

MEMORANDUM
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TO: Phillip G. Retallick, Director

FROM: Robert S. Kuehl, Deputy Attorney General

RE: PUBLIC HEARINGS UNDER 7 DEL. C. CHAPTER 91, HSCA

DATE: June 24, 1992

The purpose of this memorandum is to explain the Legal Office's interpretation of when a public hearing on a signed consent decree is required by 7 Del. C. Chapter 91, HSCA. The reason for an "interpretation" is that Chapter 91 is somewhat ambiguous on this point.

It is our interpretation that DNREC only has to hold a public hearing on a signed consent decree when a "meritorious request" is made by a member of the public. If no such request is made, and no comments are received from the public, no public hearing on the consent decree is required under Chapter 91. If someone comments on a consent decree, but does not request a public hearing, DNREC may hold one at its discretion.

Seven Del. C. Section 9107(b) states as follows:

When the Secretary and potentially responsible parties reach settlement agreement providing for a voluntary remedy, it shall be filed with the Superior court as a consent decree. The Secretary shall allow at least 20 days for public comment before the proposed consent decree is entered.

While this section does not expressly require advertising of a public notice to begin the 20 day comment period, we have interpreted it to require such notice, and DNREC has, in fact, advertised the first two consent decrees in this manner. Obviously, it is reasonable to alert members of the public to the fact of a "comment period" on a consent decree. We recommend you continue this practice.

Seven Del. C. Section 9112 states as follows:

Public hearings shall be held on regulations developed pursuant to this chapter, the proposed settlement agreement and the proposed plan of remedial action in accordance with §§ 6004 and 6006 of this title, as well as any additional notice and hearing requirements the Secretary has adopted by regulation.

One could read Section 9112 to always require a public hearing on a consent decree because of the language "...shall be held...". However, for the reasons discussed below, we do not interpret this Section to require a public hearing if no request is made and no comments are received from any member of the public.

Section 9112 refers to 7 Del. C. Sections 6004 and 6006. Neither of these sections specifically refers to consent decrees, or the triggering event that determines when a public hearing is required for a consent decree. Section 6004 only applies to "permit applications." It specifies application procedures, public notice requirements, and also addresses when a public hearing on a permit application is required. A public hearing is required on a permit application if DNREC receives a "meritorious request" for a hearing.

Since 7 Del. C. Section 9112 specifically refers to § 6004 even though there is no such thing as a "permit application" under Chapter 91, the General Assembly must have been referring to the triggering mechanism of Section 6004 (i.e. a "meritorious request") as to when a public hearing is required for a consent decree under Chapter 91. We believe that the General Assembly, in Section 9112, did not intend to require that a public hearing "...shall be held on...the proposed settlement agreement..." even if no meritorious request is received by DNREC, although a strict reading of the language of Section 9112 might suggest otherwise. Therefore, a public hearing must be held on a consent decree only if DNREC receives a "meritorious request" for a hearing as described in 7 Del. C. Section 6004.

Section 6006 states that, whenever a public hearing is required, either on a permit application, regulation, plan, alleged violation, or variance request, it shall be conducted according to the procedures set out in Section 6006. Therefore, if a timely meritorious request for a public hearing on the consent decree is received by DNREC, Section 6006 embodies all the procedures for advertising the public notice and conducting the public hearing.

In summary, the General Assembly, in enacting Section 9112, intended that a public hearing on a consent decree would be required if a meritorious request is received pursuant to Section 6004, and that a public hearing, if it is requested, is to be advertised and conducted pursuant to the requirements of Section 6006.

Another question involves the issue of when a request for a public hearing must be made by member of the public. Section 6004 says that a "meritorious request" must be made within "a reasonable time" which it defines as "15 days, unless federal law requires a longer time..." No federal is involved in Chapter 91, so this means 15 days. However, Section 6004 clearly gives DNREC discretion to allow a longer time to make such a request. Since Section 9107(b) provides a 20 day comment period, it would make sense to also allow 20 days for a meritorious request to be made. This is what DNREC has been done so far. However, a reasonable interpretation of Section 9112 (and Section 6004) is that DNREC could allow the public only 15 days to request a public hearing, while allowing 20 days in which to make comments on the consent decree. While this may be legally permissible, we recommend that DNREC allow the same 20 day period for both making comments and requesting a hearing.

There is one last matter for interpretation that involves when the consent decree is filed with the Superior Court. Section 9107(b) (quoted above) is ambiguous on this point, but seems to suggest that the consent decree should be filed with the Court before the 20-day comment period begins. However, we do not believe that this is what the General Assembly intended. There is no question that under Chapter 91 if a hearing is requested or

comments are received, it is DNREC, not the Superior Court, that is to handle the administrative process of holding public hearings and receiving comments. It would also be DNREC that responds to the comments and makes any necessary changes to the consent decree. This "decision" by DNREC about whether to alter a signed consent decree in response to public comments would be appealable to the EAB pursuant to Section 9110(b)(1). Following that, it would be appealable to the Superior Court pursuant to Section 9110(b)(2). Therefore, the logical way to proceed is to not file the consent decree with the Superior Court until after the 20-day comment period expires, and after any public hearing is held, if such a hearing is required. This is what we believe the General Assembly intended. This is how we recommend you proceed with the administration of Chapter 91.

RSK:sfh
RSK92010

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