

WSR 25-02-085
PROPOSED RULES
ENVIRONMENTAL AND
LAND USE HEARINGS OFFICE
(Growth Management Hearings Board)
[Filed December 27, 2024, 3:18 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 24-08-015.

Title of Rule and Other Identifying Information: Chapter 242-03 WAC, GMHB rules of practice and procedure.

Hearing Location(s): On February 4, 2025, at 9:00 a.m. Zoom [https://eluhwa-wa-gov.zoom.us/j/6690698875?](https://eluhwa-wa-gov.zoom.us/j/6690698875?pwd=YVJDN0R4WmRPUDBQdjdvaeE82ZVF1UT09&omn=86401404695) [pwd=YVJDN0R4WmRPUDBQdjdvaeE82ZVF1UT09&omn=86401404695](https://eluhwa-wa-gov.zoom.us/j/6690698875?pwd=YVJDN0R4WmRPUDBQdjdvaeE82ZVF1UT09&omn=86401404695), Meeting ID 669 069 8875, Passcode 635907. Physical location 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501. The public hearing will be conducted online via Zoom; however, participants who wish to comment may phone in using the Zoom call-in information or they may participate in person.

Date of Intended Adoption: February 28, 2025.

Submit Written Comments to: Jamie Merly, 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501, email Jamie.Merly@eluhwa-wa.gov, beginning December 30, 2024, by February 17, 2024 [2025].

Assistance for Persons with Disabilities: Contact Jamie Merly, phone 360-485-1282, email Jamie.Merly@eluhwa-wa.gov, by February 3, 2024 [2025].

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The rule changes will clarify that the growth management hearings board (board) shall dismiss based upon a stipulated motion. The rule changes clarify terminology to reduce confusion about the board's statutory authority. Lastly, the rule changes add a rule that the board will determine whether the respondent has delayed or suspended the effective date of the action subject to petition.

Reasons Supporting Proposal: The rule changes align board procedure with existing statutory and case law (see *Spokane County v. Growth Management Hearings Board*, 534 P. 3d 1203, 2023). The court of appeals Division III held that RCW 36.70A.330 does not require the board to hold a compliance hearing after a finding of noncompliance when the parties settle their dispute and agree to dismiss.

Statutory Authority for Adoption: RCW 36.70A.270.

Statute Being Implemented: Chapter 36.70A RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state environmental and land use hearings office, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Jamie Merly, 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501, 360-485-1282.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. Washington state environmental and land use hearings office is not specifically listed in RCW 34.05.328 (5) (b) (i) and does not intend to make this section voluntarily applicable to this rule update per subsection (5) (b) (ii). One of the primary purposes of the rule change is to clarify procedures for implementing existing statutes, consistent

with RCW 34.05.328 (5) (b) (v). Therefore, unless subsection (5) (b) (ii) is invoked by the joint administrative rules [review] committee after filing CR-102, no cost-benefit analysis is required.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Scope of exemption for rule proposal:

Is fully exempt.

December 27, 2024
 Jamie Merly, Director
 Legal and Administrative Services

OTS-5887.1

AMENDATORY SECTION (Amending WSR 11-13-109, filed 6/21/11, effective 7/22/11)

WAC 242-03-020 Function. The function of the board is to make informed decisions on appeals within the scope of its ~~((jurisdiction))~~ statutory authority arising from implementation of the Growth Management Act, Shoreline Management Act, and State Environmental Policy Act, in a clear, consistent, timely, and impartial manner that recognizes regional diversity.

AMENDATORY SECTION (Amending WSR 12-05-110, filed 2/22/12, effective 3/24/12)

WAC 242-03-025 ~~((Jurisdiction-))~~ Statutory authority. ~~((Subject matter jurisdiction-))~~ The board ~~((shall))~~ has statutory authority to hear and determine:

(1) Petitions alleging that a state agency, county, or city is not in compliance with the requirements of:

(a) The Growth Management Act; or

(b) Chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, including the department of ecology's approval or denial of such adoption or amendment but excluding the department of ecology's adoption of a shoreline master program by rule pursuant to RCW 90.58.070(2); or

(c) Chapter 43.21C RCW as it relates to plans, development regulations, and amendments adopted under the act or chapter 90.58 RCW; or

(2) Petitions from cities or the governor relating to an adopted county-wide planning policy; or

(3) Petitions alleging that the ~~((twenty))~~ 20-year growth management planning projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

AMENDATORY SECTION (Amending WSR 23-11-077, filed 5/17/23, effective 6/16/23)

WAC 242-03-060 Board office. (1) The administration of the board is consolidated in one office - The environmental and land use hearings office:

Growth Management Hearings Board
c/o Environmental and Land Use Hearings Office
1111 Israel Road S.W., Suite 301
Tumwater, WA 98501
P.O. Box 40903
Olympia, WA 98504-0953
website: www.eluho.wa.gov
ELUHO Main Office: 360-664-9160
Fax: 360-586-2253
Regional Email Inboxes
email: eastern@eluho.wa.gov
email: western@eluho.wa.gov
email: central@eluho.wa.gov

(2) Unless a party does not have the technological capacity to do so, the filing of all petitions, briefs, exhibits, and other documents related to any proceeding before a regional panel shall be electronically through the CMS. Exhibits must be formatted and filed in accordance with the board's electronic exhibit requirements. Information about accessing the CMS and requirements for exhibits is available at the ELUHO website at www.eluho.wa.gov.

(3) Email or mail filings shall substitute for filing through the CMS in the event that the filing through the CMS is unavailable or impossible or if a party does not have the technological capacity, such as lack of access to an internet connection or a computer, to utilize the CMS.

AMENDATORY SECTION (Amending WSR 11-13-109, filed 6/21/11, effective 7/22/11)

WAC 242-03-095 Case numbering. The board shall assign a case number to each petition for review which shall be the official reference number for purposes of identification. The first two digits of the case number shall correspond to the last two digits of the calendar year in which the petition was filed. The third digit shall designate which regional panel (~~(has jurisdiction)~~) shall preside over the matter. The Eastern Washington panel shall use the digit "1"; the Western Washington panel shall use the digit "2"; and the Central Puget Sound panel shall use the digit "3." The last four digits shall be numbered sequentially in order of receipt. Consolidated cases are generally assigned the number of the last filed petition followed by a "c."

AMENDATORY SECTION (Amending WSR 16-02-114, filed 1/6/16, effective 2/6/16)

WAC 242-03-510 Index of the record. (1) Within (~~(thirty)~~) 30 days of service of a petition for review, the respondent shall file with the board and serve a copy on the parties (~~(of)~~) an index listing all materials used in taking the action which is the subject of the petition for review, including materials submitted in public comment. The index shall contain sufficient identifying information to enable unique documents to be distinguished.

(2) Concurrent with the filing of the index, the respondent shall make all documents in the index reasonably available to the petitioners for inspection and copying without the necessity for a public records request. In addition, the written or electronic record of the legislative proceedings where action was taken shall be available to the parties for inspection or transcription. Respondents may charge for the cost of copies of documents requested by other parties in accordance with RCW 42.56.120, as amended.

(3) Within seven days after the filing of the index, any other party may file a list of proposed additions to the index. To the extent such documents were submitted to the jurisdiction or a part of the jurisdiction's proceedings prior to the challenged action, they are presumed admissible subject to relevance. If the respondent objects to any proposed addition, the petitioner may bring a motion to supplement the record as provided in WAC 242-03-565.

(4) Respondent may file a corrected index to add, delete, or correct the listing of documents it considered, without the necessity for a motion to supplement the record, by no later than a week before the date for filing the petitioner's prehearing brief.

AMENDATORY SECTION (Amending WSR 23-11-077, filed 5/17/23, effective 6/16/23)

WAC 242-03-530 Presiding officer—Powers and duties. It shall be the duty of the presiding officer to conduct conferences or hearings in an impartial and orderly manner. The presiding officer shall have the authority, subject to the other provisions of the act or these rules to:

(1) Inspect the petition for review to determine whether, on its face, compliance with requirements for (~~(subject matter jurisdiction)~~) the board's statutory authority over the matter, procedural filing and service requirements, and standing requirements of the act is shown, and if compliance is not shown, to recommend an action or to refer the issue to the board for resolution;

(2) Require that parties not represented by counsel designate a spokesperson(s);

(3) Conduct the prehearing conference, seek clarification or simplification of issues, establish the case schedule, and regulate the course of the case;

(4) Rule on all procedural matters, objections and routine motions; resolve procedural issues concerning service of documents by email or by mail in light of technical capabilities or other circumstances;

- (5) Rule on all evidentiary matters including supplementation of the record;
- (6) Decide motions for intervention, amicus, or compliance participant status;
- (7) Consolidate cases for hearing pursuant to RCW 36.70A.290(5) or coordinate cases pursuant to WAC 242-03-030(5) and 242-03-030(6) when such consolidation or coordination will expedite disposition and avoid duplication of evidence and argument;
- (8) Review cases for settlement or mediation opportunities and assist the parties in arranging such sessions;
- (9) Administer oaths and affirmations if witnesses are permitted to testify, authorize discovery, or issue subpoenas in exceptional circumstances as provided in RCW 34.05.446;
- (10) Encourage the parties to stipulate to the admissibility of documents in advance of a hearing and rule on issues concerning the content of the record;
- (11) Limit the length of a brief or impose format restrictions;
- (12) Rule on requests for settlement extensions;
- (13) Determine whether oral argument will be allowed on a motion and, if so, schedule the hearing; determine whether a conference or hearing shall be held by teleconference or in person;
- (14) Require a party to provide a complete copy of the comprehensive plan, county-wide planning policy, or other core document germane to determination of the case;
- (15) Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver; and
- (16) Take any other action necessary and authorized by these rules, the act, or the Administrative Procedure Act, chapter 34.05 RCW.

AMENDATORY SECTION (Amending WSR 23-11-077, filed 5/17/23, effective 6/16/23)

WAC 242-03-540 Prehearing conference—Purpose. The purpose of a prehearing conference is to:

- (1) Determine the feasibility of and encourage settlement of the matter or any portion thereof and provide information about mediation as set forth in WAC 242-03-575;
- (2) Obtain a stipulation of relevant facts including the board's (~~jurisdiction~~) statutory authority to consider the matter, the petitioner's standing in the matter, and the timeliness of the petition for review;
- (3) Obtain agreement as to the issues of law and fact presented and their clarification, simplification, limitation, or resolution, so as to frame the final issues to be decided by the board;
- (4) Rule on any pending matters of intervention, consolidation, or the qualification of individual board members or the composition of the panel;
- (5) Determine the witnesses, if any, that may be allowed to be called by the parties;
- (6) Set the final case schedule for filing motions, deadlines for briefing, and date and time of the hearing on the merits;
- (7) Determine the approximate time necessary for the presentation of evidence and/or argument of the respective parties;

(8) Obtain all other information which may aid in the prompt disposition of the matter; and

(9) Resolve procedural issues concerning service of documents by email or by mail in light of technical capabilities or other circumstances.

AMENDATORY SECTION (Amending WSR 11-13-109, filed 6/21/11, effective 7/22/11)

WAC 242-03-545 Prehearing order. (1) Within seven days after the prehearing conference, the presiding officer shall issue a prehearing order memorializing rulings of the board at or prior to the prehearing conference, establishing the issues for resolution in the case, and setting the final case schedule for motions, briefing, and the hearing on the merits. The prehearing order may include:

(a) Admissions concerning (~~jurisdiction~~) the board's statutory authority to consider the matter, standing, or timeliness of the appeal;

(b) Provisions concerning the record, documents to be provided, witnesses allowed, if any, and authenticity and/or admissibility of exhibits;

(c) Limitations on length of briefs and the coordination of arguments from parties with related issues; or

(d) Any other matters that may expedite the resolution of the matter.

(2) Any objection to such order shall be made in writing within seven days after the date the order is dated. The prehearing order shall control ensuing proceedings unless modified for good cause by a subsequent order.

AMENDATORY SECTION (Amending WSR 21-17-069, filed 8/12/21, effective 9/12/21)

WAC 242-03-555 Dispositive motions. (1) Dispositive motions on a limited record to determine the board's (~~jurisdiction~~) statutory authority to consider the matter, the standing of a petitioner, or the timeliness of the petition are permitted. The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline or a procedural challenge to the State Environmental Policy Act (SEPA) compliance.

(2) Dispositive motions and responses shall be filed by the dates established in the prehearing order. The board may refuse to hear a motion that is not timely filed, except where good cause is shown.

(3) The presiding officer, taking into consideration the complexity and finality of the issues raised, may, in the presiding officer's discretion, request a reply brief from the moving party, schedule a telephonic hearing for argument of the motion or may defer the board's consideration of the motion until the hearing on the merits.

(4) Unless the order on dispositive motions is a final order pursuant to WAC 242-03-030(9), no motion for reconsideration will be allowed.

AMENDATORY SECTION (Amending WSR 21-17-069, filed 8/12/21, effective 9/12/21)

WAC 242-03-590 Briefs. (1) A petitioner, or a moving party when a motion has been filed, shall submit a brief addressing each legal issue it expects the board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order.

(2) Briefs shall be filed according to the requirements and schedule in the prehearing order or any subsequent order amending the briefing schedule.

(3) Clarity and brevity are expected to assist the board in meeting its statutorily imposed time limits. A presiding officer may limit the length of a brief and impose format restrictions.

(4) A copy of any development regulation provision cited in the brief shall be included as an appendix, unless the provision is quoted verbatim in the brief.

(5) Where there is a map in the record that helps illustrate the material facts, petitioner shall include a copy of that map as an exhibit to the brief.

(6) The respondent shall indicate in its brief whether it has delayed the effective date of the action subject to the petition before the board until after the board issues its final decision and order.

AMENDATORY SECTION (Amending WSR 23-11-077, filed 5/17/23, effective 6/16/23)

WAC 242-03-720 Dismissal of action. (1) Any action shall be dismissed by the board:

(a) Upon petitioner's withdrawal of the petition for review before entry of a final decision and order; or

(b) Upon stipulation for dismissal by petitioner(s) and respondent(s) (~~before entry of a final decision and order~~).

(2) Any action may be dismissed by the board:

(a) Upon motion of the respondent alleging that the petitioner has failed to prosecute the case, failed to comply with these rules, or failed to follow any order of the board; or

(b) Upon the board's own motion for failure by the parties to comply with these rules or any order of the board.

(c) Upon the board's own motion for petitions that are frivolous, not within the board's (~~subject matter jurisdiction~~) statutory authority to consider the matter, not in compliance with procedural service and filing requirements, or the petitioner's lack of standing.

AMENDATORY SECTION (Amending WSR 11-13-109, filed 6/21/11, effective 7/22/11)

WAC 242-03-820 Final decision and order. (1) In its final decision and order, the board shall either:

(a) Find that the state agency, county or city is in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption, denial or amendment of shoreline master pro-

grams, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county or city is not in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption, denial or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW.

(2) If the board's final decision and order finds noncompliance:

(a) Conclusions of law in the final decision and order shall specify the nature, scope, and statutory basis for the finding of non-compliance.

(b) The board shall determine and set forth in the final order whether the county or city has delayed or suspended the effective date of the action subject to the petition before the board until after the board issues a final determination pursuant to RCW 36.70A.300 (4) (b).

(c) The board's final decision and order shall remand the matter to the state agency, county, and/or city and establish a compliance schedule as specified in RCW 36.70A.300 (3) (b).

~~((e))~~ (d) The board retains ~~((jurisdiction of))~~ authority over the matter until the board issues its final order on compliance.

(3) In its final decision and order, the board may determine that part or all of a comprehensive plan or development regulations, including shoreline master program provisions, are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand;

(b) Includes in its final decision and order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the act; and

(c) Specifies the part or parts, if applicable, of the plan or regulation that are determined to be invalid and the reasons for invalidity.

(4) The effect of a determination of invalidity is as set forth in RCW 36.70A.302.

AMENDATORY SECTION (Amending WSR 11-13-109, filed 6/21/11, effective 7/22/11)

WAC 242-03-960 Continued noncompliance—Recommendation to the governor. If the board finds that the county, city, or state agency continues to be in noncompliance with the act, the board shall transmit its findings to the governor. The board may recommend that sanctions authorized by the act be imposed or, in the alternative, refer the matter to the department of commerce to provide technical assistance to facilitate speedy resolution of the finding of noncompliance. A county or city's efforts to meet a compliance schedule shall be considered by the board in making a recommendation on sanctions to the governor or in recommending a referral to the department of commerce.