

OREGON DEPARTMENT OF FORESTRY'S
NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES
WILDFIRE HAZARD ZONE

If a landowner appeals the Wildfire Hazard Zone assignment of their property, the matter will be set for a contested case hearing. A contested case hearing is like a trial but is less formal. It allows the landowner to appeal the Hazard Zone and wildland-urban interface assignments made by the Department of Forestry (Department) involving land that you own.

Oregon Revised Statute (ORS) 183.413 requires that you are provided with this statement of rights and procedures that describes the contested case process. This statement explains some of the procedures by which the Department conducts contested case hearings, the rights that you have at a contested case hearing, and the import and effect of a contested case hearing. This is information that you should read to prepare for the hearing.

1. **Authority and Jurisdiction.** The hearing will be conducted as provided in the Oregon Administrative Procedures Act (APA), ORS chapter 183, and the Model Rules of Procedure for Contested Cases, Oregon Administrative Rules (OAR) Chapter 137, and Division 3. *See* OAR 629-001-0005 (adopting the model rules). In addition, OAR 629-001-0010 through OAR 629-001-0055, and OAR 629-044-1000 through OAR 629-044-1041 may affect the contested case process. Other relevant statutes and rules that serve as authority for the hearing and affect the conduct and substance of your contested case hearing are cited in the notice that you received from the Department and include ORS Chapter 477.490, and OAR 629-044-1000 through 1041.
2. **Right to an attorney.** You have the right to be represented by an attorney throughout the contested case process, including at the hearing or at any prehearing conferences. *See* ORS 183.417; OAR 137-003-0550. Parties in contested cases are ordinarily and customarily represented by attorneys. Legal aid organizations may be able to assist you if you cannot afford an attorney. However, you are not required to be represented by counsel **unless** you are an agency, corporation, partnership, limited liability company, trust, government body, or unincorporated association, in which case you are required to obtain an attorney. *See* OAR 137-003-0550. If you are not represented by an attorney at the hearing but decide that you want an attorney to represent you, you may request a recess for an opportunity to get an attorney. The ALJ will decide whether to grant such a request.

The Department is authorized to be represented by a lay representative in certain contested cases. *See* ORS 183.452; OAR 629-001-0010; OAR 137-003-0545. As a default, the Department is represented by a lay representative in its contested cases when it is authorized to do so. The Department may obtain legal assistance from the Oregon Department of Justice if the Department needs to make legal arguments or otherwise determines that having an attorney advise or represent it is required or in the Department's best interests in a particular case. *See* ORS 183.452; OAR 629-001-0010. If the

Department determines that representation by a lay attorney is not in its interests, it will notify you that it will be represented by an attorney from the Department of Justice.

- 3. Translation; assistance for persons with disabilities.** An interpreter will be provided at proceedings for non-English speaking parties or witnesses. Appropriate auxiliary aids and services will be provided at no cost to persons with disabilities who are parties or witnesses to a contested case. If you or one of your witnesses need translation assistance or assistance with a disability, please contact the Department and the Office of Administrative Hearings (OAH) ahead of any proceedings so that your needs may be accommodated. *See* OAR 137-003-0590.
- 4. Notice to active duty servicemembers.** Active duty servicemembers have a right to stay contested case proceedings under the federal Servicemembers Civil Relief Act. *See generally* 50 USC 3901 *et seq.* For more information, contact the Oregon State Bar (800-452-8260), the Oregon Military Department (503-584-3571), or the nearest United States Armed Forces Legal Assistance Office (<http://legalassistance.law.af.mil>). The Oregon Military Department does not have a toll-free telephone number.
- 5. Time and place of the hearing.** A hearing date has not yet been set. The Department will refer this case to the OAH, and the OAH will schedule a hearing. *See* OAR 137-003-0515; OAR 137-003-0525. Once the hearing is scheduled, the OAH will notify you of the time, date, and place of the hearing. *See* OAR 137-003-0525. Prior to the hearing, there may be a prehearing conference. *See* OAR 137-003-0575. If a prehearing conference is set, you will be informed of the date, place, and time of the prehearing conference. *See* OAR 137-003-0575. Prehearing conferences are a flexible procedure devised designed to facilitate the conduct of the hearing and the resolution of the case. *See* OAR 137-003-0575. The purpose of a prehearing conference could include any of the following: to facilitate discovery and to resolve disagreements about discovery; to identify, simplify and clarify issues; to eliminate irrelevant or immaterial issues; to obtain stipulations of fact and to admit documents into evidence; to provide to the ALJ, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify; to authenticate documents; to decide the order of proof and other procedural matters pertaining to the conduct of the hearing; to assist in identifying whether the case might be appropriate for settlement or for a collaborative dispute resolution process and, if the agency agrees that the case is appropriate, to refer the case to the agency for settlement discussions or for exploration or initiation of a collaborative dispute resolution process; to schedule the date, time and location of the hearing or for any other matters connected with the hearing, including dates for pre-filed testimony and exhibits; and to consider any other matters that may expedite the orderly conduct of the proceeding.
- 6. Administrative Law Judge.** The person who will preside at a hearing is known as an administrative law judge (ALJ). *See* ORS 477.490 (Statewide map of wildfire hazard); OAR 629-001-0025(1); OAR 137-003-0600(1). The ALJ is an independent decision maker, not employed by the Department, who will rule on all matters that arise at the hearing, subject to Department consideration of matters transmitted for Department decision under OAR 137-003-0635 and OAR 629-001-0030, matters subject to Department review under OAR 137-003-0640(7) and OAR 629-001-0035 or OAR 137-003-0568, or matters subject to review by

the chief ALJ under OAR 137-003-0640. The ALJ will be assigned by the Chief ALJ from the OAH. The OAH consists of employees of, and independent contractors with, the Chief ALJ.

7. **Issues to be considered at the hearing.** The issues that will be considered at the hearing are set forth in the notice or proposed order that you received from the Department, in other pre-hearing filings, or in the request for a hearing. *See* OAR 629-001-0025(4). You have the right to respond to all issues properly before the ALJ and present evidence and witnesses on those issues. *See* OAR 629-001-0025(4) (limiting the issues that may be considered at the hearing).
8. **Discovery.** Discovery is the process by which parties obtain information from each other that helps them prepare for the hearing. The rules governing discovery in this case are OAR 137-003-0566 through OAR 137-003-0572. If you want information from the Department, you must first ask the Department for that information. *See* OAR 137-003-0568. If you are not satisfied with the Department's response, you may ask the ALJ to order the Department to produce the information. *See* OAR 137-003-0568.
9. **Witnesses.** At the hearing, witnesses must testify under oath or affirmation to tell the truth. ORS 183.417(6). All witnesses are subject to cross-examination and to questioning by the ALJ. *See* ORS 183.450; OAR 137-003-0610. The Department or the ALJ can issue subpoenas on your behalf requiring witnesses to appear at the hearing upon a showing that their testimony is relevant to the case and is reasonably necessary to establish your position. *See* ORS 183.440; OAR 137-003-0585. If you are represented by an attorney, your attorney may issue subpoenas for attendance of witnesses at the hearing. ORS 183.445; OAR 137-003-0585. You are responsible for paying witness fees and mileage to any person whom you subpoena. *See* OAR 137-003-0585.
10. **Evidence.** The general purpose of a contested case hearing is to determine the facts and to apply the law to the facts. The Department will present evidence in support of its position. You will also have the right to present evidence in support of your position. The order of presentation of evidence is normally as follows:
 - a. Opening Statements by the Department and by you;
 - b. The Department's presentation of evidence;
 - c. Your presentation of evidence;
 - d. Rebuttal evidence by the Department and by you, as allowed by the ALJ;
and
 - e. Closing Statements by the Department and by you.

See ORS 183.450; OAR 137-003-0610.

11. **Burden of presenting evidence.** The burden of presenting evidence to support an allegation or position rests upon the proponent of the allegation or position. Normally, each fact must be proven by a preponderance of evidence—meaning that each fact must be

shown to be more likely than not. If you have the burden of proof on an issue, or if you intend to present evidence on an issue for which the Department has the burden of proof, you should be prepared to present relevant evidence, as described below.

12. Admissible evidence. To be admitted at the hearing, evidence must be relevant and be of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. *See* OAR 137-003-0050. The ALJ may exclude evidence that is irrelevant, immaterial, or unduly repetitious. *See* OAR 137-003-0050. The ALJ will often admit hearsay evidence. The fact that evidence is hearsay generally affects how much reliance the Department or ALJ will place on it in reaching a decision. There are generally four kinds of evidence:

- a. Testimony. Witnesses, including you, who have knowledge of the facts may provide testimony to be received in evidence.
- b. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.
- c. Experiments. The results of experiments, demonstrations and similar means used to prove a fact may be received in evidence.
- d. Judicial Notice. The Department or the ALJ may take “judicial notice” of facts that are not subject to reasonable dispute and are generally known or capable of accurate and ready determination. You will be informed if any facts received as “judicial notice” and will be given an opportunity to contest any facts so noticed.

See ORS 183.450; OAR 137-003-0610.

Unaccepted proposals of settlement are privileged and are not admissible at the hearing. OAR 629-001-0025(2).

13. Objections to evidence. Objections to evidence must be made at the time the evidence is offered. *See* ORS 183.450. Objections are generally made on one or more of the following grounds:

- a. The evidence is inadmissible;
- b. The evidence is unreliable;
- c. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case; or
- d. The evidence is unduly repetitious and duplicates evidence already received.

14. Continuances or adjournments. There are normally no continuances or adjournments granted at the end of the hearing for presentation of additional testimony or evidence.

However, if you can show that the record should remain open for additional evidence, the ALJ may grant additional time for submission of such evidence.

15. Record. A record will be made of the entire proceeding to preserve and perpetuate the testimony and other evidence for appeal. *See* ORS 183.417(8)– (10). A record of live testimony will be created using a tape or digital recorder. The recording is generally not transcribed, unless there is an appeal to the Court of Appeals. However, you may obtain a copy of the recording from the OAH (the OAH may charge a fee for the copy).

16. Proposed order. After the hearing, the ALJ will issue a proposed order in the form of findings of fact, conclusions of law, and recommended agency action. You will be provided with a copy. *See* ORS 183.464; OAR 137-003-0645.

Exceptions. You will also be given an opportunity to make written objections, called "exceptions," to the ALJ's proposed order. Exceptions shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding and shall be based only on the grounds that either a necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record, a necessary legal conclusion is omitted or is contrary to law or the Board or Department policy, or prejudicial procedural error occurred. Exceptions must be numbered and must specify the disputed finding, opinions, or conclusions. The nature of the suggested error shall be specified, and the alternative or corrective language provided. You will be notified of how and when exceptions to the proposed order must be filed. *See generally* OAR 137-003-0650 and OAR 629-001-0040.

17. Final order. The State Forester will issue the Final Order in this case. *See* OAR 629-044-1041; OAR 137-003-0665.

The State Forester has some ability to modify the proposed order issued by the ALJ. If the proposed order is modified in any substantial manner, the modification will be identified and explained. A proposed finding of "historical" fact will be modified only if the State Forester determines that there is clear and convincing evidence in the record that the ALJ's finding was incorrect. *See* OAR 137-003-0665. Generally, a historical fact is a fact related to the events that transpired, as opposed to a finding of ultimate fact or a conclusion of law.

18. Final Order by Default. The Department's Notice of Proposed Action will automatically become a Final Order by Default if a party does not request a hearing, or if a party requests a hearing and then withdraws the request, notifies the Department or the ALJ that the party will not appear at the hearing, or otherwise fails to appear at the hearing. The Department will not issue a separate Final Order. The Department designates its file, including all materials submitted by a party, as the record, which constitutes a prima facie case to support the Final Order. *See* ORS 183.417(4); OAR 629-001-0055(3)(b); OAR 137-003-0672.

19. Reconsideration and Rehearing; Appeal. As a condition of judicial review, you must file for reconsideration or rehearing with the person or body which rendered the final order in the proceeding. *See* OAR 629-001-0050; OAR 137-003-0675. The petition must state

with specificity the grounds for objection to the order and the remedy sought and must be filed within 60 calendar days of the date the final order is served. *See* OAR 629-001-0050; OAR 137-003-0675.

If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days only following the date the order denying the petition for reconsideration or rehearing is served. *See* ORS 183.482. If the Department does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 60 days only following such date. *See* ORS 183.482. Date of service shall be the date on which the Department delivered or mailed its order in accordance with ORS 183.470. *See* ORS 183.482.

20. Relevant Statutes and Rules. In addition to the statutes and rules cited in the Notice or Orders, the following statutes and rules are relevant to this matter:

ORS 477.001: Definitions

ORS 477.015: Definition of wildland-urban interface

ORS 477.025: Variability of wildland-urban interface fire protection problems

ORS 477.027: Establishment of classes of wildland-urban interface

ORS 477.490: Statewide wildfire hazard map

OAR 629-044-1000: Wildland-Urban Interface and Wildfire Hazard Mapping rule purpose

OAR 629-044-1005: Definitions

OAR 629-044-1011: Wildland-Urban Interface Identification Criteria

OAR 629-044-1016: Periodic Wildland-Urban Interface Lands Identification

OAR 629-044-1021: Wildfire Hazard Rating

OAR 629-044-1026: Wildfire Hazard Map

OAR 629-044-1031: Notification

OAR 629-044-1036: Locally Developed Wildfire Plans

OAR 629-044-1041: Appeal of Wildfire Hazard Assignment