



RULE-MAKING ORDER

(RCW 34.05.360)

CR-103 (7/22/01)

Agency: ENVIRONMENTAL HEARINGS OFFICE

- Permanent Rule
- Emergency Rule
- Expedited Rule Making

(1) Date of adoption: April 22, 2004

(2) Purpose: DURING THE 2003 SESSION, THE LEGISLATURE ADOPTED ESSB 5776 CREATING THE NEW ENVIRONMENTAL AND LAND USE HEARINGS BOARD IN THE ENVIRONMENTAL HEARINGS OFFICE (EHO). THE STATUTE REQUIRES THAT THE EHO ADOPT IMPLEMENTING RULES. THIS FILING PROVIDES A SET OF EMERGENCY IMPLEMENTING RULES PENDING FINAL RULE ADOPTION.

(3) Citation of existing rules affected by this order: THESE ARE NEW RULES NO EXISTING RULES ARE AFFECTED.

Repealed:

Amended:

Suspended:

(4) Statutory authority for adoption: RCW 43.21L (ESSB 5776) AND RCW 34.05.360.

Other Authority:

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR _____ on _____ (date).

Describe any changes other than editing from proposed to adopted version:

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reason for this Finding: DURING THE 2003 SESSION, THE LEGISLATURE ADOPTED ESSB 5776 CREATING THE NEW ENVIRONMENTAL AND LAND USE HEARINGS BOARD IN THE ENVIRONMENTAL HEARINGS OFFICE (EHO). THE STATUTE REQUIRES THAT THE EHO ADOPT IMPLEMENTING RULES. THIS FILING PROVIDES A SET OF EMERGENCY IMPLEMENTING RULES PENDING FINAL RULE ADOPTION.

(5.3) Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?: Yes No If Yes, explain: The ELUHB rules are procedural. Procedural rules are exempt from "Pre-notice Inquiry"(CR101). RCW 34.05.310 (4)(g)(i). The emergency rules took over six months to develop after consultation with stakeholder groups. It was thought probable to adopt those emergency rules, as permanent rules without change or further stakeholder negotiations. Shortly after the emergency rules were developed the membership of the EHO Board changed. At the last EHO agency meeting it was decided to open up the section on record review to further stakeholder comment – thus changing the process and timing for permanent rule adoption. RCW 34.05.350(2). These circumstances constitute changed conditions necessitating re-issuance of the emergency rules.

(6) Effective date of rule:

Permanent Rules

- 31 days after filing
- Other (specify) _____*

Emergency Rules

- Immediately
- Later (specify) 4 30 04

*(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

Name (Type or Print)

Eric Z. Lucas

Signature

Title
Administrative Appeals Judge
EHO Rules Coordinator

Date
April 22, 2004

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FIELD

APR 22 2004

TIME 10:30 ATA
PM

WSR 04-10-002

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>49</u>	Amended	<u>0</u>	Repealed	<u>0</u>

The number of sections adopted at the request of a nongovernmental entity: None

New _____ Amended _____ Repealed _____

The number of sections adopted in the agency's own initiative: none.

New _____ Amended _____ Repealed _____

The number of sections adopted in order to clarify, streamline, or reform agency procedures: none.

New 49 Amended _____ Repealed _____

The number of sections adopted using: None.

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

Chapter 199-08 WAC

PRACTICE AND PROCEDURE--BEFORE THE ENVIRONMENTAL AND LAND USE
HEARINGS BOARD

PART A
GENERAL

NEW SECTION

WAC 199-08-300 Purpose of this chapter and applicability of the board's rules of practice to the civil rules of procedure and the rules of evidence. (1) The purpose of chapter 199-08 WAC is to provide rules of practice before the environmental and land use hearings board (hereinafter "board"). The interpretation of these rules may be guided, where relevant, by the civil rules of superior court (hereinafter "civil rules") and the rules of evidence for the superior courts of the state of Washington, as those rules have been construed by Washington state courts.

(2) Except where in conflict with the board's rules, Washington statutes regarding pretrial procedures, civil rules and rules of evidence shall be followed in proceedings before the board unless the presiding officer determines that the evidence, although in conflict with the rules, is admissible pursuant to WAC 199-08-515.

(3) This chapter shall govern practice before the board. The rules in this chapter are consistent with the model rules of procedure issued by the office of administrative hearings, chapter 10-08 WAC except where specifically noted.

NEW SECTION

WAC 199-08-305 Definitions. As used in this chapter the following terms shall have the following meanings:

(1) "Agency" means any state or local governmental entity.

(2) "Adjudicative proceeding" means a proceeding involving an opportunity for hearing before the board as defined in chapter 34.05 RCW. The terms "appeal," "adjudicative proceeding" and "case" are used interchangeably in this chapter.

(3) "Board" means the environmental and land use hearings board, a quasi-judicial body created pursuant to chapter 43.____ RCW ESSB 5776 and described in WAC 199-08-315.

(4) "Filing" of a document means actual receipt by the board during regular office hours. Any document filed with the board shall contain an affirmation that copies were served on the appropriate agency, local government and parties. Filing by facsimile is permitted of documents ten pages or less if the original document is concurrently mailed or submitted to a commercial delivery service.

(5) "Final decision" means the highest and last decision available within the permit agency with respect to a permit application to the agency, including, but not limited to, decisions resulting from internal appeals available within the agency for the permit decision.

(6) "Local government" means any county, incorporated city or town, which has approved, denied or conditioned any economic development project subject to ESSB 5776 and as further defined in subsection (9) of this section.

(7) "Participating permit agency" means any permit agency in which the applicant for a qualifying project has filed an application for an environmental or land use permit that is required for the qualifying project.

(8) "Party" means:

(a) A person to whom any local government or agency decision is specifically directed;

(b) A person named as a party to the appeal, or allowed to intervene or joined as a party by the board;

(c) Any participating permit agency.

(9) "Permit" means any license, permit, certificate, certification, approval, compliance schedule, or other similar document pertaining to any regulatory or management program related to the protection, conservation, use of, or interference with the land, air, or water in the state. This document must be required to be obtained from a state agency or local government, including, but not limited to, counties, cities, and air agencies, prior to constructing or operating a qualifying project. Local government permits include, but are not limited to, subdivisions, binding site plans, planned unit developments, shoreline permits or other approvals under RCW 90.58.140, master plan approvals, site plan approvals, permits or approvals required by critical area ordinances, conditional use permits, variances, and site-specific rezones authorized by a comprehensive plan or subarea plan or other equivalent documents however titled or denominated. Local government permits excluded under this definition include the adoption or amendment of a comprehensive plan, subarea plan, legislative actions or development regulations, certifications by local health districts of water and sewer availability, and building, grading, flood hazard, utility connection, and other

nondiscretionary construction permits.

(10) "Permit agency" means any state agency or local government, including, but not limited to, air agencies, authorized by law to issue permits.

(11) "Person" means any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.

(12) "Petition for review" is a document that when properly filed with the board initiates an adjudicative proceeding before the board.

(13) "Presiding officer" means any member of the board or an administrative appeals judge who is assigned to conduct a conference or hearing by the chairperson or the vice-chairperson.

(14) "Service" of a document means delivery of the document to the other parties to the appeal. Service may be made in any of the following ways:

(a) Personally, in accordance with the laws of the state, with a return of service or affidavit of service completed.

(b) First-class, registered or certified mail. Service is complete upon deposit in the United States mail properly stamped and addressed.

(c) Facsimile transmission with mailing or submission to a commercial delivery service of copies on the same day. Service by facsimile is regarded as complete by production of the confirmation of transmission and evidence of mailing or submission to a delivery service of the copies.

(d) Commercial delivery service. Service by commercial delivery service is regarded as complete upon delivery to the delivery company with charges prepaid.

(15) "Qualifying project" means an economic development project that is:

(a) Located within a county that in its entirety qualifies as a distressed area as defined in RCW 43.168.020(3), and a rural natural resources impact area as defined in RCW 43.160.020;

(b) Designed to provide at least thirty full-time year-round jobs; and

(c) Designated as a qualifying project by the office of permit assistance established under chapter 43.42 RCW if a request for a determination of such designation is made to the office by the project applicant as provided by law.

NEW SECTION

WAC 199-08-310 Computation of time. (1) In computing any period of time prescribed or allowed by these rules or applicable statute, the day of the act after which the designated period of time begins to run is not to be included. The time within which any act shall be done, as provided by these rules, shall be

computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a legal holiday, and then it is excluded and the next succeeding day which is neither a Saturday, Sunday nor a legal holiday is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(2) This section also pertains to the period for filing with the board any petition for review, petition for declaratory ruling or any other adjudication which this chapter authorizes.

PART B
BOARD ADMINISTRATION AND JURISDICTION

NEW SECTION

WAC 199-08-315 Board membership, function and jurisdiction.

(1) **Members.** An environmental and land use hearings board is established within the environmental hearings office created under RCW 43.21B.005. The environmental and land use hearings board shall be composed of six members, as provided in RCW 90.58.170. The chairperson of the pollution control hearings board shall be the chairperson of the environmental and land use hearings board. The members of the environmental and land use hearings board shall receive the compensation, travel, and subsistence expenses as provided in RCW 43.03.050 and 43.03.060.

(2) **Function and jurisdiction.** This board is a quasi-judicial body with powers of de novo review as authorized by chapter 43.____ RCW (ESSB 5776) to adjudicate or determine appeals from any person aggrieved by the granting, denying or rescinding of a permit issued pursuant to chapter 43.____ RCW (ESSB 5776);

(3) **Expedited review.** The board shall provide expedited review of petitions filed under this chapter. Any matter reviewed on the decision record must be set for hearing within sixty days of the date set for submitting the decision record of all participating permit agencies, absent a showing of good cause for a different date or a stipulation of the parties. Any matter reviewed de novo must be set for hearing or trial no later than one hundred twenty days after the initial hearing date. The board shall issue a final decision and order within thirty days after the final hearing required in this section.

(4) **Administrative appeals judges.** The chairperson may appoint any member of the board or an administrative appeals judge from the environmental hearings office to be the presiding officer.

(5) This section is intended to be general and informational only and failure herein to list matters over which the board has jurisdiction shall not constitute a waiver or withdrawal of that jurisdiction.

NEW SECTION

WAC 199-08-320 Office hours, telephone number, telefacsimile number and address of the board. (1) The administrative business of the board, except rule making, is performed by the environmental hearings office. To the extent necessary for rule making, the appeals board holds regular meetings at 10:00 a.m. on the second Tuesday of each month at the address set forth below.

(2) The board is organized within the Environmental Hearings Office, 4224 6th Avenue S.E., Building No. 2 Rowe Six, Lacey, Washington. The mailing address is:

Environmental and Land Use Hearings Board
4224 6th Avenue S.E., Building No. 2, Rowe Six
P.O. Box 40903
Lacey, WA 98504-0903

(3) The telephone number of the board is 360-459-6327. The telefacsimile number is 360-438-7699.

(4) The office hours of the environmental hearings office are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays.

NEW SECTION

WAC 199-08-325 Public information about practice before the board and public records. (1) Questions about board procedures may be directed to the environmental hearings office by e-mail at eho@eho.wa.gov, by regular mail or, during regular office hours, by telephone or by telefacsimile. The board's website address is: www.eho.wa.gov.

(2) Case files of appeals pending before the board, past written opinions of the board and other public records maintained by the board under chapter 198-12 WAC are available for public inspection and copying during regular office hours at the environmental hearings office. The form for requests for public records is set forth in WAC 198-12-140. Any person seeking to make copies of such public records may copy the documents at the environmental hearings office for a reasonable charge per page.

PART C
FILING AN APPEAL WITH THE BOARD AND SERVICE

NEW SECTION

WAC 199-08-335 Types of petitions before the board. The board is empowered to hear and decide the following:

 Petitions for review of final decisions made by state agencies and local governments on permit applications for qualifying economic development projects.

NEW SECTION

WAC 199-08-340 Where to file a petition for review and number of copies. (1) Proceedings for review under this chapter shall be commenced by filing a petition with the environmental and land use hearings board. An adjudicative proceeding before the board shall be begun by filing a petition for review and one copy at the environmental hearings office. The board shall acknowledge filing of the petition for review by a stamp and the board's stamp on the petition shall be prima facie evidence of the date of filing. The board may thereafter require that additional copies be filed.

(2) Such petition is barred, and the board may not grant review, unless the petition is timely filed with the board and timely served on the following persons who shall be parties to the review of the petition:

(a) The participating permit agencies, which for purposes of the petition shall be:

(i) If a state agency, the director thereof; and

(ii) If a local government, the jurisdiction's corporate entity which shall be served as provided in RCW 4.28.080; and

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address as applicant in the application to the participating permit agencies;

(ii) Each person identified in project application documents as an owner of the property at issue or, if none, each person identified as a taxpayer for the property at issue in the records of the county assessor.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance by the permit agency of the permit for the qualifying project.

(4) For the purposes of this section, the date on which a

permit decision is issued is:

(a) Three days after a written decision is mailed by the permit agency to the project applicant or, if not mailed, the date on which the permit agency provides notice that a written decision is publicly available; or

(b) If (a) of this subsection does not apply, the date the decision is entered into the public record.

(5) Service on all parties shall be by personal service or by mail. Service by mail is effective on the date of mailing. Proof of service shall be by affidavit or declaration under penalty of perjury.

NEW SECTION

WAC 199-08-350 Contents of the petition for review.

Petitions for review to the board pursuant to chapter 43.____ RCW (ESSB 5776) and shall contain:

(1) The name, mailing address, telephone number and telefacsimile number (if available) of the appealing party, and of the representative, if any;

(2) Identification of the parties, by listing in the caption or otherwise. In every case, the agency and/or the local government whose decision is being appealed and the person to whom the decision is directed shall be named as parties;

(3) A copy of the application form without attachments, which was filed with the local government pursuant to legal requirements;

(4) A copy of the decision or permit appealed from;

(5) A short and plain statement showing the grounds upon which the appealing party considers such decision or permit to be unjust or unlawful;

(6) A clear and concise statement upon which the appealing party relies to sustain his or her grounds for appeal;

(7) A clear and concise statement of fact demonstrating that the petitioner has standing to seek board review;

(8) A separate and concise statement of each error alleged to have been committed;

(9) The relief sought, including the specific nature and extent;

(10) The signature of the representative of the appealing party or of the appealing party. The signature of the representative or the appealing party shall constitute a certificate by the signatory that the signatory has read the petition and that it is consistent with civil rule 11;

(11) All pleadings shall be so construed as to do substantial justice.

PART D
APPEARANCE AND PRACTICE BEFORE THE BOARD

NEW SECTION

WAC 199-08-385 Persons who may appear before the board. (1) Any person has the right to represent himself or herself in a proceeding before the board.

(2) The only persons who are qualified to represent another person or entity before the board are the following:

(a) Attorneys at law duly qualified and entitled to practice before the highest court of record of any state.

(b) An authorized officer, partner, owner, employee or member of an association, partnership, corporation, organization, government agency or local government.

(c) Legal interns admitted to practice under the applicable admission to practice rules of the Washington state court rules as long as the conditions and limitations of the applicable rules are satisfied.

(d) Any other individual designated by an entity to serve as a spokesperson in a case with the approval of the board's presiding officer.

(3) When an active part, as a representative of a participating agency, was taken in the same case or proceeding by a former employee, said former employee of:

(a) Any participating agency; or

(b) A member of the legal staff of a local governmental agency; or

(c) The attorney general's staff, may not appear in a representative capacity on behalf of other parties in a formal board proceeding, except when permitted by applicable state conflict of interest laws.

(4) No former member of the board shall, for a period of one year after the termination of his or her membership, represent a party before the board on any matter.

NEW SECTION

WAC 199-08-390 Appearance by representative. (1) An attorney or authorized representative as defined in WAC 199-08-385 may appear for a party by either of the following actions:

(a) Filing a written notice of appearance, a petition for review or another pleading containing the name of the party to be represented, and the name, address and telephone number of the

representative; or

(b) Entering an appearance at the time and place of a conference or hearing on the appeal, and notifying the presiding officer conducting the same of the party to be represented and the name, address and telephone number of the representative.

(2) Copies of every written notice of appearance or pleading that identifies the representative shall be served by the representative on all other parties or their representatives of record at the time the original is filed with the board.

(3) Where a petition for review has been filed with the board by the department of ecology or attorney general, the attorney general shall, unless the department or attorney general notifies the board otherwise, be deemed to have entered an appearance for the department, and the attorney general shall be exempt from the requirement of filing and serving a written notice of appearance.

(4) After a representative appears on behalf of a party, the board shall serve all future notices, orders and correspondence upon such representative. Service upon the representative shall constitute service upon the party, except for final orders, which shall be served on both the party and the representative.

(5) After a representative appears on behalf of a party, and gives notice to all other parties to the appeal, all future pleadings and correspondence shall be served upon that representative. Service upon the representative shall constitute service upon the party.

NEW SECTION

WAC 199-08-395 Withdrawal or substitution of representatives.

An attorney or other representative withdrawing from a case shall immediately so notify the board and all parties of record in writing, or shall state such withdrawal for the record at a conference or hearing. Any substitution of an attorney or representative shall be accomplished by written notification to the board and to all parties of record, together with the written consent of the prior attorney or representative, and if such consent cannot be obtained, a written statement of the reason therefor shall be supplied.

NEW SECTION

WAC 199-08-400 Conduct before the board by representatives.

All persons who are representing parties before the board shall conform to the standards of ethical conduct required of attorneys

before the courts of Washington even if the representative is not an attorney. Representatives who, in the opinion of the presiding officer, violate those ethical standards may be reprimanded or sanctioned. Sanctions may include, among other measures, the imposition of costs and the exclusion of the representative from the proceedings. The board may, after notifying the representative and holding a hearing, take appropriate disciplinary action including, but not limited to, barring such person from representing another party in any future board proceedings.

NEW SECTION

WAC 199-08-405 Parties not represented by legal counsel-- Waiver of rules to prevent manifest injustice. The presiding officer may waive any of these rules, other than a rule relating to jurisdiction, for any party not represented by legal counsel where necessary to avoid manifest injustice.

NEW SECTION

WAC 199-08-410 Presiding officer duties and powers. It shall be the duty of the presiding officer to conduct conferences or hearings in cases assigned in an impartial and orderly manner. The presiding officer shall have the authority, subject to the other provisions of these rules:

- (1) To administer oaths and affirmations.
- (2) To issue subpoenas and protective orders as provided in the Administrative Procedure Act.
- (3) To rule on all procedural matters, objections and motions.
- (4) To rule on all offers of proof and receive relevant evidence.
- (5) To question witnesses called by the parties in an impartial manner to develop any facts deemed necessary for a fair and adequate decision.
- (6) To secure and present in an impartial manner such evidence, in addition to that presented by the parties, as deemed necessary to decide the matter fairly and equitably.
- (7) To take appropriate disciplinary action with respect to representatives of parties appearing before the board.
- (8) To issue orders joining other parties, on motion of any party, or in the judgment of the presiding officer, when it appears that such other parties may have an interest in, or may be affected by, the proceedings.
- (9) To consolidate matters for hearing when such consolidation

will expedite disposition of the matters and avoid duplication of testimony and when the rights of the parties will not be prejudiced thereby.

(10) To hold prehearing and settlement conferences.

(11) To permit and regulate the taking of discovery.

(12) To regulate the course of the hearing.

(13) To dismiss a petition for review or take other appropriate disciplinary actions, where a party or representative fails to appear or participate in a prehearing conference, hearing or at any other stage of the appeal proceeding.

(14) To take any other action necessary and authorized by these rules and the law.

NEW SECTION

WAC 199-08-415 Mediation. The board may, on occasion, recommend that the parties to an appeal engage in mediation. One or more parties may also recommend to the other parties or the presiding officer that mediation occur. Subject to availability, an administrative appeals judge from the environmental hearings office may serve as the mediator for the board. In the event that the mediation proves unsuccessful and the case proceeds to hearing, any administrative appeals judge who served as a mediator will neither preside over the hearing nor have any contact with the board members regarding the case other than to inform them that the mediation did not result in a settlement.

NEW SECTION

WAC 199-08-420 Subpoenas. (1) **Issuance.** Subpoenas may be issued by any member of the board, the presiding officer assigned to the case or by the attorney of record, as provided in the Administrative Procedure Act. Each subpoena shall be subscribed with the signature of the issuing person. Parties desiring subpoenas to be signed by the presiding officer or a board member shall make a showing of general relevance and reasonable scope of the testimony or evidence sought, shall prepare the subpoenas for issuance, shall send them to the board's office for signature, and, upon return, shall make arrangements for service.

(2) **Form.** Every subpoena shall name the environmental and land use board and the title of the proceedings, and shall command the person to whom it is directed to attend and give testimony or produce designated books, documents, or things under that person's control at a specified time and place.

(3) **Service.** Service of subpoenas to a witness who is not party to the case shall be made by personally serving a copy of the subpoena to such person, in accordance with civil rule 45, and tendering on demand, where entitled to make such a demand, the fees for one day's attendance and the mileage allowed by law. All costs shall be paid by the party seeking the attendance of the witness.

(4) **Proof of service.** The person serving the subpoena shall make proof of service by filing the subpoena and the required return, affidavit or acknowledgment of service with the board or presiding officer of the case. Failure to make proof of service does not affect the validity of the service.

(5) **Quashing.** Upon motion made promptly (at or before the time specified in the subpoena for compliance) by the person subpoenaed and upon notice to the party for whom the subpoena was issued, the board or its presiding officer may:

(a) Quash; or

(b) Modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue; or

(c) Condition denial of the motion upon just and reasonable conditions.

(6) **Geographical scope.** Attendance of witnesses and production of evidence may be required from any place in the state of Washington, at any designated place of hearing.

PART E PREHEARING PRACTICE

NEW SECTION

WAC 199-08-425 Dismissal of petitions for review on jurisdictional grounds. (1) Timely filing of the petition for review, and other petitions within the board's jurisdiction is required for the board to acquire jurisdiction.

(2) Any party may challenge the jurisdiction of the board to hear a petition for review on jurisdictional grounds, and the board may independently raise the jurisdictional issue. The board may, when satisfied that it does not have jurisdiction, dismiss the petition for review.

NEW SECTION

WAC 199-08-426 Certification of permit applications. (1) Within seven days after receipt of service of the petition filed pursuant to law, the project applicant shall file with the board and serve on all parties an affidavit certifying all applications for permits that the project applicant has filed with participating permit agencies for the qualifying project, provided, however, that no permit may be included that has been issued and appealed to an administrative hearings board or to court prior to the date of service of the petition filed with the board under this chapter. The board shall request verification from the participating agencies of the permit applications certified in the project applicant's affidavit and of the expected date for final decision on the permit applications. Filing of the affidavit shall toll the schedule for hearing by the board until twenty-one days after issuance of the final permit decision on the last permit required for the qualifying project that has been certified in the project applicant's affidavit and verified by a participating agency as applied for, unless the petition filed and served by the petitioner relates to the final permit decision.

NEW SECTION

WAC 199-08-427 Initial hearing, jurisdictional motions and case scheduling.

Initial hearing.

(1) Within seven days after the expiration of the appeal period for the final permit decision on the last permit required for the qualifying project, the petitioner shall note an initial hearing on jurisdictional and other preliminary matters, and, if applicable, on other pretrial matters. This initial hearing shall be set no sooner than thirty-five days and not later than fifty days after the expiration of the appeal period for the final permit.

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner.

(3) The defenses of lack of standing, untimely filing or service of the petition, lack of good faith or improper purpose in filing, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the board allows discovery on such issues.

(4) The parties may waive the initial hearing by scheduling with the board a date for the hearing or hearings on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (5) of this section.

Case schedule order.

(5) The petitioner shall move the board for an order at the initial hearing that sets the date on which the permit decision record or records of the applicable permit agency or agencies, if any, must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and schedules a hearing or hearings on the merits.

NEW SECTION

WAC 199-08-428 Stays. (1) Any party may request the board to stay or suspend an action by a participating permit agency or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) The board may grant a stay only if the board finds that:

(a) The party requesting the stay is likely to prevail on the merits;

(b) Without the stay the party requesting it will suffer irreparable harm;

(c) The grant of a stay will not substantially harm other parties to the proceedings; and

(d) The request for the stay is timely in light of the circumstances of the case.

(3) The board may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

NEW SECTION

WAC 199-08-429 Discovery. The parties may not conduct pretrial discovery except with the prior permission of the board, which may be sought by motion, subject to any applicable rules adopted by the board and RCW 34.05.446(3), at any time after service of the petition. The party requesting discovery must make a prima facie showing of need. The board shall strictly limit discovery to what is necessary for equitable and timely review of the issues.

NEW SECTION

WAC 199-08-430 Correction or amendment of notice. (1) Within thirty days of receipt by the board, if any petition for review is found to be defective or insufficient, the board may require the party filing the petition for review to correct, clarify or amend the same to conform to the requirements of any relevant statutes and the board's rules. The board may refuse to schedule any conference or hearing thereon until compliance with such requirements, or may issue an appropriate order which may include providing for dismissal of the petition upon failure to comply within a specified time.

(2) Other amendments and supplemental pleadings shall conform to civil rule 15.

NEW SECTION

WAC 199-08-435 Intervention. (1) The presiding officer may grant a petition for intervention by any person at any time, upon determining that the petitioner qualifies as an intervenor pursuant to civil rule 24, that the intervention will serve the interests of justice and that the prompt and orderly conduct of the appeal will not be impaired.

(2) The presiding officer may impose conditions upon the intervenor's participation in the proceedings.

NEW SECTION

WAC 199-08-440 Joinder of parties. The presiding officer shall order the joinder of the permittee, permitting agency or any other interested person or entity in accordance with civil rule 19. The presiding officer may also permit the joinder of persons who are not necessary to the determination of the appeal in accordance with civil rule 20.

NEW SECTION

WAC 199-08-445 Answers to petitions for review. (1) A party need not file an answer to a petition for review filed pursuant to these rules.

NEW SECTION

WAC 199-08-450 Initial hearing and case scheduling. (1) Upon receipt of petitioner's request for an initial hearing, which complies with the requirements of these regulations, the board shall promptly mail to each party a scheduling letter which sets the time and location of the initial hearing.

(2) In those cases where the presiding officer does not order a prehearing conference, the letter setting the initial hearing date and time will be mailed at least thirty-five days before the initial hearing date. The letter may also set the schedule for filing motions and prehearing briefs, and will notify the parties that an interpreter can be made available, upon reasonable notice to the board, for a witness or party who does not speak English or is hearing-impaired. The scheduling letter will control the subsequent proceedings, unless modified for good cause by the presiding officer.

(3) In cases where the presiding officer decides to hold a prehearing conference, the scheduling letter will also notify the parties of the time and location of the prehearing conference. The scheduling letter will be mailed at least seven days before the prehearing conference.

NEW SECTION

WAC 199-08-455 Prehearing conferences. (1) The purpose of a prehearing conference shall be:

(a) To determine the feasibility of a settlement of the appeal or, failing settlement;

(b) To prepare the case for hearing by scheduling prehearing deadlines and by identifying the issues, and if possible, witnesses, exhibits, stipulations, and admissions.

(2) Appearance by a party or by the party's representative at a prehearing conference is mandatory. If a party fails to attend a prehearing conference, that is not justified by good cause, the presiding officer may issue an order of default against the absent party or other appropriate action.

NEW SECTION

WAC 199-08-460 Case scheduling and prehearing orders. After an initial hearing or prehearing conference which has not resulted in settlement, the presiding officer shall enter a prehearing order. Normally, this will include a statement of issues, a schedule for filing motions and briefs, and lists of witnesses and exhibits or provide for filing such lists, as well as other matters which may bear on the preparation for hearing. The issues stated in the prehearing order shall control the subsequent course of the proceedings, unless modified for good cause by subsequent order.

NEW SECTION

WAC 199-08-465 Settlement and mediation agreements. (1) Where the parties settle an appeal before hearing, the parties shall prepare a written order of dismissal to which the settlement agreement is attached, and submit that order to the board. If the agreement is in accordance with the law, the board shall enter the order and dispose of the case.

(2) This section also pertains to settlement agreements reached after mediation.

NEW SECTION

WAC 199-08-470 Use of telephone conferences, motion hearings and hearings. Upon the motion of any party or independently, the presiding officer may decide to conduct any conference, motion hearing or hearing by telephone conference call to promote the fair, speedy and economical processing of a matter. If the presiding officer grants the party's request for a telephone conference, the requesting party shall initiate and pay for the conference call.

NEW SECTION

WAC 199-08-475 Motions. (1) An application to the board for an order shall be by motion which, unless made during a hearing, shall be in writing, state with particularity the grounds therefor and set forth the relief sought. Each written motion shall have

appended to it the order which the motion seeks.

(2) For motions for continuance or for schedule changes, or other motions that are likely to be uncontested, the moving party shall affirmatively seek the stipulation of all parties and present a stipulated order wherever possible.

(3) If the motion is contested, any party may request that the board hold a motion hearing. At a motion hearing, the board will consider the arguments of the parties but will not take evidence. Unless a motion hearing is requested by one or more parties, or the board independently sets a motion hearing date, the board will normally decide the motion exclusively on the parties' written submissions. The motion, proposed order and other relevant materials shall be filed and served. Where the hearing coordinator specifies that the hearing shall be telephonic, the moving party shall originate the telephonic hearing conference call. The presiding officer will decide whether or not a motion hearing will be held, and notify the parties accordingly.

(4) Unless a scheduling letter or order provides otherwise, the following schedule governs all written motions (including any supporting affidavits, memoranda of law, or other documentation):

(a) All responses to any motion shall be filed and served ten days from the date the motion is received. The moving party shall then have seven days from receipt of the response to file and serve a reply.

(b) In cases where the moving party requests a motion hearing, all dispositive motions shall be filed and served not later than twenty-eight days before the motion hearing.

(c) All dispositive motions shall be filed and served not later than two months before the hearing date, unless the presiding officer by order allows otherwise.

(d) In exigent or exceptional circumstances, a party may at any time request the board to modify the above schedules by requesting a scheduling conference (which may be telephonic) with the presiding officer.

(5) The board will decide a motion on the written record unless the presiding officer orders a motion hearing.

NEW SECTION

WAC 199-08-480 Postponements and continuances of hearings.

(1) Postponement or continuance of a hearing is within the discretion of the presiding officer, whether contested or uncontested by the parties. The board may postpone or continue a hearing on its own motion.

(2) The postponement or continuance of a hearing shall be sought by written motion and according to the procedure set forth in WAC 199-08-475.

NEW SECTION

WAC 199-08-485 Dismissal, default or withdrawal of appeal.

(1) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties a default or other dispositive order which shall include a statement of the grounds for the order. Within seven days after service of a default or dismissal order for failure to attend or participate, the party against whom it was entered may file a written motion requesting that the order be vacated and stating the grounds relied upon.

(2) A petitioner may request to withdraw a petition for review. Requests before the petitioner rests its case-in-chief during the hearing are mandatory and afterwards are permissive.

**PART F
HEARINGS**

NEW SECTION

WAC 199-08-490 Hearing briefs. Hearing briefs, if filed, should be submitted to the board at least seven days before the time of hearing or other such time as the board may prescribe. An original and six copies must be filed. In all cases where briefs are filed, a copy shall also be served on the other parties or their attorneys. The board may permit or require the filing of additional briefs.

NEW SECTION

WAC 199-08-495 Procedures at hearings. (1) **Presiding officer.** All hearings shall be conducted by a presiding officer who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections and motions.

(2) **Testimony under oath.** Oaths shall be administered by the presiding officer or other officer with authority to administer oaths. All testimony to be considered by the board shall be sworn or affirmed.

(3) **Recording.**

(a) An official recording of all evidentiary hearings shall be

made by manual, electronic, or other type of recording device.

(b) Unofficial use of photographic and recording equipment is permitted at hearings; however, the presiding officer shall be consulted first and may impose conditions on their use as necessary to prevent disruption of the hearing.

(4) Order of presentation of evidence.

(a) The presiding officer shall determine the proper order of presentation of evidence. As a general rule, the petitioning party shall initially introduce its evidence.

(b) The opposing party shall introduce its evidence after the petitioner has rested. Rebuttal and surrebuttal evidence will be received only at the discretion of the presiding officer.

(c) Witnesses may be called out of turn in contravention of this rule by agreement of all parties.

(5) Opening statements. Unless the presiding officer rules otherwise, parties shall present an oral opening statement setting out briefly a statement of the basic facts, disputes and issues of the case.

(6) Written statement of qualifications of expert witnesses. Any party who plans to introduce the testimony of any expert witness at the hearing shall submit as an exhibit to the board and all parties at the hearing a written statement of the qualifications, experience, and expertise of each such expert witness.

(7) Former employee as an expert witness. No former employee of a participating permit agency, its legal staff or legal representative, or the board or the attorney general shall at any time after leaving the employment with a participating permit agency appear, except when permitted by applicable state conflict of interest law, as an expert witness on behalf of other parties in a formal proceeding in which an active part in the investigation as a representative of the department or board was taken.

(8) Objections and motions to strike. Objections to the admission or exclusion of evidence shall be in short form, stating the legal grounds of objection relied upon, and the transcript shall not include extended argument or debate.

(9) Rulings. The presiding officer, on objection or independently, shall exclude all irrelevant or unduly repetitious evidence and all rulings upon objections to the admissibility of evidence shall be made in accordance with WAC 199-08-515 through 199-08-535.

NEW SECTION

WAC 199-08-500 Scope and standard of review. (1) Hearings upon petitions for review shall be quasi-judicial in nature. The scope and standard of review shall be as follows:

(2) For all permit decisions being reviewed that were made by

quasi-judicial bodies or permit agency officers who made factual determinations in support of the decisions, after the conduct of proceedings in which the parties had an opportunity consistent with due process to make records on the factual issues, board review of factual issues and the conclusions drawn from the factual issues shall be confined to the records created by the quasi-judicial bodies or permit agency officers, except that:

(3) For decisions described in subsection (2) of this section, the records may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the permit decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to a permit decision proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the permit decision.

(4) For permit decisions other than those described in subsection (2) of this section, the board review of the permit decision shall be de novo on issues presented as error in the petition.

(5) The board may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

NEW SECTION

WAC 199-08-510 Provision of interpreters and of reasonable accommodations to individuals with special needs. (1) Whenever any person involved in an adjudicative proceeding before the board is eligible for an interpreter, as that eligibility is defined in WAC 10-08-150, or qualifies for reasonable accommodations as an individual with disabilities, that person shall request an interpreter or other reasonable accommodations from the presiding officer not later than three weeks before the date of the hearing, conference or other situation for which the interpreter or assistance is needed. The board shall comply with WAC 10-08-150 and 10-08-160(2) regarding the provision of interpreters.

(2) Information about proceedings before the board is available in alternate format upon request.

NEW SECTION

WAC 199-08-515 Rules of evidence--Admissibility criteria.

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. All relevant evidence is admissible which, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the presiding officer shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings in matters not involving trial by jury in the superior courts of the state of Washington.

(2) The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state.

NEW SECTION

WAC 199-08-520 Rules of evidence--Official notice--Matters of law. The board and its hearing officers, upon request made before or during a hearing, will officially notice:

(1) **Federal law.** The Constitution; congressional acts, resolutions, records, journals and committee reports; decisions of federal courts and administrative agencies; executive orders and proclamations; and all rules, orders and notices published in the Federal Register.

(2) **State law.** The Constitution of the state of Washington, acts of the legislature, resolutions, records, journals and committee reports; decisions of Washington state courts and administrative agencies; executive orders and proclamations by the governor; and all rules, orders and notices filed with the code reviser.

(3) **Governmental organization.** Organization, territorial limitations, officers, departments, and general administration of the government of the state of Washington, the United States, the several states and foreign nations.

(4) **Agency organization.** Participating permit agency, commission or board organization, administration, officers, personnel, official publications, and practitioners before its bar.

NEW SECTION

WAC 199-08-525 Rules of evidence--Official notice--Material facts. (1) In the absence of controverting evidence, the board and its hearing officers, upon request made before or during a hearing, or in a proposed decision, may officially notice:

(a) **Board proceedings.** The pendency of, the issues and position of the parties therein, and the disposition of any proceeding then pending before or theretofore concluded by the board;

(b) **Business customs.** General customs and practices followed in the transaction of business;

(c) **Notorious facts.** Facts so generally and widely known to all well informed persons as not to be subject to reasonable dispute, or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively, facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency;

(d) **Technical knowledge.** Matters within the technical knowledge of the board as a body of experts, within the scope or pertaining to the subject matter of its statutory duties, responsibilities or jurisdiction.

(2) **Request or suggestion.** Any party may request, or the presiding officer may suggest, that official notice be taken of a material fact, which shall be clearly and precisely stated, orally on the record, at any prehearing conference or oral hearing or argument, or may make such request or suggestion by written notice, any pleading, motion, memorandum, or brief served upon all parties, at any time prior to a final decision.

(3) **Statement.** Where an initial or final decision of the board rests in whole or in part upon official notice of a material fact, such fact shall be clearly and precisely stated in such decision. In determining whether to take official notice of material facts, the hearing officer may consult any source of pertinent information, whether or not furnished as it may be, by any party and whether or not admissible under the rules of evidence.

(4) **Controversion.** Any party may controvert a request or a suggestion that official notice of a material fact be taken at the time the same is made if it be made orally, or by a pleading, reply or brief in response to the pleading or brief or notice in which the same is made or suggested. If any decision is stated to rest in whole or in part upon official notice of a material fact which the parties have not had a prior opportunity to controvert, any party may controvert such fact by appropriate exceptions if such notice be taken in a petition for reconsideration if notice of such fact be taken in a final report. Such controversion shall concisely and clearly set forth the sources, authority and other data relied upon to show the existence or nonexistence of the material fact assumed or denied in the decision.

(5) **Evaluation of evidence.** Nothing herein shall be construed

to preclude the board or its authorized agents from utilizing their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

NEW SECTION

WAC 199-08-535 Rules of evidence--Tentative admission--Exclusion--Discontinuance--Objections. When objection is made to the admissibility of evidence, such evidence may be received subject to a later ruling. The officer conducting the hearing may, either with or without objection, exclude inadmissible evidence or order cumulative evidence discontinued. Parties objecting to the introduction of evidence shall state the precise grounds of such objection at the time such evidence is offered.

**PART G
DECISIONS BY THE BOARD AFTER HEARING**

NEW SECTION

WAC 199-08-540 Contents of the record. The record before the board in any adjudicative proceeding shall consist of the decision or order appealed from, the petition for review therefrom, responsive pleadings, if any, and notices of appearances, and any other written applications, motions, stipulations or requests duly filed by any party and written reports or orders of the presiding officer. Such record shall also include all depositions, if they are admitted at the hearing, the transcript of testimony as provided in WAC 199-08-545, and other proceedings at the hearing, together with all exhibits admitted.

NEW SECTION

WAC 199-08-545 Preparation of transcripts. (1) The board, in its discretion, may at any time cause a transcript to be printed, but will not normally do so.

(2) When the board does not cause a transcript to be printed, it shall be the obligation of the party wishing a transcript, or portions of it, to order the same from the board reporter and assume the printing costs.

NEW SECTION

WAC 199-08-550 Preparation of findings, conclusions and orders. Upon request of the board or presiding officer proposed findings, conclusions and orders shall be prepared by counsel and the same shall be based upon the board's oral or memorandum opinion. The board or presiding officer may adopt, in whole or in part, the proposed findings, conclusions and orders or the board may prepare its own findings, conclusions and orders.

NEW SECTION

WAC 199-08-555 Final decisions and orders. (1) Upon completion of the record and submission of the issues for decision and order, a written final decision and order concurred in by a majority of the board may be adopted which shall contain findings and conclusions as to each contested issue of fact and law: Provided, That in the event that the board considers the record and that four of the members cannot agree on a decision, the substantive decision under appeal will control. The board will formally adopt its final decision and order.

(2) Copies of the final decision and order shall be mailed by the board to each party to the petition for review and to the attorney or representative of record, if any.

NEW SECTION

WAC 199-08-565 Petitions for reconsideration. (1)(a) After issuance of a final decision, any party may file a petition for reconsideration with the board. Such petition must be filed within ten days of mailing of the final decision. The board may require an answer to the petition. Copies of the petition for reconsideration, and an answer, if required, shall be served on the other parties of record.

(b) The filing of a petition for reconsideration does not stay

the effectiveness of the final decision of the board.

(c) In response to a petition for reconsideration, the board may deny it, or may reverse or modify its decision or may reopen the hearing. The board is deemed to have denied the petition if, within twenty days from the date the petition is filed, the board does not act on the petition or specify a date by which it will act on the petition.

(2) The time for filing a petition for judicial review does not commence until disposition of any timely petition for reconsideration. However, the filing of a petition for reconsideration is not a prerequisite for seeking judicial review.

(3) Copies of the final decision and order and of the board's disposition of any petition for reconsideration shall be mailed by the board to each party to the appeal and to the attorney or representative of record.

PART H APPEALS FROM BOARD DECISIONS

NEW SECTION

WAC 199-08-570 Time for filing petitions for review to superior court and court of appeals. (1) Superior court review. In order to obtain judicial review of a final decision of the environmental and land use hearings board, a party to the board case as consolidated shall timely file a petition for judicial review in the superior court for Thurston County and timely serve the board and all parties to the proceedings before the board by personal service or by mail. Such petition is timely filed and served only if it is filed and served on all parties within thirty days after the filing of the final decision and order of the board. Service by mail shall be deemed effective on the date of deposit with the United States Postal Service.

(2) Direct review. Any party may apply for direct review by the court of appeals. An application for direct review must be filed with the superior court within ten days after the filing of the petition for judicial review. In considering an application for direct review under this chapter, it shall be presumed that:

(a) The qualifying project presents fundamental and urgent issues affecting the public interest which require a prompt determination; and

(b) Delay in obtaining a final and prompt determination of such issues would be detrimental to a party and the public interest.

NEW SECTION

WAC 199-08-580 Certification of record. Within thirty days of receipt of a copy of the petition for judicial review to the superior court or notice of acceptance of the certificate of appealability by the court of appeals, the board shall certify and transmit to the reviewing court the record made before the board. Additional time for certification and transmission of the record may be allowed by the reviewing court. Normally the record will not include a transcript of the testimony. Unless the board has caused a transcript to be printed, arrangements for and costs of the written transcript shall be the obligation of the party seeking judicial review.