

**WSR 25-07-076**  
**PROPOSED RULES**  
**ENVIRONMENTAL AND**  
**LAND USE HEARINGS OFFICE**  
[Filed March 17, 2025, 9:49 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 24-08-013.

Title of Rule and Other Identifying Information: Chapter 371-08 WAC, Environmental and land use hearings office (ELUHO) (pollution control hearings board (board)) practice and procedure.

Hearing Location(s): On May 2, 2025, at 10:00 a.m., via Zoom at <https://eluhwa-gov.zoom.us/j/87938757276>, Meeting ID 879 3875 7276; or One-tap mobile +12532050468,,87938757276# US, +12532158782,,87938757276# US (Tacoma); or at 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501. Find your local number at <https://eluhwa-gov.zoom.us/j/87938757276>.

Date of Intended Adoption: May 30, 2025.

Submit Written Comments to: Jamie Merly, 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501, email [Jamie.Merly@eluhwa.gov](mailto:Jamie.Merly@eluhwa.gov), beginning 8:00 a.m. on March 17, 2025, by 5:00 p.m. on May 5, 2025.

Assistance for Persons with Disabilities: Contact Jamie Merly, phone 360-485-1282, email [Jamie.Merly@eluhwa.gov](mailto:Jamie.Merly@eluhwa.gov), by May 1, 2025.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Clarifies "date of receipt" of board orders or decisions to align with *Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 509 P.3d 325 (2022); adds new sections with procedures regarding the board's handling of confidential and exempt information and issuing protective orders; updates language to be gender neutral; adds new section and amends sections related to consolidation of appeals to align with RCW 43.21B.340; removes the requirement that settlement agreements be submitted to the board upon requesting a dismissal due to settlement; and amends a section and adds a new section to give clarity on requirements for filing exhibits.

Reasons Supporting Proposal: The rule changes provide clarity to board litigants of board procedures. They align the board rules with recent caselaw and statutory changes. They align with current business standards respecting gender nonbinary designations.

Statutory Authority for Adoption: RCW 43.21B.170.

Statute Being Implemented: Chapter 43.21B RCW.

Rule is necessary because of state court decision, *Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 509 P.3d 325 (2022).

Name of Proponent: ELUHO, pollution control hearings board, governmental.

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

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

A cost-benefit analysis is not required under RCW 34.05.328. ELUHO is not specifically listed in RCW 34.05.328 (5) (a) (i) and does not intend to make this section voluntarily applicable to this rule update per subsection (5) (a) (ii). The rule changes amend procedural rules as defined in RCW 34.05.328 (5) (c) (i) (A). Unless subsection (5) (a) (ii) is invoked by the joint administrative rules [review] committee after filing the CR-102, no cost-benefit analysis is required.

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

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

Scope of exemption for rule proposal:

Is fully exempt.

March 17, 2025

Jamie Merly, Director

Legal and Administrative Services

### RDS-6034.3

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**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) "CMS" means the environmental and land use hearings office case management system or any successor system designated by the board.

(6) "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, proven by a preponderance of the evidence, whichever is later. 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 45 days from the date of mailing.

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

~~((7))~~ (8) "Filing" of a document means actual receipt by the board between the hours of 8:00 a.m. and 5:00 p.m. on days other than Saturdays, Sundays, or legal holidays. The board's record of the date and time of receipt of a document shall be evidence of the date of filing. Filings received after 5:00 p.m., or on a Saturday, Sunday, or legal holiday, shall be considered filed on the next business day. If the last day for filing a document as required by these rules falls on

a day when the board is closed under WAC 371-08-320(3), then the time for such filing shall be extended until the end of the next business day upon which the board is open for business.

(a) The filing of documents with the board shall be electronically through the CMS. Information about accessing the CMS is available at the ELUHO website at [www.eluho.wa.gov](http://www.eluho.wa.gov). If a party does not have the technological capacity to file electronically through the CMS, a party may file documents by personal delivery, commercial delivery, fax, electronic mail, or first-class, registered, or certified mail.

(b) Any document filed with the board shall contain an affirmation that copies were served on the appropriate agency and parties.

(c) Filing of a document in the method authorized in (a) of this subsection shall substitute for filing through the CMS in the event the CMS is unavailable or in emergency situations in which the governor declares a statewide emergency.

~~((8))~~ (9) "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.

~~((9))~~ (10) "Person" means any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.

~~((10))~~ (11) "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.

~~((11))~~ (12) "Service" of appeals and other documents related to adjudicative proceedings before the board means delivery of the document to the parties to the appeal. Service of board decisions means delivery of the document to the 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) Fax transmission with mailing or submission to commercial delivery service of copies on the same day. Service by fax 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 is authorized if agreed to by the receiving party. Service by email is regarded as complete when the email is sent successfully. Electronic service is regarded as complete when the document is uploaded successfully to the receiving party's designated electronic system. The receiving party's record of the date and time of receipt of a document shall be evidence of the service date.

~~((12))~~ (13) "Signature" means a written signature, or an electronic signature executed or adopted by a person with the intent to sign a document either in the form of s/\_\_\_\_ (name typed out), a graphic representation of an electronic signature, or a digital graphic representation of the signature as signed by the person. An electronic signature shall be considered the same as an original signature for all purposes.

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**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 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) As prescribed by RCW 76.09.205, a person aggrieved by the approval or disapproval of an application to conduct a forest practice or the approval or disapproval of any landscape plan or permit or watershed analysis may seek review before the board by filing a notice of appeal with the board, and filing a copy of the notice of appeal with the department of natural resources and the attorney general within 30 days from the date of receipt of the approval or disapproval decision.

(3) The notice of appeal shall be filed with the board within 30 days of the date of receipt of the order or decision unless otherwise provided by law. The board's rule governing the computation of time (WAC 371-08-310) shall determine how the 30-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, proven by a preponderance of the evidence, whichever is later. 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 45 days from the date of mailing.))~~

(4) An appeal shall be filed with the board electronically through the CMS, except as identified in WAC 371-08-361 (3)(e). If a party does not have the technological capacity to file electronically through the CMS, a party may file by personal delivery, commercial delivery, fax, electronic mail, 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. Upon receiving the notice of appeal, the board will acknowledge receipt. The board's record of the date and time of receipt of a document shall be evidence of the filing date. Filings received after 5:00 p.m., or on a Saturday, Sunday, or legal holiday, shall be considered filed on the next business day. If the last day for filing a document as required by these rules falls on a day when the board is closed under WAC 371-08-320(3), then the time for such filing shall be extended until the end of the next business day upon which the board is open for business.

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**WAC 371-08-340 Contents of notice of appeal.** The notice of appeal shall contain:

(1) The name, mailing address, telephone number, fax number (if available), and email address of the appealing party, and of the representative, if any;

(2) Identification of the parties, by listing in the caption or otherwise. In every case, the agency whose decision is being appealed

and the person to whom the decision is directed shall be named as parties;

(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;

(5) A clear and concise statement of facts upon which an appealing party relies to sustain ~~((his or her))~~ their grounds for appeal;

(6) The relief sought, including the specific nature and extent;

(7) The signature of the representative of the appealing party or the appealing party. The signature of the representative or the appealing party shall constitute a certificate by the signatory that the signatory has read the notice of appeal and that it is consistent with civil rule 11;

(8) Proof of service must be filed with the board to perfect the appeal;

(9) All pleadings shall be so construed as to do substantial justice.

AMENDATORY SECTION (Amending WSR 05-15-017, filed 7/7/05, effective 8/7/05)

**WAC 371-08-345 Service of the notice of appeal on the agency and other interested parties.** (1) Within ~~((thirty))~~ 30 days of the date of receipt of the agency's order or decision, the appellant shall also serve a copy of the notice of appeal on the agency whose order or decision is being appealed. Proof of service may be made by certificate or affidavit filed with the board.

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

(3) The board's rule governing the computation of time, WAC 371-08-310, shall determine how the 30-day period is calculated.

NEW SECTION

**WAC 371-08-361 Claims of confidential and exempt information.**

(1) Statutory provisions limit or prevent disclosure of certain information provided to the board. This rule addresses how to designate documents as containing exempt or confidential information when filing with the board. WAC 371-08-451 governs access to, and exchange of, such information in proceedings before the board. Chapter 198-14 WAC governs ELUHO's process for responding to requests for public records.

(2) **Definitions.**

(a) Document means any writing as the legislature has defined that term in the Public Records Act, chapter 42.56 RCW.

(b) Confidential information means information properly designated as confidential pursuant to the Climate Commitment Act, chapter 70A.65 RCW, the Public Records Act, chapter 42.56 RCW, or any other provision of law.

(c) Exempt information means information prohibited from disclosure under an exemption in the Public Records Act, chapter 42.56 RCW,

the Climate Commitment Act, chapter 70A.65 RCW, or any other provision of law providing an exemption from disclosure.

(d) Provider means any person who submits documents to the board under a claim that information contained therein is confidential or exempt.

**(3) Filing confidential or exempt information with the board.**

(a) Any provider claiming that information provided to the board is confidential or exempt must make that claim in writing at the time of filing and must state the basis for the claim.

(b) The provider must also file a cover sheet identifying that one or more documents in the filing contain information claimed as confidential or exempt.

(c) Any provider claiming that a document contains confidential or exempt information must file a redacted and an unredacted version with the board.

(d) If the claim applies to multiple pages within a document, the provider may file a single page in the redacted version identifying the contiguous pages that are subject to the claim. If the claim applies to a document in its entirety, the provider may file a single page as the redacted version identifying that the document in its entirety is confidential or exempt.

(e) Unredacted versions must be filed by personal delivery, commercial delivery, fax, electronic mail, or first-class, registered, or certified mail. The provider should contact the board's staff for instructions on filing unredacted versions with the board.

**(4) Designating information as confidential or exempt.**

(a) The provider must clearly designate information claimed to be confidential or exempt on each page of the unredacted version by outlining, underlining, bracketing, or marking the text with gray shading. The provider must clearly mark each copy of the document with the designation "Outlined/shaded/underlined/bracketed information is designated as confidential/exempt pursuant to (insert provision of law)" on the first page of a multipage document and on each specific page that the provider asserts a claim.

(b) The provider must label the redacted version of the document as redacted. The provider must completely mask the information subject to the claim or leave a blank space where the information is located in the redacted version. To the extent practicable, redacted and unredacted versions must have the same pagination and the text must appear on the same lines on each page.

(c) When a document contains more than one type of information, the provider is responsible for distinguishing between information designated as confidential or exempt.

**(5) Motion for protective order.** When a provider designates and files documents under this rule and an applicable protective order has not been issued, the provider must file a motion pursuant to WAC 371-08-450 for protective order at the time of filing the designated information.

AMENDATORY SECTION (Amending WSR 15-03-044, filed 1/14/15, effective 2/14/15)

**WAC 371-08-365 Persons who may appear before the board.** (1) Any person has the right to represent himself or herself in a proceeding before the board.

(2) The only persons who are qualified to represent another person or entity before the board are the following:

(a) Attorneys at law duly qualified and entitled to practice before the highest court of record of any state.

(b) An authorized officer, partner, owner, employee or member of an association, partnership, corporation, organization, government subdivision or agency.

(c) Legal interns admitted to practice under the applicable admission to practice rules of the Washington state court rules as long as the conditions and limitations of the applicable rules are satisfied.

(d) Any other individual designated by an entity to serve as spokesperson in a case, with the approval of the board's presiding officer.

(3) No former employee of the department or member of the attorney general's staff may appear in a representative capacity on behalf of other parties in a board proceeding except when permitted by applicable rules of professional conduct or conflict of interest laws.

(4) No former member of the board shall, for a period of one year after the termination of (~~his or her~~) their membership, represent a party before the board on any matter.

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**WAC 371-08-390 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 and enter protective orders as provided in the Administrative Procedure Act;

(3) To rule on all procedural matters, objections, and motions;

(4) To rule on all offers of proof and receive relevant evidence;

(5) To question 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 in the judgment of the presiding officer, 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 prehearing conferences;

(11) To permit and regulate the taking of discovery;

(12) To regulate the course of the hearing;

(13) To dismiss an appeal or take other appropriate actions if a party or representative fails to appear at a prehearing conference, hearing, or at any other stage of the appeal proceeding;

(14) To take any other action necessary and authorized by these rules and the law.

NEW SECTION

**WAC 371-08-391 Consolidation.** (1) The presiding officer may consolidate appeals when consolidation will:

- (a) Expedite disposition of the appeals;
- (b) Avoid duplication of testimony; and
- (c) Not prejudice the rights of the parties.

(2) Where multiple permits for the same underlying clean energy project, as defined in RCW 43.158.010, are appealed to one or more of the environmental boards, as identified in RCW 43.21B.005, the presiding officer shall consolidate the appeals for hearing when:

(a) Appeals of permits related to the same underlying project are either:

(i) Filed within 60 days of each other; or

(ii) If not filed within 60 days of each other and the board issues a stay of the appeal following the permit applicant's request. Such a stay must include a stay of the construction of the project pending appeal pursuant to RCW 43.21B.320, to allow other anticipated appeals of permits for the same underlying project to be filed to accommodate consolidation. The board may set a deadline after which an appeal may proceed in the absence of other permit appeals in order to ensure efficient resolution of appeals; or

(b) The presiding officer determines the criteria in subsection (1) of this section have been met.

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**WAC 371-08-440 Settlement and mediation agreements.** (1) Where the parties settle an appeal before hearing, the parties shall prepare and submit to the board a request for an order of dismissal (~~to which the settlement agreement is attached~~), submit that request to the board, and the board shall enter an order and dismiss the case.

(2) This section also pertains to settlement agreements reached during mediation.

AMENDATORY SECTION (Amending WSR 23-11-076, filed 5/17/23, effective 6/16/23)

**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, 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 or testimony from witnesses.

(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 90 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 14 days from the receipt of the motion by the nonmoving party. The moving party then has 10 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.

(6) Exhibits must be formatted and filed in accordance with the board's electronic exhibit requirements, which are available at the ELUHO website at [www.eluho.wa.gov](http://www.eluho.wa.gov).

#### NEW SECTION

**WAC 371-08-451 Protective orders.** (1) Pursuant to the Administrative Procedure Act, chapter 34.05 RCW, the board may issue a protective order when the board finds that filings will require information designated as confidential or exempt as defined in WAC 371-08-361 to be disclosed in the proceeding. The board on its own initiative, or upon motion by a party, may amend its protective order.

(2) **Denial of protective order.** If the board denies a motion for a protective order, the presiding officer will order disclosure and any terms and conditions of disclosure.

(3) **Designating and filing documents subject to a protective order.** Parties must comply with the requirements in the protective order and in WAC 371-08-361 for designating, marking, and filing documents containing information claimed to be confidential or exempt. The provider must file a cover sheet identifying that one or more documents in the filing contain information subject to the protective order. Unredacted versions must be filed by personal delivery, commercial delivery, fax, electronic mail, or first-class, registered, or certified

mail. The provider should contact the board's staff for instructions on filing unredacted versions with the board.

(4) **Ruling on designations.** The presiding officer will review documents claimed to be subject to the protective order. The presiding officer may rule that any document is not subject to the protective order. The party seeking the designation has the burden to support the claimed designation. The board will provide an opportunity for the provider to respond, either orally or in writing, before ordering disclosure, in whole or in part, and any terms and conditions of disclosure. A party to a proceeding may also challenge a designation by filing a motion requesting that the presiding officer review and remove the claimed designation.

#### NEW SECTION

**WAC 371-08-471 Hearing exhibits.** Hearing exhibits must be formatted and filed in accordance with the board's electronic exhibit requirements, which are available at the ELUHO website at [www.eluho.wa.gov](http://www.eluho.wa.gov).

#### NEW SECTION

**WAC 371-08-547 Deadline to issue final decision for consolidated appeals before the board and the shorelines hearings board. Waivers and extensions of deadline.** For appeals of clean energy projects consolidated pursuant to RCW 43.21B.340, the board shall issue a decision within 240 days from the date of the last filed consolidated appeal, unless waived by all parties. The board may extend the 240-day time period by up to 60 days on a motion from a party or the board upon a finding of good cause.