

New Rules for Appeals & Practice Tips
for Appearing before the Pollution
Control Hearings Board

by Christopher Swanson, PCHB and SHB
Board member



Agenda

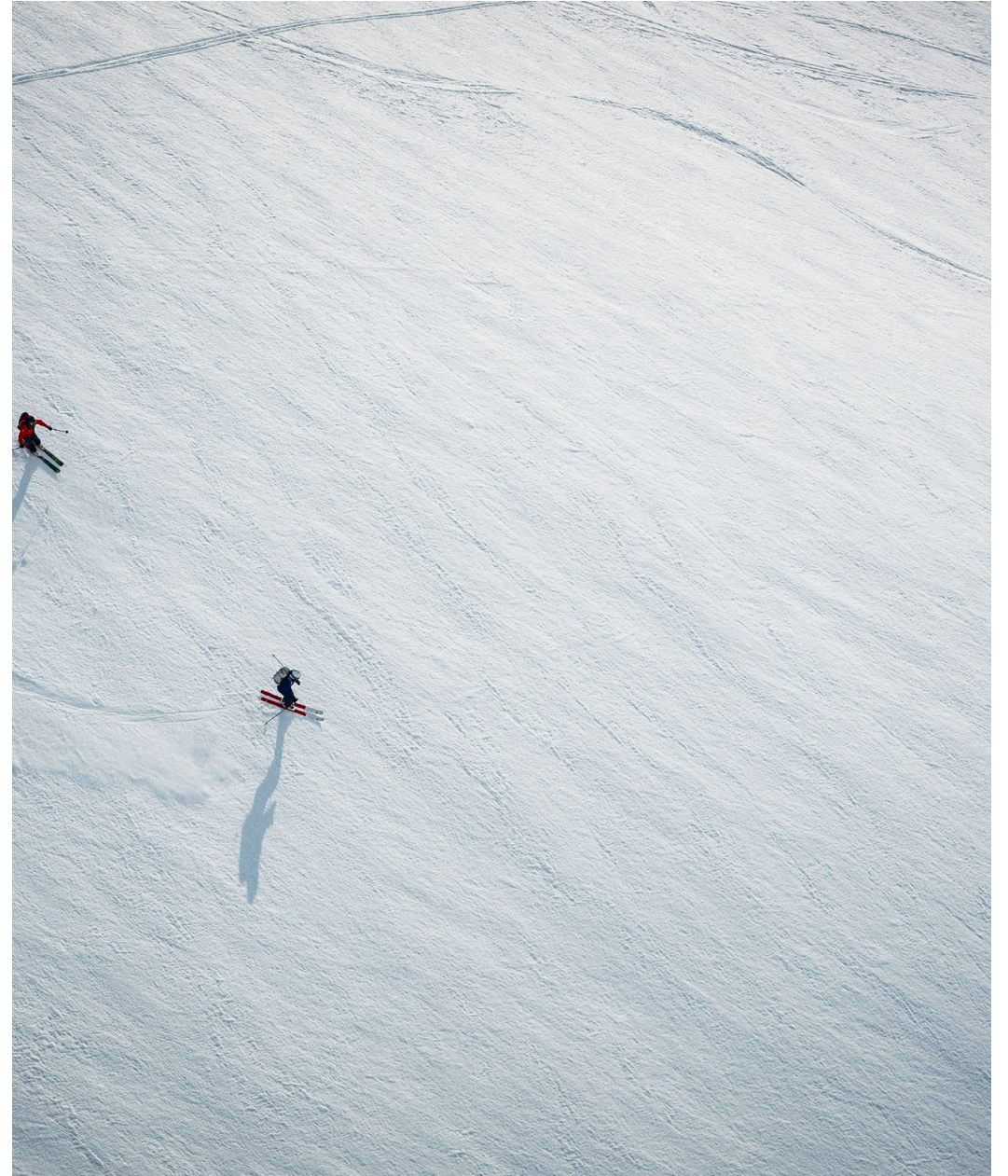
Rules Update

Tips and Tricks -writing
and why writing is crucial
at the PCHB/SHB





Rules Update



Rulemaking Changes

- PCHB

Clarify “date of receipt” of Board orders or decisions to align with *Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 509 P.3d 325 (2022);

- SHB

Add new sections with procedures regarding the Board’s handling of confidential and exempt information and issuing protective orders;

- ELUHO

Update language to be gender neutral;

Add new section and amend sections related to consolidation of appeals to align with RCW 43.21B.340;

Remove the requirement that settlement agreements be submitted to the Board upon requesting a dismissal due to settlement; and

Clarify requirements for filing exhibits.

• WAC 461-08-340 Filing a timely petitions for review with the board. (Amended)	-340: Change indicates an exception to the requirement of electronic filing through CMS for unredacted versions of documents containing confidential or exempt information.
• WAC 461-08-350 Contents of the petition for review. (Amended)	-350, -385: Updates language for gender neutrality.
• WAC 461-08-381 Claims of confidential and exempt information. (New)	-381: Defines confidential and exempt information and how these should be designated and filed in proceedings before the board, including redacted versions of documents containing such information. Also indicates that provider of designated information must file a motion for a protective order.
• WAC 461-08-385 Persons who may appear before the board. (Amended)	
• WAC 461-08-410 Presiding officer—Powers and duties. (Amended)	-410: Removes standard for consolidation from Presiding officer’s powers and duties – is placed in new section - 411.
• WAC 461-08-411 Consolidation. (New)	
• WAC 461-08-465 Settlement and mediation agreements. (Amended)	-411: Presiding Officers already have authority to consolidate matters for hearing, this new section indicates the standard for consolidation including the circumstances under which multiple permits for the same clean energy project shall be consolidated.
• WAC 461-08-475 Motions. (Amended)	
• WAC 461-08-476 Protective orders. (New)	-465: Change - removes requirement to attach settlement agreement agreed between parties pursuant to a request for an order of dismissal.
• WAC 461-08-491 Hearing exhibits. (New)	-476: Indicates that the Board may issue a protective order pursuant to APA if filings will require information designated as confidential or exempt information and a process for challenging such designations.
	-475, -491: Requires filing and formatting according to the Board’s electronic exhibit requirements.

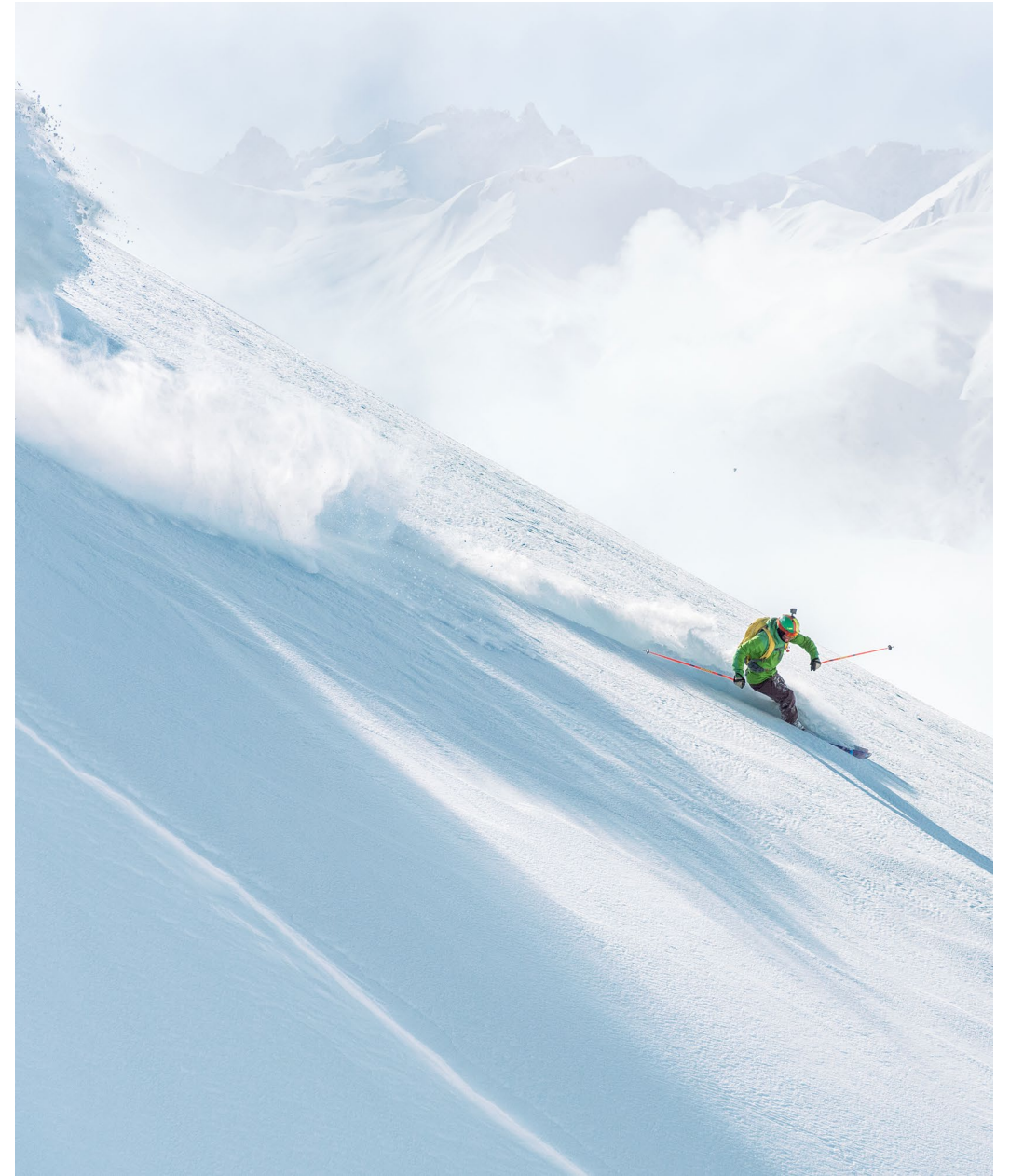
• WAC 371-08-305 Definitions. (Amended)	-305: Adds and clarifies definition of “date of receipt” of Board orders or decisions to align with <i>Fode v. Dep’t of Ecology</i> , 22 Wn. App. 2d 22, 509 P.3d 325 (2022);
• WAC 371-08-335 Filing a timely petitions for review with the board. (Amended)	-335: Removes definition of “date of receipt,” and places in definitions section. Other change indicates an exception to the requirement of electronic filing through CMS for unredacted versions of documents containing confidential or exempt information.
• WAC 371-08-340 Contents of notice of appeal. (Amended)	-340, -365: Updates language for gender neutrality.
• WAC 371-08-345 Service of the notice of appeal on the agency and other interested parties. (Amended)	-345: Ministerial change for “30” days. Other change indicates computation of time will be according to board rule.
• WAC 371-08-361 Claims of confidential and exempt information. (New)	-361: Defines confidential and exempt information and how these should be designated and filed in proceedings before the board, including redacted versions of documents containing such information. Also indicates that provider of designated information must file a motion for a protective order.
• WAC 371-08-365 Persons who may appear before the board. (Amended)	-390: Removes standard for consolidation from Presiding officer’s powers and duties – is placed in new section -411.
• WAC 371-08-390 Presiding officer–Powers and duties. (Amended)	-391: Presiding Officers already have authority to consolidate matters for hearing, this new section indicates the standard for consolidation including the circumstances under which multiple permits for the same clean energy project shall be consolidated.
• WAC 371-08-391 Consolidation. (New)	-440: Change removes requirement to attach settlement agreement agreed between parties pursuant to a request for an order of dismissal.
• WAC 371-08-440 Settlement and mediation agreements. (Amended)	-451: Indicates that the Board may issue a protective order pursuant to APA if filings will require information designated as confidential or exempt information and a process for challenging such designations.
• WAC 371-08-450 Motions. (Amended)	-450, -471: Requires filing and formatting according to the Board’s electronic exhibit requirements.
• WAC 371-08-451 Protective orders. (New)	-547: Indicates the deadline for when the board must issue a decision after the filing of a consolidated appeal of a clean energy project.
• WAC 371-08-471 Hearing exhibits. (New)	
• WAC 371-08-547 Deadline to issue final decision for consolidated appeals before the board and the shorelines hearings board. Waivers and extensions of deadline. (new)	

ELUHO

- WAC 198-14-060 Processing of public records requests—General. (Amended)
 - WAC 198-14-080 Exemptions. (Amended)
- 060: Clarifies process of how ELUHO may notify persons named in records requested through a public records request. Other change indicates that ELUHO's public records officer will review requested records to determine if any exemption against disclosure applies. Ministerial change for "30" days. Updates language for gender neutrality.
- 080: Adds Climate Commitment Act section RCVW70A.65.100(9) to list of "other statute" that exempts or prohibits disclosure.



Practice Tips







“Good Writing is
Short writing.”

Brian Watkins, Chief Legal Officer,
Board of Industrial Insurance
Appeals and National Judicial
College Faculty Writing instructor



Why is good
writing so
important for
PCHB/SHB
practice?





Complexity of Facts

Complexity of Law


Audience (Board Members and Judges)

Appeal



Nine Qualities of Good Writing

from Ann Hadley, annhadley.com

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1. Anticipates Reader Questions
 2. Grounded in Data
 3. Good writing is like good teaching
 4. Tells a Full story
 5. Good writing comes on the rewrite
 6. Good writing is like math
 7. Good writing is simple but not simplistic
 8. Good writing doesn't get hung up on what's been said before



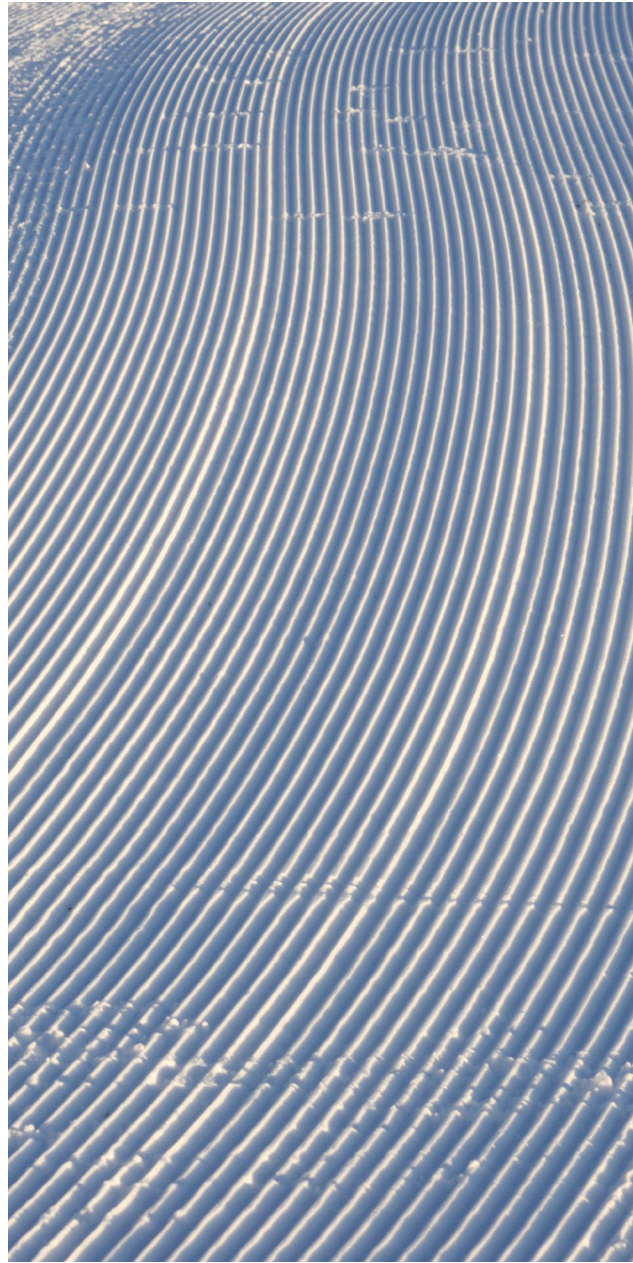
The Tenth Quality (especially pertinent to the the PCHB/SHB)

Set the stage with extremely well thought out issues.



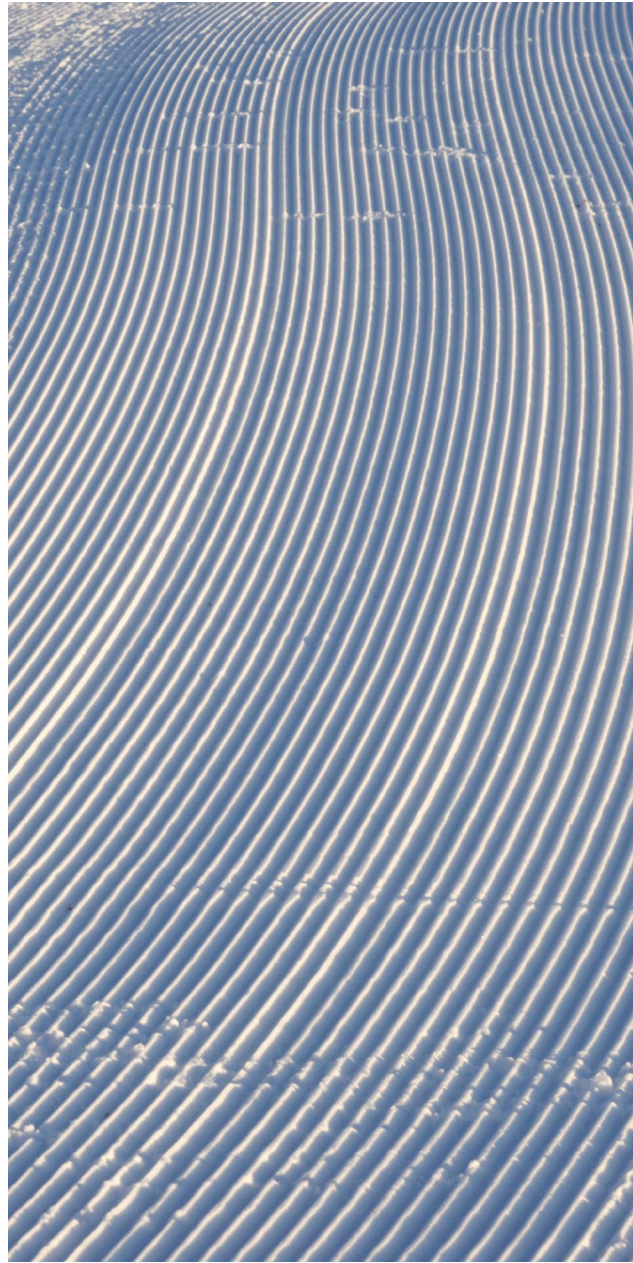
Anticipates

Knowing your audience, what questions will they have. Answer them.



Data

Simplify complex ideas. Point to the most pertinent data that tells your story. Explain where it is and why it is important.



Teaching

Help us to learn about why this data is important to the law.
Explain difficult concepts and why they are important



Telling a Full Story

Help us to learn about why this data is important to the law.
Explain difficult concepts and why they are important



The Rewrite

Get a first draft and then start chipping away at it.

“Writing is easy. All you have to do is cross out the wrong words.”

Mark Twain



Math

Shape the lumpy jumble of data into an accessible formula for the reader.



Good writing is simple, but not Simplistic

Can you write it as if you and I had met at a coffee shop and you had to explain the concepts in as few words as possible?



Good writing does not get hung up on what has been said Before

Write with clarity. Don't be indulgent.

"At times he may indulge himself with a long one (sentence), but he will make sure there are no folds in it, no vagueness, no parenthetical interruptions of its view as a whole, when he has done with it, it won't be a sea-serpent with half its arches under water,; it will be a torch-light procession."

Mark Twain



Good Writers aren't Smug

"Most of the time I feel stupid, insensitive, mediocre, talentless and vulnerable – like I'm about to cry any second – and wrong. I've found that when that happens, it usually means I'm writing pretty well, pretty deeply, pretty rawly."

Andre Dubois III (House of Sand and Fog)



Extremely Well Thought Out Issues

Without a road map, we are lost for sure.

(I don't know who first said this)



Thank you

Christopher Swanson

Board Member, Pollution
Control Hearings Board and
Shorelines Hearings Board

www.eluho.wa.gov