

SENATE BILL REPORT

SB 6422

As of January 29, 2010

Title: An act relating to environmental and land use hearings boards.

Brief Description: Regarding environmental and land use hearings boards and making more uniform the timelines for filing appeals with those boards.

Sponsors: Senators Fairley and Kline; by request of Governor Gregoire.

Brief History:

Committee Activity: Government Operations & Elections: 1/28/10.

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Staff: Karen Epps (786-7424)

Background: Environmental Hearings Office. The Environmental Hearings Office was established by the Legislature in 1979 to provide consolidated administrative services for the Pollution Control Hearings Board (PCHB), the Forest Practices Appeals Board, and the Shorelines Hearings Board. The Hydraulic Appeals Board was added in 1986 and the Environmental and Land Use Hearings Board was added in 2003. As a general rule, the proceedings of these boards are guided by the Administrative Procedure Act (APA).

Pollution Control Hearings Board. The Pollution Control Hearings Board (PCHB) presides over certain appeals of decisions made by the Department of Ecology (Ecology), air pollution control boards or authorities, and local health departments. The PCHB consists of three members appointed by the Governor and confirmed by the Senate. These members must have experience or training in matters pertaining to the environment, and at least one member must be a lawyer admitted to practice law in this state. Proceedings before the PCHB are conducted in accordance with procedures adopted by the PCHB. The PCHB must make findings of fact and conclusions of law in each of its decisions. Decisions of the PCHB may be appealed to superior court by any of the parties.

Shorelines Hearings Board. The Shoreline Management Act (SMA), enacted in 1971, governs uses of state shorelines. The Shorelines Hearings Board (SHB) hears appeals from shoreline substantial development, conditional use, and variance permit decisions, and from those shoreline penalties jointly issued by local government and Ecology, or issued by Ecology alone. Three of the SHB members, who also serve on the PCHB, are full-time

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employees, appointed by the Governor and confirmed by the Senate. At least one member is an attorney. The three other members who serve part time are: the State Land Commissioner or designee, a representative from the Washington State Association of Counties, and one from the Association of Washington Cities.

Hydraulic Appeals Board. A hydraulic project approval is required for any project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. The Hydraulic Appeals Board (HAB) has jurisdiction to hear appeals arising from the approval, denial, conditioning, or modification of a hydraulic approval issued by the Department of Fish and Wildlife (DFW) for the diversion of water for agricultural irrigation or stock watering purposes or when associated with streambank stabilization to protect farm and agricultural land or off-site mitigation proposals. The HAB also has jurisdiction to hear appeals of the approval, denial, conditioning, or modification of a hydraulic permit for the construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences or property under. The board consists of three members: the director of Ecology or the director's designee, the director of the Department of Agriculture or the director's designee, and the director or the director's designee of DFW.

Forest Practices Appeals Board. In 1974 the Legislature passed the Forest Practices Act which established the Forest Practices Appeals Board (FPAB). The FPAB consists of three members who are appointed by the Governor and confirmed by the state Senate for staggered six-year terms. One of the three must be an attorney. The FPAB hears appeals relating to the approval or disapproval of forest practice applications, landscape plans, or watershed analyses. Superior court review of FPAB decisions is available through the APA.

Environmental and Land Use Hearings Board. Any state or local permit, license, certificate, approval, or other regulatory or management program document pertaining to the land, air, or water of the state must be appealed to the Environmental and Land Use Hearings Board (ELUHB) if it is for a qualifying economic development project. A qualifying project is an economic development project that is:

- located within a county that entirely qualifies as both a distressed area and a rural natural resources impact area;
- designed to provide at least 30 full-time year-round jobs, and
- designated as a qualifying project by the Office of Permit Assistance.

The ELUHB is composed of six members, three of whom are the part-time SHB members, and three of whom are the PCHB members, who are full-time employees appointed by the Governor and confirmed by the Senate. At least one member is an attorney. The three other members who serve part time are: the State Land Commissioner or designee, a representative from the Washington State Association of Counties, and one from the Association of Washington Cities. The chairperson of the PCHB is the chairperson of the ELUHB.

Growth Management Hearings Board. The Growth Management Act (GMA) establishes three regional Growth Management Hearings Boards (GMHB) with defined geographic jurisdictions: an Eastern Washington Board; a Central Puget Sound Board; and a Western Washington Board. Each GMHB consists of three gubernatorial appointee members who are qualified by experience or training and who also meet residency requirements. At least one

member of each GMHB must be admitted to practice law in Washington, and at least one member of each GMHB must have been a city or county elected official. No more than two members of a GMHB may be from the same political party. The GMHB members serve six-year terms. The GMHBs have limited jurisdiction and may only hear and determine petitions alleging:

- that a state agency or planning jurisdiction is noncompliant with the GMA, specific provisions of the SMA, or certain mandates of the State Environmental Policy Act relating to qualifying plans, regulations, or amendments; or
- that the 20-year planning population projections adopted by the Office of Financial Management should be adjusted.

The GMHBs must make findings of fact and prepare a written decision in each decided case. Findings of fact and decisions become effective upon being signed by two or more members and upon being filed at the applicable GMHB office. Final decisions of the GMHB may be appealed to the superior court. If all parties agree, the superior court may directly review a petition filed with a GMHB.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): On July 1, 2010, the Environmental Hearings Office consists of the PCHB, the SHB, and the ELUHB. The FPAB and HAB functions are transferred to the PCHB. On July 1, 2011, the Environmental and Land Use Hearings Office will consist of the PCHB, the SHB, the ELUHB, and the GMHB. Not later than July 1, 2012, the GMHB must consist of seven members qualified by experience or training in matters pertaining to land use law or land use planning. The Governor may reduce the GMHB to six members if warranted by the board's caseload. The Governor must designate one member of either the PCHB or the GMHB to be the director of the Environmental and Land Use Hearings Office during the term of the Governor. The director may appoint one or more administrative appeals judges in the cases before the environmental boards, and with the consent of the chair of the GMHB, one or more hearing examiners in cases before the land board. The administrative appeals judges possess the powers and duties conferred by the APA.

The PCHB has jurisdiction to hear and decide appeals from the Department of Natural Resources (DNR) and DFW. This includes decisions of DNR and DFW that are reviewable under the Forest Practices Act, decisions by DFW relating to a hydraulic project approval permit, and decisions by DNR relating to surface mining. The PCHB also has jurisdiction over decisions of a state agency to take temporary possession of a derelict vessel.

The PCHB, SHB, and ELUHB may schedule a conference for the purposes of attempting to mediate the case upon the request of one or more parties and with the consent of all the parties. Mediation must be conducted by an administrative appeals judge or other duly authorized agent of the board who has received training in dispute resolution techniques or has a demonstrated history of successfully resolving disputes.

Any person with standing may commence an appeal to the PCHB by filing a notice of appeal with the board within 30 days from the date of receipt of the decision being appealed. The appeal is timely if it is filed with the PCHB and served upon the state or local agency within

the same 30-day period. The appeal must contain: (1) the appellant's name and address; (2) the date and docket number of the order, permit, license, or decision appealed; (3) a copy of the order, permit, license, or decision that is the subject of the appeal; (4) a clear, separate, and concise statement of every error alleged to have been committed; (5) a clear and concise statement of the facts upon which the requester relies to sustain his or her statement of error; and (7) a statement setting forth the relief sought. Any party aggrieved by a final decision and order of the PCHB may obtain judicial review of the final decision and order. The state or local agency that issued the decisions appealed to the board can also obtain judicial review.

If Ecology disapproves a comprehensive solid waste management plan or plan amendments prepared by a county or a city, the county or city may appeal the decision to the PCHB.

Forest landowners who have been issued a forest health hazard order may appeal the order to the PCHB. For those forest practices regulated by the Forest Practices Board and DNR, appeals must be made to the PCHB. The time period for an operator, timber owner, or forest land owner to commence an appeal of a stop order issued by DNR is within 30 days from the date of receipt of the order by the operator. Any person incurring a penalty under the Forest Practices Act may appeal the penalty to the PCHB within 30 days after the date of receipt of the penalty. A person aggrieved by the approval or disapproval of an application to conduct a forest practice or the approval or disapproval of any landscape plan, permit, or watershed analysis may seek review from the PCHB by filing a request within 30 days from the date of receipt of the decision.

A hydraulic project permit may be appealed to the PCHB within 30 days from the date of the receipt of the decision by DFW. Issuance, denial, conditioning, or modification of a hydraulic project permit may be informally appealed to DFW within 30 days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the department by rule. A permit decision that has been informally appealed to the department is appealable to the board within 30 days from the date of receipt of the department's decision on the informal appeal. Issuance of a penalty for a hydraulic project permit violation may be informally appealed to DFW within 30 days from the date of receipt of the penalty. A penalty that has been informally appealed to DFW is appealable to the PCHB with 30 days from the date of receipt of DFW's decision on the informal appeal.

Decisions by DNR concerning surface mining may be appealed to the PCHB. Regarding surface mining stop work orders, the PCHB must proceed as quickly as feasible to complete any requested adjudicative proceedings unless the parties stipulate to an appeal timeline or DNR's stop work order states that it is not effective until after the administrative review process.

A person seeking to contest the temporary possession or custody of a derelict vessel by a state agency may be appealed to the PCHB within 30 days of the date the state agency acquired custody of the vessel. The PCHB must hear and determine the validity of the decision to take the vessel. Within five days after the request for a hearing, the PCHB must notify the vessel owner and the state agency of the date, time, and location for the hearing. A proceeding brought regarding a derelict vessel may be heard by one member of the PCHB, whose decision is the final decision of the board.

A petition for review of a decision for a shoreline development permit or a shoreline substantial development permit to the SHB must be commenced within 30 days from the date of receipt of the decision. Construction under a shoreline development permit or a shoreline substantial development permit must include provisions to assure that construction does not begin until after 30 days from the date of receipt or until all review proceedings are terminated, if the proceedings were initiated within 30 days from the date of receipt. Decisions on permits on shorelines of the state may be appealed to the SHB by filing a petition for review within 30 days of the date of receipt of the decision. Ecology's final decision on a proposed master program or master program amendment by a local government planning under GMA may be appealed to the GMHB by filing a petition within 60 days from the date of Ecology's final decisions to approve or reject a proposed master program or master program amendment. Ecology's written notice must conspicuously and plainly state that it is Ecology's final decision and there will be no further modifications. Any person incurring a penalty under the SMA may appeal the penalty to the SHB within 30 days after the date of receipt of the penalty.

To the extent possible, the ELUHB and the SHB must not schedule hearings that are in conflict with city or county council meetings if a board member also serves on a city or county council.

This act applies only to appeals that are commenced on or after the effective date of this act. Various sections concerning the FPAB and the HAB are repealed. However, these repeals do not affect any existing right acquired or liability or obligation incurred under these statutes, nor do they affect any proceeding instituted under them. All pending cases before the FPAB and HAB must be continued and acted upon by those boards. All existing rules of the FPAB remain in effect to be used by the PCHB until the PCHB adopts superseding rules for forest practices appeals.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony: PRO: This bill stems from discussions that occurred last interim around reforming the Natural Resource agencies, and is designed to reduce the size of bureaucracy, and deliver 21st century customer service, while maintaining the commitment to protect the public's natural resources. This bill reduces the size of the hearings office from five boards down to two boards. For citizens, the appeal process is terribly complex, and this bill is designed to make things easier for our citizens. The bill as originally introduced put all of the timelines to 30 days. It was never the Governor's intent to reduce a citizen's right to access. The timelines under which the GMHB operates were the only timelines being reduced. The consolidation of these hearings boards into the EHO creates a platform for future efficiencies. The workload from the HAB and FPAB can be absorbed into the PCHB workload. The types of appeals that these boards hear are similar to

what the PCHB currently hears. Appeal timelines are established at 30 days for non-planning appeals, and 60 days for planning appeals. The substitute leaves in place the informal appeal process that DNR uses under the Forest Practices Act. The substitute protects the 60 day appeal period for appeals to the GMHB.

OTHER: The Forest Protection Association has concerns about the appeals process to the PCHB. They are concerned about potential increased costs. The FPAB works well and there is flexibility within the appeals process that they want to make sure will continue under the PCHB. The Washington Association of Counties supports the bill as originally introduced, as it sets timelines for all appeal processes at 30 days. Leaving the appeal timelines for the GMHB at 60 days is not consistent with the intent of this bill.

Persons Testifying: PRO: John Mankowski, Governor's Office; Kathleen Mix, Environmental Hearings Office; Lenny Young, DNR; Peter Birch, DFW; April Putney, Futurewise.

OTHER: Debora Munguia, Washington Forest Protection Association; Josh Weiss, Washington Association of Counties; Brynn Brady, Pierce County.