



RULE-MAKING ORDER

-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Environmental Hearings Office

- Permanent Rule**
 Emergency Rule

Effective date of rule:

Permanent Rules

- 31 days after filing.
 Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

- Immediately upon filing.
 Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes No If Yes, explain:

Purpose: The 2004 Legislature passed SSB 5590, amending Chapter 43.21B RCW. (Chapter 204, Laws of 2004) modifying the basis for calculating the time period for appeals to the Pollution Control Hearings Board. Emergency rules are currently effective so that the PCHB's rules are consistent with the 2004 legislation. This rulemaking makes permanent those changes in the PCHB's procedural rules, WAC Chapter 371-08. As part of this rulemaking, the EHO sought and received stakeholder input on a number of other changes to the PCHB's procedural rules, and the permanent rule includes changes based on that stakeholder process.

Citation of existing rules affected by this order:

Repealed:
 Amended: WAC 371-08-305; 371-08-335; 371-08-345; 371-08-445; 371-08-450
 Suspended:

Statutory authority for adoption: RCW 43.21B.170 (PCHB rulemaking authority); RCW Chapter 34.05.

Other authority : RCW 43.21B.001; .190; .230; .300; .310 (sections amended by SSB 5590)

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR 05-08-022 on 3-30-05 (date).

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

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
 Address: _____ fax () _____
 e-mail _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- 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.
 That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Date adopted: June 14, 2005

NAME (TYPE OR PRINT)

Bill Clarke

SIGNATURE

TITLE

Director

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

JUL 7 2005

844

TIME _____ (AM) (PM)
 WSR 05-15-017

(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	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	3	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	_____	Amended	2	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	5	Repealed	_____
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The number of sections adopted using:

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

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-305 Definitions. As used in this chapter the following terms shall have the following meaning:

(1) "Adjudicative proceeding" means a proceeding involving an opportunity for hearing before the board as defined in RCW 34.05.010. The term "adjudicative proceeding" is used interchangeably with the terms "case" and "appeal" in this chapter.

(2) "Agency" means any state governmental entity, air pollution control authority, local health department or other agency whose decisions are subject to the board's jurisdiction.

(3) "Board" means the pollution control hearings board, a quasi-judicial board created pursuant to chapter 43.21B RCW and described in WAC 371-08-315. Where appropriate, the term "board" also refers to the designated agents of the pollution control hearings board.

(4) "Business days" means Monday through Friday exclusive of any state or federal holidays.

(5) "Department" refers to and means the department of ecology.

~~((5))~~ (6) "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 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. Electronic filing of documents may be authorized by the presiding officer after consultation with the parties regarding format and authentication.

~~((6))~~ (7) "Party" means:

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

(b) A person named as a party to the adjudicative proceeding, allowed to intervene or joined as a party by the board.

~~((7))~~ (8) "Person" means any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.

~~((8))~~ (9) "Presiding officer" means a member of the board or an administrative appeals judge who is assigned to conduct a conference or hearing by the chairperson or vice-chairperson.

~~((9))~~ (10) "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 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 delivery service of the copies.

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

AMENDATORY SECTION (Amending WSR 97-19-064, filed 9/15/97, effective 10/16/97)

WAC 371-08-335 Filing a timely appeal with the board. (1) An appeal before the board shall be begun by filing a notice of appeal with the board at the environmental hearings office and by serving a copy of the appeal notice on the agency whose decision is being appealed. For the board to acquire jurisdiction both such filing and such service must be timely accomplished.

(2) The notice of appeal shall be filed with the board within thirty days of the date ~~((that a copy))~~ of receipt of the order or decision ~~((is posted in the United States mail, properly addressed, postage prepaid, to the appealing party))~~. The board's rule governing the computation of time (WAC 371-08-310) shall determine how the thirty-day appeal period is calculated. The "date of receipt" of an order or decision means:

(a) Five business days after the date of mailing; or
(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the agency, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

(3) An appeal may be filed with the board by personal delivery, commercial delivery, facsimile, or first-class, registered or certified mail. An appeal is filed with the board on the date the board actually receives the notice of the appeal, not the date that the notice is mailed. Upon receiving the notice of appeal, the board will acknowledge receipt. The date stamped on the appeal notice shall be prima facie evidence of the filing date. The board may thereafter require that additional copies be filed.

AMENDATORY SECTION (Amending WSR 96-17-016, filed 8/12/96, effective 9/12/96)

WAC 371-08-345 Service of the notice of appeal on the agency and other interested parties. (1) Within thirty days of the date ~~((that a copy))~~ of receipt of the agency's order or decision ~~((is mailed to the appellant))~~, the appellant shall also serve a copy of the notice of appeal on the agency whose order or decision is being appealed. Proof of service may be made by certificate or affidavit filed with the board.

(2) A copy of the notice of appeal shall also be served on all other persons named as parties to the appeal. There is no time limit on when such service must be made.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-445 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 call to promote the fair, speedy and economical processing of a matter. ~~((If the presiding officer grants a party's request for a telephone conference, the requesting party shall initiate and pay for the call.))~~

AMENDATORY SECTION (Amending WSR 02-06-012, filed 2/22/02, effective 3/25/02)

WAC 371-08-450 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.))~~ A proposed order shall be submitted with a motion only at the request of the presiding officer.

(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. The presiding officer will decide whether or not a motion hearing will be held and notify the parties accordingly. 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. ((If a motion hearing is set by the presiding officer and is to be held by phone, the moving party shall originate the telephonic hearing conference call.))

(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 dispositive of all or part of an appeal shall be filed and served ((ten)) fourteen days from the ((date the motion is received)) receipt of the motion by the nonmoving party. The moving party shall then have ((seven)) ten 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.)) All responses to any nondispositive motion shall be filed and served five days from receipt of the motion by the nonmoving party. The moving party shall then have three days from receipt of the response to file and serve a reply.

(c) All dispositive motions shall be filed and served not later than ((forty-five)) sixty days before the secondary hearing date, or, if no secondary date applies, the primary 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.