

# LANE REGIONAL AIR PROTECTION AGENCY

## 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:

- (1) "Adoption" means the carrying of a motion by the Board with regard to the subject matter or issues of an intended Agency action.
- (2) "Agency" means the Lane Regional Air Protection Agency.
- (3) "Board" means the Board of Directors of the Lane Regional Air Protection Agency.
- (4) "Chair" means the chair of the Board of Directors of the Lane Regional Air Protection Agency.
- (5) "Director" means the Director of the Lane Regional Air Protection Agency and authorized deputies or officers.
- (6) "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 Agency, except a claim of personal liability.
- (7) "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR chapter 137, division 001 (excluding 137-001-0008 through 137-001-0009), chapter 137, division 003, and chapter 137, division 004, as amended and in effect on January 1, 2006.
- (8) "Presiding Officer" means the Agency, its Chair, Hearings Officer, the Director or any individual designated by the Agency or the Director to preside in any contested case, public, or other hearing. Any employee of the Agency who actually presided in any such hearing is presumptively designated by the Agency 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.

### **Rulemaking**

#### **Section 14-115 Rulemaking Notice**

- (1) Prior to the adoption, amendment or repeal of any rule, the Agency shall give notice of its intended action on the Agency website and to persons who have requested notice pursuant to ORS 183.335(7).

- (2) The notice required by subsection (1) 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 Agency 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 Agency in considering the need; and
  - (d) A statement of fiscal impact on state and local agencies, public and businesses, including small businesses which may be affected.

#### **Section 14-120 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 137-001-0005 through 137-001-0060. As used in those rules, the terms "agency," "governing body" and "decision maker" generally should be interpreted to mean "Board."

#### **Section 14-125 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 137-001-0080.

- (1) If no notice has been provided before adoption of a temporary rule, the Agency 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 Agency 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 14-126 Effective Date of Rules or Orders**

The rule or order shall become effective upon adoption by the Board, unless a different effective date is required by statute or specified in the rule or order. The rule or order is not filed with the Secretary of State unless agreed by LRAPA and DEQ.

### **Section 14-130 Petition to Promulgate, Amend or Repeal Rule--Content of Petition, Filing of Petition**

The filing of petitions for rulemaking and action thereon by the Commission shall be in accordance with the Attorney General's Uniform Rules of Procedure set forth in OAR 137-001-0070. As used in that rule, the term "agency" general refers to the Board but may also refer to the Agency if context requires.

### **Section 14-135 Declaratory Rulings**

Except as specifically provided to the contrary by these rules, the declaratory ruling process shall be governed by the Attorney General's Model Rules, OAR 137-002-0010 through 137-002-0060. As used in those rules, the terms "agency," "governing body" and "decision maker" generally should be interpreted to mean "Board."

### **Section 14-140 Contested Cases: Contested Case Proceedings Generally**

Except as specifically provided to the contrary by these rules, contested case proceedings including notice requirements shall be governed by the Attorney General's Model Rules of Procedure, OAR 137-003-0501 through 137-003-0700. As used in those rules, the terms "agency," "governing body" and "decision maker" generally should be interpreted to mean "Board".

### **Section 14-145 Agency Representation by Environmental Law Specialist**

- (1) Environmental Law Specialists, and other Agency personnel as approved by the Director, are authorized to appear on behalf of the Agency and Board in contested case hearings involving formal enforcement actions issued under these rules and issuance, revocation, modification, or denial of licenses, permits, certifications, or other authorizations, including general permit coverage or registrations.
- (2) Environmental Law Specialists or other approved personnel may not present legal argument as defined under OAR 137-003-0545 on behalf of the Agency or Board in contested case hearings.

### **Section 14-147 Authorized Representative of Respondent other than a Natural Person in a Contested Case Hearing**

A corporation, partnership, limited liability company, unincorporated association, trust and government body may be represented by either an attorney or an authorized representative in a contested case hearing before the hearing officer or Board to the extent allowed by OAR 137-003-0555.

### **Section 14-150 Liability for the Acts of a Person's Employees**

A person is legally responsible for not only its direct acts but also the acts of its employee when the employee is acting within the scope of the employment relationship, regardless of whether the person expressly authorizes the act in question. The mental state of an employee can be imputed to the

employer. Nothing in this rule prevents the Agency from issuing a formal enforcement action to an employee for violations occurring during the scope of the employee's employment.

### **Section 14-155 Consolidation or Bifurcation of Contested Case Hearings**

Proceedings for the assessment of multiple civil penalties for multiple violations may be consolidated into a single proceeding or bifurcated into separate proceedings, at the Agency's discretion. Additionally, the Agency, at its discretion, may consolidate or bifurcate contested case hearings involving the same fact or set of facts constituting the violation.

### **Section 14-160 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 Agency 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 14-165 Default Orders**

- (1) When the Agency 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 Agency 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 Agency 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 Agency 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 Agency 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).
- (6) Any default order shall be the final order of the Agency.

### **Section 14-170 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 Agency 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 paragraph (d), 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 paragraph (a)), 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), 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 paragraphs (a) through (f).
  - (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:
  - (A) 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;
  - (B) 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 Agency.

#### **Section 14-175 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 14-185 Request for Stay Pending Judicial Review**

- (1) Any person entitled to judicial review of an Agency order who files a timely petition for judicial review may request the Agency to stay the enforcement of the Agency 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 Agency as the respondent;
  - (b) The full title of the Agency decision as it appears on the order, and the date of the Agency decision;

- (c) A summary of the Agency decision; and
  - (d) The name, address and telephone number of each of the following:
    - (A) The petitioner; and
    - (B) All other parties to the Agency 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 paragraph (d) that they may participate in the stay proceeding before the Agency, if they file a response in accordance with section 14-190 within ten (10) days from delivery or mailing of the stay request to the Agency.
  - (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 Agency 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 paragraphs (f) and (g). 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 Agency and, on the same date, a copy delivered or mailed to all parties identified in the request, as required by paragraph (2)(d).

**Section 14-190 Request for Stay--Motion to Intervene**



- (1) Any party identified under 14-185(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 Agency 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; and
  - (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 paragraph (2)(c).
- (4) The response must be delivered or mailed to the Agency and to all parties identified in the stay request within ten (10) days of the date of delivery or mailing to the Agency of the stay request.

#### **Section 14-200 Request for Stay--Agency Determination**

- (1) The Agency may allow the petitioner to amend or supplement the stay request to comply with 14-185(2) or 14-190. All amendments and supplements shall be delivered or mailed as provided in 14-185(3), and the deadlines for response and Agency action shall be computed from the date of delivery or mailing to the Agency.
- (2) After the deadline for filing of responses, the Agency 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 Agency may rely on evidence in such affidavits only if it rebuts intervenor evidence.
- (3) The Agency's order shall:
  - (a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the Agency 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 Agency 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 Agency order.
- (4) Nothing in 14-140 or in 14-190, 14-200 and this section prevents the Agency from receiving evidence from Agency staff concerning the stay request. Such evidence shall be presented by affidavit within the time limits imposed by 14-205(1). If there are further proceedings pursuant to paragraph (2)(b), the Agency staff may present additional evidence in the same manner that parties are permitted to present additional evidence.

**Section 14-205 Request for Stay--Time Frames**

1. Unless otherwise agreed to by the Agency, petitioner and respondents, the Agency shall commence any proceeding instituted pursuant to 14-190 within twenty (20) days after receiving the stay request.
2. Unless otherwise agreed to by the Agency, petitioner and respondents, the Agency shall grant or deny the stay request within thirty (30) days after receiving it.