
Date: October 6, 2006
To: Environmental Quality Commission
From: Stephanie Hallock, Director
Subject: Agenda Item F, EQC Discussion of Concept to Clarify Proposed Orders in Contested Cases, October 5 and 6, 2006 EQC Meeting

Why this is Important The DEQ implements environmental protection laws and rules. Most people voluntarily comply with the laws. Sometimes DEQ must take enforcement action to compel compliance or create deterrence. When a person or business does not agree with DEQ's enforcement action, they have the right to an appeal and a "contested case" hearing before an administrative law judge (ALJ). If they are unsatisfied with the decision of an ALJ they may appeal the decision to the Environmental Quality Commission. Commission members must have access to complete information about the contested case hearings.

Purpose of the Item In response to a June 2006 EQC request, this report introduces a concept for providing more complete information for the Commission when reviewing Proposed Orders on appeal in contested enforcement cases. DEQ asks for Commission guidance on whether to proceed.

DEQ's suggested solution is a rule that would allow parties in contested cases, including the DEQ, to request the ALJ to clarify a Proposed Order by providing a more comprehensive explanation.

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 ALJ appointed by the Office of Administrative Hearings. (Oregon Revised Statutes (ORS) 183.635) Most contested cases challenge DEQ administrative enforcement orders and civil penalties. In less than 1% of 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.

Preparation of Proposed Order
Following the close of the record for a contested case hearing, the ALJ issues a Proposed Order. (ORS 183.650(1) & Oregon Administrative Rule (OAR) 340-011-0575(2)) The ALJ must prepare the Proposed Order according to rules promulgated by the Oregon Attorney General's

Office. (OAR 137-003-0645) Among other things, those rules require the ALJ to fully dispose of all issues presented by:

- (i) making findings of fact needed to support the Proposed Order along with a statement of the underlying facts,
- (ii) explaining the reasoning that leads from the findings of facts to the conclusion, and
- (iii) recommending an appropriate action for the Commission based on the conclusions.

Appeal of ALJ decisions

Any Party may seek EQC review of a Proposed Order. Any Commissioner may also request EQC review of a Proposed Order. If no one files a petition for EQC review, the Proposed Order becomes final, although it may still be appealed to the Oregon Court of Appeals.

Materials available to the EQC on a Petition for Review

The ALJ prepares a hearing record and a Proposed Order for the EQC. The hearing record contains all notices, answers and other legal documents submitted in the matter; all documentary and other tangible evidence submitted into the record; and electronically stored oral transcripts of the hearing including the testimony given. Complete written transcripts are seldom prepared because of the length of some hearings and the costs of transcription. Generally, Commissioners must rely on the Proposed Order for evidence presented orally and for evaluation of all evidence.

Limitations on clarifying the Proposed Order for the EQC

If the Proposed Order does not document important oral testimony, evaluate important evidence, or fully explain the conclusions, the missing information will not generally be available to the EQC. Furthermore, current rules do not provide express authority for either Party to request clarification from the ALJ to provide to the Commission in advance of its review, even when the Parties know additional information will be needed for meaningful review by the Commission.

EQC limitation on altering findings of fact

Commission review of an ALJ decision is limited by the Oregon Administrative Procedures Act (APA) and by the Commission's own rules. 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. (ORS 183.650(3)) When the Proposed Order does not address a material issue, or it does not adequately evaluate the evidence, the EQC is unable to assess the rightness of a finding.

EQC limitation on considering new evidence

The Commission ordinarily may not consider new evidence when it reviews an ALJ decision. Sometimes a Party may present information to the EQC which does not appear in the Proposed Order or in the hearing record. In these instances, it is difficult for the Commissioners to determine whether the information is already admitted into the record but considered not credible, relevant or material by the ALJ, or whether the information is new and not in the record. In these cases Commissioners will not know whether they can consider the information in their deliberations.

EQC limitation on modifying the Proposed Order

If the Commission modifies the Proposed Order by either reversing the outcome, or by changing a finding of fact, the Commission must explain its reasoning. (ORS 183.650(2) & OAR 137-003-0665) Sometimes the ALJ does not provide a full explanation of the reasoning behind a conclusion, or omits evaluation of a material argument made by one of the Parties. If the EQC is unable to determine why the ALJ made a particular determination, the EQC may have difficulty explaining why its reasoning differs from the ALJ's reasoning.

Prior EQC Discussions of the Issue

At the June 2006 EQC meeting, the Commissioners requested that the Department identify a means to provide the Commission with more complete records. The Commissioners were especially interested in finding a method for Parties, including DEQ, to request that the ALJ clarify Proposed Orders before appeal to the EQC. This would allow DEQ to provide the EQC with sufficient information.

**Proposed
Solution**

The proposed solution is to allow any Party to make a "motion for clarification" to the ALJ, requesting that the ALJ meet the standards already set forth in OAR 137-003-0645. The clarity and completeness of Proposed Orders would be improved. The number of petitions for EQC review would be reduced because the Parties would not need to resort to EQC review to obtain clarity. In some cases, time to reach a final order would be reduced by months or years.

Because this proposal would create a new rule that would be slightly different from processes established in the Department of Justice (DOJ) rules which govern the Hearing Panel and ALJs, an approval from DOJ would be necessary. DOJ staff are willing to discuss the proposal.

**Advice
Requested**

The Department asks whether this proposed solution meets the EQC's needs and whether the DEQ should pursue a rulemaking.

- Attachments**
- A. OAR 137-003-0645 Proposed Orders in Contested Cases
 - B. OAR 137-003-0655 Further Hearing and Issuance of Final Order
 - C. OAR 137-003-0665 Final Orders in Contested Cases

Approved:

Jane K. Hickman, Administrator
Office of Compliance and
Enforcement

Report Prepared By: Les Carlough
503.229.5422

ATTACHMENT A

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.

* * *

(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 therefrom; and
- (j) The name of the administrative law judge who prepared the proposed order and date the order was issued.

* * *

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 19-2003, f. 12-12-03, cert. ef. 1-1-04

ATTACHMENT B

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.

* * *

Stat. Auth.: ORS 183.341

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

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

ATTACHMENT C

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 therefrom; 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 modifications and provide an explanation to the parties as to 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 modifications 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 the finding made by the administrative law judge is not supported by a preponderance of the evidence in the record. 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.

* * *

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(5), 183.470 & 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