

WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

Physical address:

Environmental and Land Use Hearings Office
1111 Israel Rd. SW, Ste 301
Tumwater WA 98501

Mailing address:

Environmental and Land Use Hearings Office
PO Box 40903
Olympia WA 98504-0903

(360) 664-9160 Fax: (360) 586-2253
Web Address: <http://www.eluho.wa.gov>
E-Mail: eluho@eluho.wa.gov

“Your Right to Be Heard”

Board Members

Neil L. Wise, Chair
Carolina Sun-Widrow, Member
Michelle Gonzalez, Member

Administrative Appeals Judge

Heather Francks
Margaret Lee

Administrative Manager

Nancy Coverdell
Legal Assistant-PCHB/SHB
Lynn Eccles

Legal Assistant-GMHB

Desiree Ortiz
Legal Office Assistant
Morgan Pilon

This is your informal guide to your rights and responsibilities in an appeal. It is not exclusive, it is not legal advice, and **does not have force and effect of state law or regulation**. More detailed information, in RCW 43.21B, the act creating the Pollution Control Hearings Board, and in a chapter of the Washington Administrative Code entitled, "Rules of Practice and Procedure of the Pollution Control Hearings Board, WAC 371-08," is available at your county law library or upon request from the Environmental and Land Use Hearings Office and at the Environmental and Land Use Hearings Office website at <http://www.eluho.wa.gov>.

For more detailed information, please open up on the web page the *Frequently Asked Questions* and *Forms*. ALTERNATE FORMAT AVAILABLE UPON REQUEST

YOUR RIGHT TO BE HEARD

The Pollution Control Hearings Board (PCHB) hears appeals from orders and decisions made by:

1. Local and regional air pollution control agencies or authorities.
2. The State Department of Ecology.
3. The Department of Fish and Wildlife (WDFW) pertaining to hydraulic project approval (HPA) decisions.
4. The Department of Natural Resources (DNR) pertaining to forest practices, surface mining, and forest health orders, and
5. Other agencies and orders as provided by law.

The Board's sole function is to give you and all other litigants in a disputed matter an opportunity for a full and complete hearing, as promptly as possible, followed by a fair and impartial written decision based on the facts and law.

The Board is not affiliated with the Department of Ecology or any other agency.

To insure the Board's impartiality, the state Legislature created this independent, quasi-judicial state agency entirely separate from any other state, or regional resource or regulatory agency or local unit of government.

The Board consists of three full-time members, who are appointed by the governor and confirmed by the State Senate for staggered six-year terms. One of the three must be an attorney. All are salaried employees of the State, who also serve on the Shorelines Hearings Board.

DO YOU NEED AN ATTORNEY?

An attorney may represent you, but the law does not require one. Consider this very carefully before deciding to represent yourself. The appeal process can be complicated and significant rights may be at stake. The hearings are conducted more like court trials, instead of city council meetings.

WHEN, WHERE, AND HOW TO FILE AN APPEAL

No fee is required for filing an appeal.

Generally, the Board must RECEIVE your appeal within 30 days of the “receipt” of the order or decision. “Date of Receipt” is defined in RCW 43.21B.001(2)

If the appeal pertains to a decision or action by a state agency regarding a derelict vessel, the appeal must be filed and served within 30 days of when the state agency acquired custody of the vessel, or within 30 days of the date of redemption if the vessel is redeemed before the agency acquires custody.

Different deadlines apply to some types of decisions made by the Department of Natural Resources pertaining to forest practices. Refer to the Forest Practices Act, Ch. 76.09 RCW for specific information pertaining to the type of decision you want to appeal. Note some deadlines are as short as 15 days. The decision document itself will also generally include appeal information about the timeline for appeal.

An appeal may be filed with the Board by personal deliver and commercial delivery at the physical address, by fax, by electronic

mail, or by first-class, registered mail sent to the mailing address.

Pollution Control Hearings Board

Physical address:

1111 Israel Rd. SW, Ste 301
Tumwater, WA, 98501

Mailing address:

PO Box 40903
Olympia WA 98504-0903

Fax:

360-586-2253

E-Filing address:

pchb-sbappeals@eluh.wa.gov.

An **ORIGINAL** and one copy should be sent in the mail in addition to the fax filing and e-filing. Mailed and personally served originals should also include one copy.

Within 30 days of receipt of the decision, you must also serve a copy of your appeal with the Department of Ecology or Clean Air Agency or other agency whose order or decision you are appealing.

If you are appealing a decision on a permit, you should also serve a copy of your appeal on the holder of the permit unless you are the permittee.

In some situations pertaining to forest practices a copy of your appeal must also be filed with the attorney general. Refer to the Forest Practices Act, Ch. 76.09 RCW for specific information pertaining to the type of decision you are appealing.

Failure to observe the 30 day deadline for filing with the Board and serving the Department of Ecology or Air Pollution Control Authority or other agency will result in termination and dismissal of the appeal.

Service on all parties shall be by personal service or by mail. Service by mail is effective on the date of mailing; however, filing with the Board is only effective on actual receipt by the Board.

Filing of the appeal does not stop (stay) the effectiveness of an appealed permit. For information on how to obtain a stay or temporary restraining order for all appeals except for forest practices appeals, please refer to RCW 43.21B.320 and Civil Rules for Superior Court 65 (CR 65).

TEMPORARY SUSPENSION OR DISCONTINUANCE (STAY)

A person appealing a Department of Natural Resources approval under RCW 76.09.205, or any operator, timber owner, or forest landowner appealing a stop work order, may request a temporary suspension or discontinuance of the department's decision. The Appellant must file a motion, supported by affidavit, setting forth specific facts supporting a temporary suspension or discontinuance. Upon receipt of the motion, the presiding officer will schedule a hearing and serve notice of the hearing on all parties.

In emergency situations, a temporary suspension or discontinuance may be granted by the presiding officer without a hearing, only if it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party before any adverse party can be heard in opposition.

For more information on the temporary suspension or discontinuance process, refer to WAC 223-08-087.

CONTENT OF THE APPEAL

Your appeal should include the following items:

- A copy of the order or decision you are appealing, and if the order or decision followed an application, a copy of the application.
- Your name and address (mailing and legal, if different) and, if applicable, the name and address of your representative.
- A daytime phone number, and an e-mail address if available.
- A brief statement why you are appealing.
- The relief you seek (what you want the Board to do).
- A statement, signed by you or your representative, attesting the content of the appeal is true.

IF YOUR PERMIT IS APPEALED

Perhaps you have been granted a permit by the Department of Ecology, air authority or another agency, but another party has appealed. You have a right to defend the permit and are automatically a respondent in the appeal before the Board. All subsequent sections in this publication apply to you as well as to the appellant.

HEARING DATES

When an appeal is filed, the Board will assign and notify you of a date for hearing the case.

THE PRE-HEARING CONFERENCE

Soon after the appeal is filed, a pre-hearing conference is scheduled with the Presiding Officer. The pre-hearing conference is usually held within 4-6 weeks of the appeals' filing and is generally conducted by telephone. The scheduling letter will provide you with a phone number and pin code for you to call in for the pre-hearing conference at the designated time. This conference is not for the purpose of arguing your case. The conference has three purposes: to discuss interest in settlement, including use of the Board's no-cost mediation program, to determine the legal issues, and to set a schedule for preparing the case for hearing if settlement is not reached. Prior to the pre-hearing conference each party is required to submit a preliminary list of legal issues, proposed witnesses and exhibits. After the pre-hearing conference, a written pre-hearing order will be mailed to the parties. It will include the hearing date, the list of legal issues, hearing preparation deadlines, and other important procedural information.

CAN THIS DISPUTE BE SETTLED?

Litigation is time and energy consuming for the parties. Each party needs to think about possible compromise. For settlement to be reached, each side needs to offer something. Parties are encouraged to begin settlement talks, without waiting for Board participation.

The Board has a no-cost mediation program to assist parties in reaching settlement. It is a voluntary program offered to the parties without charge. All parties must agree to mediate before a mediation can be scheduled. A trained Administrative Appeals Judge will work with the parties to resolve the case.

If the parties settle directly or through mediation, a written document containing the settlement terms will ultimately be signed by all, and filed with the Board, which will dismiss the appeal if the settlement conforms to the law.

BEFORE THE HEARING

Before the hearing you will want to prepare. You have the right to review the agency's file of their decision. Contact it to arrange a time and place to see the file.

You and the other parties have the right to find out in advance what witnesses and other evidence will be used at the hearing. This may be provided to you without formal procedures, such as by looking at public records. If done formally, this **discovery** is best accomplished with the assistance of a lawyer. Examples of formal discovery are: **Deposition**-questioning witnesses before the hearing, under oath with a court reporter present. **Interrogatory**-presenting written questions to the other side. There are formal rules that apply to discovery.

MOTIONS

Any party may file a motion. A motion is a request by one of the parties asking the Board, or the Presiding Officer to rule on a particular issue.

A motion may be dispositive or non-dispositive. A dispositive motion may be based on an issue or issues, or the whole case. A non-dispositive motion is a request for relief, which does not decide an issue or issues or the whole case. An example of a non-dispositive motion is a motion in limine. A motion in limine asks the Board, in advance of the hearing to exclude certain evidence. Dispositive motions are decided by the full Board. An example of a dispositive motion is a motion for summary judgment. A motion for summary judgment is typically based on sworn statements of fact from a person having personal knowledge of the facts alleged. A sworn statement may be either a declaration or an affidavit. An example of a declaration may be found on our website at <http://www.eluho.wa.gov>. After you have opened to the home page, click on the "Practice and Procedure" button on the top of the page.

A declaration or affidavit may also identify and attach documents as exhibits. This is the format of the declaration contained in the sample forms on the website.

Dispositive Motions

The scheduling of dispositive motions is set forth in the pre-hearing order. Please file with the Board an original and sufficient copies of the dispositive motion for each Board member and the presiding officer, if the presiding officer is not a Board member. A copy should be served simultaneously on the date the motion is filed, on each party in the case.

Any party opposing the motion will typically have 14 days from the day it received the motion, to file an original and the requisite copies of a response with the Board, and serve a copy on each of the other parties. The moving party generally will have 10 days from the date it receives the response, to file an original and the requisite copies of a reply with the Board, and serve a copy on each of the other parties. Any party may request an oral hearing from the Presiding Officer on the motion. The Presiding Officer determines whether to grant or deny the request. If the request is granted, the parties will typically personally appear and present their oral argument to the Board at its hearing room in Tumwater, Washington.

Non-dispositive Motions

The deadlines for responding and replying to non-dispositive motions will generally be shorter than the above deadlines for dispositive motions. Additionally, most non-dispositive motions will be reviewed and decided solely by the Presiding Officer. In those situations, the parties need only supply an original and one copy of the pleadings to the Board.

HEARING

At the hearing, it is important to be **on time**. A party's failure to appear may result in default.

You will have your full opportunity to present your side of the case, but there is a judicial procedure to be followed, so that all sides can be heard in an orderly manner.

The Presiding Officer for the Board manages the proceedings. A court reporter will record what is said. The appellant usually has the obligation to present his or her case first. Then, the respondent will present its case. In a case involving a penalty or a regulatory order, the agency assessing the penalty is required to present its case first.

Each side has the right to make an **opening statement**, briefly outlining what its evidence will be. After the opening statements, the parties with the burden of proof will present its evidence. In a penalty or regulatory action, the agency has the burden of proof and will call witnesses first. In a permit appeal, the appealing party has the burden of proof and presents its witnesses first at the hearing.

In certain cases, the Presiding Officer may determine a **site visit** would be helpful to the Board's understanding of the evidence. At such a visit, the parties are requested to limit communication with the Board during the site visit. It is appropriate to point out physical landmarks, to help the Board later, at the hearing, but a court reporter is not present during the site visit, and it is not the time to present evidence or argue your case.

After the site visit, we return to the hearing. **Witnesses** who are sworn to tell the truth, testify from their personal knowledge in response to questions from the party calling that witness. After this **direct testimony**, the witness answers questions asked by the other parties during "**cross-examination**." The Board members may also ask questions.

Persons essential to your case need to be present at the hearing to testify as witnesses. The "hearsay" rule prevents you from testifying for them or relating what they know or what they have said.

Exhibits, such as letters, contracts, photographs, and maps, etc. may be offered as evidence. Before the hearing, number your exhibits and prepare an exhibit list. At the hearing, you will need to have the original and one copy for each member of the Board, the Presiding Officer, if not a Board member, and for the other parties. If you have multiple exhibits, please place them in a binder. In the alternative, the Board has now implemented a process to accept exhibits electronically. If you are interested in this process, please ask the presiding officer at the pre-hearing conference.

After all the evidence has been presented, litigants can summarize their arguments in closing statements. The hearing is then closed and no further evidence is taken.

THE BOARD'S DECISION

The Board will deliberate on the testimony, exhibits, and final arguments, before issuing a written decision.

The written decision called "Findings of Fact, Conclusions of Law, and Order" is prepared and mailed to all parties generally within 90 days after the hearing, or after the submission of memoranda, briefs, or proposed findings.

YOU MAY APPEAL THE FINAL ORDER

The Board's decision may be appealed to Superior Court within 30 days from the date the **ORDER is mailed**, or you may file a

petition with the Board for reconsideration within 10 days of the date of the mailing of the **ORDER**.

You may appeal the Board's final action on a petition for reconsideration within 30 days from the date the order is mailed. Please note, if the Board fails to act on the petition for reconsideration within 20 days of its filing, it is deemed denied. In certain cases raising urgent statewide or regional issues or involving significant precedential matters, a procedure for direct review by the Court of Appeals may be available.

reasonable accommodations, that person shall notify the presiding officer at least three weeks before the hearing or situation for which assistance is needed.

FREQUENTLY USED TERMS

AIR POLLUTION CONTROL

AGENCY: a local or regional agency authorized under the Washington Clean Air Act, RCW 70.94, to issue orders and assess penalties for air pollution violations, and to issue notices of construction for new air emission sources.

APPEAL: A request for review of a decision filed with the Board.

APPELLANT: A person or entity bringing the appeal.

BOARD: The Washington State Pollution Control Hearings Board.

DISMISSAL: Dismissal is an order entered by the Board terminating the appeal, canceling the hearing, and ending the Board's consideration of the case.

DISPOSITIVE MOTION: Motions concerning matters that are central to the case (such as a motion for summary judgment or a motion to dismiss) are called "dispositive" motions because they can "dispose of" (or end), all or part of the appeal.

ECOLOGY: The Washington State Department of Ecology.

INTERVENOR: A third party asking to be heard in an appeal.

PARTY: A person who is an appellant, respondent, or intervenor.

PERSON: An individual, partnership, corporation, association, organization, governmental subdivision, agency, or entity of any character.

PRESIDING OFFICER: A member of the Board or an Administrative Appeals Judge who is assigned by the chair or vice-chair to conduct a conference or hearing.

RESPONDENT: A person or entity on the other side of the dispute from the appellant.

STIPULATION: An agreement between the parties.

The Environmental and Land Use Hearings Office does not discriminate in employment or any of its services against persons with disabilities, and will make reasonable accommodations for any citizen who needs assistance to participate in our hearings or other activities. If a party or a witness requires an interpreter, or qualifies for