

WASHINGTON STATE SHORELINES HEARINGS BOARD
ENVIRONMENTAL HEARINGS OFFICE

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“Your Right To Be Heard”

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This is your informal guide to your rights and responsibilities in an appeal. It is not exclusive and **does not have force and effect of state law or regulation**. More detailed information is contained in the Washington Administrative Code WAC 461-08 and the Shorelines Management Act, RCW 90.58. which can be accessed through the Environmental Hearings Office website: <http://www.eho.wa.gov>. For more detailed information, please open up on the web page the *Environmental Hearings Office Handbook* and the *Sample Forms*. ALTERNATE FORMAT AVAILABLE UPON REQUEST.

YOUR RIGHT TO BE HEARD

The Shoreline Management Act, (SMA) Chapter 90.58 RCW, which was adopted by a vote of the people, provides for the management of development along the state's shorelines. Local government administers and issues shoreline substantial development, conditional use, and variance permits. Approvals by local government of shoreline conditional use and variance permits must be reviewed by the State Department of Ecology (Ecology), which then issues the final decision. Local government and/or Ecology can also issue fines, which may include regulatory orders under the Shoreline Act.

The Shorelines Hearings Board (Board) hears appeals (which are called petitions for review) from these permit decisions, and from those shoreline penalty orders jointly issued by local government and Ecology, or issued by Ecology alone.

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 the law.

The Shoreline Management Act created this independent, quasi-judicial Board to give you an opportunity to appeal a shoreline permit or penalty. The Board is an independent agency, not affiliated with any other state government, regulatory agency, or local unit of government.

Three of the Shorelines Hearings Board members are full time employees, appointed by the governor and confirmed by the senate. At least one member is an attorney. The full-time members also serve as the Pollution Control Hearings Board. The three other members of the Shorelines Hearings Board, who serve part time are: (1) the State Land Commissioner or designee, (2) a representative from the Washington State Association of Counties, and (3) a representative from the Association of Washington Cities.

In petitions for review involving a single family residence or certain structures serving a single family residence, or in other cases designated by the Chair of the Board, the case may be heard by a panel of three board members, at least one and not more than two of whom shall be members of the Pollution Control 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 TO FILE A PETITION FOR REVIEW

The deadline for filing your petition for review with the board varies according to the type of permit or government action you are appealing.

SHORELINES PERMITS: If you are appealing the grant, denial, or rescission of a shorelines permit of any type, your petition must be filed within 21 days of the “date of receipt” as defined in RCW 43.21B.001. The “date of receipt” is the trigger date for when the twenty-one day appeal period begins to run. It is important to recognize that the “date of receipt” varies according to the type of permit you are appealing.

If you want to appeal a local government's decision approving, denying, or rescinding a **substantial development** or a local government's denial of a **variance** or **conditional use**, the "date of receipt" is the date that the applicant receives written notice from Ecology that it has received the local government's decision.

If you want to appeal a **conditional use** or **variance permit** which has been approved by a local government, and either approved or denied by Ecology, the "date of receipt" is the date the local government or applicant actually receives Ecology's written decision.

Where a project involves both a substantial development and a conditional use or variance permit, the latest applicable date of receipt may be used in filing the petition for review.

For example:

If you are appealing a substantial development (either approved or denied) and a locally approved conditional use or variance permit, the "date of receipt" for both permit appeals is the conditional use/variance date; i.e., the date that Ecology transmits its final decision or order on the conditional use or variance permit to the local government or applicant.

However, if you are appealing a substantial development (either approved or denied) and the local government denial of a conditional use permit or variance permit, the "date of receipt" for both permits is the date the local government or applicant actually receives Ecology's written decision.

SHORELINE PENALTIES: If you are appealing a penalty assessed against you, your appeal must be filed with the board within thirty (30) days of the date you actually receive the penalty notice.

FOR ANY TYPE OF APPEAL: In preparing any appeal for the Board, it is important to refer to the statute that authorizes the appeal, sets the appeal deadline, and sets forth other requirements. For shoreline permit appeals, please refer to RCW 90.58.180. For shoreline penalty appeals, please refer to RCW 90.58.210.

WHERE AND HOW TO FILE A PETITION FOR REVIEW

No fee is required for filing an appeal.

Your appeal must be filed with EACH of the following parties:

The original with

- Shorelines Hearings Board

Physical address:
1111 Israel Rd. SW, Ste 301
Tumwater, WA 98501

Mailing address:
PO Box 40903
Olympia WA 98504-0903

Within seven days of filing any petition for review with the Board pertaining to a decision of local government the petitioner shall SERVE copies of the petition on:

- State Department of Ecology, 300 Desmond Drive PO Box 47600 Olympia, WA 98504-7600
- State Attorney General, Ecology Division, 2425 Bristol Court SW 2nd Floor., PO Box 40117, Olympia, WA 98504-0117
- the local government making the decision.

The petition should also be served on:

- the permit applicant, if you are not the applicant.

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.

CONTENT OF THE PETITION FOR REVIEW

You need to supply the Board, in writing, with:

- A copy of local government's and/or Ecology's final decision on the permit (or a copy of the penalty order).
- A copy of the shoreline permit application.
- Your name and address (mailing and legal, if different) and, if applicable, the name and address of your representative.
- A daytime phone number.
- A brief statement why you are appealing.
- The relief you seek.
- A statement, signed by you or your representative, attesting the content of the petition is true.

Whenever you write to the Board, you have to send a copy to the other parties, and show this on your letter, such as by a "cc." If you want to talk with the Board, the other litigants should be present or on the

telephone. The Board members and presiding officers act as judges and are not allowed to hear from one side only.

IF YOUR PERMIT HAS BEEN APPEALED

Perhaps you have been granted a shoreline development permit by local government, 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 petitioner.

HEARING DATES

When a petition for review is filed, the Board will assign a date for hearing the case. The Board's calendar is crowded and litigants have to wait their turn for a hearing. The Board typically takes a site visit of the permit site on the first day. If more than one hearing day is required, the hearing is likely to be continued in the Board's office.

THE PRE-HEARING CONFERENCE

Soon after the appeal is filed, the pre-hearing conference is scheduled with the Presiding Officer. The conference is usually held within 4-6 weeks of the filing of the petition for review, 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 also 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 telephone, email, regular mail, or 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 applying to discovery. These are described or referenced in the Board's regulations.

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.eho.wa.gov>. After you have opened to the home page, click on the "Forms" button on the left side of the page then on "EHO Samples and Forms."

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 Lacey, 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 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 petitioner usually has the obligation to present its case first. Then, the respondent will present its case. In a penalty case, 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. Next, the Board and parties may conduct a **site visit**. 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 them to testify. 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. Parties with important knowledge are to be sworn and testify themselves.

Exhibits, such as letters, 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 copies 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.

After all the evidence has been presented, litigants can summarize their arguments in closing statements. The record is then closed and the hearing ends.

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 litigants. With certain exceptions, decisions on cases must be issued within 180 days of the filing date.

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 a reconsideration within 10 days of the mailing of the **ORDER**. You may appeal the Board's final actions 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 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.

FREQUENTLY USED TERMS

BOARD: The Washington State Shorelines 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.

PETITION FOR REVIEW: An appeal of a shoreline permit decision by Ecology or the local government, or an appeal of a civil penalty issued by Ecology, or jointly by Ecology and the local government.

PETITIONER: A person or entity bringing the appeal.

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

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

SHORELINES OF THE STATE: Includes saltwater areas of the state, reservoirs, streams with more than 20 cubic feet per second of mean annual flow, lakes equal to or greater than 20 acres in size, and their associated wetlands.

STIPULATION: An agreement between the parties.

SUBSTANTIAL DEVELOPMENT: Any development where the total cost or fair market value is greater than \$5000, or which materially interferes with the normal public use of the water or shorelines of the state.

The Environmental 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. At least 10 days advance notice is needed to provide special accommodation services. If a party or a witness requires an interpreter, or qualifies for reasonable accommodations, that person shall notify the presiding officer at least three weeks before the hearing or situation for which assistance is needed.