

# LANE REGIONAL AIR POLLUTION AUTHORITY

## TITLE 14

### Rules of Practice and Procedure

#### Section 14-110 Definitions

The words and phrases used in this Title have the same meaning given them in ORS 183.310. Additional terms are defined as follows unless context requires otherwise:

- "Adoption" means the carrying of a motion by the Board with regard to the subject matter or issues of an intended Authority action.
- "Authority" means the Lane Regional Air Pollution Authority.
- "Board" means the Board of Directors of the Lane Regional Air Pollution Authority.
- "Chair" means the chair of the Board of Directors of the Lane Regional Air Pollution Authority.
- "Director" means the Director of the Lane Regional Air Pollution Authority and authorized deputies or officers.
- "Filing" or "filed" means receipt in the office of the Director. Such receipt is adequate where filing is required for a document on a matter before the Authority, except a claim of personal liability.
- "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR 137-01-005 through 137-04-010 as amended and in effect on April 29, 1988.
- "Presiding Officer" means the Authority, its Chair, Hearings Officer, the Director or any individual designated by the Authority or the Director to preside in any contested case, public, or other hearing. Any employee of the Authority who actually presided in any such hearing is presumptively designated by the Authority or Director, such presumptive designation to be overcome only by a written statement to the contrary bearing the signature of the Chair or the Director.

#### Section 14-120 Public Information Hearings

1. Generally, a public informational hearing is held upon request by an affected party whose permit is proposed to be modified, or by ten (10) or more interested persons prior to proposed issuance of a new or renewal permit. A public informational hearing is neither a contested case hearing nor a rule making hearing as defined in ORS Chapter 183.
2. The Presiding Officer shall follow any applicable procedural law, including case law and rules, and take appropriate procedural steps to accomplish the purpose of the hearing. Interested persons may, on their own motion or that of the Presiding Officer, submit written briefs or oral argument to assist the Presiding Officer in resolution of the procedural matters set forth herein.
3. Prior to the submission of testimony by members of the general public, the Presiding Officer shall present and offer for the record a summary of the questions the resolution of which, in the Presiding Officer's preliminary opinion, will determine the matter at issue. The Presiding Officer shall also present as many of the facts relevant to the resolution of these question as are available and which can practicably be presented in that forum.

4. Following the public information hearing, or within a reasonable time after receipt of the report of the Presiding Officer, the Director or Board shall take action upon the matter. Prior to or at the time of such action, the Authority or Director shall address separately each substantial distinct issue raised in the hearings record. This shall be in writing if taken by the Director or shall be noted in the minutes if taken by the Board in a public forum.

#### Section 14-140 Rulemaking Notice

1. Prior to the adoption, amendment or repeal of any rule, the Authority shall give notice of its intended action in one or more newspapers of general circulation and to persons who have requested notice pursuant to ORS 183.335(7).

2. The notice required by Subsection 1, above, shall state the subject matter, issues and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected. The notice shall also give the time and place of hearing and the time, place and manner where a full description of the intended action or copy of the proposed rule and supporting documents may be obtained.

3. The Authority shall, at the time the notice is issued, prepare and make available to the public:

A. The citation(s) of statutory or other legal authority relied upon and bearing upon the intended action;

B. A statement of need for the action and how the action is intended to meet the need;

C. A list of principal documents, reports or studies, if any, used by the Authority in considering the need;

D. A statement of fiscal impact on state and local agencies, public and businesses, including small businesses which may be affected.

#### Section 14-145 Rulemaking Hearings and Process

Except as specifically provided to the contrary by this section, the rulemaking process shall be governed by the Attorney General's Model Rules, OAR 137-01-005 through 137-01-060. As used in those rules, the terms "agency," "governing body" and "decision maker" generally should be interpreted to mean "Board."

##### 1. Conduct of Hearing

A. The hearing to consider a rule may be conducted by the Board or by a presiding officer. The presiding officer may be the Director, a member of the Board or any other person designated by the Board.

B. If the presiding officer or any decision maker has a potential conflict of interest as defined in ORS 244.020(4), that officer shall comply with the requirements of ORS Chapter 244 (e.g., ORS 244.120 and 244.130).

C. At the commencement of the hearing, any person wishing to be heard shall provide name, address and affiliation to the presiding officer. Additional persons may be heard at the discretion of the presiding officer. The presiding officer may require that the witness complete a form to indicate the name of the witness, whether the witness favors or opposes the proposed action and such other information as the presiding officer may deem appropriate.

D. At the commencement of the hearing, the presiding officer shall state the purpose of the hearing and describe the manner in which persons may present their views, and summarize the content of the notice provided pursuant to ORS 183.335.

E. Subject to the discretion of the presiding officer, the order of presentation shall be:

(1) Statements of proponents;

(2) Statements of opponents; and

(3) Statements of other witnesses present and wishing to be heard.

F. The presiding officer or any member of the Authority may question any witness making a statement at the hearing. The presiding officer may permit other persons to question witnesses.

G. There shall be no rebuttal or additional statement given by any witness unless requested or permitted by the presiding officer. The presiding officer may allow an opportunity for reply by those whose statements were rebutted.

H. The hearing may be continued with recesses as determined by the presiding officer until all listed witnesses have had an opportunity to testify.

I. The presiding officer shall, when practicable, receive all physical and documentary evidence presented by witnesses. Each exhibit shall be marked and shall identify the witness offering the exhibit. Unless returned, written exhibits shall be preserved by the Authority pursuant to any applicable retention schedule for public records under ORS 192.001 et seq.

J. The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious or immaterial matter.

K. The presiding officer may provide for a verbatim oral, written, or mechanical record of all the proceedings or, in the alternative, may provide for a record in the form of minutes.

2. Presiding Officer's Report. Except when a rulemaking hearing is conducted by the Board, the presiding officer shall, within a reasonable time after the hearing, provide the Board with a written summary of statements given and exhibits received and a report of the officer's observation of physical experiments, demonstrations, or exhibits. The presiding officer may make recommendations, but such recommendations are not binding upon the Authority.

3. Action of Board. At the conclusion of the hearing, or after receipt of the presiding officer's report and recommendation, if any, the Board may adopt, amend or repeal rules covered by the notice of intended action. The Board shall fully consider all written and oral submissions.

4. Notice of Authority action

A. The Authority, prior to enforcing air quality standards adopted by rule, shall submit the standards to the Commission for approval.

B. The Authority shall furnish copies of rules requiring registration, permits to construct sources and testing requirements to building permit issuing agencies within its jurisdiction.

#### Section 14-150 Temporary Rules

The Board may adopt temporary rules, along with supportive findings, pursuant to ORS 183.335(5)(b) and 183.355(2) and the Attorney General's Model Rule OAR 137-01-080.

1. If no notice has been provided before adoption of a temporary rule, the Authority shall give notice of its temporary rulemaking to persons, entities and media specified under ORS 183.335(1) by mailing or personally delivering to

each of them a copy of the rule or rules as adopted and a copy of the statements required under ORS 183.335(5).  
If a temporary rule or rules are over ten pages in length, the Authority may provide a summary and state how and where a copy of the rule or rules may be obtained. Failure to give this notice shall not affect the validity of any rule.

2.A temporary rule is effective for less than 180 calendar days if a shorter period is specified in the rule, or for 180 calendar days if the rule does not specify a shorter period.

#### Section 14-155 Petition to Promulgate, Amend or Repeal Rule--Content of Petition, Filing of Petition.

1.An interested person may petition the Authority to adopt, amend or repeal a rule. The petition shall be legible, signed by or on behalf of the petitioner, and shall contain a detailed statement of:

A.The rule petitioner requests the Authority to promulgate, amend or repeal. When a new rule is proposed, the petition shall set forth the proposed language in full. When amendment of an existing rule is sought, the affected portion of the rule shall be set forth in the petition in full with matter proposed to be deleted enclosed in brackets and/or lined through, and proposed additions shown by underlining, boldface or highlighting.

B.Facts or arguments in sufficient detail to show the reasons for adoption, amendment or repeal of the rule.

C.All propositions of law to be asserted by petitioner.

D.Sufficient facts to show the effect of adoption, amendment or repeal of the rule.

E.The name and address of petitioner and of any other person known by petitioner to be interested in the rule sought to be adopted, amended or repealed.

2.The petition shall be deemed filed when received by the Director.

3.Upon receipt of the petition:

A.The Director shall provide a copy of the petition, together with a copy of the applicable rules of practice, to all persons named in the petition and may schedule oral presentations.

B.The Board shall, in writing, within thirty (30) days after date of submission of the petition, either deny the petition or initiate rule-making proceedings in accordance with Section 15-140 and this Section.

#### Section 14-160 Declaratory Rulings

1.Upon petition by any interested person, the Board in its discretion may issue a declaratory ruling as to the applicability to any person, property or state of facts of any rule or statute enforced by the Authority.

2.The petition to institute proceedings for declaratory ruling shall contain:

A.The rule or statute that may apply to the person, property or state of facts;

B.A detailed statement of the relevant facts, including sufficient facts to show how petitioner would be affected by the ruling;

C.All propositions of law or contentions asserted by petitioner;

D.The questions presented;

E. The specific relief requested; and

F. The name and address of petitioner and any other persons known by petitioner to be interested in the requested declaratory ruling.

### 3. Filing and Service of Petition

A. The petition shall be deemed filed when received by the Director.

B. Within sixty (60) days after the petition is filed, the Authority shall notify the petitioner whether it will issue a ruling. If the Authority decides to issue a ruling, it shall serve all persons named in the petition by mailing:

(1) A copy of the petition, together with a copy of the Authority's rules of practice; and

(2) Notice of any proceeding at which the petition will be considered.

C. Notwithstanding Part B of this Subsection, the Board may decide at any time that it will not issue a declaratory ruling in any specific instance.

4. Contents of Notice of Hearing. The notice of proceeding for a declaratory ruling shall set forth:

A. A copy of the petition requesting the declaratory ruling;

B. The time and place of the proceeding; and

C. The designation of the presiding officer.

### 5. Conduct of Hearing, Briefs and Oral Argument

A. The proceeding shall be conducted by and shall be under the control of the presiding officer.

B. At the proceeding, petitioner and any other interested person shall have the right to present oral argument. The presiding officer may impose reasonable time limits on the time allowed for oral argument. Petitioner, agency staff and interested persons may file briefs in support of their respective positions. The presiding officer shall fix the time and order of filing briefs.

6. Presiding Officer's Opinion. Except when the hearing is before the Board, the presiding officer shall prepare an opinion for consideration by the Board.

### 7. Decision of Board--Time, Form and Service

A. The Board shall issue its declaratory ruling within sixty (60) days of the close of the proceeding or within sixty (60) days of the time permitted for the filing of briefs, whichever is later.

B. The ruling shall be in writing and shall include:

(1) The facts upon which the ruling is based;

(2) The statute or rule in issue;

(3) The Board conclusion as to the applicability of the statute or rule to those facts;

(4)The Board conclusion as to the legal effect or result of applying the statute to those facts; and

(5)The reasons relied upon by the Board to support its conclusion.

#### Section 14-170 Contested Case Notice

##### 1. Service of Written Notice

A. Whenever a statute or rule requires that the Board or Authority serve a written notice or final order upon a party, other than for purposes of rulemaking or for notice to members of the public in general, the notice or final order shall be personally delivered or sent by registered or certified mail.

B. Notice to a party shall be posted, addressed to, or personally delivered to:

(1)The party; or

(2)Any person designated by law as competent to receive service of a summons or notice for the party; or

(3)Following appearance of counsel for the party, the party's counsel.

C. A party holding a permit issued by the Authority or Board, or an applicant therefore, shall be conclusively presumed able to be served at the address given in his application, as it may be amended from time to time, until the expiration date of the permit.

D. Service of written notice may be proven by a certificate executed by the person effecting service.

E. In all cases not specifically covered by this Section, a rule or a statute, a writing to a person if mailed to the person at his last known address, is rebuttably presumed to have reached the person in a timely fashion, notwithstanding lack of certified or registered mailing.

#### Section 14-175 Contested Case Proceedings

1. Except as specifically provided to the contrary by these rules, contested cases shall be governed by the Attorney General's Model Rules of Procedure, OAR 137-03-001 through 137-03-093. In general, a contested case proceeding is initiated when a decision of the Director is appealed to the Hearings officer. Therefore, as used in the Model Rules, the terms "agency," "governing body" and "decision maker" generally should be interpreted to mean "Hearings Officer." The term "agency" may also be interpreted to be, "Board" where context requires.

2. Contested case is initiated by a party requesting a hearing after receiving notice of opportunity for hearing. In the case of appeal of civil penalty issued by the Director, the notice of opportunity for a hearing is generally embodied in the notice of assessment of civil penalty. Other notices of proposed action, where there is opportunity for hearing, shall contain the full disclosures required by ORS 183.415(2).

3. A notice of opportunity for hearing shall include:

A. A statement of party's right to hearing or a statement of the time and place of hearing;

B. A statement of the authority and jurisdiction under which the hearing is to be held;

C.A reference to the particular section of statutes and rules involved; and

D.A short and plain statement of the matters asserted or charged.

E.In addition to the requirements of ORS 183.415(2), a contested case notice may include a statement that the record of the proceeding to date, including information in the Authority file or files on the subject of the contested case, automatically become part of the contested case record upon default for the purpose of proving a prima facie case.

F.Except as otherwise required by law, the contested case notice shall include a statement that if a request for hearing is not received by the Authority within twenty-one (21) days of the date of mailing or other service of the notice, the person shall waive the right to a hearing under ORS Chapter 183.

#### 4.Answer Required: Consequences of Failure to Answer

A.Unless waived in the notice of opportunity for a hearing, and except as otherwise provided by statute or rule, a party who has been served the written notice shall have twenty-one (21) days from the date of mailing or personal delivery of the notice in which to file a written answer or an application for hearing.

B.In the answer, the party shall admit or deny all factual matters and shall affirmatively allege any and all affirmative claims or defenses the party may have and the reasoning in support thereof. Except for good cause shown:

(1)Factual matters not controverted shall be presumed admitted;

(2)Failure to raise a claim or defense shall be presumed to be waiver of such claim or defense;

(3)New matters alleged in the answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Authority or Board; and

(4)Subject to ORS 183.415(10), evidence shall not be taken on any issue not raised in the notice and the answer unless such issue is specifically raised by a subsequent petitioner for party status and is determined to be within the scope of the proceeding by the presiding officer.

C.In the absence of a timely answer, the Director on behalf of the Board or Authority may issue a default order and judgment, based upon a prima facie case made on the record, for the relief sought in the notice.

#### 5.Rights of Parties in Contested Cases

A.In addition to the information required to be given under ORS 183.413 (2) and ORS 183.415(7), before commencement of a contested case hearing, the Authority shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

B.Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default. Informal settlement may be made in permit modification or revocation proceedings by written agreement of the parties and the Authority consenting to a suspension, fine or other form of intermediate sanction.

C.Unless precluded by law, informal disposition includes, upon agreement between the Authority and the parties, but is not limited to, a modified contested case proceeding, non-record abbreviated hearing, non-binding arbitration and mediation, but does not include binding arbitration.

## 6. Request by Person to Participate as Party or Limited Party

A. When the Authority gives notice that it intends to hold a contested case hearing, persons who have an interest in the outcome of the Authority's proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

B. A person requesting to participate as a party or a limited party shall file a petition, with sufficient copies for service on all parties, with the agency at least twenty-one (21) days before the date set for hearing. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file timely.

C. The petition shall include the following:

(1) Names and addresses of the petitioner and of any organization which the petitioner represents.

(2) Name and address of the petitioner's attorney, if any.

(3) A statement of whether the request is for participation as a party or a limited party and, if as a limited party, the precise area or areas in which participation is sought.

(4) If the petitioner seeks to protect a personal interest in the outcome of the Authority's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding.

(5) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest.

(6) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interests identified in Subparts (4) or (5), above.

D. The Authority shall serve a copy of the petition on each party personally or by mail. Each party shall have seven (7) days from the date of personal service or Authority mailing to file a response to the petition.

E. If the Authority determines that good cause has been shown for failure to file a timely petition, the Authority at its discretion may:

(1) Shorten the time within which answers to the petition shall be filed, or

(2) Postpone the hearing until disposition is made of the petition.

F. If a person is granted participation as a party or a limited party, the Authority may postpone or continue the hearing to a later date when it appears that commencing or continuing the hearing would jeopardize or unduly burden one or more of the parties in the case.

G. In ruling on petitions to participate as a party or a limited party, the Authority shall consider:

(1) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding.

(2)Whether any such affected interest is within the scope of the Authority's jurisdiction and within the scope of the notice of contested case hearing.

(3)When a public interest is alleged, the qualifications of the petitioner to represent that interest.

(4)The extent to which the petitioner's interest will be represented by existing parties.

H.A petition to participate as a party may be treated as a petition to participate as a limited party.

I.The Authority has discretion to grant petitions for persons to participate as a party or a limited party. The Authority shall specify areas of participation and procedural limitations as it deems appropriate.

J.The Authority ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner and all parties. If the petition is allowed, the Authority shall also serve petitioner with the notice of rights required by ORS 183.413(2).

## 7.Subpoenas

A.Upon a showing of good cause and general relevance, any party to a contested case shall be issued subpoenas to compel the attendance of witnesses and the production of books, records and documents.

B.Subpoenas may be issued by:

(1)A Hearings Officer; or

(2)A member of the Board; or

(3)An attorney of record for the party requesting the subpoena.

C.Each subpoena authorized by this section shall be served personally upon the witness by the party or any person over eighteen (18) years of age.

D.Witnesses who are subpoenaed, other than parties or officers or employees of the Authority or Board, shall receive the same fees and mileage as in civil actions in the circuit court.

E.The party requesting the subpoena shall be responsible for serving the subpoena and tendering the fees and mileage to the witness.

F.A person present in a hearing room before a Hearings Officer during the conduct of a contested case hearing may be required, by order of the Hearings Officer, to testify in the same manner as if he were in attendance before the Hearings Officer upon a subpoena.

G.Upon a showing of good cause a Hearings Officer or the Chairman of the Board may modify or withdraw a subpoena.

H.Nothing in this section shall preclude informal arrangements for the production of witnesses or documents, or both.

8.Non-Attorney Representation. A person may be represented by an attorney or by an authorized representative in a contested case proceeding before the Board or Authority.

A.Definitions. For purposes of this rule, the following words and phrases have the following meaning:

(1)"Authorized representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental authority other than a state agency.

(2)"Legal argument" includes arguments on:

- (a) The jurisdiction of the Authority to hear the contested case.
- (b)The constitutionality of a statute or rule or the application of a constitutional requirement of an agency.
- (c)The application of court precedent to the facts of the particular contested case proceeding.

(3)"Legal argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

- (a)The application of facts to the statutes or rules directly applicable to the issues in the contested case;
- (b)Comparison of prior actions of the Authority in handling similar situations;
- (c)The literal meaning of the statutes or rules directly applicable to the issues in the contested case; or
- (d)The admissibility of evidence or the correctness of procedures being followed.

B.On or before the first appearance by an authorized representative as defined in Subsection 1 of this Section, an authorized representative must provide the presiding officer with a letter authorizing the named representative to appear on behalf of a party or limited party.

C.The presiding officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure the orderly and timely development of the hearing record, and shall not allow an authorized representative who is not an attorney to present legal argument as defined in Subsection 1 of this Section.

D.When an authorized representative is representing a party or a limited party in a hearing, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change the applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the presiding officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

#### Section 14-180 Conducting Contested Case Evidentiary Hearings

- 1.The contested case evidentiary hearing shall be conducted by and under the control of a Hearings Officer.
- 2.If the Hearings Officer has a potential conflict of interest as defined in ORS 244.020(7), that officer shall comply with the requirement of ORS 244.120 and 244.130.
- 3.The Hearings Officer may schedule and hear any preliminary matter, including a pre-hearing conference, and shall schedule the hearing on the merits. Reasonable written notice of the date, time and place of preliminary hearings and conferences shall be given to all parties.
- 4.The hearing shall be conducted, subject to the discretion of the Hearings Officer, so as to include the following:

- A. The staff report and evidence of the proponent in support of its action;
  - B. The statement and evidence of opponents and other parties, except that limited parties may address only subjects within the area to which they have been limited;
  - C. Comments and questions;
  - D. Any rebuttal evidence by proponents and opponents;
  - E. Any closing arguments by parties or limited parties.
5. Presiding officers or decision makers, interested agencies and parties shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the Authority.
6. The hearing may be continued with recesses as determined by the Hearings Officer.
7. The Hearings Officer may set reasonable time limits for oral presentation any may exclude or limit cumulative, repetitious or immaterial matter.
8. Exhibits shall be marked and maintained by the Authority as part of the record of the proceedings.

#### Section 14-190 Evidentiary Rules

- 1. Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.
- 2. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.
- 3. All offered evidence not objected to will be received by the presiding officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.
- 4. Evidence objected to may be received by the presiding officer. Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.
- 5. Any time ten (10) days or more before a hearing, the Authority, an interested agency, and any party may serve upon every party, interested agency, and the Authority a copy of any affidavit, certificate or other document proposed to be introduced in evidence. Unless cross-examination is requested of the affiant, certificate preparer or other document preparer or custodian within five (5) days prior to hearing, the affidavit, certificate or other document may be offered subject to the same standards and received with the same effect as oral testimony.
- 6. If cross-examination is requested of the affiant, certificate preparer or other document preparer or custodian as provided in Subsection 5 of this Section, and the requestor is informed within five (5) days prior to the hearing that the requested witness will not appear for cross-examination, the affidavit, certificate or other document may be received in evidence, if the Authority or presiding officer determines that the party requesting cross-examination would not be unduly prejudiced or injured by lack of cross-examination.

#### Section 14-200 Final Orders

- 1. A final order shall be issued by the Hearings Officer, who may direct any party to prepare the final order.

2. Final orders on contested cases shall be in writing and shall include the following:

A. Rulings on admissibility of offered evidence when the rulings are not set forth in the record.

B. Findings of fact--those matters that are either agreed as fact or that, when disputed, are determined by the Hearings Officer on substantial evidence to be facts over contentions to the contrary. A finding must be made on each fact necessary to reach the conclusions of law on which the order is based.

C. Conclusion(s) of law--applications of the controlling law to the facts found and the legal results arising therefrom.

D. Order--the action taken by the Authority as a result of the facts found and the legal conclusions arising therefrom.

E. A citation of the statutes under which the order may be appealed.

#### Section 14-205 Default Orders

1. When the Authority has given a party an opportunity to request a hearing and the party fails to make a request within a specified time, or when the Authority has set a specified time and place for a hearing and the party fails to appear at the specified time and place, the Director may enter a final order by default.

2. The Authority may issue an order of default only after a prima facie case on the record has been made. The record may be made by the Director at a meeting convened by the Director or Hearings Officer, at a scheduled hearing on the matter.

3. The record shall be complete at the time of the notice at the time the default order is issued.

4. The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. When the record is made at the time the notice or order is issued, the Authority file may be designated as the record. In all cases, the record must contain substantial evidence to support the findings of fact.

5. When the Hearings Officer has set a specified time and place for a hearing in a matter in which only one party is before the Hearings Officer and that party subsequently notifies the Authority that the party will not appear at such specified time and place, the Hearings Officer may enter a default order, cancel the hearing and follow the procedure described in Subsections 2 and 4 of this Section.

6. Any default order shall be the final order of the Authority.

#### Section 14-210 Appeal to the Board

1. Filing of Appeal. The Hearings Officer's Final Order shall be the final order of the Board unless within thirty (30) days from the date of mailing, or if not mailed then from the date of personal service, any of the parties, a member of the Board, or the Director files with the Board and serves upon each party and the Authority a Notice of Appeal. A proof of service thereof shall also be filed, but failure to file a proof of service shall not be a ground for dismissal of the Notice of Appeal.

A. The timely filing and service of a Notice of Appeal is a jurisdictional requirement for the commencement of an appeal to the Board and cannot be waived; a Notice of Appeal which is filed or served late shall not be considered and shall not affect the validity of the Hearings Officer's Final Order which shall remain in full force and effect.

B.The timely filing and service of a sufficient Notice of Appeal to the Board shall automatically stay the effect of the Hearings Officer's Final Order.

2.Content of Notice of Appeal. A Notice of Appeal shall be in writing and need only state the party's or a Board member's intent that the Board review the Hearings Officer's Final Order.

3.Procedures on Appeal:

A.Appellant's Exceptions and Brief--Within thirty (30) days from the date of service or filing of his Notice of Appeal, whichever is later, the appellant shall file with the Board and serve upon each other party written exceptions, brief and proof of service. Such exceptions shall specify those findings and conclusions objected to and the reasoning for the exception, and shall include proposed alternative findings of fact, conclusions of law, and order with specific references to those portions to the record upon which the party relies. Matters not raised before the Hearings Officer shall not be considered. In any case where opposing parties timely serve and file Notices of Appeal, the first to file shall be considered to be the appellant and the opposing party the cross appellant.

B.Appellee's Brief--Each party so served with exceptions and brief shall then have thirty (30) days from the date of service or filing, whichever is later, in which to file with the Board and serve upon each other party an answering brief and proof of service.

C.Reply Brief--Except as provided in Part D of this Subsection, each party served with an answering brief shall have twenty (20) days from the date of service or filing, whichever is later, in which to file with the Board and serve upon each other party a reply brief and proof of service.

D.Cross Appeals--Should any party entitled to file an answering brief so elect, he may also cross appeal to the Board the Hearings Officer's Final Order by filing with the Board and serving upon each other party in addition to an answering brief a Notice of Cross Appeal, exceptions (described in Part A of this Subsection), a brief on cross appeal and proof of service, all within the same time allowed for an answering brief. The appellant-cross appellee shall then have thirty (30) days in which to serve and file his reply brief, cross answering brief and proof of service. There shall be no cross reply brief without leave of the Board Chair or Hearings Officer.

E.Briefing on Board-Invoked Review--Where one or more members of the Board commence an appeal to the Board pursuant to Subsection 1 of this Section, and where no party to the case has timely served and filed a Notice of Appeal, the Chair shall promptly notify the parties of the issue that the Board desires the parties to brief and the schedule for filing and serving briefs. The parties shall limit their briefs to those issues. Where one or more members of the Board have commenced an appeal to the Board and a party has also timely commenced such a proceeding, briefing shall follow the schedule set forth in Parts A through F of this Subsection.

F.Extensions--The Chair or the Hearings Officer, upon request, may extend any of the time limits contained in this Section. Each extension shall be made in writing and be served upon each party. Any request for an extension may be granted or denied in whole or in part.

G.Failure to Prosecute--The Board may dismiss any appeal or cross appeal if the appellant or cross appellant fails to timely file and serve any exceptions or brief required by these rules.

H.Oral Argument--Following the expiration of the time allowed the parties to present exceptions and briefs, the Chair may at his or her discretion schedule the appeal for oral argument before the Board.

4.Scope of Review--In an appeal to the Board of a Hearings Officer's Final Order, the review by the Board shall be confined to the record of proceedings before the Hearings officer. The Board may not substitute its judgment for that of the Hearings Officer in making any particular finding of fact, conclusion of law or order. As to any finding of fact made by the Hearings Officer, the Board may make an identical finding without any further consideration of the record.

#### 5.Remand

A.In the case of disputed allegations of irregularities in procedure before the Hearings Officer not shown in the record which, if proved, would warrant reversal or remand, the Board may refer the allegations to another Hearings Officer appointed by the Board to take evidence and make finding of fact upon them.

B.The Board may affirm or remand the proposed order. The Board shall remand the order only if it finds:

(1)The proposed order to be unlawful in substance or procedure, but error in procedure shall not be cause for remand unless the Board shall find that substantial rights of the appellant were prejudiced thereby;

(2)The proposed order is not supported by substantial evidence in the whole record.

6.After the conclusion of oral argument, the Board shall consider the appeal. The Board shall adopt an order allowing or denying the appeal in whole or in part. The order shall contain findings of fact and conclusions of law necessary to support the order. The order of the Board shall be the final order of the Authority.

#### Section 14-220 Power of the Director

1.Except as provided by Section 15-040, the Director, on behalf of the Board, may execute any written order which has been consented to in writing by the parties adversely affected thereby.

2.The Director, on behalf of the Board, may prepare and execute written orders implementing any action taken by the Board on any matter.

3.The Director, on behalf of the Board, may prepare and execute orders upon default where:

A.The adversely affected parties have been properly notified of the time and manner in which to request a hearing and have failed to file a proper, timely request for a hearing; or

B.Having requested a hearing, the adversely affected party has failed to appear at the hearing or at any duly scheduled pre-hearing conference.

4.Default orders based upon failure to appear shall issue only upon the making of a prima facie case on the record.

#### Section 14-225 Immediate Suspension or Refusal to Renew a Permit, Notice of Opportunity for Hearing, Service

1.If the Authority finds there is a serious danger to the public health or safety, it may immediately suspend or it may refuse to renew a permit. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order is a written order which is not a final order under ORS Chapter 183. An emergency suspension order is not an order in a contested case and may be issued without notice or an opportunity for a hearing as required for contested cases under ORS Chapter 183.

2.Except where the danger to the public health or safety is so imminent that the opportunity for the permittee to object under Part C of this Subsection is not practicable as determined by the Authority, the Authority shall provide the

permittee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a pre-suspension notice. The pre-suspension notice shall:

- A. Specify the acts of the permittee and the evidence available to the Authority which would be grounds for revocation, suspension or refusal to renew the permit under the agency's usual procedures.
  - B. Specify the reasons why the acts of the permittee seriously endanger the public's health or safety.
  - C. Identify a person in the Authority authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.
3. The Authority may provide the pre-suspension notice to the permittee in writing, orally by telephone, or in person, or by any other means available to the Authority. Where the pre-suspension notice is given orally, the Authority subsequently shall provide the permittee with a written copy of the notice.
4. Following the pre-suspension notice, the Authority shall provide the permittee an immediate opportunity to object to the Authority's specifications provided in the pre-suspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.
5. When the Authority issues the emergency suspension order, the Authority shall serve the order on the permittee either personally or by registered or certified mail. The order shall include the following statements required under ORS 183.415(2) and (3):
- A. That the permittee has the right to demand hearing to be heard as soon as practicable to contest the emergency suspension order;
  - B. That if the demand is not received by the Authority within ninety (90) days of the date of the notice of the emergency suspension order, the permittee shall have waived its right to a hearing;
  - C. The effective date of the emergency suspension order;
  - D. The specifications noted in Subsection 6.B of this Section;
  - E. That with the agreement of the permittee and the Authority, the hearing opportunity on the emergency suspension order may be combined with any other Authority proceeding affecting the permit. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the permit.
6. If timely requested by the permittee pursuant to Part E of this Subsection, the Authority shall hold a hearing on the emergency suspension order as soon as practicable. At the hearing, the Authority shall consider the facts and circumstances including, but not limited to:
- A. Whether at the time of issuance of the order there was probable cause to believe from the evidence available to the Authority that there were grounds for revocation, suspension or refusal to renew the permit under the Authority's usual procedures;
  - B. Whether the acts or omissions of the permittee pose a serious danger to the public's health or safety.
  - C. Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order;
  - D. Whether the Authority followed the appropriate procedures in issuing the emergency suspension order.

### Section 14-230 Ex Parte Communications

1. An ex parte communication is an oral or written communication to an Authority decision maker or the presiding officer, 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 Authority staff or counsel about facts in the record.
2. If an Authority decision maker or presiding officer receives an ex parte communication during the pendency of the proceeding, the officer 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 at the hearing, at a separate hearing for the limited purpose of receiving evidence relating to the ex parte communication, or in writing.
3. The Authority's record of ex parte communications pertaining to a contested case proceeding shall include:
  - A. The ex parte communication, if in writing;
  - B. A statement of the substance of the ex parte communication, if oral;
  - C. The Authority or presiding officer's notice to the parties of the ex parte communication; and
  - D. Rebuttal evidence.

### Section 14-235 Request for Stay Pending Judicial Review

1. Any person entitled to judicial review of an Authority order who files a timely petition for judicial review may request the Authority to stay the enforcement of the Authority order that is the subject of judicial review.
2. The stay request shall contain:
  - A. The name of the person filing the request, identifying that person as a petitioner and the Authority as the respondent;
  - B. The full title of the Authority decision as it appears on the order, and the date of the Authority decision;
  - C. A summary of the Authority decision; and
  - D. The name, address and telephone number of each of the following:
    - (1) The petitioner; and
    - (2) All other parties to the Authority proceeding. When the party was represented by an attorney in the proceeding, then the name, address and telephone number of the attorney 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 Part D, above, that they may participate in the stay proceeding before the Authority, if they file a response in accordance with Section 14-240 within ten (10) days from delivery or mailing of the stay request to the Authority.
  - F. A statement of facts and reasons sufficient to show that the stay request should be granted because:

(1)The petitioner will suffer irreparable injury if the order is not stayed;

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

(3)Granting the stay will not result in substantial public harm.

G.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 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.

H.A description of additional procedures, if any, the petitioner believes should be followed by the Authority in determining the appropriateness of the stay request.

I.An appendix of affidavits containing all evidence (other than evidence contained in the record of the contested case out of which the stay request arose) upon which the petitioner relies in support of the statements required under Parts F and G of this Subsection. The record of the contested case out of which the stay request arose is a part of the record of the stay proceeding.

3.The request must be delivered or mailed to the Authority and, on the same date, a copy delivered or mailed to all parties identified in the request, as required by Subsection 2.D of this Section.

#### Section 14-240 Request for Stay--Motion to Intervene

1.Any party identified under Subsection 14-235.2.D desiring to participate as a party in the stay proceeding may file a response to the request for stay.

2. The response shall contain:

A.The full title of the Authority 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, rejecting or proposing alternatives to the petitioner's statement on the bond amount or undertaking or other reasonable conditions that should be imposed on petitioner, should the stay request be granted.

3.The response may contain affidavits containing additional evidence upon which the party relies in support of the statement under Subsection 2.C of this Section.

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

#### Section 14-245 Request for Stay--Authority Determination

1. The Authority may allow the petitioner to amend or supplement the stay request to comply with Subsection 14-235.2 or Section 14.240. All amendments and supplements shall be delivered or mailed as provided in Subsection 14-235.3, and the deadlines for response and Authority action shall be computed from the date of delivery or mailing to the Authority.
2. After the deadline for filing of responses, the Authority shall:
  - A. Decide upon the basis of the material before it; or
  - B. Conduct such further proceedings as it deems desirable; or
  - C. Allow the petitioner, within a time certain, to submit responsive legal arguments and affidavits to rebut any response. Petitioner may not bring new direct evidence through such affidavits. The Authority may rely on evidence in such affidavits only if it rebuts intervenor evidence.
3. The Authority's order shall:
  - A. Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the Authority order, and may impose reasonable conditions, including but not limited to a bond 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 Authority 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 Authority order.
4. Nothing in Section 14-190 or in Sections 14-235, 14-240 and this Section prevents the Authority from receiving evidence from Authority staff concerning the stay request. Such evidence shall be presented by affidavit within the time limits imposed by Subsection 14.250.1. If there are further proceedings pursuant to Subsection 2.B of this Section, the Authority staff may present additional evidence in the same manner that parties are permitted to present additional evidence.

#### Section 14-250 Request for Stay--Time Frames

1. Unless otherwise agreed to by the Authority, petitioner and respondents, the Authority shall commence any proceeding instituted pursuant to Section 14-235 within twenty (20) days after receiving the stay request.
2. Unless otherwise agreed to by the Authority, petitioner and respondents, the Authority shall grant or deny the stay request within thirty (30) days after receiving it.