

Title 371 WAC

POLLUTION CONTROL HEARINGS BOARD

Chapters

- 371-08 Practice and procedure.
371-12 Public records.

Chapter 371-08 WAC

PRACTICE AND PROCEDURE

WAC

- 371-08-005 Membership, function and jurisdiction.
371-08-010 Board administration—Office of the board.
371-08-015 Board administration—Meeting of the board.
371-08-020 Board administration—Quorum.
371-08-030 Board administration—Communications with the board.
371-08-031 Procedures applicable.
371-08-032 Definitions.
371-08-035 Appearance and practice before the board—Persons who may and may not appear.
371-08-040 Appearance and practice before the board—Appearance by representative.
371-08-045 Appearance and practice before the board—No formal admission to practice.
371-08-050 Appearance and practice before the board—Withdrawal or substitution of representatives.
371-08-055 Appearance and practice before the board—Conduct.
371-08-065 Presiding officer—Powers and duties.
371-08-071 Subpoenas.
371-08-075 Appeals to the board—Contents of notice of appeal.
371-08-080 Appeals to the board—Time for filing appeals.
371-08-085 Appeals to the board—Dismissal of appeal on jurisdictional grounds.
371-08-095 Appeals to the board—Cross-appeals.
371-08-100 Appeals to the board—Correction or amendment of notice.
371-08-102 Appeals to the board—Responsive pleadings.
371-08-104 Appeals to the board—Stays.
371-08-105 Conferences—Two types.
371-08-110 Conferences—Purpose of informal conferences.
371-08-115 Conferences—When held.
371-08-120 Conferences—Agreements at informal conferences.
371-08-125 Conferences—Purpose of prehearing conferences.
371-08-130 Conferences—When held.
371-08-131 Conferences—Documentary evidence.
371-08-132 Conferences—Excerpts from documentary evidence.
371-08-135 Conferences—Failure to supply prehearing information.
371-08-140 Conferences—Agreements at prehearing conferences.
371-08-144 Procedures—Telephone.
371-08-150 Hearings—Types of hearings.
371-08-155 Hearings—Election of type of hearings.
371-08-156 Hearings—Assignment day—Time.
371-08-160 Hearings—Notice of hearing.
371-08-163 Hearings—Briefs.
371-08-165 Hearings—Continuances, hearing postponements and dismissal.
371-08-175 Hearings—Setting subsequent hearings.
371-08-180 Hearings—Procedures at hearings.
371-08-183 Hearings—Standard and scope of review.
371-08-185 Hearings—Additional evidence by presiding officer.
371-08-186 Rules of evidence—Admissibility criteria.
371-08-187 Rules of evidence—Official notice—Matters of law.
371-08-188 Rules of evidence—Official notice—Material facts.

- 371-08-189 Rules of evidence—Tentative admission—Exclusion—Discontinuance—Objections.
371-08-190 Disposition of contested cases—Definition.
371-08-195 Disposition of contested cases—Record.
371-08-196 Disposition of contested cases—Transcripts.
371-08-200 Disposition of contested cases—Proposed and final decisions and orders.
371-08-201 Disposition of contested cases—Presentation of additional evidence.
371-08-205 Disposition of contested cases—Exceptions.
371-08-210 Disposition of contested cases—Finality of proposed decisions and orders.
371-08-215 Disposition of contested cases—Final decisions and orders.
371-08-220 Appeals to the courts—Notice of appeal to the superior court.
371-08-230 Appeals to the courts—Certification of record.
371-08-235 Computation of time.
371-08-240 Petitions for declaratory ruling.
371-08-245 Petitions for rule making.
371-08-250 Review of permits under the National Pollutant Discharge Elimination System.
371-08-255 Review of permits issued under chapter 173-303 WAC.
371-08-260 Applicability of SEPA guidelines.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 371-08-006 Public records. [Order, § 371-08-006, filed 5/31/73.] Repealed by Order 74-3, filed 5/8/74. See chapter 371-12 WAC.
371-08-025 Board administration—Office of the clerk of the board. [Order 75-1, § 371-08-025, filed 1/9/75; Order 70-1, § 371-08-025, filed 12/18/70.] Repealed by 81-17-055 (Order 82-1, Resolution No. 82-1), filed 8/18/81. Statutory Authority: RCW 43.21B.170.
371-08-060 Presiding officer—Definition. [Order 70-1, § 371-08-060, filed 12/18/70.] Repealed by Order 75-1, filed 1/9/75.
371-08-070 Presiding officer—Substitution of presiding officer. [Order 70-1, § 371-08-070, filed 12/18/70.] Repealed by Order 75-1, filed 1/9/75.
371-08-090 Appeals to the board—Granting the appeal. [Order 75-1, § 371-08-090, filed 1/9/75; Order 70-1, § 371-08-090, filed 12/18/70.] Repealed by 81-17-055 (Order 82-1, Resolution No. 82-1), filed 8/18/81. Statutory Authority: RCW 43.21B.170.
371-08-145 Conferences—Applicability of superior court rules. [Order 75-1, § 371-08-145, filed 1/9/75; Order 70-1, § 371-08-145, filed 12/18/70.] Repealed by 81-17-055 (Order 82-1, Resolution No. 82-1), filed 8/18/81. Statutory Authority: RCW 43.21B.170.
371-08-170 Hearings—Continuances. [Order 70-1, § 371-08-170, filed 12/18/70.] Repealed by Order 75-1, filed 1/9/75.
371-08-225 Appeals to the courts—Notice of appeal to the court of appeals. [Order 75-1, § 371-08-225, filed 1/9/75; Order 70-1, § 371-08-225, filed 12/18/70.] Repealed by Order 77-1, filed 9/8/76. Later promulgation, see WAC 371-08-220.

WAC 371-08-005 Membership, function and jurisdiction. (1) Members. The pollution control hearings board (hereinafter board) is an independent agency of

the state of Washington, composed of three members appointed by the governor, with the advice and consent of the senate, for a term of six years. The members are to be qualified by experience or training in pertinent matters pertaining to the environment, and at least one member shall be a lawyer, and not more than two members shall be of the same political party.

(2) **Function and jurisdiction.** The function of this board is to provide an expeditious and efficient disposition of appeals from the decisions and orders of the department of ecology (hereinafter department) or its director; and from the decisions of air pollution control boards or authorities established pursuant to chapter 70.94 RCW, when such orders and decisions concern matters within the jurisdiction of the board as provided in the act creating it or any subsequent legislation (chapter 43.21B RCW).

(a) Appeals will lie from the issuance, modification or termination of any permit or license issued by the department or air pollution control boards or authorities, including the issuance, modification, or termination of waste disposal permits; the denial of the application for such permits, or the denial of an application for the modification of the terms of such permits.

(b) The board also has jurisdiction to hear and decide appeals from any person aggrieved by an order issued by the department or by such air pollution control boards or authorities with respect to violations of any law administered by the department or of any rule or regulation adopted by the department or by air pollution boards or authorities, inclusive of any variances which the department or air pollution boards and authorities may be authorized to grant, but exclusive of appeals based upon claimed violations of their purely administrative rules and regulations. The board further has jurisdiction to hear and decide appeals from any person aggrieved by any final decision contained in the document issued by the department pursuant to the Environmental Coordination Procedures Act, RCW 90.62.060(6).

(c) This section is intended to be general and informational only, and failure herein to list matters over which the board has jurisdiction at law shall not constitute any waiver or withdrawal whatsoever from such jurisdiction.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-005, filed 8/18/81; Order 75-1, § 371-08-005, filed 1/9/75; Order 70-1, § 371-08-005, filed 12/18/70.]

WAC 371-08-010 Board administration--Office of the board. The headquarters and principal office of the board is the Environmental Hearings Office, 4224 6th Avenue S.E., Building 2 Rowesix, Mailstop: PY-21, Lacey, Washington. (Telephone No. (206) 459-6327).

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-010, filed 8/18/81; Order 75-1, § 371-08-010, filed 1/9/75; Order 70-1, § 371-08-010, filed 12/18/70.]

WAC 371-08-015 Board administration--Meeting of the board. The board shall meet in formal sessions at its principal office at 10:00 a.m. on the first Tuesday of

each month; and shall meet at such other times and places as the board may designate.

[Order 75-1, § 371-08-015, filed 1/9/75; Order 70-1, § 371-08-015, filed 12/18/70.]

WAC 371-08-020 Board administration--Quorum. Two members of the board shall constitute a quorum for making orders or decisions, or for promulgating rules and regulations relating to its procedures, and may act although one position on the board be vacant (RCW 43.21B.090). One member or designated administrative law judge may hold hearings and take testimony when assigned by the board to so do. The findings of such member or administrative law judge shall not become final until approved by a quorum of the board. The lawyer member shall be the chief administrative law judge.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-020, filed 8/18/81; Order 75-1, § 371-08-020, filed 1/9/75; Order 70-1, § 371-08-020, filed 12/18/70.]

WAC 371-08-030 Board administration--Communications with the board. All written communications by parties pertaining to a particular case, including requests for hearings on claimed violations of rules and regulations as specifically provided in RCW 43.21B.120; notices of appeal from orders and decisions of the director and/or department; and applications and requests for relief of any kind, shall be filed with the board at its principal office in Lacey, Washington. Copies of all such written communications shall be furnished to the department or other appropriate agency and to all other interested parties or their representatives of record, and the original filed with the board shall show thereon compliance with this requirement.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-030, filed 8/18/81; Order 75-1, § 371-08-030, filed 1/9/75; Order 70-1, § 371-08-030, filed 12/18/70.]

WAC 371-08-031 Procedures applicable. (1) The board shall be guided in procedural matters before it by chapter 371-08 WAC. Chapter 371-08 WAC specifically replaces the uniform procedural rules chapter 1-08 WAC, except where specifically noted.

(2) Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding pretrial procedures in civil cases in the superior courts of this state shall be followed. Such rules shall include but shall not be limited to those rules pertaining to discovery of evidence by parties to civil actions.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-031, filed 8/18/81; Order 75-1, § 371-08-031, filed 1/9/75.]

WAC 371-08-032 Definitions. As used in this chapter the following terms shall have the following meaning:

(1) "Board" refers to and means the pollution control hearings board as described in WAC 371-08-005. Where appropriate, the term "board" also refers to the

designated agents of the pollution control hearings board.

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

(3) "Presiding officer" or "hearing officer" shall mean any member of the board or any person who is assigned to conduct a conference or hearing by the chairman or by the vice-chairman in event of the chairman's absence.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-032, filed 8/18/81; Order 75-1, § 371-08-032, filed 1/9/75.]

WAC 371-08-035 Appearance and practice before the board—Persons who may and may not appear. No person may appear in a representative capacity before the board 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 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) A bona fide officer, partner or full-time employee of an individual firm, association, partnership, corporation or local government unit who appears for such individual, firm, association, partnership, corporation or local government unit.

(4) Legal interns admitted to practice under APR 9 of the rules of court may appear before the board under the conditions and limitations therein specified.

(5) No former employee of the department or member of the attorney general's staff may, at any time after leaving the employment of the department or the attorney general, appear, except when permitted by RCW 42.18.220, in a representative capacity on behalf of other parties in a formal proceeding in which an active part as a representative of the department was taken in the same case or proceeding.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-035, filed 8/18/81; Order 75-1, § 371-08-035, filed 1/9/75; Order 70-1, § 371-08-035, filed 12/18/70.]

WAC 371-08-040 Appearance and practice before the board—Appearance by representative. (1) Appearances may be made on behalf of any party by his attorney or other duly authorized representative as defined in WAC 371-08-035, by

(a) Filing a written notice of appearance containing the name of the party to be represented, and the name, address and telephone number of the representative, or by

(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 shall be furnished by the representative to all other parties or their representatives of record at the time the original is filed with the board.

(3) Unless the department notifies the board otherwise, the attorney general shall, in all appeals from decisions and orders of the department and director, be deemed to have entered appearance for the department, and shall be exempt from the requirements herein relating to the filing of written notices of appearance and to the furnishing of copies of same to other parties and their representatives.

(4) Thereafter all future notices and orders shall be served by the board upon such representative. Service upon the representative shall constitute service upon the party.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-040, filed 8/18/81; Order 75-1, § 371-08-040, filed 1/9/75; Order 70-1, § 371-08-040, filed 12/18/70.]

WAC 371-08-045 Appearance and practice before the board—No formal admission to practice. Duly authorized representatives shall be permitted to appear in proceedings before the board without a formal request or admission to practice before the board.

[Order 75-1, § 371-08-045, filed 1/9/75; Order 70-1, § 371-08-045, filed 12/18/70.]

WAC 371-08-050 Appearance and practice before the board—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 on 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.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-050, filed 8/18/81; Order 75-1, § 371-08-050, filed 1/9/75; Order 70-1, § 371-08-050, filed 12/18/70.]

WAC 371-08-055 Appearance and practice before the board—Conduct. All persons appearing in a representative capacity in proceedings before the board 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 standard, the presiding officer may admonish or reprimand such person, or exclude such person from further participation in the proceedings and adjourn the same, or report the matter to the board which may, in its discretion, after notice and hearing, take appropriate disciplinary action including, but not limited to, a letter of reprimand, and refusal to permit such person to appear in a representative capacity in any proceeding before the board.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-055, filed 8/18/81; Order 75-1, §

371-08-055, filed 1/9/75; Order 70-1, § 371-08-055, filed 12/18/70.]

WAC 371-08-065 Presiding officer—Powers and duties. 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 as provided in RCW 34.04.105;
- (3) To rule on all procedural matters, objections and motions;
- (4) To rule on all offers of proof and receive relevant evidence;
- (5) To interrogate witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the appeal;
- (6) To secure and present in an impartial manner such evidence, in addition to that presented by the parties, as deemed necessary to fairly and equitably decide the appeal;
- (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 *sua sponte* when it appears that such other parties may have an interest in, or may be affected by, the proceedings;
- (9) To consolidate appeals for hearing when such consolidation will expedite disposition of the appeals and avoid duplication of testimony and when the rights of the parties will not be prejudiced thereby;
- (10) To hold conferences for the settlement or amplification of the issues;
- (11) To take or cause to be taken depositions and interrogatories pursuant to these rules and to procedures available to litigants in civil cases in superior courts in the state of Washington;
- (12) To cause to be submitted, written sworn statements as currently provided in WAC 1-08-470 through 1-08-500;
- (13) To regulate the course of the hearing;
- (14) To take any other action necessary and authorized by these rules and the law.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-065, filed 8/18/81; Order 75-1, § 371-08-065, filed 1/9/75; Order 70-1, § 371-08-065, filed 12/18/70.]

WAC 371-08-071 Subpoenas. (1) **Issuance.** Subpoenas may be issued by any member of the board, or presiding officer assigned to the case, or by the attorney of record, as provided in RCW 34.04.105. Each subpoena shall be subscribed with the signature of the issuing person. Parties desiring subpoenas to be signed by a person from the board shall make a showing of general relevance and reasonable scope of the testimony or evidence sought, and shall prepare the subpoenas for issuance, send them to the board's office for signature, and upon return shall make arrangements for service.

(2) **Form.** Every subpoena shall name the pollution control hearings 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 shall be made by delivering a copy of the subpoena to such person 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 acknowledgement 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 to whom the subpoena is directed 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.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-071, filed 8/18/81.]

WAC 371-08-075 Appeals to the board—Contents of notice of appeal. The notice of appeal shall contain:

- (1) The name, mailing address and telephone number of the appealing party, and of the representative, if any;
- (2) The appealing party's legal residence or principal place of business within the state;
- (3) A copy of the order or decision appealed from, and if the order or decision followed an application, a copy of the application;
- (4) A short and plain statement showing the grounds upon which the appealing party considers such order or decision to be unjust or unlawful, and if one of the grounds so asserted is failure to comply with RCW 43.21C.030 (2)(c) (SEPA), three copies of any environmental impact statement if available to appellant;
- (5) The relief sought, including the specific nature and extent;
- (6) A statement that the appealing party has read the notice and believes the contents to be true, followed by the party's signature and the signature of the representative, if any. If the appealing party is unavailable to sign the notice of appeal, it may be signed by the representative.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-075, filed 8/18/81; Order 75-1, § 371-08-075, filed 1/9/75; Order 70-1, § 371-08-075, filed 12/18/70.]

WAC 371-08-080 Appeals to the board--Time for filing appeals. (1) Unless provided otherwise by law, the notice of appeal shall be filed within thirty days from the date the copy of the order or decision of the department or other agency or pollution control board (or authority) was communicated to the appealing party. The original and one copy of the notice of appeal shall be filed, by mail or otherwise, with the board. The date of filing shall be the date of actual receipt by the board. Receipt of an appeal shall be acknowledged; the date stamp placed thereon shall be prima facie evidence of the date of receipt. The board may thereafter require additional copies to be filed.

(2) If the appeal is of a decision or order of the department, one copy shall be filed, by mail or otherwise, with the director of ecology. If the decision or order appealed from is made by another agency or an air pollution control board (or authority), a notice of appeal shall also be filed with that agency or board (or authority). If the appeal involves a license or permit, a copy of the notice of appeal shall also be mailed to the holder thereof.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-080, filed 8/18/81; Order 75-1, § 371-08-080, filed 1/9/75; Order 70-1, § 371-08-080, filed 12/18/70.]

WAC 371-08-085 Appeals to the board--Dismissal of appeal on jurisdictional grounds. Any party may challenge the jurisdiction of the board to hear an appeal on jurisdictional grounds, and the board may sua sponte raise the jurisdictional issue. The board may, when satisfied that it does not have jurisdiction, dismiss an appeal.

[Order 75-1, § 371-08-085, filed 1/9/75; Order 70-1, § 371-08-085, filed 12/18/70.]

WAC 371-08-095 Appeals to the board--Cross-appeals. Within twenty days after a notice of appeal is received, interested parties may file a notice of cross-appeal with the board which shall conform in all respects to the requirements for a notice of appeal. The cross-appellant shall be subject to the same rules as an appellant, unless the rule is clearly inapplicable.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-095, filed 8/18/81; Order 75-1, § 371-08-095, filed 1/9/75; Order 70-1, § 371-08-095, filed 12/18/70.]

WAC 371-08-100 Appeals to the board--Correction or amendment of notice. (1) If any notice of appeal is found by the board to be defective or insufficient, the board may require the party filing said notice of appeal to correct, clarify or amend the same to conform to the requirements of the statute 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 such appeal upon failure to comply within a specified time.

(2) Prior to the scheduling of the hearing, the party appealing may amend the notice of appeal at any time; thereafter, such amendment may be made on such terms

as the board or presiding officer may prescribe, and the presiding officer may, when deemed necessary, in justice to all parties, require correction, clarification or amendment of a notice of appeal before allowing any hearing thereon to proceed, or may issue an order requiring such correction, clarification or amendment to be made within a specified time, and if such requirement is not complied with, the board may issue an appropriate order which may include dismissal of the appeal.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-100, filed 8/18/81; Order 75-1, § 371-08-100, filed 1/9/75; Order 70-1, § 371-08-100, filed 12/18/70.]

WAC 371-08-102 Appeals to the board--Responsive pleadings. Respondent(s) may file an answer to an appeal with the board and serve a copy thereof upon other parties within twenty days of receipt of the notice of appeal, or such further time that the board may allow. Answers shall generally conform to the requirements of a notice of appeal.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-102, filed 8/18/81.]

WAC 371-08-104 Appeals to the board--Stays. (1) The existing law relating to the staying of appealed orders or decisions pending final determination by the board applies to pending matters.

(2) In an appropriate case, a party may apply for a stay of an appealed order or decision. Written application for such stay must be clearly designated as such in the title, preferably by a separate document. The factual and legal reasons for the granting of a stay shall be stated, and the application shall be supported by affidavits, where appropriate. The original application and one copy shall be filed with the board, and one copy shall be served on the appropriate agency and permit holder (if such holder is not the moving party), if any.

(3) Upon receipt of an application, the board will schedule a hearing on the motion. If it appears that a hearing on the merits and issues of the case should be consolidated with the application for a stay, the board will advance the hearing date on its own initiative, or by request of the parties.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-104, filed 8/18/81.]

WAC 371-08-105 Conferences--Two types. Conferences shall be of two types: Informal and prehearing.

[Order 75-1, § 371-08-105, filed 1/9/75; Order 70-1, § 371-08-105, filed 12/18/70.]

WAC 371-08-110 Conferences--Purpose of informal conferences. The purpose of an informal conference shall be to determine the feasibility of a settlement of the appeal. The presiding officer shall be present at the opening and closing of a scheduled informal conference. If it may facilitate an agreement or a settlement, the presiding officer may leave the conference from time to time.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-110, filed 8/18/81; Order 75-1, § 371-08-110, filed 1/9/75; Order 70-1, § 371-08-110, filed 12/18/70.]

WAC 371-08-115 Conferences—When held. At any time prior to hearing on an appeal, any party thereto may file a written application with the board, requesting an informal conference. The board may thereupon, at its discretion, or any time on its own motion, order an informal conference on not less than seven days' notice mailed to each party to the appeal, at a time and place fixed by the board. At any time prior to hearing, the presiding officer to whom the case is assigned, may, pursuant to agreement of all parties, convene and preside at an informal conference at a time and place agreed upon.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-115, filed 8/18/81; Order 75-1, § 371-08-115, filed 1/9/75; Order 70-1, § 371-08-115, filed 12/18/70.]

WAC 371-08-120 Conferences—Agreements at informal conferences. (1) All agreements reached at informal conferences shall be stated on the record by the presiding officer and the parties shall indicate their concurrence on the record.

(2) If an agreement concerning final disposition of the appeal is reached by all the parties present or represented at a conference, an order may be issued in conformity therewith, providing the board finds said agreement is in accordance with the law.

(3) If the board decides that the agreement is not in accordance with the law and the facts, it may schedule another informal conference, or direct that a prehearing conference be held.

(4) If no agreement is reached by the parties as to final disposition of an appeal, a prehearing conference may thereupon be held.

[Order 75-1, § 371-08-120, filed 1/9/75; Order 70-1, § 371-08-120, filed 12/18/70.]

WAC 371-08-125 Conferences—Purpose of prehearing conferences. The purpose of a prehearing conference shall be to obtain a stipulation of facts to show the board's jurisdiction in the matter; to obtain agreement as to the issues of law and fact presented and the simplification or limitation thereof; to determine the necessity of amendments to the notice of appeal or other pleadings; to determine the possibility of obtaining admissions of facts and authenticity of documents which will avoid unnecessary proof; to determine the admissibility of exhibits; to obtain stipulation as to all or part of the facts in the case; to determine the limitation of the number of witnesses; to obtain information as to the number of expert and lay witnesses expected to be called by the parties and their names when possible; to determine the approximate time necessary for the presentation of the evidence of the respective parties; and to obtain all other information which may aid in the prompt disposition of the appeal.

[Title 371 WAC—p 6]

[Order 75-1, § 371-08-125, filed 1/9/75; Order 70-1, § 371-08-125, filed 12/18/70.]

WAC 371-08-130 Conferences—When held. At any time prior to hearing on an appeal, any party thereto may file a written application with the board requesting a prehearing conference. The board may, thereupon, at its discretion, or at any time on its own motion, order a prehearing conference on not less than seven days' notice mailed to each party to the appeal, at a time and place fixed by the board. At any time prior to hearing, the presiding officer to whom the case is assigned, may, pursuant to agreement of all parties, convene and preside at a prehearing conference at a time and place agreed upon. Such prehearing conference may also be held immediately at the conclusion of an informal conference if time permits, or, at the discretion of the presiding officer, may be held at a later time on seven days' written notice to each party to the appeal.

[Order 75-1, § 371-08-130, filed 1/9/75; Order 70-1, § 371-08-130, filed 12/18/70.]

WAC 371-08-131 Conferences—Documentary evidence. (1) The board or its presiding officer may require:

(a) That all documentary evidence which is to be offered during the taking of evidence be identified at or prior to any prehearing conference.

(b) That documentary evidence not identified, as required by subsection (1)(a), be excluded as evidence in the absence of a clear showing that the offering party had good cause for the failure to produce the evidence sooner.

(c) That the authenticity of all documents so presented and examined be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

(2) The presiding officer may, upon findings made on the record, limit the documentary evidence to that presented at any prehearing conference. For good cause shown any party may submit additional documentary evidence at the time of hearing.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-131, filed 8/18/81; Order 75-1, § 371-08-131, filed 1/9/75.]

WAC 371-08-132 Conferences—Excerpts from documentary evidence. When only portions 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 to the presiding officer and to the other parties. However, the whole of the original document shall be made available for examination and for use by all parties to the proceeding.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-132, filed 8/18/81; Order 75-1, § 371-08-132, filed 1/9/75.]

WAC 371-08-135 Conferences—Failure to supply prehearing information. If any party fails to supply the

presiding officer at a prehearing conference the information reasonably necessary to aid the board in properly scheduling hearings, the board or the presiding officer may suspend setting a hearing pending receipt of the required information, or may refuse to grant such party a continuance of the original hearing, or may otherwise restrict the time or location of hearing for receipt of such party's evidence.

[Order 75-1, § 371-08-135, filed 1/9/75; Order 70-1, § 371-08-135, filed 12/18/70.]

WAC 371-08-140 Conferences--Agreements at prehearing conferences. At the conclusion of a prehearing conference, the presiding officer conducting the same shall state on the record the results thereof. The statement shall include the agreements of the parties concerning issues, admissions, witnesses, time and location of hearings, the issues remaining to be determined and other matters that may expedite the subsequent hearing. The statement of agreement and issues, and rulings of the presiding officer, shall control the subsequent course of the proceedings, unless modified for good cause by subsequent order.

[Order 75-1, § 371-08-140, filed 1/9/75; Order 70-1, § 371-08-140, filed 12/18/70.]

WAC 371-08-144 Procedures--Telephone. Parties may agree to conduct any conference or hearing, or any part thereof, provided in these rules by telephone conference call. Upon a timely request, the board or its presiding officer may schedule such conference or hearing if it appears to promote the fair, speedy and economical processing of a matter compatible with this procedure.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-144, filed 8/18/81.]

WAC 371-08-150 Hearings--Types of hearings. The statute creating the board contemplates two kinds of hearings, informal and formal, without any indication as to what the distinction should be, but with very different provisions for the review of order entered. The procedures in conducting these two types of hearings by the board shall be generally the same.

[Order 75-1, § 371-08-150, filed 1/9/75; Order 70-1, § 371-08-150, filed 12/18/70.]

WAC 371-08-155 Hearings--Election of type of hearings. In all appeals over which the board has jurisdiction, the party taking the appeal may elect a formal or informal hearing. If different parties appeal from the same order and one elects a formal hearing, the hearing will be formal. If no party taking an appeal of an order makes an election, the hearing will be informal. However, notwithstanding any election of a party taking an appeal, the department or any air pollution control board or authority may, within ten days after receiving a notice of appeal, notify the board of its intention that the hearing be formal and when such notice of intention is filed, the hearing will be formal.

[Order 75-1, § 371-08-155, filed 1/9/75; Order 70-1, § 371-08-155, filed 12/18/70.]

(1989 Ed.)

WAC 371-08-156 Hearings--Assignment day--Time. (1) As a general rule, the board, or its designee, shall assign hearing days for cases before it for review on the first Tuesday of each month: *Provided*, That if such day falls on a legal holiday, the assignment day shall be the next working day. The board in its discretion may make such assignments at other times.

(2) The board or its designee may set prehearing conference dates at the same time and on the same conditions as that set out in subsection (1) above.

(3) In all cases, the chairman shall be consulted before assignments are finalized.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-156, filed 8/18/81; Order 75-1, § 371-08-156, filed 1/9/75.]

WAC 371-08-160 Hearings--Notice of hearing. (1) **Time.** If the board schedules a hearing, it shall mail a written notice thereof to all parties not less than twenty days prior to the hearing date unless otherwise provided by law.

(2) **Contents.** The notice shall identify the appeal to be heard, the names of the parties to the appeal and their representatives, if any, and shall specify the time and place of hearing, and that the hearing is to be held pursuant to chapter 43.21B RCW and chapter 371-08 WAC.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-160, filed 8/18/81; Order 75-1, § 371-08-160, filed 1/9/75; Order 70-1, § 371-08-160, filed 12/18/70.]

WAC 371-08-163 Hearings--Briefs. An original and three copies of written briefs, if filed, should be submitted to the board at least three days before the time of hearing, or other such time as the board may prescribe. When 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. Proposed findings may be included with the briefs.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-163, filed 8/18/81.]

WAC 371-08-165 Hearings--Continuances, hearing postponements and dismissal. (1) **Continuances.**

(a) *Pursuant to agreements at prehearing conference.* If agreement is reached at a prehearing conference, continuances shall be granted in accordance with such agreement and no written application therefor shall be required.

(b) *Requests prior to hearing.* If, prior to the hearing date, a party is not able to fully present evidence at the scheduled hearing, such party shall file a written request for continuance with the board setting forth the reasons therefor as soon as such reasons are known and deliver copies to all other parties.

(c) *Requests at time of hearing.* If reasons requiring a continuance of a hearing are not known in time to permit compliance with subsection (b) of this section, application therefor may be made orally at the hearing.

(d) *When granted.* Applications for a continuance made pursuant to subsections (b) or (c) above shall only

[Title 371 WAC—p 7]

be granted upon a proper showing of good cause to prevent manifest injustice. In order to show "good cause," the party applying for a continuance because of the unavailability of a witness or witnesses shall show that due diligence was exercised in attempting to obtain the presence of such witnesses at the time set for hearing and the reasons for their unavailability, and shall identify the witnesses and explain, in substance, what the testimony of such witnesses would prove. In all cases in which a request for continuance is granted, subsequent hearings shall be scheduled.

(2) **Hearing postponements.** A postponement of a hearing may be requested by any party after receipt of the notice of hearing: *Provided*, That written objections are filed within ten days of the receipt of such notice. Copies of such request shall be served on all other parties. If the request is granted, all parties shall be notified of the postponement. Requests for postponement not filed within the ten day period shall be granted only in exceptional cases to prevent manifest injustice.

In all cases in which a request for postponement is granted, subsequent hearings shall be scheduled in accordance with WAC 371-08-175.

(3) **Dismissal.** If the appealing party fails to appear at the scheduled hearing and fails to obtain a continuance or postponement as provided in this section, the appeal shall be dismissed except to prevent manifest injustice or unless such party can show good cause for such failure. Such showing shall be made in writing under oath and shall be filed with the board and copies delivered to all other parties not later than ten days after the mailing of the order of dismissal.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-165, filed 8/18/81; Order 75-1, § 371-08-165, filed 1/9/75; Order 70-1, § 371-08-165, filed 12/18/70.]

WAC 371-08-175 Hearings--Setting subsequent hearings. Any further hearings shall be scheduled in due course at such time and place as deemed proper by the board, the presiding officer or the chairman.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-175, filed 8/18/81; Order 75-1, § 371-08-175, filed 1/9/75; Order 70-1, § 371-08-175, filed 12/18/70.]

WAC 371-08-180 Hearings--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. All testimony to be considered by the board shall be sworn, and each person shall swear (or affirm) that the testimony about to be given shall be the truth, the whole truth, and nothing but the truth.

(3) **Order of presentation of evidence.** The presiding officer shall determine the proper order of presentation of evidence. As a general rule, the appealing party shall initially introduce its evidence, except that in case of an appeal from an order assessing a penalty, the department (or air pollution board), shall initially introduce all

evidence necessary to its case. Rebuttal evidence will then be received.

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

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

(5) **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.

(6) **Former employee as an expert witness.** No former employee of the department shall, at any time after leaving the employment of the department, appear, except when permitted by RCW 42.18.220, 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 was taken.

(7) **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.

(8) **Rulings.** The presiding officer, on objection or *sua sponte*, 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 371-08-185 through 371-08-189.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-180, filed 8/18/81; Order 75-1, § 371-08-180, filed 1/9/75; Order 70-1, § 371-08-180, filed 12/18/70.]

WAC 371-08-183 Hearings--Standard and scope of review. (1) The board will apply the specific criteria provided by law in making its decision on each case.

(2) Hearings shall be quasi-judicial in nature and shall be conducted de novo unless otherwise provided by law.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-183, filed 8/18/81.]

WAC 371-08-185 Hearings--Additional evidence by presiding officer. The presiding officer may, when all parties have rested, present such evidence, in addition to that presented by the parties, as deemed necessary to decide the appeal fairly and equitably. Any such evidence secured and presented by the presiding officer shall be presented in an impartial manner, and shall be received subject to full opportunity for cross-examination by all parties. If a party desires to present rebuttal evidence to any evidence so presented by the presiding officer, application shall be made therefor immediately following the conclusion of such evidence. Such application shall be granted by assignment of a time and place for presentation of such rebuttal evidence.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-185, filed 8/18/81; Order 75-1, §

371-08-185, filed 1/9/75; Order 70-1, § 371-08-185, filed 12/18/70.]

WAC 371-08-186 Rules of evidence—Admissibility criteria. Subject to the other provisions of these rules, all relevant evidence is admissible which, in the opinion of the officer conducting the hearing, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the officer conducting the hearing 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.

[Order 75-1, § 371-08-186, filed 1/9/75.]

WAC 371-08-187 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 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 department, commission or board organization, administration, officers, personnel, official publications, and practitioners before its bar.

(5) **Rules of regional authorities.** Rules or regulations of air pollution control boards or authorities established pursuant to chapter 70.94 RCW, when such rules or regulations are filed with the board pursuant to RCW 43.21B.260.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-187, filed 8/18/81; Order 75-1, § 371-08-187, filed 1/9/75.]

WAC 371-08-188 Rules of evidence—Official notice—Material facts. 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:

(1) **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;

(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 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 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;

(6) **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;

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

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-188, filed 8/18/81; Order 75-1, § 371-08-188, filed 1/9/75.]

WAC 371-08-189 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.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-189, filed 8/18/81; Order 75-1, § 371-08-189, filed 1/9/75.]

WAC 371-08-190 Disposition of contested cases--
Definition. As used herein, a contested case shall mean any case not previously disposed of by agreement of the parties, or by dismissal thereof either voluntarily or for failure of prosecution, which is submitted to the board for determination of any issue of fact or law.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-190, filed 8/18/81; Order 75-1, § 371-08-190, filed 1/9/75; Order 70-1, § 371-08-190, filed 12/18/70.]

WAC 371-08-195 Disposition of contested cases--
Record. The record before the board in any contested case shall consist of the decision or order appealed from, the notice of appeal 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 371-08-196, and other proceedings at the hearing, together with all exhibits offered. No part of the department's record or other documents shall be made part of the record of the board unless admitted in evidence.

[Order 75-1, § 371-08-195, filed 1/9/75; Order 70-1, § 371-08-195, filed 12/18/70.]

WAC 371-08-196 Disposition of contested cases--
Transcripts. The following shall be the policy of the board with regard to transcription of the record:

(1) If less than two or no members of the board are present at the hearing and if exceptions to the proposed decision and order of the board or presiding officer have been timely filed as provided by WAC 371-08-205, the board shall cause a transcript to be printed for review by the board. Any party may obtain a transcript upon payment of the reasonable cost thereof.

(2) The board, in its discretion, may at any time cause a transcript to be printed.

(3) In any case when the board shall not cause a transcript to be printed, it shall be the obligation of the party wishing a transcript, or such portions of it, to order the same from the board reporter and assume the cost of printing same.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-196, filed 8/18/81; Order 75-2, § 371-08-196, filed 11/5/75; Order 75-1, § 371-08-196, filed 1/9/75.]

WAC 371-08-200 Disposition of contested cases--
Proposed and final decisions and orders. (1) Final.

(a) When the hearing on the appeal has been heard by a majority of the board, and upon completion of the record and submission of the issues for decision and order, a written final decision and order concurred in by them then may be adopted which shall contain findings and conclusions as to each contested issue of fact and law.

(b) After issuance of a final decision issued under this subsection, any party may file a petition for reconsideration with the board. Such petition must be filed within eight days of mailing of the final decision. Copies of the petition for reconsideration, and an answer, if required, shall be served on the other parties of record. The original and three copies shall be filed with the board.

(c) The filing of a petition for reconsideration shall suspend the final decision of the board until the petition is denied by the board, or a modified decision is entered by the board.

(d) In response to a petition for reconsideration, the board may deny it, or may modify its decision or reopen the hearing.

(e) Such final decision and order shall be the final decision of the board for purposes of judicial review.

(2) **Proposed.** When the hearing on the appeal has been heard by less than a majority of the board or when less than a majority of the board concur in the matter or when the board shall otherwise elect to do so, a written proposed final decision and order shall thereafter be prepared which shall contain findings and conclusions as to each contested issue of fact and law.

The provision of WAC 371-08-205, 371-08-210, and 371-08-215 shall apply to such proposed decision and order. Petitions for reconsideration are not applicable to final decisions issued after such proposed decisions.

(3) Copies of the final decision and order and proposed decision and order, as the case may be, shall be mailed by the board to each party to the appeal and to the attorney or representative of record.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-200, filed 8/18/81; Order 75-2, § 371-08-200, filed 11/5/75; Order 75-1, § 371-08-200, filed 1/9/75; Order 70-1, § 371-08-200, filed 12/18/70.]

WAC 371-08-201 Disposition of contested cases--
Presentation of additional evidence. After the parties have rested or upon review of the record, the board may present such evidence, in addition to that contained in the record, as deemed necessary to decide the appeal fairly and equitably. Any evidence secured and presented by the board shall be presented in an impartial manner, and shall be received subject to full opportunity for cross-examination by all parties. If a party desires to present rebuttal evidence to any evidence so presented by the board, application shall be made therefor immediately following the submission of such evidence. Such application will be granted by assignment of a time and place for taking of such rebuttal evidence.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-201, filed 8/18/81; Order 75-1, § 371-08-201, filed 1/9/75.]

WAC 371-08-205 Disposition of contested cases--
Exceptions. (1) Time for filing. Within twenty days, or such further period as the board may allow on written application of a party, from the date of receipt of the proposed decision and order to the parties or their attorneys of record, any party aggrieved thereby may file with the board, a written statement of exceptions thereto. Copies thereof shall be furnished to all other

parties. In the event such statement of exceptions is filed, the failure of any party not aggrieved by the proposed decision and order to file a statement of exceptions shall not be deemed a waiver by such party of any objections or irregularities disclosed by the record.

(2) **Contents.** Such statement of exceptions shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein. A general exception to findings of fact on the ground that the weight of evidence is to the contrary shall not be considered sufficient compliance, unless the exception shall refer to the evidence relied upon in support thereof. If legal issues are involved, the statement of exceptions shall set forth the legal theory relied upon and citation of authority and/or argument in support thereof. The statement of exceptions should also contain the exceptor's proposed findings of fact and/or conclusions of law covering the factual and legal issues to which exceptions are being taken.

(3) **Reply to exceptions.** Any party may, within ten days or such further time as the board may allow, submit a reply to exceptions, a written brief or a statement of position regarding the matters on which exceptions were taken, or the board may, on its own motion, require the parties to submit written briefs or statements of position or to appear and present oral argument regarding the matters on which exceptions were taken, within such time and on such terms as may be prescribed.

(4) **Action by board on exceptions.** The board shall, in a case in which it determines that a statement of exceptions does not properly conform to the provisions of subsection (2) above, issue an order requiring the party to amend such statement of exceptions to conform to that rule, within a specified time. Failure of the party to comply with such order shall result in the board issuing an order adopting the proposed decision and order of the board as the decision and order of the board on the ground that no legally sufficient statement of exceptions had been taken to said proposed decision and order.

(5) **Exceptions to rulings on admissibility of evidence.** If an exception is taken to a ruling or rulings of a presiding officer sustaining an objection to admissibility of evidence, or denying a continuance for the presentation of further evidence, and the board determines that said ruling or rulings were erroneous, the board may:

- (a) Return the case to the presiding officer with appropriate instructions, or
- (b) open the matter for further argument and decision by the board itself.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-205, filed 8/18/81; Order 75-1, § 371-08-205, filed 1/9/75; Order 70-1, § 371-08-205, filed 12/18/70.]

WAC 371-08-210 Disposition of contested cases--Finality of proposed decisions and orders. In the event no statement of exceptions is filed as provided herein by any party, the proposed decisions and order of the presiding officer may be adopted by the board and become the final decision and order of the board. Such adoption

of the proposed decision and order shall be the final decision of the board for purposes of judicial review.

[Order 75-1, § 371-08-210, filed 1/9/75; Order 70-1, § 371-08-210, filed 12/18/70.]

WAC 371-08-215 Disposition of contested cases--Final decisions and orders. After the filing of a statement or statements of exceptions, if any, and reply, if any, the filing of briefs or presentation of oral argument, thereon, if required, and the obtaining of additional evidence, if any, as provided for in WAC 371-08-201, the record before the board shall be considered by at least two of the members of the board: *Provided*, That if two members cannot agree on a decision, the third member must consider the record before the board: *And further provided*, That if two members cannot agree on a decision in any case, the substantive decision of the department or pollution control board (or authority) will control in those cases where the appealing party has the burden of proof. Every final decision and order rendered by the board shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the board's order based thereon. A copy of the decision and order, including the findings and conclusions, shall be mailed to each party to the appeal and to the attorney of record.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-215, filed 8/18/81; Order 75-1, § 371-08-215, filed 1/9/75; Order 70-1, § 371-08-215, filed 12/18/70.]

WAC 371-08-220 Appeals to the courts--Notice of appeal to the superior court. All appeals from orders of the board, whether after a formal or informal hearing, shall be to a superior court. (See *Maple Leaf Investors, Inc. v. Department of Ecology*, 10 Wn.App. 586.) The appealing party shall file with the board and all parties of record a copy of the notice of appeal to the superior court.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-220, filed 8/18/81; Order 77-1, § 371-08-220, filed 9/8/76; Order 75-1, § 371-08-220, filed 1/9/75; Order 70-1, § 371-08-220, filed 12/18/70.]

WAC 371-08-230 Appeals to the courts--Certification of record. Upon receipt of a copy of the notice of appeal to the superior court, the board shall certify and transmit to the reviewing court the record made before the board as set forth in RCW 34.04.130(4) and in accordance with WAC 371-08-195 through 371-08-196.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-230, filed 8/18/81; Order 77-1, § 371-08-230, filed 9/8/76; Order 75-1, § 371-08-230, filed 1/9/75; Order 70-1, § 371-08-230, filed 12/18/70.]

WAC 371-08-235 Computation of time. 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, a Sunday, or a legal holiday, and then it is excluded and the next succeeding day which is neither a Saturday, a

Sunday, nor a legal holiday, is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

[Order 75-1, § 371-08-235, filed 1/9/75; Order 70-1, § 371-08-235, filed 12/18/70.]

WAC 371-08-240 Petitions for declaratory ruling.

(1) **Right to petition for declaratory ruling.** As prescribed by RCW 34.04.080, any interested person may petition the board for a declaratory ruling.

(2) **Form of petition.** The form of the petition for a declaratory ruling shall generally adhere to the following:

(a) At the top of the page shall appear the wording "Before the pollution control hearings board, 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 certification of complaints in the superior courts of this state.

(c) The original and two legible copies shall be filed with the board. Petitions shall be on white paper, either 8-1/2" x 11" or 8-1/2" x 13" in size.

(3) **Consideration of petition.** The entire board shall consider the petition, and within a reasonable time shall:

(a) Issue a nonbinding declaratory ruling; or

(b) Notify the person that no declaratory ruling is to be issued; or

(c) Set a reasonable time and place for a hearing or for submission of written evidence on 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) **Disposition of petition.** If a hearing is held or evidence is submitted as provided in subsection (3)(c) above, the board shall, within a reasonable time:

(a) Issue a binding declaratory ruling; or

(b) Issue a nonbinding declaratory ruling, or

(c) Notify the person that no declaratory ruling is to be issued.

[Order 75-1, § 371-08-240, filed 1/9/75; Order 70-1, § 371-08-240, filed 12/18/70.]

WAC 371-08-245 Petitions for rule making. (1) **Right to petition for rule making.** Any interested person may petition the board for the promulgation, amendment, or repeal of any rule.

[Title 371 WAC—p 12]

(2) **Form of petition.** The form of the petition for promulgation, amendment, or repeal of any rule shall generally adhere to the following:

At the top of the page shall appear the wording, "Before the pollution control hearings board, 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."

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 the 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 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.

Petitions shall be dated and signed by the person or entity named in the first paragraph or by the petitioner's attorney. The original and two legible copies of the petition shall be filed with the board. Petitions shall be on white paper, either 8-1/2" x 11" or 8-1/2" x 13" in size.

(3) **Consideration of petitions.** All petitions shall be considered by the entire board, and the board may, in its discretion, order an informal hearing or meeting for the further consideration and discussion of the requested promulgation, amendment, or repeal of any rule.

(4) **Notification of disposition of petition.** The board shall notify the petitioning person within a reasonable time of the disposition, if any, of the petition.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution No. 82-1), § 371-08-245, filed 8/18/81; Order 75-1, § 371-08-245, filed 1/9/75; Order 70-1, § 371-08-245, filed 12/18/70.]

WAC 371-08-250 Review of permits under the National Pollutant Discharge Elimination System. (1) The provisions of this section shall apply only to review proceedings before the board pertaining to permits issued by the department of ecology under the provisions of the National Pollutant Discharge Elimination System.

(2) In those cases where the board determines that a permit issued by the department of ecology is invalid in any respect, the board shall issue an order directing the department of ecology to reissue the permit in accordance with said order and consistent with the provisions of said order and with all applicable federal statutes and

guidelines as well as with applicable state statutes and guidelines.

[Order 75-1, § 371-08-250, filed 1/9/75; Order 74-2, § 371-08-250, filed 2/7/74.]

WAC 371-08-255 Review of permits issued under chapter 173-303 WAC. (1) The provisions of this section shall apply only to review proceedings before the board pertaining to permits issued by the department of ecology under chapter 173-303 WAC.

(2) In the event that the board determines that a permit issued by the department of ecology under chapter 173-303 WAC is invalid in any respect, the board shall issue an order remanding the permit to the department of ecology for reconsideration and appropriate action consistent with the provisions of said order and federal and state law.

[Statutory Authority: RCW 43.21B.170. 83-14-074 (Order 83-1, Resolution No. 83-1), § 371-08-255, filed 7/6/83.]

WAC 371-08-260 Applicability of SEPA guidelines. The board has reviewed its authorized activities pursuant to WAC 197-10-800(4) and has found them all to be exempt from the provisions of chapter 197-10 WAC.

[Order 77-2, § 371-08-260, filed 12/6/77.]

Chapter 371-12 WAC PUBLIC RECORDS

WAC

371-12-010	Purpose.
371-12-020	Definitions.
371-12-030	Public records available.
371-12-040	Communications with the board.
371-12-050	Public records officer.
371-12-060	Office hours.
371-12-070	Requests for public records.
371-12-080	Copying.
371-12-090	Exemptions.
371-12-100	Review of denials of public records requests.
371-12-110	Protection of public records.
371-12-120	Records index.
371-12-130	Adoption of form.

WAC 371-12-010 Purpose. The purpose of this chapter shall be to ensure compliance by the pollution control hearings board with the provisions of chapter 1, Laws of 1973 (Initiative 276, Disclosure—Campaign finances—Lobbying—Records); and in particular with sections 25 through 32 of that act, dealing with public records.

[Order 74-1, § 371-12-010, filed 2/7/74.]

WAC 371-12-020 Definitions. (1) **Public records.** "Public record" includes any writing containing information relating to the performance of any governmental or proprietary function which is prepared, owned, used or retained by the pollution control hearings board, regardless of physical form or characteristics.

(2) **Writing.** "Writing" means handwriting, typewriting, printing, photostating, photographing and every

other means of recording any form of communication or representation, including letters, words, pictures, sounds; or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums and other documents.

(3) **Pollution control hearings board.** The pollution control hearings board (hereinafter board) is a quasi-judicial body created pursuant to chapter 43.21B RCW and is hereinafter referred to as the "board." Where appropriate, the term "board" also refers to the staff and employees of the environmental hearings office.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-020, filed 8/18/81; Order 74-1, § 371-12-020, filed 2/7/74.]

WAC 371-12-030 Public records available. All public records of the board, as defined in WAC 371-12-020, are deemed to be available for public inspection and copying pursuant to these rules, except as otherwise provided by section 31, chapter 1, Laws of 1973, and these rules.

[Order 74-1, § 371-12-030, filed 2/7/74.]

WAC 371-12-040 Communications with the board. All communications with the board, including but not limited to the submission of materials pertaining to its operations and/or the administration or enforcement of chapter 1, Laws of 1973, and these rules, requests for copies of the board's decisions and other matters, shall be addressed as follows: Pollution Control Hearings Board, Environmental Hearings Office, 4224 6th Avenue S.E., Building 2 Rowesix, MS: PY-21, Lacey, Washington 98504.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-040, filed 8/18/81; Order 74-1, § 371-12-040, filed 2/7/74.]

WAC 371-12-050 Public records officer. The administrative officer shall be in charge of the public records. Such person shall be responsible for implementation of these rules and regulations regarding release of public records, and generally insuring compliance with the public records disclosure requirements of chapter 1, Laws of 1973, sections 25 through 34.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-050, filed 8/18/81; Order 74-1, § 371-12-050, filed 2/7/74.]

WAC 371-12-060 Office hours. Public records shall be available for inspection and copying during the customary office hours of the board. For the purposes of this chapter, the customary office hours shall be from 9:00 a.m. to noon and from 1:00 p.m. to 4:00 p.m., Monday through Friday, excluding legal holidays.

[Order 74-1, § 371-12-060, filed 2/7/74.]

WAC 371-12-070 Requests for public records. In accordance with the provisions of chapter 1, Laws of 1973, that agencies prevent unreasonable invasions of

privacy, protect public records from damage or disorganization, and prevent excessive interference with essential functions of the agency, public records may be inspected or copied or copies of such records may be obtained, by members of the public, upon compliance with the following procedures:

(1) A request shall be made in writing upon a form prescribed by the board which shall be available at its administrative office. The form shall be presented to the board or to any member of the board's staff at the administrative office of the board during customary office hours. The request shall include the following information:

(a) The name of the person requesting the record;

(b) The time of day and calendar date on which the request was made;

(c) The nature of the request;

(d) If the matter requested is referenced within the current index maintained by the records officer, a reference to the requested record as it is described in such current index;

(e) If the requested matter is not identifiable by reference to the board's current index, an appropriate identification of the record requested.

(2) In all cases in which a member of the public is making a request, it shall be the obligation of the staff member to whom the request is made, to assist the member of the public in appropriately identifying the public record requested.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-070, filed 8/18/81; Order 74-1, § 371-12-070, filed 2/7/74.]

WAC 371-12-080 Copying. No fee shall be charged for the inspection of public records. The board shall charge a fee of ten cents per page of copy for providing copies of public records and for use of the board's copy equipment. This charge is the amount necessary to reimburse the board for its actual costs incident to such copying.

[Order 74-1, § 371-12-080, filed 2/7/74.]

WAC 371-12-090 Exemptions. (1) The board reserves the right to determine that a public record requested in accordance with the procedures outlined in WAC 371-12-100 is exempt under the provisions of sections 31, chapter 1, Laws of 1973.

(2) In addition, pursuant to §§ 26, chapter 1, Laws of 1973, the board reserves the right to delete identifying details when it makes available or publishes any public records, in any cases when there is reason to believe that disclosure of such details would be an invasion of personal privacy protected by chapter 1, Laws of 1973. The board will fully justify such deletion in writing.

(3) All denials of requests for public records must be accompanied by a written statement specifying the reason for the denials, including a statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

[Order 74-1, § 371-12-090, filed 2/7/74.]

[Title 371 WAC—p 14]

WAC 371-12-100 Review of denials of public records requests. (1) Any person who objects to denials of a request for a public record may petition for prompt review of such decision by tendering a written request for review. The written request shall specifically refer to the written statement by the staff member which constituted or accompanied the denial.

(2) Immediately after receiving a written request for review of a decision denying a public record, the staff member denying the request shall refer it to a member of the board. The member shall immediately consider the matter and, if appropriate, call a special meeting of the board as soon as possible to review the denial. In any case, the request shall be returned with a final written decision of the board or its acting member within two business days following the original denial.

(3) Administrative remedies shall not be considered exhausted until the board or its acting member shall have returned the petition with a decision or until the close of the second business day following denial of inspection, whichever occurs first.

(4) With regard to review of denial or requests hereunder, the provisions of WAC 371-08-020 shall be inapplicable.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-100, filed 8/18/81; Order 74-1, § 371-12-100, filed 2/7/74.]

WAC 371-12-110 Protection of public records. The administrative officer shall, to the extent practicable, insure that records requested are not removed from the premises nor portions thereof removed by members of the public.

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-110, filed 8/18/81; Order 74-1, § 371-12-110, filed 2/7/74.]

WAC 371-12-120 Records index. (1) **Index.** The board shall have available to all persons a current index which shall provide identifying information as to those records applicable to the board, which have been issued, adopted or promulgated since June 30, 1972, described in sections 26 of chapter 1, Laws of 1973, as follows:

"(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(b) Those statements of policy and interpretations of policy, statute and the constitution which have been adopted by the agency;

"(c) Administrative staff manuals and instructions to staff that affect a member of the public;

"(d) Planning policies and goals, and interim and final planning decisions;

"(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

"(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory or enforcement responsibilities of the

agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party."

(2) Availability. The current index promulgated by the board shall be available for inspection by all persons under the same rules and on the same conditions as are applied to public records available for inspection.

[Order 74-1, § 371-12-120, filed 2/7/74.]

WAC 371-12-130 Adoption of form. The board hereby adopts the use by all persons requesting inspection and/or copies of records the form set out below, entitled "Request for public records."

We have received your request for copies of our public records. Please complete the form and return it with the amount required. We will forward the requested copies to you as soon as we receive this form.

Thank you.

Return to:

Pollution Control Hearings Board
Environmental Hearings Office
4224 6th Avenue S.E.
Building 2 Rowsix, MS: PY-21
Lacey, Washington 98504

POLLUTION CONTROL HEARINGS BOARD

REQUEST FOR PUBLIC RECORDS

Date ----- Time -----

Name -----

Address -----

Description of Records (see index):

I certify that the information obtained through this request for public records will not be used for commercial purposes.

Signature

Number of Copies -----

Number of Pages -----

Per Page Charge \$-----

Total Charge \$-----

[Statutory Authority: RCW 43.21B.170. 81-17-055 (Order 82-1, Resolution 82-1), § 371-12-130, filed 8/18/81; Order 74-1, § 371-12-130 and Form, filed 2/7/74.]