AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-300 Purpose of this chapter and applicability of the board's rules of practice to the civil rules of procedure and the rules of evidence. (1) The purpose of chapter 461-08 WAC is to provide rules of practice before the shorelines hearings board (hereinafter "board"). The interpretation of these rules may be guided, where relevant, by the civil rules of superior court (hereinafter "civil rules") and the rules of evidence for the superior courts of the state of Washington, as those rules have been construed by Washington state courts.

(2) Except where in conflict with the board's rules, Washington statutes regarding administrative procedure, pretrial procedures, civil rules and rules of evidence shall be followed in proceedings before the board unless the presiding officer determines that the evidence, although in conflict with the rules, is admissible pursuant to WAC 461-08-515.

(3) This chapter shall govern practice before the board. The rules in this chapter are consistent with the model rules of procedure issued by the office of administrative hearings, chapter 10-08 WAC except where specifically noted.

AMENDATORY SECTION (Amending WSR 13-21-068, filed 10/16/13, effective 11/16/13)

WAC 461-08-305 Definitions. The following terms apply throughout this chapter and, unless the context clearly requires otherwise, have the following meanings:

(1) "Agency" means any state governmental entity.

(2) "Adjudicative proceeding" means a proceeding involving an opportunity for hearing before the board as defined in chapter 34.05 RCW. The terms "appeal," "adjudicative proceeding" and "case" are used interchangeably in this chapter.

(3) "Board" means the shorelines hearings board, a quasi-judicial body created pursuant to chapter 90.58 RCW and described in WAC 461-08-315.

(4) "Date of filing" as used in this chapter and RCW 90.58.140(6) has different meanings depending upon the type of local government decision that is being appealed.

(a) "Date of filing" of a local government's approval or denial of a substantial development permit, or local government's denial of a variance or conditional use permit, is the date of actual receipt by the department of the local government's decision.

(b) "Date of filing" of a local government's approval of a conditional use permit or variance is the date that the department transmits its final decision or order to local government.

(c) For substantial development permits filed simultaneously with approvals of conditional use permits or variances, the "date of filing" is the date that the department transmits its final decision or order on the variance or conditional use permit to local government.

(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~~)) 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 date stamp placed on the document shall be evidence of the filing date.

(a) Electronic filing of documents, and fax filing of documents ten pages or less, are permitted, so long as the original document and any required copies are mailed or submitted to a commercial delivery service on the same day. The date and time of receipt will be the date of transmission as indicated by the board's computer or fax machine, unless the transmission is completed after 5:00 p.m. or on a Saturday, Sunday, or legal holiday, in which case filing will be the next business day.

(b) Any document filed with the board shall contain an affirmation that copies were served on the appropriate agency, local government 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 presiding officer after consultation with the parties regarding format and authentication.~~))

(7) "Local government" means any county, incorporated city or town which contains within its boundaries any lands or water subject to chapter 90.58 RCW.

(8) "Party" means:

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

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

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

(10) "Petition for review" is a document that when properly filed with the board initiates an adjudicative proceeding before the board.

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

(12) "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~~)) Fax transmission with mailing or submission to a commercial delivery service of copies on the same day. Service by ((~~facsimile~~)) fax is regarded as complete by production of the confirmation of transmission and evidence of mailing or submission to a delivery service of the copies.

(d) Commercial delivery service. Service by commercial delivery service is regarded as complete upon delivery to the 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.

AMENDATORY SECTION (Amending WSR 13-21-068, filed 10/16/13, effective 11/16/13)

WAC 461-08-315 Board membership, function and jurisdiction. (1) **Members.** The board is made up of six members. Three members are also members of the pollution control hearings board and are appointed by the governor. A fourth member is appointed by the association of Washington cities and a fifth member is appointed by the Washington state association of ((~~county commissioners~~)) counties. The sixth member is the commissioner of public lands or the commissioner's designee.

(2) **Function and jurisdiction.** This board is a quasi-judicial body with powers of de novo review authorized by chapter 90.58 RCW to adjudicate or determine the following matters:

(a) Appeals from any person aggrieved by the granting, denying or rescinding of a permit issued or penalties incurred pursuant to chapter 90.58 RCW;

(b) Appeals of department rules, regulations or guidelines; and

(c) Appeals from department decisions to approve or reject a proposed master program or program amendment of local governments which are not planning under RCW 36.70A.040.

(3) This section is intended to be general and informational only and failure herein to list matters over which the board has jurisdiction shall not constitute a waiver or withdrawal of that jurisdiction.

AMENDATORY SECTION (Amending WSR 13-21-068, filed 10/16/13, effective 11/16/13)

WAC 461-08-320 Board office hours((~~, telephone number, telefacsimile number and address of the board~~)) and contact information. (1) The administrative business of the board, except rule making, is performed by the environmental and land use hearings office. To the extent necessary for rule making, the ((~~appeals~~)) board holds regular meetings at 10:00 a.m. on the second Tuesday of each month at the address set forth below.

(2) The information included in this section is current at the time of rule adoption, but may change. Current information is available on the board's internet site at www.eluho.wa.gov.

(a) The board is organized within the Environmental and Land Use Hearings Office, 1111 Israel Road S.W., Tumwater, Washington. The mailing address is:

Shorelines Hearings Board
P.O. Box 40903
Olympia, WA 98504-0903

((~~(3)~~)) (b) The telephone number of the board is 360-664-9160. The ((~~telefacsimile~~)) fax number is 360-586-2253. The board's e-mail address is eluho@eluho.wa.gov.

((~~(4)~~)) (3) The office hours of the environmental and land use hearings office are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays.

AMENDATORY SECTION (Amending WSR 13-21-068, filed 10/16/13, effective 11/16/13)

WAC 461-08-325 Public information about practice before the board and public records. (1) Questions about board procedures may be directed to the environmental and land use hearings office by mail or, during regular office hours, by telephone ((~~or by telefacsimile~~)), by fax, or e-mail at eluho@eluho.wa.gov.

(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 198-14 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 198-14-050. Any person seeking to make copies of such public records may copy the documents at the environmental and land use hearings office for a reasonable charge per page.~~

~~(3)~~)) The environmental and land use hearings office maintains a web site with information on the shorelines hearings board, including information about the board members, the board hearings calendar, past decisions of the board, a brief description of the appeal process with helpful information for practice before the board, a set of frequently asked questions, sample forms, and links to the board's rules of procedure and other pertinent statutes and rules. This web site may be accessed via the internet at ((~~http://www.eluho.wa.gov~~)) www.eluho.wa.gov.

(3) Case files of appeals pending before the board, past written opinions of the board and other public records maintained by the board under chapter 198-14 WAC are available for public inspection and copying during regular office hours at the environmental and land use hearings office. The procedures for obtaining public records from the board are set forth in chapter 198-14 WAC.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-335 Types of petitions before the board. The board is empowered to hear and decide the following:

(1) Petitions for review of permitting decisions;

(2) Petitions for review of penalties imposed under chapter 90.58 RCW;

(3) Petitions for review of master programs adopted by jurisdictions that are not ((~~subject~~)) planning pursuant to the Growth Management Act;

(4) Petitions for review of regulations adopted by the department pursuant to chapter 90.58 RCW;

(5) Petitions for declaratory rulings;

(6) Petitions for rule making by the board; and

(7) Petitions by the department for rescission of permits issued by local government.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-350 Contents of the petition for review. Petitions for review to the board pursuant to RCW 90.58.180 (1) and (2) shall contain:

(1) The name, mailing address, telephone number ((~~and telefacsimile~~)), fax number (if available), and e-mail address (if available) 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 and/or the local government whose decision is being appealed and the person to whom the decision is directed shall be named as parties;

(3) ((~~A copy of the application for a shoreline permit which was filed with the local government pursuant to RCW 90.58.140;~~

~~(4)~~)) A copy of the decision or permit appealed from;

((~~(5)~~)) (4) A short and plain statement showing the grounds upon which the appealing party considers such decision or permit to be unjust or unlawful;

((~~(6)~~)) (5) A clear and concise statement upon which the appealing party relies to sustain his or her grounds for appeal;

((~~(7)~~)) (6) The relief sought, including the specific nature and extent;

((~~(8)~~)) (7) The signature of the ((~~representative of the~~)) appealing party or ((~~of the appealing party~~)) its representative. The signature of the representative or the appealing party shall constitute a certificate by the signatory that the signatory has read the petition and that it is consistent with civil rule 11;

((~~(9)~~)) (8) All pleadings shall be so construed as to do substantial justice.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-385 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 agency or local government.

(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 a spokesperson in a case with the approval of the board's presiding officer.

(3) No former employee of the department, or local jurisdiction, or member of the attorney general's staff may appear in a representa-

tive capacity on behalf of other parties in a ((~~formal~~)) board proceeding ((~~in which an active part as a representative of the department was taken in the same case or proceeding, at any time after leaving the employment of the department or the attorney general~~)), except when permitted by applicable ((~~state~~)) 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 membership, represent a party before the board on any matter.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-395 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 for 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~~)) consistent with civil rule 71.

AMENDATORY SECTION (Amending WSR 10-18-021, filed 8/23/10, effective 9/23/10)

WAC 461-08-415 Mediation. In all appeals, upon request of one or more parties and with the consent of all parties, the board may assign a mediator. The mediator must be an administrative appeals judge or other duly authorized agent of the board who has received training in dispute resolution techniques or has a demonstrated history of successfully resolving disputes, as determined by the board. A person who mediates in a particular appeal may not participate in a hearing on that appeal and may not write the decision and order in the appeal. The mediator may not communicate with board members regarding the mediation other than to inform them of the pendency of the mediation and whether the case settled. Mediation provided by the ((~~pollution control hearings board or shoreline hearings~~)) board must be conducted pursuant to the provisions of the Uniform Mediation Act, chapter 7.07 RCW.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-435 Intervention. (1) The department and the attorney general may intervene by right within fifteen days from the date of receipt of the petition for review by the department or the attor-

ney general pursuant to RCW 90.58.180(1) in any matter set out therein((~~, and if such intervention is sought it shall be granted~~)).

(2) The presiding officer may grant a petition for intervention by any person at any time, upon determining that the petitioner qualifies as an intervenor pursuant to civil rule 24, that the intervention will serve the interests of justice and that the prompt and orderly conduct of the appeal will not be impaired.

(3) The presiding officer may impose conditions upon the intervenor's participation in the proceedings.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-455 Prehearing conferences. (1) The purpose of a prehearing conference ((~~shall be:~~

~~(a) To determine the feasibility of a settlement of the appeal or, failing settlement;~~

~~(b)~~)) is to prepare the case for hearing by scheduling prehearing deadlines and by identifying the issues((~~, and if possible, witnesses, exhibits, stipulations, and admissions~~)). At the prehearing conference, the presiding officer will encourage the parties to engage in settlement negotiations as the case proceeds.

(2) Appearance by a party or by the party's representative at a prehearing conference is mandatory. If a party fails to attend a prehearing conference, that is not justified by good cause, the presiding officer may issue an order of default against the absent party or other appropriate action.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-460 Prehearing orders. ((~~After a~~)) Following the prehearing conference ((~~which has not resulted in settlement,~~)) the presiding officer shall enter a prehearing order. Normally, this will include a statement of issues, a schedule for filing motions and briefs, ((~~and lists of witnesses and exhibits or provide for filing such lists,~~)) as well as other matters which may bear on the preparation for hearing. The issues stated in the prehearing order shall control the subsequent course of the proceedings, unless modified for good cause by subsequent order.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-465 Settlement and mediation agreements. (1) Where the parties settle an appeal before hearing, the parties shall prepare a written order of dismissal to which the settlement agreement is attached, ((~~and~~)) submit that order to the board((~~. If the agreement is~~

~~in accordance with the law~~)), and the board shall enter ((~~the~~)) an order and ((~~dispose of~~)) dismiss the case.

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

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-470 Use of telephone conferences, motion hearings and hearings. Upon the motion of any party or independently, the presiding officer may decide to conduct any conference, oral argument on a motion, or hearing by telephone conference call or other electronic means to promote the fair, speedy, and economical processing of a matter.

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-475 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~~)) agreement 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 an 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 sixty days before the 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.

AMENDATORY SECTION (Amending WSR 96-15-002, filed 7/3/96, effective 8/3/96)

WAC 461-08-485 Dismissal, default or withdrawal of appeal. (1) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties a default or other dispositive order which shall include a statement of the grounds for the order. Within seven days after service of a default or dismissal order for failure to attend or participate, the party against whom it was entered may file a written motion requesting that the order be vacated and stating the grounds relied upon.

(2) An appellant may request to withdraw an appeal. Requests ((~~before the appellant rests its case-in-chief during the hearing are mandatory and afterwards are permissive~~)) to withdraw an appeal shall be governed by civil rule 41.

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-490 Hearing briefs. Hearing briefs, if filed, must be submitted to the board at least seven days before the time of hearing or ((~~other~~)) 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.

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-495 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 recording 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 the 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 introduce 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.

((~~(c)~~)) (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 shall 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 or the board or the attorney general 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 or representative of the department or board.

(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 461-08-515 through 461-08-535.

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-555 Final decisions and orders. (1) **Full-board cases.** When the hearing on the petition for review has been heard by a majority of the board in a full-board case, 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 material to the disposition of the matter: Provided, That in the event that the full board considers the record and that four of the members cannot agree on a decision, the substantive decision under appeal will control. The board will formally adopt its final decision and order.

(2) **Short-board cases.** When the hearing on the petition for review has been heard by two or more board members in a short-board case, 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: Provided, That in the event that the three board members consider the record and ((~~two~~)) a majority of the members cannot agree on a decision, the substantive decision under appeal will control. The board will formally adopt its final decision and order.

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

AMENDATORY SECTION (Amending WSR 07-03-074, filed 1/17/07, effective 2/17/07)

WAC 461-08-575 Direct review to the court of appeals based upon an accepted certificate of appealability 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 by the court of appeals 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 for 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 shall be by the superior court. The superior court's decision may be appealed to the court of appeals.