

FOCUSED REVIEW

Implementing Public Comment Requirements of Administrative Procedures Act



Joint Legislative Oversight
& Sunset Committee

Executive Summary

Delaware agencies with the statutory authority to create and adopt regulations must follow the processes in place by the Administrative Procedures Act. Citizens and interest groups have a minimum of 30 days to submit written public comments on all proposed regulations.

Agencies vary in their methods of analyzing collected public comments because there is no standardized requirement for analysis. Nevertheless, all agencies consistently engage with public comments with the nature of their responses differing based on comment content. Notably, most public comments do not result in changes to proposed regulations.

In total, the Joint Legislative Oversight and Sunset Committee (JLOSC) staff examined 124 final regulations from six state agencies. Public comments led to substantive changes of 4 regulations and non-substantive changes of 40.

JLOSC staff also assessed neighboring states, finding similar public participation processes with distinctions in comment submission duration, notice types, and agency comment analysis.

Based on all information reviewed, the Department of Natural Resources and Environmental Control stands out for its comprehensive and consistent approach to public comments, utilizing a department specific document called a Technical Response Memorandum. However, there's potential for improvement in public accessibility by directly linking to these department memos in their final regulations. If Delaware opts for a uniform approach to public comment analysis, a document like the Department of Natural Resources and Environmental Control created Technical Response Memorandum could be a viable solution.

Objective, Scope, and Methodology

The Joint Legislative Oversight and Sunset Committee (“JLOSC” or “Committee”) voted on June 8, 2023, for their staff to perform a focused review of the different methods used by state entities in implementing the public comment requirements of the Administrative Procedures Act (“APA”). APA is the portion of Delaware law governing how state agencies create and adopt regulations.

In this review, JLOSC staff reviewed public comment connected to final regulations adopted by state agencies connected to reviews completed by JLOSC within the past 3 years. JLOSC staff specifically looked at the methods used by 6 state agencies in Delaware connected to reviews completed by JLOSC within the past three years. These 6 agencies included:

- Department of Education.
- Department of Natural Resources and Environmental Control.
- Department of State.
- Department of Transportation.
- Health and Social Services.
- State Fire Prevention Commission.

Additionally, staff reviewed similar APA public comment requirements of 4 neighboring states:

- Maryland.
- New Jersey.
- New York.
- Pennsylvania.

To complete this report, JLOSC staff reviewed volumes 22 through 27 of the monthly Register of Regulations, news articles, and other available public documents on agency websites.¹ In total staff reviewed the publication of 124 final regulations published by the 6 agencies identified in the scope of this review.

Unlike full oversight and sunset reviews, this review does not follow the full review process which includes a self-report and formal presentation from the entity under review. In a focused review, JLOSC staff explore the specific research request from JLOSC and provide a report of findings and recommendations on the topic.

Background Information

JLOSC staff reviewed public comment connected to final regulations adopted by state agencies connected to reviews completed by JLOSC within the past 3 years. The following is a summary of the findings.

Name of Act: Delaware Administrative Procedures Act (“APA”)

Date of creation: Senate Bill 320, 128th General Assembly, signed July 1976.

Section of Delaware Code for Agency Regulations and Public Comment: [29 Del. C. § 10115](#).

Recent Statute Changes of Interest:

- Regulatory Accountability and Transparency Act of 2015.²
 - Senate Bill 113, 148th General Assembly, signed July 2015.
 - Requires each agency to submit a regulatory impact statement to the Registrar of Regulations whenever it proposes to adopt or amend certain regulations affecting individuals or small businesses.
 - Senate Bill 120, 148th General Assembly, signed July 2015.
 - Requires each agency to submit a “regulatory flexibility analysis” (“RFA”) to the Registrar of Regulations whenever it proposes to adopt or amend certain regulations affecting individuals or small businesses.

Office Responsible for Publishing Regulations: The Office of the Registrar of Regulations publishes the monthly Delaware Register of Regulations and the Delaware Administrative Code. Agencies must submit all regulation changes to the Office of the Registrar of Regulations.

¹ Delaware Register of Regulations: <https://regulations.delaware.gov>

² Act not related to public comment but is the last substantive change applied to APA with the objective to provide the public more information on proposed regulations.

Register of Regulations: The Register is an official State publication released on the first day of each month and serves as a comprehensive compilation of all regulatory changes that occur during that month. Administrative regulations, outlined in the Register, have the force and effect of law. The Register is a centralized location that provides public information on emergency, proposed, and final regulations. Adopted final regulations are published in the Delaware Administrative Code.

Register of Regulations Website: <https://regulations.delaware.gov> publishes all proposed and final regulations monthly. Provides citizen participation information.

Number of Final Regulations Published: The Office of the Registrar of Regulations maintains previous issues of the Register organized by volumes according to fiscal year, starting with volume 1 covering July 1997 through June 1998. The following data provides context for final regulations published by all state agencies for the previous three fiscal years:

- Fiscal Year 2021: 133 final regulations published.
- Fiscal Year 2022: 144 final regulations published.
- Fiscal Year 2023: 179 final regulations published.

Summary of the Regulation Process: Agencies must first have statutory authority to draft regulations and must ensure that their regulations reflect the rulemaking authority as permitted by the General Assembly. Agencies must submit notice to the public when creating, modifying, or removing regulations. Public notice requires the agency to submit their proposed changes to the Office of the Registrar of Regulations for publication in the monthly Register of Regulations. The public has opportunity to comment on the proposed regulation changes for at least 30 days. If the agency holds a public hearing, the public has at least 15 additional days to submit written comments after the final public hearing.

Citizen Participation in the Regulatory Process: [29 Del. C. § 10116](#) requires the agency to provide notice of proposed regulations and receive all written comments. It allows the agency to exercise its discretion in processing and analyzing received public comments and determining how the agency will consider the public comments in its conclusions.

Results of Public Comments – Substantive and Non-Substantive Changes: Public comments fall into two categories, substantive and non-substantive changes. Agencies can incorporate non-substantive changes into their final regulations without republishing as proposed changes. Substantive changes to proposed regulations require the agency to republish the regulations as proposed which resets the public comment period to 30 days.

Judicial Review: [29 Del. C. § 10141](#) allows for individuals to file for declaratory relief through the Courts if an individual or group feels an adopted regulation is unfair or unlawful. To do this, they need to file a complaint with the Court within 30 days from when the agency published the regulation as final in the Register of Regulations.

Agency Analysis of Public Comments: In this focused review, JLOSC staff assessed public comments related to final regulations implemented by 6 state agencies that had undergone reviews conducted by JLOSC within the last 3 years. In total, staff reviewed the publication of 124 final regulations published by these 6 agencies. Public comment resulted in substantive

changes of 4 regulations and non-substantive changes of 40 regulations. The following is a summary of approaches used by agencies to review public comments:

1. Department of Education (“DOE”).

- Responds with clarifications and explanations.
- Summarizes comments, occasionally including commenter names and affiliations.
- Tends to bundle similar comments.
- 17 non-substantial comments incorporated.
- **2 substantive changes made to regulations because of public comment: Office of the Secretary and Professional Standards Board.**

2. Department of Natural Resources and Environmental Control (“DNREC”):

- DNREC responds to public comments with a Technical Response Memorandum (“TRM”) attached as an Appendix on its website.³
- TRM documents address each comment and include responses, but they are not directly linked within the final regulations in the Register.
- Some final regulations incorporate summaries of substantive comments and responses.
- 3 non-substantial comments incorporated.

3. Department of State (“DOS”).

- DOS divisions, especially under the Division of Professional Regulation, identify and summarize public comments in a consistent format.
- Substantive comments receive detailed responses while non-substantive comments are simply acknowledged.
- Personal experiences supporting regulations occasionally included in the final regulations without direct changes.
- 1 non-substantial comments incorporated.
- **2 substantive changes made to regulations because of public comment: Board of Nursing and the Board of Pharmacy.**

4. Department of Transportation (“DeIDOT”).

- DeIDOT's Division of Planning includes public comments in entirety or as summaries in final regulations.
- Few public comments have been received by DeIDOT in the reviewed period.
- 5 non-substantial comments incorporated.

5. Health and Social Services (“DHSS”).

- Responds with clarifications and explanations.
- Summarizes comments without disclosing commenter identities.

³ Technical Response Memorandums are prepared at the request of the DNREC’s Hearing Officer. They are available on the DNREC website under *regulatory orders*: <https://dnrec.delaware.gov/secretary-orders/regulatory>

- Publishes original comments with commenter identities.
- Provides explanations for rejecting certain recommendations.
- Refers to commenter as "one commenter " without specific identities.
- 13 non-substantial comments incorporated.

6. Fire Prevention Commission ("Fire Commission").

- Identifies commenter names and affiliations.
- States commenter stances with minimal description.
- 1 non-substantial comment incorporated.

Public Comment Process in Neighboring States: JLOSC staff reviewed APA public comment requirements of 4 neighboring states. The following is a summary of findings:

1. Maryland.

- Maryland agencies format final regulations uniformly.
- Public comments only acknowledged or responded to if they result in changes to the regulation.
- Public comment information is minimal in Maryland's Register.

2. New Jersey.

- Notices posted twice a month.
- 30-day public comment window, extendable if sufficient public interest.
- Identifies changes in the "filed" section of the notice.
- Office of Administrative Law reviews the clarity of notices.
- Consistent organizational structure in responding to comments.

3. New York.

- Regulations posted every 7 days.
- 4 types of notices used.
- 60-day public comment window.
- Conducts an "assessment of public comments."
- Varies in presentation style, with some agencies summarizing comments and responses.

4. Pennsylvania.

- Pennsylvania's agencies handle public comments similarly to Delaware.
- Environmental Quality Board provides a detailed "Summary of Comments and Responses."
- Division of Medical Marijuana integrates comments into relevant sections but lacks a dedicated public comment section.

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Research Conclusion:

- Agencies vary in the number of regulations and volume of comments.
 - All agencies consistently respond to public comments.
 - Responses vary based on the content of the comments.
 - DNREC demonstrates a comprehensive approach to public comments with TRMs but could improve public accessibility by linking TRMs directly in the final regulations.

- Most public comments do not lead to changes in proposed regulations.
 - In total, the staff examined the publication of 124 final regulations. Public comments led to substantive changes in 4 regulations and non-substantive changes of 40 regulations.

- Neighboring states have similar public participation processes.
 - Differences include the duration for submitting public comments, type of notices published, and agency analysis of public comments.
 - Maryland acknowledges public comments only if they lead to changes, providing limited information.
 - New Jersey agencies consistently respond to public comments, with changes often being non-substantive.
 - New York uses 4 notice types, 60-day public comment period, and agencies conduct an "assessment of public comments" which vary in detail and clarity.
 - Pennsylvania agencies mirror Delaware's practices with some agencies providing detailed summaries of comments.

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