

Chapter 363-11 WAC

PRACTICE AND PROCEDURE—BOARD OF PILOTAGE COMMISSIONERS

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- 363-11-210 Subpoenas—Enforcement. [WSR 97-08-042, recodified as § 363-11-210, filed 3/28/97, effective 3/28/97; Rule .08.210, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-220 Subpoenas—Geographical scope. [WSR 97-08-042, recodified as § 363-116-220, filed 3/28/97, effective 3/28/97; Rule .08.220, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-300 Depositions and interrogatories in contested cases—Signing attestation and return. [WSR 97-08-042, recodified as § 363-11-300, filed 3/28/97, effective 3/28/97; Rule .08.300, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-340 Depositions upon interrogatories—Interrogation. [WSR 97-08-042, recodified as § 363-116-340, filed 3/28/97, effective 3/28/97; Rule .08.340, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-360 Depositions upon interrogatories—Provisions of deposition rule. [WSR 97-08-042, recodified as § 363-11-360, filed 3/28/97, effective 3/28/97; Rule .08.360, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-430 Prehearing conference rule—Authorized. [WSR 97-08-042, recodified as § 363-11-430, filed 3/28/97, effective 3/28/97; Rule .08.430, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-440 Prehearing conference rule—Record of conference action. [WSR 97-08-042, recodified as § 363-11-440, filed 3/28/97, effective 3/28/97; Rule .08.440, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.
- 363-11-450 Submission of documentary evidence in advance. [WSR 97-08-042, recodified as § 363-11-450, filed 3/28/97, effective 3/28/97; Rule .08.450, effective 3/1/60, filed 3/23/60.] Repealed by WSR 12-12-041, filed 5/30/12, effective 6/30/12. Statutory Authority: Chapter 88.16 RCW.

WAC 363-11-001 General rule and information. The chairperson of the board of pilotage commissioners is the assistant secretary of marine operations of the department of transportation of the state of Washington or the assistant secretary's designee. Information regarding the Pilotage Act, complaints and other matters coming under the provisions of the Pilotage Act and the board's rules and regulations may be obtained by contacting the chairperson or the board's staff in person or in writing at the Office of the Board of Pilotage Commissioners. All public documents in the custody of the board may be obtained upon request made to the chairperson of the Board of Pilotage Commissioners.

Any matter filed with the chairperson and/or the staff will be brought to the attention of the board at its next regular meeting, the date of which is the second Thursday of each month. Persons desiring to do so may also attend the board meetings. Please see www.pilotage.wa.gov for office hours, meeting times and locations.

The purpose and scope of activity of the board of pilotage commissioners are set out in chapter 88.16 RCW and are as follows:

- Scope: (1) Puget Sound pilotage district.
(2) Grays Harbor pilotage district.

Purpose: The purpose of the board of pilotage commissioners is to prevent the loss of human lives, loss of property and vessels and to protect the marine environment by maintenance of a competent and efficient pilotage service on the

state's waters. To accomplish this end the board examines proficiency of potential pilots, licenses pilots, regulates pilots, enforces the use of pilots, sets pilotage rates, receives and investigates reports of accidents involving pilots, keeps records of various matters affecting pilotage and fulfills other responsibilities enumerated in chapter 88.16 RCW.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-001, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-001, filed 3/28/97, effective 3/28/97. Statutory Authority: RCW 88.16.035. WSR 80-03-081 (Order 79-6, Resolution No. 79-6), § 296-11-001, filed 3/4/80. Statutory Authority: RCW 88.16.035 and 88.16.155. WSR 78-09-057 (Order 78-2, Resolution No. 78-2), § 296-11-001, filed 8/23/78; Order 2-68, § 296-11-001, filed 11/1/68.]

WAC 363-11-010 Appearance and practice before agency—Who may appear. No person may appear in a representative capacity before the board of pilotage commissioners or its designated hearing officer other than the following:

(1) Attorneys at law duly qualified and entitled to practice before the supreme court of the state of Washington.

(2) Attorneys at law duly qualified and entitled to practice before the highest court of record of any other state, if the attorneys at law of the state of Washington are permitted to appear in a representative capacity before administrative agencies of such other state, and if not otherwise prohibited by our state law.

(3) Persons otherwise qualified as possessing the requisite skill to appear and expertly represent others who have applied to the board of pilotage commissioners and have been duly authorized by the board to appear in a representative capacity before the board.

(4) A bona fide officer, partner, or full time employee of an individual firm, association, partnership, or corporation who appears for such individual firm, association, partnership, or corporation.

[WSR 97-08-042, recodified as § 363-11-010, filed 3/28/97, effective 3/28/97; Rule .08.010, effective 3/1/60, filed 3/23/60.]

WAC 363-11-020 Appearance and practice before agency—Appearance in certain proceedings may be limited to attorneys. In all hearings involving the taking of testimony and the formulation of a record subject to review by the courts, where the board of pilotage commissioners or its designated hearing officer determines that representative activity in such hearing requires a high degree of legal training, experience, and skill, the board or its designated hearing officer may limit those who may appear in a representative capacity to attorneys at law.

[WSR 97-08-042, recodified as § 363-11-020, filed 3/28/97, effective 3/28/97; Rule .08.020, effective 3/1/60, filed 3/23/60.]

WAC 363-11-030 Appearance and practice before agency—Solicitation of business unethical. It shall be unethical for persons acting in a representative capacity before the board of pilotage commissioners to solicit business by circulars, advertisements or by personal communication or interviews not warranted by personal relations, provided that such representatives may publish or circulate business cards. It is equally unethical to procure business indirectly by solicitors of any kind.

[WSR 97-08-042, recodified as § 363-11-030, filed 3/28/97, effective 3/28/97; Rule .08.030, effective 3/1/60, filed 3/23/60.]

WAC 363-11-040 Appearance and practice before agency—Standards of ethical conduct. All persons appearing in proceedings before the board of pilotage commissioners in a representative capacity shall conform to the standards of ethical conduct required of attorneys before the courts of Washington. If any such person does not conform to such standards, the board may decline to permit such person to appear in a representative capacity in any proceeding before the board.

[WSR 97-08-042, recodified as § 363-11-040, filed 3/28/97, effective 3/28/97; Rule .08.040, effective 3/1/60, filed 3/23/60.]

WAC 363-11-050 Appearance and practice before agency—Appearance by former employee of board or member of attorney general's staff. No former employee of the board of pilotage commissioners or member of the attorney general's staff may at any time after severing his employment with the board or the attorney general appear, except with the written permission of the board, and in compliance with chapter 42.22 RCW, in a representative capacity on behalf of other parties in a formal proceeding wherein he previously took an active part as a representative of the board.

[WSR 97-08-042, recodified as § 363-11-050, filed 3/28/97, effective 3/28/97; Rule .08.050, effective 3/1/60, filed 3/23/60.]

WAC 363-11-060 Appearance and practice before agency—Former employee as expert witness. No former employee of the board of pilotage commissioners shall at any time after severing his employment with the board appear, except with the written permission of the board, and in compliance with chapter 42.22 RCW, as an expert witness on behalf of other parties in a formal proceeding wherein he previously took an active part in the investigation as a representative of the board.

[WSR 97-08-042, recodified as § 363-11-060, filed 3/28/97, effective 3/28/97; Rule .08.060, effective 3/1/60, filed 3/23/60.]

WAC 363-11-090 Adoption of the model rules of procedure. Except as they may be inconsistent with the rules of this chapter, the board adopts the model rules of procedure as set forth in chapter 10-08 WAC, et seq. Where the rules of this chapter conflict with chapter 10-08 WAC, the rules of this chapter shall govern.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-090, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-090, filed 3/28/97, effective 3/28/97; Rule .08.090, effective 3/1/60, filed 3/23/60.]

WAC 363-11-230 Depositions and interrogatories—Right to take. Except as may be otherwise provided in this chapter, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for use as evidence in the proceeding, except that leave must be obtained if notice of the taking is served by a proponent within twenty days after the filing of a complaint. The attendance of witnesses may be compelled by the use of a subpoena. Depositions shall be taken only in accordance with this rule and the rule of subpoenas.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-230, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-

(5/30/12)

230, filed 3/28/97, effective 3/28/97; Rule .08.230, effective 3/1/60, filed 3/23/60.]

WAC 363-11-240 Depositions and interrogatories—Scope. Unless otherwise ordered, the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding. Depositions shall not exceed four hours, including breaks, unless otherwise agreed to by the parties, or unless otherwise ordered by the presiding officer based upon a motion by the party seeking the deposition demonstrating good cause why the deposition should exceed four hours.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-240, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-240, filed 3/28/97, effective 3/28/97; Rule .08.240, effective 3/1/60, filed 3/23/60.]

WAC 363-11-250 Depositions and interrogatories—Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States depositions shall be taken before an officer authorized to administer oaths by the laws of the state of Washington or of the place where the examination is held; within a foreign country, depositions shall be taken before a secretary of an embassy or legation, consul general, vice consul or consular agent of the United States, or a person designated by the board of pilotage commissioners or agreed upon by the parties by stipulation in writing filed with the board. Except by stipulation, no deposition shall be taken before a person who is a party or the privy of a party, or a privy of any counsel of a party, or who is financially interested in the proceeding.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-250, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-250, filed 3/28/97, effective 3/28/97; Rule .08.250, effective 3/1/60, filed 3/23/60.]

WAC 363-11-260 Depositions and interrogatories—Authorization. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice of not less than fifteen days in writing to the board of pilotage commissioners and all parties. The notice shall state the time and place for taking the deposition, the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used as other depositions.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-260, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-260, filed 3/28/97, effective 3/28/97; Rule .08.260, effective 3/1/60, filed 3/23/60.]

WAC 363-11-270 Depositions and interrogatories—Protection of parties and deponents. After notice is served for taking a deposition, upon its own motion or upon motion reasonably made by any party or by the person to be examined and upon notice and for good cause shown the board of pilotage commissioners or its designated hearing officer may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that

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stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed, the deposition shall be opened only by order of the board, or that business secrets or secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the board, or the board may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the board or its designated hearing officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as above provided. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the board. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-270, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-270, filed 3/28/97, effective 3/28/97; Rule .08.270, effective 3/1/60, filed 3/23/60.]

WAC 363-11-280 Depositions and interrogatories.

(1) Written interrogatories. Written interrogatories may be submitted in accordance with the rules of this chapter, which may become a part of the record of proceedings upon a motion made by one of the parties. Parties shall have sixty days to respond to interrogatories.

(2) Depositions and interrogatories in hearings brought pursuant to WAC 363-116-083 and 363-116-084. The board and the exam committee shall be required to produce for depositions no more than a total of three fact witnesses (two board/committee members, one test developer), and no more than one expert witness, in connection with any hearing requested pursuant to WAC 363-116-083 and 363-116-084, unless the board's chair, in his/her sole discretion, determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must demonstrate to the presiding officer that "exceptional circumstances" exist and that such information cannot be obtained through other means in order to increase the number of witnesses.

No more than five written interrogatories (including subparts) in total may be submitted to other board and/or exam committee members, which may then be submitted as a part of the record of proceedings upon a motion duly made.

The scope of the deposition and interrogatories shall be limited to those issues set forth in WAC 363-116-083(5) and 363-116-084(5) and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made

and a written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, performance evaluations, correspondence to the petitioner, and/or other documents submitted to the board as a part of the decision making process.

(3) Depositions and interrogatories in hearings brought pursuant to WAC 363-116-086.

(a) Board/TEC witnesses - The board and the trainee evaluation committee (TEC) shall be required to produce no more than a total of two fact witnesses (one board witness, one TEC witness) and no more than one expert witness in support of its decisions made pursuant to WAC 363-116-080, unless the chair, in his/her sole discretion, determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must demonstrate to the presiding officer that "exceptional circumstances" exist and that such information cannot be obtained through other means in order to increase the number of witnesses.

No more than five written interrogatories (including subparts) in total may be submitted to other board and/or TEC members, which may then be submitted as a part of the record of proceedings upon a motion duly made. The scope of the deposition and interrogatories will be limited as set forth in WAC 363-116-086 (3)(b) and (c) and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and a written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, correspondence to the petitioner, training trip reports, training trip report summary spreadsheets, and/or other documents submitted to the board as a part of the decision making process.

(b) Training and supervising pilots - The board has determined that requiring or permitting the deposition of training and supervising pilots in connection with a hearing pursuant to WAC 363-116-086 would jeopardize the integrity of the training program and would stifle candid and honest assessments of a trainee's performance in the training program. The training and supervising pilots prepare written training trip reports for each training trip. Those reports shall speak for themselves. Notwithstanding any other provision in these regulations, no training or supervising pilot shall be deposed, or called as a witness, in connection with a hearing brought pursuant to WAC 363-116-086. Consistent with WAC 363-11-410, to the extent a particular training trip report is considered by a party to be vague and/or ambiguous, a party may seek, by way of motion, a declaration from a training or supervising pilot, seeking clarification of specific issues which the party believes, for good cause shown, should be clarified. Such declaration may then become a part of the record of proceedings.

(4) Depositions and interrogatories in hearings brought pursuant to RCW 88.16.100(5), WAC 363-116-370 and 363-116-420. The board shall be required to produce for depositions no more than a total of two fact witnesses and, if it deems necessary one expert witness, in connection with any hearing requested pursuant to RCW 88.16.100(5), WAC 363-116-370 and 363-116-420, unless the board's chair, in his/her

sole discretion, determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must show just cause to the presiding officer as to why additional witnesses should be subject to deposition and/or interrogatories and that such information cannot be obtained through other means.

Unless the presiding officer rules otherwise based on a showing of just cause, no more than five written interrogatories (including subparts) in total may be submitted to other board members concerning the matters at issue, which may then be submitted as a part of the record of proceedings upon a motion duly made.

The scope of the deposition and interrogatories will be limited as set forth in RCW 88.16.100(5), WAC 363-116-370 and 363-116-420 and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and an adequate written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, correspondence to the petitioner, and/or other documents submitted to the board as a part of the decision making process.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-280, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-280, filed 3/28/97, effective 3/28/97; Rule .08.280, effective 3/1/60, filed 3/23/60.]

WAC 363-11-290 Depositions and interrogatories—Recordation. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally or by someone acting under his direction and in his presence, record the testimony by transcription from stenographic notes. Depositions shall not be recorded via videotape, or other video recording device under any circumstances. Objections to the notice, qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented or to the conduct of the officer, or of any party, shall be noted by the officer upon the deposition. All objections by any party not so made are waived.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-290, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-290, filed 3/28/97, effective 3/28/97; Rule .08.290, effective 3/1/60, filed 3/23/60.]

WAC 363-11-310 Depositions and interrogatories—Use and effect. Subject to rulings by the hearing officer upon objections a deposition taken and filed as provided in this rule will not become a part of the record in the proceeding until received in evidence by the hearing officer upon the motion of any party. Except by agreement of the parties or ruling of the hearing officer, only that portion of the deposition transcript cited during the adjudicative hearing which demonstrates that the witness made a previously inconsistent statement may become a part of the record of proceedings. The portion of the transcript submitted shall include such testimony necessary to give proper context to the witness's prior statement, as determined by the hearing officer. A party does not make a party, or the privy of a party, or any hostile witness his witness by taking his deposition. Any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party.

(5/30/12)

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-310, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-310, filed 3/28/97, effective 3/28/97; Rule .08.310, effective 3/1/60, filed 3/23/60.]

WAC 363-11-320 Depositions and interrogatories in contested cases—Fees of officers and deponents. Deponents whose depositions are taken and the officers taking the same shall be entitled to the same fees as are paid for like services in the superior courts of the state of Washington which fees shall be paid by the party at whose instance the depositions are taken.

[WSR 97-08-042, recodified as § 363-11-320, filed 3/28/97, effective 3/28/97; Rule .08.320, effective 3/1/60, filed 3/23/60.]

WAC 363-11-330 Depositions upon interrogatories—Submission of interrogatories. Where written interrogatories are submitted as permitted under this chapter, the party offering the testimony shall separately and consecutively number each interrogatory. The number of interrogatories shall not exceed five, including subparts. Answers shall be provided within sixty days of receipt, unless otherwise ordered by the presiding officer, and may be submitted as a part of the record of proceedings upon a motion duly made by either party.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-330, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-330, filed 3/28/97, effective 3/28/97; Rule .08.330, effective 3/1/60, filed 3/23/60.]

WAC 363-11-350 Depositions upon interrogatories—Attestation and return. The answers to interrogatories shall certify under penalty of perjury, of the laws of the state of Washington that the answers are true and correct as of the date of attestation.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-350, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-350, filed 3/28/97, effective 3/28/97; Rule .08.350, effective 3/1/60, filed 3/23/60.]

WAC 363-11-370 Official notice—Matters of law. The board of pilotage commissioners or its hearing officer, 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 administrative agencies of the state of Washington, 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.** The board of pilotage commissioners' organization, administration, officers, personnel, official publications, and practitioners before its bar.

[Ch. 363-11 WAC p. 5]

[WSR 97-08-042, recodified as § 363-11-370, filed 3/28/97, effective 3/28/97; Rule .08.370, effective 3/1/60, filed 3/23/60.]

WAC 363-11-380 Official notice—Material facts. In the absence of controverting evidence, the board of pilotage commissioners and its hearing officers, upon request made before or during a hearing, may officially notice:

(1) **Agency 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 of pilotage commissioners;

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

(3) **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;

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

(5) **Request or suggestion.** Any party may request, or the hearing officer or the board of pilotage commissioners 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;

(6) **Statement.** Where an initial or final decision of the board of pilotage commissioners 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 of the board 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;

(7) **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 an initial or intermediate decision or by 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;

(8) **Evaluation of evidence.** Nothing herein shall be construed to preclude the board of pilotage commissioners or its authorized agents from utilizing their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

[WSR 97-08-042, recodified as § 363-11-380, filed 3/28/97, effective 3/28/97; Rule .08.380, effective 3/1/60, filed 3/23/60.]

WAC 363-11-390 Presumptions. Upon proof of the predicate facts specified in the following six subsections hereof without substantial dispute and by direct, clear, and convincing evidence, the board of pilotage commissioners, with or without prior request or notice, may make the following presumptions, where consistent with all surrounding facts and circumstances:

(1) **Continuity.** That a fact of a continuous nature, proved to exist at a particular time, continues to exist as of the date of the presumption, if the fact is one which usually exists for at least that period of time;

(2) **Identity.** That persons and objects of the same name and description are identical;

(3) **Delivery.** Except in a proceeding where the liability of the carrier for nondelivery is involved, that mail matter, communications, express or freight, properly addressed, marked, billed and delivered respectively to the post office, telegraph, cable or radio company, or authorized common carrier of property with all postage, tolls and charges properly prepaid, is or has been delivered to the addressee or consignee in the ordinary course of business;

(4) **Ordinary course.** That a fact exists or does not exist, upon proof of the existence or nonexistence of another fact which in the ordinary and usual course of affairs, usually and regularly co-exists with the fact presumed;

(5) **Acceptance of benefit.** That a person for whom an act is done or to whom a transfer is made has, does or will accept same where it is clearly in his own self-interest so to do;

(6) **Interference with remedy.** That evidence, with respect to a material fact which in bad faith is destroyed, eloi-gned, suppressed or withheld by a party in control thereof, would if produced, corroborate the evidence of the adversary party with respect to such fact.

[WSR 97-08-042, recodified as § 363-11-390, filed 3/28/97, effective 3/28/97; Rule .08.390, effective 3/1/60, filed 3/23/60.]

WAC 363-11-400 Stipulations and admissions of record. The existence or nonexistence of a material fact, as made or agreed in a stipulation or in an admission of record, will be conclusively presumed against any party bound thereby, and no other evidence with respect thereto will be received upon behalf of such party, provided:

(1) **Upon whom binding.** Such a stipulation or admission is binding upon the parties by whom it is made, their privies and upon all other parties to the proceeding who do not expressly and unequivocally deny the existence or nonexistence of the material fact so admitted or stipulated, upon the making thereof, if made on the record at a pre-hearing conference, oral hearing, oral argument or by a writing filed and served upon all parties within five days after a copy of such stipulation or admission has been served upon them;

(2) **Withdrawal.** Any party bound by a stipulation or admission of record at any time prior to final decision may be permitted to withdraw the same in whole or in part by showing to the satisfaction of the hearing officer or the board of pilotage commissioners that such stipulation or admission was made inadvertently or under a bona fide mistake of fact

contrary to the true fact and that its withdrawal at the time proposed will not unjustly prejudice the rights of other parties to the proceeding.

[WSR 97-08-042, recodified as § 363-11-400, filed 3/28/97, effective 3/28/97; Rule .08.400, effective 3/1/60, filed 3/23/60.]

WAC 363-11-410 Adjudicative hearings—Testimony. (1) Testimony in hearings brought pursuant to WAC 363-116-083 and 363-116-084. The board and the exam committee shall be required to produce no more than a total of three fact witnesses (two board/committee members, one test developer), and no more than one expert witness, for any hearing requested pursuant to WAC 363-116-083 and 363-116-084, unless the board's chair, in his/her sole discretion, determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must demonstrate to the presiding officer that "exceptional circumstances" exist and that such information cannot be obtained through other means in order to increase the number of witnesses.

The scope of the hearing shall be limited to those issues set forth in WAC 363-116-083(5) and 363-116-084(5) and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and a written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, performance evaluations, correspondence to the petitioner, and/or other documents submitted to the board as a part of the decision making process.

(2) Testimony in hearings brought pursuant to WAC 363-116-086.

(a) Board/TEC witnesses - The board and the trainee evaluation committee (TEC) shall be required to produce no more than a total of two fact witnesses (one board witness, one TEC witness) and no more than one expert witness in support of its decisions made pursuant to WAC 363-116-080, unless the chair, in his/her sole discretion, determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must demonstrate to the presiding officer that "exceptional circumstances" exist and that such information cannot be obtained through other means in order to increase the number of witnesses. The scope of the testimony for the hearing will be limited as set forth in WAC 363-116-086 (3)(b) and (c) and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and a written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, training trip reports, training trip report summary spreadsheets, correspondence to the petitioner, and/or other documents submitted to the board as a part of the decision making process.

(b) Training and supervising pilots - The board has determined that requiring or permitting the testimony of training and supervising pilots in connection with a hearing pursuant to WAC 363-116-086 would jeopardize the integrity of the training program and would stifle candid and honest assessments of a trainee's performance in the training program. The training and supervising pilots prepare written training trip

reports for each training trip. Those reports shall speak for themselves. Notwithstanding any other provision in these regulations, no training or supervising pilot shall be called as a witness in connection with a hearing brought pursuant to WAC 363-116-086. To the extent a particular training trip report is considered by a party to be vague and/or ambiguous, a party may seek, by way of motion, a declaration from a training or supervising pilot, seeking clarification of specific issues which the party believes, for good cause shown, should be clarified. The burden to demonstrate that there is a necessity for such a declaration shall be on the petitioner, who must demonstrate to the presiding officer that "exceptional circumstances" exist and that such information cannot be obtained through other means. Such declaration may then become a part of the record of proceedings, upon a motion duly made by a party to the proceedings.

(3) Testimony in hearings brought pursuant to RCW 88.16.100(5), WAC 363-116-370 and 363-116-420. The board shall be required to produce no more than a total of two fact witnesses and, if it deems necessary one expert witness, in connection with any hearing requested pursuant to RCW 88.16.100(5), WAC 363-116-370 and 363-116-420, unless the board's chair, in his/her sole discretion determines that additional witnesses are necessary. If the petitioner asserts that there is a necessity for additional witnesses, he/she must show just cause to the presiding officer as to why additional witnesses should testify and that such information cannot be obtained through other means.

The scope of the testimony for the hearing will be limited to those issues set forth in RCW 88.16.100(5), WAC 363-116-370 and 363-116-420 and shall not include inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and an adequate written explanation has been provided. A written explanation may be in the form of a written recommendation, board or committee meeting minutes, incident reports, correspondence to the petitioner, and/or other documents submitted to the board as a part of the decision making process.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-410, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-410, filed 3/28/97, effective 3/28/97; Rule .08.410, effective 3/1/60, filed 3/23/60.]

WAC 363-11-420 Scope of discovery, relevant documents for hearings and record of proceedings. (1) Hearings brought pursuant to WAC 363-116-083 and 363-116-084. The scope of discovery and relevant admissible documents, shall be limited to those materials bearing on the issues set forth in WAC 363-116-083(5) and 363-116-084(5), and as may otherwise be limited by chapter 363-11 WAC herein. Documentation and materials relating to the performance of pilot applicants other than those requesting a hearing are not relevant, they shall not be subject to discovery, they shall not be submitted as an exhibit or referenced in any hearing, nor shall they be submitted for inclusion in any record of proceeding conducted pursuant to WAC 363-116-083 and 363-116-084.

(2) Hearings brought pursuant to WAC 363-116-086. The scope of discovery and relevant admissible documents shall be limited to those materials bearing on the issues set

forth in WAC 363-116-086, and as may otherwise be limited by chapter 363-11 WAC herein. Documentation and materials relating to the performance of pilot trainees other than those requesting a hearing are not relevant, they shall not be subject to discovery, they shall not be submitted as an exhibit or referenced in any hearing, nor shall they be submitted for inclusion in any hearing or record of proceeding conducted pursuant to WAC 363-116-086.

(3) Hearings brought pursuant to RCW 88.16.100(5), WAC 363-116-370 and 363-116-420. The scope of discovery and relevant admissible documents shall be limited to those materials bearing on the issues set forth in RCW 88.16.-110(5), WAC 363-116-370 and 363-116-420.

In all proceedings the issues to be adjudicated shall be made initially as precise as possible, in order that hearing officers may proceed promptly to conduct the hearings on relevant and material matter only.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-420, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-420, filed 3/28/97, effective 3/28/97; Rule .08.420, effective 3/1/60, filed 3/23/60.]

WAC 363-11-460 Excerpts from documentary evidence. When portions only of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the hearing examiner and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the whole of the original document shall be made available for examination and for use by all parties to the proceeding.

[WSR 97-08-042, recodified as § 363-11-460, filed 3/28/97, effective 3/28/97; Rule .08.460, effective 3/1/60, filed 3/23/60.]

WAC 363-11-470 Expert or opinion testimony—Number and qualifications of witnesses. That the hearing examiner or other appropriate officer in all classes of cases where practicable make an effort to have the interested parties agree upon the witness or witnesses who are to give expert or opinion testimony, either by selecting one or more to speak for all parties or by limiting the number for each party; and, if the interested parties cannot agree, require them to submit to him and to the other parties written statements containing the names, addresses and qualifications of their respective opinion or expert witnesses, by a date determined by him and fixed sufficiently in advance of the hearing to permit the other interested parties to investigate such qualifications.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-470, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-470, filed 3/28/97, effective 3/28/97; Rule .08.470, effective 3/1/60, filed 3/23/60.]

WAC 363-11-480 Expert or opinion testimony—Written sworn statements. That the hearing examiner or other appropriate officer, in all classes of cases in which it is practicable and permissible, require, and when not so permissible, make every effort to bring about by voluntary submission, that all direct opinion or expert testimony and all direct testimony be reduced to written sworn statements, and,

together with the exhibits upon which based, be submitted to him and to the other parties to the proceeding by a date determined by the hearing officer and fixed a reasonable time in advance of the hearing, which shall be no less than sixty days prior to the hearing; and that such sworn statements be acceptable as evidence upon formal offer at the hearing, subject to objection on any ground except that such sworn statements shall not be subject to challenge because the testimony is not presented orally, and provided that witnesses making such statements shall not be subject to cross-examination unless a request is made sufficiently in advance of the hearing to insure the presence of the witnesses. If cross examination is requested, the sworn written statement may be supplemented with live direct testimony consistent with the sworn written statement.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-480, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-480, filed 3/28/97, effective 3/28/97; Rule .08.480, effective 3/1/60, filed 3/23/60.]

WAC 363-11-490 Expert or opinion testimony—Supporting data. That the hearing examiner or other appropriate officer, in his discretion but consistent with the rights of the parties, cause the parties to make available for inspection in advance of the hearing, and for purposes of cross-examination at the hearing, the data underlying statements and exhibits submitted in accordance with WAC 363-11-480, at least sixty day prior to the hearing, but, wherever practicable that he restrict to a minimum the placing of such data in the record.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-490, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-490, filed 3/28/97, effective 3/28/97; Rule .08.490, effective 3/1/60, filed 3/23/60.]

WAC 363-11-500 Expert or opinion testimony and testimony based on economic or statistical data—Effect of noncompliance with WAC 363-11-470 or 363-11-480. Whenever the manner of introduction of opinion or expert testimony is governed by requirements fixed under the provisions of WAC 363-11-470 or 363-11-480, such testimony not submitted in accordance with the relevant requirements shall not be received in evidence in the absence of a clear showing that the offering party had good cause for his failure to conform to such requirements.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-500, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-500, filed 3/28/97, effective 3/28/97; Rule .08.500, effective 3/1/60, filed 3/23/60.]

WAC 363-11-510 Continuances. Any party who desires a continuance shall, immediately upon receipt of notice of a hearing, or as soon thereafter as facts requiring such continuance come to his knowledge, notify the board of pilotage commissioners or its designated hearing officer of said desire, stating in detail the reasons why such continuance is necessary. The board or its designated hearing officer, in passing upon a request for continuance, shall consider whether such request was promptly and timely made. For good cause shown, the board or its designated hearing officer may grant such a continuance and may at any time order a continuance upon its or his own motion. During a hearing, if

it appears in the public interest or in the interest of justice that further testimony or argument should be received, the examiner or other officer conducting the hearing may in his discretion continue the hearing and fix the date for introduction of additional evidence or presentation of argument. Such oral notice shall constitute final notice of such continued hearing.

[WSR 97-08-042, recodified as § 363-11-510, filed 3/28/97, effective 3/28/97; Rule .08.510, effective 3/1/60, filed 3/23/60.]

WAC 363-11-520 Rules of evidence—Admissibility criteria. Subject to the other provisions and rules on evidence set forth in this chapter, evidentiary rulings shall conform with RCW 34.05.452 and WAC 10-08-140.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-520, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-520, filed 3/28/97, effective 3/28/97; Rule .08.520, effective 3/1/60, filed 3/23/60.]

WAC 363-11-530 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, in his discretion, 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. A party may move to exclude evidence previously admitted pursuant to WAC 10-08-140(6); a party may also move to exclude previously admitted evidence if a subsequent ruling by the presiding officer renders previously admitted evidence irrelevant, cumulative, immaterial and/or inadmissible and the moving party can demonstrate that the granting of such motion will not unjustly prejudice the rights of the other party. Such a motion shall be permissible and considered timely if made prior to the close of the hearing.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-530, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-530, filed 3/28/97, effective 3/28/97; Rule .08.530, effective 3/1/60, filed 3/23/60.]

WAC 363-11-540 Petitions for rule making, amendment or repeal—Who may petition. Any interested person may petition the board of pilotage commissioners requesting the promulgation, amendment, or repeal of any rule.

[WSR 97-08-042, recodified as § 363-11-540, filed 3/28/97, effective 3/28/97; Rule .08.540, effective 3/1/60, filed 3/23/60.]

WAC 363-11-550 Petitions for rule making, amendment or repeal—Requisites. Where the petition requests the promulgation of a rule, the requested or proposed rule must be set out in full. The petition must also include all the reasons for the requested rule together with briefs of any applicable law. Where the petition requests the amendment or repeal of a rule presently in effect, the rule or portion of the rule in question must be set out as well as a suggested amended form, if any. The petition must include all reasons for the requested amendment or repeal of the rule.

[WSR 97-08-042, recodified as § 363-11-550, filed 3/28/97, effective 3/28/97; Rule .08.550, effective 3/1/60, filed 3/23/60.]

(5/30/12)

WAC 363-11-560 Petitions for rule making, amendment or repeal—Agency must consider. All petitions shall be considered by the board of pilotage commissioners and the board may, in its discretion, order a hearing for the further consideration and discussion of the requested promulgation, amendment, repeal, or modification of any rule.

[WSR 97-08-042, recodified as § 363-11-560, filed 3/28/97, effective 3/28/97; Rule .08.560, effective 3/1/60, filed 3/23/60.]

WAC 363-11-570 Petitions for rule making, amendment or repeal—Notice of disposition. The board of pilotage commissioners shall notify the petitioning party within a reasonable time of the disposition, if any, of the petition.

[WSR 97-08-042, recodified as § 363-11-570, filed 3/28/97, effective 3/28/97; Rule .08.570, effective 3/1/60, filed 3/23/60.]

WAC 363-11-580 Declaratory rulings. As prescribed by chapter 34.05 RCW et seq., any interested person may petition the board of pilotage commissioners for a declaratory ruling. The board shall consider the petition and within a reasonable time the board shall:

- (1) Issue a nonbinding declaratory ruling; or
- (2) Notify the person that no declaratory ruling is to be issued or
- (3) Set a reasonable time and place for a hearing or the submission of written evidence upon the matter, and give reasonable notification to the person of the time and place for such hearing or submission and of the issues involved.
- (4) If a hearing is held or evidence is submitted as provided in subsection (3), the board shall within a reasonable time:
 - (a) Issue a binding declaratory rule; or
 - (b) Issue a nonbinding declaratory ruling; or
 - (c) Notify the person that no declaratory ruling is to be issued.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-580, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-580, filed 3/28/97, effective 3/28/97; Rule .08.580, effective 3/1/60, filed 3/23/60.]

WAC 363-11-590 Forms. (1) Any interested person petitioning the board of pilotage commissioners for a declaratory ruling pursuant to RCW 34.05.240, shall generally adhere to the following form for such purpose.

(a) At the top of the page shall appear the wording "Before the board of pilotage commissioners, state of Washington," on the left side of the page below the foregoing the following caption shall be set out: "In the matter of the petition of (name of petitioning party) for a declaratory ruling." Opposite the foregoing caption shall appear the word "petition."

(b) The body of the petition shall be set out in numbered paragraphs. The first paragraph shall state the name and address of the petitioning party. The second paragraph shall state all rules or statutes that may be brought into issue by the petition. Succeeding paragraphs shall set out the state of facts relied upon in form similar to that applicable to complaints in civil actions before the superior courts of this state. The concluding paragraphs shall contain the prayer of the petitioner. The petition shall be subscribed and verified in the manner

prescribed for verification of complaints in the superior courts of this state.

(c) The original and two legible copies shall be filed with the agency. Petitions shall be on white paper, either 8 1/2" x 11" or 8 1/2" x 14" in size.

(2) Any interested person petitioning the board of pilotage commissioners requesting the promulgation, amendment or repeal of any rules shall generally adhere to the following form for such purpose.

(a) At the top of the page shall appear the wording "Before the board of pilotage commissioners, state of Washington." On the left side of the page below the foregoing the following caption shall be set out: "In the matter of the petition of (name of petitioning party) for (state whether promulgation, amendment or repeal) of rule (or rules)." Opposite the foregoing caption shall appear the word "petition."

(b) The body of the petition shall be set out in numbered paragraphs. The first paragraph shall state the name and address of the petitioning party and whether petitioner seeks the promulgation of new rule or rules, or amendment or repeal of existing rule or rules. The second paragraph, in case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety. Where the petition is for amendment, the new matter shall be underscored and the matter proposed to be deleted shall appear in double parentheses. Where the petition is for repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by agency rule number. The third paragraph shall set forth concisely the reasons for the proposal of the petitioner and shall contain a statement as to the interest of the petitioner in the subject matter of the rule. Additional numbered paragraphs may be used to give full explanation of petitioner's reason for the action sought.

(c) Petitions shall be dated and signed by the person or entity named in the first paragraph or by his attorney. The original and two legible copies of the petition shall be filed with the agency. Petitions shall be on white paper, either 8 1/2" x 11" or 8 1/2" x 14" in size.

[Statutory Authority: Chapter 88.16 RCW. WSR 12-12-041, § 363-11-590, filed 5/30/12, effective 6/30/12. WSR 97-08-042, recodified as § 363-11-590, filed 3/28/97, effective 3/28/97; Rule .08.590, effective 3/1/60, filed 3/23/60.]