

WSR 23-02-072
PROPOSED RULES
ENVIRONMENTAL AND
LAND USE HEARINGS OFFICE
[Filed January 4, 2023, 10:00 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-19-090.

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

Hearing Location(s): On February 8, 2023, at 9:00 a.m., Zoom <https://us02web.zoom.us/j/2407504750>; or 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501. The public hearing will be conducted online via Zoom; however, participants who wish to comment may phone in using the Zoom call-in information or they may participate in person.

Date of Intended Adoption: March 31, 2023.

Submit Written Comments to: Jamie Merly, 1111 Israel Road S.W., Suite 301, Tumwater, WA 98501, email Jamie.Merly@eluhwa.gov, by February 17, 2023.

Assistance for Persons with Disabilities: Contact Jamie Merly, phone 360-485-1282, email Jamie.Merly@eluhwa.gov, by February 6, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The rule changes have several purposes and anticipated effects: (1) Clarify electronic filing procedures and remove paper filing, (the rule changes will provide procedures for electronic filing via a case management system portal); (2) require the filing of dispositive motions no later than 90 days before the hearing date, allowing more time for the board to consider dispositive issues prior to hearing; (3) clarify what the "date of receipt" means for timely filing of an appeal (this clarification reduces confusion about the timeliness of filing an appeal); (4) remove the holding of settlement conferences from the presiding officer powers and duties; (5) clarify that proof of service must be filed with the board to perfect the appeal, reducing confusion about proof of service requirements; (6) allow parties who have settled an appeal to submit a request for dismissal rather than a written order of dismissal; (7) reduce confusion about forest practices appeals by adding existing statutory language to the rule that describes the filing requirements for these appeals; (8) repeal the board jurisdictional rule. Board jurisdiction is set forth in statute and rule making lags behind the statutory delegation of authority, causing inconsistencies and confusion to appellants; and (9) remove the requirement that parties apply to the board to request a certificate of appealability for direct review of board decisions by the court of appeals. This will align with RCW 34.05.518. Without the requirement, parties may file directly with the court of appeals without receiving certification by the board.

Reasons Supporting Proposal: The rule changes provide procedures to assist pollution control hearings board litigants in filing petitions and other case documents electronically, eliminating the requirement to file in paper. Parties who lack the technological capacity to file electronically may file by other means. The rule changes assist litigants by clarifying other board procedures and aligning rules with statutes.

Statutory Authority for Adoption: RCW 43.21B.170.

Statute Being Implemented: Chapter 43.21B RCW.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The rule change effective date is intended to align with the launch of the agency's new case management system. The new case management system is being built in response to RCW 43.21B.005(6) to provide greater transparency for growth management hearings board, pollution control hearings board, and shorelines hearings board decisions. The new system will allow electronic filing of case documents.

Name of Proponent: ELUHO, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Jamie Merly, 1111 Israel Road S.W., Suite 301, 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)(b)(i) and does not intend to make this section voluntarily applicable to this rule update per subsection (5)(b)(ii). One of the primary purposes of the rule change is to clarify procedures for implementing existing statutes, consistent with RCW 34.05.328 (5)(b)(v). Therefore, unless subsection [(5)(b)](ii) is invoked by the joint administrative rules committee after filing [a] 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.

January 4, 2023

Jamie Merly

Director of Legal and Administrative Services

OTS-4279.1

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

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

~~((6))~~ (7) "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 ((stamp placed on the document)) 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) ~~((Electronic))~~ The 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)) 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. 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.

~~((7))~~ (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) "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))~~ (9) "Person" means any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.

~~((9))~~ (10) "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))~~ (11) "Service" of a document for administrative review 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) 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 (~~(, other than the appeal document itself,)~~) by email or electronic filing is authorized if ((the parties agree to electronic service or if authorized by the presiding officer)) agreed to by the receiving party. Service by email is regarded as complete when the email is sent successfully. Service by electronic filing is regarded as complete when the document is uploaded successfully to the receiving party's designated electronic filing system.

(12) "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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-305, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-305, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310. WSR 05-15-017, § 371-08-305, filed 7/7/05, effective 8/7/05. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-305, filed 7/3/96, effective 8/3/96.]

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

WAC 371-08-310 Computation of time. (1) The time within which any act shall be done, as provided by these rules, is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a legal holiday, or a day when the board is closed for business under WAC 371-08-320(3), and then it is excluded and the next succeeding day which is neither a Saturday, Sunday nor a legal holiday, or a day when the board is closed for business under WAC 371-08-320(3) is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in the computation.

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

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-310, filed 1/17/07, ef-

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

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

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. The board has jurisdiction to hear and decide appeals from the following decisions of the department of agriculture, the department of ecology, the director of ecology, local conservation districts, air pollution control authorities established pursuant to chapter 70.94 RCW, local health departments, the department of natural resources, the department of fish and wildlife, any state agency that is an authorized public entity under RCW 79.100.010, 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, 77.55.291, 78.44.250, 86.16.081, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, 90.64.102, and 90.76.080.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 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 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 RCW 90.03.665.

(e) Decisions 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 issuance and enforcement of permits to use biosolids 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 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.)~~

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-315, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170, 90.58.175, 2010 c 84, 2010 c 130, 2010 c 210, and 2010 c 285. WSR 10-18-021, § 371-08-315, filed 8/23/10, effective 9/23/10. Statutory Authority: RCW 34.05.360 and 2003 c 325. WSR 04-03-001, § 371-08-315, filed 1/7/04, effective 2/7/04. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-315, filed 7/3/96, effective 8/3/96.]

AMENDATORY SECTION (Amending WSR 19-20-034, filed 9/24/19, effective 10/25/19)

WAC 371-08-320 Board office hours 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 or other matters, the board will hold ((special)) meetings 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.

(b) The mailing address of the board is:

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

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

(3) The office hours of the board and the environmental and land use hearings office are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays or when the office is closed due to weather, technological failure, or other hazardous or emergency conditions or events.

[Statutory Authority: RCW 43.21B.170. WSR 19-20-034, § 371-08-320, filed 9/24/19, effective 10/25/19. Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-320, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.005, 43.21B.090, and 36.70A.270(7). WSR 12-05-110, § 371-08-320, filed 2/22/12, effective 3/24/12. Statutory Authority: RCW 43.21B.170. WSR 02-06-011, § 371-08-320, filed 2/22/02, effective 3/25/02; WSR 96-15-003, § 371-08-320, filed 7/3/96, effective 8/3/96.]

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

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, fax, or email.

(2) The environmental and land use hearings office maintains a website with information about and access to the CMS for electronic filing, and 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 website may be accessed via the internet at 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 on the website (www.eluho.wa.gov) or 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-325, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.005, 43.21B.090, and 36.70A.270(7). WSR 12-05-110, § 371-08-325, filed 2/22/12, effective 3/24/12. Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-325, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-325, filed 7/3/96, effective 8/3/96.]

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

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) 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 ((thirty)) 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 ((thirty-day)) 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, ((when the actual receipt date can be)) 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 ((forty-five)) 45 days from the date of mailing.

((+3)) (4) An appeal ((may)) shall be filed with the board electronically through the CMS. 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 ((, not the date that the notice is mailed)). Upon receiving the notice of appeal, the board will acknowledge receipt. The board's record of the date ((stamped on the appeal notice)) and time of receipt of a document shall be prima facie evidence of the filing date. ((The board may thereafter require that additional copies be filed.)) 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-335, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170, 90.58.175, 2010 c 84, 2010 c 130, 2010 c 210, and 2010 c 285. WSR 10-18-021, § 371-08-335, filed 8/23/10, effective 9/23/10. Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-335, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310. WSR 05-15-017, § 371-08-335, filed 7/7/05, effective 8/7/05. Statutory Authority: RCW 43.21B.170 and 1997 c 125. WSR 97-19-064, § 371-08-335, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 43.21B.170 and Den Beste v. Washington, No. 13967-1-III (Div. III, April 18, 1996). WSR 96-17-016, § 371-08-335, filed 8/12/96, effective 9/12/96.]

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

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 (~~((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;
- (9) Proof of service must be filed with the board to perfect the appeal.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-340, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-340, filed 7/3/96, effective 8/3/96.]

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

WAC 371-08-370 Procedure for representing a party before the board. (1) An attorney or authorized representative as defined in WAC 371-08-365 may appear for a party by either of the following actions:

(a) Filing a notice of appeal, another pleading or a written notice of appearance containing the name of the party to be represented, and the name, address (~~and~~), telephone number, and email address of the representative; or

(b) Entering an appearance at the time and place of a conference or hearing on the appeal, and notifying the presiding officer conducting the same of the party to be represented and the name, address (~~and~~), telephone number, and email address of the representative.

(2) Copies of every written notice of appearance or pleading that identifies the representative shall be served by the representative on all other parties or their representatives of record at the time the original is filed with the board.

(3) Unless the department notifies the board otherwise, the attorney general shall, in all appeals from decisions and orders of the department and director, be deemed to have entered an appearance for the department, and shall be exempt from the requirements herein relating to the filing of written notices of appearance and to the furnishing of copies of same to other parties and their representatives.

(4) After a representative appears on behalf of a party, the board shall serve all future notices, orders and correspondence upon such representative. Service upon the representative shall constitute service upon the party.

(5) After a representative appears on behalf of a party, all other parties to the appeal shall serve all future pleadings and correspondence upon that representative. Service upon the representative shall constitute service upon the party.

[Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-370, filed 7/3/96, effective 8/3/96.]

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

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 (~~and settlement 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.

[Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-390, filed 7/3/96, effective 8/3/96.]

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

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~~) issue 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-430, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-430, filed 7/3/96, effective 8/3/96.]

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

WAC 371-08-435 Prehearing conferences. (1) The board may, upon written request by a party or on its own, schedule a prehearing con-

ference on not less than seven days notice (~~mailed~~) to each party to the appeal, at a time and place fixed by the board. The purpose of the prehearing conference 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 prehearing 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-435, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-435, filed 7/3/96, effective 8/3/96.]

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

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~~) request for an order of dismissal to which the (~~written~~) settlement agreement is attached, submit that (~~order~~) 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-440, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-440, filed 7/3/96, effective 8/3/96.]

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

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 af-

firmatively 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 (~~sixty~~) 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 (~~fourteen~~) 14 days from the receipt of the motion by the non-moving party. The moving party then has (~~ten~~) 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.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-450, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-450, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW, and RCW 43.21B.001, [43.21B].190, [43.21B].230, [43.21B].300, [43.21B].310. WSR 05-15-017, § 371-08-450, filed 7/7/05, effective 8/7/05. Statutory Authority: RCW 43.21B.170. WSR 02-06-012, § 371-08-450, filed 2/22/02, effective 3/25/02; WSR 96-15-003, § 371-08-450, filed 7/3/96, effective 8/3/96.]

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

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

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-470, filed 1/17/07, ef-

fective 2/17/07. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-470, filed 7/3/96, effective 8/3/96.]

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

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))~~ board's final decision and order ~~((to))~~ shall be served on each party to the appeal or ~~((to))~~ the attorney or representative of record ~~((, if any))~~. The board's final decision and order may be served electronically when a party agrees to electronic service. Service upon the representative constitutes service upon the party.

[Statutory Authority: RCW 43.21B.170, 90.58.175. WSR 15-03-044, § 371-08-535, filed 1/14/15, effective 2/14/15. Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. WSR 07-03-074, § 371-08-535, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-535, filed 7/3/96, effective 8/3/96.]

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

WAC 371-08-550 Petitions for reconsideration. (1)(a) After issuance of a final decision, any party may file a petition for reconsideration with the board. Such petition must be filed and served on all parties within ~~((ten))~~ 10 days of ~~((mailing of))~~ the board serving the final decision under WAC 371-08-535(3). The board may require an answer, or parties may elect to file an answer, to the petition for reconsideration. Any answer to a petition for reconsideration must be filed and served on all parties within five days of the receipt of the petition.

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

(c) In response to a petition for reconsideration, the board may deny it, or may reverse or modify its decision or may reopen the hearing. The board is deemed to have denied the petition if, within ~~((twenty))~~ 20 days from the date the petition is filed, the board does not act on the petition or specify a date by which it will act on the petition.

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

(3) The board shall (~~(mail copies of)~~) serve the final decision and order and of the board's disposition of any petition for reconsideration (~~(to)~~) on each party to the appeal or (~~(to)~~) on the attorney or representative of record. The board's final decision and order may be served electronically when a party agrees to electronic service. Service on the representative constitutes service on the party.

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

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

WAC 371-08-555 Time for filing petitions for review to superior court. An appeal of a final board order is called a petition for review. A petition for review must be filed with superior court within (~~(thirty)~~) 30 days from the date of service of the final order or decision as provided in RCW 34.05.542. The petitioner shall file a copy of the petition for review to superior court with the board and shall serve all parties of record. All appeals must first be filed in superior court even if direct review to the court of appeals will be sought.

[Statutory Authority: RCW 43.21B.170, 90.58.175, 2010 c 84, 2010 c 130, 2010 c 210, and 2010 c 285. WSR 10-18-021, § 371-08-555, filed 8/23/10, effective 9/23/10. Statutory Authority: RCW 43.21B.170, chapter 34.05 RCW and RCW 43.21B.190. WSR 06-07-088, § 371-08-555, filed 3/15/06, effective 4/15/06. Statutory Authority: RCW 43.21B.170 and SHB 1314. WSR 97-19-064, § 371-08-555, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 43.21B.170. WSR 96-15-003, § 371-08-555, filed 7/3/96, effective 8/3/96.]

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 371-08-560 Direct review to the court of appeals upon certification by the board.