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STATE OF WASHINGTON  
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NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF  
PILOTAGE COMMISSIONERS,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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ROBERT W. FERGUSON  
Attorney General

GUY M. BOWMAN  
Assistant Attorney General  
WSBA No. 29214  
P.O. Box 40113  
Olympia, WA 98504-0113  
(360) 753-4963  
OID No. 91028

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## I. INTRODUCTION

The Washington State Board of Pilotage Commissioners (Board) is charged with issuing pilot licenses to trainees who, at the completion of their training program, can demonstrate to the satisfaction of the Board that they can “safely, efficiently, and consistently” pilot ships “without supervision.” Based upon Captain Bruce Nelson’s (Nelson) performance in the Board’s training program, and after lengthy deliberations, the Board properly determined that Nelson did not demonstrate these necessary traits and denied him a pilot’s license. During Nelson’s training program, he had more interventions in which a supervising pilot had to assume control of the vessel during a training trip and he had significantly worse marks than any trainee who received a pilot’s license. In his last month of training, he nearly rammed the Pier 86 grain dock in Seattle.

It is well settled that this Board is to be given “considerable discretion” in matters of licensing marine pilots. *Bock v. Bd. of Pilotage Comm’rs*, 91 Wn.2d 94, 100, 566 P.2d 1173 (1978); *State ex rel. Sater v. Bd. of Pilotage Comm’rs*, 198 Wash. 695, 90 P.2d 238 (1939). The Board’s licensing decisions will be upheld so long as they are not “arbitrary and capricious,” and are “fair and consistent” with its other licensing decisions. *Bock*, 91 Wn.2d at 100. It was neither arbitrary nor capricious for the Board to refuse to license an unsafe trainee in this case. And six days of

hearings that focused exclusively on “comparator evidence” proved that the Board applied the same standards and processes to all trainees in a fair and consistent manner, and substantial evidence supports the Board’s denial of a pilot’s license to Nelson.

The Court of Appeals properly followed precedent when, in an Unpublished Opinion, it affirmed the Board’s Final Order (Order) denying Nelson a pilot’s license. This decision does not warrant review under RAP 13.4(b)<sup>1</sup> and the Petition for Review should be denied.

## **II. COUNTERSTATEMENT OF THE ISSUES**

A. Whether the Court of Appeals properly determined that the Board did not act arbitrarily and capriciously and made licensing decisions that were “fair and consistent” in accordance with Washington law.

B. Whether the Court of Appeals properly determined that the Board used and applied the same constitutionally valid standards and procedures for evaluating all trainees, including Nelson.

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<sup>1</sup> RAP 13.4

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

### III. COUNTERSTATEMENT OF THE CASE

#### A. Background on Pilot Licensing

The Board sets the number of pilots necessary to provide pilotage services, conducts written and simulator examinations to generate a trainee pool, and issues pilot licenses. The Trainee Evaluation Committee (Committee) develops, supervises, and manages the pilot trainees in their training program. The Committee is responsible for, among other things, monitoring and reporting the progress of all pilot trainees to the Board. RCW 88.16.090, *see* Appendix A; WAC 363-116-078, *see* Appendix B; AR15026652-54, Findings of Fact (FF) at 3-13.<sup>2</sup>

At the conclusion of a trainee's program, and again following any extension thereof, the Committee reviews all relevant information, including the Training Trip Reports (Report) prepared for each trainee,<sup>3</sup> and makes a recommendation to the Board as to a trainee's suitability for licensing. If the Committee cannot reach a consensus, it reports both the

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<sup>2</sup> King County did not renumber the Administrative Record as Clerk's Papers numbers when it transmitted the record to the Court of Appeals.

<sup>3</sup> The Report was developed by the Board in consultation with experienced Puget Sound Pilots, who are subject matter experts in the area of piloting in the Puget Sound. The Board adopted the Report as a tool to objectively measure an applicant's progress in meeting the adopted standards necessary to succeed in the program. The adopted standards are the content groups for the Reports (i.e., piloting and ship handling and general seamanship skills; local knowledge; bridge presence and communication skills) enumerated in WAC 363-116-080(5).

majority and minority positions to the Board. WAC 363-116-080(5);<sup>4</sup>  
FF at 16, AR15026655.

The Board independently analyzes all of the training data, the Reports and the Committee's recommendations. It then votes as to whether the trainee has proven to the satisfaction of the Board that he or she can safely, consistently, and independently pilot. To make this determination, the criteria and standards the Board uses include, but are not limited to, the following: "Performance in the training program; piloting and ship handling and general seamanship skills; local knowledge; and, bridge presence and communication skills."

WAC 363-116-080(5); FF at 16, AR15026655; AR00000227-28;  
Conclusions of Law (CL) at 2, AR15026664; CL at 3, AR15026665. *See also* RCW 88.16.035(1)(b); RCW 88.16.035(1)(i), *see* Appendix C;

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<sup>4</sup> WAC 363-116-080

(5) After completion of a training program the trainee evaluation committee (TEC) shall review the evaluations and the pilot trainee's performance on other required aspects of the training program and make a recommendation to the board that the pilot trainee is: Suitable for licensing; not suitable for licensing; or, in need of more training and further evaluation. The board shall consider such recommendation and may: Issue the license if there is a need for a pilot in the relevant pilotage district; require more training for the pilot trainee if necessary; deny a license if it finds that the pilot trainee should not be licensed; or, delay the issuance of a license, if there is no need for a pilot at that time in the relevant district. If the board delays the issuance of a license, it may prescribe additional training trips for the pilot trainee and continue the pilot trainee in the training program. The criteria to be followed by the board in issuing or denying licenses shall include, but not be limited to: Performance in the training program; piloting and ship handling and general seamanship skills; local knowledge; and, bridge presence and communication skills.



RCW 88.16.090(2)(a).<sup>5</sup>

These published standards are available to the public and to all trainees. The Committee goes over the expectations of the Board with each trainee during the development of the training program before the trainee signs as having accepted the program. The trainee's signature is an acknowledgement of his or her understanding of the Committee's and the Board's expectations. AR00000220-22; AR00000663-66; AR00000703-04; AR00003745-71.

To ensure that the training and evaluation process is valid, fair, and consistent, it has numerous checks and balances to prevent a commissioner, or small group of commissioners, from taking control of the process. An expert in Industrial/Organization Psychology found the training and evaluation process to be valid and reliable. That expert's opinions were found credible and were adopted as fact by Administrative Law Judge (ALJ) Richard Roberts (Roberts) and the Board.

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<sup>5</sup> RCW 88.16.090

(2)(a) A person is eligible to be licensed as a pilot or a pilot trainee if the person:

(i) Is a citizen of the United States;

(ii) Is over the age of twenty-five years and under the age of seventy years;

(iii)(A) Holds at the time of application, as a minimum, a United States government license as master of steam or motor vessels of not more than one thousand six hundred gross register tons (three thousand international tonnage convention tons) upon oceans, near coastal waters, or inland waters; or the then most equivalent federal license as determined by the board; any such license to have been held by the applicant for a period of at least two years before application;

AR00000229-31; AR00000297-302; AR00001533-38; AR00000642-48;  
FF at 39, AR15026659; CL at 6, AR15026665-66; CP at 564-71.

**B. Nelson Did Not Perform Successfully in His Training Program**

The Unpublished Court of Appeals' Opinion accurately summarizes the pertinent facts regarding Nelson's training program. *Nelson v. State*, No. 75559-5, slip op. at 2-7 (WA Ct. App., Div. I Dec. 11, 2017). His training program was extended several times based upon his inability to demonstrate that he could safely, independently, and consistently pilot in the training program. FF at 18-27, AR15026681-82; AR00003745-71. Late in Nelson's training program, on March 1, 2008, Committee Member Captain Kromann (Kromann) had to intervene during a training trip to avert a disastrous collision at the Pier 86 grain dock in Seattle. Kromann testified that the intervention was required because Nelson did not exhibit the "situational awareness" needed to realize the extreme danger he was putting the ship and dock in. The incident was so troubling to Kromann that he could no longer support Nelson's licensing. AR00000495-98; AR00001120-29; AR00003519-744; AR00006915-19.

Throughout the training process, the Committee and Board continued to extensively review Nelson's progress. FF at 28, AR15026682; AR00000500-05; AR00003766-69; AR15026748-49. *See generally* AR00006001-7013; AR00003519-90; FF at 28, AR15026657;

AR15003742-44. All agreed that Nelson struggled in his training program; was inconsistent overall, particularly with respect to speed control, heading control, and use of tugs; and demonstrated a “disconnect” in fundamental ship handling skills, and a “lack of situational awareness” in the near disastrous collision with the grain dock. Interventions were necessary where Nelson would freeze and be unable to respond as situations developed. AR15001249, 55-56. It was only after Nelson continued to have these same problems after several training program extensions, and more than 100 additional training trips, that the Committee and the Board concluded he was not capable of safe piloting and voted to not license him. AR15001146-47; AR15001242-43; AR15026646-49; FF at 18-31, AR15026656-58; CL at 6, AR15026665-66; AR15026681-83; AR00004120; AR00000484-89; AR00000494-95. *See generally* AR00002432-35, 93; AR00003519-90; AR00003757, 67; AR00006001-786; AR15001080-81; AR15001229; AR15003742-44, 46-50.

In light of the record before it, the Board unanimously voted to deny issuing a pilot’s license to Nelson and notified him of its decision. FF at 33-34, AR15026658. Nelson claims he “successfully completed” the training program. Br. Pet’r at 5. This factual issue was resolved at the

hearing with a determination that he did not successfully complete the training program. AR15026646-47, 56-66. Nelson appealed.

**C. The Comparator Evidence Elicited at the Remand Hearing Confirms the Board Was Justified in Denying Nelson a Pilot's License, and the Training Process Was Applied in a Fair and Consistent Manner To All Trainees**

An initial hearing concerning the Board's decision took place over seven days in March and April 2010 (Initial Hearing). A subsequent remand hearing spanned six days in 2014 (Remand Hearing). Combined, these proceedings involved 13 days of hearings, over 30 witnesses, and thousands of pages of documents. Following the Remand Hearing, ALJ Roberts, an independent and experienced ALJ, and later Board Review Officer Edmund I. Kiley, affirmed the Board's decision to deny Nelson a pilot's license, as set forth in the Order. AR15026642-90. The matter was then appealed to the King County Superior Court, which affirmed the Order in an extensive written order dated June 29, 2016 (Order Affirming the Board's Final Order on Remand entered July 21, 2015). CP at 208-31.

The six-day remand hearing focusing on "comparator evidence," whether Nelson was treated in a fair and consistent manner when compared to the other trainees in his training class, confirmed the validity, reliability, fairness, consistency, and constitutionality of the Board's training program as applied to all trainees, including Nelson. AR15026642-90. The evidence

established that for each trainee, the Board considered all of the information from each training trip and from the entire training program in making licensing determinations. The training trips marked as interventions or containing low scores were relevant only to the extent they reflected a trainee's ability to safely pilot. FF at 44-52, AR15026660-62; AR15000345; AR15000483; AR15000748; AR15001523.

The Committee and the Board looked at the specific details of each trip and then made a judgment about what that trip revealed about the trainee. AR15026660-02. When a particular trip had low scores or an intervention marked on a Report, the Committee and the Board would examine the details (type of ship, the tug boats, the severity of any problems, weather, the personality of the training pilot, etc.) to determine what the trip revealed about the trainee's abilities and whether the trainee exhibited a pattern of a serious lack of situational awareness. AR15000289; AR15026660-62.

The comparator evidence showed that Nelson was not the only trainee who struggled and needed extra training. The Committee recommended, and the Board approved, one or more training extensions to eight trainees, including Nelson. In each case, the trainee's documented Reports revealed a pattern of problems with piloting that the Committee

wanted to address. Training extensions were designed to address those problems by giving them additional opportunities to demonstrate to the Board their ability to safely pilot. AR15026659-62.

**D. The Final Order Affirmed the Denial of a Pilot's License To Nelson**

The Order affirmed the Board's decision to deny Nelson a pilot's license. In addition to the above findings, the following Findings of Fact and Conclusions of Law were made:

- The evidence introduced on remand failed to show that the Board or the Committee applied a different standard to any of the pilot trainees, or that Nelson was treated differently from any other trainee. FF at 44, 45, 46, 47, 48, AR15026660-61.
- Nelson's assertions that other trainees were evaluated differently, based on his evidence of "isolated incidents . . . plucked from hundreds of pages of a pilot trainee's training trips" were "unpersuasive." FF at 51, AR15026661-62.
- Because the Board did not use statistics to make its licensing decisions, statistical evidence was of limited probative value and was

- deemed not persuasive<sup>6</sup>; however, it demonstrated that Nelson was comparatively a worse performer than those who were licensed. FF at 51-53, AR15026661-62.
- Expert testimony confirmed that the results produced in the training program were reliable, valid, and consistent. FF at 39, 44-53, AR15026659-62.
- There was “no evidence at all” that Nelson was the victim of age discrimination, gender discrimination, favoritism, nepotism, or bias. FF at 55, 56, 57, AR15026662-63.<sup>7</sup> The Board properly acted within its discretion in denying Nelson a marine pilot’s license. There was no evidence whatsoever of arbitrary and capricious conduct by the Board or the Committee, nor was there any evidence of a bad motive on their part. The evidence was clear that the Committee and the Board went to great lengths and spent a considerable amount of time and expense to facilitate the successful completion of his training program. There was no

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<sup>6</sup> It was not deemed “irrelevant” as Nelson alleges. Br. Pet’r at 6, 16. He claims that the ALJ “cited” to a WAC section purporting to disallow comparator evidence. However, the WAC cited by the ALJ was made for the purpose of clearly stating that Justice Yu’s order requiring consideration of comparator evidence was followed (resulting in the six-day Remand Hearing).

<sup>7</sup> In a footnote, Nelson cites a stipulated judgment in favor of Captain Katherine Sweeney, who successfully brought a gender discrimination claim against the Board. That case proves nothing for Nelson. After 13 days of hearings, there was no evidence at all of any claimed discrimination against him.

persuasive evidence that he was not trained or evaluated properly.

CL at 6, AR15026665-66.<sup>8</sup>

- The Board’s training program was an “excellent tool for training and evaluating trainees and providing feedback to the Committee, Board, and the trainee.” It is valid and reliable for identifying those who can safely pilot. FF at 39, 53, AR15026659, 62; CP at 564-71.

#### **IV. REASONS WHY THE COURT SHOULD DENY REVIEW**

The Court of Appeals, in its comprehensive Unpublished Opinion, followed precedent and correctly concluded that the Board did not act in an “arbitrary and capricious” manner when it denied Nelson a pilot’s license, and that the Board’s licensing process was applied in a “fair and consistent” manner to all trainees, including Nelson. The Unpublished Opinion does not raise any reviewable issue of constitutional law or a matter of substantial public interest. It does not meet the criteria for review in RAP 13.4(b).

##### **A. The Court of Appeals’ Decision Closely Followed Precedent in Analyzing and Affirming the Board’s Denial of a Pilot’s License To Nelson**

The Court of Appeals reviewed each of Nelson’s evidentiary challenges for which he presented argument or analysis and found that

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<sup>8</sup> By agreement, the Board did not offer for the ALJ’s consideration the portions of the expert testimony and reports that addressed the issue of intervention severity.



each challenged finding was supported by substantial evidence. *Nelson*, slip op. at 9-10. It found there was substantial evidence to support the Board's adoption of expert testimony and the finding that each trainee's training program was "unique" and "comparable to other trainees' programs." *Nelson*, slip op. at 9. The Court of Appeals based its review on the agency record, as required by the Administrative Procedure Act. RCW 34.05, see Appendix D. *Nelson*, slip op. at 8. See *City of Redmond v Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

In rejecting Nelson's contention that the Board's decision to deny him a pilot's license was arbitrary and capricious, the Board articulated the proper legal standard for its *de novo* review (willful and unreasoning action, taken without regard to or consideration of the facts and circumstances), and properly placed the burden of demonstrating prejudice and the Order's invalidity on Nelson. *Nelson*, slip op. at 8, 10 (citing *Pub. Util. Dist. No. 2 of Pac. Cty. v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 45, 336 P.3d 65 (2014); *Steward v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 352 P.3d 920 (2011));

RCW 34.05.570(1)(a), (d).<sup>9</sup>

Acknowledging that the Board has “considerable discretion” in carrying out its statutorily authorized duties, the Court of Appeals concluded that the Board’s decision to deny Nelson a pilot’s license was not arbitrary and capricious because it was based upon its evaluation of his performance and knowledge, applying the criteria set forth in WAC 363-116-080(5). *Nelson*, slip op. at 12 (citing *Bock*, 91 Wn.2d at 100). The Court of Appeals referenced the Board’s determination that Nelson had failed to consistently perform at a level sufficient to ensure protection of the public, and that he was not improving despite multiple extensions of his training program. *Nelson*, slip op. at 12-13.

The Court of Appeals also concluded that the Board evaluated Nelson’s candidacy (and all others) based upon the criteria adopted in WAC 363-116-080(5), the Committee recommendations, and its review of the Reports to determine that Nelson should not be granted a pilot’s license. *Id.*, slip op. at 12-13. The Board’s exercise of discretion was not unfettered, as Nelson contends, but tethered to the adopted standards and

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<sup>9</sup> RCW 34.05.570

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

the evidence. *Id.* Moreover, the Board treated and evaluated each trainee using the same methodology and criteria, in a fair and consistent manner. *Id.* The Court of Appeals rejected Nelson's argument that the adoption and subsequent alteration of the training Report required additional rulemaking; the Court of Appeals explained that the Report was simply a means of collecting the information required under WAC 363-116-080(5). *Nelson*, slip op., at 15-18. The Court of Appeals also determined that the Board's criteria for granting a pilot's license set forth in WAC 363-116-080(5) was constitutionally valid and consistent with its enabling statute. *Nelson*, slip op. at 20-23.

Finally, the Court of Appeals rejected Nelson's due process claim, finding both that the length of time needed to resolve this matter was reasonable given the procedural history and that he failed to engage in a suitable analysis of the factors in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Nelson*, slip op. at 24-25.

Because the Court of Appeals' decision followed well-established precedent in reaching its conclusions, there is no need for discretionary review.

**B. The Court of Appeals' Rejection of Nelson's Unsupported Factual Allegation That the Board Treated Him Unfairly Does Not Create Any Constitutional Concern or Issue of Substantial Public Importance Warranting Further Review**

To justify discretionary review under RAP 13.4(b)(3),<sup>10</sup> Nelson must provide substantial legal authority supporting his position. Instead, Nelson continues to assert the factually unsupported argument that he was treated differently. However, the fact finder (ALJ), the Board, the Superior Court, and the Court of Appeals all found no evidentiary support in the record for Nelson's factual allegations.

Nelson asserts that the Board evaluated him differently because there were no evaluation standards. However, as set forth above, the Board does have standards by which all of the trainees are measured—all must prove to the satisfaction of the Board that they have the ability to safely, efficiently, and independently pilot vessels. This is evaluated by the Board through review of each trainee's Reports and the recommendations of the Committee. The Reports are used to measure the licensing criteria adopted by the Board under

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<sup>10</sup> RAP 13.4

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved;

WAC 363-116-080(5). *See also* RCW 88.16.090(4)<sup>11</sup> (granting the Board authority to establish performance measures and other criteria or qualifications for licensure); *Nelson*, slip op. at 11-12, 14.

These criteria are not unconstitutionally vague. The Court of Appeals correctly noted that regulations are presumed to be constitutionally valid. *Nelson*, slip op. at 21 (quoting *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 894 P.2d 582 (1995); (citing *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991)). The licensing criteria set forth in WAC 363-116-080(5) are informed by

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<sup>11</sup> RCW 88.16.090

(4) Pilot applicants shall be evaluated and may be ranked for entry into a board-specified training program in a manner specified by the board based on their performance on a written examination or examinations established by the board, performance on other evaluation exercises as may be required by the board, and other criteria or qualifications as may be set by the board.

When the board determines that the demand for pilots requires entry of an applicant into the training program it shall issue a training license to that applicant, but under no circumstances may an applicant be issued a training license more than four years after taking the written entry examination. The training license authorizes the trainee to do such actions as are specified in the training program.

After the completion of the training program the board shall evaluate the trainee's performance and knowledge. The board, as it deems appropriate, may then issue a pilot license, delay the issuance of the pilot license, deny the issuance of the pilot license, or require further training and evaluation.

RCW 88.16; *see* Appendix E. RCW 88.16.005<sup>12</sup> states that the intended purpose of the chapter is to provide marine and environmental safety by requiring experienced and competent licensed pilots aboard vessels in specified state waters. RCW 88.16.035(b)(i)<sup>13</sup> authorizes the Board to establish training and qualification requirements for pilot licensees so as to ensure safe and competent pilotage services. *Nelson*, slip op. at 23.

WAC 363-116-080(5) provides the basis for determining whether a trainee has the skills necessary to carry out this mandate and must be viewed in the context of the enabling statutes. *Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 173 P.3d 275 (2007) (citing cases). In this light, the Court of Appeals correctly concluded

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<sup>12</sup> RCW 88.16.005

The legislature finds and declares that it is the policy of the state of Washington to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the state of Washington through the sound application of compulsory pilotage provisions in certain of the state waters.

The legislature further finds and declares that it is a policy of the state of Washington to have pilots experienced in the handling of vessels aboard vessels in certain of the state waters with prescribed qualifications and licenses issued by the state.

It is the intent of the legislature to ensure against the loss of lives, loss or damage to property and vessels, and to protect the marine environment through the establishment of a board of pilotage commissioners representing the interests of the people of the state of Washington.

It is the further intent of the legislature not to place in jeopardy Washington's position as an able competitor for waterborne commerce from other ports and nations of the world, but rather to continue to develop and encourage such commerce.

<sup>13</sup> RCW 88.16.035

(b)(i) Issue training licenses and pilot licenses to pilot applicants meeting the qualifications provided for in RCW 88.16.090 and such additional qualifications as may be determined by the board;

WAC 363-116-080(5) is not unconstitutionally vague, as the terms used are informed by the Legislature's intent and the scope of the Board's statutory authority, and they are sufficiently clear to members of the pilotage community, including Nelson, on how they will be evaluated. *Nelson*, slip op. at 23.

The Board properly exercised its authority when it determined, after a review of all of the information, that Nelson did not successfully complete his training program and therefore was not suitable for licensing. The Court of Appeals agreed, concluding that the Board's decision was not arbitrary and capricious, and was fair and consistent, and that the criteria in WAC 363-116-080(5) are not unconstitutionally vague. *Nelson*, slip op. at 10-14, 20-23.

Nelson continues to claim that he was given more difficult training trips than other trainees were, and that the statistics and expert testimony supported his claim of unfair treatment. These claims were extensively litigated in the six-day Remand Hearing, and were rejected by the ALJ. FF at 51, AR15026661-62. The Court of Appeals correctly affirmed, agreeing with the superior court, that there was substantial evidence to find that Nelson was assessed using the same methodology and criteria as others, and that his performance and knowledge were not evaluated in a way meaningfully different than the other trainees.

*Nelson*, slip op. at 13-14. See AR15026660-62. Nelson simply failed to carry his burden of proof on his claims.

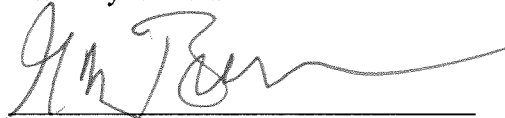
The Court of Appeals correctly concluded that the Board's decision was: (i) not arbitrary and capricious; (ii) fair and consistent; (iii) based upon substantial evidence; and (iv) in accordance with this Court's precedent in *Bock* and *Sater*. The decision of the Court of Appeals imposes no unequal treatment and presents no question of constitutional law or issue of substantial public interest that requires clarification or warrants discretionary review.

#### V. CONCLUSION

The Court of Appeals properly affirmed the Board's licensing decision. Discretionary review should be denied.

RESPECTFULLY SUBMITTED this 18th day of April  
2018.

ROBERT W. FERGUSON  
Attorney General



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GUY M. BOWMAN  
Assistant Attorney General  
WSBA No. 29214  
Attorneys for Respondent



**PROOF OF SERVICE**

I certify that I served a copy of this document by Electronic Mail  
on all parties or their counsel of record on the date below as follows:

Mary Ruth Mann  
James W. Kytle  
Mann & Kytle PLLC  
Attorneys at Law  
[mrmann@mannkytle.com](mailto:mrmann@mannkytle.com)  
[jkytle@mannkytle.com](mailto:jkytle@mannkytle.com)

Catherine Hendricks  
Assistant Attorney General  
[CathH@atg.wa.gov](mailto:CathH@atg.wa.gov)

Allyson Zipp  
Assistant Attorney General  
[AllysonZ@atg.wa.gov](mailto:AllysonZ@atg.wa.gov)

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 18th day of April, 2018, at Tumwater, WA.

  
\_\_\_\_\_  
CHARLOTTE ARMSTRONG

NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE  
COMMISSIONERS,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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**APPENDIX A**

**RCW 88.16.090**

**Pilot and pilot trainee licenses—Qualifications—Duration—Annual fee—Examinations and evaluations—Training program and license—Penalty—Reporting requirements.**

(1) A person may pilot any vessel subject to this chapter on waters covered by this chapter only if licensed to pilot such vessels on such waters under this chapter.

(2)(a) A person is eligible to be licensed as a pilot or a pilot trainee if the person:

(i) Is a citizen of the United States;

(ii) Is over the age of twenty-five years and under the age of seventy years;

(iii)(A) Holds at the time of application, as a minimum, a United States government license as master of steam or motor vessels of not more than one thousand six hundred gross register tons (three thousand international tonnage convention tons) upon oceans, near coastal waters, or inland waters; or the then most equivalent federal license as determined by the board; any such license to have been held by the applicant for a period of at least two years before application;

(B) Holds at the time of licensure as a pilot, after successful completion of the board-required training program, a first class United States endorsement without restrictions on the United States government license for the pilotage district in which the pilot applicant desires to be licensed; however, all applicants for a pilot examination scheduled to be given before July 1, 2008, must have the United States pilotage endorsement at the time of application; and

(C) The board may require that applicants and pilots have federal licenses and endorsements as it deems appropriate; and

(iv) Successfully completes a board-specified training program.

(b) In addition to the requirements of (a) of this subsection, a pilot applicant must meet such other qualifications as may be required by the board.

(c) A person applying for a license under this section shall not have been convicted of an offense involving drugs or the personal consumption of alcohol in the twelve months prior to the date of application. This restriction does not apply to license renewals under this section.

(3) The board may establish such other training license and pilot license requirements as it deems appropriate.

(4) Pilot applicants shall be evaluated and may be ranked for entry into a board-specified training program in a manner specified by the board based on their performance on a written examination or examinations established by the board, performance on other evaluation exercises as may be required by the board, and other criteria or qualifications as may be set by the board.

When the board determines that the demand for pilots requires entry of an applicant into the training program it shall issue a training license to that applicant, but under no circumstances may an applicant be issued a training license more than four years after taking the written entry examination. The training license authorizes the trainee to do such actions as are specified in the training program.

After the completion of the training program the board shall evaluate the trainee's performance and knowledge. The board, as it deems appropriate, may then issue a pilot license, delay the issuance of the pilot license, deny the issuance of the pilot license, or require further training and evaluation.

(5) The board may (a) appoint a special independent committee or (b) contract with private or governmental entities knowledgeable and experienced in the development, administration,

and grading of licensing examinations or simulator evaluations for marine pilots, or (c) do both. Active, licensed pilots designated by the board may participate in the development, administration, and grading of examinations and other evaluation exercises. If the board does appoint a special examination or evaluation development committee, it is authorized to pay the members of the committee the same compensation and travel expenses as received by members of the board. Any person who willfully gives advance knowledge of information contained on a pilot examination or other evaluation exercise is guilty of a gross misdemeanor.

(6) This subsection applies to the review of a pilot applicant's written examinations and evaluation exercises to qualify to be placed on a waiting list to become a pilot trainee. Failure to comply with the process set forth in this subsection renders the results of the pilot applicant's written examinations and evaluation exercises final. A pilot applicant may seek board review, administrative review, and judicial review of the results of the written examinations and evaluation exercises in the following manner:

(a) A pilot applicant who seeks a review of the results of his or her written examinations or evaluation exercises must request from the board-appointed or board-designated examination committee an administrative review of the results of his or her written examinations or evaluation exercises as set forth by board rule.

(b) The determination of the examination committee's review of a pilot applicant's examination results becomes final after thirty days from the date of service of written notification of the committee's determination unless a full adjudicative hearing before an administrative law judge has been requested by the pilot applicant before the thirty-day period has expired, as set forth by board rule.

(c) When a full adjudicative hearing has been requested by the pilot applicant, the board shall request the appointment of an administrative law judge under chapter **34.12** RCW who has sufficient experience and familiarity with pilotage matters to be able to conduct a fair and impartial hearing. The hearing shall be governed by chapter **34.05** RCW. The administrative law judge shall issue an initial order.

(d) The initial order of the administrative law judge is final unless within thirty days of the date of service of the initial order the board or pilot applicant requests review of the initial order under chapter **34.05** RCW.

(e) The board may appoint a person to review the initial order and to prepare and enter a final order as governed by chapter **34.05** RCW and as set forth by board rule. The person appointed by the board under this subsection (6)(e) is called the board reviewing officer.

(7) Pilots are licensed under this section for a term of five years from and after the date of the issuance of their respective state licenses. Licenses must thereafter be renewed as a matter of course, unless the board withholds the license for good cause. Each pilot shall pay to the state treasurer an annual license fee in an amount set by the board by rule. Pursuant to RCW **43.135.055**, the fees established under this subsection may be increased through the fiscal year ending June 30, 2011. The fees must be deposited in the pilotage account. The board may assess partially active or inactive pilots a reduced fee.

(8) All pilots and pilot trainees are subject to an annual physical examination by a physician chosen by the board. The physician shall examine the pilot's or pilot trainee's heart, blood pressure, circulatory system, lungs and respiratory system, eyesight, hearing, and such other items as may be prescribed by the board. After consultation with a physician and the United States coast guard, the board shall establish minimum health standards to ensure that pilots and pilot trainees licensed by the state are able to perform their duties. Within ninety

days of the date of each annual physical examination, and after review of the physician's report, the board shall make a determination of whether the pilot or pilot trainee is fully able to carry out the duties of a pilot or pilot trainee under this chapter. The board may in its discretion check with the appropriate authority for any convictions of or information regarding offenses by a licensed pilot or pilot trainee involving drugs or the personal consumption of alcohol in the prior twelve months.

(9) The board may require vessel simulator training for a pilot trainee and shall require vessel simulator training for a licensed pilot subject to RCW 88.16.105. The board shall also require vessel simulator training in the first year of active duty for a new pilot and at least once every five years for all active pilots.

(10) The board shall prescribe, pursuant to chapter 34.05 RCW, such reporting requirements and review procedures as may be necessary to assure the accuracy and validity of license and service claims. Willful misrepresentation of such required information by a pilot applicant shall result in disqualification of the pilot applicant.

[ 2009 c 470 § 708; 2008 c 128 § 4; 2007 c 518 § 706; 2005 c 26 § 2; 1999 sp.s. c 1 § 607; 1995 c 175 § 1; 1991 c 200 § 1002. Prior: 1990 c 116 § 27; 1990 c 112 § 1; 1987 c 264 § 2; 1986 c 122 § 1; 1981 c 303 § 1; 1979 ex.s. c 207 § 3; 1977 ex.s. c 337 § 7; 1967 c 15 § 5; 1935 c 18 § 8; RRS § 9871-8; prior: 1907 c 147 § 1; 1888 p 176 § 8.]

#### NOTES:

**Effective date—2009 c 470:** See note following RCW 46.68.170.

**Severability—Effective date—2007 c 518:** See notes following RCW 46.68.170.

**Effective date—2005 c 26:** See note following RCW 88.16.035.

**Effective date—1999 sp.s. c 1:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 27, 1999]." [ 1999 sp.s. c 1 § 620.]

**Effective date—1995 c 175:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [ 1995 c 175 § 2.]

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Findings—Severability—1990 c 116:** See notes following RCW 90.56.210.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE  
COMMISSIONERS,

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**ANSWER TO PETITION FOR REVIEW**

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**APPENDIX B**

**WAC 363-116-078****Training program.**

After passing the written examination and simulator evaluation, pilot applicants pursuing a pilot license will be put on a list for the applicable pilotage district(s) and must enter and successfully complete a training program specified by the board.

(1) Notification. Pilot applicants on a list as described in subsection (2) of this section, waiting to enter a training program shall provide the board with a current address to be used for notification for entry into a training program. Such address shall be a place at which mail is delivered. In addition, a pilot applicant may provide the board with other means of contact such as a phone number, fax number, and/or an email address. The mailing address will, however, be considered the primary means of notification by the board. It will be the responsibility of the pilot applicant to ensure that the board has a current mailing address at all times. If a pilot applicant cannot personally receive mail at the address provided to the board for any period of time, another person may be designated in writing with a notarized copy to the board as having power of attorney specifically to act in the pilot applicant's behalf regarding such notice. If notice sent to the address provided by the pilot applicant is returned after three attempts to deliver, that pilot applicant will be skipped and the next pilot applicant on the list will be contacted for entry into a training program. A person so skipped will remain next on the list. A pilot applicant or his/her designated attorney in fact shall respond within fifteen calendar days of receipt of notification to accept, refuse, or request a delayed entry into a training program.

(2) Entry. At such time that the board chooses to start a pilot applicant or applicants in a training program for a pilotage district, notification shall be given as provided in this section. Pilot applicants shall be ranked in accordance with a point system established by the board to assess overall performance on the written examination and simulator evaluation. Applicants shall be eligible to enter a training program for a pilotage district in the order of such rankings or as otherwise may be determined by the board. A pilot applicant who refuses entry into a program will be removed from the waiting list with no further obligation by the board to offer a position in that district's training program to such pilot applicant. If the pilot applicant applied for a license in the other pilotage district when applying for the written examination, the applicant shall remain available for that other district's training program in accordance with his/her position on that list.

(a) A pilot applicant who is not able to start a training program within two months of the board's specified entry date may, with written consent of the board, delay entry into that training program. When an applicant delays entry into a training program by more than two months, the board will give notice to the next pilot applicant on the list for that pilotage district to enter a training program. The pilot applicant who delays entry, shall remain eligible for the next position in that district, provided that the next position becomes available within the earlier of:

- (i) Four years from the pilot applicant's taking the written examination; or
- (ii) The date scheduled for the next pilotage examination for the district.

(b) A pilot applicant not able to start in a training program within two months of the board's specified entry date and who does not obtain the board's written consent to delay entry into a training program shall no longer be eligible for that district's training program without retaking

the examination provided in WAC 363-116-076 and the simulator evaluation provided in WAC 363-116-077.

(3) Training license. Prior to receiving a training license pilot applicants must pass a physical examination by a board-designated physician and in accordance with the requirements of WAC 363-116-120 for initial pilot applicants. A form provided by the board must be completed by the physician and submitted to the board along with a cover letter indicating the physician's findings and recommendations as to the pilot applicant's fitness to pilot. The physical examination must be taken not more than ninety days before issuance of the training license. Holders of a training license will be required to pass a general physical examination annually within ninety days prior to the anniversary date of that license. Training license physical examinations will be at the expense of the pilot applicant. All training licenses shall be signed by the chairperson or his/her designee and shall have an expiration date. Training licenses shall be surrendered to the board upon completion or termination of the training program.

(4) Development. As soon as practical after receiving notification of eligibility for entry into a training program as set forth in this section, the pilot applicant shall meet with the trainee evaluation committee (TEC) for the purpose of devising a training program for that pilot applicant. The training program shall be tailored to the ability and experience of the individual pilot applicant and shall consist of observation trips, training trips and evaluation trips, and such other forms of learning and instruction that may be designated. The TEC shall recommend a training program for adoption by the board. After adoption by the board, it will be presented to the pilot applicant. If the pilot applicant agrees in writing to the training program, the board shall issue a training license to the pilot applicant, which license shall authorize the pilot applicant to take such actions as are contained in the training program. If the pilot applicant does not agree to the terms of a training program in writing within fifteen business days of it being mailed to the applicant by certified mail, return receipt requested, that pilot applicant shall no longer be eligible for entry into that pilotage district's training program and the board may give notice to the next available pilot applicant that he/she is eligible for entry into a training program pursuant to the terms in subsections (1) and (2) of this section.

(5) Initial route.

(a) The trainee evaluation committee (TEC) shall assign an initial route between a commonly navigated port or terminal and the seaward boundary of the pilotage district to each trainee at the beginning of his/her training program.

(b) Unless an extension of time is granted by the board, within eight months of the beginning of the training program if the trainee is on stipend or within fifteen months of the beginning of the training program if the trainee is not on stipend, the trainee must:

(i) Take and pass all conning quizzes provided by the board applicable to the assigned route. These quizzes can be repeated as necessary, provided that they may not be taken more than once in any seven-day period and further provided that they must be successfully passed before the expiration date time period specified in (b) of this subsection; and

(ii) Take and pass the local knowledge examinations provided by the board applicable to the assigned route. These examinations can be repeated as necessary, provided that they may not be taken more than once in any seven-day period and further provided that they must be successfully passed before the expiration date time period specified in (b) of this subsection; and



(iii) Possess a first class pilotage endorsement without tonnage or other restrictions on his/her United States Coast Guard license to pilot on the assigned initial route.

(6) Specification of trips. To the extent possible, a training program shall provide a wide variety of assignments, observation, training and evaluation trips. A training program may contain deadlines for achieving full or partial completion of certain necessary actions. Where relevant, it may specify such factors as route, sequence of trips, weather conditions, day or night, stern or bow first, draft, size of ship and any other relevant factors. The board may designate specific trips or specific numbers of trips that shall be made with training pilots or with the pilot members of the trainee evaluation committee (TEC) or with pilots of specified experience. In the Puget Sound pilotage district, pilot trainees shall complete a minimum of one hundred fifty trips. The board shall set from time to time the minimum number of trips for pilot trainees in the Grays Harbor pilotage district. The total number of trips in a training program shall be established by the board based on the recommendation of the TEC. The board will ensure that during a training program the pilot trainee will get significant review by training pilots and the pilot members of the TEC.

(7) Length of training program. The board shall set the minimum length of a training program provided that it will not be less than eight months in the Puget Sound pilotage district.

(8) Local knowledge. A training program shall provide opportunities for the education of pilot trainees and shall provide for testing of pilot trainees on the local knowledge necessary to become a pilot. This education program shall be developed by the trainee evaluation committee (TEC) and recommended to the board for adoption, in the form of a policy statement, and shall be tailored to the needs of the individual pilot trainee. It shall be the responsibility of the pilot trainee to obtain the local knowledge necessary to be licensed as a pilot in the pilotage district for which he/she is applying. Prior to the completion of a training program, the board, or its designee, may give such local knowledge examination(s) as it deems appropriate to the pilot trainees who shall be required to pass such examination(s) before completing a training program. The TEC may require a pilot trainee to sit for a local knowledge examination provided the TEC informs the pilot trainee in writing sixty days in advance of the scheduled date of the examination. Failure to sit for the examination on the date scheduled may constitute cause for removal from the training program. The TEC may also establish in writing such interim performance requirements as it deems necessary. These local examinations can be repeated as necessary, except that an examination for the same local area may not be taken more than once in any seven-day period and all required local knowledge examinations must be successfully passed before the expiration date of the training program. The local knowledge required of a pilot trainee and the local knowledge examination(s) may include the following subjects as they pertain to the pilotage district for which the pilot trainee seeks a license:

- (a) Area geography;
- (b) Waterway configurations including channel depths, widths and other characteristics;
- (c) Hydrology and hydraulics of large ships in shallow water and narrow channels;
- (d) Tides and currents;
- (e) Winds and weather;
- (f) Local aids to navigation;
- (g) Bottom composition;
- (h) Local docks, berths and other marine facilities including length, least depths and other characteristics;
- (i) Mooring line procedures;

- (j) Local traffic operations e.g., fishing, recreational, dredging, military and regattas;
- (k) Vessel traffic system;
- (l) Marine VHF usage and phraseology, including bridge-to-bridge communications regulations;
- (m) Air draft and keel clearances;
- (n) Submerged cable and pipeline areas;
- (o) Overhead cable areas and clearances;
- (p) Bridge transit knowledge - Signals, channel width, regulations, and closed periods;
- (q) Lock characteristics, rules and regulations;
- (r) Commonly used anchorage areas;
- (s) Danger zone and restricted area regulations;
- (t) Regulated navigation areas;
- (u) Naval operation area regulations;
- (v) Local ship assist and escort tug characteristics;
- (w) Tanker escort rules - State and federal;
- (x) Use of anchors and knowledge of ground tackle;
- (y) Applicable federal and state marine and environmental safety law requirements;
- (z) Marine security and safety zone concerns;
- (aa) Harbor safety plan and harbor regulations;
- (bb) Chapters **88.16 RCW** and **363-116 WAC**, and other relevant state and federal regulations in effect on the date the examination notice is published pursuant to **WAC 363-116-076**; and

(cc) Courses in degrees true and distances in nautical miles and tenths of miles between points of land, navigational buoys and fixed geographical reference points, and the distance off points of land for such courses as determined by parallel indexing along pilotage routes.

(9) Rest. It is the pilot trainee's responsibility to provide adequate rest time so that he/she is fully able to pilot on training trips. Pilot trainees shall not take pilot training trips in which they will be piloting the vessel without observing the rest rules for pilots in place by federal or state law or regulation or any other rest requirements contained in a training program. For purposes of calculating rest required before a training trip in which the pilot trainee will be piloting after an observation trip in which the pilot trainee did not pilot the vessel, such observation trip shall be treated as though it had been a normal pilot training assignment.

(10) Stipend.

(a) At the initial meeting with the trainee evaluation committee (TEC) the pilot trainee shall indicate whether he/she wishes to receive a stipend during their training program. In the Puget Sound pilotage district, as a condition of receiving such stipend, pilot trainees will agree to forego during their training program other full- or part-time employment which prevents them from devoting themselves on a full-time basis to the completion of their training program. With the consent of the board and, if necessary, the restructuring of their training program, pilot trainees may elect to change from a stipend to nonstipend status, and vice versa, during their training program. In the Puget Sound pilotage district the stipend paid to pilot trainees shall be six thousand dollars per month (or such other amount as may be set by the board from time to time), shall be contingent upon the board's setting of a training surcharge in the tariffs levied pursuant to **WAC 363-116-300** sufficient to cover the expense of the stipend and shall be paid from a pilot training account as directed by the board and pursuant thereto shall be paid to pilot trainees as set forth below:

(b) In the Grays Harbor pilotage district the stipend paid to pilot trainees shall be determined by the board and shall be contingent upon the board's receipt of funds, from any party collecting the tariff or providing funds, sufficient to cover the expense of the stipend and shall be paid from a pilot training account as directed by the board and pursuant thereto shall be paid to pilot trainees as set forth below:

Determinations as to stipend entitlement will be made on a full calendar month basis and documentation of trips will be submitted to the board by the fifth day of the following month. The stipend will be paid on an all or nothing basis for each month except that prorations shall be allowed at the rate of two hundred dollars per day (or such other amount as may be set by the board from time to time), under the following circumstances:

(i) For the first and last months of a training program (unless the training program starts on the first or ends on the last day of a month); or

(ii) For a pilot trainee who is deemed unfit for duty by a board-designated physician during a training month; or

(iii) For a pilot trainee who requests a change from a nonstipend status to a stipend status, or from a stipend status to a nonstipend status as set forth in (g) of this subsection.

(c) In the Puget Sound pilotage district a minimum of eighteen trips are required each month for eligibility to receive the stipend. In the Grays Harbor pilotage district the minimum number of trips each month for eligibility to receive the stipend is seventy percent or such number or percentage of trips that may be set by the board of the total number of vessel movements occurring in this district during that month. Only trips required by the training program can be used to satisfy these minimums. Trips will be documented at the end of each month.

(d) It is the pilot trainee's responsibility to make all hard-to-get trips before the end of the training program. If a training program is extended due to a failure to get all of these trips, the board may elect not to pay the stipend if the missing trips were available to the pilot trainee but not taken.

(e) The TEC with approval by the board may allocate, assign or specify training trips among multiple pilot trainees. Generally, the pilot trainee who entered his/her training program earlier has the right of first refusal of training trips provided that the TEC may, with approval by the board, allocate or assign training trips differently as follows:

(i) When it is necessary to accommodate any pilot trainee's initial route;

(ii) When it is necessary to spread hard-to-get trips among pilot trainees so that as many as possible complete required trips on time. If a pilot trainee is deprived of a hard-to-get trip by the TEC, that trip will not be considered "available" under (c) of this subsection. However, the pilot trainee will still be required to complete the minimum number of trips for the month in order to receive a stipend, and the minimum number of trips as required to complete his/her training program;

(f) If a pilot trainee elects to engage in any full-or part-time employment, the terms and conditions of such employment must be submitted to the TEC for prior determination by the board of whether such employment complies with the intent of this section prohibiting employment that "prevents (pilot trainees) from devoting themselves on a full-time basis to the completion of the training program."

(g) If a pilot trainee requests to change to a nonstipend status as provided in this section such change shall be effective for a minimum nonstipend period of thirty days, provided that before any change takes effect the board and the pilot trainee must agree in writing on the terms of a revised training program.

(h) Any approved pilot association or other organization collecting the pilotage tariff levied by WAC 363-116-185 or 363-116-300 shall transfer the pilot training surcharge receipts to the board at least once a month or otherwise dispose of such funds as directed by the board. In the Grays Harbor pilotage district, if there is no separate training surcharge in the tariff, any organization collecting the pilotage tariff levied by WAC 363-116-185 shall transfer sufficient funds to pay the stipend to the board at least once a month or otherwise dispose of such funds as directed by the board. The board may set different training stipends for different pilotage districts. Receipts from the training surcharge shall not belong to the pilot providing the service to the ship that generated the surcharge or to the pilot association or other organization collecting the surcharge receipts, but shall be disposed of as directed by the board. Pilot associations or other organizations collecting surcharge receipts shall provide an accounting of such funds to the board on a quarterly basis or at such other intervals as may be requested by the board. Any audited financial statements filed by pilot associations or other organizations collecting pilotage tariffs shall include an accounting of the collection and disposition of these surcharges. The board shall direct the disposition of all funds in the account.

(11) Trainee evaluation committee. There is hereby created a trainee evaluation committee (TEC) to which members shall be appointed by the board. The TEC shall include at a minimum: Three active licensed Washington state pilots, who, to the extent possible, shall be from the pilotage district in which the pilot trainee seeks a license and at least one of whom shall be a member of the board; one representative of the marine industry (who may be a board member) who holds, or has held, the minimum U.S. Coast Guard license required by RCW 88.16.090; and one other member of the board who is not a pilot. The TEC may include such other persons as may be appointed by the board. The TEC shall be chaired by a pilot member of the board and shall meet as necessary to complete the tasks accorded it. In the event that the TEC cannot reach consensus with regard to any issue it shall report both majority and minority opinions to the board.

(12) Training pilots. The board shall designate as training pilots those pilots who are willing to undergo such specialized training as the board may require and provide. Training pilots shall receive such training from the board to better enable them to give guidance and training to pilot trainees and to properly evaluate the performance of pilot trainees. The board shall keep a list of training pilots available for public inspection at all times. All pilot members of the trainee evaluation committee (TEC) shall also be training pilots.

(13) Training and assessment. Before, during and after a pilot trainee pilots a vessel under the supervision of a pilot on a training trip, the supervising pilot shall, to the extent possible, communicate with and give guidance to the pilot trainee in an effort to make the trip a valuable learning experience. On an evaluation trip, this communication will normally occur after completion of the trip. After each trip, the supervising pilot shall complete a trip report form provided by the board. Trip report forms prepared by licensed pilots who are not training pilots shall be used by the trainee evaluation committee (TEC) and the board for assessing a pilot trainee's progress, providing guidance to the pilot trainee and for making alterations to a training program. The use of trip report forms prepared by licensed pilots who are not training pilots shall be appropriately weighed by the board and the TEC when making licensing decisions and recommendations. All trip report forms shall be delivered or mailed by the supervising pilot to the board. They shall not be given to the pilot trainee. The supervising pilot may show the contents of the form to the pilot trainee, but the pilot trainee has no right to see the form until it is filed with the board. The TEC shall review these trip report forms from time

to time and the chairperson of the TEC shall report the progress of all pilot trainees at each meeting of the board. If it deems it necessary, the TEC may recommend, and the board may make, changes from time to time in the training program requirements applicable to a pilot trainee, including the number of trips in a training program.

(14) Termination of and removal from a training program. A pilot trainee's program may be immediately terminated and the trainee removed from a training program by the board if it finds any of the following:

- (a) Failure to maintain the minimum federal license required by RCW **88.16.090**;
  - (b) Conviction of an offense involving drugs or involving the personal consumption of alcohol;
  - (c) Failure to devote full time to training in the Puget Sound pilotage district if receiving a stipend;
  - (d) The pilot trainee is not physically fit to pilot;
  - (e) Failure to make satisfactory progress toward timely completion of the program or timely meeting of interim performance requirements in a training program;
  - (f) Inadequate performance on examinations or other actions required by a training program;
  - (g) Failure to complete the initial route requirements specified in subsection (5) of this section within the time periods specified;
  - (h) Inadequate, unsafe, or inconsistent performance in a training program and/or on training trips as determined by the supervising pilots, the trainee evaluation committee (TEC) and/or the board; or
  - (i) Violation of a training program requirement, law, regulation or directive of the board.
- (15) Completion of a training program shall include the requirement that the pilot trainee:
- (a) Successfully and timely complete the requirements set forth in the training program;
  - (b) Possess a valid first class pilotage endorsement without tonnage or other restrictions on his/her United States government license to pilot in all of the waters of the pilotage district in which the pilot applicant seeks a license; and
  - (c) Successfully complete any local knowledge examination(s) required by the board and specified in the training program.

[Statutory Authority: Chapter **88.16** RCW. WSR 13-08-025, § 363-116-078, filed 3/27/13, effective 4/27/13; WSR 12-05-064, § 363-116-078, filed 2/15/12, effective 3/17/12; WSR 10-04-100, § 363-116-078, filed 2/3/10, effective 3/6/10. Statutory Authority: Chapter **88.16** RCW and 2008 c 128. WSR 08-15-119, § 363-116-078, filed 7/21/08, effective 8/21/08. Statutory Authority: RCW **88.16.105**. WSR 06-20-107, § 363-116-078, filed 10/4/06, effective 11/4/06. Statutory Authority: Chapter **88.16** RCW and 2005 c 26. WSR 05-18-021, § 363-116-078, filed 8/29/05, effective 10/1/05.]

NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Appellant,

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STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE  
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**ANSWER TO PETITION FOR REVIEW**

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**APPENDIX C**

**RCW 88.16.035**

**Board of pilotage commissioners—Powers and duties.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

(1) The board of pilotage commissioners shall:

(a) Adopt rules, pursuant to chapter 34.05 RCW, necessary for the enforcement and administration of this chapter;

(b)(i) Issue training licenses and pilot licenses to pilot applicants meeting the qualifications provided for in RCW 88.16.090 and such additional qualifications as may be determined by the board;

(ii) Establish a comprehensive training program to assist in the training and evaluation of pilot applicants before final licensing; and

(iii) Establish additional training requirements, including a program of continuing education developed after consultation with pilot organizations, including those located within the state of Washington, as required to maintain a competent pilotage service;

(c) Maintain a register of pilots, records of pilot accidents, and other history pertinent to pilotage;

(d) Determine from time to time the number of pilots necessary to be licensed in each district of the state to optimize the operation of a safe, fully regulated, efficient, and competent pilotage service in each district;

(e) Annually fix the pilotage tariffs for pilotage services provided under this chapter: PROVIDED, That the board may fix extra compensation for extra services to vessels in distress, for awaiting vessels, for all vessels in direct transit to or from a Canadian port where Puget Sound pilotage is required for a portion of the voyage, or for being carried to sea on vessels against the will of the pilot, and for such other services as may be determined by the board: PROVIDED FURTHER, That as an element of the Puget Sound pilotage district tariff, the board may consider pilot retirement plan expenses incurred in the prior year in either pilotage district. However, under no circumstances shall the state be obligated to fund or pay for any portion of retirement payments for pilots or retired pilots;

(f) File annually with the governor and the chairs of the transportation committees of the senate and house of representatives a report which includes, but is not limited to, the following: The number, names, ages, pilot license number, training license number, and years of service as a Washington licensed pilot of any person licensed by the board as a Washington state pilot or trainee; the names, employment, and other information of the members of the board; the total number of pilotage assignments by pilotage district, including information concerning the various types and sizes of vessels and the total annual tonnage; the annual earnings or stipends of individual pilots and trainees before and after deduction for expenses of pilot organizations, including extra compensation as a separate category; the annual expenses of private pilot associations, including personnel employed and capital expenditures; the status of pilotage tariffs, extra compensation, and travel; the retirement contributions paid to pilots and the disposition thereof; the number of groundings, marine occurrences, or other incidents which are reported to or investigated by the board, and which are determined to be accidents, as defined by the board, including the vessel name, location of incident, pilot's or trainee's name, and disposition of the case together with information received before the board acted from all persons concerned, including the United States coast guard; the names, qualifications, time scheduled for examinations, and the district of persons

desiring to apply for Washington state pilotage licenses; summaries of dispatch records, quarterly reports from pilots, and the bylaws and operating rules of pilotage organizations; the names, sizes in deadweight tons, surcharges, if any, port of call, name of the pilot or trainee, and names and horsepower of tug boats for any and all oil tankers subject to the provisions of RCW 88.16.190 together with the names of any and all vessels for which the United States coast guard requires special handling pursuant to their authority under the Ports and Waterways Safety Act of 1972; the expenses of the board; and any and all other information which the board deems appropriate to include;

(g) Make available information that includes the pilotage act and other statutes of Washington state and the federal government that affect pilotage, including the rules of the board, together with such additional information as may be informative for pilots, agents, owners, operators, and masters;

(h) Appoint advisory committees and employ marine experts as necessary to carry out its duties under this chapter;

(i) Provide for the maintenance of efficient and competent pilotage service on all waters covered by this chapter; and do such other things as are reasonable, necessary, and expedient to insure proper and safe pilotage upon the waters covered by this chapter and facilitate the efficient administration of this chapter.

(2) The board may pay stipends to pilot trainees under subsection (1)(b) of this section.

[ 2009 c 496 § 1; 2008 c 128 § 2; 2006 c 53 § 1; 2005 c 26 § 1; 1987 c 264 § 1; 1977 ex.s. c 337 § 4.]

#### NOTES:

**Retroactive application—2006 c 53:** "This act is intended to clarify the authority of the board of pilotage commissioners to pay stipends to pilot trainees that have indicated they wish to receive a stipend during the board of pilotage commissioners' training program. Section 1 of this act is remedial and curative in nature and applies retroactively to December 1, 2005. Specifically, the board may pay stipends, pursuant to the rules established by the board, to any pilot trainees that qualified for the stipends on, or after, December 1, 2005." [ 2006 c 53 § 3.]

**Effective date—2006 c 53:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 14, 2006]." [ 2006 c 53 § 4.]

**Effective date—2005 c 26:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 12, 2005]." [ 2005 c 26 § 4.]

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.



NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE  
COMMISSIONERS,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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**Chapter 34.05 RCW**

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*Nonbinding effect of unpublished rules and procedures: RCW 42.56.040.*

*Not applicable to the following proceedings and agreements: RCW 2.64.092, 41.56.452, 41.76.070, 47.64.310, 70.24.370, and 74.36.120.*

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**34.05.001**

**Legislative intent.**

The legislature intends, by enacting this 1988 Administrative Procedure Act, to clarify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making. The legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in effect. The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.

[ 1988 c 288 § 18.]

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**34.05.010**

**Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW 34.05.260. "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW 34.05.240, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW 82.04.067.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW 34.05.610 for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[ 2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

**NOTES:**

**Effective dates—1992 c 44:** See RCW 42.41.901.

**Effective dates—1989 c 175:** "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [ 1989 c 175 § 186.]

**Severability—1982 c 10:** See note following RCW 6.13.080.

**Legislative affirmation—1981 c 324:** "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [ 1981 c 324 § 1.]

**Severability—1981 c 324:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1981 c 324 § 18.]

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**34.05.020**

**Savings—Authority of agencies to comply with chapter—Effect of subsequent legislation.**

Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter or its applicability to any agency except to the extent that such legislation shall do so expressly.

[ 1988 c 288 § 102; 1967 c 237 § 24. Formerly RCW 34.04.940.]

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**34.05.030**

**Exclusions from chapter or parts of chapter.**

- (1) This chapter shall not apply to:
  - (a) The state militia, or
  - (b) The board of clemency and pardons, or
  - (c) The department of corrections or the indeterminate sentencing review board with respect to persons who are in their custody or are subject to the jurisdiction of those agencies.
- (2) The provisions of RCW 34.05.410 through 34.05.598 shall not apply:



- (a) To adjudicative proceedings of the board of industrial insurance appeals except as provided in RCW 7.68.110 and 51.48.131;
  - (b) Except for actions pursuant to chapter 46.29 RCW, to the denial, suspension, or revocation of a driver's license by the department of licensing;
  - (c) To the department of labor and industries where another statute expressly provides for review of adjudicative proceedings of a department action, order, decision, or award before the board of industrial insurance appeals;
  - (d) To actions of the Washington personnel resources board, the director of financial management, and the department of enterprise services when carrying out their duties under chapter 41.06 RCW;
  - (e) To adjustments by the department of revenue of the amount of the surcharge imposed under RCW 82.04.261; or
  - (f) To the extent they are inconsistent with any provisions of chapter 43.43 RCW.
- (3) Unless a party makes an election for a formal hearing pursuant to RCW 82.03.140 or 82.03.190, RCW 34.05.410 through 34.05.598 do not apply to a review hearing conducted by the board of tax appeals.
- (4) The rule-making provisions of this chapter do not apply to:
- (a) Reimbursement unit values, fee schedules, arithmetic conversion factors, and similar arithmetic factors used to determine payment rates that apply to goods and services purchased under contract for clients eligible under chapter 74.09 RCW; and
  - (b) Adjustments by the department of revenue of the amount of the surcharge imposed under RCW 82.04.261.
- (5) All other agencies, whether or not formerly specifically excluded from the provisions of all or any part of the administrative procedure act, shall be subject to the entire act.

[ 2015 3rd sp.s. c 1 § 309; 2011 1st sp.s. c 43 § 431; 2006 c 300 § 4; 2002 c 354 § 225; 1994 c 39 § 1; 1993 c 281 § 15; 1989 c 175 § 2; 1988 c 288 § 103; 1984 c 141 § 8; 1982 c 221 § 6; 1981 c 64 § 2; 1979 c 158 § 90; 1971 ex.s. c 57 § 17; 1971 c 21 § 1; 1967 ex.s. c 71 § 1; 1967 c 237 § 7; 1963 c 237 § 1; 1959 c 234 § 15. Formerly RCW 34.04.150.]

**NOTES:**

**Effective date—Purpose—2011 1st sp.s. c 43:** See notes following RCW 43.19.003.

**Effective dates—Contingent effective date—2006 c 300:** See note following RCW 82.04.261.

**Short title—Headings, captions not law—Severability—Effective dates—2002 c 354:** See RCW 41.80.907 through 41.80.910.

**Effective date—1993 c 281:** See note following RCW 41.06.022.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**34.05.040**

**Operation of chapter if in conflict with federal law.**

If any part of this chapter is found to be in conflict with federal requirements which are a condition precedent to the allocation of federal funds to the state, the conflicting part of this chapter is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and such findings or determination shall not affect the operation of the remainder of this chapter in its application to the agencies concerned.

[ 1988 c 288 § 104; 1959 c 234 § 19. Formerly RCW 34.04.930.]

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**34.05.050**

**Waiver.**

Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this chapter.

[ 1988 c 288 § 105.]

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**34.05.060**

**Informal settlements.**

Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. This section does not require any party or other person to settle a matter.

[ 1988 c 288 § 106.]

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**34.05.070**

**Conversion of proceedings.**

(1) If it becomes apparent during the course of an adjudicative or rule-making proceeding undertaken pursuant to this chapter that another form of proceeding under this chapter is necessary, is in the public interest, or is more appropriate to resolve issues affecting the participants, on his or her own motion or on the motion of any party, the presiding officer or other official responsible for the original proceeding shall advise the parties of necessary steps for conversion and, if within the official's power, commence the new proceeding. If the agency refuses to convert to another proceeding, that decision is not subject to judicial review. Commencement of the new proceeding shall be accomplished pursuant to the procedural rules of the new proceeding, except that elements already performed need not be repeated.

(2) If appropriate, a new proceeding may be commenced independently of the original proceeding or may replace the original proceeding.

(3) Conversion to a replacement proceeding shall not be undertaken if the rights of any party will be substantially prejudiced.

(4) To the extent feasible the record of the original proceeding shall be included in the record of a replacement proceeding.

(5) The time of commencement of a replacement proceeding shall be considered to be the time of commencement of the original proceeding.

[ 1988 c 288 § 107.]

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### **34.05.080**

#### **Variation from time limits.**

(1) An agency may modify time limits established in this chapter only as set forth in this section. An agency may not modify time limits relating to rule-making procedures or the time limits for filing a petition for judicial review specified in RCW 34.05.542.

(2) The time limits set forth in this chapter may be modified by rule of the agency or by rule of the chief administrative law judge if:

(a) The agency has an agency head composed of a body of individuals serving part time who do not regularly meet on a schedule that would allow compliance with the time limits of this chapter in the normal course of agency affairs;

(b) The agency does not have a permanent staff to comply with the time limits set forth in this chapter without substantial loss of efficiency and economy; and

(c) The rights of persons dealing with the agency are not substantially impaired.

(3) The time limits set forth in this chapter may be modified by rule if the agency determines that the change is necessary to the performance of its statutory duties. Agency rule may provide for emergency variation when required in a specific case.

(4) Time limits may be changed pursuant to RCW 34.05.040.

(5) Time limits may be waived pursuant to RCW 34.05.050.

(6) Any modification in the time limits set forth in this chapter shall be to new time limits that are reasonable under the specific circumstances.

(7) In an adjudicative proceeding, any agency whose time limits vary from those set forth in this chapter shall provide reasonable and adequate notice of the pertinent time limits to persons affected. The notice may be given by the presiding or reviewing officer involved in the proceeding.

(8) Two years after July 1, 1989, the chief administrative law judge shall cause a survey to be made of variations by agencies from the time limits set forth in this chapter, and shall submit a written report of the results of the survey to the office of the governor.

[ 1989 c 175 § 3; 1988 c 288 § 108.]

#### **NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.090**

**Forest practices board—Emergency rules.**

Emergency rules adopted by the forest practices board pertaining to forest practices and the protection of aquatic resources are subject to this chapter to the extent provided in RCW 76.09.055.

[ 1999 sp.s. c 4 § 202.]

**NOTES:**

**Effective date—1999 sp.s. c 4 §§ 201, 202, and 203:** See note following RCW 76.09.055.

**Part headings not law—1999 sp.s. c 4:** See note following RCW 77.85.180.

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**34.05.100**

**Respectful language.**

(1) All agency orders creating new rules, or amending existing rules, shall be formulated in accordance with the requirements of RCW 44.04.280 regarding the use of respectful language.

(2) No agency rule is invalid because it does not comply with this section.

[ 2004 c 175 § 2.]

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**34.05.110**

**Violations of state law or agency rule by small businesses—Notice requirements—Waiver of penalty for first-time paperwork violations.**

(1) Agencies must provide to a small business a copy of the state law or agency rule that a small business is violating and a period of at least seven calendar days to correct the violation before the agency may impose any fines, civil penalties, or administrative sanctions for a violation of a state law or agency rule by a small business. If no correction is possible or if an agency is acting in response to a complaint made by a third party and the third party would be disadvantaged by the application of this subsection, the requirements in this subsection do not apply.

(2) Except as provided in subsection (4) of this section, agencies shall waive any fines, civil penalties, or administrative sanctions for first-time paperwork violations by a small business.

(3) When an agency waives a fine, penalty, or sanction under this section, when possible it shall require the small business to correct the violation within a reasonable period of time, in a manner specified by the agency. If correction is impossible, no correction may be required and failure to correct is not grounds for reinstatement of fines, penalties, or sanctions under subsection (5)(b) of this section.

(4) Exceptions to requirements of subsection (1) of this section and the waiver requirement in subsection (2) of this section may be made for any of the following reasons:

(a) The agency head determines that the effect of the violation or waiver presents a direct danger to the public health, results in a loss of income or benefits to an employee, poses a potentially significant threat to human health or the environment, or causes serious harm to the public interest;

(b) The violation involves a knowing or willful violation;

(c) The violation is of a requirement concerning the assessment, collection, or administration of any tax, tax program, debt, revenue, receipt, a regulated entity's financial filings, or insurance rate or form filing;

(d) The requirements of this section are in conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits, as determined by the agency head;

(e) The small business committing the violation previously violated a substantially similar requirement; or

(f) The owner or operator of the small business committing the violation owns or operates, or owned or operated a different small business which previously violated a substantially similar requirement.

(5)(a) Nothing in this section prohibits an agency from waiving fines, civil penalties, or administrative sanctions incurred by a small business for a paperwork violation that is not a first-time offense.

(b) Any fine, civil penalty, or administrative sanction that is waived under this section may be reinstated and imposed in addition to any additional fines, penalties, or administrative sanctions associated with a subsequent violation for noncompliance with a substantially similar paperwork requirement, or failure to correct the previous violation as required by the agency under subsection (3) of this section.

(6) Nothing in this section may be construed to diminish the responsibility for any citizen or business to apply for and obtain a permit, license, or authorizing document that is required to engage in a regulated activity, or otherwise comply with state or federal law.

(7) Nothing in this section shall be construed to apply to small businesses required to provide accurate and complete information and documentation in relation to any claim for payment of state or federal funds or who are licensed or certified to provide care and services to vulnerable adults or children.

(8) Nothing in this section affects the attorney general's authority to impose fines, civil penalties, or administrative sanctions as otherwise authorized by law; nor shall this section affect the attorney general's authority to enforce the consumer protection act, chapter 19.86 RCW.

(9) As used in this section:

(a) "Small business" means a business with two hundred fifty or fewer employees or a gross revenue of less than seven million dollars annually as reported on its most recent federal income tax return or its most recent return filed with the department of revenue.

(b) "Paperwork violation" means the violation of any statutory or regulatory requirement that mandates the collection of information by an agency, or the collection, posting, or retention of information by a small business. This includes but is not limited to requirements in the Revised Code of Washington, the Washington Administrative Code, the Washington State Register, or any other agency directive.

(c) "First-time paperwork violation" means the first instance of a particular or substantially similar paperwork violation.

[ 2011 c 18 § 1; 2010 c 194 § 1; 2009 c 358 § 1.]

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### **34.05.120**

#### **Extension of rights and responsibilities—State registered domestic partnerships.**

(1) Subject to the availability of funds appropriated for this specific purpose, except where inconsistent with federal law or regulations applicable to federal benefit programs, agencies shall amend their rules to reflect the intent of the legislature to ensure that all privileges, immunities, rights, benefits, or responsibilities granted or imposed by statute to an individual because that individual is or was a spouse in a marital relationship are granted or imposed on equivalent terms to an individual because that individual is or was in a state registered domestic partnership.

(2) Except where inconsistent with federal law or regulations applicable to federal benefit programs, all agency orders creating new rules, or amending existing rules, shall be formulated to reflect the intent stated in subsection (1) of this section.

(3) No agency rule is invalid because it does not comply with this section.

[ 2009 c 521 § 2.]

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### **34.05.210**

#### **Code and register—Publication and distribution—Omissions, removals, revisions—Judicial notice.**

(1)(a) The code reviser shall cause the Washington Administrative Code to be compiled, indexed by subject, and published. All current, permanently effective rules of each agency shall be published in the Washington Administrative Code. Compilations shall be supplemented or revised as often as necessary and at least annually in a form compatible with the main compilation.

(b) The statute law committee, in its discretion, may publish the official copy of the Washington Administrative Code in a digital format on the code reviser or legislative web site.

(c) The code reviser shall provide a paper copy of the entire Washington Administrative Code or any section or sections of the code upon request. The code reviser may charge a minimal fee sufficient to cover costs of printing and mailing the paper copy.

(d) The code reviser shall provide a limited number of free paper copies of the Washington Administrative Code to libraries or institutions on request for access and archival purposes.

(2) Subject to the provisions of this chapter, the code reviser shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules.

(3) The code reviser shall publish a register setting forth the text of all rules filed during the appropriate register publication period.

(4) The code reviser may omit from the register or the compilation, rules that would be unduly cumbersome, expensive, or otherwise inexpedient to publish, if such rules are made available in printed or processed form on application to the adopting agency, and if the register or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(5) The code reviser may edit and revise rules for publication, codification, and compilation, without changing the meaning of any such rule.

(6) When a rule, in whole or in part, is declared invalid and unconstitutional by a court of final appeal, the adopting agency shall give notice to that effect in the register. With the consent of the attorney general, the code reviser may remove obsolete rules or parts of rules from the Washington Administrative Code when:

(a) The rules are declared unconstitutional by a court of final appeal; or

(b) The adopting agency ceases to exist and the rules are not transferred by statute to a successor agency.

(7) Compilations and registers shall be made available for purchase, in print or tangible, digital format, at a price fixed by the code reviser.

(8) The board of law library trustees of each county shall keep and maintain a complete and current set of registers and compilations when required for use and inspection as provided in chapter 27.24 RCW. If the register or compilation is published in digital format on the code reviser or legislative web site, providing on-site access to the digital version of the register shall satisfy the requirements of this subsection for access to the register.

(9) Judicial notice shall be taken of rules filed and published as provided in RCW 34.05.380 and this section.

[ 2011 c 156 § 4; 2007 c 456 § 3; 1988 c 288 § 201; 1982 1st ex.s. c 32 § 7; 1980 c 186 § 12; 1977 ex.s. c 240 § 9; 1959 c 234 § 5. Formerly RCW 34.04.050.]

#### NOTES:

**Purpose—Finding—Intent—2011 c 156:** See note following RCW 1.08.080.

**Severability—1980 c 186:** See note following RCW 34.05.320.

**Effective date—1977 ex.s. c 240:** See RCW 34.08.905.

*binding effect of unpublished rules and procedures: RCW 42.56.040.*

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#### 34.05.220

#### Rules for agency procedure—Indexes of opinions and statements.

(1) In addition to other rule-making requirements imposed by law:

(a) Each agency may adopt rules governing the formal and informal procedures prescribed or authorized by this chapter and rules of practice before the agency, together with forms and instructions. If an agency has not adopted procedural rules under this section, the model rules adopted by the chief administrative law judge under RCW 34.05.250 govern procedures before the agency.

(b) To assist interested persons dealing with it, each agency shall adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information and make submissions or requests. No person may be required to comply with agency procedure not adopted as a rule as herein required.

(2) To the extent not prohibited by federal law or regulation, nor prohibited for reasons of confidentiality by state law, each agency shall keep on file for public inspection all final orders, decisions, and opinions in adjudicative proceedings, interpretive statements, policy statements, and any digest or index to those orders, decisions, opinions, or statements prepared by or for the agency.

(3) No agency order, decision, or opinion is valid or effective against any person, nor may it be invoked by the agency for any purpose, unless it is available for public inspection. This subsection is not applicable in favor of any person who has actual knowledge of the order, decision, or opinion. The agency has the burden of proving that knowledge, but may meet that burden by proving that the person has been properly served with a copy of the order.

(4) Each agency that is authorized by law to exercise discretion in deciding individual cases is encouraged to formalize the general principles that may evolve from these decisions by adopting the principles as rules that the agency will follow until they are amended or repealed.

(5) To the extent practicable, any rule proposed or adopted by an agency should be clearly and simply stated, so that it can be understood by those required to comply.

(6) The departments of employment security, labor and industries, ecology, and revenue shall develop and use a notification process to communicate information to the public regarding the postadoption notice required by RCW 34.05.362.

[ 2003 c 246 § 2; 1994 c 249 § 24; 1989 c 175 § 4; 1988 c 288 § 202; 1981 c 67 § 13; 1967 c 237 § 2; 1959 c 234 § 2. Formerly RCW 34.04.020.]

**NOTES:**

**Finding—2003 c 246:** See note following RCW 34.05.362.

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**Effective dates—Severability—1981 c 67:** See notes following RCW 34.12.010.

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**34.05.230**

**Interpretive and policy statements.**



(1) An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

(2) A person may petition an agency requesting the conversion of interpretive and policy statements into rules. Upon submission, the agency shall notify the joint administrative rules review committee of the petition. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rule-making proceedings in accordance with this chapter.

(3) Each agency shall maintain a roster of interested persons, consisting of persons who have requested in writing to be notified of all interpretive and policy statements issued by that agency. Each agency shall update the roster periodically and eliminate persons who do not indicate a desire to continue on the roster. Whenever an agency issues an interpretive or policy statement, it shall send a copy of the statement to each person listed on the roster. The agency may charge a nominal fee to the interested person for this service.

(4) Whenever an agency issues an interpretive or policy statement, it shall submit to the code reviser for publication in the Washington State Register a statement describing the subject matter of the interpretive or policy statement, and listing the person at the agency from whom a copy of the interpretive or policy statement may be obtained.

[ 2004 c 31 § 3; 2001 c 25 § 1; 1997 c 409 § 202; 1996 c 206 § 12; 1995 c 403 § 702; 1988 c 288 § 203.]

**NOTES:**

**Part headings—Severability—1997 c 409:** See notes following RCW 43.22.051.

**Findings—1996 c 206:** See note following RCW 43.05.030.

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.240**

**Declaratory order by agency—Petition.**

(1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for: (a) The form, contents, and filing of petitions for a declaratory order; (b) the procedural rights of persons in relation thereto; and (c) the disposition of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

(3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.

(4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

(a) Enter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;

(b) Set the matter for specified proceedings to be held no more than ninety days after receipt of the petition;

(c) Set a specified time no more than ninety days after receipt of the petition by which it will enter a declaratory order; or

(d) Decline to enter a declaratory order, stating the reasons for its action.

(6) The time limits of subsection (5) (b) and (c) of this section may be extended by the agency for good cause.

(7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(8) A declaratory order has the same status as any other order entered in an agency adjudicative proceeding. Each declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusions.

[ 1988 c 288 § 204; 1959 c 234 § 8. Formerly RCW 34.04.080.]

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### **34.05.250**

#### **Model rules of procedure.**

The chief administrative law judge shall adopt model rules of procedure appropriate for use by as many agencies as possible. The model rules shall deal with all general functions and duties performed in common by the various agencies. Each agency shall adopt as much of the model rules as is reasonable under its circumstances. Any agency adopting a rule of procedure that differs from the model rules shall include in the order of adoption a finding stating the reasons for variance.

[ 1988 c 288 § 205.]

**34.05.260**

**Electronic distribution.**

(1) In order to provide the greatest possible access to agency documents to the most people, agencies are encouraged to make their rule, interpretive, and policy information available through electronic distribution as well as through the regular mail. Agencies that have the capacity to transmit electronically may ask persons who are on mailing lists or rosters for copies of interpretive statements, policy statements, preproposal statements of inquiry, and other similar notices whether they would like to receive the notices electronically.

(2) Electronic distribution to persons who request it may substitute for mailed copies related to rule making or policy or interpretive statements. If a notice is distributed electronically, the agency is not required to transmit the actual notice form but must send all the information contained in the notice.

(3) Agencies which maintain mailing lists or rosters for any notices relating to rule making or policy or interpretive statements may establish different rosters or lists by general subject area.

[ 1997 c 126 § 1.]

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**34.05.270**

**Agency web sites for rule-making information.**

Within existing resources, each state agency shall maintain a web site that contains the agency's rule-making information. A direct link to the agency's rule-making page must be displayed on the agency's homepage. The rule-making web site shall include the complete text of all proposed rules, emergency rules, and permanent rules proposed or adopted within the past twelve months, or include a direct link to the index page on the Washington State Register web site that contains links to the complete text of all proposed rules, emergency rules, and permanent rules proposed or adopted within the past twelve months by that state agency. For proposed rules, the time, date, and place for the rule-making hearing and the procedures and timelines for submitting written comments and supporting data must be posted on the web site.

[ 2009 c 93 § 1.]

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**34.05.271**

**Department of fish and wildlife—Significant agency action—Identification and categorization of sources of information used.**

(1)(a) Before taking a significant agency action, the department of fish and wildlife must identify the sources of information reviewed and relied upon by the agency in the course of preparing to take significant agency action. Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of fish and wildlife shall make available on the agency's web site the index of

records required under RCW 42.56.070 that are relied upon, or invoked, in support of a proposal for significant agency action.

(b) On the agency's web site, the department of fish and wildlife must identify and categorize each source of information that is relied upon in the form of a bibliography, citation list, or similar list of sources. The categories in (c) of this subsection do not imply or infer any hierarchy or level of quality.

(c) The bibliography, citation list, or similar list of sources must categorize the sources of information as belonging to one or more of the following categories:

- (i) Independent peer review: Review is overseen by an independent third party;
- (ii) Internal peer review: Review by staff internal to the department of fish and wildlife;
- (iii) External peer review: Review by persons that are external to and selected by the department of fish and wildlife;
- (iv) Open review: Documented open public review process that is not limited to invited organizations or individuals;
- (v) Legal and policy document: Documents related to the legal framework for the significant agency action including but not limited to:
  - (A) Federal and state statutes;
  - (B) Court and hearings board decisions;
  - (C) Federal and state administrative rules and regulations; and
  - (D) Policy and regulatory documents adopted by local governments;
- (vi) Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under the processes described in (c)(i), (ii), (iii), and (iv) of this subsection;
- (vii) Records of the best professional judgment of department of fish and wildlife employees or other individuals; or
- (viii) Other: Sources of information that do not fit into one of the categories identified in this subsection (1)(c).

(2)(a) For the purposes of this section, "significant agency action" means an act of the department of fish and wildlife that:

- (i) Results in the development of a significant legislative rule as defined in RCW 34.05.328;
  - (ii) Results in the development of technical guidance, technical assessments, or technical documents that are used to directly support implementation of a state rule or state statute; or
  - (iii) Results in the development of fish and wildlife recovery plans.
- (b) "Significant agency action" does not include rule making by the department of fish and wildlife associated with fishing and hunting rules.

(3) This section is not intended to affect agency action regarding individual permitting, compliance and enforcement decisions, or guidance provided by an agency to a local government on a case-by-case basis.

[ 2014 c 21 § 1; 2013 c 68 § 2.]

**NOTES:**

**Finding—Intent—2013 c 68:** "(1) The legislature finds that it is critically important that scientific information used to inform public policy be of the highest quality and integrity. Furthermore, the legislature recognizes that a public benefit is derived from greater

transparency as to what scientific information, data, or records are being used to inform public policy or relied upon in agency decision making.

(2) Therefore, in order to help ensure that agencies routinely use scientifically credible information in conducting their policy-making functions, it is the intent of the legislature to have those sources of scientific information reviewed and relied upon by agencies be identified in a clear and transparent way." [ 2013 c 68 § 1.]

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### **34.05.272**

#### **Department of ecology—Significant agency action—Identification and categorization of sources of information used.**

(1) This section applies only to the water quality and shorelands and environmental assistance programs within the department of ecology.

(2)(a) Before taking a significant agency action, the department of ecology must identify the sources of information reviewed and relied upon by the agency in the course of preparing to take significant agency action. Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of ecology shall make available on the agency's web site the index of records required under RCW 42.56.070 that are relied upon, or invoked, in support of a proposal for significant agency action.

(b) On the agency's web site, the department of ecology must identify and categorize each source of information that is relied upon in the form of a bibliography, citation list, or similar list of sources. The categories in (c) of this subsection do not imply or infer any hierarchy or level of quality.

(c) The bibliography, citation list, or similar list of sources must categorize the sources of information as belonging to one or more of the following categories:

- (i) Independent peer review: Review is overseen by an independent third party;
- (ii) Internal peer review: Review by staff internal to the department of ecology;
- (iii) External peer review: Review by persons that are external to and selected by the department of ecology;
- (iv) Open review: Documented open public review process that is not limited to invited organizations or individuals;
- (v) Legal and policy document: Documents related to the legal framework for the significant agency action including but not limited to:
  - (A) Federal and state statutes;
  - (B) Court and hearings board decisions;
  - (C) Federal and state administrative rules and regulations; and
  - (D) Policy and regulatory documents adopted by local governments;
- (vi) Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under the processes described in (c)(i), (ii), (iii), and (iv) of this subsection;
- (vii) Records of the best professional judgment of department of ecology employees or other individuals; or
- (viii) Other: Sources of information that do not fit into one of the categories identified in this subsection(1)(c).

(3) For the purposes of this section, "significant agency action" means an act of the department of ecology that:

(a) Results in the development of a significant legislative rule as defined in RCW **34.05.328**; or

(b) Results in the development of technical guidance, technical assessments, or technical documents that are used to directly support implementation of a state rule or state statute.

(4) This section is not intended to affect agency action regarding individual permitting, compliance and enforcement decisions, or guidance provided by an agency to a local government on a case-by-case basis.

[ 2014 c 22 § 1; 2013 c 69 § 2.]

**NOTES:**

**Finding—Intent—2013 c 69:** "(1) The legislature finds that it is critically important that scientific information used to inform public policy be of the highest quality and integrity. Furthermore, the legislature recognizes that a public benefit is derived from greater transparency as to what scientific information, data, or records are being used to inform public policy or relied upon in agency decision making.

(2) Therefore, in order to help ensure that agencies routinely use scientifically credible information in conducting their policy-making functions, it is the intent of the legislature to have those sources of scientific information reviewed and relied upon by agencies be identified in a clear and transparent way." [ 2013 c 69 § 1.]

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**34.05.310**

**Prenotice inquiry—Negotiated and pilot rules.**

(1)(a) To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties, agencies must solicit comments from the public on a subject of possible rule making before filing with the code reviser a notice of proposed rule making under RCW **34.05.320**. The agency must prepare a statement of inquiry that:

(i) Identifies the specific statute or statutes authorizing the agency to adopt rules on this subject;

(ii) Discusses why rules on this subject may be needed and what they might accomplish;

(iii) Identifies other federal and state agencies that regulate this subject, and describes the process whereby the agency would coordinate the contemplated rule with these agencies;

(iv) Discusses the process by which the rule might be developed, including, but not limited to, negotiated rule making, pilot rule making, or agency study;

(v) Specifies the process by which interested parties can effectively participate in the decision to adopt a new rule and formulation of a proposed rule before its publication.

(b) The statement of inquiry must be filed with the code reviser for publication in the state register at least thirty days before the date the agency files notice of proposed rule making under RCW **34.05.320** and the statement, or a summary of the information contained in that statement, must be sent to any party that has requested receipt of the agency's statements of inquiry.

(2) Agencies are encouraged to develop and use new procedures for reaching agreement among interested parties before publication of notice and the adoption hearing on a proposed rule. Examples of new procedures include, but are not limited to:

(a) Negotiated rule making by which representatives of an agency and of the interests that are affected by a subject of rule making, including, where appropriate, county and city representatives, seek to reach consensus on the terms of the proposed rule and on the process by which it is negotiated; and

(b) Pilot rule making which includes testing the feasibility of complying with or administering draft new rules or draft amendments to existing rules through the use of volunteer pilot groups in various areas and circumstances, as provided in RCW 34.05.313 or as otherwise provided by the agency.

(3)(a) An agency must make a determination whether negotiated rule making, pilot rule making, or another process for generating participation from interested parties prior to development of the rule is appropriate.

(b) An agency must include a written justification in the rule-making file if an opportunity for interested parties to participate in the rule-making process prior to publication of the proposed rule has not been provided.

(4) This section does not apply to:

(a) Emergency rules adopted under RCW 34.05.350;

(b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;

(c) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;

(d) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;

(e) Rules the content of which is explicitly and specifically dictated by statute;

(f) Rules that set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045; or

(g) Rules that adopt, amend, or repeal:

(i) A procedure, practice, or requirement relating to agency hearings; or

(ii) A filing or related process requirement for applying to an agency for a license or permit.

[ 2011 c 298 § 20; 2004 c 31 § 1; 1995 c 403 § 301; 1994 c 249 § 1; 1993 c 202 § 2; 1989 c 175 § 5; 1988 c 288 § 301.]

**NOTES:**

**Purpose—Intent—Agency transfer—Contracting—Effective date—2011 c 289:**  
See notes following RCW 19.02.020.

**Application—1995 c 403 §§ 201, 301-305, 401-405, and 801:** See note following RCW 34.05.328.

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

**Severability—1994 c 249:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1994 c 249 § 38.]

**Application—1994 c 249:** "This act applies prospectively only and not retroactively." [ 1994 c 249 § 36.]

**Finding—Intent—1993 c 202:** "The legislature finds that while the 1988 Administrative Procedure Act expanded public participation in the agency rule-making process, there continue to be instances when participants have developed adversarial relationships with each other, resulting in the inability to identify all of the issues, the failure to focus on solutions to problems, unnecessary delays, litigation, and added cost to the agency, affected parties, and the public in general.

When interested parties work together, it is possible to negotiate development of a rule that is acceptable to all affected, and that conforms to the intent of the statute the rule is intended to implement.

After a rule is adopted, unanticipated negative impacts may emerge. Examples include excessive costs of administration for the agency and compliance by affected parties, technical conditions that may be physically or economically unfeasible to meet, problems of interpretation due to lack of clarity, and reporting requirements that duplicate or conflict with those already in place.

It is therefore the intent of the legislature to encourage flexible approaches to developing administrative rules, including but not limited to negotiated rule making and a process for testing the feasibility of adopted rules, often called the pilot rule process. However, nothing in chapter 202, Laws of 1993 shall be construed to create any mandatory duty for an agency to use the procedures in RCW 34.05.310 or 34.05.313 in any particular instance of rule making. Agencies shall determine, in their discretion, when it is appropriate to use these procedures." [ 1993 c 202 § 1.]

**Effective date—1989 c 175:** See note following RCW 34.05.010.

*es coordinator duties regarding business: RCW 43.17.310.*

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## 34.05.312

### Rules coordinator.

Each agency shall designate a rules coordinator, who shall have knowledge of the subjects of rules being proposed or prepared within the agency for proposal, maintain the records of any such action, and respond to public inquiries about possible, proposed, or adopted rules and the identity of agency personnel working, reviewing, or commenting on them. The office and mailing address of the rules coordinator shall be published in the state register at the time of designation and maintained thereafter on the code reviser web site for the duration of the designation. The rules coordinator may be an employee of another agency.

[ 2007 c 456 § 4; 2003 c 246 § 4; 1993 c 202 § 3.]



**NOTES:**

**Finding—2003 c 246:** See note following RCW 34.05.362.

**Finding—Intent—1993 c 202:** See note following RCW 34.05.310.

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**34.05.313**

**Feasibility studies—Pilot projects.**

(1) During the development of a rule or after its adoption, an agency may develop methods for measuring or testing the feasibility of complying with or administering the rule and for identifying simple, efficient, and economical alternatives for achieving the goal of the rule. A pilot project shall include public notice, participation by volunteers who are or will be subject to the rule, a high level of involvement from agency management, reasonable completion dates, and a process by which one or more parties may withdraw from the process or the process may be terminated. Volunteers who agree to test a rule and attempt to meet the requirements of the draft rule, to report periodically to the proposing agency on the extent of their ability to meet the requirements of the draft rule, and to make recommendations for improving the draft rule shall not be obligated to comply fully with the rule being tested nor be subject to any enforcement action or other sanction for failing to comply with the requirements of the draft rule.

(2) An agency conducting a pilot rule project authorized under subsection (1) of this section may waive one or more provisions of agency rules otherwise applicable to participants in such a pilot project if the agency first determines that such a waiver is in the public interest and necessary to conduct the project. Such a waiver may be only for a stated period of time, not to exceed the duration of the project.

(3) The findings of the pilot project should be widely shared and, where appropriate, adopted as amendments to the rule.

(4) If an agency conducts a pilot rule project in lieu of meeting the requirements of the regulatory fairness act, chapter 19.85 RCW, the agency shall ensure the following conditions are met:

(a) If over ten small businesses are affected, there shall be at least ten small businesses in the test group and at least one-half of the volunteers participating in the pilot test group shall be small businesses.

(b)(i) If there are at least one hundred businesses affected, the participation by small businesses in the test group shall be as follows:

(A) Not less than twenty percent of the small businesses must employ twenty-six to fifty employees;

(B) Not less than twenty percent of the small businesses must employ eleven to twenty-six employees; and

(C) Not less than twenty percent of the small businesses must employ zero to ten employees.

(ii) If there do not exist a sufficient number of small businesses in each size category set forth in (b)(i) of this subsection willing to participate in the pilot project to meet the minimum

requirements of that subsection, then the agency must comply with this section to the maximum extent practicable.

(c) The agency may not terminate the pilot project before completion.

(d) Before filing the notice of proposed rule making pursuant to RCW 34.05.320, the agency must prepare a report of the pilot rule project that includes:

(i) A description of the difficulties small businesses had in complying with the pilot rule;

(ii) A list of the recommended revisions to the rule to make compliance with the rule easier or to reduce the cost of compliance with the rule by the small businesses participating in the pilot rule project;

(iii) A written statement explaining the options it considered to resolve each of the difficulties described and a statement explaining its reasons for not including a recommendation by the pilot test group to revise the rule; and

(iv) If the agency was unable to meet the requirements set forth in (b)(i) of this subsection, a written explanation of why it was unable to do so and the steps the agency took to include small businesses in the pilot project.

[ 1995 c 403 § 303; 1993 c 202 § 4.]

**NOTES:**

**Application—1995 c 403 §§ 201, 301-305, 401-405, and 801:** See note following RCW 34.05.328.

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

**Finding—Intent—1993 c 202:** See note following RCW 34.05.310.

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**34.05.314**

**Rules development agenda.**

Each state agency shall prepare a semiannual agenda for rules under development. The agency shall file the agenda with the code reviser for publication in the state register not later than January 31st and July 31st of each year. Not later than three days after its publication in the state register, the agency shall send a copy of the agenda to each person who has requested receipt of a copy of the agenda. The agency shall also submit the agenda to the director of financial management, the rules review committee, and any other state agency that may reasonably be expected to have an interest in the subject of rules that will be developed.

[ 1997 c 409 § 206.]

**NOTES:**

**Part headings—Severability—1997 c 409:** See notes following RCW 43.22.051.

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**34.05.315**

**Rule-making docket.**

(1) Each agency shall maintain a current public rule-making docket. The rule-making docket shall contain the information specified in subsection (3) of this section.

(2) The rule-making docket shall contain a listing of each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced by publication of a notice of proposed rule adoption under RCW 34.05.320 until the proposed rule is withdrawn under RCW 34.05.335 or is adopted by the agency.

(3) For each rule-making proceeding, the docket shall indicate all of the following:

(a) The name and address of agency personnel responsible for the proposed rule;

(b) The subject of the proposed rule;

(c) A citation to all notices relating to the proceeding that have been published in the state register under RCW 34.05.320;

(d) The place where written submissions about the proposed rule may be inspected;

(e) The time during which written submissions will be accepted;

(f) The current timetable established for the agency proceeding, including the time and place of any rule-making hearing, the date of the rule's adoption, filing, publication, and its effective date.

[ 1989 c 175 § 6; 1988 c 288 § 302.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.320**

**Notice of proposed rule—Contents—Distribution by agency—Institutions of higher education.**

(1) At least twenty days before the rule-making hearing at which the agency receives public comment regarding adoption of a rule, the agency shall cause notice of the hearing to be published in the state register. The publication constitutes the proposal of a rule. The notice shall include all of the following:

(a) A title, a description of the rule's purpose, and any other information which may be of assistance in identifying the rule or its purpose;

(b) Citations of the statutory authority for adopting the rule and the specific statute the rule is intended to implement;

(c) A short explanation of the rule, its purpose, and anticipated effects, including in the case of a proposal that would modify existing rules, a short description of the changes the proposal would make, and a statement of the reasons supporting the proposed action;

(d) The agency personnel, with their office location and telephone number, who are responsible for the drafting, implementation, and enforcement of the rule;

(e) The name of the person or organization, whether private, public, or governmental, proposing the rule;

- (f) Agency comments or recommendations, if any, regarding statutory language, implementation, enforcement, and fiscal matters pertaining to the rule;
  - (g) Whether the rule is necessary as the result of federal law or federal or state court action, and if so, a citation to such law or court decision;
  - (h) When, where, and how persons may present their views on the proposed rule;
  - (i) The date on which the agency intends to adopt the rule;
  - (j) A copy of the small business economic impact statement prepared under chapter **19.85** RCW, or a copy of the school district fiscal impact statement under RCW **28A.305.135** in the case of the state board of education, or an explanation for why the agency did not prepare the statement;
  - (k) A statement indicating whether RCW **34.05.328** applies to the rule adoption; and
  - (l) If RCW **34.05.328** does apply, a statement indicating that a copy of the preliminary cost-benefit analysis described in RCW **34.05.328**(1)(c) is available.
- (2)(a) Upon filing notice of the proposed rule with the code reviser, the adopting agency shall have copies of the notice on file and available for public inspection. Except as provided in (b) of this subsection, the agency shall forward three copies of the notice to the rules review committee.
- (b) A pilot of at least ten agencies, including the departments of labor and industries, fish and wildlife, revenue, ecology, retirement systems, and health, shall file the copies required under this subsection, as well as under RCW **34.05.350** and **34.05.353**, with the rules review committee electronically for a period of four years from June 10, 2004. The office of regulatory assistance shall negotiate the details of the pilot among the agencies, the legislature, and the code reviser.
- (3) No later than three days after its publication in the state register, the agency shall cause either a copy of the notice of proposed rule adoption, or a summary of the information contained on the notice, to be mailed to each person, city, and county that has made a request to the agency for a mailed copy of such notices. An agency may charge for the actual cost of providing a requesting party mailed copies of these notices.
- (4) In addition to the notice required by subsections (1) and (2) of this section, an institution of higher education shall cause the notice to be published in the campus or standard newspaper of the institution at least seven days before the rule-making hearing.

[ 2012 c 210 § 2; 2004 c 31 § 2; 2003 c 165 § 1; 1995 c 403 § 302; 1994 c 249 § 14; 1992 c 197 § 8; 1989 c 175 § 7; 1988 c 288 § 303; 1982 c 221 § 2; 1982 c 6 § 7; 1980 c 186 § 10; 1977 ex.s. c 84 § 1. Formerly RCW 34.04.045.]

**NOTES:**

**Application**—1995 c 403 §§ 201, 301-305, 401-405, and 801: See note following RCW 34.05.328.

**Findings**—**Short title**—**Intent**—1995 c 403: See note following RCW 34.05.328.

**Severability**—**Application**—1994 c 249: See notes following RCW 34.05.310.

**Effective date**—1989 c 175: See note following RCW 34.05.010.

**Severability—1980 c 186:** "If any provision of this 1980 act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1980 c 186 § 29.]

*Revised adoption: RCW 34.05.353.*

*all business economic impact statement—Purpose—Contents: RCW 19.85.040.*

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### **34.05.322**

#### **Scope of rule-making authority.**

For rules implementing statutes enacted after July 23, 1995, an agency may not rely solely on the section of law stating a statute's intent or purpose, or on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for its statutory authority to adopt the rule. An agency may use the statement of intent or purpose or the agency enabling provisions to interpret ambiguities in a statute's other provisions.

[ 1995 c 403 § 118.]

#### **NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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### **34.05.325**

#### **Public participation—Concise explanatory statement.**

(1) The agency shall make a good faith effort to insure that the information on the proposed rule published pursuant to RCW 34.05.320 accurately reflects the rule to be presented and considered at the oral hearing on the rule. Written comment about a proposed rule, including supporting data, shall be accepted by an agency if received no later than the time and date specified in the notice, or such later time and date established at the rule-making hearing.

(2) The agency shall provide an opportunity for oral comment to be received by the agency in a rule-making hearing.

(3) If the agency possesses equipment capable of receiving telefacsimile transmissions or recorded telephonic communications, the agency may provide in its notice of hearing filed under RCW 34.05.320 that interested parties may comment on proposed rules by these means. If the agency chooses to receive comments by these means, the notice of hearing shall provide instructions for making such comments, including, but not limited to, appropriate telephone numbers to be used; the date and time by which comments must be received; required methods to verify the receipt and authenticity of the comments; and any limitations on the number of pages for telefacsimile transmission comments and on the minutes of tape recorded comments. The agency shall accept comments received by these means for

inclusion in the official record if the comments are made in accordance with the agency's instructions.

(4) The agency head, a member of the agency head, or a presiding officer designated by the agency head shall preside at the rule-making hearing. Rule-making hearings shall be open to the public. The agency shall cause a record to be made of the hearing by stenographic, mechanical, or electronic means. Regardless of whether the agency head has delegated rule-making authority, the presiding official shall prepare a memorandum for consideration by the agency head, summarizing the contents of the presentations made at the rule-making hearing, unless the agency head presided or was present at substantially all of the hearings. The summarizing memorandum is a public document and shall be made available to any person in accordance with chapter 42.56 RCW.

(5) Rule-making hearings are legislative in character and shall be reasonably conducted by the presiding official to afford interested persons the opportunity to present comment individually. All comments by all persons shall be made in the presence and hearing of other attendees. Written or electronic submissions may be accepted and included in the record. Rule-making hearings may be continued to a later time and place established on the record without publication of further notice under RCW 34.05.320.

(6)(a) Before it files an adopted rule with the code reviser, an agency shall prepare a concise explanatory statement of the rule:

- (i) Identifying the agency's reasons for adopting the rule;
- (ii) Describing differences between the text of the proposed rule as published in the register and the text of the rule as adopted, other than editing changes, stating the reasons for differences; and
- (iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.

(b) The agency shall provide the concise explanatory statement to any person upon request or from whom the agency received comment.

[ 2009 c 336 § 1; 2005 c 274 § 262; 1998 c 125 § 1; 1995 c 403 § 304; 1994 c 249 § 7; 1992 c 57 § 1; 1988 c 288 § 304.]

**NOTES:**

**Application**—1995 c 403 §§ 201, 301-305, 401-405, and 801: See note following RCW 34.05.328.

**Findings**—**Short title**—**Intent**—1995 c 403: See note following RCW 34.05.328.

**Severability**—**Application**—1994 c 249: See notes following RCW 34.05.310.

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**34.05.328**

**Significant legislative rules, other selected rules.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 1622-S2.SL) \*\*\*

(1) Before adopting a rule described in subsection (5) of this section, an agency must:

(a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements;

(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;

(c) Provide notification in the notice of proposed rule making under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis must be available when the rule is adopted under RCW 34.05.360;

(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law;

(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law;

(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

(i) A state statute that explicitly allows the agency to differ from federal standards; or

(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and

(i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

(2) In making its determinations pursuant to subsection (1)(b) through (h) of this section, the agency must place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.

(3) Before adopting rules described in subsection (5) of this section, an agency must place in the rule-making file a rule implementation plan for rules filed under each adopting order. The plan must describe how the agency intends to:

(a) Implement and enforce the rule, including a description of the resources the agency intends to use;

(b) Inform and educate affected persons about the rule;

(c) Promote and assist voluntary compliance; and

(d) Evaluate whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes.

(4) After adopting a rule described in subsection (5) of this section regulating the same activity or subject matter as another provision of federal or state law, an agency must do all of the following:

(a) Coordinate implementation and enforcement of the rule with the other federal and state entities regulating the same activity or subject matter by making every effort to do one or more of the following:

- (i) Deferring to the other entity;
- (ii) Designating a lead agency; or
- (iii) Entering into an agreement with the other entities specifying how the agency and entities will coordinate implementation and enforcement.

If the agency is unable to comply with this subsection (4)(a), the agency must report to the legislature pursuant to (b) of this subsection;

(b) Report to the joint administrative rules review committee:

(i) The existence of any overlap or duplication of other federal or state laws, any differences from federal law, and any known overlap, duplication, or conflict with local laws; and

(ii) Make recommendations for any legislation that may be necessary to eliminate or mitigate any adverse effects of such overlap, duplication, or difference.

(5)(a) Except as provided in (b) of this subsection, this section applies to:

(i) Significant legislative rules of the departments of ecology, labor and industries, health, revenue, social and health services, and natural resources, the employment security department, the forest practices board, the office of the insurance commissioner, and to the legislative rules of the department of fish and wildlife implementing chapter **77.55 RCW**; and

(ii) Any rule of any agency, if this section is voluntarily made applicable to the rule by the agency, or is made applicable to the rule by a majority vote of the joint administrative rules review committee within forty-five days of receiving the notice of proposed rule making under **RCW 34.05.320**.

(b) This section does not apply to:

(i) Emergency rules adopted under **RCW 34.05.350**;

(ii) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;

(iii) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;

(iv) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;

(v) Rules the content of which is explicitly and specifically dictated by statute;

(vi) Rules that set or adjust fees under the authority of **RCW 19.02.075** or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of **RCW 19.80.045**;

(vii) Rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents; or

(viii) Rules of the department of revenue that adopt a uniform expiration date for reseller permits as authorized in **RCW 82.32.780** and **82.32.783**.

(c) For purposes of this subsection:

(i) A "procedural rule" is a rule that adopts, amends, or repeals (A) any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related process



requirement for making application to an agency for a license or permit; or (C) any policy statement pertaining to the consistent internal operations of an agency.

(ii) An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

(iii) A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

(d) In the notice of proposed rule making under RCW 34.05.320, an agency must state whether this section applies to the proposed rule pursuant to (a)(i) of this subsection, or if the agency will apply this section voluntarily.

(6) By January 31, 1996, and by January 31st of each even-numbered year thereafter, the office of regulatory assistance, after consulting with state agencies, counties, and cities, and business, labor, and environmental organizations, must report to the governor and the legislature regarding the effects of this section on the regulatory system in this state. The report must document:

(a) The rules proposed to which this section applied and to the extent possible, how compliance with this section affected the substance of the rule, if any, that the agency ultimately adopted;

(b) The costs incurred by state agencies in complying with this section;

(c) Any legal action maintained based upon the alleged failure of any agency to comply with this section, the costs to the state of such action, and the result;

(d) The extent to which this section has adversely affected the capacity of agencies to fulfill their legislatively prescribed mission;

(e) The extent to which this section has improved the acceptability of state rules to those regulated; and

(f) Any other information considered by the office of financial management to be useful in evaluating the effect of this section.

[ 2011 c 298 § 21; 2011 c 149 § 1; 2010 c 112 § 15. Prior: 2003 c 165 § 2; 2003 c 39 § 13; 1997 c 430 § 1; 1995 c 403 § 201.]

**NOTES:**

**Reviser's note:** This section was amended by 2011 c 149 § 1 and by 2011 c 298 § 21, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Purpose—Intent—Agency transfer—Contracting—Effective date—2011 c 289:**  
See notes following RCW 19.02.020.

**Effective date—2011 c 149:** See note following RCW 43.42.010.

**Effective date—2010 c 112 §§ 2, 3, 11, 12, and 15:** See note following RCW 82.32.780.

**Retroactive application—2010 c 112:** See note following RCW 82.32.780.

**Findings—Short title—Intent—1995 c 403:** "(1) The legislature finds that:

(a) One of its fundamental responsibilities, to the benefit of all the citizens of the state, is the protection of public health and safety, including health and safety in the workplace, and the preservation of the extraordinary natural environment with which Washington is endowed;

(b) Essential to this mission is the delegation of authority to state agencies to implement the policies established by the legislature; and that the adoption of administrative rules by these agencies helps assure that these policies are clearly understood, fairly applied, and uniformly enforced;

(c) Despite its importance, Washington's regulatory system must not impose excessive, unreasonable, or unnecessary obligations; to do so serves only to discredit government, makes enforcement of essential regulations more difficult, and detrimentally affects the economy of the state and the well-being of our citizens.

(2) The legislature therefore enacts chapter 403, Laws of 1995, to be known as the regulatory reform act of 1995, to ensure that the citizens and environment of this state receive the highest level of protection, in an effective and efficient manner, without stifling legitimate activities and responsible economic growth. To that end, it is the intent of the legislature, in the adoption of chapter 403, Laws of 1995, that:

(a) Unless otherwise authorized, substantial policy decisions affecting the public be made by those directly accountable to the public, namely the legislature, and that state agencies not use their administrative authority to create or amend regulatory programs;

(b) When an agency is authorized to adopt rules imposing obligations on the public, that it do so responsibly: The rules it adopts should be justified and reasonable, with the agency having determined, based on common sense criteria established by the legislature, that the obligations imposed are truly in the public interest;

(c) Governments at all levels better coordinate their regulatory efforts to avoid confusing and frustrating the public with overlapping or contradictory requirements;

(d) The public respect the process whereby administrative rules are adopted, whether or not they agree with the result: Members of the public affected by administrative rules must have the opportunity for a meaningful role in their development; the bases for agency action must be legitimate and clearly articulated;

(e) Members of the public have adequate opportunity to challenge administrative rules with which they have legitimate concerns through meaningful review of the rule by the executive, the legislature, and the judiciary. While it is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, the court should determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through a process of reason; and whether the agency took a hard look at the rule before its adoption;

(f) In order to achieve greater compliance with administrative rules at less cost, that a cooperative partnership exist between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties; and

(g) Workplace safety and health in this state not be diminished, whether provided by constitution, by statute, or by rule." [ 1995 c 403 § 1.]

**Application—1995 c 403 §§ 201, 301-305, 401-405, and 801:** "Sections 201, 301 through 305, 401 through 405, and 801 of this act shall apply to all rule making for which a

statement of proposed rule making under RCW 34.05.320 is filed after July 23, 1995." [ 1995 c 403 § 1102.]

*revised adoption: RCW 34.05.353.*

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### **34.05.330**

#### **Petition for adoption, amendment, repeal—Agency action—Appeal.**

(1) Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The office of financial management shall prescribe by rule the format for such petitions and the procedure for their submission, consideration, and disposition and provide a standard form that may be used to petition any agency. Within sixty days after submission of a petition, the agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

(2) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, and the petition alleges that the rule is not within the intent of the legislature or was not adopted in accordance with all applicable provisions of law, the person may petition for review of the rule by the joint administrative rules review committee under RCW 34.05.655.

(3) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, the petitioner, within thirty days of the denial, may appeal the denial to the governor. The governor shall immediately file notice of the appeal with the code reviser for publication in the Washington state register. Within forty-five days after receiving the appeal, the governor shall either (a) deny the petition in writing, stating (i) his or her reasons for the denial, specifically addressing the concerns raised by the petitioner, and, (ii) where appropriate, the alternative means by which he or she will address the concerns raised by the petitioner; (b) for agencies listed in RCW 43.17.010, direct the agency to initiate rule-making proceedings in accordance with this chapter; or (c) for agencies not listed in RCW 43.17.010, recommend that the agency initiate rule-making proceedings in accordance with this chapter. The governor's response to the appeal shall be published in the Washington state register and copies shall be submitted to the chief clerk of the house of representatives and the secretary of the senate.

(4) In petitioning for repeal or amendment of a rule under this section, a person is encouraged to address, among other concerns:

- (a) Whether the rule is authorized;
- (b) Whether the rule is needed;
- (c) Whether the rule conflicts with or duplicates other federal, state, or local laws;
- (d) Whether alternatives to the rule exist that will serve the same purpose at less cost;
- (e) Whether the rule applies differently to public and private entities;
- (f) Whether the rule serves the purposes for which it was adopted;
- (g) Whether the costs imposed by the rule are unreasonable;
- (h) Whether the rule is clearly and simply stated;
- (i) Whether the rule is different than a federal law applicable to the same activity or subject matter without adequate justification; and
- (j) Whether the rule was adopted according to all applicable provisions of law.

(5) The \*department of community, trade, and economic development and the office of financial management shall coordinate efforts among agencies to inform the public about the existence of this rules review process.

(6) The office of financial management shall initiate the rule making required by subsection (1) of this section by September 1, 1995.

[ 1998 c 280 § 5; 1996 c 318 § 1; 1995 c 403 § 703; 1988 c 288 § 305; 1967 c 237 § 5; 1959 c 234 § 6. Formerly RCW 34.04.060.]

**NOTES:**

**\*Reviser's note:** The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.335**

**Withdrawal of proposal—Time and manner of adoption.**

(1) A proposed rule may be withdrawn by the proposing agency at any time before adoption. A withdrawn rule may not be adopted unless it is again proposed in accordance with RCW 34.05.320.

(2) Before adopting a rule, an agency shall consider the written and oral submissions, or any memorandum summarizing oral submissions.

(3) Rules not adopted and filed with the code reviser within one hundred eighty days after publication of the text as last proposed in the register shall be regarded as withdrawn. An agency may not thereafter adopt the proposed rule without refiling it in accordance with RCW 34.05.320. The code reviser shall give notice of the withdrawal in the register.

(4) An agency may not adopt a rule before the time established in the published notice, or such later time established on the record or by publication in the state register.

[ 1989 c 175 § 8; 1988 c 288 § 306; 1980 c 186 § 11. Formerly RCW 34.04.048.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**Severability—1980 c 186:** See note following RCW 34.05.320.

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**34.05.340**

**Variance between proposed and final rule.**

(1) Unless it complies with subsection (3) of this section, an agency may not adopt a rule that is substantially different from the rule proposed in the published notice of proposed rule adoption or a supplemental notice in the proceeding. If an agency contemplates making a

substantial variance from a proposed rule described in a published notice, it may file a supplemental notice with the code reviser meeting the requirements of RCW 34.05.320 and reopen the proceedings for public comment on the proposed variance, or the agency may withdraw the proposed rule and commence a new rule-making proceeding to adopt a substantially different rule. If a new rule-making proceeding is commenced, relevant public comment received regarding the initial proposed rule shall be considered in the new proceeding.

(2) The following factors shall be considered in determining whether an adopted rule is substantially different from the proposed rule on which it is based:

(a) The extent to which a reasonable person affected by the adopted rule would have understood that the published proposed rule would affect his or her interests;

(b) The extent to which the subject of the adopted rule or the issues determined in it are substantially different from the subject or issues involved in the published proposed rule; and

(c) The extent to which the effects of the adopted rule differ from the effects of the published proposed rule.

(3) If the agency, without filing a supplemental notice under subsection (1) of this section, adopts a rule that varies in content from the proposed rule, the general subject matter of the adopted rule must remain the same as the proposed rule. The agency shall briefly describe any changes, other than editing changes, and the principal reasons for adopting the changes. The brief description shall be filed with the code reviser together with the order of adoption for publication in the state register. Within sixty days of publication of the adopted rule in the state register, any interested person may petition the agency to amend any portion of the adopted rule that is substantially different from the proposed rule. The petition shall briefly demonstrate how the adopted rule is substantially different from the proposed rule and shall contain the text of the petitioner's proposed amendment. For purposes of the petition, an adopted rule is substantially different if the issues determined in the adopted rule differ from the issues determined in the proposed rule or the anticipated effects of the adopted rule differ from those of the proposed rule. If the petition meets the requirements of this subsection and RCW 34.05.330, the agency shall initiate rule-making proceedings upon the proposed amendments within the time provided in RCW 34.05.330.

[ 1989 c 175 § 9; 1988 c 288 § 307.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.345**

**Failure to give twenty days notice of intended action—Effect.**

Except for emergency rules adopted under RCW 34.05.350, when twenty days notice of intended action to adopt, amend, or repeal a rule has not been published in the state register, as required by RCW 34.05.320, the code reviser shall not publish such rule and such rule shall not be effective for any purpose.

[ 1988 c 288 § 308; 1967 c 237 § 4. Formerly RCW 34.04.027.]

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**34.05.350**

**Emergency rules and amendments.**

(1) If an agency for good cause finds:

(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest;

(b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; or

(c) In order to implement the requirements or reductions in appropriations enacted in any budget for fiscal year 2009, 2010, 2011, 2012, or 2013, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency,

the agency may dispense with those requirements and adopt, amend, or repeal the rule on an emergency basis. The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee.

(2) An emergency rule adopted under this section takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing. Identical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule. This section does not relieve any agency from compliance with any law requiring that its permanent rules be approved by designated persons or bodies before they become effective.

(3) Within seven days after the rule is adopted, any person may petition the governor requesting the immediate repeal of a rule adopted on an emergency basis by any department listed in RCW 43.17.010. Within seven days after submission of the petition, the governor shall either deny the petition in writing, stating his or her reasons for the denial, or order the immediate repeal of the rule. In ruling on the petition, the governor shall consider only whether the conditions in subsection (1) of this section were met such that adoption of the rule on an emergency basis was necessary. If the governor orders the repeal of the emergency rule, any sanction imposed based on that rule is void. This subsection shall not be construed to prohibit adoption of any rule as a permanent rule.

[ 2011 1st sp.s. c 2 § 1; 2009 c 559 § 1; 1994 c 249 § 3; 1989 c 175 § 10; 1988 c 288 § 309; 1981 c 324 § 4; 1977 ex.s. c 240 § 8; 1959 c 234 § 3. Formerly RCW 34.04.030.]

**NOTES:**

**Effective date—2011 1st sp.s. c 2:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its

existing public institutions, and takes effect immediately [May 31, 2011]." [ 2011 1st sp.s. c 2 § 2.]

**Effective date—2009 c 559:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 19, 2009]." [ 2009 c 559 § 2.]

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

**Effective date—1977 ex.s. c 240:** See RCW 34.08.905.

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### 34.05.353

#### Expedited rule making.

(1) An agency may file notice for the expedited adoption of rules in accordance with the procedures set forth in this section for rules meeting any one of the following criteria:

(a) The proposed rules relate only to internal governmental operations that are not subject to violation by a person;

(b) The proposed rules adopt or incorporate by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;

(c) The proposed rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;

(d) The content of the proposed rules is explicitly and specifically dictated by statute;

(e) The proposed rules have been the subject of negotiated rule making, pilot rule making, or some other process that involved substantial participation by interested parties before the development of the proposed rule; or

(f) The proposed rule is being amended after a review under RCW 34.05.328.

(2) An agency may file notice for the expedited repeal of rules under the procedures set forth in this section for rules meeting any one of the following criteria:

(a) The statute on which the rule is based has been repealed and has not been replaced by another statute providing statutory authority for the rule;

(b) The statute on which the rule is based has been declared unconstitutional by a court with jurisdiction, there is a final judgment, and no statute has been enacted to replace the unconstitutional statute;

(c) The rule is no longer necessary because of changed circumstances; or

(d) Other rules of the agency or of another agency govern the same activity as the rule, making the rule redundant.

(3) The expedited rule-making process must follow the requirements for rule making set forth in RCW 34.05.320, except that the agency is not required to prepare a small business economic impact statement under RCW 19.85.025, a statement indicating whether the rule constitutes a significant legislative rule under RCW 34.05.328(5)(c)(iii), or a significant legislative rule analysis under RCW 34.05.328. An agency is not required to prepare statements of inquiry under RCW 34.05.310 or conduct a hearing for the expedited rule making. The notice for the expedited rule making must contain a statement in at least ten-point type, that is substantially in the following form:

**NOTICE**

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO (INSERT NAME AND ADDRESS) AND RECEIVED BY (INSERT DATE).

(4) The agency shall send either a copy of the notice of the proposed expedited rule making, or a summary of the information on the notice, to any person who has requested notification of proposals for expedited rule making or of regular agency rule making, as well as the joint administrative rules review committee, within three days after its publication in the Washington State Register. An agency may charge for the actual cost of providing a requesting party mailed copies of these notices. The notice of the proposed expedited rule making must be preceded by a statement substantially in the form provided in subsection (3) of this section. The notice must also include an explanation of the reasons the agency believes the expedited rule-making process is appropriate.

(5) The code reviser shall publish the text of all rules proposed for expedited adoption, and the citation and caption of all rules proposed for expedited repeal, along with the notice required in this section in a separate section of the Washington State Register. Once the notice of expedited rule making has been published in the Washington State Register, the only changes that an agency may make in the noticed materials before their final adoption or repeal are to correct typographical errors.

(6) Any person may file a written objection to the expedited rule making. The objection must be filed with the agency rules coordinator within forty-five days after the notice of the proposed expedited rule making has been published in the Washington State Register. A person who has filed a written objection to the expedited rule making may withdraw the objection.

(7) If no written objections to the expedited rule making are filed with the agency within forty-five days after the notice of proposed expedited rule making is published, or if all objections that have been filed are withdrawn by the persons filing the objections, the agency may enter an order adopting or repealing the rule without further notice or a public hearing. The order must be published in the manner required by this chapter for any other agency order adopting, amending, or repealing a rule.

(8) If a written notice of objection to the expedited rule making is timely filed with the agency and is not withdrawn, the notice of proposed expedited rule making published under



this section is considered a statement of inquiry for the purposes of RCW 34.05.310, and the agency may initiate further rule-making proceedings in accordance with this chapter.

(9) As used in this section, "expedited rule making" includes both the expedited adoption of rules and the expedited repeal of rules.

[ 2004 c 31 § 4; 2001 c 25 § 2.]

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### **34.05.360**

#### **Order adopting rule, contents.**

The order of adoption by which each rule is adopted by an agency shall contain all of the following:

- (1) The date the agency adopted the rule;
- (2) A concise statement of the purpose of the rule;
- (3) A reference to all rules repealed, amended, or suspended by the rule;
- (4) A reference to the specific statutory or other authority authorizing adoption of the rule;
- (5) Any findings required by any provision of law as a precondition to adoption or effectiveness of the rule; and
- (6) The effective date of the rule if other than that specified in RCW 34.05.380(2).

[ 1988 c 288 § 311.]

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### **34.05.362**

#### **Postadoption notice.**

Either before or within two hundred days after the effective date of an adopted rule that imposes additional requirements on businesses the violation of which subjects the business to a penalty, assessment, or administrative sanction, an agency identified in RCW 34.05.220(6) shall notify businesses affected by the rule of the requirements of the rule and how to obtain technical assistance to comply. Notification must be provided by email, if possible, to every person identified to receive the postadoption notice under RCW 34.05.220(6).

The notification must announce the rule change, briefly summarize the rule change, refer to appeal procedures under RCW 34.05.330, and include a contact for more information. Failure to notify a specific business under this section does not invalidate a rule or waive the requirement to comply with the rule. The requirements of this section do not apply to emergency rules adopted under RCW 34.05.350.

[ 2003 c 246 § 3.]

#### **NOTES:**

**Finding—2003 c 246:** "The legislature finds that many businesses in the state are frustrated by the complexity of the regulatory system. The Washington Administrative Code containing agency rules now fills twelve volumes, and appears to be growing each year. While

the vast majority of businesses make a good faith attempt to comply with applicable laws and rules, many find it extremely difficult to keep up with agencies' issuance of new rules and requirements. Therefore, state agencies are directed to make a good faith attempt to notify businesses affected by rule changes that may subject noncomplying businesses to penalties." [ 2003 c 246 § 1.]

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### **34.05.365**

#### **Incorporation by reference.**

An agency may incorporate by reference and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has been adopted by an agency of the United States, of this state, or of another state, by a political subdivision of this state, or by a generally recognized organization or association if incorporation of the full text in the agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in agency rules shall fully identify the incorporated matter. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies readily available to the public. The incorporating agency shall have, maintain, and make available for public inspection a copy of the incorporated matter. The rule must state where copies of the incorporated matter are available.

[ 1988 c 288 § 312.]

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### **34.05.370**

#### **Rule-making file.**

(1) Each agency shall maintain an official rule-making file for each rule that it (a) proposes by publication in the state register, or (b) adopts. The file and materials incorporated by reference shall be available for public inspection.

(2) The agency rule-making file shall contain all of the following:

(a) A list of citations to all notices in the state register with respect to the rule or the proceeding upon which the rule is based;

(b) Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding on which the rule is based;

(c) All written petitions, requests, submissions, and comments received by the agency and all other written material regarded by the agency as important to adoption of the rule or the proceeding on which the rule is based;

(d) Any official transcript of oral presentations made in the proceeding on which the rule is based or, if not transcribed, any tape recording or stenographic record of them, and any memorandum prepared by a presiding official summarizing the contents of those presentations;

(e) All petitions for exceptions to, amendment of, or repeal or suspension of, the rule;

(f) Citations to data, factual information, studies, or reports on which the agency relies in the adoption of the rule, indicating where such data, factual information, studies, or reports are

available for review by the public, but this subsection (2)(f) does not require the agency to include in the rule-making file any data, factual information, studies, or reports gathered pursuant to chapter 19.85 RCW or RCW 34.05.328 that can be identified to a particular business;

(g) The concise explanatory statement required by RCW 34.05.325(6); and

(h) Any other material placed in the file by the agency.

(3) Internal agency documents are exempt from inclusion in the rule-making file under subsection (2) of this section to the extent they constitute preliminary drafts, notes, recommendations, and intra-agency memoranda in which opinions are expressed or policies formulated or recommended, except that a specific document is not exempt from inclusion when it is publicly cited by an agency in connection with its decision.

(4) Upon judicial review, the file required by this section constitutes the official agency rule-making file with respect to that rule. Unless otherwise required by another provision of law, the official agency rule-making file need not be the exclusive basis for agency action on that rule.

[ 1998 c 280 § 7; 1996 c 102 § 2; 1995 c 403 § 801; 1994 c 249 § 2; 1988 c 288 § 313.]

**NOTES:**

**Application**—1995 c 403 §§ 201, 301-305, 401-405, and 801: See note following RCW 34.05.328.

**Findings**—**Short title**—**Intent**—1995 c 403: See note following RCW 34.05.328.

**Severability**—**Application**—1994 c 249: See notes following RCW 34.05.310.

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**34.05.375**

**Substantial compliance with procedures.**

No rule proposed after July 1, 1989, is valid unless it is adopted in substantial compliance with RCW 34.05.310 through 34.05.395. Inadvertent failure to mail notice of a proposed rule adoption to any person as required by RCW 34.05.320(3) does not invalidate a rule. No action based upon this section may be maintained to contest the validity of any rule unless it is commenced within two years after the effective date of the rule.

[ 1988 c 288 § 314.]

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**34.05.380**

**Filing with code reviser—Written record—Effective dates.**

(1) Each agency shall file in the office of the code reviser a certified copy of all rules it adopts, except for rules contained in tariffs filed with or published by the Washington utilities and transportation commission. The code reviser shall place upon each rule a notation of the time and date of filing and shall keep a permanent written record of filed rules open to public

inspection. In filing a rule, each agency shall use the standard form prescribed for this purpose by the code reviser.

(2) Emergency rules adopted under RCW 34.05.350 become effective upon filing unless a later date is specified in the order of adoption. All other rules become effective upon the expiration of thirty days after the date of filing, unless a later date is required by statute or specified in the order of adoption.

(3) A rule may become effective immediately upon its filing with the code reviser or on any subsequent date earlier than that established by subsection (2) of this section, if the agency establishes that effective date in the adopting order and finds that:

- (a) Such action is required by the state or federal Constitution, a statute, or court order;
- (b) The rule only delays the effective date of another rule that is not yet effective; or
- (c) The earlier effective date is necessary because of imminent peril to the public health, safety, or welfare.

The finding and a brief statement of the reasons therefor required by this subsection shall be made a part of the order adopting the rule.

(4) With respect to a rule made effective pursuant to subsection (3) of this section, each agency shall make reasonable efforts to make the effective date known to persons who may be affected by it.

[ 2007 c 456 § 5; 1989 c 175 § 11; 1988 c 288 § 315; 1987 c 505 § 17; 1980 c 87 § 11; 1959 c 234 § 4. Formerly RCW 34.04.040.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.385**

**Rules for rule making.**

The code reviser may adopt rules for carrying out the provisions of this chapter relating to the filing and publication of rules and notices of intention to adopt rules, including the form and style to be employed by the various agencies in the drafting of such rules and notices.

[ 1988 c 288 § 316; 1967 c 237 § 13. Formerly RCW 34.04.055.]

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**34.05.390**

**Style, format, and numbering—Agency compliance.**

After the rules of an agency have been published by the code reviser:

(1) All agency orders amending or rescinding such rules, or creating new rules, shall be formulated in accordance with the style, format, and numbering system of the Washington Administrative Code;

(2) Any subsequent printing or reprinting of such rules shall be printed in the style and format (including the numbering system) of such code; and

(3) Amendments of previously adopted rules shall incorporate any editorial corrections made by the code reviser.

[ 1988 c 288 § 317; 1967 c 237 § 14. Formerly RCW 34.04.057.]

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### 34.05.395

#### **Format and style of amendatory and new sections—Failure to comply.**

(1) Rules proposed or adopted by an agency pursuant to this chapter that amend existing sections of the administrative code shall have the words which are amendatory to such existing sections underlined. Any matter to be deleted from an existing section shall be indicated by setting such matter forth in full, enclosed by double parentheses, and such deleted matter shall be lined out with hyphens. A new section shall be designated "NEW SECTION" in upper case type and such designation shall be underlined, but the complete text of the section shall not be underlined. No rule may be forwarded by any agency to the code reviser, nor may the code reviser accept for filing any rule unless the format of such rule is in compliance with the provisions of this section.

(2) Once the rule has been formally adopted by the agency the code reviser need not, except with regard to the register published pursuant to RCW 34.05.210(3), include the items enumerated in subsection (1) of this section in the official code.

(3) Any addition to or deletion from an existing code section not filed by the agency in the style prescribed by subsection (1) of this section shall in all respects be ineffectual, and shall not be shown in subsequent publications or codifications of that section unless the ineffectual portion of the rule is clearly distinguished and an explanatory note is appended thereto by the code reviser in accordance with RCW 34.05.210.

[ 1988 c 288 § 318; 1980 c 186 § 14; 1977 c 19 § 1. Formerly RCW 34.04.058.]

#### **NOTES:**

**Severability—1980 c 186:** See note following RCW 34.05.320.

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### 34.05.410

#### **Application of Part IV.**

(1) Adjudicative proceedings are governed by RCW 34.05.413 through 34.05.476, except as otherwise provided:

(a) By a rule that adopts the procedures for brief adjudicative proceedings in accordance with the standards provided in RCW 34.05.482 for those proceedings;

(b) By RCW 34.05.479 pertaining to emergency adjudicative proceedings; or

(c) By RCW 34.05.240 pertaining to declaratory proceedings.

(2) RCW 34.05.410 through 34.05.494 do not apply to rule-making proceedings unless another statute expressly so requires.

[ 1988 c 288 § 401.]

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**34.05.413**

**Commencement—When required.**

(1) Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(2) When required by law or constitutional right, and upon the timely application of any person, an agency shall commence an adjudicative proceeding.

(3) An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding. An agency may require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits. The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.

(4) If an agency is required to hold an adjudicative proceeding, an application for an agency to enter an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

(5) An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

[ 1989 c 175 § 12; 1988 c 288 § 402.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.416**

**Decision not to conduct an adjudication.**

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

[ 1988 c 288 § 403.]

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**34.05.419**

**Agency action on applications for adjudication.**

After receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows:

(1) Except in situations governed by subsection (2) or (3) of this section, within ninety days after receipt of the application or of the response to a timely request made by the agency under subsection (2) of this section, the agency shall do one of the following:

(a) Approve or deny the application, in whole or in part, on the basis of brief or emergency adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter;

(b) Commence an adjudicative proceeding in accordance with this chapter; or

(c) Dispose of the application in accordance with RCW 34.05.416;

(2) Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application;

(3) If the application seeks relief that is not available when the application is filed but may be available in the future, the agency may proceed to make a determination of eligibility within the time limits provided in subsection (1) of this section. If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible applicants as provided by law and, upon request, shall notify the applicant of the status of the application.

[ 1988 c 288 § 404.]

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### **34.05.422**

#### **Rate changes, licenses.**

(1) Unless otherwise provided by law: (a) Applications for rate changes and uncontested applications for licenses may, in the agency's discretion, be conducted as adjudicative proceedings; (b) applications for licenses that are contested by a person having standing to contest under the law and review of denials of applications for licenses or rate changes must be conducted as adjudicative proceedings; and (c) an agency may not revoke, suspend, or modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute.

(2) An agency with authority to grant or deny a professional or occupational license must notify an applicant for a new or renewal license not later than twenty days prior to the date of the examination required for that license of any grounds for denial of the license which are based on specific information disclosed in the application submitted to the agency. The agency must notify the applicant either that the license is denied or that the decision to grant or deny the license will be made at a future date. If the agency fails to give the notification prior to the examination and the applicant is denied licensure, the examination fee must be refunded to the applicant. If the applicant takes the examination, the agency must notify the applicant of the result.

(3) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, an existing full, temporary, or provisional license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new

license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(4) If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings must be promptly instituted and determined.

(5) This section does not apply to requests made by the department of revenue, under the authority of RCW 82.08.155, to the \*liquor control board to suspend a person's spirits license and to refuse to renew any spirits license held by the person and to issue any new spirits license to the person.

[ 2012 c 39 § 6; 1989 c 175 § 13; 1988 c 288 § 405; 1980 c 33 § 1; 1967 c 237 § 8. Formerly RCW 34.04.170.]

**NOTES:**

**\*Reviser's note:** The "state liquor control board" was renamed the "state liquor and cannabis board" by 2015 c 70 § 3.

**Construction—Effective date—2012 c 39:** See notes following RCW 82.08.155.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.425**

**Presiding officers—Disqualification, substitution.**

(1) Except as provided in subsection (2) of this section, in the discretion of the agency head, the presiding officer in an administrative hearing shall be:

(a) The agency head or one or more members of the agency head;

(b) If the agency has statutory authority to do so, a person other than the agency head or an administrative law judge designated by the agency head to make the final decision and enter the final order;

(c) One or more administrative law judges assigned by the office of administrative hearings in accordance with chapter 34.12 RCW; or

(d) A person or persons designated by the secretary of health pursuant to RCW 43.70.740.

(2) An agency expressly exempted under RCW 34.12.020(4) or other statute from the provisions of chapter 34.12 RCW or an institution of higher education shall designate a presiding officer as provided by rules adopted by the agency.

(3) Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified.

(4) Any party may petition for the disqualification of an individual promptly after receipt of notice indicating that the individual will preside or, if later, promptly upon discovering facts establishing grounds for disqualification.



(5) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(6) When the presiding officer is an administrative law judge, the provisions of this section regarding disqualification for cause are in addition to the motion of prejudice available under RCW 34.12.050.

(7) If a substitute is required for an individual who becomes unavailable as a result of disqualification or any other reason, the substitute must be appointed by the appropriate appointing authority.

(8) Any action taken by a duly appointed substitute for an unavailable individual is as effective as if taken by the unavailable individual.

[ 2013 c 109 § 4; 1989 c 175 § 14; 1988 c 288 § 406.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.428**

**Representation.**

(1) A party to an adjudicative proceeding may participate personally or, if the party is a corporation or other artificial person, by a duly authorized representative.

(2) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by provision of law, other representative.

[ 1989 c 175 § 15; 1988 c 288 § 407.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.431**

**Conference—Procedure and participation.**

(1) Agencies may hold prehearing or other conferences for the settlement or simplification of issues. Every agency shall by rule describe the conditions under which and the manner in which conferences are to be held.

(2) In the discretion of the presiding officer, and where the rights of the parties will not be prejudiced thereby, all or part of the conference may be conducted by telephone, television, or other electronic means. Each participant in the conference must have an opportunity to participate effectively in, to hear, and, if technically and economically feasible, to see the entire proceeding while it is taking place.

[ 1988 c 288 § 408.]

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**34.05.434**

**Notice of hearing.**

(1) The agency or the office of administrative hearings shall set the time and place of the hearing and give not less than seven days advance written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(2) The notice shall include:

(a) Unless otherwise ordered by the presiding officer, the names and mailing addresses of all parties to whom notice is being given and, if known, the names and addresses of their representatives;

(b) If the agency intends to appear, the mailing address and telephone number of the office designated to represent the agency in the proceeding;

(c) The official file or other reference number and the name of the proceeding;

(d) The name, official title, mailing address, and telephone number of the presiding officer, if known;

(e) A statement of the time, place and nature of the proceeding;

(f) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(g) A reference to the particular sections of the statutes and rules involved;

(h) A short and plain statement of the matters asserted by the agency; and

(i) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with this chapter.

(3) If the agency is unable to state the matters required by subsection (2)(h) of this section at the time the notice is served, the initial notice may be limited to a statement of the issues involved. If the proceeding is initiated by a person other than the agency, the initial notice may be limited to the inclusion of a copy of the initiating document. Thereafter, upon request, a more definite and detailed statement shall be furnished.

(4) The notice may include any other matters considered desirable by the agency.

(5) The notice may be served on a party via electronic distribution, with a party's agreement.

[ 2013 c 110 § 1; 1988 c 288 § 409; 1980 c 31 § 1; 1967 c 237 § 9; 1959 c 234 § 9. Formerly RCW 34.04.090.]

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**34.05.437**

**Pleadings, briefs, motions, service.**

(1) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement.

(2) At appropriate stages of the proceedings, the presiding officer may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(3) A party that files a pleading, brief, or other paper with the agency or presiding officer shall serve copies on all other parties, unless a different procedure is specified by agency rule.

[ 1988 c 288 § 410.]

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**34.05.440**

**Default.**

(1) Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice to, or hearing for the benefit of, that party, except that any default or other dispositive order affecting that party shall be served upon him or her or upon his or her attorney, if any.

(2) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

(3) Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

[ 1989 c 175 § 16; 1988 c 288 § 411.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.443**

**Intervention.**

(1) The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(2) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(3) The presiding officer shall timely grant or deny each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

[ 1988 c 288 § 412.]

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### **34.05.446**

#### **Subpoenas, discovery, and protective orders.**

(1) The presiding officer may issue subpoenas and may enter protective orders. A subpoena may be issued with like effect by the agency or the attorney of record in whose behalf the witness is required to appear.

(2) An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used.

(3) Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(4) Discovery orders and protective orders entered under this section may be enforced under the provisions of this chapter on civil enforcement of agency action.

(5) Subpoenas issued under this section may be enforced under RCW 34.05.588(1).

(6) The subpoena powers created by this section shall be statewide in effect.

(7) Witnesses in an adjudicatory proceeding shall be paid the same fees and allowances, in the same manner and under the same conditions, as provided for witnesses in the courts of this state by chapter 2.40 RCW and by RCW 5.56.010, except that the agency shall have the power to fix the allowance for meals and lodging in like manner as is provided in RCW 5.56.010 as to courts. The person initiating an adjudicative proceeding or the party requesting issuance of a subpoena shall pay the fees and allowances and the cost of producing records required to be produced by subpoena.

[ 1989 c 175 § 17; 1988 c 288 § 413; 1967 c 237 § 10. Formerly RCW 34.04.105.]

#### **NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**34.05.449**

**Procedure at hearing.**

(1) The presiding officer shall regulate the course of the proceedings, in conformity with applicable rules and the prehearing order, if any.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

(3) In the discretion of the presiding officer, and where the rights of the parties will not be prejudiced thereby, all or part of the hearing may be conducted by telephone, television, or other electronic means. Each party in the hearing must have an opportunity to participate effectively in, to hear, and, if technically and economically feasible, to see the entire proceeding while it is taking place.

(4) The presiding officer shall cause the hearing to be recorded by a method chosen by the agency. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.

(5) The hearing is open to public observation, except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules. A presiding officer may order the exclusion of witnesses upon a showing of good cause. To the extent that the hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

[ 1989 c 175 § 18; 1988 c 288 § 414.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.452**

**Rules of evidence—Cross-examination.**

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

(3) All testimony of parties and witnesses shall be made under oath or affirmation.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

[ 1988 c 288 § 415; 1959 c 234 § 10. Formerly RCW 34.04.100.]

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### **34.05.455**

#### **Ex parte communications.**

(1) [(a)] A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection:

(a) [(i)] Where the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding;

(b) [(ii)] Any presiding officer may receive aid from legal counsel, or from staff assistants who are subject to the presiding officer's supervision; and

(c) [(iii)] Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.

(d) [(b)] This subsection does not apply to communications required for the disposition of ex parte matters specifically authorized by statute.

(2) Unless required for the disposition of ex parte matters specifically authorized by statute or unless necessary to procedural aspects of maintaining an orderly process, a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.

(3) Unless necessary to procedural aspects of maintaining an orderly process, persons to whom a presiding officer may not communicate under subsections (1) and (2) of this section may not communicate with presiding officers without notice and opportunity for all parties to participate.

(4) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (5) of this section.

(5) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written

responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. Portions of the record pertaining to ex parte communications or rebuttal statements do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact at issue and that portion is admitted pursuant to RCW 34.05.452.

(6) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified, and the portions of the record pertaining to the communication may be sealed by protective order.

(7) The agency shall, and any party may, report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

[ 1988 c 288 § 416.]

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#### **34.05.458**

##### **Separation of functions.**

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its preadjudicative stage, or one who is subject to the authority, direction, or discretion of such a person, may not serve as a presiding officer in the same proceeding.

(2) A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

(3) A person may serve as presiding officer at successive stages of the same adjudicative proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

[ 1988 c 288 § 417.]

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#### **34.05.461**

##### **Entry of orders.**

(1) Except as provided in subsection (2) of this section:

(a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;

(b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and

(c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

(8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown. The initial or final order may be served on a party via electronic distribution, with a party's agreement.

(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).

(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

[ 2013 c 110 § 2; 1995 c 347 § 312; 1989 c 175 § 19; 1988 c 288 § 418.]

**NOTES:**



**Finding—Severability—Part headings and table of contents not law—1995 c 347:**  
See notes following RCW 36.70A.470.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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### **34.05.464**

#### **Review of initial orders.**

(1) As authorized by law, an agency may by rule provide that initial orders in specified classes of cases may become final without further agency action unless, within a specified period, (a) the agency head upon its own motion determines that the initial order should be reviewed, or (b) a party to the proceedings files a petition for administrative review of the initial order. Upon occurrence of either event, notice shall be given to all parties to the proceeding.

(2) As authorized by law, an agency head may appoint a person to review initial orders and to prepare and enter final agency orders.

(3) RCW 34.05.425 and 34.05.455 apply to any person reviewing an initial order on behalf of an agency as part of the decision process, and to persons communicating with them, to the same extent that it is applicable to presiding officers.

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

(5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.

(6) The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument.

(7) The reviewing officer shall enter a final order disposing of the proceeding or remand the matter for further proceedings, with instructions to the presiding officer who entered the initial order. Upon remanding a matter, the reviewing officer shall order such temporary relief as is authorized and appropriate.

(8) A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461(3).

(9) The reviewing officer shall cause copies of the final order or order remanding the matter for further proceedings to be served upon each party.

[ 1989 c 175 § 20; 1988 c 288 § 419.]

#### **NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

**34.05.467**

**Stay.**

A party may submit to the presiding or reviewing officer, as is appropriate to the stage of the proceeding, a petition for stay of effectiveness of a final order within ten days of its service unless otherwise provided by statute or stated in the final order. Disposition of the petition for stay shall be made by the presiding officer, reviewing officer, or agency head as provided by agency rule. Disposition may be made either before or after the effective date of the final order. Disposition denying a stay is not subject to judicial review.

[ 1988 c 288 § 420.]

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**34.05.470**

**Reconsideration.**

(1) Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The place of filing and other procedures, if any, shall be specified by agency rule.

(2) No petition for reconsideration may stay the effectiveness of an order.

(3) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration. The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed, the agency does not either: (a) Dispose of the petition; or (b) serve the parties with a written notice specifying the date by which it will act on the petition.

(4) Unless the petition for reconsideration is deemed denied under subsection (3) of this section, the petition shall be disposed of by the same person or persons who entered the order, if reasonably available. The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further hearing.

(5) The filing of a petition for reconsideration is not a prerequisite for seeking judicial review. An order denying reconsideration, or a notice provided for in subsection (3)(b) of this section is not subject to judicial review.

[ 1989 c 175 § 21; 1988 c 288 § 421.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.473**

**Effectiveness of orders.**

(1) Unless a later date is stated in an order or a stay is granted, an order is effective when entered, but:

(a) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order;

(b) A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order;

(c) For purposes of determining time limits for further administrative procedure or for judicial review, the determinative date is the date of service of the order.

(2) Unless a later date is stated in the initial order or a stay is granted, the time when an initial order becomes a final order in accordance with RCW 34.05.461 is determined as follows:

(a) When the initial order is entered, if administrative review is unavailable; or

(b) When the agency head with such authority enters an order stating, after a petition for administrative review has been filed, that review will not be exercised.

(3) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with RCW 34.05.479.

[ 1989 c 175 § 22; 1988 c 288 § 422.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.476**

**Agency record.**

(1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.

(2) The agency record shall include:

(a) Notices of all proceedings;

(b) Any prehearing order;

(c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(d) Evidence received or considered;

(e) A statement of matters officially noticed;

(f) Proffers of proof and objections and rulings thereon;

(g) Proposed findings, requested orders, and exceptions;

(h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(i) Any final order, initial order, or order on reconsideration;

(j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and

(k) Matters placed on the record after an ex parte communication.

(3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.

[ 1988 c 288 § 423.]

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**34.05.479**

**Emergency adjudicative proceedings.**

(1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.

[ 1988 c 288 § 424.]

**NOTES:**

*signation of persons for emergency adjudications by utilities and transportation commission: RCW 80.01.060.*

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**34.05.4791**

**Secure community transition facility—Proceeding concerning public safety measures.**

A petition brought pursuant to RCW 71.09.342(5) shall be heard under the provisions of RCW 34.05.479 except that the decision of the governor's designee shall be final and is not subject to judicial review.

[ 2002 c 68 § 10.]

**NOTES:**

**Purpose—Severability—Effective date—2002 c 68:** See notes following RCW 36.70A.200.

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**34.05.482**

**Brief adjudicative proceedings—Applicability.**

- (1) An agency may use brief adjudicative proceedings if:
- (a) The use of those proceedings in the circumstances does not violate any provision of law;
  - (b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties;
  - (c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494; and
  - (d) The issue and interests involved in the controversy do not warrant use of the procedures of RCW 34.05.413 through 34.05.479.
- (2) Brief adjudicative proceedings are not authorized for public assistance and food stamp or benefit programs provided for in Title 74 RCW, including but not limited to public assistance as defined in \*RCW 74.04.005(1).

[ 1998 c 79 § 3; 1988 c 288 § 425.]

**NOTES:**

\***Reviser's note:** RCW 74.04.005 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (1) to subsection (11).

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**34.05.485**

**Brief adjudicative proceedings—Procedure.**

- (1) If not specifically prohibited by law, the following persons may be designated as the presiding officer of a brief adjudicative proceeding:
- (a) The agency head;
  - (b) One or more members of the agency head;
  - (c) One or more administrative law judges; or
  - (d) One or more other persons designated by the agency head.
- (2) Before taking action, the presiding officer shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter.
- (3) At the time any unfavorable action is taken the presiding officer shall serve upon each party a brief statement of the reasons for the decision. Within ten days, the presiding officer

shall give the parties a brief written statement of the reasons for the decision and information about any internal administrative review available.

(4) The brief written statement is an initial order. If no review is taken of the initial order as authorized by RCW 34.05.488 and 34.05.491, the initial order shall be the final order.

[ 1989 c 175 § 23; 1988 c 288 § 426.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.488**

**Brief proceedings—Administrative review—Applicability.**

Unless prohibited by any provision of law, an agency, on its own motion, may conduct administrative review of an order resulting from brief adjudicative proceedings. An agency shall conduct this review upon the written or oral request of a party if the agency receives the request within twenty-one days after service of the written statement required by RCW 34.05.485(3).

[ 1989 c 175 § 24; 1988 c 288 § 427.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.491**

**Brief proceedings—Administrative review—Procedures.**

Unless otherwise provided by statute:

(1) If the parties have not requested review, the agency may review an order resulting from a brief adjudicative proceeding on its own motion and without notice to the parties, but it may not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

(2) The reviewing officer may be any person who could have presided at the brief proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

(3) The reviewing officer shall give each party an opportunity to explain the party's view of the matter and shall make any inquiries necessary to ascertain whether the proceeding must be converted to a formal adjudicative hearing.

(4) The order on review must be in writing, must include a brief statement of the reasons for the decision, and must be entered within twenty days after the date of the initial order or of the request for review, whichever is later. The order shall include a description of any further

available administrative review or, if none is available, a notice that judicial review may be available.

(5) A request for administrative review is deemed to have been denied if the agency does not make a disposition of the matter within twenty days after the request is submitted.

[ 1988 c 288 § 428.]

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#### **34.05.494**

##### **Agency record in brief proceedings.**

(1) The agency record consists of any documents regarding the matter that were considered or prepared by the presiding officer for the brief adjudicative proceeding or by the reviewing officer for any review. The agency shall maintain these documents as its official record.

(2) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in brief adjudicative proceedings or for the judicial review of brief adjudicative proceedings.

[ 1988 c 288 § 429.]

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#### **34.05.510**

##### **Relationship between this chapter and other judicial review authority.**

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

[ 1988 c 288 § 501.]

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#### **34.05.514**

##### **Petition for review—Where filed.**

(1) Except as provided in subsections (2) through (4) of this section, proceedings for review under this chapter shall be instituted by paying the fee required under RCW **36.18.020** and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b)

the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.

(2) For proceedings involving institutions of higher education, the petition shall be filed either in the county in which the principal office of the institution involved is located or in the county of an institution's campus if the action involves such campus.

(3) For proceedings conducted by the pollution control hearings board pursuant to chapter **43.21B** RCW or as otherwise provided in RCW **90.03.210**(2) involving decisions of the department of ecology on applications for changes or transfers of water rights that are the subject of a general adjudication of water rights that is being litigated actively under chapter **90.03** or **90.44** RCW, the petition must be filed with the superior court conducting the adjudication, to be consolidated by the court with the general adjudication. A party to the adjudication shall be a party to the appeal under this chapter only if the party files or is served with a petition for review to the extent required by this chapter.

(4) For proceedings involving appeals of examinations or evaluation exercises of the board of pilotage commissioners under chapter **88.16** RCW, the petition must be filed either in Thurston county or in the county in which the board maintains its principal office.

[ 2017 c 52 § 12; 2008 c 128 § 16; 2001 c 220 § 3. Prior: 1995 c 347 § 113; 1995 c 292 § 9; 1994 c 257 § 23; 1988 c 288 § 502.]

**NOTES:**

**Intent—Construction—Effective date—2001 c 220:** See notes following RCW 43.21B.110.

**Finding—Severability—Part headings and table of contents not law—1995 c 347:** See notes following RCW 36.70A.470.

**Severability—1994 c 257:** See note following RCW 36.70A.270.

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**34.05.518**

**Direct review by court of appeals.**

(1) The final decision of an administrative agency in an adjudicative proceeding under this chapter may, except as otherwise provided in \*chapter **43.21L** RCW, be directly reviewed by the court of appeals either (a) upon certification by the superior court pursuant to this section or (b) if the final decision is from an environmental board as defined in subsection (3) of this section, upon acceptance by the court of appeals after a certificate of appealability has been filed by the environmental board that rendered the final decision.

(2) For direct review upon certification by the superior court, an application for direct review must be filed with the superior court within thirty days of the filing of the petition for review in superior court. The superior court may certify a case for direct review only if the judicial review is limited to the record of the agency proceeding and the court finds that:

(a) Fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination;



(b) Delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest;

(c) An appeal to the court of appeals would be likely regardless of the determination in superior court; and

(d) The appellate court's determination in the proceeding would have significant precedential value.

Procedures for certification shall be established by court rule.

(3)(a) For the purposes of direct review of final decisions of environmental boards, environmental boards include those boards identified in RCW **43.21B.005** and the growth management hearings board as identified in RCW **36.70A.250**.

(b) An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

(i) Fundamental and urgent statewide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

(4) The environmental board shall state in the certificate of appealability which criteria it applied, explain how that criteria was met, and file with the certificate a copy of the final decision.

(5) For an appellate court to accept direct review of a final decision of an environmental board, it shall consider the same criteria outlined in subsection (3) of this section, except as otherwise provided in \*chapter **43.21L** RCW.

(6) The procedures for direct review of final decisions of environmental boards include:

(a) Within thirty days after filing the petition for review with the superior court, a party may file an application for direct review with the superior court and serve the appropriate environmental board and all parties of record. The application shall request the environmental board to file a certificate of appealability.

(b) If an issue on review is the jurisdiction of the environmental board, the board may file an application for direct review on that issue.

(c) The environmental board shall have thirty days to grant or deny the request for a certificate of appealability and its decision shall be filed with the superior court and served on all parties of record.

(d) If a certificate of appealability is issued, the parties shall have fifteen days from the date of service to file a notice of discretionary review in the superior court, and the notice shall include a copy of the certificate of appealability and a copy of the final decision.

(e) If the appellate court accepts review, the certificate of appealability shall be transmitted to the court of appeals as part of the certified record.

(f) If a certificate of appealability is denied, review shall be by the superior court. The superior court's decision may be appealed to the court of appeals.

[ **2010 c 211 § 15; 2003 c 393 § 16; 1995 c 382 § 5; 1988 c 288 § 503; 1980 c 76 § 1.**  
Formerly RCW **34.04.133.**]

**NOTES:**

\***Reviser's note:** Chapter **43.21L** RCW was repealed in its entirety pursuant to 2010 c 210 § 46 and **2010 1st sp.s. c 7 § 37.**

**Effective date—Transfer of power, duties, and functions—2010 c 211:** See notes following RCW 36.70A.250.

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**34.05.522**

**Refusal of review by court of appeals.**

The court of appeals may refuse to accept direct review of a case pursuant to RCW 34.05.518 if it finds that the case does not meet the applicable standard in RCW 34.05.518 (2) or (5). Rules of Appellate Procedure 2.3 do not apply in this instance. The refusal to accept such review is not subject to further appellate review, notwithstanding anything in Rule 13.3 of the Rules of Appellate Procedure to the contrary.

[ 1995 c 382 § 6; 1988 c 288 § 504; 1980 c 76 § 2. Formerly RCW 34.04.135.]

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**34.05.526**

**Appellate review by supreme court or court of appeals.**

An aggrieved party may secure appellate review of any final judgment of the superior court under this chapter by the supreme court or the court of appeals. The review shall be secured in the manner provided by law for review of superior court decisions in other civil cases.

[ 1988 c 288 § 505; 1988 c 202 § 35; 1971 c 81 § 87; 1959 c 234 § 14. Formerly RCW 34.04.140.]

**NOTES:**

**Reviser's note:** This section was amended by 1988 c 202 § 35, effective June 9, 1988, and by 1988 c 288 § 505, effective July 1, 1989, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability—1988 c 202:** See note following RCW 2.24.050.

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**34.05.530**

**Standing.**

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

[ 1988 c 288 § 506.]

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### **34.05.534**

#### **Exhaustion of administrative remedies.**

A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review, except:

(1) A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor;

(2) A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required; or

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile; or

(c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

[ 1997 c 409 § 302; 1995 c 403 § 803; 1988 c 288 § 507.]

#### **NOTES:**

**Part headings—Severability—1997 c 409:** See notes following RCW 43.22.051.

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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### **34.05.542**

#### **Time for filing petition for review.**

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office

of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

[ 1998 c 186 § 1; 1988 c 288 § 509.]

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### **34.05.546**

#### **Petition for review—Contents.**

A petition for review must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the agency whose action is at issue;
- (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
- (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;
- (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;
- (7) The petitioner's reasons for believing that relief should be granted; and
- (8) A request for relief, specifying the type and extent of relief requested.

[ 1988 c 288 § 510.]

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### **34.05.550**

#### **Stay and other temporary remedies.**

(1) Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy.

(2) After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.

(3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:

- (a) The applicant is likely to prevail when the court finally disposes of the matter;
  - (b) Without relief the applicant will suffer irreparable injury;
  - (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
  - (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.
- (4) If the court determines that relief should be granted from the agency's action granting a stay or other temporary remedies, the court may remand the matter or may enter an order denying a stay or granting a stay on appropriate terms.

[ 1989 c 175 § 25; 1988 c 288 § 511.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.554**

**Limitation on new issues.**

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

- (a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;
- (b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;
- (c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or
- (d) The interests of justice would be served by resolution of an issue arising from:
  - (i) A change in controlling law occurring after the agency action; or
  - (ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

[ 1988 c 288 § 512.]

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**34.05.558**

**Judicial review of facts confined to record.**

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

[ 1988 c 288 § 513.]

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**34.05.562**

**New evidence taken by court or agency.**

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

- (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
- (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
- (c) The agency improperly excluded or omitted evidence from the record; or
- (d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

[ 1988 c 288 § 514.]

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**34.05.566**

**Agency record for review—Costs.**

(1) Within thirty days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action. The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

(2) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (4) of this section.

(3) The agency may charge a nonindigent petitioner with the reasonable costs of preparing any necessary copies and transcripts for transmittal to the court. A failure by the petitioner to

pay any of this cost to the agency relieves the agency from the responsibility for preparation of the record and transmittal to the court.

(4) The record may be shortened, summarized, or organized temporarily or, by stipulation of all parties, permanently.

(5) The court may tax the cost of preparing transcripts and copies of the record:

(a) Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(b) In accordance with any provision of law.

(6) Additions to the record pursuant to RCW 34.05.562 must be made as ordered by the court.

(7) The court may require or permit subsequent corrections or additions to the record.

[ 1989 c 175 § 26; 1988 c 288 § 515.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.570**

**Judicial review.**

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.



[ 2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.574**

**Type of relief.**

(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

(2) The sole remedy available to a person who is wrongfully denied licensure based upon a failure to pass an examination administered by a state agency, or under its auspices, is the right to retake the examination free of the defect or defects the court may have found in the examination or the examination procedure.

(3) The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law.

(4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.

[ 1989 c 175 § 28; 1988 c 288 § 517.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.578**

**Petition by agency for enforcement.**

(1) In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the superior court.

(2) The petition must name as respondent each alleged person against whom the agency seeks to obtain civil enforcement.

(3) Venue is determined as in other civil cases.

(4) A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, any other civil remedy provided by law, or any combination of the foregoing.

[ 1988 c 288 § 518.]

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### **34.05.582**

#### **Petition by others for enforcement.**

(1) Any person who would qualify under this chapter as having standing to obtain judicial review of an agency's failure to enforce an order directed to another person may file a petition for civil enforcement of that order, but the action may not be commenced:

(a) Until at least sixty days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to the head of the agency concerned, to the attorney general, and to each person against whom the petitioner seeks civil enforcement;

(b) If the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the same person; or

(c) If a petition for review of the same order has been filed and a stay is in effect.

(2) The petition shall name, as respondents, the agency whose order is sought to be enforced and each person against whom the petitioner seeks civil enforcement.

(3) The agency whose order is sought to be enforced may move to dismiss the petition on the grounds that it fails to qualify under this section or that the enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss the petition unless the petitioner demonstrates that (a) the petition qualifies under this section and (b) the agency's failure to enforce its order is based on an exercise of discretion that is arbitrary or capricious.

(4) Except to the extent expressly authorized by law, a petition for civil enforcement may not request, and the court may not grant, any monetary payment apart from taxable costs.

[ 1988 c 288 § 519.]

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### **34.05.586**

#### **Defenses, limitations on.**

(1) Except as expressly provided in this section, a respondent may not assert as a defense in a proceeding for civil enforcement any fact or issue that the respondent had an opportunity to assert before the agency or a reviewing court and did not, or upon which the final determination of the agency or a reviewing court was adverse to the respondent. A respondent may assert as a defense only the following:

(a) That the rule or order is invalid under RCW 34.05.570(3) (a), (b), (c), (d), (g), or (h), but only when the respondent did not know and was under no duty to discover, or could not reasonably have discovered, facts giving rise to this issue;

(b) That the interest of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action after the respondent has exhausted the last foreseeable opportunity for seeking relief from the agency or from a reviewing court;

(c) That the order does not apply to the respondent or that the respondent has not violated the order; or

(d) A defense specifically authorized by statute to be raised in a civil enforcement proceeding.

(2) The limitations of subsection (1) of this section do not apply to the extent that:

(a) The agency action sought to be enforced is a rule and the respondent has not been a party in an adjudicative proceeding that provided an adequate opportunity to raise the issue; or

(b) The agency action sought to be enforced is an order and the respondent was not notified actually or constructively of the related adjudicative proceeding in substantial compliance with this chapter.

(3) The court, to the extent necessary for the determination of the matter, may take new evidence.

[ 1989 c 175 § 29; 1988 c 288 § 520.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.588**

**Enforcement of agency subpoena.**

(1) If a person fails to obey an agency subpoena issued in an adjudicative proceeding, or obeys the subpoena but refuses to testify or produce documents when requested concerning a matter under examination, the agency or attorney issuing the subpoena may petition the superior court of any county where the hearing is being conducted, where the subpoenaed person resides or is found, or where subpoenaed documents are located, for enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, shall set forth in what specific manner the subpoena has not been complied with, and shall request an order of the court to compel compliance. Upon such petition, the court shall enter an order directing the person to appear before the court at a time and place fixed in the order to show cause why the person has not obeyed the subpoena or has refused to testify or produce documents. A copy of the court's show cause order shall be served upon the person. If it appears to the court that the subpoena was properly issued, and that the particular questions the person refused to answer or the requests for production of documents were reasonable and relevant, the court shall enter an order that the person appear before the agency at the time and place fixed in the order and testify or produce the required documents, and on failing to obey this order the person shall be dealt with as for contempt of court.

(2) Agencies with statutory authority to issue investigative subpoenas may petition for enforcement of such subpoenas in accordance with subsection (1) of this section. The agency may petition the superior court of any county where the subpoenaed person resides or is found, or where subpoenaed documents are located. If it appears to the court that the subpoena was properly issued, that the investigation is being conducted for a lawfully authorized purpose, and that the testimony or documents required to be produced are adequately specified and relevant to the investigation, the court shall enter an order that the person appear before the agency at the time and place fixed in the order and testify or produce the required documents, and failing to obey this order the person shall be dealt with as for contempt of court.

(3) Petitions for enforcement of agency subpoenas are not subject to RCW 34.05.578 through 34.05.590.

[ 1989 c 175 § 30.]

**NOTES:**

**Effective date—1989 c 175:** See note following RCW 34.05.010.

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**34.05.590**

**Incorporation of other judicial review provisions.**

Proceedings for civil enforcement are governed by the following provisions of this chapter on judicial review, as modified where necessary to adapt them to those proceedings:

- (1) RCW 34.05.510(2) (ancillary procedural matters); and
- (2) RCW 34.05.566 (agency record for judicial review).

[ 1988 c 288 § 521.]

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**34.05.594**

**Review by higher court.**

Decisions on petitions for civil enforcement are reviewable as in other civil cases.

[ 1988 c 288 § 522.]

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**34.05.598**

**Frivolous petitions.**

The provisions of RCW 4.84.185 relating to civil actions that are frivolous and advanced without reasonable cause apply to petitions for judicial review under this chapter.

[ 1988 c 288 § 607.]

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**34.05.610**

**Joint administrative rules review  
committee—Members—Appointment—Terms—Vacancies.**

(1) There is hereby created a joint administrative rules review committee which shall be a bipartisan committee consisting of four senators and four representatives from the state legislature. The senate members of the committee shall be appointed by the president of the senate, and the house members of the committee shall be appointed by the speaker of the house. Not more than two members from each house may be from the same political party. The appointing authorities shall also appoint one alternate member from each caucus of each house. All appointments to the committee are subject to approval by the caucuses to which the appointed members belong.

(2)(a) Members and alternates shall be appointed as soon as possible after the legislature convenes in regular session in an odd-numbered year. Except when filling a vacancy, a successor to any member or alternate must be appointed in an odd-numbered year as soon as possible after the legislature convenes in regular session, but no later than by June 30th of the same year. A vacancy on the committee must be filled in accordance with subsection (4) of this section within thirty days of the vacancy occurring. Members and alternates may be reappointed to the committee.

(b) The term of any member or alternate appointed to the committee extends until a successor is appointed and qualified, or until the member or alternate no longer serves in the legislature, whichever occurs first.

(3) The president of the senate shall appoint the chairperson and the vice chairperson from among the committee membership as soon as possible after the legislature convenes in regular session in January 2016. The speaker of the house shall appoint the chairperson and the vice chairperson in alternating even-numbered years beginning in the year 2018 from among the committee membership. The secretary of the senate shall appoint the chairperson and the vice chairperson in the alternating even-numbered years beginning in the year 2020 from among the committee membership. Appointments of the chairperson and vice chairperson shall be made in each even-numbered year as soon as possible after a legislative session convenes in regular session, but no later than by June 30th of the same year.

(4) The chairperson of the committee shall cause all meeting notices and committee documents to be sent to the members and alternates. A vacancy must be filled by appointment of a legislator from the same political party as the original appointment. The appropriate appointing authority shall make the appointment within thirty days of the vacancy occurring.

[ 2015 2nd sp.s. c 11 § 1; 1998 c 280 § 9; 1996 c 318 § 2; 1988 c 288 § 601; 1983 c 53 § 1; 1981 c 324 § 5. Formerly RCW 34.04.210.]

**NOTES:**

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.620**

**Review of proposed rules—Notice.**

If the rules review committee finds by a majority vote of its members that a proposed rule is not within the intent of the legislature as expressed in the statute which the rule implements, or that an agency may not be adopting a proposed rule in accordance with all applicable provisions of law, the committee shall give the affected agency written notice of its decision. The notice shall be given at least seven days prior to any hearing scheduled for consideration of or adoption of the proposed rule pursuant to RCW 34.05.320. The notice shall include a statement of the review committee's findings and the reasons therefor. When the agency holds a hearing on the proposed rule, the agency shall consider the review committee's decision.

[ 1996 c 318 § 3; 1994 c 249 § 17; 1988 c 288 § 602; 1987 c 451 § 1; 1981 c 324 § 6. Formerly RCW 34.04.220.]

**NOTES:**

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.630**

**Review of existing rules—Policy and interpretive statements, etc.  
—Notice—Hearing.**

(1) All rules required to be filed pursuant to RCW 34.05.380, and emergency rules adopted pursuant to RCW 34.05.350, are subject to selective review by the committee.

(2) All agency policy and interpretive statements, guidelines, and documents that are of general applicability, or their equivalents, are subject to selective review by the committee to determine whether or not a statement, guideline, or document that is of general applicability, or its equivalent, is being used as a rule that has not been adopted in accordance with all applicable provisions of law.

(3) If the rules review committee finds by a majority vote of its members: (a) That an existing rule is not within the intent of the legislature as expressed by the statute which the rule implements, (b) that the rule has not been adopted in accordance with all applicable provisions of law, or (c) that an agency is using a policy or interpretive statement in place of a rule, the agency affected shall be notified of such finding and the reasons therefor. Within thirty days of the receipt of the rules review committee's notice, the agency shall file notice of a hearing on the rules review committee's finding with the code reviser and mail notice to all persons who have made timely request of the agency for advance notice of its rule-making proceedings as provided in RCW 34.05.320. The agency's notice shall include the rules

review committee's findings and reasons therefor, and shall be published in the Washington state register in accordance with the provisions of chapter 34.08 RCW.

(4) The agency shall consider fully all written and oral submissions regarding (a) whether the rule in question is within the intent of the legislature as expressed by the statute which the rule implements, (b) whether the rule was adopted in accordance with all applicable provisions of law, and (c) whether the agency is using a policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, in place of a rule.

[ 1998 c 21 § 1; 1996 c 318 § 4; 1994 c 249 § 18; 1993 c 277 § 1; 1988 c 288 § 603; 1987 c 451 § 2; 1981 c 324 § 7. Formerly RCW 34.04.230.]

**NOTES:**

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.640**

**Committee objections to agency intended action—Statement in register and WAC—Suspension of rule.**

(1) Within seven days of an agency hearing held after notification of the agency by the rules review committee pursuant to RCW 34.05.620 or 34.05.630, the affected agency shall notify the committee of its intended action on a proposed or existing rule to which the committee objected or on a committee finding of the agency's failure to adopt rules.

(2) If the rules review committee finds by a majority vote of its members: (a) That the proposed or existing rule in question will not be modified, amended, withdrawn, or repealed by the agency so as to conform with the intent of the legislature, (b) that an existing rule was not adopted in accordance with all applicable provisions of law, or (c) that the agency will not replace the policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, with a rule, the rules review committee may, within thirty days from notification by the agency of its intended action, file with the code reviser notice of its objections together with a concise statement of the reasons therefor. Such notice and statement shall also be provided to the agency by the rules review committee.

(3)(a) If the rules review committee makes an adverse finding regarding an existing rule under subsection (2)(a) or (b) of this section, the committee may, by a majority vote of its members, recommend suspension of the rule. Within seven days of such vote the committee shall transmit to the appropriate standing committees of the legislature, the governor, the code reviser, and the agency written notice of its objection and recommended suspension and the concise reasons therefor. Within thirty days of receipt of the notice, the governor shall transmit to the committee, the code reviser, and the agency written approval or disapproval of the recommended suspension. If the suspension is approved by the governor, it is effective from the date of that approval and continues until ninety days after the expiration of the next regular legislative session.

(b) If the rules review committee makes an adverse finding regarding a policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, under subsection (2)(c) of this section, the committee may, by a majority vote of its members, advise the governor of its finding.

(4) The code reviser shall publish transmittals from the rules review committee or the governor issued pursuant to subsection (2) or (3) of this section in the Washington state register and shall publish in the next supplement and compilation of the Washington Administrative Code a reference to the committee's objection or recommended suspension and the governor's action on it and to the issue of the Washington state register in which the full text thereof appears.

(5) The reference shall be removed from a rule published in the Washington Administrative Code if a subsequent adjudicatory proceeding determines that the rule is within the intent of the legislature or was adopted in accordance with all applicable laws, whichever was the objection of the rules review committee.

[ 1998 c 21 § 2; 1996 c 318 § 5; 1994 c 249 § 19; 1993 c 277 § 2; 1988 c 288 § 604; 1987 c 451 § 3; 1981 c 324 § 8. Formerly RCW 34.04.240.]

**NOTES:**

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.650**

**Recommendations by committee to legislature.**

The rules review committee may recommend to the legislature that the original enabling legislation serving as authority for the adoption of any rule reviewed by the committee be amended or repealed in such manner as the committee deems advisable.

[ 1988 c 288 § 605; 1987 c 451 § 4; 1981 c 324 § 9. Formerly RCW 34.04.250.]

**NOTES:**

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.655**

**Petition for review.**

(1) Any person may petition the rules review committee for a review of a proposed or existing rule or a proposed or existing policy or interpretive statement, guideline, or document



that is of general applicability, or its equivalent. A petition to review a statement, guideline, or document that is of general applicability, or its equivalent, may only be filed for the purpose of requesting the committee to determine whether the statement, guideline, or document that is of general applicability, or its equivalent, is being used as a rule that has not been adopted in accordance with all provisions of law. Within thirty days of the receipt of the petition, the rules review committee shall acknowledge receipt of the petition and describe any initial action taken. If the rules review committee rejects the petition, a written statement of the reasons for rejection shall be included.

(2) A person may petition the rules review committee under subsection (1) of this section requesting review of an existing rule only if the person has petitioned the agency to amend or repeal the rule under RCW 34.05.330(1) and such petition was denied.

(3) A petition for review of a rule under subsection (1) of this section shall:

(a) Identify with specificity the proposed or existing rule to be reviewed;

(b) Identify the specific statute identified by the agency as authorizing the rule, the specific statute which the rule interprets or implements, and, if applicable, the specific statute the department is alleged not to have followed in adopting the rule;

(c) State the reasons why the petitioner believes that the rule is not within the intent of the legislature, or that its adoption was not or is not in accordance with law, and provide documentation to support these statements;

(d) Identify any known judicial action regarding the rule or statutes identified in the petition.

A petition to review an existing rule shall also include a copy of the agency's denial of a petition to amend or repeal the rule issued under RCW 34.05.330(1) and, if available, a copy of the governor's denial issued under RCW 34.05.330(3).

(4) A petition for review of a policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, under subsection (1) of this section shall:

(a) Identify the specific policy or interpretative statement, guideline, or document that is of general applicability, or its equivalent, to be reviewed;

(b) Identify the specific statute which the rule interprets or implements;

(c) State the reasons why the petitioner believes that the policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, meets the definition of a rule under RCW 34.05.010 and should have been adopted according to the procedures of this chapter;

(d) Identify any known judicial action regarding the policy or interpretive statement, guideline, or document that is of general applicability, or its equivalent, or statutes identified in the petition.

(5) Except for petitions that the rules review committee rejects, the rules review committee shall make a final decision within ninety days of receipt of a petition for review under subsection (1) of this section. If the legislature meets in regular or special session at any time before the rules review committee makes a final decision on a petition, the rules review committee may defer making a final decision until after the adjournment sine die of the regular or special session or sessions. The rules review committee shall make a final decision on a deferred petition within ninety days of adjournment. During a legislative session, petitioners may bring any concerns raised in a petition to any legislator, and those concerns may be addressed directly through legislation.

[ 2015 2nd sp.s. c 11 § 2; 1998 c 21 § 3; 1996 c 318 § 7; 1995 c 403 § 502.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.660**

**Review and objection procedures—No presumption established.**

It is the express policy of the legislature that establishment of procedures for review of administrative rules by the legislature and the notice of objection required by RCW 34.05.630 (3) and 34.05.640(2) in no way serves to establish a presumption as to the legality or constitutionality of a rule in any subsequent judicial proceedings interpreting such rules.

[ 2001 c 64 § 2; 1988 c 288 § 606; 1981 c 324 § 10. Formerly RCW 34.04.260.]

**NOTES:**

**Legislative affirmation—Severability—1981 c 324:** See notes following RCW 34.05.010.

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**34.05.665**

**Submission of rule for review—State employees protected.**

Any individual employed or holding office in any department or agency of state government may submit rules warranting review to the rules review committee. Any such state employee is protected under chapter 42.40 RCW.

[ 1995 c 403 § 503.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.671**

**Reports—Advisory boards—Staff.**

(1) The rules review committee may make reports from time to time to the members of the legislature and to the public with respect to any of its findings or recommendations. The committee shall keep complete minutes of its meetings.

(2) The committee may establish ad hoc advisory boards, including but not limited to, ad hoc economics or science advisory boards to assist the committee in its rules review functions.

(3) The committee may hire staff as needed to perform functions under this chapter.

[ 1995 c 403 § 505.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.675**

**Inspection of properties—Oaths, subpoenas, witnesses, depositions.**

In the discharge of any duty imposed under this chapter, the rules review committee may examine and inspect all properties, equipment, facilities, files, records, and accounts of any state office, department, institution, board, committee, commission, or agency, and administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and cause the deposition of witnesses, either residing within or without the state, to be taken in the manner prescribed by law for taking depositions in civil actions in the superior courts.

[ 1995 c 403 § 506.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.681**

**Enforcement—Committee subpoena—Refusal to testify.**

In case of the failure on the part of any person to comply with any subpoena issued in [on] behalf of the rules review committee, or on the refusal of any witness to testify to any matters regarding which he or she may be lawfully interrogated, it is the duty of the superior court of any county, or of the judge thereof, on application of the committee, to compel obedience by proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify in the court.

[ 1995 c 403 § 507.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

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**34.05.900**

**Captions and headings.**

Section captions and subchapter headings used in this chapter do not constitute any part of the law.

[ 1988 c 288 § 703.]

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**34.05.902**

**Effective date—Application—1988 c 288.**

RCW 34.05.001 through 34.05.902 shall take effect on July 1, 1989, and shall apply to all rule-making actions and agency proceedings begun on or after that date. Rule-making actions or other agency proceedings begun before July 1, 1989, shall be completed under the applicable provisions of chapter 28B.19 or 34.04 RCW existing immediately before that date in the same manner as if they were not amended by chapter 288, Laws of 1988 or repealed by section 701 of chapter 288, Laws of 1988.

[ 1988 c 288 § 705.]

**NOTES:**

**Recodification—Correction of statutory references—1988 c 288:** "Parts X through XV of this act shall constitute a new chapter in Title 34 RCW, and the sections amended or set forth in this act shall be recodified in the order they appear in this act. The code reviser shall correct all statutory references to these sections and to the repealed chapters 28B.19 and 34.04 RCW to reflect this recodification and repeal." [ 1988 c 288 § 706.]

NO. 95540-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE  
COMMISSIONERS,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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**APPENDIX E**

**Chapter 88.16 RCW****PILOTAGE ACT****Chapter Listing | RCW Dispositions****Sections**

- 88.16.005** Legislative declaration of policy and intent.
- 88.16.010** Board of pilotage  
commissioners—Created—Chairperson—Members—Terms—Qualifications—Vacancies—Quorum.
- 88.16.020** Board of pilotage commissioners—Office—Compensation and travel expenses of members—Employment of personnel.
- 88.16.035** Board of pilotage commissioners—Powers and duties.
- 88.16.040** Oaths and subpoenas—Compelling attendance of witnesses—Contempt.
- 88.16.050** Pilotage districts and waters affected.
- 88.16.061** Pilotage account.
- 88.16.070** Vessels exempted and included under chapter—Fee—Penalty.
- 88.16.090** Pilot and pilot trainee licenses—Qualifications—Duration—Annual fee—Examinations and evaluations—Training program and license—Penalty—Reporting requirements
- 88.16.100** Pilots' licenses—Revocation, suspension, etc., of—Reprimand or fine—Other disciplinary actions—Procedure—Judicial review.
- 88.16.102** Pilots' licenses—Mandatory termination of.
- 88.16.103** Mandatory rest periods for pilots and pilot trainees—Rules—Assignment refusal—Penalty.
- 88.16.105** Size and type of vessels prescribed for newly licensed pilot—Rules.
- 88.16.107** Pilots or pilot trainees may testify without sanctions for doing so.
- 88.16.110** Pilots to file quarterly report—Contents.
- 88.16.115** Limiting liability of pilots and any countywide port district in Grays Harbor pilotage district—Deemed public interest.
- 88.16.118** Limited liability of pilots and pilot trainees—Liability of vessel, owner, or operator not limited.
- 88.16.120** Failure to observe pilotage rate—Penalty.
- 88.16.130** Unlicensed pilot liable for payment of rates—Penalty for refusing to employ licensed pilot.
- 88.16.133** Deviations from state law—Duty to submit pilot's report.
- 88.16.135** Assignment of pilots to vessels—Request that pilot not be assigned—Hearing on request
- 88.16.140** Pilot's lien for compensation.
- 88.16.150** General penalty—Civil penalty—Jurisdiction—Disposition of fines—Failure to inform of special directions, gross misdemeanor.
- 88.16.155** Vessel master to make certification before pilotage service offered—Procedure upon refusal—Rules—Penalties—Exception.
- 88.16.160** Severability and short title.
- 88.16.170** Oil tankers—Intent and purpose.
- 88.16.180** Oil tankers—State licensed pilot required.
- 88.16.190** Oil tankers—Restricted waters—Standard safety features required—Exemptions.
- 88.16.195** Oil tankers—Not to exceed speed of escorting tug.
- 88.16.200** Vessel designed to carry liquefied natural or petroleum gas to adhere to oil tanker provisions.
- 88.16.250** Board of pilotage commissioners authorized to adopt rules—Grays Harbor pilotage district—Tug requirements/safety measures for certain oil tankers.

**NOTES:**

*Unlicensed pilotage: RCW 88.08.060.*

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**88.16.005****Legislative declaration of policy and intent.**

The legislature finds and declares that it is the policy of the state of Washington to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the state of Washington through the sound application of compulsory pilotage provisions in certain of the state waters.

The legislature further finds and declares that it is a policy of the state of Washington to have pilots experienced in the handling of vessels aboard vessels in certain of the state waters with prescribed qualifications and licenses issued by the state.

It is the intent of the legislature to ensure against the loss of lives, loss or damage to property and vessels, and to protect the marine environment through the establishment of a board of pilotage commissioners representing the interests of the people of the state of Washington.

It is the further intent of the legislature not to place in jeopardy Washington's position as an able competitor for waterborne commerce from other ports and nations of the world, but rather to continue to develop and encourage such commerce.

[ 1977 ex.s. c 337 § 1.]

**NOTES:**

**Severability—1977 ex.s. c 337:** "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [ 1977 ex.s. c 337 § 18.]

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**88.16.010****Board of pilotage****commissioners—Created—Chairperson—Members—Terms—Qualifications**

(1) The board of pilotage commissioners of the state of Washington is hereby created and shall consist of the assistant secretary of marine operations of the department of transportation of the state of Washington, or the assistant secretary's designee who shall be an employee of the marine division, who shall be chairperson, the director of the department of ecology, or the director's designee, and seven members appointed by the governor and confirmed by the senate. Each of the appointed commissioners shall be appointed for a term of four years from the date of the member's commission. No person shall be eligible for appointment to the board unless that person is at the time of appointment eighteen years of age or over and a citizen of the United States and of the state of Washington. Two of the appointed commissioners shall be pilots licensed under this chapter and actively engaged in

piloting upon the waters covered by this chapter for at least three years immediately preceding the time of appointment and while serving on the board. One pilot shall be from the Puget Sound pilotage district and the other pilot shall be from either the Grays Harbor pilotage district or the Puget Sound pilotage district. Two of the appointed commissioners shall be actively engaged in the ownership, operation, or management of deep sea cargo and/or passenger-carrying vessels for at least three years immediately preceding the time of appointment and while serving on the board. One of the shipping commissioners shall be a representative of American and one of foreign shipping. One of the commissioners shall be a representative from a recognized environmental organization concerned with marine waters. The remaining commissioners shall be persons interested in and concerned with pilotage, maritime safety, and marine affairs, with broad experience related to the maritime industry exclusive of experience as either a state licensed pilot or as a shipping representative.

(2) Any vacancy in an appointed position on the board shall be filled by the governor for the remainder of the unfilled term, subject to confirmation by the senate.

(3) Five members of the board shall constitute a quorum. At least one pilot, one shipping representative, and one public member must be present at every meeting. All commissioners and the chairperson shall have a vote.

[ 2008 c 128 § 1; 2003 c 58 § 1; 2001 c 36 § 4; 1991 c 200 § 1001; 1987 c 485 § 1; 1979 ex.s. c 207 § 1; 1977 ex.s. c 337 § 2; 1977 ex.s. c 151 § 73; 1971 ex.s. c 292 § 58; 1935 c 18 § 1; RRS § 9871-1. Prior: 1888 p 175 § 1.]

#### NOTES:

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

**Federal requirements—1977 ex.s. c 151:** See RCW 47.98.070.

**Severability—1971 ex.s. c 292:** See note following RCW 26.28.010.

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#### 88.16.020

#### **Board of pilotage commissioners—Office—Compensation and travel expenses of members—Employment of personnel.**

The department of transportation of the state of Washington shall be the office of the board, and all records shall be kept in the office of the department. Each pilotage commissioner shall be compensated in accordance with RCW 43.03.240 and shall be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060, to be paid out of the pilotage account on vouchers approved by the chairperson of the board: PROVIDED, That the sums received under this section shall not be considered compensation earnable as defined pursuant to RCW 41.40.010(8).

The board is authorized to employ personnel, pursuant to chapter 41.06 RCW, as necessary to conduct the business of the board.



[ 1984 c 287 § 111; 1977 ex.s. c 337 § 3; 1977 ex.s. c 151 § 74; 1975-'76 2nd ex.s. c 34 § 178; 1967 c 15 § 1; 1941 c 184 § 1; 1935 c 18 § 2; RRS § 9871-2.]

**NOTES:**

**Legislative findings—Severability—Effective date—1984 c 287:** See notes following RCW 43.03.220.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

**Federal requirements—1977 ex.s. c 151:** See RCW 47.98.070.

**Effective date—Severability—1975-'76 2nd ex.s. c 34:** See notes following RCW 2.08.115.

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**88.16.035**

**Board of pilotage commissioners—Powers and duties.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

(1) The board of pilotage commissioners shall:

(a) Adopt rules, pursuant to chapter 34.05 RCW, necessary for the enforcement and administration of this chapter;

(b)(i) Issue training licenses and pilot licenses to pilot applicants meeting the qualifications provided for in RCW 88.16.090 and such additional qualifications as may be determined by the board;

(ii) Establish a comprehensive training program to assist in the training and evaluation of pilot applicants before final licensing; and

(iii) Establish additional training requirements, including a program of continuing education developed after consultation with pilot organizations, including those located within the state of Washington, as required to maintain a competent pilotage service;

(c) Maintain a register of pilots, records of pilot accidents, and other history pertinent to pilotage;

(d) Determine from time to time the number of pilots necessary to be licensed in each district of the state to optimize the operation of a safe, fully regulated, efficient, and competent pilotage service in each district;

(e) Annually fix the pilotage tariffs for pilotage services provided under this chapter: PROVIDED, That the board may fix extra compensation for extra services to vessels in distress, for awaiting vessels, for all vessels in direct transit to or from a Canadian port where Puget Sound pilotage is required for a portion of the voyage, or for being carried to sea on vessels against the will of the pilot, and for such other services as may be determined by the board: PROVIDED FURTHER, That as an element of the Puget Sound pilotage district tariff, the board may consider pilot retirement plan expenses incurred in the prior year in either pilotage district. However, under no circumstances shall the state be obligated to fund or pay for any portion of retirement payments for pilots or retired pilots;

(f) File annually with the governor and the chairs of the transportation committees of the senate and house of representatives a report which includes, but is not limited to, the following: The number, names, ages, pilot license number, training license number, and years of service as a Washington licensed pilot of any person licensed by the board as a Washington state pilot or trainee; the names, employment, and other information of the members of the board; the total number of pilotage assignments by pilotage district, including information concerning the various types and sizes of vessels and the total annual tonnage; the annual earnings or stipends of individual pilots and trainees before and after deduction for expenses of pilot organizations, including extra compensation as a separate category; the annual expenses of private pilot associations, including personnel employed and capital expenditures; the status of pilotage tariffs, extra compensation, and travel; the retirement contributions paid to pilots and the disposition thereof; the number of groundings, marine occurrences, or other incidents which are reported to or investigated by the board, and which are determined to be accidents, as defined by the board, including the vessel name, location of incident, pilot's or trainee's name, and disposition of the case together with information received before the board acted from all persons concerned, including the United States coast guard; the names, qualifications, time scheduled for examinations, and the district of persons desiring to apply for Washington state pilotage licenses; summaries of dispatch records, quarterly reports from pilots, and the bylaws and operating rules of pilotage organizations; the names, sizes in deadweight tons, surcharges, if any, port of call, name of the pilot or trainee, and names and horsepower of tug boats for any and all oil tankers subject to the provisions of RCW 88.16.190 together with the names of any and all vessels for which the United States coast guard requires special handling pursuant to their authority under the Ports and Waterways Safety Act of 1972; the expenses of the board; and any and all other information which the board deems appropriate to include;

(g) Make available information that includes the pilotage act and other statutes of Washington state and the federal government that affect pilotage, including the rules of the board, together with such additional information as may be informative for pilots, agents, owners, operators, and masters;

(h) Appoint advisory committees and employ marine experts as necessary to carry out its duties under this chapter;

(i) Provide for the maintenance of efficient and competent pilotage service on all waters covered by this chapter; and do such other things as are reasonable, necessary, and expedient to insure proper and safe pilotage upon the waters covered by this chapter and facilitate the efficient administration of this chapter.

(2) The board may pay stipends to pilot trainees under subsection (1)(b) of this section.

[ 2009 c 496 § 1; 2008 c 128 § 2; 2006 c 53 § 1; 2005 c 26 § 1; 1987 c 264 § 1; 1977 ex.s. c 337 § 4.]

#### NOTES:

**Retroactive application—2006 c 53:** "This act is intended to clarify the authority of the board of pilotage commissioners to pay stipends to pilot trainees that have indicated they wish to receive a stipend during the board of pilotage commissioners' training program. Section 1 of this act is remedial and curative in nature and applies retroactively to December 1, 2005. Specifically, the board may pay stipends, pursuant to the rules established by the

board, to any pilot trainees that qualified for the stipends on, or after, December 1, 2005." [ 2006 c 53 § 3.]

**Effective date—2006 c 53:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 14, 2006]." [ 2006 c 53 § 4.]

**Effective date—2005 c 26:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 12, 2005]." [ 2005 c 26 § 4.]

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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### 88.16.040

#### Oaths and subpoenas—Compelling attendance of witnesses—Contempt.

Any member of the board shall have power to administer oaths in any matter before the board for consideration or inquiry and to issue subpoenas requiring witnesses to appear before the board. Such subpoenas shall be signed by a member of the board and issued in the name of the state of Washington and be served and returned, and mileage and witness fees shall be paid in like manner and effect as in a civil action. A witness wilfully disobeying such subpoena served upon the witness shall be proceeded against upon complaint of the board to the attorney general or the prosecuting attorney of the county where the attendance of the witness was demanded as for a contempt of the authority of the superior court of said county.

[ 1987 c 485 § 2; 1967 c 15 § 9; 1935 c 18 § 14; RRS § 9871-14.]

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### 88.16.050

#### Pilotage districts and waters affected.

This chapter shall apply to the pilotage districts of this state as defined in this section.

(1) "Puget Sound pilotage district", whenever used in this chapter, shall be construed to mean and include all the waters of the state of Washington inside the international boundary line between the state of Washington, the United States and the province of British Columbia, Canada and east of one hundred twenty-three degrees twenty-four minutes west longitude.

(2) "Grays Harbor pilotage district" shall include all inland waters, channels, waterways, and navigable tributaries within Grays Harbor and Willapa Harbor. The boundary line between Grays Harbor and Willapa Harbor and the high seas shall be defined by the board.

[ 1987 c 485 § 3; 1979 ex.s. c 207 § 2; 1977 ex.s. c 337 § 5; 1971 ex.s. c 297 § 2; 1967 c 15 § 2; 1935 c 18 § 3; RRS § 9871-3.]

#### NOTES:

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.061****Pilotage account.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6106-S.SL) \*\*\*

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

The account in the general fund designated in \*RCW 43.79.330(17) as the "Puget Sound pilotage account" is hereby redesignated as the "pilotage account".

The pilotage account is hereby redesignated as a nonappropriated account, and is therefore created in the custody of the state treasurer. All receipts designated, credited, or transferred to the pilotage account must be deposited into the account. Expenditures from the account may be used only for the purposes of the board of pilotage commissioners as prescribed under this chapter. Only the board or the board's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

[ 2008 c 128 § 17; 1967 c 15 § 11.]

**NOTES:**

**\*Reviser's note:** RCW 43.79.330(17) was renumbered in 1979, 1980, and 1981, and was subsequently deleted by 2008 c 128 § 18, effective July 1, 2009.

**Effective date—2008 c 128 §§ 17-20:** "Sections 17 through 20 of this act take effect July 1, 2009." [ 2008 c 128 § 21.]

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**88.16.070****Vessels exempted and included under chapter—Fee—Penalty.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

Every vessel not exempt under this section that operates in the waters of the Puget Sound pilotage district or Grays Harbor pilotage district is subject to compulsory pilotage under this chapter.

(1) A United States vessel on a voyage in which it is operating exclusively on its coastwise endorsement, its fishery endorsement (including catching and processing its own catch outside United States waters and economic zone for delivery in the United States), and/or its recreational (or pleasure) endorsement, and all United States and Canadian vessels engaged exclusively in the coasting trade on the west coast of the continental United States (including Alaska) and/or British Columbia shall be exempt from the provisions of this chapter unless a

pilot licensed under this chapter be actually employed, in which case the pilotage rates provided for in this chapter shall apply.

(2) The board may, upon the written petition of any interested party, and upon notice and opportunity for hearing, grant an exemption from the provisions of this chapter to any vessel that the board finds is (a) a small passenger vessel that is not more than one thousand three hundred gross tons (international), does not exceed two hundred feet in overall length, is manned by United States-licensed deck and engine officers appropriate to the size of the vessel with merchant mariner credentials issued by the United States coast guard or Canadian deck and engine officers with Canadian-issued certificates of competency appropriate to the size of the vessel, and is operated exclusively in the waters of the Puget Sound pilotage district and lower British Columbia, or (b) a yacht that is not more than one thousand three hundred gross tons (international) and does not exceed two hundred feet in overall length. Such an exemption shall not be detrimental to the public interest in regard to safe operation preventing loss of human lives, loss of property, and protecting the marine environment of the state of Washington. Such petition shall set out the general description of the vessel, the contemplated use of same, the proposed area of operation, and the name and address of the vessel's owner. The board shall annually, or at any other time when in the public interest, review any exemptions granted to this specified class of small vessels to insure that each exempted vessel remains in compliance with the original exemption. The board shall have the authority to revoke such exemption where there is not continued compliance with the requirements for exemption. The board shall maintain a file which shall include all petitions for exemption, a roster of vessels granted exemption, and the board's written decisions which shall set forth the findings for grants of exemption. Each applicant for exemption or annual renewal shall pay a fee, payable to the pilotage account. Fees for initial applications and for renewals shall be established by rule, and shall not exceed one thousand five hundred dollars. The board shall report annually to the legislature on such exemptions.

(3) Every vessel not exempt under subsection (1) or (2) of this section shall, while navigating the Puget Sound and Grays Harbor pilotage districts, employ a pilot licensed under the provisions of this chapter and shall be liable for and pay pilotage rates in accordance with the pilotage rates herein established or which may hereafter be established under the provisions of this chapter: PROVIDED, That any vessel inbound to or outbound from Canadian ports is exempt from the provisions of this section, if said vessel actually employs a pilot licensed by the Pacific pilotage authority (the pilot licensing authority for the western district of Canada), and if it is communicating with the vessel traffic system and has appropriate navigational charts, and if said vessel uses only those waters east of the international boundary line which are west of a line which begins at the southwestern edge of Point Roberts then to Alden Point (Patos Island), then to Skipjack Island light, then to Turn Point (Stuart Island), then to Kellet Bluff (Henry Island), then to Lime Kiln (San Juan Island) then to the intersection of one hundred twenty-three degrees seven minutes west longitude and forty-eight degrees twenty-five minutes north latitude then to the international boundary. The board shall correspond with the Pacific pilotage authority from time to time to ensure the provisions of this section are enforced. If any exempted vessel does not comply with these provisions it shall be deemed to be in violation of this section and subject to the penalties provided in RCW 88.16.150 as now or hereafter amended and liable to pilotage fees as determined by the board. The board shall investigate any accident on the waters covered by this chapter involving a Canadian pilot and shall include the results in its annual report.

[ 2017 c 88 § 1; 2012 c 81 § 1; 2008 c 128 § 3; 1996 c 144 § 1; 1995 c 174 § 1; 1987 c 194 § 2; 1977 ex.s. c 337 § 6; 1971 ex.s. c 297 § 3; 1967 c 15 § 3; 1935 c 18 § 4; RRS § 9871-4.]

**NOTES:**

**Intent—1987 c 194:** "The legislature intends to provide a limited exemption from the provisions of this chapter for a specified class of small vessels registered as passenger vessels or yachts. It is not the intent of the legislature that such an exemption shall be a precedent for future exemptions of other classes of vessels from the provisions of this chapter." [ 1987 c 194 § 1.]

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.090**

**Pilot and pilot trainee licenses—Qualifications—Duration—Annual fee—Examinations and evaluations—Training program and license—Penalty—Reporting requirements.**

(1) A person may pilot any vessel subject to this chapter on waters covered by this chapter only if licensed to pilot such vessels on such waters under this chapter.

(2)(a) A person is eligible to be licensed as a pilot or a pilot trainee if the person:

(i) Is a citizen of the United States;

(ii) Is over the age of twenty-five years and under the age of seventy years;

(iii)(A) Holds at the time of application, as a minimum, a United States government license as master of steam or motor vessels of not more than one thousand six hundred gross register tons (three thousand international tonnage convention tons) upon oceans, near coastal waters, or inland waters; or the then most equivalent federal license as determined by the board; any such license to have been held by the applicant for a period of at least two years before application;

(B) Holds at the time of licensure as a pilot, after successful completion of the board-required training program, a first class United States endorsement without restrictions on the United States government license for the pilotage district in which the pilot applicant desires to be licensed; however, all applicants for a pilot examination scheduled to be given before July 1, 2008, must have the United States pilotage endorsement at the time of application; and

(C) The board may require that applicants and pilots have federal licenses and endorsements as it deems appropriate; and

(iv) Successfully completes a board-specified training program.

(b) In addition to the requirements of (a) of this subsection, a pilot applicant must meet such other qualifications as may be required by the board.

(c) A person applying for a license under this section shall not have been convicted of an offense involving drugs or the personal consumption of alcohol in the twelve months prior to the date of application. This restriction does not apply to license renewals under this section.

(3) The board may establish such other training license and pilot license requirements as it deems appropriate.

(4) Pilot applicants shall be evaluated and may be ranked for entry into a board-specified training program in a manner specified by the board based on their performance on a written examination or examinations established by the board, performance on other evaluation exercises as may be required by the board, and other criteria or qualifications as may be set by the board.

When the board determines that the demand for pilots requires entry of an applicant into the training program it shall issue a training license to that applicant, but under no circumstances may an applicant be issued a training license more than four years after taking the written entry examination. The training license authorizes the trainee to do such actions as are specified in the training program.

After the completion of the training program the board shall evaluate the trainee's performance and knowledge. The board, as it deems appropriate, may then issue a pilot license, delay the issuance of the pilot license, deny the issuance of the pilot license, or require further training and evaluation.

(5) The board may (a) appoint a special independent committee or (b) contract with private or governmental entities knowledgeable and experienced in the development, administration, and grading of licensing examinations or simulator evaluations for marine pilots, or (c) do both. Active, licensed pilots designated by the board may participate in the development, administration, and grading of examinations and other evaluation exercises. If the board does appoint a special examination or evaluation development committee, it is authorized to pay the members of the committee the same compensation and travel expenses as received by members of the board. Any person who willfully gives advance knowledge of information contained on a pilot examination or other evaluation exercise is guilty of a gross misdemeanor.

(6) This subsection applies to the review of a pilot applicant's written examinations and evaluation exercises to qualify to be placed on a waiting list to become a pilot trainee. Failure to comply with the process set forth in this subsection renders the results of the pilot applicant's written examinations and evaluation exercises final. A pilot applicant may seek board review, administrative review, and judicial review of the results of the written examinations and evaluation exercises in the following manner:

(a) A pilot applicant who seeks a review of the results of his or her written examinations or evaluation exercises must request from the board-appointed or board-designated examination committee an administrative review of the results of his or her written examinations or evaluation exercises as set forth by board rule.

(b) The determination of the examination committee's review of a pilot applicant's examination results becomes final after thirty days from the date of service of written notification of the committee's determination unless a full adjudicative hearing before an administrative law judge has been requested by the pilot applicant before the thirty-day period has expired, as set forth by board rule.

(c) When a full adjudicative hearing has been requested by the pilot applicant, the board shall request the appointment of an administrative law judge under chapter 34.12 RCW who has sufficient experience and familiarity with pilotage matters to be able to conduct a fair and impartial hearing. The hearing shall be governed by chapter 34.05 RCW. The administrative law judge shall issue an initial order.

(d) The initial order of the administrative law judge is final unless within thirty days of the date of service of the initial order the board or pilot applicant requests review of the initial order under chapter 34.05 RCW.

(e) The board may appoint a person to review the initial order and to prepare and enter a final order as governed by chapter 34.05 RCW and as set forth by board rule. The person appointed by the board under this subsection (6)(e) is called the board reviewing officer.

(7) Pilots are licensed under this section for a term of five years from and after the date of the issuance of their respective state licenses. Licenses must thereafter be renewed as a matter of course, unless the board withholds the license for good cause. Each pilot shall pay to the state treasurer an annual license fee in an amount set by the board by rule. Pursuant to RCW 43.135.055, the fees established under this subsection may be increased through the fiscal year ending June 30, 2011. The fees must be deposited in the pilotage account. The board may assess partially active or inactive pilots a reduced fee.

(8) All pilots and pilot trainees are subject to an annual physical examination by a physician chosen by the board. The physician shall examine the pilot's or pilot trainee's heart, blood pressure, circulatory system, lungs and respiratory system, eyesight, hearing, and such other items as may be prescribed by the board. After consultation with a physician and the United States coast guard, the board shall establish minimum health standards to ensure that pilots and pilot trainees licensed by the state are able to perform their duties. Within ninety days of the date of each annual physical examination, and after review of the physician's report, the board shall make a determination of whether the pilot or pilot trainee is fully able to carry out the duties of a pilot or pilot trainee under this chapter. The board may in its discretion check with the appropriate authority for any convictions of or information regarding offenses by a licensed pilot or pilot trainee involving drugs or the personal consumption of alcohol in the prior twelve months.

(9) The board may require vessel simulator training for a pilot trainee and shall require vessel simulator training for a licensed pilot subject to RCW 88.16.105. The board shall also require vessel simulator training in the first year of active duty for a new pilot and at least once every five years for all active pilots.

(10) The board shall prescribe, pursuant to chapter 34.05 RCW, such reporting requirements and review procedures as may be necessary to assure the accuracy and validity of license and service claims. Willful misrepresentation of such required information by a pilot applicant shall result in disqualification of the pilot applicant.

[ 2009 c 470 § 708; 2008 c 128 § 4; 2007 c 518 § 706; 2005 c 26 § 2; 1999 sp.s. c 1 § 607; 1995 c 175 § 1; 1991 c 200 § 1002. Prior: 1990 c 116 § 27; 1990 c 112 § 1; 1987 c 264 § 2; 1986 c 122 § 1; 1981 c 303 § 1; 1979 ex.s. c 207 § 3; 1977 ex.s. c 337 § 7; 1967 c 15 § 5; 1935 c 18 § 8; RRS § 9871-8; prior: 1907 c 147 § 1; 1888 p 176 § 8.]

#### NOTES:

**Effective date—2009 c 470:** See note following RCW 46.68.170.

**Severability—Effective date—2007 c 518:** See notes following RCW 46.68.170.

**Effective date—2005 c 26:** See note following RCW 88.16.035.

**Effective date—1999 sp.s. c 1:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 27, 1999]." [ 1999 sp.s. c 1 § 620.]



**Effective date—1995 c 175:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [ 1995 c 175 § 2.]

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Findings—Severability—1990 c 116:** See notes following RCW 90.56.210.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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### **88.16.100**

#### **Pilots' licenses—Revocation, suspension, etc., of—Reprimand or fine—Other disciplinary actions—Procedure—Judicial review.**

(1) The board shall have power on its own motion or, in its discretion, upon the written request of any interested party, to investigate the performance of pilotage services subject to this chapter and to issue a reprimand, impose a fine against a pilot in an amount not to exceed five thousand dollars, suspend, withhold, or revoke the license of any pilot, or any combination of the above, for misconduct, incompetency, inattention to duty, intoxication, or failure to perform his duties under this chapter, or violation of any of the rules or regulations provided by the board for the government of pilots. The board may partially or totally stay any disciplinary action authorized in this subsection and subsection (2) of this section. The board shall have the power to require that a pilot satisfactorily complete a specific course of training or treatment.

(2) In all instances where a pilot licensed under this chapter performs pilot services on a vessel exempt under RCW 88.16.070, the board may on its own motion, or in its discretion upon the written request of any interested party, investigate whether the services were performed in a professional manner consistent with sound maritime practices. If the board finds that the pilotage services were performed in a manner that constitutes an act of incompetence, misconduct, or negligence so as to endanger life, limb, or property, or violated or failed to comply with state laws or regulations intended to promote marine safety or to protect navigable waters, the board may issue a reprimand, impose a fine against a pilot in an amount not to exceed five thousand dollars, suspend, withhold, or revoke the state pilot license, or any combination of the above. The board shall have the power to require that a pilot satisfactorily complete a specific course of training or treatment.

(3) The board shall implement a system of specified disciplinary actions or corrective actions, including training or treatment, that will be taken when a state licensed pilot in a specified period of time has had multiple disciplinary actions taken against the pilot's license pursuant to subsections (1) and (2) of this section. In developing these disciplinary or corrective actions, the board shall take into account the cause of the disciplinary action and the pilot's previous record.

(4) The board shall immediately review the pilot's license of a pilot who has been charged with any offense involving drugs or the personal consumption of alcohol while on duty, including an offense of operation of a vehicle or vessel while under the influence of alcohol or drugs. After a hearing held pursuant to subsection (5) of this section:

(a) The board shall order a pilot who has been found to have been convicted of an offense involving drugs or the personal consumption of alcohol while on duty and who has not been convicted of another offense involving drugs or the personal consumption of alcohol in the previous five years to actively participate in and satisfactorily complete a specific program of treatment. The board may impose other sanctions it determines are appropriate. If the pilot does not satisfactorily complete the program of treatment, the board shall suspend, revoke, or withhold the pilot's license until the treatment is completed; and

(b) The board shall suspend for not less than one year the license of a pilot found to have been convicted of a second or subsequent offense involving drugs or the personal consumption of alcohol while on duty.

(5) When the board determines that reasonable cause exists to issue a reprimand, impose a fine, suspend, revoke, or withhold any pilot's license or require training or treatment under subsection (1), (2), or (4) of this section, it shall prepare and personally serve upon such pilot a notice advising him or her of the board's intended action, the specific grounds for the action, and the right to request a hearing to challenge the board's action. The pilot shall have thirty days from the date on which notice is served to request a full hearing before an administrative law judge on the issue of the reprimand, fine, suspension, revocation, or withholding of his or her pilot's license, or requiring treatment or training. The board's proposed reprimand, fine, suspension, revocation, or withholding of a license, or requiring treatment or training shall become final upon the expiration of thirty days from the date notice is served, unless a hearing has been requested prior to that time. When a hearing is requested, the board shall request the appointment of an administrative law judge under chapter 34.12 RCW who has sufficient experience and familiarity with pilotage matters to be able to conduct a fair and impartial hearing. The hearing shall be governed by the provisions of Title 34 RCW. All final decisions of the administrative law judge shall be subject to review by the superior court of the state of Washington for Thurston county, by the superior court of the county in which the pilot maintains his or her residence or principal place of business, or by the superior court of the county in which the board maintains its office, to which court any case with all the papers and proceedings therein shall be immediately certified by the administrative law judge if requested to do so by any party to the proceedings at any time within thirty days after the date of any such final decision. No appeal may be taken after the expiration of thirty days after the date of final decision. Any case so certified to the superior court shall be tried de novo and after certification of the record to said superior court the proceedings shall be had as in a civil action. Moneys collected from fines under this section shall be deposited in the pilotage account.

(6) The board shall have the power, on an emergency basis, to temporarily suspend a state pilot's license: (a) When a pilot has been involved in any vessel accident where there has been major property damage, loss of life, or loss of a vessel, or (b) where there is a reasonable cause to believe that a pilot has diminished mental capacity or is under the influence of drugs, alcohol, or other substances, when in the opinion of the board, such an accident or physical or mental impairment would significantly diminish that pilot's ability to carry out pilotage duties and that the public health, safety, and welfare requires such emergency action. The board shall make a determination within seventy-two hours whether to continue the suspension. The board shall develop rules for exercising this authority including procedures for the chairperson or vice chairperson of the board to temporarily order such suspensions, emergency meetings of the board to consider such suspensions, the length of

suspension, opportunities for hearings, and an appeal process. The board shall develop rules under chapter 34.05 RCW.

(7) The board shall immediately notify the United States coast guard that it has revoked or suspended a license pursuant to this section and that a suspended or revoked license has been reinstated.

[ 2008 c 128 § 5; 1990 c 116 § 28; 1987 c 392 § 1; 1986 c 121 § 1; 1981 c 67 § 36; 1977 ex.s. c 337 § 12; 1971 ex.s. c 297 § 4; 1935 c 18 § 13; RRS § 9871-13. Prior: 1888 p 178 § 10.]

#### NOTES:

**Findings—Severability—1990 c 116:** See notes following RCW 90.56.210.

**Severability—1987 c 392:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1987 c 392 § 2.]

**Severability—1986 c 121:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1986 c 121 § 2.]

**Effective dates—Severability—1981 c 67:** See notes following RCW 34.12.010.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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### 88.16.102

#### **Pilots' licenses—Mandatory termination of.**

The license of a pilot is terminated upon the pilot reaching the age of seventy.

[ 2008 c 128 § 6; 1979 ex.s. c 207 § 4.]

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### 88.16.103

#### **Mandatory rest periods for pilots and pilot trainees—Rules—Assignment refusal—Penalty.**

(1) Pilots and pilot trainees, after completion of an assignment or assignments which are seven hours or longer in duration, shall receive a mandatory rest period of seven hours.

(2) A pilot or pilot trainee shall refuse a pilotage assignment if the pilot or pilot trainee is physically or mentally fatigued or if the pilot or pilot trainee has a reasonable belief that the assignment cannot be carried out in a competent and safe manner. Upon refusing an assignment under this subsection, a pilot or pilot trainee shall submit a written explanation to the board within forty-eight hours. If the board finds that the pilot's or pilot trainee's written

explanation is without merit, or reasonable cause did not exist for the assignment refusal, such pilot or pilot trainee may be subject to the provisions of RCW 88.16.100.

(3) The board shall quarterly review the dispatch records of pilot organizations or pilot's quarterly reports to ensure the provisions of this section are enforced. The board may prescribe rules for rest periods pursuant to chapter 34.05 RCW.

[ 2008 c 128 § 7; 1986 c 122 § 2; 1977 ex.s. c 337 § 9.]

**NOTES:**

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.105**

**Size and type of vessels prescribed for newly licensed pilot—Rules.**

The board shall prescribe, pursuant to chapter 34.05 RCW, rules governing the size and type of vessels which a newly licensed pilot may be assigned to pilot on the waters of this state and whether the assignment involves docking or undocking a vessel. The rules shall also prescribe required familiarization trips before a newly licensed pilot may pilot a larger or different type of vessel.

[ 2008 c 128 § 8; 1991 c 200 § 1003; 1987 c 264 § 3; 1977 ex.s. c 337 § 10.]

**NOTES:**

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.107**

**Pilots or pilot trainees may testify without sanctions for doing so.**

Any pilot or pilot trainee licensed pursuant to this chapter may appear or testify before the legislature or board of pilotage commissioners and no person shall place any sanction against said pilot or pilot trainee for having testified or appeared.

[ 2008 c 128 § 9; 1977 ex.s. c 337 § 15.]

**NOTES:**

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.110****Pilots to file quarterly report—Contents.**

(1) Every pilot licensed under this chapter shall file with the board not later than the tenth day of January, April, July, and October of each year a report for the preceding quarter. The report shall contain an account of all moneys received for pilotage by him or her or by any other person for the pilot or on the pilot's account or for his or her benefit. The report shall state the name of each vessel piloted, the amount charged to and/or collected from each vessel, the port of registry of such vessel, its dead weight tonnage, whether it was inward or outward bound, whether the amount so received, collected, or charged is in full payment of pilotage, and other information as the board shall prescribe by rule. The board may from time to time require additional information as it deems necessary.

(2) The report shall include information for each vessel that suffers a grounding, collision, or other major marine casualty that occurred while the pilot was on duty during the reporting period. The report shall also include information on near miss incidents as defined in \*RCW 88.46.100. Information concerning near miss incidents provided pursuant to this section shall not be used for imposing any sanctions or penalties. The board shall forward information provided under this subsection to the department of ecology for inclusion in the collision reporting system established under \*RCW 88.46.100.

[ 2008 c 128 § 10; 2001 c 36 § 5; 1991 c 200 § 1004; 1935 c 18 § 7; RRS § 9871-7. Prior: 1888 p 178 § 22.]

**NOTES:**

\*Reviser's note: RCW 88.46.100 was amended by 2011 c 122 § 8, deleting the definition of "near miss incident" and also deleting the provisions relating to the collision reporting system.

Effective dates—1991 c 200: See RCW 90.56.901.

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**88.16.115****Limiting liability of pilots and any countywide port district in Grays Harbor pilotage district—Deemed in public interest.**

The preservation of human life and property associated with maritime commerce on the pilotage waters of this state is declared to be in the public interest, and the limitation and regulation of the liability of pilots licensed by the state of Washington, and of any countywide port district located partly or entirely within the Grays Harbor pilotage district as defined by RCW 88.16.050(2) authorized to provide pilotage services, is necessary to such preservation and is deemed to be in the public interest.

[ 2005 c 123 § 1; 1981 c 196 § 1.]

**NOTES:**

**Report to legislature and governor—1981 c 196:** "Prior to January 5, 1983, the board of pilotage commissioners shall forward to the legislature and governor a report concerning the implementation of sections 1 through 3 of this act." [ 1981 c 196 § 4.]

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**88.16.118****Limited liability of pilots and pilot trainees—Liability of vessel, owner, or operator not limited.**

(1)(a) A pilot licensed to act as such by the state of Washington, and any countywide port district located partly or entirely within the Grays Harbor pilotage district as defined by RCW 88.16.050(2) authorized to provide pilotage services with pilots employed by or under contract with the port district, shall not be liable for damages in excess of the amount of five thousand dollars for damages or loss occasioned by a pilot's or pilot trainee's errors, omissions, fault, or neglect in the performance of pilotage or pilot training services, except as may arise by reason of the willful misconduct or gross negligence of the pilot.

(b) A pilot trainee licensed to act as such by the state of Washington is not liable for damages in excess of the amount of five thousand dollars for damages or loss occasioned by the pilot trainee's errors, omissions, fault, or neglect in the performance of pilotage or pilot training services, except as may arise by reason of the willful misconduct or gross negligence of the pilot trainee.

(2) When a pilot or pilot trainee boards a vessel to provide pilotage services, that pilot or pilot trainee becomes a servant of the vessel and its owner and operator. Nothing in this section exempts the vessel, its owner, or its operator from liability for damage or loss occasioned by that ship to a person or property on the ground that (a) the ship was piloted by a Washington state licensed pilot or pilot trainee, or (b) the damage or loss was occasioned by the error, omission, fault, or neglect of a Washington state licensed pilot or pilot trainee.

(3) Pilots, pilot trainees, and board members are immune from civil liability to any party for damages or other relief that is in any way based on the communication of, to a pilot or pilot trainee, to the board, or to any other appropriate governmental authority or person, any of the following: (a) Information about any incident or occurrence involving collision, allision, or grounding of any vessel, including near-miss occurrences; (b) information about any other marine occurrence that the pilot or pilot trainee believes involved or involves undue risk in the navigation of any vessel that could result in damage to any person, vessel, structure, aid to navigation, or the marine environment of this state; or (c) any report or other written, oral, or electronic evaluation of the performance of any pilot or pilot trainee. "Performance" includes, but is not limited to, professional ability, attitude, performance of duties, effort, knowledge, skills, and other relevant factors. This protection and immunity does not apply when a pilot or pilot trainee intentionally releases or discloses information known to be false. The immunity granted to a person under this section is in addition to any common law or statutory privilege or immunity enjoyed by the person, and this section is not intended to abrogate or modify any such common law or statutory privilege or immunity. The immunity from civil liability provided under this section shall be liberally construed to accomplish the purposes of this chapter and to encourage the free flow of information and opinions to the board.

[ 2008 c 128 § 11. Prior: 2005 c 123 § 2; 2005 c 26 § 3; 1984 c 69 § 1.]

**NOTES:**

**Effective date—2005 c 26:** See note following RCW 88.16.035.

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**88.16.120****Failure to observe pilotage rate—Penalty.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

No pilot shall charge, collect or receive and no person, firm, corporation or association shall pay for pilotage or other services performed hereunder any greater, less or different amount, directly or indirectly, than the rates or charges herein established or which may be hereafter fixed by the board pursuant to this chapter. Any pilot, person, firm, corporation or association violating the provisions of this section shall be guilty of a misdemeanor and shall be punished pursuant to RCW 88.16.150 as now or hereafter amended, said prosecution to be conducted by the attorney general or the prosecuting attorney of any county wherein the offense or any part thereof was committed.

[ 1987 c 485 § 4; 1977 ex.s. c 337 § 13; 1967 c 15 § 4; 1935 c 18 § 6; RRS § 9871-6.]

**NOTES:**

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.130****Unlicensed pilot liable for payment of rates—Penalty for refusing to employ licensed pilot.**

\*\*\* CHANGE IN 2018 \*\*\* (SEE 6519-S.SL) \*\*\*

Any person not holding a license as pilot under the provisions of this chapter who pilots any vessel subject to the provisions of this chapter on waters covered by this chapter shall pay to the board the pilotage rates payable under the provisions of this chapter. Any master or owner of a vessel required to employ a pilot licensed under the provisions of this chapter who refuses to do so when such a pilot is available shall be punished pursuant to RCW 88.16.150 as now or hereafter amended and shall be imprisoned in the county jail of the county wherein he or she is so convicted until said fine and the costs of his or her prosecution are paid.

[ 2013 c 23 § 533; 1977 ex.s. c 337 § 14; 1967 c 15 § 8; 1935 c 18 § 11; RRS § 9871-11.  
Prior: 1907 c 147 § 4.]

**NOTES:**

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.133****Deviations from state law—Duty to submit pilot's report.**

A master, pilot, or pilot trainee who deviates from the provisions of this chapter or Title 363 WAC in order to comply with any federal or international law or treaty, such as 46 U.S.C. Sec. 2304 et seq., or any other provision of law of the state, or who deviates in order to ensure the safety of the vessel or its crew under the control of the master, pilot, or pilot trainee, shall submit a pilot's report of marine safety occurrence as prescribed by the board of pilotage commissioners in WAC 363-116-200 in the case of a near-miss occurrence. If the deviation occurred while the vessel was operating under the control of a pilot or pilot trainee licensed in this state, then the report must be submitted by the pilot or pilot trainee with input provided by the master. The report must describe the circumstances leading to the deviation from the provisions of this chapter and the consequences of that deviation. If the consequences of the deviation include an incident as defined in WAC 363-116-200, then the pilot's report of marine safety occurrence must be submitted in addition to any reports required as a result of the incident. The board shall investigate the circumstances surrounding the deviation and, if the facts of the situation so warrant, may waive enforcement action against the master, pilot, or pilot trainee if the board finds that the deviation was: Taken in order to comply with any other law that may have precedence; required by the ordinary practice of seamen; or justified by the special circumstances of the case.

[ 2008 c 128 § 15,]

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**88.16.135****Assignment of pilots to vessels—Request that pilot not be assigned—Hearing on request.**

Any ship operator or ship husbanding agent may submit a request in writing to the board that a particular pilot not be assigned to pilot that company's vessels. The request shall be based on specific safety concerns of the ship operator or ship husbanding agent.

The board shall notify interested persons and hold a hearing on that request, and either approve or disapprove the request. If the request is approved, the board shall notify the affected pilot and give the pilot a specific list of vessels for which that pilot shall not provide pilotage services.

[ 2008 c 128 § 12; 1987 c 485 § 6.]

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**88.16.140****Pilot's lien for compensation.**



Each vessel, its tackle, apparel and furniture and the owner thereof shall be jointly and severally liable for the compensation of any pilot employed thereon and such pilot shall have a lien upon such vessel, her tackle, apparel and furniture for such compensation.

[ 1935 c 18 § 15; RRS § 9871-15. Prior: 1907 c 147 § 2; 1888 p 178 § 23.]

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**88.16.150****General penalty—Civil penalty—Jurisdiction—Disposition of fines—Failure to inform of special directions, gross misdemeanor.**

(1) In all cases where no other penalty is prescribed in this chapter, any violation of this chapter or of any rule or regulation of the board shall be punished as a gross misdemeanor, and all violations may be prosecuted in any court of competent jurisdiction in any county where the offense or any part thereof was committed. In any case where the offense was committed upon a ship, boat or vessel, and there is doubt as to the proper county, the same may be prosecuted in any county through any part of which the ship, boat or vessel passed, during the trip upon which the offense was committed. All fines collected for any violation of this chapter or any rule or regulation of the board shall within thirty days be paid by the official collecting the same to the state treasurer and shall be credited to the pilotage account: PROVIDED, That all fees, fines, forfeitures and penalties collected or assessed by a district court because of the violation of a state law shall be remitted as provided in chapter 3.62 RCW as now exists or is later amended.

(2) Notwithstanding any other penalty imposed by this section, any person who shall violate the provisions of this chapter, shall be liable to a maximum civil penalty of ten thousand dollars for each violation. The board may request the attorney general or the prosecuting attorney of the county in which any violation of this chapter occurs to bring an action for imposing the civil penalties provided for in this subsection.

Moneys collected from civil penalties shall be deposited in the pilotage account.

(3) Any master of a vessel who shall knowingly fail to inform the pilot dispatched to said vessel or any agent, owner, or operator, who shall knowingly fail to inform the pilot dispatcher, or any dispatcher who shall knowingly fail to inform the pilot actually dispatched to said vessel of any special directions mandated by the coast guard captain of the port under authority of the Ports and Waterways Safety Act of 1972, as amended, for the handling of such vessel shall be guilty of a gross misdemeanor.

[ 1995 c 174 § 2. Prior: 1987 c 485 § 5; 1987 c 202 § 247; 1977 ex.s. c 337 § 8; 1969 ex.s. c 199 § 41; 1967 c 15 § 7; 1935 c 18 § 10; RRS § 9871-10; prior: 1888 p 179 § 27.]

**NOTES:**

**Intent—1987 c 202:** See note following RCW 2.04.190.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

**88.16.155****Vessel master to make certification before pilotage service offered—Procedure upon refusal—Rules—Penalties—Exception.**

(1) The master of any vessel which employs a Washington licensed pilot shall certify on a form prescribed by the board of pilotage commissioners that the vessel complies with:

(a) Such provisions of the United States coast guard regulations governing the safety and navigation of vessels in United States waters, as codified in Title 33 of the code of federal regulations, as the board may prescribe; and

(b) The provisions of current international agreements governing the safety, radio equipment, and pollution of vessels and other matters as ratified by the United States Senate and prescribed by the board.

(2) The master of any vessel which employs a Washington licensed pilot shall be prepared to produce, and any Washington licensed pilot employed by a vessel shall request to see, certificates of the vessel which certify and indicate that the vessel complies with subsection (1) of this section and the rules of the board promulgated pursuant to subsection (1) of this section.

(3) If the master of a vessel which employs a Washington licensed pilot cannot certify that the vessel complies with subsection (1) of this section and the rules of the board adopted pursuant to subsection (1) of this section, the master shall certify that:

(a) The vessel will comply with subsection (1) of this section before the time the vessel is scheduled to leave the waters of Washington state; and

(b) The coast guard captain of the port was notified of the noncomplying items when they were determined; and

(c) The coast guard captain of the port has authorized the vessel to proceed under such conditions as prescribed by the coast guard pursuant to its authority under federal statutes and regulations.

(4) After the board has prescribed the form required under subsection (1) of this section, no Washington licensed pilot shall offer pilotage services to any vessel on which the master has failed to make a certification required by this section. If the master fails to make a certification the pilot shall:

(a) Disembark from the vessel as soon as safely practicable; and

(b) Immediately inform the coast guard captain of the port of the conditions and circumstances by the best possible means; and

(c) Forward a written report to the board no later than twenty-four hours after disembarking from the vessel.

(5) Any Washington licensed pilot who offers pilotage services to a vessel on which the master has failed to make a certification required by this section or the rules of the board adopted under this section shall be subject to RCW **88.16.150**, as now or hereafter amended, and RCW **88.16.100**, as now or hereafter amended.

(6) The board shall revise the requirements enumerated in this section as necessary to reflect changes in coast guard regulations, federal statutes, and international agreements. All actions of the board under this section shall comply with chapters **34.05** and **42.30** RCW. The board shall prescribe the time of and method for retention of forms which have been signed by the master of a vessel in accordance with the provisions of this section.

(7) This section shall not apply to the movement of dead ships. The board shall prescribe pursuant to chapter 34.05 RCW, after consultation with the coast guard and interested persons, for the movement of dead ships and the certification process thereon.

[ 2008 c 128 § 13; 1977 ex.s. c 337 § 11.]

**NOTES:**

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.160**

**Severability and short title.**

If any section, subsection, sentence, clause or phrase of this chapter is for any reason held to be invalid, such decision shall not affect the validity of the remaining provisions of this chapter. This chapter may be cited as the "Pilotage Act."

[ 1967 c 15 § 10; 1935 c 18 § 17; RRS § 9871-16.]

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**88.16.170**

**Oil tankers—Intent and purpose.**

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on the Columbia river and on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature recognizes that the Columbia river has many natural obstacles to navigation and shifting navigation channels that create the risk of an oil spill. The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of the Columbia river and Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of RCW 88.16.180 and 88.16.190 to decrease the likelihood of oil spills on the Columbia river and on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ licensed pilots and to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.

[ 1991 c 200 § 601; 1975 1st ex.s. c 125 § 1.]

**NOTES:**

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Severability—1975 1st ex.s. c 125:** "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [ 1975 1st ex.s. c 125 § 6.]

**Study authorized and directed:** "The House and Senate Transportation and Utilities Committees are authorized and directed to study the feasibility, benefits, and disadvantages of requiring similar pilot and tug assistance for vessels carrying other potentially hazardous materials and to submit their findings and recommendations prior to the 45th session of the Washington legislature in January, 1977. Such study shall also include a report on the feasibility, benefits and disadvantages of requiring vessels under tug escort to observe a speed limit, and such study shall include a discussion of the impact of a speed limit on the maneuverability of the vessel, the effectiveness of the tug escort and other legal and technical considerations material and relevant to the required study. Such study shall also include an evaluation and recommendations as to whether there should be a transfer of all duties and responsibilities of the board of pilotage commissioners to the Washington utilities and transportation commission or other state agency, and alternate methods for establishing fair and equitable rates for tug escort and pilot transfer." [ 1975 1st ex.s. c 125 § 5.]

*charge of oil and hazardous substances into state waters: RCW 90.56.010 through 90.56.040.*

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**88.16.180****Oil tankers—State licensed pilot required.**

Notwithstanding the provisions of RCW 88.16.070, any registered oil tanker of five thousand gross tons or greater, shall be required:

- (1) To take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for and pay pilotage rates pursuant to RCW 88.16.035; and
- (2) To take a licensed pilot while navigating the Columbia river.

[ 1991 c 200 § 602; 1983 c 3 § 231; 1975 1st ex.s. c 125 § 2.]

**NOTES:**

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Severability—1975 1st ex.s. c 125:** See notes following RCW 88.16.170.

**88.16.190****Oil tankers—Restricted waters—Standard safety features required—Exemptions.**

(1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light.

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and

(b) Twin screws; and

(c) Double bottoms, underneath all oil and liquid cargo compartments; and

(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

PROVIDED, That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: PROVIDED FURTHER, That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.05 RCW: PROVIDED FURTHER, That a tanker assigned a deadweight of less than forty thousand deadweight tons at the time of construction or reconstruction as reported in Lloyd's Register of Ships is not subject to the provisions of RCW 88.16.170 through 88.16.190.

[ 1994 c 52 § 1; 1975 1st ex.s. c 125 § 3.]

**NOTES:**

**Severability—1975 1st ex.s. c 125:** See note following RCW 88.16.170.

**88.16.195****Oil tankers—Not to exceed speed of escorting tug.**

An oil tanker under escort of a tug or tugs pursuant to the provisions of RCW 88.16.190 shall not exceed the service speed of the tug or tugs that are escorting the oil tanker.

[ 1990 c 116 § 26.]

**NOTES:**

**Findings—Severability—1990 c 116:** See notes following RCW 90.56.210.

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**88.16.200****Vessel designed to carry liquefied natural or petroleum gas to adhere to oil tanker provisions.**

Any vessel designed for the purpose of carrying as its cargo liquefied natural or liquefied petroleum gas shall adhere to the provisions of RCW 88.16.190(2) as though it were an oil tanker.

[ 2008 c 128 § 14; 1991 c 200 § 603; 1977 ex.s. c 337 § 16.]

**NOTES:**

**Effective dates—1991 c 200:** See RCW 90.56.901.

**Severability—1977 ex.s. c 337:** See note following RCW 88.16.005.

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**88.16.250****Board of pilotage commissioners authorized to adopt rules—Grays Harbor pilotage district—Tug escort requirements/safety measures for certain oil tankers.**

(1) The board of pilotage commissioners may adopt rules to implement this section. The rules may include tug escort requirements and other safety measures for oil tankers of greater than forty thousand deadweight tons, all articulated tug barges, and other towed waterborne vessels or barges within a two-mile radius of the Grays Harbor pilotage district as defined in RCW 88.16.050.

(2)(a) Prior to proposing a draft rule, the board of pilotage commissioners must consult with the department of ecology, the United States coast guard, the Grays Harbor safety committee, area tribes, public ports, local governments, and other appropriate entities. The board of pilotage commissioners may not adopt rules under this section unless a state agency or a local jurisdiction, for a facility within Grays Harbor that is required to have a contingency plan pursuant to chapter 90.56 RCW:

(i) Makes a final determination or issues a final permit after January 1, 2015, to site a new facility; or

(ii) Provides authority to an existing facility to process or receive crude oil for the first time.

(b) This subsection does not apply to a transmission pipeline or railroad facility.

(3) A rule adopted under this section must:

(a) Be designed to achieve best achievable protection as defined in RCW 88.46.010;

(b) Ensure that any escort tugs used have an aggregate shaft horsepower equivalent to at least five percent of the deadweight tons of the escorted oil tanker or articulated tug barge; and

(c) Ensure that escort tugs have sufficient mechanical capabilities to provide for safe escort.

(4) The provisions adopted under this section may not include rules affecting pilotage. This section does not affect any existing authority to establish pilotage requirements.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Articulated tug barge" means a tank barge and a towing vessel joined by hinged or articulated fixed mechanical equipment affixed or connecting to the stern of the tank barge.

(b) "Oil tanker" means a self-propelled deep draft tank vessel designed to transport oil in bulk. "Oil tanker" does not include an articulated tug barge tank vessel.

(c) "Waterborne vessel or barge" means any ship, barge, or other watercraft capable of traveling on the navigable waters of this state and capable of transporting any crude oil or petroleum product in quantities of ten thousand gallons or more for purposes other than providing fuel for its motor or engine.

[ 2015 c 274 § 12.]

**NOTES:**

**Effective date—2015 c 274:** See note following RCW 90.56.005.

**ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION**

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**Appellate Court Case Title:** Captain Bruce Nelson v. State of Washington and Washington State Board of Pilotage Commissioners  
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