
Date: June 22, 2006
To: Environmental Quality Commission
From: Stephanie Hallock, Director
Subject: Agenda Item G, EQC Discussion: EQC Contested Case Procedures, June 22-23, 2006, EQC Meeting

Purpose of the Item This staff report provides background, discusses alternative procedures and provides a starting point for EQC discussion of possible changes to the contested case process. Individual Commissioners have raised concerns about the process, including concerns about the availability of file information for contested cases under EQC review.

Background *Appeal of DEQ decisions*

Persons adversely affected by certain DEQ decisions have the right to appeal the decision and have a hearing before an administrative law judge (ALJ) appointed by the Office of Administrative Hearings. (See ORS 183.635, Attachment A.) Most appeals (contested cases) are requested to challenge DEQ administrative enforcement orders and civil penalties issued under ORS 468.090 (Attachment B). Far less often (less than 1% of contested cases), appellants contest DEQ permit denial or inclusion of conditions in a permit, and denial of certification under Section 401 of the federal Clean Water Act or inclusion of conditions in the certificate. (See, for example, ORS 468.070, Attachment C.)

Appeal of ALJ decisions

Under existing rules that govern enforcement orders and administrative penalties, any party to a contested case, including DEQ, may seek EQC review of an ALJ proposed decision regarding a contested DEQ action. Any Commissioner may also request EQC review of an ALJ decision. If no one files a petition for EQC review, the ALJ decision becomes final, although it may still be appealed to the Oregon Court of Appeals. ALJ decisions in matters relating to permits and Section 401 certificates must be reviewed by the EQC, unless the respondent and DEQ stipulate that the ALJ decision will be final. Again, the EQC final decision may be appealed to the Oregon Court of Appeals.

EQC limitation on altering findings of fact

Commission review of an ALJ decision is limited substantially by the Oregon Administrative Procedures Act (APA) and, to lesser extent, by the Commission's own rules. The most significant statutory limitation

prevents the EQC from modifying the ALJ findings relating to “historical facts.” (See ORS 183.650, Attachment D.) A finding of historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist before or at the time of the hearing. The Commission may modify a finding of historical fact only if it determines that the finding is not supported by a preponderance of the evidence in the record.

EQC limitation on considering new evidence

The Commission ordinarily may not consider new evidence when it reviews an ALJ decision. Rather, it must remand the matter back to the ALJ for this purpose. Under Commission rules, such a remand is ordinarily not appropriate, unless one of the parties to the contested case or DEQ has filed a timely motion explaining why the evidence was not originally presented to the ALJ in the first place. (See OAR 340-011-0575, Attachment E.)

Availability of ALJ hearing record

The ALJ is required to make an audio recording of the contested case hearing. Typically, hearings take several hours, but hearings of several days are not uncommon. Parties petitioning the EQC for review of an ALJ proposed decision are not required to and do not customarily submit an audio tape or transcript of the ALJ hearing. It has not been EQC practice to review a hearing transcript or audio tapes before reviewing the ALJ decision. Sometimes, however, a petitioner will provide the EQC with a transcript of relevant portions of the hearing if the petitioner is asking the EQC to set aside a finding of fact on the grounds that the finding is not supported by substantial evidence in the record. The absence of a full written transcript sometimes complicates EQC consideration of the petition for review.

EQC Alternatives The following alternatives to the existing process might address EQC concerns about the EQC’s role in reviewing ALJ decisions and the availability of the ALJ hearing record for EQC review. Note that most of these alternatives would need to be implemented through changes to Oregon Administrative Rules (OAR) Chapter 340, Division 11.

Alternatives:

<i>A. Require a full transcript</i>	
The Commission could require either the petitioner or DEQ to provide a full transcript of the ALJ hearing of a contested case.	
<u>Pros</u>	<u>Cons</u>
1. EQC would gain access to all evidence that was before the ALJ, except witness	1. Safeguards might be needed to ensure transcript accuracy. Safeguards might

<p>demeanor.</p> <p>2. Parties and DEQ could be required to cite the transcript in support of all factual statements in their briefs, which would aid EQC consideration of testimony.</p>	<p>include requiring use of a certified transcription service.</p> <p>2. Transcription would greatly increase case costs. Transcription of a one-day hearing costs approximately \$1,000.</p> <p>3. Transcripts would require additional EQC review time.</p>
<p><i>B. Require a partial transcript</i> The EQC could adopt a rule that limits all argument to the facts set out in the proposed order, unless the party or DEQ has provided the EQC with a transcript of all portions of the hearing record that support arguments about facts not set out in the order.</p>	
<p><u>Pros</u></p> <p>1. Partial transcripts would clarify for the EQC which oral arguments are supported by the administrative record and which present new testimony.</p> <p>2. DEQ and the parties would have an opportunity to review the record and provide contradictory evidence and supporting transcript excerpts before the hearing, allowing for more reasoned responses and arguments by all parties.</p> <p>3. Petitioners could forgo providing a transcript if they chose to limit their arguments to facts set out in the proposed order.</p> <p>4. This alternative would be less costly than alternative A above, since a partial transcript would cost less than a full transcript.</p>	<p><u>Cons</u></p> <p>1. Safeguards might be needed to ensure transcript accuracy. Safeguards might include requiring use of a certified transcription service.</p> <p>2. Partial transcript would require additional EQC review time.</p> <p>3. Disputes could arise about the adequacy of the partial transcript and whether the cited portions are representative of the evidence submitted to the ALJ. (The EQC could mitigate the problem by creating a rule disallowing oral argument on issues not supported by the partial transcript.)</p> <p>4. Increased requirements for preparing a case could be particularly challenging for unrepresented petitioners.</p> <p>5. Enforcing the transcript requirement might create an unfair situation if one party supported an assertion with a small portion of the transcript and rebuttal required transcription of considerably more of the hearing record.</p>

	<p>6. Partial transcripts might not contain all the information of interest to the EQC and could impact their ability to decide a case fairly.</p>
<p><i>C. Eliminate EQC review of ALJ decisions</i> The Commission could remove itself entirely from the contested case process by providing for the decision of the ALJ to be final, with all appeals going directly to the Oregon Court of Appeals.</p>	
<p><u>Pros</u></p> <p>EQC workload would decrease.</p>	<p><u>Cons</u></p> <ol style="list-style-type: none"> 1. The EQC would lose its ability to provide key interpretations of Commission rules and specific oversight of DEQ enforcement actions. 2. Petitioner would lose access to the relatively inexpensive and informal avenue of Commission review to correct ALJ errors. (If this approach were chosen, it might be beneficial to clarify or revise ALJ procedures for reconsideration of decisions.)
<p><i>D. Limit review of ALJ decisions</i> The EQC could limit its review to specific kinds of cases, for example, those that involve specific violations, penalty amounts, or matters that raise questions about rule interpretation. The EQC would also need to decide how other cases would be reviewed.</p>	
<p><u>Pros</u></p> <ol style="list-style-type: none"> 1. EQC case volume would decrease. 2. EQC would preserve its opportunity to interpret its own enforcement rules in precedent-setting cases. 	<p><u>Cons</u></p> <p>The need to differentiate which cases receive EQC review could add complexity to the process or raise objections from petitioners.</p>
<p><i>E. Delegate review to DEQ Director</i> The EQC could delegate all or some categories of contested case hearing appeals to the Director.</p>	
<p><u>Pros</u></p> <p>Director review, like EQC review, would efficiently check ALJ errors.</p>	<p><u>Cons</u></p> <p>The public might view DEQ review of contested DEQ actions as unfair, but the arrangement would likely to be legally defensible.</p>

- Attachments**
- A. ORS 183.635 Agencies required to use administrative law judges from Office of Administrative Hearings; exceptions.
 - B. ORS 468.090 Complaint procedure
 - C. ORS 468.070 Denial, modification, suspension or revocation of permits.
 - D. ORS 183.650 Form of order; modification of form of order by agency; finding of historical fact.
 - E. OAR 340-011-0575 Review of Proposed Orders in Contested Cases

Approved:

Anne Price

Report Prepared By: Les Carlough
503.229.5422