are able to participate in pre-public hearing informal process which has no formal rules and requirements, but once public process begins, except for legislative hearing, strict procedural rules and requirements apply. The public thus does not have equal access to the permit process and by definition and pursuant to the regulations cannot be as well prepared for the hearing process as the applicant.

RESPONSE *Two responses are necessary here. First of all, UPA (and hence Part 621) does not apply to enforcement hearings under Part 622. Secondly, the provisions of Part 621 which the commenter wishes to revise are in the regulations by constraint of statutory directive (see ECL Article 70 -- most particularly § 70-0119) and are not amenable to change by this agency. With these limitations stated, we wish to emphasize that DEC is sensitive to the expressed concerns and is diligently pursuing methods of expanding meaningful public participation in the permitting process.*

COMMENT In order to effect earlier public involvement, the following changes in Part 621 should be made: (a) The public should be made aware of applications at an earlier stage. (b) The public should be entitled to notice of all pre-application conferences and all meetings between the applicant and/or the applicant's experts with DEC staff and DEC executives for any permit applications filed. (c) All meetings between the applicant and/or the applicant's experts and DEC staff or DEC executives should be open to the public. (d) All documents filed by the applicant with DEC Staff during the permit applicant process should be available to the public. (e) The public should have an opportunity to be fully informed of the proposed conditions of a draft permit for the project and to submit comment to DEC prior to the determination that the draft permit is complete and meets all statutory and regulatory requirements. (f) All contacts by the applicant with Central Office staff, correspondence by the applicant with Central Office staff, appeals from decision by regional DEC staff to the Central Office, appeals by the applicant to assistant and deputy commissioners, and correspondence by the applicant or the applicant's representative to member of the Central Office or commissioners or deputy commissioners should be disclosed to the public.

RESPONSE *Philosophically, the DEC concurs that earlier public involvement in the permitting process is desirable. In connection with this goal, DEC may consider other actions to improve public accessibility to the process. However, earlier involvement by the public is regulated by Part 621 which, consistent with UPA, governs the pre-hearing process, and is not controlled by the regulations currently under review. See below for further comments on the shortness of time UPA grants intervenors to prepare their cases.*

COMMENT An applicant should not be able to begin application procedures in one DEC region, and then switch to another region when the applicant runs up against regulatory requirements specific to the region in which the application was first made. When this does occur, it creates the appearance of DEC manipulation between regions.

RESPONSE *This is not governed by the Part 624 hearing regulations, but, if at all, by UPA and Part 621. Additionally, unless the proposed project changes the applicant may not switch to another region, because the site of the proposal determines which region will review the application.*

COMMENT In Part 624 proceedings, the burden of proof is on the intervenor/public to demonstrate an adjudicable issue. However, the public has been precluded from participating in the informal process which led the DEC staff to determine that the application is adequate. At this point, DEC may actually become an advocate for the project. Either the burden of proof should remain upon the applicant, or the public should have access to the informal proceedings which lead to Staff's determination upon the application.

Any "clarification" of the burden of proof with respect to applications for party status, must account for the unfair advantage a well-financed applicant will have over intervenor groups. The applicant must have the sole burden of proof, as it is the applicant that will ultimately profit from the project. Any attempt to shift the burden of proof onto the shoulders of intervening municipalities or citizen groups constitutes a taking of rights without fair process.

RESPONSE *The applicant always has the burden of proof to demonstrate the approvability of the proposed project. Staff's draft permit represents the acknowledgment by Staff that a <u>prima facie</u> showing has been made that the proposal can meet all appropriate regulatory criteria. The intervenor then has the burden of going forward. The burden on the intervenor requires the intervenor to raise a doubt as to the ability of the applicant to meet the permitting criteria. Granting intervenors input to the project at an earlier time is beyond the scope of any revision to Part 624 hearing procedures, however the department will consider such action through changes to its permit review procedure.*

COMMENT Making Part 624 proceedings more like a court proceeding (eg.: increased use of prefiled testimony, and proof of service requirements precluding simple mailing or faxing of documents to other parties, and instead require personal service and execution

of a notarized affidavit of service) are further barriers to public participation. Since the postmark of a mailing should constitute adequate proof of service additional requirements are unnecessary.

RESPONSE *The revisions move the process closer to civil procedures because of increasingly greater financial stakes at risk in permit proceedings and attendant heightened concerns for due process. It is not anticipated that use of prefiled testimony will increase appreciably over current practice. The new regulations do not institute new requirements for proof of service, but merely state how service may be proved where needed. To make hearing procedures before the department more consistent we included general rules of practice in both Part 622 and 624. The proof of service requirements are identical and absolutely necessary in Part 622 where there are provisions for a default judgement.*

COMMENT Parts 621 and 624 should provide for requirements to move the adjudicatory proceeding to conclusion, once it is underway, in those instances where DEC and the applicant have no real interest in moving the adjudicatory proceeding along to conclusion.

RESPONSE *UPA and Part 621 provide specific timeframes for permit applications. In such cases the intervenors should make a motion to the ALJ.*

COMMENT Provision should be made whereby members of the public can initiate the determination to hold an adjudicatory hearing.

RESPONSE *The provision already existing at 6 NYCRR 621.7(b) accurately reflects the extent of public involvement allowed by UPA in the decision to hold an adjudicatory hearing.*

COMMENT Poor communities are further disenfranchised from the environmental permit process under the proposed regulations, which appear to be in direct contradiction to the principles of Executive Order 131. These rules and regulations will make environmental racism more prevalent throughout the state.

RESPONSE *In creating the new regulations we diligently sought to enhance the facility with which the permitting process may be understood and contributed to by the public. To this end we have reduced (if not eliminated) the "legalese" and attempted to set forth the procedures in a logical, chronological and understandable manner. Further the new regulations enlarge the role of parties (persons who formerly were allowed only limited participation are now granted full party status), add a new means of participation (amicus status did not exist and this new category of participant is expected to offer new insight into the cases), clarify the procedures and interpretations made by commissioner decisions and*

General Counsel declaratory rulings which may be unclear or unknown to the general public, and extensively simplify the language.

COMMENT It appears that strangers - - DEC representatives from outside the project area (the ALJ and the Executive Office) - make decisions that affect local residents, with little or no local input. Often a permit application will be revised in many respects without further notice to the public, resulting in a pro forma attempt to solicit and respond to local public input. This creates the impression that New York's environmental review process intentionally seeks to keep the public outside, and encourages litigation.

RESPONSE *We are aware of, and concerned with this misperception. This issue relates primarily to pre-hearing permit processing under the Uniform Procedures Act, ECL Article 70 ("UPA"), and only to a lesser extent to the proposed amendments here under consideration. The proposed revisions are intended to increase accessibility and participation of local residents, as explained in other responses in this document. Further, the Department is evaluating its pre-hearing policies and procedures to address the stated concerns.*

624.1 APPLICABILITY

COMMENT 624.1(a)(1) - To be consistent with SEQRA, staff should not have to determine that a substantive and significant issue exists to require a hearing, but instead should only have to determine there is a significant public interest and that there may be substantive and significant issues. The phrase "substantive and significant issues" should be replaced with one which authorizes staff to consider issues of concern to the public as well as to the Department. Requiring the party proposing an issue to demonstrate that it is substantive and significant is contrary to Executive Order No. 131. Substantial public interest in a project should be a factor triggering various levels of review and hearing. E.g., a minor project should be reclassified as major if this is the case.

RESPONSE *Public interest is a factor in staff's consideration to call for a hearing. "Minor Project" has been defined by the ECL, along with provisions which permit a minor project to be reviewed as a major project. The requirement that issues be found to be "substantive and significant" and the delegation of responsibility to staff to make the determination to go to hearing or not is set forth in 6 NYCRR 621.7(b) and is a statutory requirement not susceptible to dilution or modification by the Department (see ECL 70-0119(1)).*

COMMENT Part 624.1(a)(1) indicates that, during the public comment period, only DEC staff may identify substantive and significant issues which require an adjudicatory hearing. Part 624.1(a)(1) should be revised to allow the applicant to identify substantive and significant issues necessitating the holding of an adjudicatory hearing.

RESPONSE *Revision is not necessary. Any significant point upon which Applicant and Staff disagree may lead to a hearing at Applicant's request, if the ALJ determines at the issues conference that the issue is "substantive and significant".*

COMMENT 624.1(a)(1) - The proposed regulations must spell out the ability of the ALJ to mandate an adjudicatory hearing upon evidence received in the legislative hearing and substantiated in the issues conference, and upon fact finding and observation. Therefore, Section (a)(1) should be amended to remove the definition of "substantive and significant" issues, and should be replaced with the words: "... (an identification by staff of issues of concern to the applicant and the public)."

RESPONSE *The regulations provide that the ALJ may query the participants regarding comments made at the legislative hearing, and that this inquiry could result in issues being raised. However, it must be emphasized, that statements received during the legislative hearing <u>do not</u> constitute evidence. As to amendment of the definition of "substantive and significant" issues, see the comments and responses immediately above.*

COMMENT 624.1(a)(5) should read: "implementing regulations, an order, permit, ..."

RESPONSE *The grammatical error has been corrected.*

COMMENT 624.1(a)(6) - modify to read: "The circumstances where this part [must be used] <u>applies</u> include but are not limited to permits for aquatic pesticide permits <u>as governed by ECL sec 15-0313(4) and its implementing regulations, the registration of pesticides as governed by ECL Article 33, Title 7 and its implementing regulations..."</u>

RESPONSE *The text has been revised by substituting the word "applies" for the phrase "must be used". The second suggested revision is not required nor is the proposed language consistent with the format used in the rest of the section.*

624.2 DEFINITIONS

COMMENT 624.2(i) and (m) - Based upon past experience, parties sometimes do not understand the terms "delegated permit" and "draft permit". The following definitions are offered: **Delegated permit** (as further defined under Part 621 of this Title) means a permit issued by the department **[for a program for]** which **substitutes for** a comparable permit **[may be]** required by federal law **and is recognized by federal agency responsible for administering the federal program**. **Draft permit** means a document prepared by **department** staff which contains terms and conditions staff find are adequate to meet all legal requirements associated with such permit**[.], but is subject to modification as a result of public comments or an adjudicatory hearing**.

RESPONSE *The text has been revised to incorporate the recommendation.*

COMMENT 624.2(l) - The provision that discovery may only be had for information which is in the exclusive knowledge and possession of a party seems too limiting. There are already provisions for protective orders if a request is too onerous. If an applicant has relied on information from other parties, it presumably has that information in its possession. An intervenor should be allowed to obtain that information directly from the party.

RESPONSE *The discovery provisions, set forth in great detail at Section 624.7, are in conformance with accepted discovery practice, more fully treated under the CPLR. Generally the law does not require production of materials which are accessible to the public, such as public records (see CPLR 3120 and Benson v. Murr, 23 A.D.2d 756), and it would be incongruous to place an even greater burden on parties to an administrative hearing.*

COMMENT 624.2(r) - Since the department defines hearsay, argument, pleadings and evidence, it should further clarify in the definitions, which term would include public comments made during a legislative hearing - - would those comments be "argument" or "hearsay"? The definition of hearsay should be restricted to that used in more common practice, to refer to statements which have not been substantiated by any evidence.

RESPONSE *The amendments make it clear at 624.4(a)(4) that statements made at the legislative hearing do not constitute evidence (see Response to Comment at 624(a)(1). The definition of hearsay used at 624.2(r) accurately states its meaning as it relates to an evidentiary standard.*

COMMENT 624.2(w) - Classification of amicus as a "party" is misleading, and in contravention of the rights of the public under Executive Order No. 131. A "party" has recourse to the appeal process. "Amicus" does not grant the ability to appeal any ruling, thus must not be classified as a "party" to the proceedings. DEC has not demonstrated how "amicus" is an improvement of public rights. The following definition of "party" must be returned to the existing regulation: "Party means any person granted the right to participate either in full or in a limited manner at the hearing."

RESPONSE *The proposed definitions accurately define both "party" and "amicus". The definitions are entirely consistent with Section 624.5, which more fully delineates the rights and obligations of the various participants to a proceeding. Limited party status has been expanded to full party status and amicus status is an entirely new category which provides an additional avenue of access to the hearing process. Amicus status is less costly and does not carry with it the responsibilities and burdens of full party status.*

624.3 NOTICE OF HEARING

COMMENT 624.3 (General) - The public comment period for complex projects should be extended.

RESPONSE *This comment is directed more to ECL Article 70 and 6 NYCRR 621 than to the proposed revisions. As a practical matter, while we must begin the hearing within a specific time, on a case-by-case basis we are able to extend the time for public comment into this next segment of the permitting process.*

COMMENT 624.3 (General) - Public notice requirements should be improved to make it easier for the public to participate in permit and hearing procedures. The Department should remove obstacles which prevent the public and public officials from attending adjudicatory hearings. Proposed paragraph 624.3(b)(8) should be revised to require explication of all the avenues of participation, the showings required, and applicable filing requirements. A new provision should be inserted with states: "all issues of concern to the Department and the public must be specified."

RESPONSE *The revisions clarify and simplify participation in permit hearings. In addition to explaining in detail what is necessary to achieve party status (at 624.5), they require noticing the accessibility of the application materials so that the public may have an opportunity to familiarize itself with the proposed project. Further, although UPA's standards must be met in order for a person to become a party to any adjudication, all hearings*

are open to the public and anyone is welcome to attend. Since this is a notice to the public it is hardly necessary to inform the public regarding its concerns. Further, until the conclusion of the Legislative hearing and an opportunity to analyze the public's statements it would be difficult, if not impossible to specify all concerns. With the required production of the draft permit or statement of intent to deny (see 624.3(b)(6)), staff's concerns are required to be on record.

COMMENT 624.3(a) - Under Section 624.4(c)(1)(iii), the burden of proof (persuasion) is placed on the public that a proposed issue is substantive and significant. Where the applicant and DEC staff have a permit application under consideration for months or years, the 21 days allowed for the public to prepare to make an offer of proof to carry this burden of persuasion is grossly inadequate and a virtually insurmountable barrier to public participation in the hearing process. Few persons or organizations will be able to obtain and assimilate the necessary information, retain expert witnesses, and develop the requisite offers of proof within a three-week period. An extension of the notification period would help ensure that concerned citizens and groups have a meaningful opportunity to participate. Alternatively the public should be notified of the project when the Applicant and Staff are still having preliminary discussions regarding the character and nature of the project. At this point, the project is more fluid, and there is a greater likelihood of meaningful public input. By the time the notice of complete application occurs, Applicant, and usually Staff, are already wedded to a specific plan, which they defend, against all intervenors. The ENB should notice pre-application conferences between the applicant and Staff, permit renewals and Staff's determinations.

RESPONSE *We agree that extending the time a prospective intervenor has to evaluate large projects may result in a more effective process. Initially it should be noted that the 21-day notice is a minimum requirement. UPA (Article 70 of the ECL) and Part 621 control the time frames for notification. Mandating earlier notice is beyond the scope of Part 624. Under UPA the total time allotted to DEC to perform its mandated functions is clearly set forth and extending the times is beyond DEC's statutory authority. Within 90 days of an application's completion (either by notice or by law), the Department* ***must*** *initiate a hearing if one is going to be held. Within this 90-day period DEC has 60 days to receive comments and decide on the basis of its own permit review or from the comments, whether or not a hearing is necessary. At this point only 30 days remain for notice and to otherwise initiate the hearing. However, as has already been noted, the ALJ has the authority, after the hearing has commenced, to grant an intervening party an adjournment for the purpose of "coming up to speed" on the application. It is*

contemplated that such adjournments will be freely granted upon a showing that there has not been sufficient time for a reasonable evaluation of the project.

COMMENT 624.3(b)(6) - should be revised to clarify that if a draft permit exists, it must be made available to the public at the time the hearing notice is published.

RESPONSE *We construe the amended regulations to require this.*

Additionally, as a matter of policy Staff is urged to make its determination regarding the necessity for a hearing as early in the 90-day period as possible, notice as soon as a decision is made, and then allow the remainder of the time for public preparation. As a matter of regulatory mandate this is a very difficult concept to codify, due to the unique nature of each project reviewed by the Staff. In some cases Staff will know at the time of notice of completion, whether or not a hearing will be necessary. At other times even the statutory 60-day period may not be enough to achieve certainty.

COMMENT 624.3(b)(6) - The notice of hearing should contain exact information about how relevant documents may be obtained by the public. The applicant and DEC staff should be required to have the necessary documentation immediately available to the public.

RESPONSE *The new regulations provide for this at 624.3(b)(6).*

COMMENT Section 624.3(b)(6) should provide that the notice of public hearing will contain the name, address, and telephone number of one specific person at DEC who can be contacted.

RESPONSE *It is the practice of DEC to list this information about the ALJ and often about a programmatic staff member. A regulatory change requiring this is not mandated by SAPA or the ECL, nor, in our experience, is one necessary.*

COMMENT Proposed paragraph 624.3(b)(6) should be revised to require a listing of all the documentation available for review and specify the location at which it may be purchased.

RESPONSE *The proposed language already requires a listing of all the documentation available for review and specification of the location where it may be reviewed or copied.*

COMMENT 624.3(b)(6) - The notice of public hearing should contain a list of application materials available, including the application, the EAF, the negative or positive declaration, the DEIS, the draft permit, copy of all correspondence between the applicant and DEC, a copy of all DEC internal staff memoranda about the applicant and a copy of all supporting environmental documentation.

RESPONSE *A listing of available materials will be required. Specification of required materials is unnecessary since it will vary from project-to-project and is already defined to the extent possible by Part 621 and the various programmatic regulations.*

COMMENT 624.3(b)(6) [also see 624.4(b)(1)] - The Notice should identify a specific copying fee that must be paid for a copy of all these documents; and all of these documents should be available within three days upon payment of the stated fee. If all the relevant application materials are not provided within three days of tender of the specified fee, the date of the proposed legislative hearing and issues conference should be extended by whatever additional time period is required for the applicant or DEC to provide the application materials by personal delivery to any party requesting same.

RESPONSE *A regulatory mandate is not needed in this matter. Although it is not a statutory requirement documents are generally made available for copying. The Department must, upon a proper request, copy, for a fee, all documents which are part of the public record. The fee is prescribed under FOIL, but may be waived. 624.4(b)(1) has been revised to specify that the ALJ may grant reasonable adjournments after commencement of the issues conference, to enable prospective parties to review a particularly voluminous application.*

COMMENT 624.3(d) - Additional publication in non-English-speaking papers should be required in communities with non-English-speaking populations. Where a significant portion of the people in the immediate and general area of a project are non-English-speaking, the notice itself should also be published in that language. For major projects notice should be effected by such devices as telephone surveys, person-on-the-street interviews, mailings, "town meetings" at local places of worship, schools or PTAs. Multiple publications of each notice should be required. Notice should be provided to all elected representatives from the locality in question: local, state, and federal representatives, as well as community planning boards and school boards. Local public interest environmental organizations and national environmental groups should be mailed notices of Departmental rulemakings and permit hearings and such notices should be posted on the electronic bulletin board, EcoNet.

RESPONSE *Newspaper publication is required, by both the current and revised regulations, in a newspaper of significant circulation in the immediate area of the project. Consistent with the many comments we have received on this matter (as reflected by above consolidated comments) we are revising the new regulations to provide, at 624.3(a) that: <u>These requirements are minimums and the ALJ shall direct the applicant to provide additional notice or to provide the notice further in advance of the hearing where the ALJ finds it necessary to do so in order to adequately inform the potentially affected public about the hearing. Where the ALJ finds that a large segment of the potentially affected public has a principal language other than English, he or she shall direct the publication of the notice in a foreign language newspaper(s) serving such people. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in UPA without the applicant's consent.</u>"*

COMMENT 624.3(d) - DEC should develop a mailing list, open to the public, that would include news of hearings and other major Departmental activities.

RESPONSE *DEC publishes the Environmental Notice Bulletin which contains this information. For subscriptions, write: Environmental Notice Bulletin, Department of Environmental Conservation, 50 Wolf Road, Rm 509, Albany, NY 12233-4500; or telephone (518) 457-2344.*

624.4 LEGISLATIVE HEARING AND ISSUES CONFERENCE

COMMENT 624.4 - A minimum time period needs to be established between the determination of parties and issues and the commencement of the adjudicatory hearing. The applicant has his documents and experts ready to go. The Staff is already familiar with the application. Intervenors are in a particularly vulnerable position at this time. It is the intervenors who must marshall experts, provide them with copies of the material, focus them on issues which emerged from the Issues Conference, conduct discovery and prepare for the hearing.

RESPONSE *A regulation setting forth an arbitrary time period would not be responsive to the problem. The time necessary to prepare varies from case-to-case and from intervenor-to-intervenor. This situation needs to be handled by the ALJ on a case specific basis. Intervenors who need more time, may request more time at issues conference and a reasonable adjournment will be granted.*

COMMENT 624.4(a) - ALJs should ask questions during legislative hearings, to fully clarify citizens' comments.

RESPONSE *The ALJs are encouraged to ask questions in order to clarify the comments. No rule is necessary.*

COMMENT 624.4(a) [also 624.12] - Legislative hearing - It seems inconsistent, and misleading to the public, to require a transcript of the legislative statement session, yet generally exclude it from the hearing record. Since public participation is a legal requirement, it should be included as part of the record - just like amicus briefs - even though the statements cannot be weighed as evidence.

RESPONSE *The delineation of the precise function of legislative hearing statements is clearly set forth at 624.4(a). Including the unsworn statements and unadjudicated matters in the hearing record would be misleading.*

COMMENT 624.4(a) [also 624.3(b)] - The legislative hearing should be omitted from the permit hearing procedure and from Part 624, or the notice of hearing should contain the following warnings. "Statements made at the legislative hearing do not constitute evidence, statements made at the legislative hearing will not be made part of the record of any adjudicatory proceeding with regarding to the permit. Ordinarily statements made at legislative hearing will not result in permit denial or modification of the term of the proposed draft permit."

RESPONSE *The rules do not prescribe the text of the notice and should not because of varying requirements depending on the program area. We have, however, attempted to craft the revised regulations in such a way that the significance of the legislative hearing comments was highlighted and clarified.*

COMMENT (a) 624.4(a)(1) - it is unclear to what the reference to Section 624.12 applies to. It is apparent that either an omission in the Draft has been made, or that a correction should be made from 624.12 to 624.1(b).

RESPONSE *The reference is to the requirements for the content of the record, as set forth at 624.12. The text has been revised to clarify the intended meaning.*

COMMENT 624.4(a)(3) - To give meaning to the legislative hearing, the ALJ or Staff should be required, by regulation, to prepare a written responsiveness summary.

RESPONSE *A responsiveness summary is prepared whenever a DEIS has been prepared for the application.*

COMMENT 624.4(a)(3) requires that, for an application accompanied by a DEIS and where the Department is the lead agency under SEQRA, "all statements made at the legislative hearing shall constitute comments on the DEIS and all substantive comments shall be addressed pursuant to the procedures set forth in section 617.14 of this Title." This requirement may be unwarranted and unnecessary because these unsworn statements in most cases offer few facts and little of substantive value.

RESPONSE *This merely reflects the requirements of 6 NYCRR 617.14.*

COMMENT 624.4(a)(4) - Caution should be exercised in allowing statements made at a legislative hearing to be used to frame issues. This provision will allow outside, "non-stakes players" to interject irrelevant, frivolous or inapplicable issues that must nevertheless be addressed in the FEIS.

RESPONSE *As indicated by the proposed regulation the statements are not to be used to frame issues, but to alert the ALJ to matters about which the ALJ may wish to inquire further during the issues conference, if they are not independently addressed at that time by the parties or the potential parties.*

COMMENT 624.4(b) - The issues conference, in practice, fails to provide its intended benefits and only delays proceedings. The issues conference should be simplified and abbreviated. Further, the issues rulings issued by the ALJ should not be the subject of appeal to the Commissioner. Such appeals take months to be decided and are the single largest cause of unnecessary permitting delay.

RESPONSE *Despite the fact that considerable time is sometimes devoted, the issues conference shortens the adjudicatory process and often demonstrates a lack of any need for adjudication. In many cases an additional benefit inures to both intervenors and applicant since expensive adjudication is avoided.*

COMMENT 624.4(b) - DEC staff should be required by regulation to issue draft permits for review some reasonable time prior to the issues conference. When the draft permit is not issued prior to the issues conference, the conference sometimes is adjourned or a second issues conference session is necessary, again thereby delaying the proceedings.

RESPONSE *A regulation is not appropriate because is too inflexible. The ALJ can protect the parties' rights.*

COMMENT 624.4(b)(1) should read "...held in advance of adjudicatory hearing <u>if one is required</u>."

RESPONSE *No change is necessary since the contingency is implicit in the existing language.*

COMMENT 624.4(b)(1) - "...at any time...new info...": too open, should be more like 617.8(g). How about a showing that new info would require substantial modification of permit or denial and that the info is relevant, accurate, and required for commissioner to have adequate bases for decision. (Avoid sandbagging intervenors and late hits).

RESPONSE *The balance is implicit because the information must meet the substantive and significant standard. Current regulations make a similar provision at 624.7(a)(4), and, in our experience, have not given rise to the suggested problems.*

COMMENT 624.4(b)(1) - The Department should provide more time prior to hearing, for intervenors to review documentation and identify potential issues for adjudication. Often an Applicant will meet informally with Staff for years, before filing a formal application for a project. If UPA does not allow additional time prior to hearing, then the regulations should allow for adjournment of the issues conference, as appropriate, to allow intervenors meaningful time to review and respond to Applicants' filings. The regulations should specifically state that the ALJ has authority to grant reasonable adjournments, once the hearing has commenced, to allow intervenors additional time to review and respond to particularly complex permit applications.

RESPONSE *624.4(b)(1) Has been amended to provide that: "Upon a demonstration that the public review period for the application prior to the issues conference was insufficient to allow prospective parties to adequately prepare for the issues conference, the ALJ shall adjourn the issues conference, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the prospective parties."*

COMMENT 624.4(b)(5) - Why can't a time limit be placed on the ALJ to respond? This Paragraph requires rulings from the ALJ "at the completion of the issues conference or soon thereafter..." UPA was enacted to encourage expeditious determinations on applications. UPA seems to contemplate that the issues would have been generally determined as part of the determination of the need for a hearing (ECL 70-0119; 621.7(b)) -- i.e., delays for issues rulings are not contemplated. Part 624 should include a specific deadline by which the ALJ must issue rulings, and identify a minimum time for the Commissioner to decide appeals. The time period between the decision on the issues conference or the interim decision of the

Commissioner on the interim appeal from the ALJ decision on the issues conference and the adjudicatory hearing, should be affixed by the regulations at a minimum of three months.

RESPONSE *While it may seem desirable to set a specific time limit to produce an issues ruling, the great diversity in the complexity of individual cases would make it unwise to do so. Some cases have only one or two proposed issues and little supporting material, and some have dozens of proposed issues, with thousands of pages of supporting documents. The variation in effort and time necessary to produce the issues ruling is obvious. Additionally, there are no sanctions for exceeding a time limit and it is not easy to envision a sanction which would equitably protect the interests of all parties to the hearing.*

COMMENT 624.4(c) - The regulations should make it clear that the Issues Conference is not the appropriate time to rigorously weigh contradictory offers of proof. Too often, decisions of the Administrative Law Judges and those of the Commissioner on appeal reveal a detailed analysis and evaluation of the information provided at the Issues Conference as though evidence were being evaluated after a hearing. Although the credibility, expertise and training of the persons making the assertion has to be taken into account, the issues conference is not the appropriate stage at which to resolve conflicting factual issues.

Although one purpose of an Issues conference is to narrow or resolve disputed issues of fact without resort to taking testimony, hotly disputed issues of fact can only be resolved by a hearing and that provision should not be read to authorize the Administrative Law Judge or the Commissioner to engage in an extensive weighing of conflicting offers of proof.

RESPONSE *An issues conference is the proper time to determine if a true factual conflict has been demonstrated by the offers of proof. Determinations of issues rising out of an issues conference are analogous to determinations made in a motion for summary judgment. Submittals by intervenors are not evaluated in a vacuum, but considered in conjunction with the application materials and the staff's evaluation. An ALJ must weigh these submissions to determine whether an offer of proof demonstrates a factual issue in controversy. This evaluation is essential in order to avoid unnecessary litigation.*

COMMENT Under proposed 624.4(c)(1)(iii), an issue will be deemed adjudicable only if both "substantive and significant." This inappropriately restricts the scope of issues for adjudication, and places an unduly heavy burden on community, civic and environmental groups, and on other interested parties who seek to raise issues for adjudication. The language should be revised to permit review

of a broader range of issues: "it is proposed by a potential party and is either substantive or significant or raises a material issue of fact or of law." Substantial interest by the public, should be a triggering factor that affects the adjudicatory hearing process. ECL 70-0103(4) provides that it was the intent of the Legislature to "promote public understanding of all government activities" in enacting permit hearing procedures. There is a separate value in having an adjudicatory hearing in order to increase public understanding of a controversial project.

RESPONSE *This function is performed by the legislative hearing and any voluntary informational meeting held by applicant, programmatic staff or interested public group. An adjudicatory hearing, by its nature, is only necessary where there is a dispute to resolve regarding a factual or legal matter. The primary intent of the Legislature (ECL §70-0103(1)) was "to assure the fair, expeditious and thorough administrative review of regulatory permits." (emphasis added). As noted above, substantive and significant is a statutory standard and not subject to revision in the context of administrative rule-making. Also see the comments and responses to 624.1(a)(1) and 624.4(c)(1)(i) and (iii).*

COMMENT 624.4(c)(1)(i) and (iii): If the standard for Staff and Applicant, is identification of a "substantial" issue, then the standard should be the same for intervenors, rather than "substantive and significant".

RESPONSE *The law provides for adjudication of only substantive and significant issues between the applicant and an intervenor (ECL 70-0119). The purpose of this limitation is to avoid adjudicating issues that have little or no chance of affecting the permit decision.*

Where an applicant and DEC staff disagree, regardless of the likelihood that adjudication will change the outcome, the applicant has a due process right to challenge a denial or imposition of significant conditions.

COMMENT 624.4(c)(2) and (3) - The terms "substantive" and "significant" have established meanings as used in the existing Part 621 regulations. The definitions of these terms in proposed Sections 624.4(c)(2) and (3) should either be revised to limit the applicability of such definitions to the terms "substantive" and "significant" as used in Section 624.4(c)(1)(iii) or should be eliminated.

Overall, we would suggest that the proposed definitions of the terms "adjudicable issue," "substantive" and "significant" be eliminated. These matters are not addressed in the existing Part

624, which was originally intended only to establish procedures for a hearing. It was Part 621 which established the basis for obtaining an adjudicatory hearing in the first instance. At the very least, DEC should insure that the revised Part 624 is completely consistent with Part 621. For example, the definitions of "substantive" and "significant" should include concerns relating to economic feasibility.

RESPONSE *In conducting adjudication it is essential to "separate the wheat from the chaff" to avoid overburdening the system by engaging in undirected and misdirected litigation of matters unlikely to affect the hearing's outcome. The new language simply maintains the existing dividing line set up by the legislature for this purpose. The "Substantive and significant" standard as used in Parts 624 and 621 is derived from the UPA (see ECL 70-0119(1)). Over the years the meaning of these terms has been better defined by Decisions of the Commissioner. The amendments to Part 624 reflect these decisions, and will provide more guidance to parties.*

COMMENT 624.4(c)(3) - The regulations should define "significant" in terms of what ought to cause the Department to require a major modification to a permit or denial. The regulations should specifically acknowledge the possibility that under some circumstances a sufficient number of "insignificant" issues will amount to an adjudicable controversy.

RESPONSE *Under the regulations as they are now written, if an intervenor can demonstrate a number of minor, but substantive, issues collectively rise to the level of "significance" then an adjudicable issue has been raised.*

COMMENT 624.4(c)(3) - The regulations should omit "major" in its definition of "substantive" and should substitute the phrase "substantive modification".

RESPONSE *The language in the regulation tracks ECL 70-0119(1), which use the phrase "major modifications to the project".*

COMMENT Section 624.4(c)(4) essentially requires potential parties to take into account the conditions of the draft permit when meeting their burden of persuasion that a hearing issue exists. It is inconsistent for the hearing regulations to require potential parties to come to the issues conference ready with offers of proof on prospective issues which must account for Staff's position, without requiring Staff to disclose its position beforehand.

RESPONSE *Under most circumstances Staff will have disclosed its position beforehand through issuance of a draft permit or a denial.*

In the event Staff's position at the issues conference constitutes a new position or a surprise to any of the participants, the impacted person(s) should ask the ALJ for an extension in order to react appropriately to the new information.

COMMENT 624.4(c)(6) - The purpose of the issues conference is to define issues that will be the subject of the adjudicatory hearing. The new regulations do not include the DEIS provisions of the present regulations, but instead redefine adjudicable issue under the "substantive and significant" standard. Significant impacts, alternatives, mitigation measures, or social and economic considerations, even when specifically identified in the DEIS or raised in comments on the DEIS, may not be examined in the hearing.

The proposed regulation bars adjudication of SEQRA issues where DEC is not lead agency, unless department staff has objected to lead agency treatment. This conflicts with SEQRA (see Town of Henrietta v DEC, 430 NYS2d 440). This further narrows the potential scope of a permit hearing. Given reluctance of the Courts to rigorously review SEQR compliance, the Department should retain its right to entertain SEQR issues when another agency is the lead, especially when the lead agency is the project applicant. If the permit hearing will not address issues which have been inadequately addressed by the lead agency, in what forum will they be addressed? Could the public be arguing SEQRA issues in another forum while DEC is proceeding to issue permits?

RESPONSE *The new regulations are consistent with the interpretation the commissioner has historically attached to the current 624.6(b). There is an inherent tension between the lead agency role and the applicant's right to get a coordinated review on the one hand, and the independence of the involved agencies on the other hand. DEC has an obligation to participate in the coordinated review as an involved agency, and to assure that the EIS adequately addresses DEC's concerns. Once a coordinated review has been made and the Final EIS produced, an applicant has the right to expect SEQR matters have been resolved and will not be looked at anew by each governmental agency through which permits must be pursued. After issuance of an FEIS, if a person believes the lead agency has not adequately addressed SEQR issues, a CPLR Article 78 may be commenced. DEC does not have the statutory authority to, in the context of conducting a permit hearing, undermine the statutory role assigned to the lead agency.*

COMMENT 624.4(c)(6)(i)(a) would limit review of DEC staff determinations "to not require preparation of an environmental impact statement" to those cases in which the administrative law judge "finds that the determination was irrational or otherwise affected by an error of law." This regulation was presumably intended to preclude review of factual findings. It is unclear why

staff SEQRA determinations should be given the same degree of deference accorded findings made by a trial judge. In the proceedings at issue here, the ALJ functions as a fact-finder and should be permitted to make de novo determinations on SEQRA issues. Clause 624.4(c)(6)(i)(a) should be revised to permit review of any staff determination. Proposed subparagraph 624.4(c)(6)(ii) should be revised to eliminate all references to lead agencies and to permit adjudication of any substantive, significant or material SEQRA-based issue.

RESPONSE *Where DEC staff has made a determination, it is not administratively efficient to revisit the entire application absent a showing that staff's determination was not rational. The ALJ does not have the same expertise as the Staff, therefore without a record the ALJ should not be able to reverse a Staff determination. See the comment and response immediately preceding.*

COMMENT In 624.4(c)(6)(i)(a), the "irrational" standard is unusual, and suggests it will rarely be applied. "Arbitrary" is a better established and more appropriate legal standard.

RESPONSE *Final SEQRA determinations are reviewable under CPLR Article 78. This is the CPLR Article 78 standard where no formal record exists.*

COMMENT 624.4(c)(6)(ii) [SEQRA] (b) [non-DEC lead agency] - Instead of this complex wording, simply state that where another agency is lead agency and a final EIS has been prepared, no issue based solely on SEQRA compliance will be considered unless the department had timely notified the lead agency of deficiencies with respect to the proposed issue.

RESPONSE *We believe the proposed language is as clear as that suggested here. Additionally, 624.4(c)(6)(ii)(b) covers a wider range of contingencies than covered by the commenter's proposal.*

COMMENT 624.4(c)(7) should not eliminate adjudication of the completeness of the application. Completeness of the application should be a threshold issue at adjudicatory hearings. If DEC staff made a mistake in determining completeness, parties should be able to present evidence to demonstrate the application is not complete.

RESPONSE *An application which is missing information necessary for decision-making can be denied pursuant to ECL Section 70-0117(2). Whether there is such missing information can be subject to an adjudicatory hearing if the question otherwise meets the standards for adjudication.*

On the other hand, the UPA determination of completeness is intended as a starting point, both for public review of an application, and for commencing the permit review deadlines established by UPA. Although ideally only applications with adequate information would be determined complete under UPA, by statute applications can also be declared complete by default if the Department fails to act within the prescribed times. It is our view that the existence of the default provision demonstrates the Legislature's intent that the UPA completeness determination should not be revisited, but that, if additional information is needed, it should be handled under 621.15(b).

COMMENT 624.4(c)(8) should establish the public's right to intervene, and to allow intervenors to raise additional issues, if the issues qualify under 624.4(c)(1). The proposed language would allow only those issues "cited" by Staff to be considered by the ALJ -- reducing the ALJ's issue-determination function to a minor role. Because staff is an interested party, it should not determine the hearing issues. 624.4(c)(8) should be extended to cover applications for renewal under 621.13 where no change in operation, permittee, or permit condition is proposed by applicant, and Staff seeks to deny the renewal or grant the renewal with altered permit conditions.

RESPONSE *621.14(a) makes it clear that, when not requested by the permittee, modifications, suspensions or revocations are matters solely within the discretion of the agency Staff. Limitation of the hearing to issues related to the reasons for Staff's proposed action, and impacts arising therefrom, is therefore appropriate.*

COMMENT 624.4(c)(8) makes reference to "624.4(c)(1) of this Part." This should reference: 621.14(a) of this Title. The second reference to 624.4(c)(1) at the end of the paragraph is correct.

RESPONSE *The text of the third sentence has been revised in the following manner: " . . . The only issues that may be adjudicated are those [cited in the department's notice to the permittee as its] <u>related to the</u> basis [to modify, suspend or revoke] <u>for modification, suspension or revocation cited in the department's notice to the permittee</u>. Whenever <u>such</u> issues [addressed in this paragraph 624.4(c)(1) of this Part are eligible for adjudication] <u>are proposed for adjudication</u>, the determination . . .. "*

624.5 HEARING PARTICIPATION

COMMENT 624.5 - Elimination of limited party status will foreclose meaningful public involvement by citizen organizations and individuals in some cases, and will totally foreclose any involvement in others.

RESPONSE *All who would previously have been entitled to limited party status will be entitled to full party status under the revised regulations. The deletion of the "limited party" status and the introduction of "amicus" status has been severely criticized. Numerous comments indicate that the public misconstrues these revisions as a substitution of amicus for limited party status. Since the amicus status is limited only to submission of briefs on issues of law or policy, this has been perceived as a curtailment of limited party status, which allows full participation on identified issues. This is a misperception of what the new regulations do (see the comment and response above at 624.2(w)).*

COMMENT 624.5 - The current 624.4(d) providing for limited party status should be retained. "Interests" and "expertise" dovetail with the subjects discussed at the issues conference. An ALJ is now authorized to limit participation to those matters a party asserted at the issues conference. This enables the ALJ to organize the record's development in a logical fashion, and prevent the parties from unfairly surprising each other. It also allows the ALJ to take steps to prevent unnecessary duplication of parties' efforts, and serves as an incentive for the parties to voluntarily coordinate their efforts. The proposed regulation offers only two options on party participation - full party status or amicus. The relationship between party status and issues conference assertions is destroyed - a disincentive to potential parties to invest time and effort in issues conference preparation. Ultimately, this will result in less information being available at the ruling stage, and make it more difficult for the ALJ to manage the proceeding later on.

RESPONSE *Replacing limited party status with full party status encourages enhanced public participation. An ALJ will still possess significant authority to effectively and efficiently manage the proceeding, and preclude irrelevant or unduly repetitious testimony or argument.*

COMMENT 624.5(a) - The new regulation proposes a mandatory party category of the applicant and the DEC, which thereby creates a further lesser status for the public.

RESPONSE *The amendments do not change the current status of an applicant and department staff as parties. The language is merely descriptive of a basic fact inherent in the permitting process.*

COMMENT 624.5(b)(1)(ii) - should be rewritten to read: "identify petitioner's social, economic or environmental interest in the proceedings..." It is not clear what is meant by "environmental interest." This is a particularly troublesome point since it goes without saying that the issue to be raised must be a substantive and significant environmental issue. The elimination of social and economic interests as grounds for raising a substantive and significant environmental issue invites a dramatic and unwarranted narrowing of the opportunity for intervention.

If a petitioner is prepared to go forward with presentation of evidence on a substantive and significant issue which could lead to permit denial or significant modification of the project, it is unnecessary to require that the petitioner must also demonstrate an adequate environmental interest in order to become a party. The danger in the additional requirement of a demonstration of adequate environmental interest is that the Department is importing standards of or concepts of so-called "standing" and "injury in fact" from civil litigation into the adjudicatory hearing process. The importation of standing concepts from civil litigation into permit hearing procedures will certainly reduce the number of adjudicatory hearings and limit public participation in the adjudicatory hearing process over permit applications. In order to trigger a hearing a potential party may have to prove environmental injury in order to quality.

RESPONSE *We believe such a requirement is appropriate because the ECL is not designed to protect non-environmental interests. Environmental interests are the interests protected by the statutes which DEC administers. See In the Matter of Jack Gray Transport, Inc., Interim Decision of the Commissioner, November 20, 1985, for a complete explanation of the applicable standard. This is the standard used consistently under current regulations. In practice "environmental interest" has been very liberally interpreted.*

COMMENT 624.5(b)(2) - requirements of an offer of proof are too vague. The regulation should specify if an offer of proof needs to be in writing, and exactly what is meant by "the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue." The requirement that an intervenor state the precise grounds for opposition or support, should be clarified. Does this include economic, health and other concerns? The old language specifying identification of social, economic or environmental interests, should be retained.

Use of the word "grounds" in the description of the offer of proof seems unclear. Possibly what is meant would be better explained by the words "authority" or "information."

RESPONSE *The regulations specify "in writing". We believe that the language "the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" is sufficiently clear. "Grounds" refers to grounds a prospective intervenor believes contain legal impediments to the project going forward as advertised or to similarly based support for the project. Such grounds must be tied into laws DEC administers. An intervenor must know by the time of the issues conference, and must inform the ALJ and other parties present, whether the intervenor intends to present a case through witnesses, expert witnesses, documentary evidence, physical evidence, cross examination of the applicant's witnesses or other form. While the words "environmental interest" have been retained, "social" and "economic" have been deleted. This is because, except to the extent these concepts relate to the environmental interests DEC is mandated to enforce they are outside the purview of DEC's legal authority and expertise.*

COMMENT 624.5(b)(2)(ii) should be deleted as it is so burdensome as to effectively bar public participation. The provision must be considered in light of the 21-day notice. A member of the public must not only arrange an appointment to see the records, but then must plow through voluminous documents, gather the facts, gather information from other places, review state rules and procedures, and prepare a petition meeting all the requirements under (b)(1) and (b)(2)(i). It is not until all the facts are gathered does it become possible to determine all the substantive issues and the experts that might be needed. Where a negative declaration has been issued the public has usually received very little information. FOIL requests may even be necessary and are time consuming. Identifying exactly which experts among a field of experts would be willing and able to testify is an extremely daunting task. In some cases there may need to be experts in human health, engineers, wildlife specialists and many others. But this provision even requires more than the names of the individuals who will present testimony, it requires the nature of the testimony. Were the department to provide for a 60 day notice all of this would be possible. With only 21 days, no member of the public without paid full time staff will be able to participate. The department should not write rules that by their burdensome requirements exclude members of the public, who do not have extensive resources.

Proposed subparagraphs 624.5(b)(2)(i) and (ii) should be deleted and replaced with: "specify the nature of the argument and evidence to be presented and any other matter believed relevant."

RESPONSE *These provisions are appropriate and the burdens placed on a prospective party are necessary in order to demonstrate the substantive and significant standard as required by UPA. The requirement that a prospective intervenor arrive at the issues conference with clear arguments for issues, based on proposed testimony, either factual or expert, has been the established standard for more than ten years (see In the Matter of Halfmoon District No. 1, Interim Decision of the Commissioner, April 2, 1982). We recognize the difficulties attendant in preparing such a case within the timeframes available and adequate adjournments are available as a matter of both regulation and department policy (See response to comments under 624.3(b)(6)).*

COMMENT 624.5(b)(3) - The amicus status requires the public to hire a lawyer to write a brief. Requiring "certified experts" and "attorneys" is a restriction on a citizen's right or ability to participate in the hearings, and is anti-democratic. Additionally, amicus status limits public participation to submission of a brief, and precludes participation in prehearing meetings and other discussions, or even listing on the parties' mailing list.

RESPONSE *We are not requiring representation by an attorney. Although the regulations recognize that parties generally participate through such representation, there is no requirement, explicit or implied, that any party hire an attorney or expert. Amicus status opens participation to a whole new class of persons, who previously lacked the requisite issue to become a party (eg.: an environmental group submitting a statement/brief on a policy issue). A person requesting either Party Status or amicus status will be listed on the service list.*

COMMENT 624.5(b)(4) - The present language in Part 624, permitting the ALJ to require additional information from the person seeking party status has been deleted. Proposed paragraph 624.5(b)(4) should be revised to state: "If a potential party fails to file a petition in the form set forth above, the ALJ may require additional information from the filer. If the defect is not cured within a reasonable period of time, the ALJ may deny party status."

RESPONSE *The ability has been retained at 624.5(b)(4), which states: "If a potential party fails to file a petition in the form set forth above, the ALJ may deny party status or may require additional information from the filer."*

COMMENT 624.5(b)(4) and 624.5(c) - These should be absolute; i.e., inadequate petition or late filing -- no status.

RESPONSE *We wish to remain flexible in allowing intervention and to err, if at all, by encouraging increased public participation and eliminating more adverse environmental impacts. It would not be appropriate to exclude a person on mere technicalities when substantive and significant issues have been raised.*

COMMENT 624.5(c) - Since the standards for becoming a full party are so high and require an offer of proof that demonstrates that the permit may be denied or significantly modified, a petition that satisfies this high standard should not be denied simply because it is late. If the late petitioner can make an offer of proof sufficient to demonstrate that the permit should be denied or significantly modified, it is against the public interest not to hold an adjudicatory hearing simply because the petition was filed late.

RESPONSE *The regulations provide for late filings. If a late petitioner produces an appropriate explanation for inconveniencing the timely participants, a substantive and significant issue will be heard. We emphasize, an inability to submit on time may be addressed before the deadline by simply requesting an adjournment or an extension.*

COMMENT 624.5(c)(2)(iii) - The existing standard of "good cause" for late filing, should be retained, rather than the proposed showing of a "convincing" case, which is subjective and does not address the merits of the application for party status.

RESPONSE *A requirement that good cause be shown for being late is implied by the requirement at 624.5(c)(2). The phrase is not responsive to the other showings required for a late filing. Since 624.5(c)(3) is redundant in light of the clear requirements of 624.5(c)(2) it has been deleted from our final draft.*

COMMENT 624.5(c)(2)(ii) - late filings for party status: change the language to "unreasonable" delay or "unreasonable" prejudice.

RESPONSE *The text has been revised at 624.5(c)(2)(ii) to read: "... not delay the proceeding or otherwise unreasonably prejudice the other parties;".*

COMMENT 624.5(e)(1)(i) [also 622.4(a) and 622.10(c)(1)] - A recent opinion of the Attorney General concludes that the Adirondack Park Agency's most prudent course of action is not to allow non-lawyers to represent others in enforcement proceedings, because the Attorney General could find no statutory or regulatory authority for doing so. The revised Parts 622 and 624 should specifically authorize representation by non-lawyers as long as the

party so represented has been notified of its representatives qualifications.

RESPONSE *Such representation will be explicitly authorized so long as there is disclosure. Part 624 provides for representation by non-lawyers at 624.8(c).*

COMMENT 624.5(e)(1)(iv) should specify to whom rulings are appealed.

RESPONSE *This has been specified. See §624.6(e).*

COMMENT 624.5(e)(2) - Amicus status should be revised to include oral, as well as written argument.

RESPONSE *Oral argument on amicus issues will be allowed at the discretion of the ALJ. 624.5(e)(2) has been revised accordingly.*

COMMENT 624.5(e)(2) - The record in the Inter-Power case demonstrates that encouraging filing of briefs and memorandums by non-parties is disruptive, and blatantly unfair to the parties who have fully participated in the formal review.

RESPONSE *This comment is misplaced. The "Inter-Power" case was conducted under the rules of the Public Service Commission. Those rules differ significantly from the rules under consideration.*

COMMENT 624.5(f) - provides the ALJ with extremely broad discretion to revoke party status and should be deleted. It provides a mechanism for the Applicant and the Department to terminate public participation and eliminate public participation in the hearing process. The need for an orderly, efficient, and fair process is undeniable, however, codification of this degree of unfettered discretion is inappropriate and will completely undermine public perceptions of fairness and equity. The current regulations provide for sanctions against a party who fails to appear and participate as directed by the ALJ. See Subdivision 624.5(d). If these controls are insufficient, there are other measures that could be employed short of revoking a party's status. The agency has allowed "fairness" to be removed from the hearing process, by granting an unchallengeable method of removal of any or all parties that are not in agreement with the findings of the agency, the applicant, or the determination of the ALJ.

RESPONSE *Any process must have a mechanism to address abuse. While the sanctions available to the ALJ must be strict to be effective, it is anticipated that it will seldom if ever be employed. We understand the concerns addressed by the above*

comments, however the fears are unfounded. As a ruling on party status, any such determination of the ALJ would be immediately appealable to the Commissioner.

624.6 GENERAL RULES OF PRACTICE

COMMENT 624.6 - Since this rule should serve as a reference document for individuals wishing to understand the procedures we see no reason not to actually provide the necessary information here rather than refer people to another rule.

RESPONSE *The references to the CPLR and other statutes are being retained for the facility of understanding and interpretation gained through the body of cases defining methodology and rights attendant on these procedures (see the response to comments on the new 622.3(c)).*

COMMENT 624.6 - The "pocket veto" provision included in the March 1992 Draft should be restored: "Failure of the Commissioner to respond within fifteen working days after receipt of a motion for leave to appeal shall be deemed a denial of the motion, unless the Commissioner in his discretion shall extend such time."

RESPONSE *The department views it as more important to rule on the merits of motions and to prevent anything from falling between the cracks by default.*

COMMENT 624.6(a) and (c) - The incorporation of procedural formalities such as CPLR rules for service and motion practice into the administrative hearing process will inequitably burden community and civic groups, and other members of the public. The time frames for members of the public to respond to appeals of only five days is too short and should be lengthened to 10 days. In addition the regulations should provide that upon receipt of notice of any appeal, the ALJ shall adjourn or continue the adjudicatory hearing until the Commissioner has made a decision concerning the disputed ruling. Delete proposed subdivisions 624.6(a) and (c) and retain the current subdivision 624.5(c).

RESPONSE *The regulations move the process closer to civil procedures because of the increased financial stakes at risk in permit proceedings and the accompanying heightened concern for due process. Community and civic groups, and other members of the public will have their interests protected by these changes as will the applicants and the State of New York. Participants may request*

relief from the time limit stated in the regulations or ask that the hearing be adjourned until the Commissioner's decision, and a suitable extension will be granted in appropriate cases.

COMMENT 624.6(b) - General Construction Law §25-a is relevant as to computing time limits, and should also be cited with GCL §20.

RESPONSE *The text has been revised in the following manner to address this concern: "(1) Computation of time will be according to the rules [of section 20] of the New York State General Construction Law."*

COMMENT 624.6(b) - The five day time periods for responding to motions appears to be unnecessary and may just add to the procedural disputes which divert some hearings from the substance of the case. In some situations, motions are made on the record, responded to on the record and ruled on immediately or after a short recess. The proposed amendment could actually increase the opportunities for delay in these situations, if a party wanted to insist on the five days which 624.6(c)(3) would give it.

RESPONSE *The time limits contained under the General rules of practice section are intended to provide certainty where there has been no specific direction from the ALJ. They are not intended to bind the ALJ to an unreasonable or administratively inefficient course of action. The ALJ has authority and will, in fact, either shorten or lengthen the applicable times as appropriate under the particular circumstances of each occurrence.*

COMMENT 624.6(f) - The restriction against tape recording or televising adjudicatory hearings contained in Civil Rights Law Section 52 is probably unconstitutional. If it is constitutional, it should be repealed. Adjudicatory hearings on permit applications involve a substantial public interest and should be open to being televised just like courtroom proceedings.

RESPONSE *DEC may not promulgate a regulation or conduct hearings in contravention of statute, regardless of the nature of that law. Nor does DEC have authority to declare a law unconstitutional or the prescience to know when or if a law will be changed by the courts or the Legislature.*

624.7 DISCOVERY

COMMENT 624.7 - If the Department is going to continue to impose a high standard of proof for an intervenor to demonstrate that an adjudicable issue exists, then it is crucial that discovery be liberally provided to the intervenor for that purpose.

RESPONSE *Discovery can become unwieldy if it is open-ended. We view the application documents as normally being sufficient to alert any intervenors to matters which could potentially lead to an issue. The new regulations have been structured to provide a much more completely articulated and comprehensive discovery process than do the current regulations. They do, however, limit discovery in the pre-issues conference phase. This is to prevent "fishing expeditions" and to focus the process on the substantive and significant issues determined at the issues conference. Additional pre-issues conference discovery is possible however. If an intervenor can demonstrate that it really does need further discovery to raise an issue, the ALJ has the power to authorize that discovery and grant whatever time is necessary to review the additional material.*

COMMENT 624.7 - The existing discovery language should be retained because it is less intimidating to the public, and does not suggest that all witnesses will be expert witnesses, as does the proposed language.

RESPONSE *We certainly do not concur that the new regulations are more intimidating to the public than the current regulations; in fact we believe just the opposite to be true. The current regulations do not define precisely enough what material is discoverable. The revisions are designed to rectify this problem. Although the regulations recognize the fact that parties generally participate through experts and attorneys, there is no requirement, explicit or implied, that any party hire an attorney or an expert. However, while the new regulations do <u>not</u> envision that all witness will be experts. They <u>do</u> provide that where there are expert witnesses the ALJ may require prefiled testimony.*

COMMENT 624.7 - All discovery should be by permission of the ALJ; this will allow the ALJ, rather than the parties to make determinations about what information is relevant and therefore must be made available to the parties. Without such oversight, discovery may prove unduly burdensome and is likely to lead to unnecessary delay and expense.

RESPONSE *The reason for this regulation is to automate, as far as possible, the discovery process. The revisions will clarify the parties' rights and settle many recurring disputes previously brought before the ALJ. Of course, the ALJ is ultimately in charge and will still decide disputes. The amendments set forth the discovery procedures with a clarity and detail not found in current regulations and therefore more clearly guide the public seeking to gain discovery or to defend against another's unreasonable demands.*

COMMENT 624.7(a) provides that prior to the issue conference, discovery is limited to what is afforded under the Freedom of Information Law ("FOIL"). An applicant trying to determine the reasonableness and basis for proposed permit conditions should be entitled to discover any information which the Department relies on in developing the proposed conditions. Allowing such discovery would facilitate settlement at the issues conference stage. Therefore, applicants should not be limited to what may be obtained pursuant to FOIL prior to the issues conference.

RESPONSE *Information the Department relies on in developing the proposed conditions would generally be the type of information available under Part 616. Additionally, application may be made to the ALJ for relief if more information is needed.*

COMMENT 624.7(a) - A party or a potential party is severely limited when access to documents necessary for the case has been restricted. The ALJ should be in a position to request that FOIL requests be expedited and to take into consideration the fact that all information has not been made available.

RESPONSE *The ALJ has the power to rule on disputed discovery requests once the proceeding has been noticed for hearing.*

COMMENT 624.7(b) provides that within ten days after service of the final designation of the issues any party has the right to demand extensive discovery of the other party just as in a civil litigation. This is a one-sided discovery process, favoring applicants, which is destined to overwhelm proposed intervenors and members of the public and kill participation in the discovery process by the public. Ten days is not a reasonable time period after a decision on the issues for the public to be required to make disclosure of evidence for an adjudicatory hearing.

RESPONSE *This provision is even-handed in that it does not favor one party over another. Any discovery demands must relate to the issues. While intervenors are vulnerable for producing materials related to their individual issues and experts, the applicant is liable for the entire project. Additionally, the ALJ will be available to moderate the entire process, if needed. Discovery must be demanded within 10 days; the regulations do not call for its production within that time.*

COMMENT 624.7(b) - The regulations should provide a time period of at least 60 days between the time when the Commissioner has issued his decision on the interim appeal for deciding issues for adjudication and the time within which the intervening parties who are members of the public have to prepare pre-filed testimony and supporting documents. The public cannot be expected to commence

preparation of pre-filed testimony without knowing what issues are the subject of adjudication, so the ALJ or Commissioner should have announced the decision on party status and issues that will be adjudicated before preparation of pre-filed testimony must begin.

RESPONSE *Not all intervening parties' cases would require 60 days to prepare, nor can all cases be prepared that quickly. This matter is most efficiently left to the ALJ's judgment in response to a motion for a reasonable extension of time.*

COMMENT 624.7(b)(5): The following additional language is recommended: "lists of documentary or physical evidence to be offered at the hearing to the extent known." When attorneys are responding to, and developing their own discovery requests, they must coordinate several expert witnesses in various disciplines. Attorneys may be unaware of what evidence they should request, or what documentary or physical evidence, may become important as responses to their case are developed.

RESPONSE *We are cognizant of this problem and believe that the requested caveat is already implicit.*

COMMENT 624.7(c)(4) - It should be made clear that the DEC does not have the legal authority to authorize non-employees to access private property but, rather, may use its powers over hearing participants to obtain compliance with a discovery request. When a non-party or non-potential party objects to inspection of their property (e.g., an adjacent property owner) the department or requester may have to go to court to obtain access because there is no authority for the department to compel property access.

RESPONSE *Section 624.7(d) makes this point clear when it delineates the "tools" available to DEC in such matters.*

COMMENT 624.7(e) - ALJ should have authority to allow, not require use of prefiled written testimony (too burdensome-unrealistic).

RESPONSE *The ALJ's power here is not expanded beyond the present regulations. In the past prefiled testimony has often proved to be workable, equitable and an effective administration tool.*

COMMENT 624.7(e) - This paragraph authorizing the use of prefiled testimony is misplaced under "discovery" - it is better placed in the section that describes the ALJ's powers. Also since pre-filed testimony is not an automatic requirement, the detailed prescriptions on what it should include, the materials persons are expected to bring to the hearing with them, etc., might as well be

left to the ALJ's order that requires prefiled testimony or at that be rephrased as guidance.

RESPONSE *This properly belongs with the discovery section since it relates to another device to further inform the parties of matters being adjudicated. Under the ALJ's powers section is a coordinate rule at 624.8(b)(1)(vii) which speaks to the ALJ power with regard to disclosure.*

COMMENT The Part 622 and 624 regulations should reiterate the requirements of SAPA §401(4).

RESPONSE *The requirements will be incorporated at 622.7(e) and 624.7(g).*

624.8 CONDUCT OF THE ADJUDICATORY HEARING

COMMENT 624.8(a)(5) - Is stenographic record always timely to allow its submittal to be the determining date?

RESPONSE *It is our experience that reporting services generally take pains to provide the transcript with dispatch. In any event the record cannot be closed without the stenographic record.*

COMMENT 624.8(a)(5) - Transcripts should be available at cost.

RESPONSE *Most reporters, if asked, make transcripts available at the cost paid by the Applicant. Additionally it is the general practice of the Office of Hearings to make a copy of the transcript available on file in a public place (town hall, library, etc.) near to the project site. Copies of transcripts are also available under FOIL at the agency's copying costs.*

COMMENT Section 624.8(a)(6) does not allow adequate time for members of the public to file briefs at the conclusion of the hearing. There should be a minimum time period of at least two weeks for a party to submit a closing or post-hearing brief, and the two weeks should be measured from receipt of the transcript.

RESPONSE *Section 624.8(a)(6) does not specify any time for filing of briefs. Such scheduling is a matter for ALJ determination upon due request and argument of the parties.*

COMMENT 624.8(a)(6) - we believe that replies may be absolutely necessary where a party misrepresents the submission of another party, therefore replies must be allowed.

RESPONSE *This is a matter fully within the competence of the ALJ to remediate on a case-by-case basis.*

COMMENT 624.8(b)(1)(ix) - Regarding ALJ's referral of legal issues to General Counsel. It is questionable that the ALJ could make a referral to the General Counsel's office for a legal interpretation because during that period of time there would be no hearing pending which would suspend the running of the UPA time clock.

RESPONSE *Once the hearing has commenced this would not present a problem, since an appropriate adjournment could be made.*

COMMENT 624.8(d) and 624.6(e) - interlocutory appeals of rulings by the ALJ will cause undue delay. All ALJ rulings should be subject to appeal only at the conclusion of the hearing.

RESPONSE *Since an adjournment of the hearing is not mandatory the hearing should not be lengthened unnecessarily by this process. Even if allowing interlocutory appeals of the ALJ's rulings may occasionally lengthen the hearing, however, this alternative allows for the use of a more efficient alternative than waiting until the conclusion of the hearing.*

COMMENT 624.8(d)(2)(v) - Reference to "during the course of the hearing" is a bit confusing especially in the context of a ruling to exclude any issue which affects party status. The regulation should specify the route of appeal which would be pursued if an Administrative Law Judge rules that there shall be no hearing either because no party has demonstrated the requisite interest or no issue has been advanced which is sufficiently substantive and substantial. The denial of a request for discovery or adjournment whether before or after the Issues Conference should be subject to expedited appeal.

RESPONSE *Adequate remedy already has been provided for both these circumstances [See 624.7 and 624.8(d)(2)(v)].*

COMMENT Proposed 624.8(d)(7), providing for adjournment of the hearing during appeal only by permission of the ALJ, would be prejudicial to the interests of any person denied party status, if that determination is subsequently reversed on appeal.

RESPONSE *The uniqueness of each case makes this a decision best left to the experience of the ALJ. An adjournment is almost always granted, especially when there could be prejudice, but efficiency of the adjudicatory process is also a factor to be weighed.*

624.9 EVIDENCE, BURDEN OF PROOF AND STANDARD OF PROOF

COMMENT Extend staff's burden of proof to also cover those situations where staff wants to deny or condition a renewal and applicant has sought no change.

RESPONSE *Where a renewal is sought an applicant is obligated to demonstrate entitlement to the permit even where applicant alleges that there is no change contemplated in the permitted activity. To fulfill its obligation the applicant must establish 1) that there are no changed circumstances or changed laws which impact on the activity and 2) that no new information or submittals are required (eg.: a showing that capacity continues to exist in a permitted ash fill). After the applicant has satisfied these requirements, where staff opposes the application or wishes to condition the renewed permit, staff must establish the factual or legal basis for its position. If opposed by the applicant the reason for denial or conditioning may become an issue for adjudication. The new regulations, at 624.9(b)(3), have been modified to reflect this process.*

624.10 EX PARTE RULE

COMMENT Section 624.10 should require that during the time from of the notice of publication until the final decision of the Commissioner, both the ALJ and the Commissioner keep a record of all communications with regard to any matter that is related to an adjudicatory proceeding, and that all such communications will be disclosed to all parties.

RESPONSE *The ex parte prohibitions under 624.10(d) are adequate. Further, the supervisors with which an ALJ may consult are in the decision-making chain, and are independently prohibited from engaging in <u>ex parte</u> communications with partisans.*

COMMENT 624.10(b) permits an ALJ to consult supervisors on questions of law or procedures. In effect, a Deputy or Assistant Commissioner may decide these matters, particularly if the ALJ is a non-lawyer. This may need to be prohibited. At a minimum, if it

does occur, the request should be in writing and should be provided to all parties. Additionally, the response should be in writing, and copied to all parties.

RESPONSE *This type of requirement would be inefficient and impact adversely on administration of the Hearings Office. The regulation reflects the fact that consultation with supervisors and other Hearings Office staff is consistent with both SAPA and Governor's Executive Order 131.*

COMMENT 624.10(d) - Staff stated at the March 24, 1993 informational meeting at DEC Region 2, that SAPA prohibits the Commissioner from engaging in ex parte communications with a party or its representatives, and that the regulations should reflect that fact. The regulation should be so revised.

RESPONSE *The regulations contain this prohibition at 624.10(d).*

624.11 PAYMENT OF HEARING COSTS

COMMENT 624.11 - The applicant should be required to pay an advocacy fee to the public or to any group that is granted full party status to an adjudicatory hearing in an amount of 20 percent of the cost of preparation of the DEIS as part of a scaled hearing fee for adjudicatory hearings.

RESPONSE *This cannot be done by regulation. DEC would need specific statutory authority to do this. Compare with the Public Service Law's mandate for applicant contribution to a fund to defray expenses incurred by municipal parties for expert witness and consultant fees (PSL Section 142.6).*

COMMENT 624.11(c) - Most of the time, the applicant makes the arrangements directly with the vendor -- a private business deal between two contracting parties. Because the Department is not party to that contractual relationship any disputes which arise between applicant and vendor do not involve the department. The department should not be placed by regulation in the position of enforcing the terms of a private contract. The wording of this provision (especially 624.11(c) which holds a final decision until all costs are paid) requires that the department inject itself into this private relationship. The wording should be changed to make it clear that Applicant will be liable for the costs incurred by the Department for the transcript and room.

RESPONSE *This provision has not changed substantially in the last ten years. There is little history of misunderstanding that the intent of the regulation is as expressed in the comment.*

624.12 RECORD OF THE HEARING

COMMENT 624.12(a) - Provision needs to be made to require electronic transcript or other state-of-the-art rendition.

RESPONSE *The text has been revised at 624.12(a) to read: ". . the expense of the applicant. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.*

COMMENT 624.12(c) - The Administrative Law Judge will often direct that a copy of the transcript be provided to the intervenor at no charge. This practice is absolutely crucial to the participation of an intervenor. At least one copy of the complete record of the proceeding should be made available to the parties for reference and/or copying, on a speedy basis, and at a reasonable cost. Failure to do so is a barrier to public participation.

RESPONSE *The text has been revised to add 624.12(c), which will read: "As soon as the record becomes available the ALJ shall assure that a complete and current copy of the record is placed in an accessible location for the parties' reference and/or copying."*

COMMENT 624.12(b) - If proposed findings are filed, the ALJ is required to address them. Although proposed findings sometimes can be helpful, they also can be unduly burdensome to the ALJ who may be faced with several sets of proposed findings, each arranged in a different manner, and each with its own nuances in wording. Usually, no party will file a set of findings the ALJ can adopt.

RESPONSE *The inclusion of "proposed findings and exceptions, if any" in the record is a requirement of SAPA § 302. However, Part 624 does not make the submission of proposed findings a requirement and the ALJ's permission must still be secured before any proposed findings may be filed by the parties.*

624.13 FINAL DECISION

COMMENT 624.13(a)(2) and (3) - Comments by parties on a recommended decision could create another round of de novo evidentiary arguments to the Commissioner. In the absence of much quicker issues conference procedures, this additional delay does not provide sufficient benefits and should be eliminated.

RESPONSE *We are aware of these drawbacks. However, there are benefits, and the benefits outweigh the drawbacks. This technique has already been used successfully by both state and federal agencies. Additionally, the mechanism is for use only at the commissioner's discretion and will be applied only in cases of utmost complexity. Such cases would take considerable time and effort with or without such a provision.*

COMMENT 624.13(a)(2) - Distribution of the ALJ's recommended ruling, should be mandatory, and not discretionary. In order to make the practice standardized and regularized and to eliminate surprise this new procedure should be applied to all cases that are the subject of an adjudicatory hearing.

RESPONSE *See the comment and response immediately above. Unless the commissioner maintains control of this procedure the concerns addressed by that comment will be realized in each and every case before the agency. While it is expedient for the commissioner to have this ability in appropriate cases, to add a universally applicable further step in the permitting process would not be productive. Most cases are simply not complex enough to need any input beyond what was presented at hearing. If yet another "final" argument could be anticipated in all cases, it would encourage "sandbagging" by litigants, and attempts to reserve the best argument until it could be made directly to the commissioner. We believe that to make circulation of recommended reports standard operating procedure for all cases would be expensive, time consuming and administratively inefficient.*

COMMENT 624.13(c), stating that where the DEIS is the subject of a hearing, the DEIS plus the hearing report will constitute the FEIS, is in conflict with 617.14(i), which requires that a FEIS must include copies or a summary of substantive comments received, and their source, whether or not the comments were received in the context of the hearing, and the lead agency's responses to all substantive comments.

RESPONSE *The comments and responses must be an exhibit to the hearing report.*