
Date: October 1, 2007

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item B
Rule Adoption: Clarification of Proposed Orders in Contested Enforcement Cases
October 17, 2007, EQC Meeting

Why this is Important The Environmental Quality Commission (EQC) asked the Department of Environmental Quality (DEQ) to improve the clarity and completeness of contested case appeals coming before the EQC.

Additionally, DEQ regulations governing the appeals process (Division 11) need updating, clarification, and correction of an error in order to make the contested case process more effective.

Department Recommendation DEQ requests that the EQC adopt the proposed rules and rule amendments in Attachment A.

Background and Need for Rulemaking *Background*
One function of the DEQ is to enforce environmental laws to compel compliance and create deterrence. When a person or business does not agree with DEQ's enforcement action, they have the right to a contested case hearing before an administrative law judge (ALJ). If either party to a contested case is dissatisfied with the ALJ's decision (issued in the form of a "proposed order"), they may appeal that decision to the EQC. In order to make a sound decision on appeal, the EQC needs to be able to understand the issues and the basis for the ALJ's rulings.

Proposed Rule Changes

DEQ proposes two main changes to the existing rules in Division 11:

(1) Adopt Oregon Administrative Rule (OAR) 340-011-0573 and amend OAR 340-011-0575 to allow both parties (respondent and DEQ) in contested cases to request that the ALJ revise the proposed order when the proposed order does not contain all of the information required by OAR 137-003-0645(3).

Part (1) of the rule change is needed to ensure the EQC has the most clear and complete proposed order available for review. The rules do not currently provide both parties to contested case hearings with an opportunity to request this type of clarification of proposed orders. The proposed rule will allow both DEQ and respondents to request such a

Agenda Item B

Rule Adoption: Clarification of Proposed Orders in Contested Enforcement Cases

October 17, 2007, EQC Meeting

Page 2 of 4

clarification prior to deciding whether to appeal the proposed order to the EQC, which should eliminate the need for some appeals to the EQC and reduce the time necessary to reach some final orders. This rulemaking is needed to improve the clarity and legal sufficiency of proposed orders in contested cases, for the purpose of assisting the EQC in reaching fully informed and well reasoned decisions.

(2) Amend OAR 340-011-0510(1) to clarify the circumstances under which Environmental Law Specialists (ELs) are authorized to provide lay representation on behalf of DEQ in contested case proceedings.

Part (2) of the rule change is needed to explicitly authorize ELs to represent DEQ in contested case hearings involving permit, license, and certification revocations, modifications, and denials. EL representation of DEQ in contested case proceedings involving license, permit, or certification revocations, modifications, and denials is needed in order to effectively use agency staff and save agency resources.

Additionally, this rulemaking would:

- Correct a typographical error in OAR 340-011-0515 to reference the proper rule in the Oregon Administrative Procedures Act regarding the extent to which parties may be represented by attorneys or other authorized representatives in proceedings before ALJs or the EQC (the current rule references OAR 340-003-0555, and the proper reference is OAR 137-003-0555). Amend OAR 340-011-0005 to update the incorporation by reference of Divisions 003 and most of Division 001 of the Attorney General's Uniform and Model Rules (Model Rules), in order to keep DEQ's rules consistent with the Model Rules, which DOJ revises yearly. Additionally, the rulemaking would adopt OAR 340-011-0009 to incorporate Division 004 of the Model Rules (regulating Miscellaneous items and Orders in Other than Contested Cases). To date, the agency has not had any express authority for processing orders in other than contested cases (e.g. petitions for reconsideration), and we need procedures to apply to these circumstances.
- Finally, because this rulemaking may affect enforcement of Clean Air Act requirements, OAR 340-200-0040 would be updated to reflect the date the EQC adopts these rules. These amendments, if adopted, will be submitted to the U.S. Environmental Protection Agency as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act.

Agenda Item B

Rule Adoption: Clarification of Proposed Orders in Contested Enforcement Cases

October 17, 2007, EQC Meeting

Page 3 of 4

Effect of Rule	<p>The proposed changes are procedural in nature and the general purpose of all of the proposed rule changes is to promote a more effective and efficient enforcement process.</p> <p>In summary, the proposed changes will:</p> <ul style="list-style-type: none">• Allow any party to a DEQ contested case proceeding to request that the ALJ revise the proposed order to provide a more clear and complete description and analysis of the record on appeal to the EQC;• Clarify that ELSs may provide lay representation on behalf of the DEQ in contested case proceedings involving license, permit, or certification revocations, modifications, and denials;• Correct a typographical error to reference the proper rule in the Oregon Administrative Procedures Act regarding the extent to which parties may be represented by attorneys or other authorized representatives in proceedings before ALJs or the EQC; and• Update the incorporation by reference of the Attorney General's Model Rules, and incorporate the Attorney General's Model Rules for Miscellaneous and Orders in Other than Contested Cases. <p>Please note that the proposed language of OAR 340-011-0573(4) has been revised since the public comment period in order to correct a mistake in grammar.</p>
Commission Authority	<p>The Commission has authority to take this action under ORS 468.020.</p>
Stakeholder Involvement	<p>No advisory committee was used due to the limited procedural nature of the rulemaking. Anticipated stakeholders (the Office of Administrative Hearings (OAH), DOJ, and representatives of potential respondents) were informed of the proposed rulemaking and have informally provided input.</p>
Public Comment	<p>A public comment period extended from May 16, 2007 to July 2, 2007, and included a public hearing in Portland, Oregon. No comments were submitted, and no testimony was given (see Attachments B and C).</p>
Key Issues	<p>A key issue identified early in the rulemaking development process was the OAH's response to DEQ's proposal regarding motions for clarification. The EQC discussed this issue with DEQ and OAH at its October 6, 2006, and December 14, 2006 meetings. Specifically, OAH raised questions regarding alternative ways to achieve the EQC's goal. The EQC determined that the alternative presented would not meet the goals of the EQC, and the EQC authorized DEQ to proceed with drafting a rule that would provide for motions for clarification. The rule will</p>

Agenda Item B

Rule Adoption: Clarification of Proposed Orders in Contested Enforcement Cases

October 17, 2007, EQC Meeting

Page 4 of 4

allow *both* parties to an enforcement action to make motions for clarification, but such a motion will not *require* ALJs to take any further action to clarify proposed orders.

Next Steps

For the rules to apply in contested case hearings, DEQ will need final approval from DOJ, which will involve DOJ consultation with OAH on the proposed rule regarding motions for clarification. The Department conferred with DOJ during the development of the rules and expects approval of the rules, possibly as early as the end of November 2007.

Effective date: Upon filing with the Secretary of State.

DEQ's Rule Implementation Plan is available upon request.

Attachments

- A. Proposed Rule Revisions
- B. Summary of Public Comments and Agency Responses
- C. Presiding Officer's Report on Public Hearings
- D. Relationship to Federal Requirements Questions
- E. Statement of Need and Fiscal and Economic Impact
- F. Land Use Evaluation Statement

Available Upon Request

- 1. Legal Notice of Hearing
- 2. Cover Memorandum from Public Notice
- 3. Rule Implementation Plan

Approved:

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