


State of Oregon  
Department of Environmental Quality

Memorandum

**Date:** May 27, 2015  
**To:** Environmental Quality Commission  
**From:** Dick Pedersen, Director   
**Subject:** Agenda item J, Informational and discussion item: The role of the Environmental Quality Commission in reviewing appeals of contested-case proposed orders June 10-11, 2015, EQC meeting

**Why this is important**

In pursuing DEQ's mission to be a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water, DEQ issues permits and orders to named parties that become legally-binding requirements. Oregon statutes and rules specify how such orders are to be issued and how recipient parties may contest them. It is important that modifications to the appeal and review process be fully evaluated to ensure that they are fair, efficient and effective.

**Background**

DEQ is responsible for administering a variety of regulatory programs to protect air, water and land quality in Oregon. In the course of executing these duties, DEQ issues permits, issues compliance orders and assesses penalties. Under Oregon's Administrative Procedures Act, ORS Chapter 183, parties are entitled to challenge these actions through a "contested case hearing" process that will result in a final order from the agency and commission.

Pursuant to statutes, an administrative law judge from the Office of Administrative Hearings will hear the matter, construct a hearing record, and render findings, conclusions and explanations. The process through which this hearing is held is prescriptive and not subject to modification by the commission except as specified in the Attorney General Uniform and Model Rules of Procedure in OAR Chapter 137. EQC has adopted some modifications, as allowed, into DEQ procedural rules at OAR Chapter 340, Division 11. These rules specify how an administrative law judge will render a "proposed order" and how a respondent or DEQ may petition EQC for review of that proposed order.

Under these rules, the commission holds an oral hearing and renders a final order in the matter. This final order is then subject to further appeal by the respondent – but not by DEQ – to the Oregon Court of Appeals and the Oregon Supreme Court.

**Next steps and  
commission  
involvement**

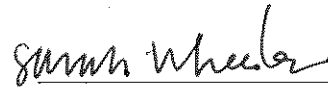
This initial informational presentation and discussion is to respond to the commission's request for information about the numbers and kinds of cases that DEQ initiates, the hearing process, the legal authorities under which EQC reviews are held, the history of the commission's role in the hearing process, alternatives to EQC review, and the potential impacts of implementing such alternatives on DEQ's mission.

DEQ asks the commissioners for initial feedback and direction on next steps. In response, DEQ intends to return to the October EQC meeting with more detailed information and recommendations on processes and implementation strategies for further discussion.

**Attachments**

A. Table of legal authorities under which EQC reviews are held

Approved:



Sarah Wheeler, Office of Compliance and Enforcement

*Report prepared by Les Carlough*

## **LIST OF AUTHORITIES FOR CONTESTED CASE HEARINGS AND EQC REVIEW**

This general summary highlights various statute and rule authorities commonly used or of special interest to this discussion about the role of the EQC. Numerous other duplicative or program-specific statutes and rules are included in the footnotes. This list is not comprehensive and is for general reference and discussion purposes only.

### **Laws governing how DEQ initiates penalty assessment:**

- **ORS 468.140** sets the maximum penalty for most violations of DEQ administered statutes, rules, permits or orders at \$25,000 per violation per day.<sup>1</sup>
- **ORS 468.130** lists the factors that the EQC must consider in setting penalty schedule rules. These factors are the basis for the OAR 340-12 penalty formula rules.
- **ORS 468.135** specifies that penalties must be imposed in the manner provided in ORS 183.745.
- **ORS 183.745** is part of ORS Chapter 183 (Attorney General uniform and model rules of administrative procedures) and requires that penalties be imposed by meeting the formal notice requirements outlined in ORS 183.415, provides a 20-day period in which a respondent may contest a penalty, and requires that the respondent be given a contested case hearing under ORS 183.413-.470.
- **OAR 340-012** are DEQ's enforcement rules, which set out the types of enforcement actions DEQ may take, outlines the penalty formula and factors, specifies how certain alternative penalties are to be calculated, and gives the director discretion regarding penalty amounts assessed.
- **OAR 340-012-170** sets out the types of considerations DEQ should consider in mitigation or settlement of a penalty.<sup>2</sup>

### **Laws governing initiation of compliance orders:**

---

<sup>1</sup> Some program chapters also specify maximum penalties of \$25,000 per violation per day: ORS 459.995(1) for solid waste and waste tires; 465.900(1) for cleanup; 466.900(1) for hazardous waste; 466.900(3) for hazardous materials spills; and 466.994(1) for underground storage tanks. There is also an assortment of special, typically smaller penalties for specific violations which are seldom imposed. ORS 468.140(3)(a) establishes a penalty maximum of \$100,000 per violation per day for violations related to spills of oil or hazardous materials that entered state waters. ORS 468.996 establishes a maximum penalty of \$250,000 per violation per day for violations that create an "imminent likelihood for an extreme hazard to the public health or which causes extensive damage to the environment." All of these penalties must be imposed according to ORS 468.135.

<sup>2</sup> This implements ORS 468.130(3) which authorizes the EQC to mitigate penalties and ORS 468.130(4) which authorizes the EQC to delegate to DEQ by rule the settlement authorities of 468.130(3).

- Various statutes expressly authorize DEQ and the EQC to issue orders. In programs where there is no express authority, there is implied authority through statutes that refer to the issuance of orders and statutes that require orders to be issued through the contested case process.<sup>3</sup>

**Laws governing permit and license contested cases:**

- **ORS 183.310** makes issuance, refusal to issue or renew, suspension, or revocation of permits and licenses subject to the contested-case process.<sup>4</sup>
- **ORS 468.070(3)** specifies the contested case procedures of ORS Chapter 183 be used for denials, modifications, suspensions, or revocations of air or water permits.<sup>5</sup>

---

<sup>3</sup> ORS 459.376 states that "The Environmental Quality Commission may take whatever action is appropriate for the enforcement of its rules and orders." ORS 468.090 allows DEQ to commence enforcement procedures related to substantiated complaints of air and water pollution which are contested through the ORS Chapter 183 contested-case hearing processes. ORS 468.035(1)(j) and 468.035(1)(n) authorize enforcement of air and water pollution and such other acts necessary to effectively carry out those duties. While there is no express authority for issuing orders for air or water quality program violations not involving actual pollution such as reporting violations, DEQ interprets these statutes (and ORS 468.140(1)(c) and 468.140(3)(b)(B) which refer to the enforceability of "orders" issued for air or water quality) to implicitly convey authority to issue orders. ORS 466.185 allows DEQ to issue orders related to complaints involving hazardous waste violations and specifies that a modified ORS 183 hearing process be used with shorter timelines. ORS 466.305 contains a similar provision for orders involving polychlorinated biphenyl (PCB) complaints. ORS 466.020 and 466.190 allow DEQ to issue orders related to hazardous waste generation, treatment, storage, or disposal compliance and specifies that EQC review of such orders must be done under ORS Chapter 183. Similar provisions apply for orders issued for compliance with subsurface sewage disposal systems (ORS 454.635), paint stewardship (459A.850), PCBs (ORS 466.265(2)), notices of land use restrictions because of environmental hazard (ORS 466.370), and underground storage tank statutes and rules (ORS 466.810). ORS 465.260 allows the Director to issue a removal or remedial action order (for cleanup of hazardous materials). This order is unique in that it not subject to pre-enforcement review by the Environmental Quality Commission – though responsibility for compliance costs may be later litigated in circuit court. ORS 466.145 specifies that DEQ decisions to issue a hazardous waste treatment permit are subject to appeal to the EQC through Chapter 183 CCH processes; however decisions to issue a hazardous waste storage permit are not (ORS 466.150). ORS 466.770 provides a similar provision for costs of corrective action for underground storage tank contamination. ORS 466.680 allows the EQC to order a person liable for cleanup of oil or hazardous materials to pay the costs incurred by DEQ in performing the cleanup and that order is appealable through the ORS 183 hearing process. ORS 468B.320 requires the EQC to making findings and order regarding state expenses in collecting, removing, or dispersing oil that entered waters of the state because a responsible party failed to do so. The EQC order is appealable as an "order in other than a contested case."

<sup>4</sup> ORS 183.310(6) defines the term "order" and specifically lists "Agency action under ORS 468B.050 to issue a permit" – making issuance of water quality permits subject to the ORS 183 contested case processes. While general permits might normally be considered permit by rule, this provision clarifies that DEQ may issue them by order rather than by rule. ORS 183.310(2) makes the suspension, revocation or refusal to renew or issue licenses (including certifications, registrations or any other form of permit or approval needed to pursue a commercial activity, trade, or profession) subject to the contested case process, although some unique timing and stay requirements apply (183.430 and 183.435).

**Laws governing the process of contested case hearings:**

- **ORS 183.413 to 183.471** contain procedural requirements of the contested case hearing including: what must be included in the Notice, how the hearing is to be held, guidance on discovery tools, evidence standards, who may represent the parties at hearing and what the order must include.
- **ORS 183.635** requires that DEQ and EQC contract with administrative law judges from the Office of Administrative hearings (OAH) to preside over the contested case hearings.
- **ORS 183.630** requires that all hearings held under ORS 183.635 be conducted according to model rules of procedure prepared by the Attorney General (*i.e.*, OAR 137-003-0501 to 137-003-0655).
- **OAR 137-003-0501 to 137-003-0655** include detailed requirements for various aspects of the hearing.
- **OAR 340-011-0500 to 340-011-0573** include EQC rules that supplement the Attorney General model rules of procedure specifically for DEQ contested case hearings.

**Laws governing the process of EQC review:**

- **ORS 183.411** "Unless otherwise provided by law, an agency may delegate authority to enter a final order in a proceeding or class of proceedings to an officer or employee of the agency, or to a class of officers or employees of the agency. A delegation of authority under this section must be made in writing before the issuance of any order pursuant to the delegation and must be retained in the agency's records."
- **ORS 468.130(3)** "The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the commission or regional authority considers proper and consistent with the public health and safety."<sup>6</sup>

---

<sup>5</sup> Various program-specific provisions apply: revocations of subsurface sewage disposal system certificate of satisfactory completion (ORS 454.665), sewage disposal service licenses (ORS 454.715), solid waste disposal site (ORS 459.245 and 459.255), waste tire storage or carrier permit (ORS 459.745 and 459.755), hazardous waste and PCB storage, treatment and disposal facility permits (ORS 466.170), underground storage tank service providers license (ORS 466.750), underground storage tank permit (ORS 466.775), heating oil tank service providers license (ORS 466.868), green permits (ORS 468.185), denial of a notice of construction under the air permitting program (ORS 468A.055), motor vehicle pollution control system approval certificate (ORS 468A.365), motor vehicle inspection certificate (ORS 468A.380), and asbestos abatement contractor's license or worker's certification (ORS 468A.725 and 468A.730).

<sup>6</sup> This provision appears to allow the EQC to accept the ALJ's factual findings and conclusions of law but nevertheless reduce the penalty based on equitable concerns. Because the detailed penalty formula already sets the penalty based on many equitable and fairness grounds, because there is already a system for considering these other factors in settlement (OAR 340-012-0170, adopted pursuant to 468.130 in part), because having the EQC take alternative action inconsistent with the proposed order would undermine DEQ's ability to finalize cases, and

- **OAR 137-003-635** specifies how the parties or ALJ may seek agency (EQC) response before the proposed order is issued about “the agency’s interpretation of its rules and applicable statutes; or which rules or statutes apply to a proceeding.”
- **OAR 137-003-0645 to 137-003-700** specify the procedures for agency review of a proposed order, including the exception process, what must be included in a final order, what constitutes default, motions for reconsideration and rehearing, and motions for intervention or stay. These rules cannot be modified by the EQC. *Relevant portions below beginning on page 5.*
- **OAR 340-011-0575 to 340-011-0585** specify the processes for EQC review of proposed orders, petitions for reconsideration or rehearing, and petitions for a stay of the effect of a final order. These rules may be modified by the EQC. *Relevant portions below beginning on page 13.*

---

because this type of action would encourage EQC appeals, DEQ does not recommend the EQC take such independent action during case review.

**Oregon Attorney General Uniform and Model Rules of Procedure Regarding  
Review of Proposed Orders**

**137-003-0645 Proposed Orders in Contested Cases**

- (1) Unless the administrative law judge is authorized or required to issue a final order without first issuing a proposed order, the administrative law judge shall prepare a proposed order.
- (2) The proposed order shall be based exclusively on:
  - (a) The pleadings, including the contested case notice, and motions;
  - (b) The applicable law;
  - (c) Evidence and arguments;
  - (d) Stipulations;
  - (e) Ex parte written communications received by the administrative law judge, memoranda prepared by the administrative law judge reflecting the substance of any ex parte oral communications made to the administrative law judge, written responses made by the administrative law judge and any memoranda prepared by the administrative law judge reflecting the substance of any oral responses made by the administrative law judge;
  - (f) Judicially cognizable facts and matters officially noticed;
  - (g) Proposed findings of fact and written argument submitted by a party or the agency;
  - (h) Intermediate orders or rulings by the administrative law judge or Chief Administrative Law Judge; and
  - (i) Any other material made part of the record of the hearing.
- (3) The proposed order shall fully dispose of all issues presented to the administrative law judge that are required to resolve the case. The proposed order shall be in writing and shall include:
  - (a) The case caption;
  - (b) The name of the administrative law judge(s), the appearances of the parties and identity of witnesses;
  - (c) A statement of the issues;
  - (d) References to specific statutes or rules at issue;
  - (e) Rulings on issues presented to the administrative law judge, such as admissibility of offered evidence, when the rulings are not set forth in the record;
  - (f) Findings as to each issue of fact and as to each ultimate fact required to support the proposed order, along with a statement of the underlying facts supporting each finding;
  - (g) Conclusions of law based on the findings of fact and applicable law;
  - (h) An explanation of the reasoning that leads from the findings of fact to the legal conclusion(s);
  - (i) The action the administrative law judge recommends the agency take as a result of the facts found and the legal conclusions arising there from; and
  - (j) The name of the administrative law judge who prepared the proposed order and the date the order was issued.
- (4) The agency by rule may provide that the proposed order will become a final order if no exceptions are filed within the time specified in the agency rule unless the agency notifies the parties and the administrative law judge that the agency will issue the final

order. If the agency adopts such a rule, the proposed order shall include a statement to this effect.

(5) If the recommended action in the proposed order is adverse to any party, the proposed order shall also include a statement that the party may file exceptions and present argument to the agency or, if authorized to issue the final order, to the administrative law judge. The proposed order shall include information provided by the agency as to:

(a) Where and when written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the official(s) who will render the final order.

(6) The administrative law judge shall serve the proposed order on the agency and each party.

(7) The proposed order shall include a certificate of service, documenting the date the proposed order was served on the agency and each party.

(8) The administrative law judge shall transmit the hearing record to the agency when the proposed order is served or, if the administrative law judge has authority to issue a final order, when the final order is served.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.460, 183.464, 183.630 & 183.685

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 1-2012, f. 1-11-12, cert. ef. 1-31-12

### **137-003-0650 Exceptions to Proposed Order**

(1) If the recommended action in the proposed order is adverse to any party or the agency, the party or agency may file exceptions and present argument to the agency or, if authorized to issue a final order, to the administrative law judge.

(2) The agency shall by rule or in writing describe:

(a) Where and when written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the official(s) who will render the final order.

(3) The agency may request the administrative law judge to review any written exceptions received by the agency and request the administrative law judge either to provide a written response to the exceptions to be made a part of the record or to revise the proposed order as the administrative law judge considers appropriate to address any exceptions. The administrative law judge shall not consider new or additional evidence unless, pursuant to OAR 137-003-0655(2), the agency requests the administrative law judge to conduct further hearing. The administrative law judge's response must be in writing, either in the form of a response to the exceptions or a revised proposed order, and sent to all parties and the agency.

(4) Agency staff may comment to the agency or the administrative law judge on the proposed order, and the agency or the administrative law judge may consider such comments, subject to OAR 137-003-0625 and 137-003-0660.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.460, 183.464 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04



**137-003-0655 Further Hearing and Issuance of Final Order**

(1) After issuance of the proposed order, if any, the administrative law judge shall not hold any further hearing or revise or amend the proposed order except at the request of the agency, except as provided in this subsection. The administrative law judge may withdraw a proposed order for correction within three working days of issuance of the proposed order. If the administrative law judge withdraws a proposed order for correction, the time for filing exceptions shall begin on the date the administrative law judge issues the corrected proposed order.

(2) If the agency requests the administrative law judge to conduct a further hearing under section (1) of this rule, the agency shall specify the scope of the hearing and the issues to be addressed. After further hearing, the administrative law judge shall issue a proposed order.

(3) If the administrative law judge's proposed order recommended a decision favorable to a party and the agency intends to reject that recommendation and issue an order adverse to that party, the agency shall issue an amended proposed order if:

- (a) The official(s) who are to render the final order have not considered the record; or
- (b) The changes to the proposed order are not within the scope of any exceptions or agency comment to which there was an opportunity to respond.

(4) Any amended proposed order issued under section (3) of this rule shall comply with OAR 137-003-0665(3) and (4) and shall include a statement that the party may file exceptions and present argument to the agency. The agency shall serve the amended proposed order on each party to the contested case proceeding.

(5) The agency or, if authorized to issue a final order, administrative law judge shall consider any timely exceptions and argument before issuing a final order. If exceptions are received, the agency or the administrative law judge may not consider new or additional evidence unless the agency requests the administrative law judge to conduct further hearings under section (1) of this rule. The agency or administrative law judge may issue an amended proposed order in light of any exceptions or argument.

(6) The agency or, if authorized, the administrative law judge shall issue a final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order as the final order, or modify the proposed order and issue the modified order as the final order.

(7) An agency should issue an amended proposed order or a final order within 90 days of the date of the proposed order. When an agency will not issue an amended proposed order or final order within 90 days of the proposed order, the agency shall give written notice to the administrative law judge and all parties of the date by which the agency expects to issue the amended proposed order or the final order. This rule does not apply to proceedings under ORS chapters 539 and 537.670 through 537.700. An agency may adopt a rule exempting classes of cases from the requirements of this subsection upon the agency's determination that, due to the nature of the cases, 90 days normally is an insufficient time in which to issue an amended proposed or final order. The requirements of this subsection apply to all orders for which the proposed order is issued after January 31, 2012.

(8) If an agency decision maker has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that decision maker shall comply with the requirements of ORS Chapter 244, including but not limited to 244.120 and 244.130.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & 183.630

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06; DOJ 1-2012, f. 1-11-12, cert. ef. 1-31-12

### **137-003-0660 Ex Parte Communications to Agency during Review of Contested Case**

(1) For purposes of this rule, an ex parte communication is an oral or written communication to an agency decision maker during its review of the contested case not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about legal issues or about facts in the record.

(2) If an agency decision maker receives an ex parte communication during its review of a contested case, the decision maker shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication.

(3) The agency shall include in the record of the contested case proceeding:

(a) The ex parte communication, if in writing;

(b) A statement of the substance of the ex parte communication, if oral;

(c) The agency's notice to the parties of the ex parte communication; and

(d) Rebuttal evidence, if any.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, ORS 183.462 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0665 Final Orders in Contested Cases**

(1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (5) of this rule, all final orders in contested cases shall include the following:

(a) Each of the elements identified in OAR 137-003-0645(3)(a)–(h),

(b) An Order stating the action taken by the agency as a result of the facts found and the legal conclusions arising there from; and

(c) A citation of the statutes under which the order may be appealed.

(3) If the agency modifies the proposed order issued by the administrative law judge in any substantial manner, the agency must identify the modification and explain to the parties why the agency made the modification. For purposes of this provision, an agency modifies a proposed order in a "substantial manner" when the effect of the modification is to change the outcome or the basis for the order or to change a finding of fact.

(4) The agency may modify a finding of historical fact made by the administrative law judge only if the agency determines that there is clear and convincing evidence in the record that the finding made by the administrative law judge was wrong. For purposes of this provision, an administrative law judge makes a finding of historical fact if the administrative law judge determines that an event did or did not occur in the past or that

a circumstance or status did or did not exist either before the hearing or at the time of the hearing.

(5) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0510(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and:

(a) Incorporate by reference a stipulation or agreed settlement signed by the party or parties agreeing to that action; or

(b) Be signed by the party or parties; and

(c) A copy must be delivered or mailed to each party and the attorney of record for each party that is represented.

(6) The final order shall be served on each party and, if the party is represented, on the party's attorney.

(7) The date of service of the final order on the parties or, if a party is represented, on the party's attorney shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.417(3), 183.470, 183.630, 183.650(3) & Or Laws 2009, ch 866, § 7

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 9-2007, f. 10-15-07 cert. ef. 1-1-08; DOJ 1-2012, f. 1-11-12, cert. ef. 1-31-12

### **137-003-0675 Reconsideration and Rehearing -- Contested Cases**

(1) Unless otherwise provided by statute, a party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 calendar days after the order is served. A copy of the petition shall also be delivered or mailed to all parties or other persons and agencies required by statute, rule or order to receive notice of the proceeding.

(2) The agency may, by rule, require a party to file a petition for reconsideration or rehearing as a condition of judicial review. The agency may, by rule or in writing, require any petition for reconsideration or rehearing to be filed with the administrative law judge.

(3) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0690(3).

(5) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(6) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(a) If the agency determines that reconsideration alone is appropriate, the agency shall enter a new final order in accordance with OAR 137-003-0665, which may be an order affirming the existing order.

(b) If the agency determines that rehearing is appropriate, the agency shall decide upon the scope of the rehearing. The agency shall request the administrative law judge to conduct further hearing on such issues as the agency specifies and to prepare a proposed order as appropriate. The agency shall issue a new final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the administrative law judge as the final order, or modify the proposed order and issue the modified order as the final order.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) Unless otherwise provided by law, a final order remains in effect during reconsideration or rehearing until stayed or changed.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.482 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 2-2000, f. & cert. ef. 3-27-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0690 Stay Request — Contested Case**

(1) Unless otherwise provided by law, any person who submits a hearing request after a final order by default has been issued or petitions for reconsideration, rehearing or judicial review may request the agency to stay the enforcement of the agency order that is the subject of the petition.

(2) The agency may, by rule or in writing, require the stay request to be filed with the administrative law judge.

(3) The stay request shall contain:

(a) The name, address and telephone number of the person filing the request and of that person's attorney or representative, if any;

(b) The full title of the agency decision as it appears on the order and the date of the agency decision;

(c) A summary of the agency decision;

(d) The name, address and telephone number of each other party to the agency proceeding. When the party was represented by an attorney or representative in the proceeding, then the name, address and telephone number of the attorney or representative shall be provided and the address and telephone number of the party may be omitted;

(e) A statement advising all persons whose names, addresses and telephone numbers are required to appear in the stay request as provided in subsection (3)(d) of this rule, that they may participate in the stay proceeding before the agency if they file a response in accordance with OAR 137-003-0695 within ten calendar days from delivery or mailing of the stay request to the agency;

(f) A statement of facts and reasons sufficient to show that:

(A) The petitioner will suffer irreparable injury if the order is not stayed; and,

(B) There is a colorable claim of error in the order;

(g) A statement explaining why granting the stay will not result in substantial public harm;

(h) A statement identifying any person, including the public, who may suffer injury if the stay is granted. If the purposes of the stay can be achieved with limitations or conditions that minimize or eliminate possible injury to other persons, petitioner shall propose such

limitations or conditions. If the possibility of injury to other persons cannot be eliminated or minimized by appropriate limitation or conditions, petitioner shall propose an amount of bond, irrevocable letter of credit or other undertaking to be imposed on the petitioner should the stay be granted, explaining why that amount is reasonable in light of the identified potential injuries;

(i) A description of additional procedures, if any, the petitioner believes should be followed by the agency in determining the appropriateness of the stay request; and  
(j) An appendix of affidavits containing evidence (other than evidence contained in the record of the contested case out of which the stay request arose) relied upon in support of the statements required under subsections (3)(f), (g) and (h) of this rule. The record of the contested case out of which the stay request arose is a part of the record of the stay proceedings.

(4) The request must be delivered or mailed to the agency and on the same date a copy delivered or mailed to all parties identified in the request as required by subsection (3)(d) of this rule.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.482(3) & 183.630

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06; DOJ 1-2012, f. 1-11-12, cert. ef. 1-31-12

### **137-003-0695 Intervention in Stay Proceeding**

(1) Any party identified under OAR 137-003-0690(3)(d) desiring to participate as a party in the stay proceeding may file a response to the request for stay.

(2) The agency may, by rule or in writing, require the response to be filed with the administrative law judge.

(3) The response shall contain:

(a) The full title of the agency decision as it appears on the order;

(b) The name, address, and telephone number of the person filing the response, except that if the person is represented by an attorney, then the name, address, and telephone number of the attorney shall be included and the person's address and telephone number may be deleted;

(c) A statement accepting or denying each of the statements of facts and reasons provided pursuant to OAR 137-003-0690(3)(f) in the petition-er's stay request; and

(d) A statement accepting, rejecting, or proposing alternatives to the petitioner's statement on the bond, irrevocable letter of credit or undertaking amount or other reasonable conditions that should be imposed on petitioner should the stay request be granted.

(4) The response may contain affidavits containing additional evidence upon which the party relies in support of the statement required under subsections (3)(c) and (d) of this rule.

(5) The response must be delivered or mailed to the agency and to all parties identified in the stay request within 10 calendar days of the date of delivery or mailing to the agency of the stay request.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.482(3) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

**137-003-0700 Stay Proceeding and Order**

(1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable, including taking further evidence on the matter. Agency staff may present additional evidence in response to the stay request. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 calendar days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, ORS 183.482(3) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00

## **EQC Rules of Procedure Regarding Review of Proposed Orders**

### **340-011-0573 Proposed Orders in Contested Cases**

(1) Following the close of the record for a contested case hearing, the administrative law judge will issue a proposed order. The administrative law judge will serve the proposed order on each participant.

(2) Within 15 days after a proposed contested case order is served, a participant in the contested case hearing may file a motion requesting that the administrative law judge clarify or supplement a proposed order. The motion must specify why the participant believes that the proposed order fails to conform to the requirements of OAR 137-003-0645 and recommend changes to the order. The motion must be filed with the administrative law judge and a copy provided to all participants.

(3) The administrative law judge may grant or deny a motion filed under section (2) of this rule within 15 days. If the motion is granted, the administrative law judge may take the matter under advisement and reissue the proposed order unchanged or may issue an amended proposed order. If the administrative law judge fails to act on the motion within 15 days, the motion is deemed denied by operation of law.

(4) The filing of a timely motion for clarification under section (2) of this rule tolls the period for filing a Petition for Commission Review of the proposed contested case order under OAR 340-011-0575. Tolling of the period begins on the day the motion is filed with the administrative law judge and ends on the day the motion is denied, deemed denied by operation of law, or the proposed order is reissued without changes. If the administrative law judge issues an amended proposed order, the amended order will be treated as a new proposed order for the purpose of filing a timely Petition for Commission Review under 340-011-0575.

(5) The motion for clarification authorized by this rule is intended to alter the provisions of OAR 137-003-0655 but not to eliminate the authority of the administrative law judge to correct a proposed order in the manner specified in section (2) of that rule.

(6) A motion for clarification and any response to a motion for clarification will be part of the record on appeal.

Stat. Auth.: ORS 468.020, 183.341, 183.452

Stats. Implemented: ORS 468A.020, 468.070, 468.090 - 0140, 183.341, 183.452

Hist.: DEQ 5-2008, f. & cert. ef. 3-20-08; DEQ 1-2014, f. & cert. ef. 1-6-14

### **340-011-0575 Review of Proposed Orders in Contested Cases**

(1) For purposes of this rule, filing means receipt in the office of the director or other office of DEQ.

(2) Commencement of Review by the Commission: The proposed order will become final unless a participant or a member of the commission files a Petition for Commission Review within 30 days of service of the proposed order. The timely filing of a Petition is a jurisdictional requirement and cannot be waived. Any participant may file a petition whether or not another participant has filed a petition.

(3) Contents of the Petition for Commission Review. A petition must be in writing and need only state the participant's or a commissioner's intent that the commission review the proposed order. Each petition and subsequent brief must be captioned to indicate the participant filing the document and the type of document (for example: Respondents Exceptions and Brief; DEQ's Answer to Respondent's Exceptions and Brief).

(4) Procedures on Review:

(a) Exceptions and Brief: Within 30 days from the filing of a petition, the participant(s) filing the petition must file written exceptions and brief. The exceptions must specify those findings and conclusions objected to, and also include proposed alternative findings of fact, conclusions of law, and order with specific references to the parts of the record upon which the participant relies. The brief must include the arguments supporting these alternative findings of fact, conclusions of law and order. Failure to take an exception to a finding or conclusion in the brief, waives the participant's ability to later raise that exception.

(b) Answering Brief: Each participant, except for the participant(s) filing that exceptions and brief, will have 30 days from the date of filing of the exceptions and brief under subsection (4)(a), in which to file an answering brief.

(c) Reply Brief: If an answering brief is filed, the participant(s) who filed a petition will have 20 days from the date of filing of the answering brief under subsection (4)(b), in which to file a reply brief.

(d) Briefing on Commission Invoked Review: When one or more members of the commission wish to review the proposed order, and no participant has timely filed a Petition, the chair of the commission will promptly notify the participants of the issue that the commission desires the participants to brief. The participants must limit their briefs to those issues. The chair of the commission will also establish the schedule for filing of briefs. When the commission wishes to review the proposed order and a participant also requested review, briefing will follow the schedule set forth in subsections (a), (b) and (c) of this section.

(e) Extensions: The commission or director may extend any of the time limits contained in section (4) of this rule. Each extension request must be in writing and filed with the commission before the expiration of the time limit. Any request for an extension may be granted or denied in whole or in part.

(f) Dismissal: The commission may dismiss any petition, upon motion of any participant or on its own motion, if the participant(s) seeking review fails to timely file the exceptions or brief required under subsection (4)(a) of this rule. A motion to dismiss made by a participant must be filed within 45 days after the filing of the Petition. At the time of dismissal, the commission will also enter a final order upholding the proposed order.

(g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the matter will be scheduled for oral argument before the commission.

(5) Additional Evidence: A request to present additional evidence must be submitted by motion and must be accompanied by a statement showing good cause for the failure to present the evidence to the administrative law judge. The motion must accompany the brief filed under subsection (4)(a) or (b) of this rule. If the commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to an administrative law judge for further proceedings.

(6) Scope of Review: The commission may substitute its judgment for that of the administrative law judge in making any particular finding of fact, conclusion of law, or order except as limited by ORS 183.650 and OAR 137-003-0665.

(7) All documents filed with the commission under this rule must also be copied upon each participant in the contested case hearing.



Attachment A

June 10-11, 2015, EQC meeting

Page 15 of 15

Stat. Auth.: ORS 183.341 & 468.020

Stats. Implemented: ORS 183.460, 183.464 & 183.470

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert.

ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00;

Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08; DEQ 1-2014, f. & cert. ef. 1-6-14

**340-011-0580 Petitions for Reconsideration or Rehearing**

(1) A participant is not required to seek either reconsideration or rehearing of a final order prior to seeking judicial review.

(2) Any petition for reconsideration or rehearing must be received by DEQ within 60 days of service of the final order. Unless specifically set forth in this rule, the procedures for petitions for reconsideration or rehearing are those in OAR 137-003-0675.

(3) A petition for reconsideration or rehearing does not stay the effect of the final order.

(4) The director, on behalf of the commission, shall issue orders granting or denying petitions for reconsideration and rehearing.

Stat. Auth.: ORS 183.341 & 468.020

Stats. Implemented: ORS 183.480 & 183.482

Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 1-2014, f. & cert. ef. 1-6-14

**340-011-0585 Petitions for a Stay of the Effect of a Final Order**

(1) A petition to stay the effect of any final order must be received by DEQ within 60 days of service of the final order. Unless specifically set forth in this rule, the procedures for petitions for a stay are those in OAR 137-003-0690 through 0700.

(2) If a participant submits a petition for reconsideration or rehearing or a late request for hearing, the petition for a stay must accompany that petition.

(3) A petition for a stay must contain all the elements set forth in OAR 137-003-0690 and be served upon all participants as set forth in 137-003-0690(4).

(4) Any participant may seek to intervene in the stay proceeding as set forth in OAR 137-003-0695 by filing a response to the petition for a stay with DEQ.

(5) The director, on behalf of the commission, shall issue an order granting or denying the petition for a stay within 30 days of receipt of the petition.

Stat. Auth.: ORS 183.341 & 468.020

Stats. Implemented: ORS 183.480 & 183.482

Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 1-2014, f. & cert. ef. 1-6-14