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CHAPTER Env-WtC 100 DEFINITIONS, ORGANIZATION, AND PUBLIC INFORMATION

Statutory Authority: RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(a)

PART Env-WtC 101 PURPOSE

Env-WtC 101.01 Purpose. The purpose of this chapter is to provide organizational rules to implement the statutory responsibilities for all matters under the jurisdiction of the wetlands council created by RSA 21-O:5-a.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

PART Env-WtC 102 DEFINITIONS

Env-WtC 102.01 “Appeal” means a proceeding in which the council determines the rights, duties, or privileges of a person seeking review of a final department decision to:

- (a) Issue or deny a permit under RSA 482-A;
- (b) Issue or deny a permit or request for variance or redevelopment waiver under RSA 483-B; or
- (c) Issue an administrative order under RSA 482-A or RSA 483-B.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9346, eff 12-10-08

Env-WtC 102.02 “Appeals clerk” means the individual designated by the commissioner pursuant to RSA 21-O:5-a, III as support staff for appeals to the council.

Source. #8533, eff 12-30-05

Env-WtC 102.03 “Appellant” means the person who initiates an appeal by filing a notice of appeal in accordance with Env-WtC 203.01 and Env-WtC 203.02.

Source. #8533, eff 12-30-05

Env-WtC 102.04 “Commissioner” means the commissioner of the department.

Source. #8533, eff 12-30-05

Env-WtC 102.05 “Council” means the wetlands council established by RSA 21-O:5-a.

Source. #8533, eff 12-30-05

Env-WtC 102.06 “Council clerk” means the individual designated by the commissioner pursuant to RSA 21-O:5-a, III as clerical support staff to the council for all matters other than appeals.

Source. #8533, eff 12-30-05

Env-WtC 102.07 “Department” means the department of environmental services.

Source. #8533, eff 12-30-05

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Env-WtC 102.08 “Department’s record” means the complete copy of all information, including but not limited to documents and verbal testimony, which is available to the department at the time it made a final decision from which an appeal has been brought to the council.

Source. #8533, *eff 12-30-05*

Env-WtC 102.09 “Director” means the director of the water division of the department of environmental services.

Source. #8533, *eff 12-30-05*

Env-WtC 102.10 “General proceedings” means council business other than appeals.

Source. #8533, *eff 12-30-05*

Env-WtC 102.11 “Intervenor” means a person allowed by the council to intervene in an appeal proceeding pursuant to Env-WtC 203.05.

Source. #8533, *eff 12-30-05*

Env-WtC 102.12 “Meeting” means a gathering of a quorum of council members, at which general proceedings or appeals or both may be conducted.

Source. #8533, *eff 12-30-05*

Env-WtC 102.13 “Person” means:

(a) For purposes of an appeal under RSA 482-A, “person” as defined in RSA 482-A:2, VI, namely “any natural person, firm, partnership, association, corporation, company, organization or legal entity of any kind including municipal corporations, governmental departments and agencies, or their subdivisions”; and

(b) For purposes of an appeal under RSA 483-B, “person” as defined in RSA 483-B:4, XII, namely “a corporation, company, association, society, firm, partnership or joint stock company, as well as an individual, a state, and any political subdivision of a state or any agency or instrumentality thereof.”

Source. #8533, *eff 12-30-05*; ss by #9214, INTERIM, *eff 7-23-08*; ss by #9346, *eff 12-10-08*

Env-WtC 102.14 “Sitting member” means an individual who has been appointed to the council and to whom the oath of office has been administered, and includes any member of the council whose term has expired until such time as a replacement is appointed, but does not include any member who has resigned from the council, regardless of whether a replacement has been appointed.

Source. #8533, *eff 12-30-05*

PART Env-WtC 103 COUNCIL ORGANIZATION

Env-WtC 103.01 Office Hours and Location.

(a) The council’s office shall be located at the Department of Environmental Services, 29 Hazen Drive, P.O. Box 95, Concord, N.H. 03302-0095.

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(b) The council's office shall be open to the public on weekdays, excluding state holidays, from 8:00 A.M. to 4:00 P.M.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

Env-WtC 103.02 Responsibilities of the Wetlands Council. The responsibilities of the council shall be as follows:

(a) As required by RSA 21-O:5-a, IV, the council shall consult with and advise the commissioner of the department with respect to the policy, programs, goals, and operations of the department as they relate to wetlands and protected shorelands, with particular emphasis on long-range planning for the department and on education of the public relative to the functions of the department;

(b) As required by RSA 21-O:5-a, V, the council shall hear and decide all appeals from final department actions relative to the functions and responsibilities of the department which relate to wetlands and protected shorelands; and

(c) As required by RSA 21-O:5-a, VI, the council shall review proposed rules of the department relative to wetlands and protected shorelands.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9346, eff 12-10-08

Env-WtC 103.03 Responsibilities of Council Clerk. The council clerk shall:

(a) Perform the record-keeping, correspondence, and other statutory functions of the council on a day-to-day basis;

(b) Receive correspondence and other communications and documents in the name of the council that do not relate to appeals;

(c) Be custodian of the council's records other than those relating to appeals; and

(d) Respond to requests for access to records under Env-WtC 104.02(a).

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

Env-WtC 103.04 Responsibilities of Appeals Clerk. The appeals clerk shall:

(a) Receive correspondence, filings, and other communications and documents in the name of the council that relate to appeals;

(b) Be custodian of the council's records relating to appeals;

(c) Prepare and maintain a calendar of all appeals pending before the council; and

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(d) Respond to requests for access to records under Env-WtC 104.02(b).

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

Env-WtC 103.05 Quorum.

(a) A quorum of the council shall be a simple majority of the total number of sitting members, provided, however, that in the context of an appeal proceeding, a quorum shall be a simple majority of those sitting members who have not recused themselves from the proceeding.

(b) The council shall take formal or official action only when a quorum is present.

Source. #8533, eff 12-30-05

PART Env-WtC 104 PUBLIC INFORMATION

Env-WtC 104.01 Record of Council Actions.

(a) Minutes shall be kept of council meetings and official actions taken by the council.

(b) Minutes of council actions which are not confidential under RSA 91-A:3, II or RSA 91-A:5 shall be public records and shall be available for inspection during the council's ordinary office hours within 144 hours from the close of the meeting or vote in question unless the 72 hour availability requirement of RSA 91-A:3, III is applicable.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

Env-WtC 104.02 Requests for Access to Records.

(a) Any person requesting access to examine those records that do not relate to appeals and which are subject to public inspection or which may otherwise be properly examined shall direct a request as specified in (c), below, to the council clerk.

(b) Any person requesting access to examine those records that relate to appeals and which are subject to public inspection or which may otherwise be properly examined shall direct a request as specified in (c), below, to the appeals clerk.

(c) Any person desiring a copy of a council record shall make a request in which the requestor:

- (1) Identifies as particularly as possible the information being sought; and
- (2) Agrees to pay a copying fee of \$0.10 per page.

(d) If records are requested which contain both public information and information that is exempt from disclosure under RSA 91-A:5, the council shall provide only the information that is not exempt from disclosure.

Source. #6652-A, eff 12-12-97, EXPIRED: 12-12-05

New. #8533, eff 12-30-05

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CHAPTER Env-WtC 200 PRACTICE AND PROCEDURE

PART Env-WtC 201 PURPOSE AND APPLICABILITY

Env-WtC 201.01 Purpose. The purpose of this chapter is to provide procedural rules to implement the statutory responsibilities for all matters under the jurisdiction of the wetlands council created by RSA 21-O:5-a.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 201.02 Applicability. These rules shall apply to any person who:

- (a) Appeals a department decision to issue or deny a permit under RSA 482-A;
- (b) Appeals a department decision to issue or deny a permit or request for variance or redevelopment waiver under RSA 483-B; or
- (c) Appeals an administrative order issued under RSA 482-A or RSA 483-B;
- (d) Seeks to intervene in an appeal pending before the council;
- (e) Seeks a declaratory ruling as defined by RSA 541-A:1, V from the council;
- (f) Petitions the council under RSA 541-A:4 to amend, adopt, or repeal a council rule; or
- (g) Otherwise wishes to present an issue to the council for consideration.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

PART Env-WtC 202 GENERAL PROCEDURES

Env-WtC 202.01 Scheduling Meetings.

- (a) As required by RSA 21-O:5-a, IV, the council shall meet quarterly.
- (b) As allowed by RSA 21-O:5-a, IV, meetings other than quarterly meetings shall be held at the call of the chairman or of 3 council members.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 202.02 Place of Meetings.

- (a) All quarterly meetings of the council shall be held in Concord.

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(b) Meetings other than quarterly meetings, including meetings held to inform the public or solicit public comments, shall be held in Concord or such other places as the council shall determine based on consideration of maximizing access of interested parties to the meeting.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 202.03 Notice of Meetings. Notice of meetings shall be publicized as required by RSA 91-A, Access to Public Records. The notice shall contain the time, date and place of meeting and the scheduled agenda for the meeting. The council clerk shall maintain a record demonstrating that all statutory notice requirements have been met.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 202.04 Record of Meetings. A record of all regular and special meetings of the council shall be kept by tape recording. Minutes of the meeting shall be prepared by the council clerk and distributed to the council members.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 202.05 Presiding Officer.

(a) The presiding officer for general proceedings shall be the chairperson of the council if present and willing to preside. If the chairperson is unavailable for any reason, the presiding officer shall be the vice-chair, if available, or a member of the council selected by those members present at the meeting.

(b) The presiding officer at a prehearing conference or for an appeal hearing shall be the chairperson of the council or the council member who is designated to preside by the chairperson.

(c) The presiding officer for general proceedings shall regulate the course of the proceedings and take such other action that is necessary for the efficient and orderly conduct of the proceedings, consistent with these rules and any other applicable state law.

(d) Unless otherwise provided, the presiding officer at an appeal hearing or prehearing conference shall:

- (1) Regulate the course of the conference or hearing;
- (2) Rule on issues of evidence;
- (3) Rule upon issues of procedure;
- (4) Administer oaths or affirmations; and
- (5) Take such other action as necessary for the efficient and orderly conduct of the hearing, consistent with these rules and any other applicable law.

(e) Exceptions to rulings of the presiding officer in an appeal shall be considered to have been preserved if a contemporaneous oral or written objection is:

- (1) Made on the record of the appeal; and

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(2) Included in a petition for reconsideration.

Source. #8534, eff 12-30-05; amd by #9347, eff 12-10-08

Env-WtC 202.06 Computation of Time.

(a) Any time period established in these rules shall be calendar days unless otherwise specified.

(b) A time period specified in these rules shall begin with the day after the triggering act or event and shall end at the department's close of business on the last day of the period.

(c) If the last day of the time period established by these rules and not established by statute falls on a Saturday, Sunday, or state legal holiday, then the time period shall be extended to end at the department's close of business on the first business day following the Saturday, Sunday, or state legal holiday.

Source. #8534, eff 12-30-05; amd by #9347, eff 12-10-08

Env-WtC 202.07 Filing of Documents.

(a) Any written communications with the council that do not relate to an appeal shall be filed by mailing or delivering in-hand the original to the following address:

Wetlands Council
c/o DES, Water Division
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095
Attn: Wetlands Council Clerk

(b) Subject to Env-WtC 203.01, any document required or allowed by these rules to be filed in conjunction with an appeal shall be filed by mailing or delivering in-hand the original and 15 copies of the document to the appeals clerk at the following address:

Wetlands Council
Attn: Appeals Clerk
c/o DES Legal Unit
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

(c) The original and one copy of any document filed that relates to an appeal shall be printed only on one side of the page and not stapled or otherwise permanently bound. The remaining 14 copies of such documents may be double-sided and stapled.

(d) For purposes of this section, "filed by mailing or delivering in-hand" includes delivery by private delivery service but excludes submittals by telefacsimile (fax) or by electronic mail (e-mail).

Source. #8534, eff 12-30-05

Env-WtC 202.08 Signatures.

(a) Every document filed with the council that is not related to an appeal shall be signed by the individual submitting the document or, if the document is filed on behalf of an entity, by a duly-authorized representative of the entity.

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(b) Every document filed with the council that relates to an appeal, other than exhibits submitted at a hearing, shall be signed and dated by the filing party or by the representative of the filing party who has filed an appearance in accordance with Env-WtC 203.07.

(c) The signature on a document filed with the council shall constitute a certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file it;
- (3) To the best of the signer's knowledge, information, and belief, there are good grounds to support it; and
- (4) The document has not been filed for purposes of delay or harassment.

Source. #8534, eff 12-30-05

Env-WtC 202.09 Issuance or Filing of Documents.

(a) All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of the council shall be deemed to have been issued on the date noted on the document.

(b) All notices, orders, decisions, or other documents issued by the council shall be sent by the council by mail or in-hand delivery to:

- (1) The addressee and all persons on the document's copy list, for documents not relating to an appeal; and
- (2) All persons on the service list prepared pursuant to Env-WtC 203.10, for documents relating to an appeal.

(c) All written correspondence or documents issued by or at the direction of the council that are sent to the addressee's last address of record shall be presumed to have been received by the addressee.

(d) All written documents governed by these rules that are addressed as specified in Env-WtC 202.07 shall be deemed to have been filed with or received by the council on the actual date of receipt by the department on behalf of:

- (1) The council clerk, for items that do not relate to an appeal; or
- (2) The appeals clerk, for items that do relate to an appeal.

Source. #8534, eff 12-30-05

Env-WtC 202.10 Communications with the Council.

(a) All communications with the council shall be filed in accordance with Env-WtC 202.07 and shall identify the name and address of the communicator and the subject matter of the communication.

(b) No person shall submit any documents or exhibits or otherwise communicate in any form any information which pertains either directly or indirectly to the subject matter of a pending appeal directly to any council member, other than at a hearing or prehearing conference for which all parties have been given notice in accordance with these rules.

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(c) Any member of the council who receives any direct communication from any person which pertains directly or indirectly to the subject matter of a pending appeal shall, at the next council meeting, inform the council on the record of the improper communication and submit a copy of the same or, if the communication was made orally, relate the substance of the communication to the council on the record.

(d) No information shall be considered by the council or made part of the record in any appeal unless the information is presented to the council in accordance with Env-WtC 203 through Env-WtC 207.

Source. #8534, eff 12-30-05

Env-WtC 202.11 Opportunity to Address the Council.

(a) Any person may request the opportunity to present information to the council as part of general proceedings.

(b) The request shall be:

- (1) Made in advance of a council meeting; and
- (2) Filed in writing in accordance with Env-WtC 202.07(a).

(c) The request shall include:

- (1) The name of the individual who wishes to present the information;
- (2) The name of the person represented by the individual, if any;
- (3) The subject of the information;
- (4) The purpose for presenting the information to the council; and
- (5) The length of time needed to present the information.

(d) The council shall allow the individual to present the information as part of general proceedings if the council determines that:

- (1) The information does not relate to a specific application that is pending before the department;
- (2) The information does not relate to a matter that is the subject of a pending appeal or for which the time in which to file an appeal has not expired; and
- (3) The information relates to a subject over which the council has statutory jurisdiction.

(e) If the council grants the request to provide information, the council shall inform the individual of the date and time at which the information can be presented.

Source. #8534, eff 12-30-05

Env-WtC 202.12 Recess and Adjournment. The council shall, from time to time, recess or adjourn any meeting as might be necessary for the orderly conduct of the meeting on its own initiative or at the request of:

- (a) Any person scheduled to present information as part of general proceedings; or
- (b) Any party to an appeal.

Source. #8534, eff 12-30-05

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Env-WtC 202.13 Waiver of Rules.

(a) The council, upon its own initiative or upon request by a member of the public or a party to an appeal, shall waive the application of any of these rules not mandated by statute after notice to all affected persons and a finding that good cause for the proposed waiver exists.

(b) Requests made prior to or subsequent to a hearing or general proceeding shall be made in writing. Requests made at a hearing or general proceeding may be made orally and shall be entered into the record.

(c) A waiver request shall:

(1) Clearly identify the rule in question and state the specific reason(s) which support the requested waiver; and

(2) If in the context of an appeal, certify that all parties have received notice of the request.

(d) In determining if good cause exists to waive a rule, the council shall consider whether:

(1) Strict adherence to the rule will cause hardship; and

(2) Waiving the rule will prejudice the interests of any party to an appeal or be detrimental to the public interest responsibilities of the council.

(e) The council shall grant the request if it determines that:

(1) The requirement is not mandated by statute;

(2) Good cause for the waiver exists; and

(3) No person objects to the waiver or, if a person does object, the reason(s) for granting the waiver outweigh the reason(s) for denying the waiver.

Source. #8534, eff 12-30-05

Env-WtC 202.14 Failure to Comply with Rules or Orders. Failure to comply with a rule of this chapter or order issued hereunder shall be a basis for the council to:

(a) Where the failure involves a noncompliant document which was submitted with the intent to file with the council, refuse to accept such a document for filing;

(b) Where the failure involves a noncompliant petition or motion, deny or conditionally deny such a petition or motion; or

(c) Where the failure involves any other issue involving noncompliance with a rule in this chapter, issue an order adverse to the person including an order dismissing the person's appeal.

Source. #8534, eff 12-30-05

Env-WtC 202.15 Change in Allowed Times. Except where a time period is fixed by statute, the council may, on its own initiative or by motion of any party and with notice to all affected parties:

(a) Enlarge or shorten the time provided for the filing of any document; or

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- (b) Advance or postpone the time set for any hearing, conference, or other activity.

Source. #8534, eff 12-30-05

PART Env-WtC 203 APPEALS: FILING; PARTIES, INTERVENORS, AND REPRESENTATIVES;
SERVICE; WITHDRAWALS; RECUSAL

Env-WtC 203.01 Initiating an Appeal.

(a) An appeal shall be commenced by filing a petition for appeal as specified in Env-WtC 203.02 with the council.

(b) An appeal of a department decision under RSA 482-A to issue or deny a permit shall be filed as required by RSA 482-A:10, IV, namely:

- (1) Within 30 days of the date of the department's decision on reconsideration; and
- (2) By certified mail or delivery in-hand to the appeals clerk as provided in Env-WtC 202.07(b).

(c) An appeal of an order issued by the department under RSA 482-A shall be filed as required by RSA 482-A:10, IV, namely:

- (1) Within 30 days of the date of the order; and
- (2) By certified mail or delivery in-hand to the appeals clerk as provided in Env-WtC 202.07(b).

(d) An appeal of a department decision under RSA 483-B to issue an order or to issue or deny a permit application or request for variance or redevelopment waiver shall be filed:

- (1) Within 30 days of the date of the order or department decision; and
- (2) By certified mail or delivery in-hand to the appeals clerk as provided in Env-WtC 202.07(b).

(e) The appellant shall send a complete copy of the petition for appeal to each person who is listed on the copy list on:

- (1) The decision on reconsideration issued by the department, for permit-related decisions under RSA 482-A;
- (2) The decision to issue or deny the permit, variance, or redevelopment waiver, for decisions under RSA 483-B; and
- (3) The order, for appeals of orders issued under RSA 482-A or RSA 483-B.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 203.02 Petition for Appeal.

(a) A petition for appeal shall include the following in the order specified:

- (1) For each appellant, the appellant's full legal name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;

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- (2) If the petition for appeal is being filed by the appellant's representative, the representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;
- (3) If the petition for appeal is being filed by a group of appellants, the group representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;
- (4) A statement that the appellant is:
 - a. For an appeal of a decision to issue or deny a permit under RSA 482-A, the applicant for a permit or a person entitled to be noticed in accordance with RSA 482-A:8 or RSA 482-A:9;
 - b. For an appeal of a decision to issue or deny a permit, variance, or redevelopment waiver under RSA 483-B, the applicant or a person who otherwise is aggrieved by the decision and has standing to challenge the decision; and
 - c. For an appeal of an order issued under RSA 482-A or RSA 483-B, the recipient of the order or a person who otherwise is aggrieved by the order and has standing to challenge the order;
- (5) A description of the land involved in the department's decision by street address and municipality, tax map and lot number, and current deed reference;
- (6) For an appeal of a decision to issue or deny a permit under RSA 482-A:
 - a. Identification of the department's decision on reconsideration and the underlying permit decision by the name of the applicant, the name of the town in which the property is located, permit number, if a permit was issued, and the department's file number and name if available; and
 - b. A copy of the reconsideration decision, permit decision, and the department's findings in support of its decision on reconsideration;
- (7) For an appeal of a decision to issue or deny a permit, variance, or redevelopment waiver under RSA 483-B:
 - a. Identification of the department's decision by the name of the applicant, the name of the town in which the property is located, the permit number, if a permit was issued, and the department's file number and name if available; and
 - b. A copy of the decision;
- (8) For an appeal of an order issued under RSA 482-A or RSA 483-B:
 - a. Identification of the order by the order number, the name of the respondent, and the department's file number and name if available; and
 - b. A copy of the order;
- (9) A clear and concise statement of the relief sought, specifying every ground upon which it is claimed that the decision or order is unlawful or unreasonable;
- (10) A concise and explicit statement of the facts and the statutory provisions upon which the council is asked to rely in granting relief;

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(11) A brief statement indicating the complexity of the issues presented to the council; and

(12) Certification that a copy of the notice of appeal was delivered to all persons as required by Env-WtC 203.01(c), specifying the name and address to whom each copy was delivered and the date and manner sent.

(b) For purposes of (a)(4)b. and c., above, standing shall be shown by a clear and concise statement as to why the appellant will suffer a direct and adverse affect or injury in fact as a result of the decision that is being appealed in a way that is actual and imminent and is particularized to the appellant and that is more than any impact of the decision on the general public. If the appellant is a group, at least one of its members shall possess standing.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 203.03 Docketing and Determination of Sufficiency of the Appeal.

(a) Upon receipt of a petition for appeal, the appeals clerk shall assign a docket number to the appeal and review the document for compliance with the requirements of Env-WtC 203.01 and Env-WtC 203.02(a).

(b) If the document appears to comply with the requirements of Env-WtC 203.01 and Env-WtC 203.02(a), the appeals clerk shall distribute a copy of the petition for appeal to each member of the council.

(c) If the document was not filed within the time limit specified in Env-WtC 203.01(b)(1), (c)(1), or (d)(1), as applicable, the appeals clerk shall distribute a copy of the document to the council with a statement that the appeal was not timely filed.

(d) If the document was timely filed but does not appear to comply with the requirements of Env-WtC 203.01(e) or Env-WtC 203.02(a), the appeals clerk shall:

(1) Send a written notice to the person who filed the document to inform the person that:

a. The document does not meet the requirements of Env-WtC 203.01(e) or Env-WtC 203.02(a), as applicable; and

b. If the person wishes to pursue the appeal, the person has 30 days in which to file to correct the deficiencies; and

(2) Provide a copy of the written notice and the document to the council.

(e) The notice sent pursuant to (d)(1), above, shall specify the area(s) in which the filing is deficient.

(f) If the appeals clerk receives a response to the notice sent pursuant to (d)(1), above, within the specified 30-day period, the appeals clerk shall provide copies of the response to the council.

(g) If the appeals clerk does not receive a response to the notice sent pursuant to (d)(1), above, within the specified 30-day period, the appeals clerk shall so inform the council at the first council meeting following the end of the 30-day period.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

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Env-WtC 203.04 Identification of Documents. Subsequent to the filing of a petition for appeal, the docket number assigned by the appeals clerk pursuant to Env-WtC 203.03(a) shall be used by all parties to identify all correspondence and other documents submitted to the council relating to the appeal, including any written testimony or exhibits used at a hearing.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 203.05 Intervenors.

(a) Subject to (f), below, any person whose rights might be directly affected by the outcome of an appeal and any person entitled to notice under RSA 482-A:8 or RSA 482-A:9 may request to intervene in the appeal.

(b) A request to intervene shall:

- (1) Contain the information specified in (c), below;
- (2) Be filed no later than 30 days prior to the hearing conducted pursuant to Env-WtC 206.01;
- (3) Be filed in accordance with Env-WtC 202.07(b); and
- (4) Be served in accordance with Env-WtC 203.10.

(c) The request to intervene shall state with particularity:

- (1) The basis for the intervenor's interest in the appeal;
- (2) The nature of the intervenor's alleged grievance; and
- (3) The nature and amount of the intervenor's participation and involvement in the underlying action from which the appeal has been made.

(d) The council's order on a motion for intervention shall specify the limitations, if any, on the intervenor's participation in the appeal.

(e) Once granted leave to intervene, an intervenor shall take the proceeding as he or she finds it and no portion of the proceeding shall be repeated because of the fact of intervention.

(f) Any person identified in Env-WtC 203.06(a)(1), (b)(1) or (4), or (c)(2) or (4) shall only be required to file an appearance as provided in Env-WtC 203.07 to participate in the appeal.

Source. #8534, eff 12-30-05

Env-WtC 203.06 Parties. For purposes of these rules, the term "party" or "parties" shall refer to:

(a) In an appeal of an administrative order, the following:

- (1) The person to whom the order was issued, if the person files an appearance in accordance with Env-WtC 203.07;
- (2) The appellant, if other than the person to whom the order was issued;
- (3) The department; and

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- (4) Any person allowed by the council to intervene;
- (b) In an appeal of the denial of a permit application, the following:
 - (1) The person who filed the permit application, if the person did not file the appeal but does file an appearance in accordance with Env-WtC 203.07;
 - (2) The appellant, if other than the person who filed the permit application;
 - (3) The department;
 - (4) The conservation commission for the municipality in which the property is located, if the conservation commission files an appearance in accordance with Env-WtC 203.07; and
 - (5) Any person allowed by the council to intervene; and
- (c) In an appeal of the issuance of a permit, the following:
 - (1) The person who filed the appeal;
 - (2) The permit holder, if not the appellant, if the permit holder files an appearance in accordance with Env-WtC 203.07;
 - (3) The department;
 - (4) The conservation commission for the municipality in which the property is located, if the conservation commission files an appearance in accordance with Env-WtC 203.07; and
 - (5) Any person allowed by the council to intervene.

Source. #8534, eff 12-30-05

Env-WtC 203.07 Appearances.

- (a) Each person identified in Env-WtC 203.06(a)(1), (b)(1) or (4), or (c)(2) or (4) who wishes to participate in the appeal shall file an appearance with the appeals clerk.
- (b) The appearance shall identify the person's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address.
- (c) If an intervenor or a person who is filing pursuant to (a), above, is represented as per Env-WtC 203.08, the representative shall file an appearance which identifies the person being represented, the representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address.
- (d) An appearance shall be filed at or before the prehearing conference.
- (e) For each appeal, the department shall designate a representative for purposes of that appeal. The designated representative shall file an appearance that contains the information specified in (c), above.
- (f) Each party and representative shall update the contact information filed pursuant to this section as necessary to reflect current information.

Source. #8534, eff 12-30-05

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Env-WtC 203.08 Representatives.

(a) Any party to an appeal before the council may be represented by an attorney licensed to practice law in New Hampshire or such other individual as the party designates. This provision shall not be construed to permit the unauthorized practice of law as defined by the New Hampshire supreme court or the New Hampshire general court.

(b) All representatives shall obtain and become familiar with these procedural rules prior to filing any documents with the council or appearing before the council.

Source. #8534, eff 12-30-05

Env-WtC 203.09 Removal of Representatives.

(a) Upon making a finding of misconduct on the part of any representative appearing before the council, the council shall prohibit that individual from acting as a representative for the pending matter.

(b) For purposes of this section, misconduct means:

- (1) Behavior that is disruptive to the orderly conduct of the appeal; or
- (2) A consistent or recurring failure to:
 - a. Meet deadlines; or
 - b. Comply with the provisions of Env-WtC 200.

(c) Prior to making a finding of misconduct so as to warrant the imposition of such prohibition, the council shall:

- (1) Inform the representative, the party represented by the representative, and all other parties and their representatives, if any, to the proceeding of the proposed prohibition; and
- (2) Provide an opportunity for the representative, the party represented by the representative, and all other parties and their representatives, if any, to address the council regarding why the prohibition should or should not be imposed.

Source. #8534, eff 12-30-05

Env-WtC 203.10 Service List; Service of Documents.

(a) For each appeal, the appeals clerk shall maintain a service list that identifies:

- (1) Each party or, if the party is represented and the representative filed the notice of appeal or has otherwise filed an appearance, the party's representative;
- (2) Each person who has filed a motion to intervene that has not yet been ruled on by the council; and
- (3) The mailing address, daytime telephone number, and, if available, fax number and e-mail address of each person identified in (1) and (2), above.

(b) The appeals clerk shall provide a copy of the service list to any person upon request.

(c) Any person who files an appeal-related document with the council shall serve a copy of the document on each person identified on the service list.

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(d) Service as required by (c), above, shall be made:

- (1) By postage-prepaid first class mail, private delivery service, or delivery in-hand; and
- (2) On or before the date of filing of the original document with the appeals clerk.

(e) When a party has appeared by a representative, service shall be upon the representative. However, timely service which is actually received by a party shall be sufficient regardless of whether the party's representative was also served.

(f) Except for documents distributed at a prehearing conference or hearing, every document required to be served upon the parties to an appeal shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service and the persons served.

(g) If time is of the essence in a filing and service will be made by mail, the person filing the document shall also send a copy of the document by fax or e-mail to all other parties for whom a fax number or e-mail address is available, and shall notify any party for whom a fax number or e-mail address is not available of the filing by telephone.

Source. #8534, eff 12-30-05

Env-WtC 203.11 Withdrawal of Appeal.

(a) The appellant may withdraw the appeal at any time prior to a final decision being made by the council.

(b) To withdraw the appeal, the appellant shall:

- (1) Submit a written notice of withdrawal to the appeals clerk stating that the appeal is being withdrawn; and
- (2) Serve a copy on all other parties to the appeal pursuant to Env-WtC 203.10.

(c) If the appeal was resolved by a settlement, the appellant shall attach a copy of the settlement to the notice of withdrawal.

Source. #8534, eff 12-30-05

Env-WtC 203.12 Withdrawal of Presiding Officer.

(a) Any party may request the presiding officer to withdraw from a matter for good cause.

(b) A request for the presiding officer to withdraw shall be:

- (1) In the form of a motion; and
- (2) Filed and handled in accordance with Env-WtC 205.01.

(c) For purposes of this section, good cause for withdrawal shall be that the presiding officer has an objectively-demonstrated bias for or against one or more of the parties. Good cause shall not include that the council member serving as the presiding officer was appointed to the council to represent a particular interest group or state agency.

(d) The party requesting the withdrawal of the presiding officer shall support the request with sworn testimony or other evidence submitted with the motion.

(e) For purposes of this section, an “objectively-demonstrated bias” means that the party requesting the presiding officer to withdraw submits evidence that shows, by a preponderance of the evidence, that the presiding officer has had personal dealings with the project under appeal or a party to the proceeding that would cause a reasonable person to believe that as a result of the dealings, the presiding officer will discount or ignore evidence and law to find in favor of or against the party.

Source. #8534, eff 12-30-05

Env-WtC 203.13 Recusal of Council Members.

(a) Any party may request a council member to recuse himself or herself from hearing the appeal for good cause.

(b) A request for recusal of a council member shall be:

- (1) In the form of a motion; and
- (2) Filed and handled in accordance with Env-WtC 205.01.

(c) For purposes of this section, good cause for recusal shall be that the council member has an objectively-demonstrated bias for or against one or more of the parties. Good cause shall not include that the council member was appointed to the council to represent a particular interest group or state agency.

(d) The party requesting the recusal of the council member shall support the request with sworn testimony or other evidence submitted with the motion.

(e) For purposes of this section, an “objectively-demonstrated bias” means that the party requesting the recusal of the council member submits evidence that shows, by a preponderance of the evidence, that the council member has had personal dealings with the project under appeal or a party to the proceeding that would cause a reasonable person to believe that as a result of the dealings, the council member will discount or ignore evidence and law to find in favor of or against the party.

Source. #8534, eff 12-30-05

PART Env-WtC 204 APPEALS: DISMISSAL OR ACCEPTANCE

Env-WtC 204.01 Motion to Summarily Dismiss.

(a) If the department or another party who has filed an appearance in accordance with Env-WtC 203.07 wishes to file a motion to summarily dismiss the petition for appeal, the motion shall be filed within 20 days from:

- (1) The date the petition was filed with the council, if the petition meets the requirements of Env-WtC 203.02(a); or
- (2) The date the corrected petition was filed pursuant to Env-WtC 203.03(e).

(b) The motion to summarily dismiss shall state all reasons why the filing party believes the council should not consider the appeal or certain issues in the appeal, such as:

- (1) The appeal does not meet the requirements of Env-WtC 203.01 or Env-WtC 203.02;
- (2) The appellant does not have standing to pursue the appeal; or

(3) The decision being appealed from is not within the council's statutory jurisdiction.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 204.02 Replies to Motions for Summary Dismissal. Any person who has filed an appearance who wishes to reply to the motion for summary dismissal shall file such reply within 10 days of the date the motion was filed with the council.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 204.03 Decision to Commence Appeal Proceeding.

(a) At its first regularly-scheduled meeting that occurs at least 30 days after receipt of a petition for appeal that meets the requirements of Env-WtC 203.03, the council shall consider the petition and any motions to summarily dismiss the petition and replies thereto and:

- (1) Dismiss the petition if any of the criteria of Env-WtC 204.04 is met; or
- (2) Commence an appeal proceeding.

(b) A decision to commence an appeal proceeding shall not be a final order of the council that is subject to further appeal.

(c) If the council dismisses the petition, the appeals clerk shall:

- (1) Prepare a written notice stating the decision, the reason(s) for the decision, and the deadline for filing a request for reconsideration; and
- (2) Serve the notice in accordance with Env-WtC 203.10.

(d) If the council decides to commence an appeal proceeding, the appeals clerk shall send written notice of the decision to all persons on the service list to inform them of the council's decision.

(e) The notice sent pursuant to (d) also shall inform the recipients that the council will schedule a prehearing conference, which shall be held no sooner than 20 days from the date of the notice.

Source. #8534, eff 12-30-05

Env-WtC 204.04 Summary Dismissal. The council shall summarily dismiss a petition for appeal if:

(a) A deficiency in the form of the petition is not cured as specified in Env-WtC 203.03(d);

(b) The petition was not filed within the time specified in Env-WtC 203.01(b)(1), (c)(1), or (d)(1), as applicable, except that the council may grant a motion filed pursuant to Env-WtC 205.02 to extend the time limit for an appeal of an order issued under RSA 483-B or a decision to issue or deny a permit or request for variance or redevelopment waiver under RSA 483-B;

(c) The council lacks jurisdiction to preside over the particular appeal, such as an appeal of an order or action of the department that is not final or that does not relate to the functions and responsibilities of the department relating to wetlands or protected shorelands;

(d) The appellant does not have standing to pursue the appeal;

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(e) The petition fails to identify facts or law that provide a basis for the relief sought;

(f) The parties have settled the appeal but have failed to withdraw the appeal within 20 days of a written request from the council to withdraw the appeal; or

(g) The appellant fails to respond to a written request of the council for a status report within the time specified in the notice, which shall be no less than 20 days from the date of the request.

Source. #8534, *eff 12-30-05*; ss by #9214, INTERIM, *eff 7-23-08*; ss by #9347, *eff 12-10-08*

Env-WtC 204.05 REPEALED

Source. #8534, *eff 12-30-05*; rpld by #9214, INTERIM, *eff 7-23-08*

Env-WtC 204.06 REPEALED

Source. #8534, *eff 12-30-05*; rpld by #9214, INTERIM, *eff 7-23-08*

PART Env-WtC 205 APPEALS: MOTIONS; PREHEARING CONFERENCES

Env-WtC 205.01 Motions and Objections Thereto.

(a) All motions shall be in written form unless the nature of the relief requested requires that the motion be made spontaneously in the context of an oral proceeding. Written motions shall be included in the record of the appeal proceedings. Oral motions shall be recorded in full in the minutes or on the tape of the hearing.

(b) Prior to filing a written motion, the party shall seek concurrence with the relief requested in the motion from all other parties to the appeal, provided however that if the motion would result in a ruling that is adverse to another party's interests, the moving party shall not be required to seek concurrence from that party.

(c) A motion shall include:

(1) A statement of the specific relief or ruling being requested;

(2) A clear and concise statement of the facts and law which support the motion; and

(3) A statement that the other parties to the appeal agree or disagree with the motion or did not respond to the request for concurrence.

(d) All parties who would be adversely affected by the ruling sought in a motion shall have an opportunity to respond to the motion. For written motions, responses shall be in writing and shall be filed not later than 5 days after receipt of the motion. For oral motions, responses shall be made during the hearing at which the oral motion was made unless the presiding officer determines, based on the nature of the motion, that it is appropriate to grant additional time to prepare a response to the motion.

(e) An objection to the motion shall clearly and concisely state:

(1) The action which the party filing the objection wants the council to take on the motion; and

(2) Any facts and law relied upon in opposition to the motion.

(f) The moving party shall have the burden of persuasion on all matters raised in the motion.

(g) Repetitious motions shall not be submitted and shall be considered disruptive behavior under Env-WtC 203.09(b).

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 205.02 Motions to Extend Time.

(a) Any person may ask the council to extend any time limit established by these rules if meeting the prescribed time limit would unduly burden the person or if an extension is otherwise necessary to conduct a more effective hearing.

(b) A request for an extension of time shall be made as a formal motion in accordance with Env-WtC 205.01 before the expiration of the prescribed period.

(c) All parties to the proceeding shall be given an opportunity to object as provided in Env-WtC 205.01.

(d) The council shall grant the requested extension if it determines that:

(1) The time period is not mandated by statute;

(2) Meeting the prescribed time limit would unduly burden the person or an extension is otherwise necessary to conduct a more effective hearing; and

(3) No person objects to the extension or, if a person does object, the reason(s) for granting the extension outweigh the reason(s) for denying the extension.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 205.03 Prehearing Conference Required.

(a) Subject to (b), below, for each appeal the council shall conduct a prehearing conference.

(b) If all parties agree in writing that a prehearing conference would not aid in the timely disposition of the appeal, a prehearing conference shall not be held.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 205.04 Notice of Prehearing Conference.

(a) The appeals clerk shall send written notice of the prehearing conference to each person on the service list.

(b) The notice sent pursuant to (a), above, shall state:

(1) The date, time, and location of the prehearing conference, provided however that the date shall be no sooner than 20 days from the date of the notice sent pursuant to Env-WtC 204.03(d);

(2) That the parties should be prepared to discuss:

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- a. Simplification of the issues in the appeal;
 - b. Stipulations or admissions to facts;
 - c. The identification of each witness expected to be called at the hearing, with a brief description of that witness's testimony;
 - d. All exhibits expected to be presented at the hearing;
 - e. Any requests for changes to or waivers of the standard procedures as specified in these rules or other matters concerning the conduct of the hearing;
 - f. The burden and standard of proof; and
 - g. Any other matter that may aid in the disposition of the appeal, including settlement; and
- (3) That in addition to the matters noted in (b)(2), above, the following may be determined as a result of the discussion held at the prehearing conference:
- a. When the hearing will be held;
 - b. The time allotted for each party's presentation at the hearing; and
 - c. The order of the parties' presentations at the hearing.

(c) The council shall cause prehearing conferences to be recorded, provided however that if all parties consent to discuss possible settlement off the record in lieu of or prior to conducting the prehearing conference, the settlement discussion shall not be recorded.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 205.05 Result of Prehearing Conference; Prehearing Order.

- (a) Where applicable, the presiding officer at the prehearing conference shall:
- (1) Make preliminary rulings subject to review and approval by the council on motions pending before the council, including:
 - a. Motions for intervention; and
 - b. Motions to change standard hearing procedures;
 - (2) Determine the order in which parties shall present evidence and testimony at the hearing on appeal and how much time each party will have to present its case;
 - (3) Preside over any discussion of simplification of the issues presented on appeal; and
 - (4) Consider any other matter which might contribute to the prompt and orderly conduct of the appeal proceedings.
- (b) Within 30 days of the prehearing conference, the appeals clerk shall prepare a written prehearing order which includes:

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- (1) All rulings made by the presiding officer at the prehearing conference on motions;
- (2) Information on the order and length of the parties' presentations at the hearing;
- (3) A statement of the issues that the council will consider in the hearing;
- (4) Any stipulations of fact made by the parties; and
- (5) A statement of any other decisions that were made as a result of the prehearing conference.

(c) The appeals clerk shall send the prehearing order prepared pursuant to (b), above, to each person on the service list.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 205.06 Pre-hearing Exchange of Information.

(a) Unless otherwise agreed at a prehearing conference, more than one week prior to the commencement of a hearing the participants shall exchange the following:

- (1) A list identifying each witness expected to be called at the hearing with a brief description of that witness's testimony;
- (2) A list of all exhibits expected to be presented at the hearing; and
- (3) Any requests for changes to or waivers of the standard procedures as specified in these rules or other matters concerning the conduct of the hearing.

(b) If a participant wishes to obtain information other than that specified in (a), above, from another participant, the requesting participant shall request the information in writing and shall file a copy of the request with the appeals clerk and serve a copy on the participant from whom the information is sought.

(c) Requests pursuant to (b), above, shall be limited to information directly related to the matter for which the hearing will be conducted.

(d) A participant receiving a request for information pursuant to (b), above, shall respond to the request within 10 days by:

- (1) Providing the information requested;
- (2) Explaining why the information will not be provided; or
- (3) Identifying a date and time when the information can be made available for inspection, which date and time shall be sufficiently in advance of the hearing on the matter that the information can be reasonably reviewed prior to the hearing.

(e) A participant who has received a request for information pursuant to (b), above, may decline to provide information that the participant believes is:

- (1) Confidential;
- (2) Privileged;
- (3) Not directly related to the matter at hand; or

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(4) Excessively burdensome to produce.

(f) If a participant declines to provide information pursuant to (e), above, the explanation provided pursuant to (d)(2), above, shall include a detailed explanation of the reason(s) why the information is not being provided.

(g) A participant who has requested information pursuant to (b), above, that is not provided may request the presiding officer to require the participant of whom the information was requested to provide the information. Such requests shall be in the form of a written motion that is filed and handled in accordance with Env-WtC 205.01.

(h) The participant shall file a motion pursuant to (g), above, within 7 days of receiving the denial of the information under (e), above, but no later than 5 days prior to the scheduled hearing. No motion shall be accepted within 5 days before a scheduled hearing unless the presiding officer determines that good cause exists for the late filing. For purposes of this paragraph, "good cause" means that the participant requesting the information did not discover the existence of the information in time to request the information, receive the denial, and file a timely motion and could not have discovered the existence of the information with reasonable diligence.

(i) The presiding officer shall grant a motion filed pursuant to (h), above, if the presiding officer determines that:

- (1) The information is directly related to the matter at hand such that the requesting participant will be materially prejudiced in the case by the lack of the requested information; and
- (2) The information is not confidential, privileged, or excessively burdensome to produce.

(j) If the presiding officer grants the motion and the participant asked to provide the information fails or refuses to provide it, the presiding officer shall:

- (1) Delay the hearing until the information is provided;
- (2) Rule that such information shall not be admissible at the hearing on the matter or in any subsequent proceeding on the matter, unless the information is already a matter of public record; or
- (3) Refer the matter to the council for a determination of whether the requesting participant cannot reasonably present its case without the requested information. If the council finds that the requesting participant cannot reasonably present its case without the requested information, the council shall find in favor of the requesting participant on the matter(s) sought to be proved by the requested information.

(k) For purposes of this section, in making a determination of whether it would be excessively burdensome to produce requested records, the presiding officer shall consider:

- (1) The volume of records requested;
- (2) The amount of time that would be needed to find, organize, and copy the records; and
- (3) The relevance of the requested records to the subject matter of the appeal.

Source. #9347, eff 12-10-08

PART Env-WtC 206 APPEALS: HEARINGS

Env-WtC 206.01 Hearing Required.

(a) Subject to (b), below, for each appeal that is not dismissed pursuant to Env-WtC 204.04, the council shall conduct a hearing in accordance with this part.

(b) If all parties agree in writing that the only issues to be decided are issues of law and that a hearing would not aid in the timely disposition of the appeal, the following procedure may be used in lieu of conducting a full hearing:

(1) The parties shall file a stipulation of facts with an assented-to motion to deny the appeal based on the stipulated facts; and

(2) The council shall grant the assented-to motion to deny the appeal to allow the reconsideration and appeal to supreme court to proceed expeditiously.

(c) Assenting to a motion to deny the appeal pursuant to (b), above, shall not be construed in any proceeding as conceding any point of law that is in contention.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9347, eff 12-10-08

Env-WtC 206.02 Hearing Notice.

(a) The appeals clerk shall prepare a notice of hearing that identifies the date, time, and place of the hearing for the appeal.

(b) If the hearing notice is issued subsequently to the prehearing order issued pursuant to Env-WtC 205.05(b), a copy of the prehearing order shall be attached to the notice of hearing.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 206.03 Opening the Proceeding. The presiding officer at an appeal hearing shall open the proceeding by describing in general terms the purpose of the proceeding and the general procedures governing its conduct.

Source. #8534, eff 12-30-0505; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 206.04 Testimony.

(a) All testimony to issues of fact presented by the parties and other witnesses shall be made under oath or affirmation.

(b) Any individual testifying before the council shall state for the record his or her name, address, and if a representative of a party, the identity of the party so represented.

(c) Any individual testifying before the council shall be subject to cross-examination as provided in (f), below.

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(d) Whenever it appears that testimony to be offered at the hearing would be more readily understood if presented in written form, the presiding officer shall require the party offering such testimony to submit the testimony in written form, provided such requirement will not substantially prejudice the interests of any party in the hearing. Upon request of the party who has been requested to submit written testimony, the presiding officer shall direct that the record be held open after the close of the hearing or that the hearing be continued to a later date for the sole purpose of allowing sufficient time to prepare the written submission. All persons offering testimony in written form shall be subject to cross-examination as provided in (f), below.

(e) Unless otherwise agreed at a prehearing conference, direct testimony shall be offered in the following order:

- (1) The person who filed the notice of appeal and such witnesses as the person may call;
- (2) The department and such witnesses as the department may call; and
- (3) Intervenor(s) and such witnesses as the intervenor(s) may call.

(f) If the presiding officer, members of the council, or legal counsel to the council have questions regarding a witness's testimony, the individual having the question shall cross-examine the witness during or at the conclusion of the testimony of that witness, as allowed by the presiding officer. The presiding officer shall allow other parties or their representatives a reasonable opportunity to cross-examine each witness. Cross-examination shall be by asking questions directly of the witness, so long as such direct questioning is not disruptive to the orderly conduct of the hearing. If the presiding officer determines that such cross-examination is disruptive to the orderly conduct of the hearing, then the presiding officer shall require the cross-examination to be conducted indirectly, by addressing questions to the witness through the presiding officer.

Source. #8534, eff 12-30-05; ss by #9347, eff 12-10-08

Env-WtC 206.05 General Evidence.

- (a) Pursuant to RSA 541-A:33, II, the rules of evidence shall not apply.
- (b) Evidence that is relevant and material to the subject matter of the hearing shall be admissible. Evidence that is irrelevant, immaterial, or unduly repetitious shall be excluded. The experience, technical competence, and specialized knowledge of the councilors, if relevant, may be used in the evaluation of all evidence submitted to the council.
- (c) Whenever necessary for a full and fair consideration of the appeal, the presiding officer shall take official notice of relevant laws, official rules, and transcripts of other hearings, judicially recognizable facts, generally recognized facts of common knowledge to the general public, and physical, technical or scientific facts within the council's specialized knowledge consistent with the requirements of RSA 541-A:33, V. The final decision of the council shall specifically identify those facts of which official notice was taken.
- (d) All documents, materials, and objects offered in evidence as exhibits shall be marked by the offering participant with the docket number and shall, if accepted, be numbered or otherwise identified in a sequential manner. Documentary evidence shall be received in the form of copies or excerpts if the original is not readily available. Any person offering any documentary or photographic evidence shall provide each member of the council and each participant with a copy of such documents or photographs, unless such documents or photographs are determined by the presiding officer to be of such form, size or character as not to be reasonably suitable for reproduction.

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(e) All written testimony and documents, materials, and objects admitted into evidence shall be made available during the course of the hearing for examination by all participants. Following the hearing, all such evidence shall be available at the department's offices in Concord during normal business hours.

(f) In any appeal proceeding involving an application for a permit or other approval, the department record, including but not limited to the application filed with the department, including all supplemental information, maps, plans, and specifications, and any amendments to the application or supplemental information, shall be placed into evidence by the department.

(g) All objections to rulings of the presiding officer regarding evidence or procedure and the grounds for the objections shall be timely stated during the course of the hearing. Nothing herein shall be construed as independent authorization for interlocutory appeals of rulings of the presiding officer.

(h) No information shall be considered as evidence or made part of the record in any proceeding before the council that is not introduced as evidence in accordance with this part.

Source. #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 206.06 Exhibits.

(a) Where evidence to be presented consists of numerical or graphic data and such evidence would make oral presentation difficult to follow, such evidence shall be presented in exhibit form. Exhibits may be summarized, supplemented, and explained.

(b) Space shall be provided in the upper right hand corner of each exhibit for the insertion of the number of the exhibit and the name of the witness through whom it is presented.

(c) The participant offering an exhibit shall supply the original and 15 copies thereof to the council and shall provide a copy to each other participant, unless exempted under Env-WtC 206.05(d).

Source. #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

Env-WtC 206.07 Burden and Standard of Proof.

(a) For any appeal under RSA 482-A, the appellant shall bear the burden of proving that the decision of the department that is being appealed was unlawful or unreasonable, as specified in RSA 482-A:10, V.

(b) For any appeal under RSA 483-B, the appellant shall bear the burden of proving that the decision of the department that is being appealed was unlawful or unreasonable.

(c) Proof shall be by a preponderance of the evidence.

(d) For any appeal under RSA 482-A, the council shall accept all findings of the department upon questions of fact properly before it as lawful and reasonable as specified in RSA 482-A:10, V, unless the appellant or other party specifically rebuts a finding as unlawful or unreasonable given the information available to the department at the time it made the finding.

(e) For any appeal under RSA 483-B, the council shall accept all findings of the department upon questions of fact properly before it as lawful and reasonable unless the appellant or other party specifically rebuts a finding as unlawful or unreasonable given the information available to the department at the time it made the finding.

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(f) For motions, waiver requests, and other non-dispositive matters, the party asserting the truth of a statement shall bear the burden of proving, by a preponderance of the evidence, that the statement is true.

(g) For purposes of this section, proof by a preponderance of the evidence means that what is sought to be proved is more probable than not.

Source. #8534, *eff* 12-30-05; ss by #9214, INTERIM, *eff* 7-23-08, (formerly Env-WtC 206.05); ss by #9347, *eff* 12-10-08

Env-WtC 206.08 Record of Appeal Proceedings.

(a) The record of the appeal proceedings shall include:

- (1) All orders and notices issued by the council or presiding officer relating to the appeal;
- (2) The audio tape recording and/or minutes of the hearing(s);
- (3) All exhibits, motions, requests for findings of fact and conclusions of law, proposed orders, and other written materials submitted by the parties at or for the hearing;
- (4) Any other item(s) specified by RSA 541-A:31, VI; and
- (5) The council's decision on appeal.

(b) All oral argument shall be recorded. The council, upon request of a party, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript.

Source. #8534, *eff* 12-30-05; ss by #9214, INTERIM, *eff* 7-23-08, (formerly Env-WtC 206.06); ss by #9347, *eff* 12-10-08

Env-WtC 206.09 Continuance.

(a) Any party may request that a hearing conducted pursuant to this part be continued for reasonable cause and reconvened or rescheduled.

(b) Prior to filing a request for a continuance of a hearing made in advance of the hearing, the party seeking the continuance shall seek concurrence with the request from all other parties to the appeal.

(c) A request for a continuance of a hearing made in advance of the hearing shall:

- (1) Be in writing;
- (2) State the reason(s) for the request;
- (3) Be filed at least 7 days before the scheduled hearing date; and
- (4) State whether the other parties to the appeal agree or disagree with the request or did not respond to the request for concurrence.

(d) A request for a continuance made at a hearing may be made orally provided it is entered in the record of the hearing.

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(e) The council shall grant the request if the council determines that reasonable cause exists and that no party will be prejudiced by the delay.

(f) For purposes of this section, reasonable cause shall include, but not be limited to:

- (1) Unavailability of an individual party, or representative, or witness;
- (2) The parties believe that an informal resolution is possible and need more time to resolve the matter; or
- (3) One or more of the parties are awaiting information, reports, data, or a related court decision which is material to the appeal.

(g) All orders for continuance shall specify the time and place at which the hearing shall be reconvened. The council shall provide notice of a rescheduled hearing on the appeal in accordance with Env-WtC 206.02 and of other related hearings in such a manner as is appropriate to ensure that reasonable notice of at least 10 days shall be given of the time and place of the continued hearing.

Source. #8534, *eff 12-30-05*; renumbered by #9214 (formerly Env-WtC 206.07); ss by #9347, *eff 12-10-08*

Env-WtC 206.10 Requests for Findings and Conclusions.

(a) Any participant may submit requests for findings of fact and conclusions of law by the close of the record, as established under Env-WtC 206.11.

(b) If a participant submits requests for findings of fact and conclusions of law, each requested finding or ruling shall be a separately-numbered statement.

Source. #8534, *eff 12-30-05*; renumbered by #9214 (formerly Env-WtC 206.07); ss by #9347, *eff 12-10-08*

Env-WtC 206.11 Close of the Record.

(a) After the conclusion of the hearing, no other evidence, testimony or exhibits shall be allowed into the record, except as allowed pursuant to (b), below.

(b) Prior to the conclusion of the hearing, a participant may request that the record be left open for a specified period of time in which to file evidence or arguments not available at the hearing. If the council determines that such material is necessary to a full consideration of the issues raised in the appeal, the presiding officer shall set a date by which the additional material shall be filed.

(c) The participant filing such additional material shall serve copies of all items filed in accordance with Env-WtC 203.10.

(d) If any other participant to the hearing requests time to respond to the material submitted, the presiding officer shall set a specific time period following filing of the material for the filing of a response. If any other participant to the hearing requests the opportunity to cross-examine on the additional material submitted, the presiding officer shall set a date and time for a hearing at which cross-examination on the additional material submitted shall be allowed, if the presiding officer determines that such cross-examination is required for a full and true disclosure of the facts.

(e) The determination to allow cross-examination shall be based on:

- (1) The nature of the factual and legal issues in dispute in the proceeding;

- (2) The testimony and evidence submitted during the hearing and any cross-examination thereon; and
- (3) The nature of the additional evidence to be submitted.

Source. #8534, *eff 12-30-05*; renumbered by #9214, (formerly Env-WtC 206.09); ss by #9347, *eff 12-10-08*

Env-WtC 206.12 Reopening of the Record.

(a) At any time prior to a final decision on the appeal, any participant in a proceeding or any member of the council may request the presiding officer to reopen the record to consider relevant, material, and non-duplicative testimony, evidence, arguments, or exhibits not previously considered.

(b) If the request is made after one or more participants have left the hearing, the request shall be in writing and a copy of the request shall be served in accordance with Env-WtC 203.10.

(c) If the presiding officer determines that such testimony, evidence, arguments, or exhibits are necessary to a full consideration of the issues raised by the appeal, the record shall be reopened to accept the offered items.

(d) The presiding officer shall give written notice of the acceptance into the record of the offered items to all participants if the participants are no longer present. The presiding officer shall also set a time within which other participants may respond to or rebut the items made part of the record.

Source. #8534, *eff 12-30-05*; ss #9214, INTERIM, *eff 7-23-08*, EXPIRES: 1-19-08 (formerly Env-WtC 206.10); ss by #9347, *eff 12-10-08*

Env-WtC 206.13 Failure to Appear. The council shall hear argument from each party present at a hearing and shall render a decision thereon, subject to the provisions of Env-WtC 206.14, where:

(a) Any party to whom notice of a hearing has been given in accordance with these rules fails to appear and fails to advise the appeals clerk of such non-appearance in advance of the hearing; and

(b) The council determines that delaying the hearing to a later date would cause undue inconvenience or prejudice to a party present at the hearing.

Source. #9347, *eff 12-10-08* (formerly Env-WtC 206.10)

Env-WtC 206.14 Reconvening of Hearings.

(a) If a hearing on appeal is held in a party's absence pursuant to Env-WtC 206.08, the party may file a motion within 10 days after the date of the hearing to reconvene the hearing.

(b) The motion shall:

- (1) State the reason(s) why the party was absent from the hearing;
- (2) State why the appeals clerk was not notified of the absence in advance of the hearing; and
- (3) Be supported by affidavits or other objective evidence.

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(c) If the council determines that good cause exists to explain the party's failure to appear at the hearing and to explain the party's failure to notify the council in advance of the hearing, the council shall reconvene the hearing by scheduling another hearing. Good cause shall include accident, sudden illness, death of a family member, or other circumstance beyond the control of the party which prevents the party from attending the hearing and from notifying the appeals clerk.

Source. #9347, eff 12-10-08 (formerly Env-WtC 206.11)

Env-WtC 206.15 Supplemental Proceedings.

(a) The provisions of this part shall not limit the council's authority to structure individual proceedings in a manner suitable to their particular subject matter and due process requirements, to require submittal of written argument, or to schedule additional hearings or conferences.

(b) An order scheduling further proceedings or otherwise reopening the record to allow filing of written argument may be issued by the presiding officer at any time prior to the issuance of a final order in a proceeding.

Source. #9347, eff 12-10-08 (formerly Env-Wtc 206.12)

PART Env-WtC 207 APPEALS: DECISION; RECONSIDERATION

Env-WtC 207.01 Issuance of Final Decision.

(a) After considering the arguments and evidence, the council shall decide whether the appellant has met its burden of proving by a preponderance of the evidence that the department's decision was unlawful or unreasonable.

(b) If the council finds in favor of the appellant, the council shall remand the matter to the department for proceedings not inconsistent with the council's decision, subject to the department's right to seek reconsideration of and further appeal the decision.

(c) The council shall issue a written decision for each appeal. If the council determines that the decision that is being appealed was unlawful or unreasonable, the council's written decision shall clearly identify the reason(s) for the decision.

(d) The appeals clerk shall serve the decision in accordance with Env-WtC 203.10.

(e) An order of the council shall not be final until the council issues a written decision pursuant to this section.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05

Env-WtC 207.02 Motion for Reconsideration.

(a) Any party seeking reconsideration of a final order of the council shall file a motion for reconsideration in accordance with RSA 541.

(b) A motion for reconsideration shall:

(1) Identify each error of fact, error of reasoning, or erroneous conclusion contained in the final order which the moving party wishes reconsidered;

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- (2) Concisely state the correct facts, referenced to the record of the appeal, correct legal reasoning, and correct conclusion urged by the moving party;
- (3) Include any memorandum of law the moving party wishes to submit; and
- (4) Be filed and handled in accordance with Env-WtC 205.01.

(c) The council shall, no later than its first regularly-scheduled meeting that occurs at least 10 days after receipt of a motion to reconsider and any objection(s) thereto, grant or deny the motion.

(d) Subject to (c), above, the council shall grant the motion or any part thereof, and schedule a reconsideration hearing, to the extent the motion reveals errors of law or fact in the council's prior decision. A hearing on reconsideration shall be limited to the issues raised in the motion for reconsideration.

(e) The council shall provide notice to all persons on the service list of its decision on the motion for reconsideration. If the decision is to grant a new hearing, the notice of the hearing shall be sent pursuant to Env-WtC 206.02.

Source. #6652-B, eff 12-12-97, EXPIRED: 12-12-05

New. #8534, eff 12-30-05; ss by #9214, INTERIM, eff 7-23-08; ss by #9347, eff 12-10-08

PART Env-WtC 208 RULEMAKING PETITIONS AND HEARINGS

Env-WtC 208.01 Filing. Any person wishing to petition the council to amend, adopt, or repeal a council rule shall file the original and one copy of the petition with the council clerk as provided in Env-WtC 202.07(a).

Source. #8534, eff 12-30-05

Env-WtC 208.02 Form and Content of Petition.

(a) A petition to adopt, amend, or repeal a council rule shall be in writing and shall be signed by the person who is seeking the ruling.

(b) A rulemaking petition shall include the following:

- (1) The name, mailing address, and daytime telephone number of each person filing the petition and, if available, a fax number and e-mail address for each such person;
- (2) Whether the person is asking the council to adopt, amend, or repeal a rule;
- (3) If the petition is to adopt a rule:
 - a. The chapter, part, and section, by alphanumeric code, where the person proposes the rule to be inserted; and
 - b. The language that the person wants to have adopted as a rule;
- (4) If the petition is to amend a rule:
 - a. The specific rule, by alphanumeric code, that is the subject of the petition; and
 - b. The language that the person wants to have adopted as a rule;

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(5) If the petition is to repeal a rule, the specific rule, by alphanumeric code, that is the subject of the petition; and

(6) A concise and explicit statement of why the petitioner wants the council to undertake the action requested.

(c) A petition to adopt, amend, or repeal a council rule may also include such other information as the person filing the petition deems pertinent and relevant, and the person may attach exhibits, illustrations and sworn written information to the petition.

Source. #8534, eff 12-30-05

Env-WtC 208.03 Processing of Rulemaking Petitions.

(a) Upon receipt of a petition to adopt, amend, or repeal a council rule, the council clerk shall forward the petition to the council.

(b) At its first meeting following receipt of a petition to adopt, amend, or repeal a council rule, the council shall review the petition and proceed in accordance with RSA 541-A:4, I.

(c) The petition shall be granted and a rulemaking proceeding shall be initiated if the council determines that the proposed action is:

(1) Consistent with state and federal law and policy; and

(2) Necessary to secure the just, efficient, and accurate resolution of council proceedings in accordance with recognized principles of due process and the requirements of RSA 541-A.

Source. #8534, eff 12-30-05

Env-WtC 208.04 Public Comment on Proposed Council Rules. The council shall provide notice of and receive public comment on proposed council rules as follows:

(a) The council shall give notice of the proposed rulemaking in accordance with RSA 541-A:6;

(b) Any person wishing to submit written comments shall file the comments as specified in the notice of proposed rulemaking;

(c) A public hearing shall be held during a meeting of the council and shall be identified on the agenda for the meeting as a hearing to receive public comment on the proposed council rules;

(d) The presiding officer shall open the public hearing and shall ask any person wishing to comment on the proposed council rules to identify himself or herself for the record and to proceed with his/her comments;

(e) All comments shall be recorded in full by tape recording or other method which will provide a verbatim record of the hearing;

(f) After all persons who wish to comment have done so, the presiding officer shall close the public hearing on the proposed council rules;

(g) For rulemaking hearings, the record shall remain open until the date specified in the notice published in the Rulemaking Register; and

(h) Hearings on proposed rules shall be continued or postponed only in accordance with RSA 541-A:11, III or IV, respectively.

Source. #8534, eff 12-30-05

PART Env-WtC 209 DECLARATORY RULINGS

Env-WtC 209.01 Filing. Any person seeking a declaratory ruling from the council shall file the original and one copy of a petition for declaratory ruling with the council clerk at the address identified in Env-WtC 202.07(a).

Source. #8534, eff 12-30-05

Env-WtC 209.02 Form and Content of Petition.

(a) A petition for a declaratory ruling shall be in writing and shall be signed by the person who is seeking the ruling.

(b) A petition for a declaratory ruling shall include the following:

- (1) The name, mailing address, and daytime telephone number of each person requesting the declaratory ruling and, if available, a fax number and e-mail address for each such person;
- (2) A precise and complete citation to the statute or administrative rule, or identifying information concerning the order, upon which the petitioner seeks a ruling; and
- (3) A concise and explicit statement explaining the background, facts, and considerations which led to the petition in order for the council to understand the nature and specific reasons for the petition and why the ruling is being requested.

(c) A petition for a declaratory ruling may also include such other information as the person filing the petition deems pertinent and relevant, and the person may attach exhibits, illustrations and sworn written information to the petition.

(d) A petition for a declaratory ruling shall not be used to circumvent the time periods and procedures established by statute and rules for appeals of department decisions.

Source. #8534, eff 12-30-05

Env-WtC 209.03 Processing of Petitions for Declaratory Rulings.

(a) Upon receipt of a petition for a declaratory ruling, the council clerk shall forward the petition to the council.

(b) At its first meeting following receipt of a petition for declaratory ruling, the council shall review the petition to determine:

- (1) Whether additional information or explanation is needed; and
- (2) Whether the complexity of the petition, including but not limited to the issue in question and the legal implications thereof, will cause the council to seek assistance from the department of justice.

(c) The council shall inform the petitioner in writing of the results of its review under (b), above. If additional information or explanation is needed, the council shall identify the needed information or

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explanation and shall establish a deadline for the petitioner to provide the information, which shall be no sooner than 20 days after the date of the notice. If the council will be seeking assistance from the department of justice, the council shall inform the petitioner of the anticipated amount of time that will be needed to obtain such assistance.

(d) If assistance from the department of justice is not required, the council shall issue a written response to the person filing the petition for declaratory ruling within 30 days of the first council meeting following receipt of a complete petition.

(e) If assistance from the department of justice is required, the council shall issue a written response to the person filing the petition for declaratory ruling within 30 days of the first council meeting following receipt of assistance from the department of justice.

(f) Declaratory rulings issued by the council shall be filed with the director of legislative services in accordance with RSA 541-A:16, II(b).

Source. #8534, *eff 12-30-05*

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APPENDIX

Rule	Statute
Env-WtC 101	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(a)
Env-WtC 102	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(a)
Env-WtC 103	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(a)
Env-WtC 104	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(a)
Env-WtC 201	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 202	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 203	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 204	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 205	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 206	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 207	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 208	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(b)
Env-WtC 209	RSA 21-O:5-a, VII; RSA 21-O:14, IV; RSA 541-A:16, I(d)