

Date: April 7, 2010

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item T, Action item: Contested Case No. AQ/OB-NWR-09-078 regarding Edward Clarence Horecny
April 29-30, 2010 EQC meeting

Introduction The Oregon Department of Environmental Quality implements environmental protection laws. Most people voluntarily comply with the laws; however, DEQ may assess civil penalties and orders to compel compliance or create deterrence. When persons or businesses do not agree with DEQ's enforcement action, they have the right to an appeal and a contested case hearing before an administrative law judge.

Recommendation DEQ recommends that the Oregon Environmental Quality Commission issue a final order adopting Judge Betterton's Proposed and Final Order.

Background On June 4, 2009, DEQ issued Edward Clarence Horecny a Notice of Civil Penalty Assessment and Order alleging a civil penalty of \$2,796. On June 1, 2009, Mr. Horecny appealed the notice and order, and a contested case hearing was held on December 2, 2009. Administrative Law Judge Ken Betterton issued a Proposed and Final Order on December 9, 2009, finding that a civil penalty of \$2,750 was appropriate. On January 4, 2010, Mr. Horecny petitioned the commission for review of that order.

Mr. Horecny did not file his exceptions and brief within thirty days of filing his Petition for Commission Review as required by EQC's rule, and still has not filed them. EQC rules allow the commission to dismiss a petition for review when the exceptions and brief are not filed in a timely manner. The rules also prevent the commission from considering any substantive arguments that were not properly raised in timely exceptions, so dismissal is ordinarily the only efficient means for dealing with a petition for review that was not accompanied by the timely filing of exceptions.

A representative of DEQ will be present at the April 29-30, 2010 EQC meeting to answer any questions you may have about this request. The commission's legal counsel will also be available to address any question relating to the commission's legal authority with respect to this matter.

EQC authority The commission has the authority to hear this appeal under OAR 340-011-0575.

Alternatives EQC may:

1. Dismiss the Petition for Commission Review and issue a final order adopting Judge Betterton's Proposed and Final Order.
2. Schedule the case for review at a future EQC meeting.

Attachments

- A. Letter from Stephanie Clark, dated February 16, 2010
- B. Letter from Bryan Smith, dated February 10, 2010
- C. Letter from Stephanie Clark, dated January 6, 2010
- D. Petition for Commission Review of the Proposed and Final Order, dated January 2, 2010
- E. Proposed and Final Order, dated December 9, 2009
- F. OAR 340-011-0575

Available upon request

1. OAR Chapter 340, Divisions 11, 12 and 264.
2. ORS Chapter 468A

Approved:

Division: _____

Leah E. Koss

Report prepared by: Bryan Smith
Environmental Law Specialist
Phone: (503) 229-5395

February 16, 2010

Bryan Smith, Environmental Law Specialist
Oregon Department of Environmental Quality
811 SW 6th Ave.
Portland, OR 97204

Re: In the Matter of Edward C. Horecny
DEQ Case No. AQ/OB-NWR-09-078

Dear Mr. Smith:

The Environmental Quality Commission received your request for dismissal of the above-referenced matter on February 11, 2010.

The commission will review your request for dismissal at its regularly scheduled meeting on April 29 and 30. The meeting location has been tentatively set for Coos Bay. I will notify you and Mr. Horecny of the exact meeting date, time and location no later than April 8, 2010.

If you have any questions about this process, please contact me by phone at (503) 229-5301, by regular U.S. mail at 811 SW 6th Avenue, Portland, Oregon 97204 or by electronic mail at Clark.Stephanie@deq.state.or.us.

Sincerely,



Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY REGULAR U.S. MAIL
Edward C. Horecny
82967 Hwy 53
Seaside, OR 97138



811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696





Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

Headquarters
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
FAX (503) 229-6124
TTY 1-800-735-2900

February 10, 2010

Oregon Environmental Quality Commission
Attention: Stephanie Clark, Assistant to the Commission
811 SW 6th Avenue
Portland, OR 97204

RECEIVED

FEB 11 2010

Oregon DEQ
Office of the Director

Re: Notice of Civil Penalty Assessment and Order
Edward Clarence Horecny
No. AQ/OB-NWR-09-078
OAH Case No. 901287
Clatsop County

Dear Ms. Clark:

I am writing to request that the Environmental Quality Commission (Commission) dismiss Edward Clarence Horecny's January 4, 2010, petition for Commission review of the December 9, 2009, Proposed and Final Order in the above-referenced matter.

Oregon Administrative Rule (OAR) 340-011-0575(5)(a) requires Mr. Horecny to file an Exceptions and Brief within thirty days of filing his petition for Commission review. Mr. Horecny has not filed an Exceptions and Brief to date, has not filed a request to extend this deadline, and thirty days since January 4, 2010, have now elapsed.

The Commission's rules allow it to dismiss a petition for review when the Exceptions and Brief were not filed in a timely manner. (OAR 340-011-0575(5)(f)) Therefore, the Department respectfully requests that this matter be scheduled for dismissal at the upcoming meeting of the Commission.

Sincerely,

Bryan Smith

cc: Edward Clarence Horecny, 82967 Highway 53, Seaside, OR 97138



BY CERTIFIED MAIL

January 6, 2010

Edward C. Horecny
82967 Hwy 53
Seaside, OR 97138

Re: In the Matter of Edward C. Horecny
DEQ Case No. AQ/OB-NWR-09-078

Dear Mr. Horecny:

The Environmental Quality Commission received your petition for review in the above-referenced matter on January 4, 2010. Your petition was filed in a timely manner.

The Proposed Order outlined appeal procedures, including filing of exceptions and briefs. The hearing decision and Oregon Administrative Rules (OAR 340-011-0575) state that you must file exceptions and brief within thirty days from the filing of your request for commission review, or February 3, 2010. Your exceptions must specify the findings and conclusions in the Proposed Order that you object to, and also include proposed alternative findings of fact, conclusions of law, and an alternative order with specific references to the parts of the record upon which you rely. 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 your ability to later raise that exception. Once your exceptions have been received, a representative of DEQ may file an answering brief within thirty days.

The commission may extend any of the time limits contained in OAR 340-011-0575(5) if an extension request is made in writing and is filed before the expiration of the time limit. I have enclosed a copy of the applicable administrative rules for your information (note that this section of rules was previously numbered 340-011-0132, but has been renumbered to 340-011-0575).

To file exceptions and briefs, please mail these documents to Stephanie Clark, on behalf of the Environmental Quality Commission, at 811 SW 6th Ave., Portland, Oregon 97204. If you fail to timely file the exceptions or brief, the commission may dismiss your petition for review and enter a final order upholding the proposed order.



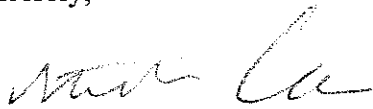
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

Edward C. Horecny

January 6, 2010
Page Two


After both parties file exceptions and briefs, this item will be set for consideration at a regularly scheduled commission meeting, and I will notify you of the date and location. If you have any questions about this process, or need additional time to file exceptions and briefs, please call me at (503) 229-5301.

Sincerely,



Stephanie Clark
Assistant to the Environmental Quality Commission

Cc: BY HAND DELIVERY - Bryan Smith, Oregon Department of Environmental Quality

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none">Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.Print your name and address on the reverse so that we can return the card to you.Attach this card to the back of the mailpiece, or on the front if space permits.	<p>A. Signature <input checked="" type="checkbox"/> <i>Bryan Smith</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p>
<p>1. Article Addressed to:</p> <p> Edward C Horecny 82967 Hwy 53 Seaside, Oregon 97138</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p> <p>3. Service Type <input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
<p>2. Article Number (Transfer from service label)</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p> <p>7005 1820 0003 2541 0185</p>

1-2-2010

Petition for Review
To Environmental Quality Commission

I totally object to the Fine and the Courts findings

I do not believe that I did any damage to the environment.

I have seen a number of places where the people have burned tires and every kind of thing to get the brush to burn and they did no harm. Since I feel that I did no harm and I have no money and no job it is a waste of everyone's time to collect anything. I am 82 years old, I have a lung disease and can't hardly breathe, so I can't work. You can call Seaside Providence Hospital and ask for Dr. Opie or some of the other Doctors that have taken care of me at the E.R.

I will also file exceptions and a brief as provided and stretch them as far as I can, and if I can't make it to the E.R. in time and I'll just plain choke to death and we'll all have it settled.

Edward C. Hareery

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
THE ENVIRONMENTAL QUALITY COMMISSION**

IN THE MATTER OF:) **PROPOSED AND FINAL ORDER**
)
EDWARD CLARENCE HORECNY,) OAH Case No.: 901287
) Agency Case No.: AQ/OB-NWR-09-
Respondent.) 078
)

HISTORY OF THE CASE

On June 4, 2009, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Civil Penalty Assessment and Order to Respondent Edward Clarence Horecny (Respondent), alleging that he violated DEQ laws, and sought a civil penalty against him in the amount of \$2,796. Respondent requested a hearing on June 11, 2009.

DEQ referred the hearing request to the Office of Administrative Hearings (OAH) on September 9, 2009. The case was assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton.

A hearing was held by telephone on December 2, 2009. Respondent appeared *pro se*. DEQ was represented by Bryan Smith, Environmental Law Specialist. Robert Vance, DEQ Compliance Coordinator, testified for DEQ. Respondent testified on his own behalf.

The record closed December 2, 2009, and the matter was taken under advisement.

ISSUES

Whether Respondent violated OAR 340-264-0060(1)(b), (c) and (3) by causing or allowing to be initiated or maintained the open burning of prohibited material, and if so, what is the appropriate penalty?

EVIDENTIARY RULING

Exhibits A1 through A7, offered by DEQ, were admitted into evidence without objection. Respondent offered no exhibits.

STIPULATIONS

(1) Respondent stipulated and agreed that on or about March 6, 2009 he caused or allowed to be initiated or maintained the open burning of vehicle rubber tires, car parts, copper wire, plastic, aerosol cans, old metal kitchen appliances, and other household debris on property in Clatsop County, Oregon.

(2) DEQ stipulated and agreed to waive the \$46 economic benefit (EB) calculation from the civil penalty that DEQ is seeking against Respondent.

FINDINGS OF FACT

(1) A local volunteer fire chief on March 6, 2009 responded to complaints of the open burning of rubber tires, car parts, appliances, and objects made of plastic, rubber and metal, at a location in Clatsop County, Oregon. He observed heavy black smoke rising from the burn pile. The fire chief took photographs of the burn and reported his observations to DEQ. (Ex. A1; Ex. A3.)

(2) DEQ Compliance Coordinator Robert Vance (Vance) responded to the scene shortly after March 6. Vance observed that the materials were still burning and smoldering. He measured the burned and burning material and estimated the volume of the material to be more than eight cubic yards. (Robert Vance's testimony.)

(3) Respondent had taken the debris and materials to the location of the burn to dispose of them by burning them. Respondent did not check with DEQ to find out if burning such materials was permitted by law. (Respondent's testimony.)

(4) By April 7, 2009, Respondent had properly disposed of the debris and waste material that he burned on March 6, 2009. (Robert Vance's testimony.)

CONCLUSIONS OF LAW

(1) Respondent violated OAR 340-264-0060(1)(b), (c) and (3) by causing or allowing to be initiated or maintained the open burning of prohibited material.

(2) A civil penalty of \$2,750 is appropriate.

OPINION

(1) Violation

DEQ has the burden of proof to establish its allegation. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683 (1980). DEQ must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of

the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1989). DEQ has met its burden.

DEQ has authority under ORS 468.100 and 468.140 to impose civil penalties for violations of chapter 468 and administrative rules adopted under the agency's authority.

DEQ has adopted administrative rules that on a statewide basis prohibit open burning of certain materials. OAR 340-264-0060 provides, in relevant part:

(1) The following persons are strictly liable for open burning in violation of this rule:

- (a) Each person who is in ownership, control or custody of the real property on which open burning occurs, including any tenant thereof;
- (b) Each person who is in ownership, control or custody of the material that is burned; and
- (c) Any person who causes or allows open burning to be initiated or maintained.

* * * * *

(3) No person may cause or allow to be initiated or maintained any open burning of any wet garbage, plastic, asbestos, wire insulation, automobile part, asphalt, petroleum product, petroleum treated material, rubber product, animal remains, or animal or vegetable matter resulting from the handling, preparation, cooking or service of food or of any other material which normally emits dense smoke or noxious odors.

Respondent stipulated and agreed that on March 6, 2009 he violated OAR 340-264-0060(1)(b), (c) and (3) by burning or causing or allowing to be burned several of the items and materials prohibited by the rule.

The next issue is what penalty should be imposed.

(2) Penalty

The formula for determining the amount of penalty for a violation is:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

BP represents the base penalty. The P factor considers whether the respondent has had any prior significant violations; the H factor addresses the respondent's history with the agency; the O factor is whether the violation was repeated or ongoing; the M factor addresses the respondent's mental state or knowledge at the time of the violation; and the C factor represents the respondent's efforts to correct the violation. EB represents the economic benefit under the EPA's BEN computer model. OAR 340-012-

0045(2)(e).

DEQ calculates the penalty as:

$$\text{Penalty}^1 = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$$

¹ DEQ made the following determinations for the penalty calculation in this matter:

VIOLATION: Causing or allowing the open burning of materials which normally emit dense smoke or noxious odors, in violation of ORS 340-264-0060(3).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0054(1)(q).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(1)(g)(A), because Respondent initiated or allowed the open burning of 5 or more cubic yards of prohibited materials (inclusive of tires).

“BP” is the base penalty, which is \$2,500 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(3)(a)(B).

“P” is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(16), and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

“H” is Respondent’s history of correcting prior significant actions(s) and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior significant actions.

“O” is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because the violation existed for one day or less and did not recur. Respondent openly burned prohibited material on March 6, 2009.

“M” is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent’s conduct was negligent. Respondent failed to take reasonable care to avoid the foreseeable risk of causing or allowing the open burning of prohibited material when he failed to learn whether or not it is legal to burn appliances, vehicle tires, copper wire, aerosol cans, and objects made of plastic, rubber and metal. Respondent knew or should have known as a matter of common knowledge that such materials cannot be openly burned.

“C” is Respondent’s efforts to correct the violation and receives a value of -1 according to OAR 340-012-0145(6)(a)(C), because Respondent took affirmative action to minimize the effects of the violation. Respondent properly disposed of the waste material generated by the illegal burn by April 7, 2009.

“EB” is the approximate economic benefit that an entity gained by not complying with the law. It is designed to “level the playing field” by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay

$$\begin{aligned} &= \$2,500 + [(0.1 \times \$2,500) \times (0 + 0 + 0 + 2 + - 1)] + \$0 \\ &= \$2,500 + [(\$250) \times (1)] + \$0 \\ &= \$2,500 + \$250 + \$0 \\ &= \$2,750 \end{aligned}$$

I find that DEQ correctly calculated the penalty.

DEQ used values for the various factors that go into calculating the penalty that resulted in the lowest possible civil penalty for Respondent for the violation at issue, except for the "M"² and "C"³ factors.

I find that DEQ correctly assigned a "M" value of 2. Respondent reasonably knew or should have known that in today's society burning items such as vehicle rubber tires, car parts, copper wire, appliances, and objects made of plastic, metal and rubber, will emit noxious smoke and fumes, and that it is unlawful to do so.

the penalty than to pay the costs of compliance. In this case, DEQ waived the "EB" calculation.

² OAR 340-012-0145(5) provides:

"M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.

(a) The values for "M" and the finding that supports each are as follows:

(A) 0 if there is insufficient information on which to base a finding under paragraphs (5)(a)(B) through (5)(a)(D).

(B) 2 if the respondent's conduct was negligent or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. * * *.

(C) 6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be violation and respondent's conduct was intentional. * * *.

(D) 10 if respondent acted flagrantly.

³OAR 340-012-0145(6) provides:

"C" is the respondent's efforts to correct the violation.

(a) The values for "C" and the finding that supports each are as follows:

(A) -3 if the respondent made extraordinary efforts to correct the violation, or took extraordinary efforts to minimize the effects of the violation.

(B) -2 if the respondent made reasonable efforts to correct the violation, reasonable affirmative efforts to minimize effects of the violation, or extraordinary efforts to ensure the violation would not be repeated.

(C) -1 if the respondent eventually made efforts to correct the violation, or took affirmative efforts to minimize the effects of the violation.

(D) 0 if there is insufficient information to make a finding under paragraphs (6)(a)(A) through (6)(a)(C), or (6)(a)(E), or if the violation or the effects of the violation could not be corrected or minimized.

(E) 2 if the respondent did not address the violation as described in paragraphs (6)(a)(A) through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D).

I find that DEQ correctly assigned a "C" value of -1. Respondent corrected the violation within approximately four weeks. No evidence was presented that the "C" value should be -2 or -3.

A civil penalty of \$2,750 should be imposed against Respondent.

ORDER

I propose DEQ issue the following order:

Respondent Edward Clarence Horecny be assessed a civil penalty of \$2,750.

/s/ Ken L. Betterton

Ken L. Betterton
Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: December 9, 2009

APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission
c/o Dick Pedersen, Director, DEQ
811 SW Sixth Avenue
Portland, OR 97204.

You may also fax your Petition for Review to (503) 229-6762 (the Director's Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for

Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.480 et seq.

CERTIFICATE OF MAILING

On December 9, 2009, I mailed the foregoing Proposed and Final Order in OAH Case No. 901287.

By: First Class and Certified Mail
Certified Mail Receipt #7009 0820 0001 6776 6302

Edward Horecny
82967 Highway 53
Seaside OR 97138

By: First Class Mail

Bryan Smith
Dept. of Environmental Quality
811 SW 6th St
Portland OR 97204

Pam Arcari
Administrative Specialist
Hearing Coordinator

Oregon Administrative Rules 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 the department.

(2) 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.

(3) Commencement of Review by the Commission: The proposed order will become final unless a participant or a member of the commission files, with the commission, 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.

(4) 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; Department's Answer to Respondent's Exceptions and Brief).

(5) 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 (5)(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 (5)(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 (5) 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 (5)(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.

(6) 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 (5)(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.

(7) 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 OAR 137-003-0655 and 137-003-0665.

(8) Service of documents on other participants: All documents required to be filed with the commission under this rule must also be served upon each participant in the contested case hearing. Service can be completed by personal service, certified mail or regular mail.

Stat. Auth.: ORS 183.341 & 468.020

Stats. Implemented: ORS 183.460, 183.464 & ORS 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