



Puget Sound Regional Council

PUGET SOUND REGIONAL COUNCIL (PSRC)

Hearing Examiner Rules of Procedure for State Environmental Policy Act (SEPA) Administrative Appeals

1. Purpose

These Hearing Examiner Rules of Procedure (Rules) are authorized by Resolution No. PSRC-EB-2016-01 (SEPA Procedures). These Rules have been approved by the PSRC Executive Director pursuant to Section 18(7)(a) of the SEPA Procedures. These Rules govern administrative practice and procedure before the independent Hearing Examiner appointed by the Executive Director for the purpose of resolving SEPA appeals that have been properly filed under the SEPA Procedures. The SEPA Procedures are incorporated by reference, for application by the Hearing Examiner.

2. Interpretation

The Hearing Examiner shall interpret these Rules and determine how they should be applied in specific situations. Where questions of practice and procedure arise that are not addressed by the Rules, the Hearing Examiner shall determine the practice or procedure that she or he deems most appropriate and consistent with providing fair treatment and due process. In making such determinations, the Hearing Examiner may look to the current Civil Rules of Procedure and Evidence Rules for Superior Court for guidance.

3. Expeditious Proceedings

To the extent practicable and consistent with these Rules, the Hearing Examiner shall schedule matters and conduct all proceedings and deliberations expeditiously. At every stage of the proceedings, all parties shall make every reasonable effort to avoid delay. Failure to comply with the timelines in these Rules is grounds for dismissal. For good cause, any of the deadlines set forth in these Rules may be modified by the Hearing Examiner.

4. Powers of the Hearing Examiner

4.1 The Hearing Examiner is an independent official who is charged with deciding SEPA appeals in a fair and impartial manner. The Hearing Examiner is not responsible to nor subject to the supervision or direction of any PSRC member, officer, or employee.

4.2 The Hearing Examiner will take all necessary action to avoid undue delay in the disposition of the proceeding, to gather facts necessary to making the decision and to maintain order and an efficient process. The Examiner shall have all powers necessary to these ends, including but not limited to the following:

4.2.1 Administer oaths and affirmations;

4.2.2 Determine the order of presentation of evidence;

4.2.3 Rule on offers of proof and receive evidence;

- 4.2.4 Rule on procedural matters, objections and motions;
- 4.2.5 Rule on the scope of, or any objections to, the administrative record;
- 4.2.6 Question witnesses and request additional exhibits;
- 4.2.7 Permit or require oral or written argument or briefs and determine the time, length and format of such submittals;
- 4.2.8 Regulate the course of hearings and conduct of the parties and others so as to maintain order and provide for a fair hearing;
- 4.2.9 Hold conferences for settlement, simplification of issues, or for any other proper purpose;
- 4.2.10 Dismiss an appeal for failure to comply with the timing, prehearing, or other requirements of the SEPA Procedures or these Rules; and
- 4.2.11 Make and issue the decision.

5. Scheduling and Timing

- 5.1 Pursuant to Section 18(5) of the SEPA Procedures, the PSRC Executive Director shall appoint a Hearing Examiner to hear and decide only those appeals that are timely filed and contain all the required information as specified in that Section of the SEPA Procedures. Within fifteen (15) days of the Executive Director's decision to appoint a Hearing Examiner, PSRC shall provide to Appellant(s) an index to the administrative record pertaining to the environmental document being challenged. Any motion by the Appellant(s) to supplement the record must be filed within fifteen (15) days of receipt of the index. Any response by PSRC to that motion shall be filed within fifteen (15) days of PSRC's receipt of the motion. The contents of the administrative record shall then be resolved by order of the Hearing Examiner. The resulting administrative record shall be the basis for the appeal hearing, except to the extent exhibits are admitted into evidence at the hearing.
- 5.2 No later than fifteen (15) days after the deadline established by the SEPA Procedures for the filing of an appeal, Appellant(s) shall identify in writing to the Hearing Examiner and to PSRC a preliminary list of the following: i) all the witnesses (lay and expert) Appellant(s) intend to call at the hearing along with a short written summary of their testimony/opinions, and ii) all of the exhibits that Appellant(s) intend to offer in the appeal.
- 5.3 No later than fifteen (15) days after receiving the materials described in Section 5.2 of these Rules, PSRC shall identify in writing to the Hearing Examiner and to Appellant(s) a preliminary list of the following: i) the witnesses (lay and expert) PSRC intends to call along with a short written summary of their testimony/opinions, and ii) the exhibits that PSRC intends to offer in responding to the appeal.
- 5.4 No later than twenty-one (21) days prior to the scheduled hearing date, Appellant(s) must file with the Hearing Examiner and with PSRC a complete set

of all of the exhibits Appellant(s) intend to offer at the hearing, and a final witness list that includes a summary of the testimony of each witness. Absent a showing of good cause, no further exhibits shall be permitted to be offered by Appellant(s) at the hearing.

- 5.5 If Appellant(s) final witness list includes any PSRC members or staff which PSRC objects to making available for witness testimony at the hearing, then PSRC must move to strike the witness(es) from Appellant(s) final witness list within four (4) days of receiving Appellant(s) final witness list. Appellant(s) shall have three (3) days from receipt of PSRC's motion to file a response. The Hearing Examiner shall rule on the motion as soon as practicable after the deadline for receipt of a response to the motion.
- 5.6 No later than fourteen (14) days prior to the scheduled hearing date, PSRC must file with the Hearing Examiner and with Appellant(s) a complete set of all of the exhibits PSRC intends to offer at the hearing, and a final witness list that includes a summary of the testimony of each witness. Absent a showing of good cause, no further exhibits shall be permitted to be offered by PSRC at the hearing.
- 5.7 The Hearing Examiner shall hold a hearing no later than ninety (90) days after the deadline established by the SEPA Procedures for the filing of an appeal. An extension of this time limit may be granted only upon a showing of good cause and with agreement by PSRC.
- 5.8 The Hearing Examiner shall have twenty-one (21) days after the close of the hearing to issue a decision in writing. The Examiner's decision shall be based on:
 - (a) The administrative record;
 - (b) Exhibits admitted at the hearing; and
 - (c) Written or oral testimony provided in the hearing on the appeal.
- 5.9 The Examiner's decision shall be distributed by mail (electronic or regular USPS) to each party representative. The Hearing Examiner's decision shall include, but not be limited to, findings of fact, conclusions of law, and a decision as to the outcome of the appeal. The Hearing Examiner may affirm, reverse, remand or modify the PSRC SEPA decision. If the decision is remanded, the Hearing Examiner shall retain jurisdiction following the remand. In the absence of a remand or motion for reconsideration, the jurisdiction of the Hearing Examiner is terminated on the date a decision is issued.
- 5.10 The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision only if one or more of the following is shown:
 - (a) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
 - (b) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
 - (c) Clear mistake as to a material fact.

Motions for reconsideration must be filed no later than ten (10) days after the date of the Hearing Examiner's decision. Unless otherwise provided by

applicable law, the filing of a motion for reconsideration does not stop or alter the running of the period provided to appeal the Hearing Examiner's decision.

6. Prehearing

- 6.1 The Hearing Examiner may at his or her discretion hold a prehearing conference (as requested by the parties to the appeal or on the Examiner's own initiative), accept prehearing motions in addition to those authorized by Section 5.1 of these Rules related to the contents of the administrative record, and establish a prehearing briefing process.
- 6.2 If a prehearing conference is held, the conference will include any necessary clarification of appeal issues or Hearing Examiner jurisdiction, discussion of procedures for the appeal, hearing date, schedule for prehearing submissions, and any other items the Hearing Examiner deems appropriate. A prehearing conference may be held by conference call. The Examiner shall issue a Prehearing Order summarizing matters resolved at the prehearing conference.
- 6.3 Absent a showing of extraordinary circumstances, the Hearing Examiner will not allow prehearing discovery, such as but not limited to, written interrogatories or depositions.
- 6.4 To the extent that the Hearing Examiner decides to accept prehearing motions in addition to those authorized by Section 5.1 of these Rules related to the contents of the administrative record, and/or to establish a prehearing briefing process, the following timelines will apply (unless modified by Prehearing Order):
 - 6.4.1 Prehearing motions shall be submitted in writing to the Hearing Examiner and concurrently to all parties to the case no later than forty-five (45) days after the deadline established by the SEPA Procedures for the filing of an appeal. The non-moving party must respond to the motion no later than fourteen (14) days from the day the motion was filed. Failure to file a timely response may be considered by the Hearing Examiner as evidence of the non-moving party's consent to the motion. The Hearing Examiner shall issue a ruling as soon as practicable after the deadline for receipt of a response to the motion.
 - 6.4.2 Prehearing briefs shall be submitted by Appellant(s) no later than fourteen (14) days prior to the hearing and by PSRC no later than seven (7) days prior to the hearing.

7. Hearing

7.1 Format

- 7.1.1 The format for the hearing will be of an informal nature yet designed in such a way that the evidence and facts relevant to a particular proceeding will be readily and efficiently available to the Hearing Examiner.
- 7.1.2 In the event of multiple appeals related to the same environmental document, the Hearing Examiner shall consolidate the appeals into a single simultaneous appeal hearing. In the consolidated hearing, the Appellants' cases shall be heard consecutively, with each Appellant presenting separately on the issues identified in its statement of appeal. Consolidation of appeals does not modify the requirement that an

Appellant is limited to those issues set forth in that Appellant's statement of appeal.

7.1.3 The general format for the hearing shall be as follows:

7.1.3.1 Opening Statements.

7.1.3.2 Appellant(s) presentation of evidence (with single cross-examination and redirect testimony allowed).

7.1.3.3 PSRC's presentation of evidence (with single cross-examination and redirect testimony allowed).

7.1.3.4 Closing Argument. The Examiner shall determine whether closing argument will be delivered orally or in writing. If requested by the Examiner, the parties may submit proposed findings and conclusions within seven (7) days of the close of the hearing.

7.1.4 The Hearing Examiner reserves the right to abbreviate the format of the hearing when it appears that no party's rights would be infringed upon by such an abbreviation and that detailed exposition of the facts is not necessary to the Hearing Examiner's understanding of the case. The Hearing Examiner also reserves the right to vary the hearing format in order to ensure due process or for convenience or efficiency.

7.1.5 Where necessary to a full understanding of the case, the Hearing Examiner may visit or inspect the site analyzed in the environmental document prior to the close of the hearing.

7.1.6 While the appeal hearing is open to public observation, only the witnesses identified and called by the parties are allowed to testify. There is no opportunity for public comment at the appeal hearing.

7.2 Expected Conduct and Appearance of Fairness

7.2.1 All persons appearing before the Hearing Examiner shall conduct themselves with civility and courtesy to all persons involved in the hearing.

7.2.2 The appearance of fairness doctrine applies to proceedings under these Rules.

7.2.3 Except for communications regarding procedural matters (which are permitted), no party or other person, organization or other entity shall communicate or attempt to communicate *ex parte* with the Examiner.

7.2.4 If a prohibited *ex parte* communication is made, the communication shall be publicly disclosed by the Examiner; any written communications, and a memorandum summarizing the substance of and participants in all oral communications, shall promptly be made available to the parties for review and an opportunity provided for them to rebut the communications.

7.3 Evidence, Testimony, Witnesses, and Standards

- 7.3.1 All hearing testimony shall be taken under oath or affirmation and shall be recorded by electronic or other means and shall become part of the case record.
- 7.3.2 The Hearing Examiner may limit the length of testimony to expedite the proceedings.
- 7.3.3 At the discretion of the Hearing Examiner, or where the parties agree and the rights of the parties will not be prejudiced, the Hearing Examiner may allow testimony via telephone or video conference or similar electronic means.
- 7.3.4 The Hearing Examiner may seek clarification of the issues and may ask questions of any witness at any time during witness testimony to seek clarification or elaboration of testimony being given. Further, the Examiner may request submittal of additional information to better enable the Examiner to make a complete and accurate evaluation of the issues.
- 7.3.5 At his or her discretion, the Hearing Examiner may allow or limit the scope of any direct- or cross-examination, including time limits on oral presentations.
- 7.3.6 The Hearing Examiner may indicate at the outset of the hearing that she/he has studied the material relating to the case and has preliminarily determined that there seem to be certain central issues that need to be addressed. The Hearing Examiner may request that these issues receive focused attention in the evidence or testimony to be offered.
- 7.3.7 The Hearing Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive or privileged. Opinion evidence presented by non-experts is discouraged, and such evidence need not be given weight by the Examiner. Hearsay evidence is also strongly discouraged, and it should be limited to cases where parties with personal knowledge are unavailable, and where the source is reliable. The Hearing Examiner may look to the Evidence Rules governing the admissibility of hearsay evidence for guidance.
- 7.3.8 The Hearing Examiner may take official notice of judicially cognizable facts. In addition, the Examiner may take notice of general, technical, or scientific facts within his or her specialized knowledge.
- 7.3.9 The burden of proof, standard of review, and scope of review are as established by Section 18(7) of the SEPA Procedures.
- 7.3.10 The Hearing Examiner may dismiss an appeal by order of default where, without good cause shown, Appellant(s) fails to appear or is unprepared to proceed at a scheduled hearing.

8. Filing and Service of Documents

8.1 Documents shall be deemed filed with the Hearing Examiner upon receipt by the Hearing Examiner, unless the Hearing Examiner has specified otherwise.

8.2 Documents shall be served personally, or by electronic mail or facsimile (fax) transmission, or by first class, registered, or certified mail. Service shall be regarded as complete at the earlier of the time personally delivered, or transmitted by electronic mail or fax, or (in the case of mail service) upon the third day after deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet.

9. Computation of Time

Computation of any period of time prescribed or allowed for matters before the Hearing Examiner shall begin with the first calendar day following that day on which the act or event initiating such period of time shall have occurred. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday as defined in RCW 1.16.050, in which event the period shall extend to the end of the next business day. When the period of time prescribed or allowed is six (6) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

10. Certified Transcript of Proceedings

10.1 Anyone desiring a certified transcript of a hearing must obtain a duplicate copy of the hearing recording from the Hearing Examiner and arrange and pay for the preparation of a verbatim transcript. The completed transcript must be returned to the Hearing Examiner for certification.

10.2 The parties shall have an opportunity to review and comment on the transcript. The Hearing Examiner shall resolve conflicts as to form and content of the transcript, and shall provide a certification when such disputes are resolved and the Examiner is satisfied that the transcript provides a reliable record of the proceedings.

Approved by the Executive Director:

Name: Josh Brown
Josh Brown, PSRC Executive Director

Signature: J. W. Brown

Date: 7/18/17