LU-24-027 IN-PERSON TESTIMONY SUBMITTAL COVER SHEET

Received From: Ken Eklund

Date: 10.23.2025

Email: futureeverything@writerguy.com

Phone:

Address: 37340 Moss Rock Dr

City, State, Zip: Corvallis OR 97330

FOR BOC OFFICE STAFF USE ONLY

BOC ID: BOC2

IDENTIFIER: T0658

Ken Eklund
37340 Moss Rock Dr.
Corvallis OR

Good evening, Chair Wyse and Commissioners Malone and Shepherd:

I urge you, Commissioners, to let everyone speak. I have faith that the people behind me will get their turn, because I have faith that you will let everyone be heard.

My name is Ken Eklund, and I live in Soap Creek Valley, 37340 Moss Rock Drive, Corvallis. I'm active in the community, as a former participant in the Solid Waste Advisory Council, the Disposal Site Advisory Committee, and Benton County Talks Trash.

I'm active on climate crisis issues, so let me direct you to the "explainers" that I've entered into the written testimony, especially the one on greenhouse gases and the land use criteria. Several others as well, on the EPA, on DEQ, and more; as the name suggests, the explainers intend to bring together and summarize what otherwise can be very scattered.

Professionally, I work in narrative design, most notably in future scenarios, where I have an international following. Projects I've created have won awards: a couple of Webby nominations (Webbies are like the Oscars of the Internet) and a special Peabody Award given for "landmark contributions to storytelling." So I have cred in "future scenarios" work and in "narrative".

I'd like to tell you my origin story – how I got involved with the dump and its issues. It was 2020, and my wife and I went over to a neighbor's house because they had a library table they were looking for a new home for. It was our first time meeting them. It being COVID time, we met outdoors. They had a lovely yard, and I told them so, and they said "yeah, good thing it's not a Dump Day, we can't use our yard on a Dump Day." So I was surprised. They live closer to the dump than we do, but not by much – we are four miles away, they are maybe three.

So that's how I first came to know for a fact that the landfill was leaking a lot of landfill gas. It takes a lot of landfill gas to make an odor plume three miles long. Nobody is going to say something like that about their home if it isn't true. And this was in 2020, before anyone knew that the dump was going to try to expand.

Fast forward to 2021, the Planning Commission hearings, lots of testimonies about Dump Days. Chair Ken Kenaston asks the dump's Environmental Manager, Ian Macnab, about landfill gas emissions – "how much is coming out of the landfill?" And Ian assures him, "it's a minimal amount." Commissioners, as we all know by now, it is not a minimal amount. But that's when I came to know that Republic's spin machine is on its highest setting, all the time.

Commissioners, I'm not speaking to you today to try to persuade you to deny this Application. As someone who knows the importance of narrative, I think that ship has already sailed. I'm reading the same material as you, and listening to the same testimonies. Viewed through the lens of narrative, I'm sure you will deny. Because at the end of the day, you need to have a narrative that you can believe in. And there's really only one of those on the table.If you deny, the narrative about what happens is very straightforward. Everyone just continues the way they're going, and doing what they're doing. Republic honors its various business contracts. Benton County gets its trash managed through the year 2040. A regional committee comes together, under House Bill 3794, to gather evidence, hear all sides, and move the region forward into a more economically and environmentally sound plan for its garbage. The various investigation and enforcement actions currently underway against Republic by DEQ and the EPA proceed at their calm, thorough, and glacial pace. Life goes on.

It's really hard for Republic to come up with a narrative that's better than that. So they haven't even tried. What they're done instead is to create a confusing scenario that's so huge and convoluted that it squeezes all the narratives out. The "scenario" they're asking you to sign is like the perfect storm of "decision by committee." What's in it, exactly? Do we know? Probably not. I don't think anyone does. It's a confusion, not a narrative.

How will it work? They left it to you to figure that out.

Commissioners, another reason that I know you will deny is this: a key part of what Republic's proposing is that Benton County government get into the environmental monitoring business. And you don't want to. It's a nightmare scenario, really: Republic commits an infraction and you take the heat for it. Better get ready for a lot of heat. I can see why Republic would propose it, but I see zero reason why you would take that on. It's just not a venture you will succeed at, and neither Republic nor staff have shown any evidence to the contrary.

One salient example: the Community Concerns Annual Report that DSAC publishes every year. Community Concerns: right on target for this Applicant. Not consulted or even considered by Staff. Not consulted by Republic, and they're on DSAC. If you look at these Reports — and you can, because the public put them in the Record for you — you'll see hundreds of complaints about dump operations.

Again, if you deny, the narrative about what happens is very straightforward. Everyone just continues doing what they're doing. You stay out of environmental enforcement. Republic takes the heat for their infractions, not you.

So I want to point something out here, which is that there's an established process for what's going on with this Application, a process I'm very familiar with. This is future scenario work. Republic and staff have worked together to develop a scenario in which the new landfill doesn't actually seriously interfere with nearby land uses, the character of the area, public spaces, and so on. Let's take a look at it, using the tools of future scenario planning.

The word "tortured" springs to mind.

Boom. Their scenario runs into trouble immediately, because although they're building a scenario, they don't know how to build scenarios.

I'm going to mention three fundamentals of future scenario work that aren't present in the Republic-Staff "Approve with Conditions" scenario. The first one: you don't just develop one scenario. Two: you evaluate the scenarios you develop by looking for signals. Three: you bring in as many viewpoints as possible, because that's where you get signals from.

Republic and staff are pretending there's only one scenario, which is the one they've laid out for you, Commissioners. But as I've already made clear, there's clearly another scenario on the table, the one where you deny. There are other scenarios as well, ones where Approval with Conditions actually runs into problems – I'll call these "more-real scenarios" and get to them in a moment.

But first, you're wondering: does this relate to the land use criteria? So let me talk to that.

The legal definition of "burden of proof" lists it as having two components: the burden of production, which is, producing evidence, and the burden of persuasion, which is delivering a convincing narrative about that evidence. This is the legal definition of burden of proof – I'll include a variety of sources for it in my speech manuscript – but it's commonsense as well. Republic can't just dump a pile of papers on the table and say, "the proof is in there somewhere."

So: Republic has the burden of proof, so they must deliver evidence and tell you a story about that evidence which you find convincing. Or they fail their burden of proof, which is grounds for denying their application. I see this all the time in LUBA decisions and findings: "we were not convinced by this" and "we found this to be more convincing than that."

You probably already know this, because it's part of the discretionary power you have in this decision. You know that ultimately you decide what terms like "adjacent" and "nearby" mean, and that ultimately you make the decision as to what is convincing and what has failed to convince. Because each of you, individually, are either convinced or you are not.

I don't see how anyone can call the Republic-Staff scenario "convincing." I don't think they do. Staff certainly doesn't. Their report focuses on whether it's complete, from an evidence point of view, not on whether or not it will actually work. They are entirely silent on that. They've kicked that upstairs for you to determine.

→ will they actually remediate anything.

"Convincing." I think they avoid that word like the plague. But it's a core consideration in your deliberations and your decision, a core part of the "burden of proof." ← to prevent "serious interference," etc.

Back to future scenario work. I had mentioned signals, and a wealth of viewpoints, as other key elements of good scenario work. "Signals" is shorthand for signs in the present that the scenario will succeed. They're often explained by this quote from author William Gibson:

"The future is here, it's just not widely distributed."

A signal is a bit of evidence that a scenario is already trying to happen.

And you need a wealth of viewpoints, because you need somewhere to look for signals.

The Republic-Staff process has none of this. It's like the definition of an echo chamber. That became crystal clear when they brought their scenario out of the echo chamber and into the real world before the Planning Commission. It generated hundreds of pretty strong signals that their scenario is completely unworkable. It's too Pollyanna. The signals of that are pretty convincing.

Again, Republic and staff have not provided you with any signals that their scenario would work. There's no evidence of that. It's completely theoretical.

But as I said, there's plenty of evidence already in testimony, and coming at you today, that the scenario won't work. In the interests of time, I won't repeat any of that here.

Instead, let me take up the thread of the other scenarios, the more-real scenarios, that come hand in hand with the Republic-Staff confusion scenario. Jeff Condit, Republic's attorney, set the stage for these yesterday, the case of the Costco in Salem. To recap: Salem permitted development of a commercial area, after discussing and agreeing that there would be no Costco or other big box store in it, but that wasn't put into the permit itself. So then the landowner changed their mind and brought in a Costco. And LUBA allowed this. LUBA basically said, *don't believe promises, get it in writing.*

So how much of the Republic-Staff scenario is promises, and how much is in writing? Basically, it's all promises, because it's all monitoring and no enforcement. Commissioners, you'll hear and read a lot of testimony about this as well.

No actual remediation.

Let me spin out a couple of these more reality-based scenarios for you. Let's pretend you approve the application, with conditions. What happens next?

- Republic changes its mind about the Conditions of Approval. Most or all of them in the Republic-Staff scenario never actually come to pass. The Board of Commissioners don't like this but what can they do? Invoke another Condition of Approval? That will be ignored as well.

- Republic changes its mind and immediately starts ramping up how much trash the dump takes in, well past their promise of 1.3 million tons a year. They get the new high volume by dropping prices to really low levels. They do that in a successful effort to derail the HB 3794 process and its desire to reduce how much trash the region generates. Once that's done, prices go back up.

- Republic changes its mind and decides to prepare for the new landfill now, so they cut down the forest that's there and start digging a hole that's 150 feet deep in its deepest part – even before the appeal of their conditional use permit is heard at LUBA.

- Republic changes its mind and decides to have two working faces at once. So in a few years both the old landfill and the new landfill are filling up fast, and Republic is back with a new expansion proposal.

The thing is, it's impossible for Benton County to protect itself and the region from these scenarios with Conditions of Approval. Because Benton County has no viable way to enforce any Conditions of Approval. Jeff Condit cited a relevant case where someone actually did enforce a Condition of Approval – which only goes to prove what I am saying. That case took 8 years and millions of dollars. The only way for Benton County to succeed with Conditions of Approval is not to go down that road at all. Commissioners, there's nothing but tears for us down that road.

So I'll say again: two scenarios. One, the deny one, that <u>has been</u> developed the way that scenarios should: in the open, lots of dialog, lots of consensus. <u>If you deny</u>, everyone just continues the way we're going. We execute on the plan. The HB 3794 regional committee comes together, and together the region moves forward with a more economically and environmentally sound plan. Life goes on, and Benton County is a guiding force.

The other scenario has been developed in the way that scenarios shouldn't: behind the scenes, no dialog, no consensus. If you approve with Conditions, you've hung Benton County's hat on Conditions of Approval that have no history of being enforced and are all monitoring and no enforcement. So it effectively means that Benton County has lost control over Coffin Butte Landfill. You will have signed something and really have no idea of how it will go.

Let me spin out another version of the Approval with Conditions scenario for you, a non-extreme one in which Republic Services doesn't change its mind about anything.

You sign on to Approve with Conditions. Republic says "thank you very much" and shows your signature to its shareholders, who are very happy to see it, and then puts your signed Approval in its back pocket.

Life goes on. The dump continues to cause Dump Days and the crisis over what to do with leachate continues to deepen. The bad news about PFAS continues to pile up. Republic continues to battle the EPA and DEQ on compliance. The trash continues to pile up on our roadways.

But now there's that Approval in Republic's back pocket, and the residents of the entire area know it. It's sitting there like a time bomb. We know that something big and bad is going to happen, and so does Benton County government. How big and how bad, no one knows. But people make their decisions accordingly, in proportion to the risk. When you smell the landfill, that's the smell of defeat. Because it's not going to get better. It's going to get worse. You can hear the time bomb ticking. You make your decisions accordingly, and these individual decisions begin to pile up.

Commissioners, I think that's the very definition of serious interference with the character of the area.

And: I wonder how you would feel, if some previous Commissioners had put such an arrangement in motion so that during your term, it would become your responsibility to protect your community using Conditions of Approval that are all monitoring, no compliance. And set them the task of making those Conditions work with Republic Services, who are now people who did not participate in drafting the Conditions of Approval, who have no skin in the game, so to speak, and thus may see them as an unwelcome imposition to be subverted at every level.

I think the provisions in land use code that charge you with guaranteeing no serious interference with the character of the area, and no undue burden on public services, were written to give you clear direction not to cause the events I've just described. As was your oath of office.

Note that in this very realistic scenario, we haven't even gotten to the landfilling yet, and already Approval with Conditions is spinning the situation far out of County control.

Commissioners.
Chair Wyse. Commissioner Malone.
Commissioner Shepherd.

Let's look underneath all the confusion, at Republic's actual narrative underlying this application, the quiet part they won't say out loud. It's this: that Benton County continue to be the region's trash can. Right now, if Republic steps on the pedal, Benton County opens its lid. The narrative if you deny changes all that – the narrative if you deny signals to everyone in the wasteshed that those days are over, that we have to find a better way forward, together. Republic's Application is first and foremost an attempt to stop that signal from going out.

Please, Commissioners, send that signal. Let's solve the trash problem, not expand it. Let's stop kicking that can down the road. Thank you and I'm happy to answer any questions.

– Maybe from you, Commissioner Shepherd.

(18:15)

Ken Eklund
3734 0 Moss Rock Dr
Corvallis OR

Brian Rupe, Republic Area VP: if you read what's behind these words, he's saying that (a) Republic cannot be a good steward of the environment on its own, and (b) is actively looking for counties that won't or can't enforce environmental laws, and Benton is that county right now

If the commitment here is to be the best stewards of the environment as possible, then maybe doesn't it make sense for Benton County to keep some of this volume here in in Benton County, where you not only have a very concerned and educated citizen group, you have a county that's very involved, and [puts hand to chest] somebody who's willing to partner with you at the landfill, as opposed to that volume being pushed out of Benton County where that may not happen. – Brian Rupe, Planning Commission meeting #2, 2:04:10

Burden of proof (law)

From Wikipedia, the free encyclopedia

In a legal dispute, one party has the **burden of proof** to show that they are correct, while the other party has no such burden and is presumed to be correct. The burden of proof requires a party to produce evidence to establish the truth of facts needed to satisfy all the required legal elements of the dispute. It is also known as the **onus of proof**.

The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which is: "the necessity of proof always lies with the person who lays charges."[11] In civil suits, for example, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the plaintiff, and the defendant bears the burden of proving an affirmative defense. The burden of proof is on the prosecutor for criminal cases, and the defendant is presumed innocent. If the claimant fails to discharge the burden of proof to prove their case, the claim will be dismissed.

Definition

A "burden of proof" is a party's duty to prove a disputed assertion or charge, and includes the burden of production (providing enough evidence on an issue so that the trier-of-fact decides it rather than in a peremptory ruling like a directed verdict) and the burden of persuasion (standard of proof such as preponderance of the evidence).[2][3]

A "burden of persuasion" or "risk of non-persuasion"[4] is an obligation that remains on a single party for the duration of the court proceeding.[5] Once the burden has been entirely discharged to the satisfaction of the trier of fact, the party carrying the burden will succeed in its claim. For example, the presumption of innocence in a criminal case places a legal burden upon the prosecution to prove all elements of the offense (generally beyond a reasonable doubt), and to disprove all the defenses except for affirmative defenses in which the proof of non-existence of all affirmative defense(s) is not constitutionally required of the prosecution.[6]

The burden of persuasion should not be confused with the evidential burden, or burden of production, or duty of producing (or going forward with evidence)[7] which is an obligation that may shift between parties over the course of the hearing or trial. The evidential burden is the burden to adduce sufficient evidence to properly raise an issue at court.

Explainer

Burden of Proof vs. Standard of Evidence: How Legal Cases Get Decided

Last updated: Jul 01, 2025 4:36 AM

SHARE

Last updated 4 months ago. Our resources are updated regularly but please keep in mind that links, programs, policies, and contact information do change.

Contents

Every day in American courtrooms, judges and juries face a fundamental question: Has someone proven their case? The answer depends on two concepts that most people never think about but that determine the outcome of every legal dispute in the country.

These concepts—burden of proof and standard of evidence—shape everything from murder trials to divorce proceedings to workplace disputes. Understanding them reveals why some cases that seem obvious to the public result in surprising verdicts, and why the legal system sometimes appears to let guilty people go free or punish innocent ones.

The stakes couldn't be higher. These rules determine who goes to prison, who pays damages, who keeps their children, and who gets fired.

The Foundation: Who Must Prove What

Burden of Proof: The "Who" Question

The _____ answers a simple but crucial question: which side in a legal dispute must convince the judge or jury that their version of events is correct?

This isn't just a procedural detail. It's a fundamental protection against arbitrary accusations and government overreach. The burden of proof forces people to back up their claims with evidence rather than simply making accusations and demanding that others prove their innocence.

In most situations, the party bringing a legal action—the plaintiff in a civil case or the prosecutor in a criminal case—bears the burden of proof. This makes intuitive sense: if you're accusing someone of wrongdoing or asking a court to award you money, you should have to prove your case.

But the burden of proof is more sophisticated than it first appears. It actually consists of two distinct components that serve different functions and can shift between parties during a trial.

The Two Components: Production vs. Persuasion

Burden of Production (also called the "burden of going forward"): This is the initial obligation to present enough evidence to get your case in front of a judge or jury. It's the minimum threshold that prevents frivolous lawsuits and ensures that only cases with some factual basis proceed to trial.

Think of it as the entry fee for having your day in court. If you can't meet the burden of production, your case gets dismissed before the other side even has to respond.

The burden of production can shift between parties multiple times during a trial. Once the plaintiff presents enough evidence to meet their initial burden, the defendant might need to present evidence for their defenses. If they do, the burden might shift back to the plaintiff to address those defenses.

Burden of Persuasion: This is the ultimate responsibility to convince the decision-maker that your version of events is true according to the required standard of evidence. Unlike the burden of production, the burden of persuasion typically stays with whoever has it initially throughout the entire case.

This distinction matters enormously in practice. Even if the burden of production shifts back and forth, one side retains the ultimate responsibility to prove their case. This prevents cases from becoming endless battles where nobody has clear responsibility for proving anything.

Who Carries the Burden: Case by Case

The allocation of burden varies depending on the type of legal proceeding:

Criminal Cases: The prosecution always bears the burden of proving the defendant's guilt. This reflects the _____—a cornerstone principle that anyone accused of a crime is considered innocent until proven guilty.

The defendant doesn't have to prove anything. They can sit silently throughout their trial, present no evidence, call no witnesses, and not even testify on their own behalf. Their silence cannot be used against them.

Civil Cases: The plaintiff typically bears the burden of proving their case. If you're suing someone for money damages or asking a court to force them to do something, you must prove why you deserve what you're asking for.

This allocation makes practical sense. The person disrupting the status quo by filing a lawsuit should have to justify that disruption with evidence.

Affirmative Defenses: Even when defendants don't bear the overall burden of proof, they may need to prove specific defenses they raise. If a criminal defendant claims insanity or self-defense, they often must prove those defenses by a _____ even though the prosecution still bears the overall burden of proving guilt beyond a reasonable doubt.

Administrative Hearings: The burden typically falls on whoever is seeking to change the status quo. If you're applying for government benefits, you must prove you're eligible. If a government agency is trying to revoke your professional license, the agency must prove misconduct.

Standard of Evidence: The "How Much" Question

While burden of proof determines who must prove something, the standard of evidence (also called "standard of proof") determines how much proof is required.

The American legal system uses different standards depending on what's at stake. The more serious the consequences, the higher the standard of proof required. This creates a sophisticated system that balances protecting individual rights against the need to resolve disputes and punish wrongdoing.

Beyond a Reasonable Doubt: The Highest Bar

This is the most demanding standard in American law, used almost exclusively in criminal cases where someone's freedom or life is at stake.

To meet this standard, the evidence must be so convincing that no other reasonable explanation can come from the evidence. The jury must be "virtually certain" of the defendant's guilt to render a guilty verdict.

Importantly, this doesn't mean absolute certainty. The legal system recognizes that very few things can be known with complete certainty. Instead, it requires proof that eliminates any reasonable doubt based on reason and common sense.

The *In re Winship* (1970) Supreme Court decision established that the Due Process Clauses of the Fifth and Fourteenth Amendments require proof beyond a reasonable doubt for criminal convictions. This high standard reflects the severe consequences of criminal conviction and embodies the principle that "it is better that 10 guilty persons escape than one innocent suffer."

Preponderance of the Evidence: The Civil Standard

This is the most common standard, used in most civil cases. It's also the least demanding of the main standards of proof.

To meet this standard, you must show that your claims are "more likely than not" true. This is often described as a "greater than 50% chance" that your version of events is correct.

The evidence must simply "tip the scale" in your favor, even if only slightly. This standard acknowledges that in civil disputes—typically involving money or property rather than personal liberty—the law must choose between competing claims even when certainty is impossible.

This standard allocates the risk of erroneous decisions roughly equally between the parties. In close cases, the plaintiff wins if they can show their claims are even slightly more likely true than false.

Clear and Convincing Evidence: The Middle Ground

This intermediate standard is higher than preponderance but lower than beyond a reasonable doubt. It's used in civil cases where the stakes are more significant than typical monetary disputes.

To meet this standard, the evidence must be "highly and substantially more likely to be true than untrue." The fact-finder must be convinced that the claim is "highly probable."

This standard appears in cases involving:

- **Civil commitment proceedings** for involuntary psychiatric treatment, as established in *Addington v. Texas* (1979)
- **Termination of parental rights** cases
- **Fraud claims** in will disputes

- **Child custody disputes** in some jurisdictions
- **Certain employment discrimination claims**

The Supreme Court's decision in *Addington* illustrates the careful balancing involved in choosing standards of proof. The Court recognized that involuntary commitment involves significant liberty interests that warrant a higher standard than preponderance, but also noted that the inherent uncertainties of psychiatric diagnosis make the "beyond a reasonable doubt" standard inappropriate.

Justia

Evidentiary Standards and Burdens of Proof in Legal Proceedings

In almost every legal proceeding, the parties are required to adhere to important rules known as burdens of proof and evidentiary standards. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal.

The burden of proof determines which party is responsible for putting forth evidence and the level of evidence they must provide in order to prevail. In most cases, the plaintiff (the party bringing the claim) has the burden of proof. As an initial matter. they must meet the burden of production. This requires the plaintiff to put forth evidence in the form of witness testimony, documents, or objects. After the plaintiff presents his or her case-in-chief, the burden of production shifts to the defendant, who then has the opportunity to provide evidence either rebutting the plaintiff's evidence or supporting the defendant's own arguments.

Evidentiary Standards in Civil Cases

Once the plaintiff has met the burden of production, they must meet the burden of persuasion. This burden involves the standard of proof the plaintiff must meet in presenting evidence to the judge or jury. A standard of proof determines the amount of evidence that the plaintiff or defendant needs to provide in order for the jury to reach a particular result. In most civil cases, the standard of proof is "a preponderance of the evidence." This standard requires the jury to return a judgment in favor of the plaintiff if the plaintiff is able to show that a particular fact or event was more likely than not to have occurred.