
SUBSTITUTE SENATE BILL 5041

State of Washington

55th Legislature

1997 Regular Session

By Senate Committee on Agriculture & Environment (originally sponsored by Senator Benton)

Read first time 03/05/97.

1 AN ACT Relating to environmental appeals; amending RCW 43.21B.110,
2 43.21B.130, 43.21B.170, 43.21B.180, 43.21B.240, 43.21B.305, 43.21B.310,
3 43.27A.190, 75.20.140, 90.03.383, 90.14.130, 90.14.190, 90.14.200,
4 90.58.180, and 90.66.080; reenacting and amending RCW 34.05.514; and
5 adding a new section to chapter 43.21B RCW.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 34.05.514 and 1995 c 347 s 113 and 1995 c 292 s 9 are
8 each reenacted and amended to read as follows:

9 (1) Except as provided in subsections (2) and (3) of this section,
10 proceedings for review under this chapter shall be instituted by paying
11 the fee required under RCW 36.18.020 and filing a petition in the
12 superior court, at the petitioner's option, for (a) Thurston county,
13 (b) the county of the petitioner's residence or principal place of
14 business, or (c) in any county where the property owned by the
15 petitioner and affected by the contested decision is located.

16 (2) For proceedings involving institutions of higher education, the
17 petition shall be filed either in the county in which the principal
18 office of the institution involved is located or in the county of a
19 branch campus if the action involves such branch.

1 (3) For proceedings involving water quantity decisions of the
2 department of ecology, as defined in section 17 of this act, relating
3 to water withdrawal, instream flow, and water management plans, the
4 petition shall be filed in the superior court specified in section 17
5 of this act. For proceedings involving the relinquishment of a water
6 right, the petition shall be filed in the superior court specified in
7 RCW 90.14.130.

8 **Sec. 2.** RCW 43.21B.110 and 1993 c 387 s 22 are each amended to
9 read as follows:

10 (1) The pollution control hearings board shall only have
11 jurisdiction to hear and decide appeals from the following decisions of
12 the department, the director, (~~the administrator of the office of~~
13 ~~marine safety,~~) and the air pollution control boards or authorities as
14 established pursuant to chapter 70.94 RCW, or local health departments:

15 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
16 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and
17 90.56.330.

18 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
19 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
20 (~~90.14.130,~~) and 90.48.120.

21 (c) The issuance, modification, or termination of any permit,
22 certificate, or license by the department or any air authority in the
23 exercise of its jurisdiction, including the issuance or termination of
24 a waste disposal permit, the denial of an application for a waste
25 disposal permit, or the modification of the conditions or the terms of
26 a waste disposal permit.

27 (d) Decisions of local health departments regarding the grant or
28 denial of solid waste permits pursuant to chapter 70.95 RCW.

29 (e) Decisions of local health departments regarding the issuance
30 and enforcement of permits to use or dispose of biosolids under RCW
31 70.95J.080.

32 (f) Any other decision by the department(~~, the administrator of~~
33 ~~the office of marine safety,~~) or an air authority which pursuant to
34 law must be decided as an adjudicative proceeding under chapter 34.05
35 RCW.

36 (2) The jurisdiction of the pollution control hearings board is
37 further limited as follows:

1 (a) The hearings board has no jurisdiction to review water quantity
2 decisions, as defined in section 17 of this act, that are appealed
3 directly to a superior court, to review orders pertaining to the
4 relinquishment of a water right issued pursuant to RCW 90.14.130, or to
5 review proceedings regarding general adjudications of water rights
6 conducted pursuant to chapter 90.03 or 90.44 RCW.

7 (b) The following hearings shall not be conducted by the hearings
8 board:

9 ~~((a))~~ (i) Hearings required by law to be conducted by the
10 shorelines hearings board pursuant to chapter 90.58 RCW.

11 ~~((b))~~ (ii) Hearings conducted by the department pursuant to RCW
12 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
13 90.44.180.

14 ~~((c) Proceedings by the department relating to general~~
15 ~~adjudications of water rights pursuant to chapter 90.03 or 90.44 RCW.~~

16 ~~(d))~~ (iii) Hearings conducted by the department to adopt, modify,
17 or repeal rules.

18 (3) ~~((Review of))~~ Rules and regulations adopted by the hearings
19 board shall be subject to review in accordance with the provisions of
20 the Administrative Procedure Act, chapter 34.05 RCW.

21 **Sec. 3.** RCW 43.21B.130 and 1990 c 65 s 3 are each amended to read
22 as follows:

23 The administrative procedure act, chapter 34.05 RCW, shall apply to
24 the appeal of rules and regulations adopted by the board to the same
25 extent as it applied to the review of rules and regulations adopted by
26 the directors and/or boards or commissions of the various departments
27 whose powers, duties and functions were transferred by section 6,
28 chapter 62, Laws of 1970 ex. sess. to the department. ~~((All other~~
29 ~~decisions and orders of the director and all decisions of air pollution~~
30 ~~control boards or authorities established pursuant to chapter 70.94 RCW~~
31 ~~shall be subject to review by the hearings board as provided in this~~
32 ~~chapter.))~~

33 **Sec. 4.** RCW 43.21B.170 and 1995 c 382 s 3 are each amended to read
34 as follows:

35 All proceedings before the hearings board or any of its members
36 shall be conducted in accordance with such rules of practice and
37 procedure as the hearings board may prescribe. The rules adopted by

1 the board must include provisions for the following: (1) Within thirty
2 days after the appeal petition is filed, the agency responsible for the
3 decision under review is required to furnish to the hearings board and
4 the party filing the appeal a transcript of all oral evidence and a
5 copy of all documentary evidence considered by the agency in making its
6 decision; (2) the hearings board may not accept from the agency
7 responsible for the decision under review evidence which is not
8 relevant to the findings set forth in the decision; (3) if the
9 observations of individuals were relied upon in making the decision,
10 the agency responsible for the decision under review is required to
11 identify those individuals and make them available for examination and
12 cross-examination before the hearings board; and (4) the agency
13 responsible for the decision under review has the burden of proving
14 that its decision is justified, including the burden of moving forward
15 with the evidence. The hearings board shall publish such rules and
16 arrange for the reasonable distribution thereof.

17 **Sec. 5.** RCW 43.21B.180 and 1994 c 253 s 6 are each amended to read
18 as follows:

19 Judicial review of a decision of the hearings board may be obtained
20 only pursuant to RCW 34.05.510 through 34.05.598, except that, at the
21 option of the party or parties appealing to the hearings board,
22 judicial review of a decision of the hearings board in superior court
23 shall be de novo with the burden of proof placed on the agency
24 responsible for the decision under review. The director shall have the
25 same right of review from a decision made pursuant to RCW 43.21B.110 as
26 does any person.

27 **Sec. 6.** RCW 43.21B.240 and 1989 c 175 s 105 are each amended to
28 read as follows:

29 The department and air authorities shall not have authority to hold
30 adjudicative proceedings pursuant to the Administrative Procedure Act,
31 chapter 34.05 RCW. Such hearings, except those involving water
32 quantity decisions, as defined in section 17 of this act, that are
33 appealed directly to a superior court, and appeals of orders pertaining
34 to the relinquishment of a water right issued pursuant to RCW
35 90.14.130, shall be held by the pollution control hearings board.

1 **Sec. 7.** RCW 43.21B.305 and 1994 c 253 s 5 are each amended to read
2 as follows:

3 In an appeal that involves a penalty of five thousand dollars or
4 less, and in an appeal relating to a water quantity decision as defined
5 in section 17 of this act, the appeal may be heard by one member of the
6 board, whose decision shall be the final decision of the board. The
7 board shall define by rule alternative procedures to expedite small
8 appeals. These alternatives may include: Mediation, upon agreement of
9 all parties unless initiated as provided in section 17 of this act;
10 submission of testimony by affidavit; conducting hearing by telephone;
11 or other forms that may lead to less formal and faster resolution of
12 appeals. The board shall provide for the conduct of mediation
13 conferences and hearings pertaining to a water quantity decision, as
14 defined in section 17 of this act, in the general area of the
15 petitioner's residence.

16 **Sec. 8.** RCW 43.21B.310 and 1992 c 73 s 3 are each amended to read
17 as follows:

18 (1) Except as provided in subsection (2) of this section, any order
19 issued by the department(~~(, the administrator of the office of marine~~
20 safety~~),~~) or authority pursuant to RCW 70.94.211, 70.94.332,
21 70.105.095, 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any
22 provision enacted after July 26, 1987, or any permit, certificate, or
23 license issued by the department may be appealed to the pollution
24 control hearings board if the appeal is filed with the board and served
25 on the department or authority within thirty days after receipt of the
26 order. Except as provided under chapter 70.105D RCW, (~~this is~~) these
27 are the exclusive means of appeal of such an order.

28 (~~(2)~~) (a) The department, the administrator, or the authority in
29 its discretion may stay the effectiveness of an order during the
30 pendency of such an appeal.

31 (~~(3)~~) (b) At any time during the pendency of an appeal of such an
32 order to the board, the appellant may apply pursuant to RCW 43.21B.320
33 to the hearings board for a stay of the order or for the removal
34 thereof.

35 (~~(4)~~) (c) Any appeal before the hearings board must contain the
36 following in accordance with the rules of the hearings board:

37 (~~(a)~~) (i) The appellant's name and address;

1 (~~(b)~~) (ii) The date and docket number of the order, permit, or
2 license appealed;

3 (~~(c)~~) (iii) A description of the substance of the order, permit,
4 or license that is the subject of the appeal;

5 (~~(d)~~) (iv) A clear, separate, and concise statement of every
6 error alleged to have been committed;

7 (~~(e)~~) (v) A clear and concise statement of facts upon which the
8 requester relies to sustain his or her statements of error; and

9 (~~(f)~~) (vi) A statement setting forth the relief sought.

10 (~~(5)~~) (d) Upon failure to comply with any final order of the
11 department or the administrator, the attorney general, on request of
12 the department or the administrator, may bring an action in the
13 superior court of the county where the violation occurred or the
14 potential violation is about to occur to obtain such relief as
15 necessary, including injunctive relief, to insure compliance with the
16 order. The air authorities may bring similar actions to enforce their
17 orders.

18 (~~(6)~~) (e) An appealable decision or order shall be identified as
19 such and shall contain a conspicuous notice to the recipient that it
20 may be appealed only by filing an appeal with the hearings board and
21 serving it on the department within thirty days of receipt.

22 (2) Water quantity decisions of the department, as defined in
23 section 17 of this act, may be appealed either to the pollution control
24 hearings board or directly to a superior court as provided in section
25 17 of this act. Appeals of orders pertaining to the relinquishment of
26 a water right are filed in superior court as provided by RCW 90.14.130.

27 **Sec. 9.** RCW 43.27A.190 and 1987 c 109 s 11 are each amended to
28 read as follows:

29 Notwithstanding and in addition to any other powers granted to the
30 department of ecology, whenever it appears to the department that a
31 person is violating or is about to violate any of the provisions of the
32 following:

33 (1) Chapter 90.03 RCW; or

34 (2) Chapter 90.44 RCW; or

35 (3) Chapter 86.16 RCW; or

36 (4) Chapter 43.37 RCW; or

37 (5) Chapter 43.27A RCW; or

1 (6) Any other law relating to water resources administered by the
2 department; or

3 (7) A rule or regulation adopted, or a directive or order issued by
4 the department relating to subsections (1) through (6) of this section;
5 the department may cause a written regulatory order to be served upon
6 ((said)) the person either personally, or by registered or certified
7 mail delivered to addressee only with return receipt requested and
8 acknowledged by him or her. The order shall specify the provision of
9 the statute, rule, regulation, directive or order alleged to be or
10 about to be violated, and the facts upon which the conclusion of
11 violating or potential violation is based, and shall order the act
12 constituting the violation or the potential violation to cease and
13 desist or, in appropriate cases, shall order necessary corrective
14 action to be taken with regard to such acts within a specific and
15 reasonable time. The regulation of a headgate or controlling works as
16 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other
17 person so authorized by the department shall constitute a regulatory
18 order within the meaning of this section. A regulatory order issued
19 hereunder shall become effective immediately upon receipt by the person
20 to whom the order is directed, except for regulations under RCW
21 90.03.070 which shall become effective when a written notice is
22 attached as provided therein. Any person aggrieved by such order may
23 appeal the order pursuant to RCW 43.21B.310 or if the order is a water
24 quality decision, as defined in section 17 of this act, pursuant to
25 section 17 of this act.

26 **Sec. 10.** RCW 75.20.140 and 1995 c 382 s 7 are each amended to read
27 as follows:

28 (1) In all appeals, the hydraulic appeals board shall have all
29 powers relating to administration of oaths, issuance of subpoenas, and
30 taking of depositions, but such powers shall be exercised in conformity
31 with chapter 34.05 RCW.

32 (2) In all appeals, the hydraulic appeals board, and each member
33 thereof, shall be subject to all duties imposed upon and shall have all
34 powers granted to, an agency by those provisions of chapter 34.05 RCW
35 relating to adjudicative proceedings.

36 (3) All proceedings before the hydraulic appeals board or any of
37 its members shall be conducted in accordance with such rules of

1 practice and procedure as the board may prescribe. Such rules shall be
2 published and distributed.

3 (4) Judicial review of a decision of the hydraulic appeals board
4 may be obtained only pursuant to RCW 34.05.510 through 34.05.598.

5 (5) At the option of the applicant for hydraulic approval, judicial
6 review of a decision of the hydraulic appeals board shall be de novo
7 with the burden of proof placed upon the department.

8 **Sec. 11.** RCW 90.03.383 and 1991 c 350 s 1 are each amended to read
9 as follows:

10 (1) The legislature recognizes the value of interties for improving
11 the reliability of public water systems, enhancing their management,
12 and more efficiently utilizing the increasingly limited resource.
13 Given the continued growth in the most populous areas of the state, the
14 increased complexity of public water supply management, and the trend
15 toward regional planning and regional solutions to resource issues,
16 interconnections of public water systems through interties provide a
17 valuable tool to ensure reliable public water supplies for the citizens
18 of the state. Public water systems have been encouraged in the past to
19 utilize interties to achieve public health and resource management
20 objectives. The legislature finds that it is in the public interest to
21 recognize interties existing and in use as of January 1, 1991, and to
22 have associated water rights modified by the department of ecology to
23 reflect current use of water through those interties, pursuant to
24 subsection (3) of this section. The legislature further finds it in
25 the public interest to develop a coordinated process to review
26 proposals for interties commencing use after January 1, 1991.

27 (2) For the purposes of this section, the following definitions
28 shall apply:

29 (a) "Interties" are interconnections between public water systems
30 permitting exchange or delivery of water between those systems for
31 other than emergency supply purposes, where such exchange or delivery
32 is within established instantaneous and annual withdrawal rates
33 specified in the systems' existing water right permits or certificates,
34 or contained in claims filed pursuant to chapter 90.14 RCW, and which
35 results in better management of public water supply consistent with
36 existing rights and obligations. Interties include interconnections
37 between public water systems permitting exchange or delivery of water

1 to serve as primary or secondary sources of supply, but do not include
2 development of new sources of supply to meet future demand.

3 (b) "Service area" is the area designated in a water system plan or
4 a coordinated water system plan pursuant to chapter 43.20 or 70.116 RCW
5 respectively. When a public water system does not have a designated
6 service area subject to the approval process of those chapters, the
7 service area shall be the designated place of use contained in the
8 water right permit or certificate, or contained in the claim filed
9 pursuant to chapter 90.14 RCW.

10 (3) Public water systems with interties existing and in use as of
11 January 1, 1991, or that have received written approval from the
12 department of health prior to that date, shall file written notice of
13 those interties with the department of health and the department of
14 ecology. The notice may be incorporated into the public water system's
15 five-year update of its water system plan, but shall be filed no later
16 than June 30, 1996. The notice shall identify the location of the
17 intertie; the dates of its first use; the purpose, capacity, and
18 current use; the intertie agreement of the parties and the service
19 areas assigned; and other information reasonably necessary to modify
20 the water right permit. Notwithstanding the provisions of RCW
21 90.03.380 and 90.44.100, for public water systems with interties
22 existing and in use as of January 1, 1991, the department of ecology,
23 upon receipt of notice meeting the requirements of this subsection,
24 shall, as soon as practicable, modify the place of use descriptions in
25 the water right permits, certificates, or claims to reflect the actual
26 use through such interties, provided that the place of use is within
27 service area designations established in a water system plan approved
28 pursuant to chapter 43.20 RCW, or a coordinated water system plan
29 approved pursuant to chapter 70.116 RCW, and further provided that the
30 water used is within the instantaneous and annual withdrawal rates
31 specified in the water right permit and that no outstanding complaints
32 of impairment to existing water rights have been filed with the
33 department of ecology prior to September 1, 1991. Where such
34 complaints of impairment have been received, the department of ecology
35 shall make all reasonable efforts to resolve them in a timely manner
36 through agreement of the parties or through available administrative
37 remedies.

38 (4) Notwithstanding the provisions of RCW 90.03.380 and 90.44.100,
39 exchange or delivery of water through interties commencing use after

1 January 1, 1991, shall be permitted when the intertie improves overall
2 system reliability, enhances the manageability of the systems, provides
3 opportunities for conjunctive use, or delays or avoids the need to
4 develop new water sources, and otherwise meets the requirements of this
5 section, provided that each public water system's water use shall not
6 exceed the instantaneous or annual withdrawal rate specified in its
7 water right authorization, shall not adversely affect existing water
8 rights, and shall not be inconsistent with state-approved plans such as
9 water system plans or other plans which include specific proposals for
10 construction of interties. Interties commencing use after January 1,
11 1991, shall not be inconsistent with regional water resource plans
12 developed pursuant to chapter 90.54 RCW.

13 (5) For public water systems subject to the approval process of
14 chapter 43.20 RCW or chapter 70.116 RCW, proposals for interties
15 commencing use after January 1, 1991, shall be incorporated into water
16 system plans pursuant to chapter 43.20 RCW or coordinated water system
17 plans pursuant to chapter 70.116 RCW and submitted to the department of
18 health and the department of ecology for review and approval as
19 provided for in subsections (5) through (9) of this section. The plan
20 shall state how the proposed intertie will improve overall system
21 reliability, enhance the manageability of the systems, provide
22 opportunities for conjunctive use, or delay or avoid the need to
23 develop new water sources.

24 (6) The department of health shall be responsible for review and
25 approval of proposals for new interties. In its review the department
26 of health shall determine whether the intertie satisfies the criteria
27 of subsection (4) of this section, with the exception of water rights
28 considerations, which are the responsibility of the department of
29 ecology, and shall determine whether the intertie is necessary to
30 address emergent public health or safety concerns associated with
31 public water supply.

32 (7) If the intertie is determined by the department of health to be
33 necessary to address emergent public health or safety concerns
34 associated with public water supply, the public water system shall
35 amend its water system plan as required and shall file an application
36 with the department of ecology to change its existing water right to
37 reflect the proposed use of the water as described in the approved
38 water system plan. The department of ecology shall process the
39 application for change pursuant to RCW 90.03.380 or 90.44.100 as

1 appropriate, except that, notwithstanding the requirements of those
2 sections regarding notice and protest periods, applicants shall be
3 required to publish notice one time, and the comment period shall be
4 fifteen days from the date of publication of the notice. Within sixty
5 days of receiving the application, the department of ecology shall
6 issue findings and advise the department of health if existing water
7 rights are determined to be adversely affected. If no determination is
8 provided by the department of ecology within the sixty-day period, the
9 department of health shall proceed as if existing rights are not
10 adversely affected by the proposed intertie. The department of ecology
11 may obtain an extension of the sixty-day period by submitting written
12 notice to the department of health and to the applicant indicating a
13 definite date by which its determination will be made. No additional
14 extensions shall be granted, and in no event shall the total review
15 period for the department of ecology exceed one hundred eighty days.

16 (8) If the department of health determines the proposed intertie
17 appears to meet the requirements of subsection (4) of this section but
18 is not necessary to address emergent public health or safety concerns
19 associated with public water supply, the department of health shall
20 instruct the applicant to submit to the department of ecology an
21 application for change to the underlying water right or claim as
22 necessary to reflect the new place of use. The department of ecology
23 shall consider the applications pursuant to the provisions of RCW
24 90.03.380 and 90.44.100 as appropriate. If in its review of proposed
25 interties and associated water rights the department of ecology
26 determines that additional information is required to act on the
27 application, the department may request applicants to provide
28 information necessary for its decision, consistent with agency rules
29 and written guidelines. Parties disagreeing with the decision of the
30 department of ecology on the application for change in place of use may
31 appeal the decision to the pollution control hearings board or directly
32 to a superior court as provided in section 17 of this act.

33 (9) The department of health may approve plans containing intertie
34 proposals prior to the department of ecology's decision on the water
35 right application for change in place of use. However, notwithstanding
36 such approval, construction work on the intertie shall not begin until
37 the department of ecology issues the appropriate water right document
38 to the applicant consistent with the approved plan.

1 **Sec. 12.** RCW 90.14.130 and 1987 c 109 s 13 are each amended to
2 read as follows:

3 When it appears to the department of ecology that a person entitled
4 to the use of water has not beneficially used his or her water right or
5 some portion thereof, and it appears that (~~said~~) the right has or may
6 have reverted to the state because of such nonuse, as provided by RCW
7 90.14.160, 90.14.170, or 90.14.180, the department of ecology shall
8 notify such person by order: PROVIDED, That where a company,
9 association, district, or the United States has filed a blanket claim
10 under the provisions of RCW 90.14.060 for the total benefits of those
11 served by it, the notice shall be served on such company, association,
12 district or the United States and not upon any of its individual water
13 users who may not have used the water or some portion thereof which
14 they were entitled to use. The order shall contain: (1) A description
15 of the water right, including the approximate location of the point of
16 diversion, the general description of the lands or places where such
17 waters were used, the water source, the amount involved, the purpose of
18 use, and the apparent authority upon which the right is based; (2) a
19 statement that unless sufficient cause be shown on appeal the water
20 right will be declared relinquished; and (3) a statement that such
21 order may be appealed to (~~the pollution control hearings board~~)
22 superior court. Any person aggrieved by such an order may appeal it to
23 (~~the pollution control hearings board pursuant to RCW 43.21B.310~~) the
24 superior court in a county where the land to which the water right is
25 appurtenant is located. Such an appeal to superior court may be either
26 on the record or de novo at the option of a water right holder to whom
27 the order is directed. The order shall be served by registered or
28 certified mail to the last known address of the person and be posted at
29 the point of division or withdrawal. The order by itself shall not
30 alter the recipient's right to use water, if any.

31 **Sec. 13.** RCW 90.14.190 and 1987 c 109 s 14 are each amended to
32 read as follows:

33 Any person feeling aggrieved by any decision of the department of
34 ecology, other than a water right relinquishment order issued pursuant
35 to RCW 90.14.130, may have the same reviewed by the pollution control
36 hearings board, or may appeal the decision directly to a superior court
37 pursuant to (~~RCW 43.21B.310~~) section 17 of this act. In any such
38 review, the findings of fact as set forth in the report of the

1 department of ecology shall be prima facie evidence of the fact of any
2 waiver or relinquishment of a water right or portion thereof. If the
3 hearings board affirms the decision of the department, a party seeks
4 review in superior court of that hearings board decision pursuant to
5 chapter 34.05 RCW, and the court determines that the party was injured
6 by an arbitrary, capricious, or erroneous order of the department, the
7 court may award reasonable attorneys' fees.

8 **Sec. 14.** RCW 90.14.200 and 1989 c 175 s 180 are each amended to
9 read as follows:

10 (1) All matters relating to the implementation and enforcement of
11 this chapter by the department of ecology shall be carried out in
12 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
13 except where the provisions of this chapter expressly conflict with
14 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are
15 ~~((adjudicative proceedings within the meaning of chapter 34.05 RCW.~~
16 ~~Final decisions of the department of ecology in these proceedings))~~
17 appealable to superior court as provided in RCW 90.14.130. Other final
18 decisions of the department of ecology under this chapter are subject
19 to review by the pollution control hearings board or a superior court
20 in accordance with ((chapter 43.21B RCW)) section 17 of this act.

21 (2) RCW 90.14.130 provides nonexclusive procedures for determining
22 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
23 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
24 among other proceedings, general adjudication proceedings initiated
25 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
26 apply to litigation involving determinations of the department of
27 ecology under RCW 90.03.290 relating to the impairment of existing
28 rights.

29 **Sec. 15.** RCW 90.58.180 and 1995 c 347 s 310 are each amended to
30 read as follows:

31 (1) Any person aggrieved by the granting, denying, or rescinding of
32 a permit on shorelines of the state pursuant to RCW 90.58.140 may seek
33 review from the shorelines hearings board by filing a petition for
34 review within twenty-one days of the date of filing as defined in RCW
35 90.58.140(6).

36 Within seven days of the filing of any petition for review with the
37 board as provided in this section pertaining to a final decision of a

1 local government, the petitioner shall serve copies of the petition on
2 the department and the office of the attorney general. The department
3 and the attorney general may intervene to protect the public interest
4 and insure that the provisions of this chapter are complied with at any
5 time within fifteen days from the date of the receipt by the department
6 or the attorney general of a copy of the petition for review filed
7 pursuant to this section. (~~The shorelines hearings board shall
8 schedule review proceedings on the petition for review without regard
9 as to whether the period for the department or the attorney general to
10 intervene has or has not expired.~~)

11 (2) The department or the attorney general may obtain review of any
12 final decision granting a permit, or granting or denying an application
13 for a permit issued by a local government by filing a written petition
14 with the shorelines hearings board and the appropriate local government
15 within twenty-one days from the date the final decision was filed as
16 provided in RCW 90.58.140(6).

17 (3) The review proceedings authorized in subsections (1) and (2) of
18 this section are subject to the provisions of chapter 34.05 RCW
19 pertaining to procedures in adjudicative proceedings. Judicial review
20 of such proceedings of the shorelines hearings board is governed by
21 chapter 34.05 RCW, except that judicial review of a decision by the
22 board may be either on the record or de novo at the option of the party
23 or parties applying for the permit being reviewed, and except that the
24 burden of proving the validity of the decision rests upon the
25 department or local government whose decision is under review. The
26 board shall issue its decision on the appeal authorized under
27 subsections (1) and (2) of this section within one hundred eighty days
28 after the date the petition is filed with the board or a petition to
29 intervene is filed by the department or the attorney general, whichever
30 is later. The time period may be extended by the board for a period of
31 thirty days upon a showing of good cause or may be waived by the
32 parties.

33 (4) Any person may appeal any rules, regulations, or guidelines
34 adopted or approved by the department within thirty days of the date of
35 the adoption or approval. The board shall make a final decision within
36 sixty days following the hearing held thereon.

37 (5) The board shall find the rule, regulation, or guideline to be
38 valid and enter a final decision to that effect unless it determines
39 that the rule, regulation, or guideline:

1 (a) Is clearly erroneous in light of the policy of this chapter; or
2 (b) Constitutes an implementation of this chapter in violation of
3 constitutional or statutory provisions; or

4 (c) Is arbitrary and capricious; or

5 (d) Was developed without fully considering and evaluating all
6 material submitted to the department during public review and comment;
7 or

8 (e) Was not adopted in accordance with required procedures.

9 (6) If the board makes a determination under subsection (5) (a)
10 through (e) of this section, it shall enter a final decision declaring
11 the rule, regulation, or guideline invalid, remanding the rule,
12 regulation, or guideline to the department with a statement of the
13 reasons in support of the determination, and directing the department
14 to adopt, after a thorough consultation with the affected local
15 government and any other interested party, a new rule, regulation, or
16 guideline consistent with the board's decision.

17 (7) A decision of the board on the validity of a rule, regulation,
18 or guideline shall be subject to review in superior court, if
19 authorized pursuant to chapter 34.05 RCW. A petition for review of the
20 decision of the shorelines hearings board on a rule, regulation, or
21 guideline shall be filed within thirty days after the date of final
22 decision by the shorelines hearings board.

23 **Sec. 16.** RCW 90.66.080 and 1979 c 3 s 8 are each amended to read
24 as follows:

25 The department is hereby empowered to promulgate such rules as may
26 be necessary to carry out the provisions of this chapter. Decisions of
27 the department, other than rule making, shall be subject to review by
28 the pollution control hearings board or a superior court in accordance
29 with chapter 43.21B RCW.

30 NEW SECTION. **Sec. 17.** A new section is added to chapter 43.21B
31 RCW to read as follows:

32 (1) For purposes of chapter . . . , Laws of 1997 (this act), a
33 "water quantity decision" includes the following actions by the
34 department of ecology:

35 (a) A decision to grant or deny a permit or certificate for a right
36 to the beneficial use of water or to amend, change, or transfer such a
37 right;

1 (b) A decision to enforce the conditions of a permit for, or right
2 to, the beneficial use of water or to require any person to discontinue
3 the use of water;

4 (c) A decision to establish or modify a minimum flow or level for
5 water under chapter 90.03, 90.22, or 90.54 RCW, or to reserve water for
6 such a minimum flow or level; and

7 (d) A decision to establish a water management plan under chapter
8 90.03, 90.44, or 90.54 RCW.

9 (2) A person who is aggrieved or adversely affected by a water
10 quantity decision may appeal the decision either to the pollution
11 control hearings board pursuant to RCW 43.21B.310 or directly to a
12 superior court. Any such appeal to superior court may be either on the
13 record or de novo at the option of an appealing party. An appeal of a
14 decision regarding a water withdrawal must be filed in the county where
15 the point of withdrawal is located. An appeal of a decision regarding
16 an instream flow or a water management plan must be filed in the county
17 with the greatest amount of territory governed by the flow or plan.

18 (3) An appeal to the hearings board of a water quantity decision
19 must contain, in addition to the information listed in RCW
20 43.21B.310(1)(c), a notice of exercise or waiver of the right to
21 require mediation. Upon receipt of an appeal petition indicating an
22 election to attempt mediation, the hearings board shall suspend further
23 action on the appeal and order a stay of the appealed decision. The
24 hearings board shall promptly schedule and, after at least seven days'
25 notice, conduct an initial conference for the purpose of agreeing upon
26 the selection of a mediator who is either trained in dispute resolution
27 techniques or experienced in successfully resolving disputes. If the
28 parties are unable to agree on a mediator, each party shall nominate a
29 mediator and the mediator is selected by lot from among the nominees.
30 An administrative appeals judge or other employee of the hearings board
31 may serve as a mediator, but may not participate in hearing or in
32 writing the decision or order in that appeal. Evidence of conduct or
33 statements made during the course of mediation must be treated by the
34 mediator and the parties in a confidential manner and are not
35 admissible in subsequent proceedings in the appeal. All other
36 proceedings pertaining to the appeal must be stayed until conclusion of
37 the mediation effort but no later than one hundred eighty days after
38 the appeal is filed. However, the hearings board is not prevented from
39 entertaining motions filed by the parties while mediation is ongoing

1 and discovery may be conducted while mediation is ongoing if agreed to
2 by all parties.

3 (4) The mediation process terminates when the mediation effort is
4 concluded, but no later than one hundred eighty days after the date on
5 which the appeal is filed. When notified by the mediator of an
6 agreement by all parties to conclude the mediation effort, the hearings
7 board shall take such further action on the appeal as the parties
8 agreed upon, which may include entry of an order embodying the
9 agreement and dismissing the appeal, remand of the matter to the
10 department for reconsideration of the decision being appealed, or
11 resumption of its consideration of the appeal. When notified by the
12 mediator that the parties appear to be unable to conclude the mediation
13 effort by agreement, the hearings board, after giving notice to the
14 parties, shall conclude the mediation process and resume consideration
15 of the appeal. At any time during the mediation process, the hearings
16 board shall enter an order dismissing the appeal when requested to do
17 so by a party. A water quantity decision which has been appealed to
18 the hearings board and dismissed by it to conclude a mediation effort
19 may be appealed directly to superior court, as provided in subsection
20 (1) of this section, within thirty days after entry of the order of
21 dismissal.

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