

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-300 Purpose of this chapter and applicability of the board's rules of practice and the civil rules of procedure and the rules of evidence.

(1) The purpose of chapter 371-08 WAC is to provide rules of practice before the pollution control hearings board (hereinafter "board"). The interpretation of these rules of practice 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 of evidence, is admissible pursuant to WAC 371-08-500.

(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 07-03-074, filed 1/17/07, effective 2/17/07)

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.)) 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 date of filing.

(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

and will constitute the date of filing, unless the transmission is completed after 5:00 p.m. or on a Saturday, Sunday, or legal holiday, in which case the date of 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 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) "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) ~~((Faesimile))~~ Fax transmission with mailing or submission to commercial delivery service of copies on the same day. Service by ~~((faesimile))~~ 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, 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 10-18-021, filed 8/23/10, effective 9/23/10)

WAC 371-08-315 Membership, function and jurisdiction. (1) **Members.** The board is 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 board has jurisdiction to hear and decide appeals from the following decisions of the department of agriculture ((pursuant to chapters 90.48 and 90.64 RCW)), the department of ecology, ((from the decisions of)) the director of ecology, local conservation districts, air pollution control authorities established pursuant to chapter 70.94 RCW, ((from the decisions of)) local health departments, ((when such orders and decisions concern matters within the jurisdiction of the board as provided in RCW 43.21B.110, the decisions of)) the department of natural resources, the department of fish and wildlife, ((and the department of ecology that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7); forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180; decisions of the department of fish and wildlife to issue, deny, condition or modify a hydraulic project approval permit under chapter 77.55 RCW; decisions of the department of natural resources that are reviewable under RCW 78.44.270 and 78.44.380, and decisions of a) any state agency that is an authorized public entity under RCW 79.100.010 ((to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable under RCW 79.100.120.)), and the parks and recreation commission:~~

(a) ~~Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.95.315, 70.95M.080, 70.95N.260, 70.105.080, 70.105.095(2), 70.107.050, 70.240.050, 70.275.100, 70.275.110, 76.09.170, ((section 10, chapter 130, Laws of 2010, section 11, chapter 130, Laws of 2010, RCW)) 77.55.291, 78.44.250, ((section 1, chapter 84, Laws of 2010, RCW)) 86.16.081, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, ((90.56.320,)) 90.56.330, ((90.58.560 and chapter 90.64 RCW)) 90.64.102, and 90.76.080.~~

(b) ~~Orders issued pursuant to RCW 18.104.043, 18.104.060, ((18.104.065)) 18.104.130, 43.27A.190, 70.94.211, 70.94.332, 70.94.640, 70.94.715, 70.95.315, 70.95C.230, 70.105.095, 70.107.060, 86.16.110, 88.46.070, 90.14.130, 90.14.190, 90.46.250 90.48.120, 90.48.240, and ((chapter 90.64 RCW)) 90.64.040.~~

(c) ~~Except as provided in RCW 90.03.210(2), the issuance, modification, termination or denial of any permit, certificate or license by the department of ecology or any air pollution control authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, a decision to approve or deny a solid waste management plan under RCW 70.95.094, an application for a solid waste permit exemption under RCW 70.95.300, an application for a change under RCW 90.03.383, or a permit to distribute reclaimed water under RCW 90.46.220.~~

(d) ~~The granting, denial, revocation, or suspension of a water right examiner certificate issued by the department under ((chapter 285, Laws of 2010)) RCW 90.03.665.~~

(e) ~~Decisions ((by the department disapproving a comprehensive solid waste management plan or any amendments to that plan that are appealed by the submitting entity pursuant to RCW 70.95.094)) of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW, including appeals by the department of ecology as provided in RCW 70.95.185.~~

(f) ~~Decisions of local health departments regarding the ((grant or denial of solid waste)) issuance and enforcement of permits ((or~~

of)) to use biosolids ((permits pursuant to chapter 70.95 RCW)) under RCW 70.95J.080.

(g) Disputes between the department and the governing bodies of local governments regarding local planning requirements under RCW 70.105.220 and zone designation under RCW 70.105.225, pursuant to RCW 70.105.250.

(h) Decisions of the department of ecology regarding waste-derived fertilizer or micronutrient fertilizer under RCW 15.54.820, and decisions of the department of ecology regarding waste-derived soil amendments under RCW 70.95.300.

(i) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026 as provided in RCW 90.64.028.

(j) Any other decision by the department of ecology((, the administrator of marine safety)) or an air pollution control authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(k) Decisions of the department of natural resources, the department of fish and wildlife, and the department of ecology that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7).

(l) Forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180.

(m) Decisions of the department of fish and wildlife to issue, deny, condition, or modify a hydraulic project approval permit under chapter 77.55 RCW.

(n) Decisions of the department of natural resources that are reviewable under RCW 78.44.270.

(o) Decisions of an authorized public entity under RCW 79.100.010 to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable under RCW 79.100.120.

(3) 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.

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

WAC 371-08-320 ((~~Environmental and land use hearings~~)) Board of office hours((, telephone number and address)) and contact information.

(1) The administrative business of the board, except rule making, is performed by the environmental and land use hearings office. The board holds 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 housed at the Environmental and Land Use Hearings Office, 1111 Israel Road S.W., Tumwater, Washington 98501. The

principal hearing room used by the board is located at the same address, although many hearings are held near the site of the dispute at issue.

~~((3))~~ (b) The mailing address of the board is:

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

~~((4))~~ (c) The telephone number of the board is 360-664-9160. The ~~((telefaesimile))~~ fax number is 360-586-2253. The board's e-mail address is eluho@eluho.wa.gov.

~~((5))~~ (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 12-05-110, filed 2/22/12, effective 3/24/12)

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 and land use hearings office by mail or, during regular office hours, by telephone, ~~((telefaesimile))~~ fax, or e-mail.

~~((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 and land use hearings office. The form for requests for public records is set forth on the agency's web site at eluho@eluho.wa.gov.~~

~~((3))~~ The environmental and land use 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.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 08-03-045, filed 1/10/08, effective 2/10/08)

WAC 371-08-330 Board decision making on appeals. The number of board members required to make a decision on a case differs depending on the type of case.

(1) **Short-board appeals.** Pursuant to RCW 43.21B.305, an appeal that involves a penalty of fifteen thousand dollars or less imposed by the department of ecology, another state agency or an air pollution control authority or that involves a derelict or abandoned vessel under RCW 79.100.120 may be heard by a single member of the board. Such appeals are called short-board appeals. The decision of that single member shall be the final decision of the entire board. For appeals that involve a derelict or abandoned vessel under RCW 79.100.120 only, an administrative appeals judge employed by the board may be substituted for a board member.

(2) **Full-board appeals.** All other types of appeals are called full-board appeals. The chairperson may assign a single member to hold the hearing in a full-board appeal; however, at least two members shall review the record and issue a decision. Two members of the board shall constitute a quorum for making a decision and may act although one position on the board is vacant or one board member is unavailable.

(3) **Administrative appeals judges.** For both full-board and short-board cases, the chairperson may appoint an administrative appeals judge from the environmental and land use hearings office to be the presiding officer.

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

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 and land use 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 unless otherwise provided by law. 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,))~~ 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, 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.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-340 Contents of notice of appeal. The notice of appeal 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 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 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) All pleadings shall be so construed as to do substantial justice.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-355 Petitions for declaratory ruling. (1) As prescribed by RCW 34.05.240, any interested person may petition the board for a declaratory ruling. The board shall consider any petition for declaratory ruling in accordance with these rules and the Administrative Procedure Act.

(2) Two members of the board shall constitute a quorum when the board acts on a petition for a declaratory (~~(judgment petition)~~) order. Two members of the board may act although one position on the board is vacant.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

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(~~(, at any time after leaving the employment of the department or the attorney general,)~~) appear(~~(, except when permitted by the applicable state conflict of interest laws,)~~) in a representative 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)) 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 membership, represent a party before the board on any matter.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-375 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)) consistent with civil rule 71.~~

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

WAC 371-08-395 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 me-

diation other than to inform them of the pendency of the mediation and whether the case settled. Mediation provided by the ~~((environmental hearings))~~ board~~((s))~~ must be conducted pursuant to the provisions of the Uniform Mediation Act, chapter 7.07 RCW.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-430 Scheduling letter. (1) Upon receipt of a notice of appeal which complies with the requirements of these regulations, the board shall mail written notice to each party of the primary and, if applicable, the secondary hearing dates. The notice or scheduling letter will identify the case to be heard, the identity of the parties and the time and location of the hearing. The letter shall also state that an interpreter can be made available upon reasonable notice to the board for any witness or party who is hearing impaired or who does not speak English.

(2) The letter may set out a filing schedule for motions and prehearing briefs. Where the presiding officer decides to hold a prehearing conference, the letter shall also state the date, time and location of the prehearing conference.

~~((3) The scheduling letter shall control the subsequent course of the appeal unless modified for good cause by subsequent order of the board or the presiding officer.))~~

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-435 Prehearing conferences. (1) The board may, upon written request by a party or on its own, schedule 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))~~ The purpose of the prehearing conference~~(, parties may engage in settlement negotiations. Where settlement proves unavailing, the presiding officer may schedule all deadlines for motions and discovery and memorialize those dates in a prehearing order. The prehearing order may also identify the issues to be tried, stipulations, admissions, witnesses and exhibits for the hearing))~~ is to prepare the case for hearing by scheduling prehearing deadlines and by identifying the issues. At the prehearing conference, the presiding officer will encourage the parties to engage in settlement negotiations as the case proceeds.

(2) Following the prehearing conference the presiding officer shall enter a prehearing order. Normally, this will include a statement of issues, a schedule for filing motions and briefs, as well as other matters which may bear on the preparation for hearing. The issues which the prehearing order identifies for the hearing shall control the subsequent course of the appeal, and shall be the only issues to be tried at the hearing, unless modified for good cause by subsequent order of the board or the presiding officer.

(3) Appearance by a party or by the party's representative at the prehearing conference is mandatory. If a party fails to attend a pre-

hearing conference, that is not justified by good cause, the presiding officer may issue an order of default against the absent party or take other appropriate action.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

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 written order of dismissal to which the written settlement agreement is attached(~~(. If the agreement is in accordance with the law))~~, submit that order to the board, and the board shall enter ~~((the))~~ an order and dismiss the case.

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

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

WAC 371-08-445 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, motion hearing or hearing by telephone 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 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 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 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.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-465 Dismissal, default or withdrawal of the 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 dismissal 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 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.

AMENDATORY SECTION (Amending WSR 02-06-013, filed 2/22/02, effective 3/25/02)

WAC 371-08-485 Standard and scope of review and burden of proof at hearings. (1) Hearings shall be ~~((formal--and))~~ quasi-judicial in nature. The scope and standard of review shall be de novo unless otherwise provided by law.

(2) The board shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

(3) The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders. In other cases, the appealing party shall have the initial burden of proof.

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

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 material to the disposition of the matter.

(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.

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

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 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 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.

AMENDATORY SECTION (Amending WSR 96-15-003, filed 7/3/96, effective 8/3/96)

WAC 371-08-565 Certification of record. (1) Within thirty days of receipt of a copy of the petition for judicial review to the superior court or notice of acceptance of the certificate of appealability by the court of appeals, the board shall certify and transmit to the reviewing court the record made before the board. Additional time for certification and transmission of the record may be allowed by the reviewing court.

(2) Normally the record will not include a transcript of the testimony. Unless the board has caused a transcript to be printed, arrangements for and costs of the written transcript shall be the obligation of the party seeking judicial review.