

Title 371 WAC

ENVIRONMENTAL HEARINGS OFFICE (POLLUTION CONTROL HEARINGS BOARD)

Chapters

371-08 Practice and procedure.

Chapter 371-08 WAC

PRACTICE AND PROCEDURE

WAC

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WAC 371-08-305 Definitions. The following terms apply throughout this chapter and, unless the context clearly requires otherwise, have the following meanings:

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

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

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

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

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

(6) "Filing" of a document means actual receipt by the board during regular office hours. Any document filed with the board shall contain an affirmation that copies were served on the appropriate agency and parties. Filing by facsimile is permitted of documents ten pages or less if the original document is concurrently mailed or submitted to a commercial delivery service. Electronic filing of documents, other than the appeal document itself, may be authorized by the presid-

ing officer after consultation with the parties regarding format and authentication.

(7) "Party" means:

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

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

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

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

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

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

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

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

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

(e) Electronic service. Electronic service of documents, other than the appeal document itself, is authorized if the parties agree to electronic service or if authorized by the presiding officer.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-305, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310. 05-15-017, § 371-08-305, filed 7/7/05, effective 8/7/05. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-305, filed 7/3/96, effective 8/3/96.]

WAC 371-08-310 Computation of time. (1) The time within which any act shall be done, as provided by these rules, is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a legal holiday, and then it is excluded and the next succeeding day which is neither a Saturday, Sunday nor a legal holiday is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in the computation.

(2) This section also pertains to the period for filing an appeal with the board, petition for rule making, petition for declaratory ruling or any other adjudication authorized by this chapter.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-310, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170 and 1997 c 125. 97-19-064, § 371-08-310, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 43.21B.170 and Den Beste v. Washington, No. 13967-1-III (Div. III, April 18, 1996). 96-17-016, § 371-08-310, filed 8/12/96, effective 9/12/96.]

WAC 371-08-325 Public information about practice before the board and public records. (1) Questions about practicing before the board may be directed to the environmental hearings office by mail or, during regular office hours, by telephone or by telefacsimile.

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

(3) The environmental hearings office maintains a web site with information on the pollution control hearings board, including information about the board members, the board hearings calendar, past decisions of the board, a handbook with helpful information for practice before the board, sample forms, and links to the board's rules of practice and other pertinent statutes and rules. This web site may be accessed via the internet at <http://www.eho.wa.gov>.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-325, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, 96-15-003, § 371-08-325, filed 7/3/96, effective 8/3/96.]

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

(2) The notice of appeal shall be filed with the board within thirty days of the date of receipt of the order or decision. The board's rule governing the computation of time (WAC 371-08-310) shall determine how the thirty-day appeal period is calculated. The "date of receipt" of an order or decision means:

(a) Five business days after the date of mailing; or

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

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

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-335, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310, 05-15-017, § 371-08-335, filed 7/7/05, effective 8/7/05. Statutory Authority:

RCW 43.21B.170 and 1997 c 125. 97-19-064, § 371-08-335, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 43.21B.170 and Den Beste v. Washington, No. 13967-1-III (Div. III, April 18, 1996). 96-17-016, § 371-08-335, filed 8/12/96, effective 9/12/96.]

WAC 371-08-405 Jurisdictional requirements of the board—Dismissal on jurisdictional grounds. (1) Timely filing of the notice of appeal with the board and timely service of the notice of appeal on the appropriate agency are required for the board to acquire jurisdiction.

(2) Any party may challenge the jurisdiction of the board to hear an appeal, and the board may independently raise the jurisdictional issue. The board shall, when satisfied that it does not have jurisdiction, dismiss an appeal.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-405, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, 96-15-003, § 371-08-405, filed 7/3/96, effective 8/3/96.]

WAC 371-08-450 Motions. (1) An application to the board for an order must be by motion which, unless made during a hearing, must be in writing, state with particularity the grounds therefor and set forth the relief sought. A moving party is not required to submit a proposed order with a motion unless requested to do so by the presiding officer.

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

(3) If the motion is contested, any party may request, or the board may independently set, an oral argument on the motion. The presiding officer will decide whether or not oral argument will be held and notify the parties accordingly. At oral argument, the board will consider the arguments of the parties but will not take evidence.

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

(a) All motions dispositive of all or part of an appeal must be filed and served not later than sixty days before the secondary hearing date, or, if no secondary date applies, the primary hearing date, unless the presiding officer by order allows otherwise.

(b) All responses to any dispositive motion must be filed and served fourteen days from the receipt of the motion by the nonmoving party. The moving party then has ten days from receipt of the response to file and serve a reply.

(c) All responses to any nondispositive motion must be filed and served five days from receipt of the motion by the nonmoving party. The moving party then has three days from receipt of the response to file and serve a reply.

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

(5) Unless oral argument is held, the board normally decides motions exclusively on the parties' written submissions.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-450, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW

43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310. 05-15-017, § 371-08-450, filed 7/7/05, effective 8/7/05. Statutory Authority: RCW 43.21B.170. 02-06-012, § 371-08-450, filed 2/22/02, effective 3/25/02; 96-15-003, § 371-08-450, filed 7/3/96, effective 8/3/96.]

WAC 371-08-460 Postponements or continuances of hearings. (1) Postponement or continuance of a hearing is within the discretion of the presiding officer, whether contested or uncontested by the parties. The board may postpone or continue a hearing on its own motion.

(2) A party may seek the postponement or continuance of a hearing by written motion and according to the procedure set forth in WAC 371-08-450.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-460, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-460, filed 7/3/96, effective 8/3/96.]

WAC 371-08-470 Hearing briefs. Hearing briefs, if filed, must be submitted to the board at least seven days before the hearing or such other time as directed by the presiding officer. The original brief must be filed with the board and a copy served on the other parties or their attorneys. Additional copies must be submitted to the board as required by the presiding officer and consistent with the prehearing order. The board may permit or require the filing of additional briefs.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-470, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-470, filed 7/3/96, effective 8/3/96.]

WAC 371-08-475 Procedures at hearings. (1) **Presiding officer.** All hearings are 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.** All testimony to be considered by the board must be sworn or affirmed. The presiding officer, or other authorized officer, shall administer the oath to witnesses.

(3) **Recording.**

(a) An official record of all evidentiary hearings must be made by manual, electronic, or other type of recording device.

(b) Unofficial use of photographic and recording equipment is permitted at hearings; however, anyone seeking to use such equipment must consult first with the presiding officer, who may impose conditions on their use as necessary to prevent disruption of the hearing.

(4) **Order of presentation of evidence.**

(a) The presiding officer shall determine the proper order of presentation of evidence. As a general rule, the appealing party shall initially introduce its evidence, except that in case of an appeal from a regulatory order or an order assessing a penalty, the issuing agency shall initially introduce all evidence necessary to its case.

(b) The opposing party shall present its evidence after the party initially presenting evidence has rested.

(c) Rebuttal and surrebuttal evidence will be received only at the discretion of the presiding officer.

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

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

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

(7) **Former employee as an expert witness.** Except when permitted by applicable state conflict of interest law, no former employee of the department may appear as an expert witness on behalf of other parties in a formal board proceeding in which he or she took an active part in the matter giving rise to the appeal as an employee of the department.

(8) **Objections and motions to strike.** Objections to the admission or exclusion of evidence must be in short form stating the legal grounds of objection relied upon.

(9) **Rulings.** The presiding officer, on objection or independently, shall exclude all irrelevant or unduly repetitious evidence and all rulings upon objections to the admissibility of evidence shall be made in accordance with WAC 371-08-480 through 371-08-515.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-475, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-475, filed 7/3/96, effective 8/3/96.]

WAC 371-08-535 Final decisions and orders. (1)

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

(2) 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 provided further, That if two members cannot agree on a decision in any case, the substantive decision of the agency (or authority) will control.

(3) The board shall mail copies of the final decision and order to each party to the appeal or to the attorney or representative of record, if any. Service upon the representative constitutes service upon the party.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-535, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-535, filed 7/3/96, effective 8/3/96.]

WAC 371-08-550 Petitions for reconsideration. (1)(a)

After issuance of a final decision, any party may file a petition for reconsideration with the board. Such petition must be filed and served on all parties within ten days of mailing of the final decision. The board may require an answer, or parties may elect to file an answer, to the petition for reconsideration. Any answer to a petition for reconsideration must be filed and served on all parties within five days of the receipt of the petition.

(b) The filing of a petition for reconsideration does not stay the effectiveness of the final decision of the board.

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

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

(3) The board shall mail copies of the final decision and order and of the board's disposition of any petition for reconsideration to each party to the appeal or to the attorney or representative of record. Service on the representative constitutes service on the party.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-550, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-550, filed 7/3/96, effective 8/3/96.]

WAC 371-08-560 Direct review to the court of appeals upon certification by the board. (1) Within thirty days after filing the petition for review with the superior court, a party may file an application for direct review with the superior court and must serve the board and all parties of record. The application for direct review shall request the board to file a certificate of appealability.

(2) If the board's jurisdiction is among the issues on review to the superior court, the board may, on its own motion, file an application for direct review with the superior court on the jurisdictional issue.

(3) From the date the board is served a copy of the application for direct review under subsection (1) of this section, the board shall have thirty days to grant or deny the request to file a certificate of appealability. The board shall file its decision granting or denying the certificate of appealability with the superior court and serve the parties of record.

(4) The board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest, and either of the following:

(a) Fundamental and urgent statewide or regional issues are raised; or

(b) The proceeding is likely to have significant precedential value.

(5) The board shall state in the certificate of appealability, or in its decision denying the certificate, which criteria set forth in subsection (4) of this section it applied and how those criteria were or were not met.

(6) Where the board issues a certificate of appealability, the parties have fifteen days from the date the certificate is served to file a notice of discretionary review in the superior court. The notice must include a copy of both the certificate of appealability and the final order or decision of the board being appealed.

(7) If the appellate court accepts review, the certificate of appealability shall be transmitted to the court of appeals as part of the certified record.

(8) If the certificate of appealability is denied, review of the board's decision shall be by the superior court. The superior court's decision may be appealed to the court of appeals.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 371-08-560, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. 96-15-003, § 371-08-560, filed 7/3/96, effective 8/3/96.]