
HOUSE BILL 1774

State of Washington

54th Legislature

1995 Regular Session

By Representatives Chandler, Mastin, Basich and Honeyford

Read first time 02/08/95. Referred to Committee on Agriculture & Ecology.

1 AN ACT Relating to the water-related actions of the department of
2 ecology; amending RCW 43.21A.070, 34.05.425, 34.05.419, 34.05.461,
3 34.05.514, 34.05.530, 34.05.534, 34.12.040, 43.21B.110, 43.21B.130,
4 43.21B.240, 43.21B.300, 43.21B.310, 43.21B.320, 43.27A.190, 90.03.383,
5 90.14.130, 90.14.190, 90.14.200, and 90.66.080; and creating a new
6 section.

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

8 NEW SECTION. **Sec. 1.** The legislature finds that the principle of
9 requiring parties to exhaust the available administrative remedies has,
10 with regard to water-related decisions of the department of ecology,
11 imposed severe burdens on members of the public. They are required to
12 expend considerable resources and to suffer intolerable delays. The
13 purpose of this act is to provide for the expedited review of certain
14 water-related decisions of the department.

15 **Sec. 2.** RCW 43.21A.070 and 1970 ex.s. c 62 s 7 are each amended to
16 read as follows:

17 (1) The administrative procedure act, chapter 34.05 RCW, shall
18 apply to the review of ((decisions)) a water-related agency action by

1 the director (~~to the same extent as it applied to decisions issued by~~
2 ~~the directors of the various departments whose powers, duties and~~
3 ~~functions are transferred by this 1970 amendatory act to the department~~
4 ~~of ecology~~). The administrative procedure act shall further apply to
5 all other decisions of the director (~~as in chapter 34.05 RCW~~
6 ~~provided~~) except as limited by RCW 43.21B.240. In any adjudicative
7 proceeding commenced in response to a water-related agency action by
8 the department, an administrative law judge shall serve as the
9 presiding officer for the hearing in accordance with RCW 34.05.425(3).

10 (2) For purposes of this section, a "water-related agency action"
11 includes the following:

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

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

18 (c) An order issued under chapter 90.14 RCW regarding the
19 relinquishment of a water right; and

20 (d) A decision to establish a minimum flow or level for water under
21 chapter 90.03, 90.22, or 90.54 RCW, or to reserve water for such a
22 minimum flow or level.

23 **Sec. 3.** RCW 34.05.425 and 1989 c 175 s 14 are each amended to read
24 as follows:

25 (1) Except as provided in subsections (2) and (3) of this section,
26 in the discretion of the agency head, the presiding officer in an
27 administrative hearing shall be:

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

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

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

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

1 (3) The presiding officer in an administrative hearing for a water-
2 related agency action taken by the department of ecology, as defined in
3 RCW 43.21A.070, shall be an administrative law judge assigned by the
4 office of administrative hearings in accordance with chapter 34.12 RCW.
5 The administrative law judge shall make the final decision and enter
6 the final order for these hearings.

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

11 ~~((+4))~~ (5) Any party may petition for the disqualification of an
12 individual promptly after receipt of notice indicating that the
13 individual will preside or, if later, promptly upon discovering facts
14 establishing grounds for disqualification.

15 ~~((+5))~~ (6) The individual whose disqualification is requested
16 shall determine whether to grant the petition, stating facts and
17 reasons for the determination.

18 ~~((+6))~~ (7) When the presiding officer is an administrative law
19 judge, the provisions of this section regarding disqualification for
20 cause are in addition to the motion of prejudice available under RCW
21 34.12.050.

22 ~~((+7))~~ (8) If a substitute is required for an individual who
23 becomes unavailable as a result of disqualification or any other
24 reason, the substitute must be appointed by the appropriate appointing
25 authority.

26 ~~((+8))~~ (9) Any action taken by a duly appointed substitute for an
27 unavailable individual is as effective as if taken by the unavailable
28 individual.

29 **Sec. 4.** RCW 34.05.419 and 1988 c 288 s 404 are each amended to
30 read as follows:

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

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

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

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

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

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

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

22 (4) After receipt of an application for an adjudicative proceeding
23 in response to a water-related agency action taken by the department of
24 ecology, as defined in RCW 43.21A.070, the department of ecology shall
25 within thirty days of the receipt of the application commence an
26 adjudicatory proceeding in accordance with this chapter.

27 **Sec. 5.** RCW 34.05.461 and 1989 c 175 s 19 are each amended to read
28 as follows:

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

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

34 (b) If the presiding officer is a person designated by the agency
35 to make the final decision and enter the final order, the presiding
36 officer shall enter a final order, or is an administrative law judge
37 acting pursuant to RCW 34.05.425(3); and

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

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

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

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

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

36 (6) If a person serving or designated to serve as presiding officer
37 becomes unavailable for any reason before entry of the order, a
38 substitute presiding officer shall be appointed as provided in RCW
39 34.05.425. The substitute presiding officer shall use any existing

1 record and may conduct any further proceedings appropriate in the
2 interests of justice.

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

6 (8) Initial or final orders shall be served in writing within
7 ninety days after conclusion of the hearing or after submission of
8 memos, briefs, or proposed findings in accordance with subsection (7)
9 of this section unless this period is waived or extended for good cause
10 shown.

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

13 **Sec. 6.** RCW 34.05.514 and 1994 c 257 s 23 are each amended to read
14 as follows:

15 (1) Except as provided in subsections (2) and (3) of this section
16 (~~((and RCW 36.70A.300(3)))~~), proceedings for review under this chapter
17 shall be instituted by filing a petition in the superior court, at the
18 petitioner's option, for (a) Thurston county, (b) the county of the
19 petitioner's residence or principal place of business, or (c) in any
20 county where the property owned by the petitioner and affected by the
21 contested decision is located.

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

26 (3) For proceedings involving water-related agency actions taken by
27 the department of ecology, as defined in RCW 43.21A.070, the petition
28 shall be filed in the superior court in the county that will be
29 directly and immediately affected by the decision.

30 **Sec. 7.** RCW 34.05.530 and 1988 c 288 s 506 are each amended to
31 read as follows:

32 A person has standing to obtain judicial review of agency action if
33 that person is aggrieved or adversely affected by the agency action.
34 An agency has standing to obtain judicial review of a final order if
35 the final order is adverse to the agency and is issued by an
36 administrative law judge acting pursuant to RCW 34.05.425(3). A person

1 is aggrieved or adversely affected within the meaning of this section
2 only when all three of the following conditions are present:

3 (1) The agency action has prejudiced or is likely to prejudice that
4 person;

5 (2) That person's asserted interests are among those that the
6 agency was required to consider when it engaged in the agency action
7 challenged; and

8 (3) A judgment in favor of that person would substantially
9 eliminate or redress the prejudice to that person caused or likely to
10 be caused by the agency action.

11 **Sec. 8.** RCW 34.05.534 and 1988 c 288 s 507 are each amended to
12 read as follows:

13 A person may file a petition for judicial review under this chapter
14 only after exhausting all administrative remedies available within the
15 agency whose action is being challenged, or available within any other
16 agency authorized to exercise administrative review, except:

17 (1) A petitioner for judicial review of a rule need not have
18 participated in the rule-making proceeding upon which that rule is
19 based, or have petitioned for its amendment or repeal;

20 (2) A petitioner for judicial review need not exhaust
21 administrative remedies to the extent that this chapter or any other
22 statute states that exhaustion is not required; ((or))

23 (3) The court may relieve a petitioner of the requirement to
24 exhaust any or all administrative remedies upon a showing that:

25 (a) The remedies would be patently inadequate;

26 (b) The exhaustion of remedies would be futile; or

27 (c) The grave irreparable harm that would result from having to
28 exhaust administrative remedies would clearly outweigh the public
29 policy requiring exhaustion of administrative remedies; or

30 (4) A petitioner for judicial review of a final order issued by an
31 administrative law judge acting pursuant to RCW 34.05.425(3) need not
32 exhaust any other administrative remedy.

33 **Sec. 9.** RCW 34.12.040 and 1981 c 67 s 4 are each amended to read
34 as follows:

35 Whenever a state agency conducts a hearing which is not presided
36 over by officials of the agency who are to render the final decision,
37 the hearing shall be conducted by an administrative law judge assigned

1 under this chapter. In any adjudicative proceeding commenced in
2 response to a water-related agency action by the department of ecology,
3 as defined in RCW 43.21A.070, the hearing shall be conducted by an
4 administrative law judge assigned under this chapter according to
5 procedural rules developed by the chief administrative law judge. In
6 assigning administrative law judges, the chief administrative law judge
7 shall wherever practical (1) use personnel having expertise in the
8 field or subject matter of the hearing, and (2) assign administrative
9 law judges primarily to the hearings of particular agencies on a long-
10 term basis.

11 **Sec. 10.** RCW 43.21B.110 and 1993 c 387 s 22 are each amended to
12 read as follows:

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

18 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
19 70.105.080, 70.107.050, 88.46.090, (~~(90.03.6007)~~) 90.48.144, 90.56.310,
20 and 90.56.330.

21 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
22 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
23 (~~(90.14.1307)~~) and 90.48.120.

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

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

32 (e) Decisions of local health departments regarding the issuance
33 and enforcement of permits to use or dispose of biosolids under RCW
34 70.95J.080.

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

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

3 (a) The hearings board shall have no jurisdiction whatsoever to
4 review water-related agency actions of the department of ecology listed
5 in RCW 43.21A.070 or to review proceedings regarding general
6 adjudications of water rights conducted pursuant to chapter 90.03 or
7 90.44 RCW.

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

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

12 ~~((b))~~ (ii) Hearings conducted by the department pursuant to RCW
13 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
14 90.44.180.

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

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

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

22 **Sec. 11.** RCW 43.21B.130 and 1990 c 65 s 3 are each amended to read
23 as follows:

24 The administrative procedure act, chapter 34.05 RCW, shall apply to
25 the appeal of rules and regulations adopted by the board to the same
26 extent as it applied to the review of rules and regulations adopted by
27 the directors and/or boards or commissions of the various departments
28 whose powers, duties and functions were transferred by section 6,
29 chapter 62, Laws of 1970 ex. sess. to the department. Except with
30 regard to water-related agency actions by the department, as defined in
31 RCW 43.21A.070, which are appealable to an administrative law judge
32 pursuant to RCW 34.05.425(3), all other decisions and orders of the
33 director and all decisions of air pollution control boards or
34 authorities established pursuant to chapter 70.94 RCW shall be subject
35 to review by the hearings board as provided in this chapter.

36 **Sec. 12.** RCW 43.21B.240 and 1989 c 175 s 105 are each amended to
37 read as follows:

1 The department and air authorities shall not have authority to hold
2 adjudicative proceedings pursuant to the Administrative Procedure Act,
3 chapter 34.05 RCW, except with regard to water-related agency actions
4 of the department listed in RCW 43.21A.070 that may be appealed to an
5 administrative law judge as provided in RCW 34.05.425(3). ((Such)) All
6 other hearings shall be held by the pollution control hearings board.

7 **Sec. 13.** RCW 43.21B.300 and 1993 c 387 s 23 are each amended to
8 read as follows:

9 (1) Any civil penalty provided in RCW 18.104.155, 70.94.431,
10 70.105.080, 70.107.050, 88.46.090, ((90.03.600,)) 90.48.144, 90.56.310,
11 and 90.56.330 shall be imposed by a notice in writing, either by
12 certified mail with return receipt requested or by personal service, to
13 the person incurring the penalty from the department, the administrator
14 of the office of marine safety, or the local air authority, describing
15 the violation with reasonable particularity. Within fifteen days after
16 the notice is received, the person incurring the penalty may apply in
17 writing to the department, the administrator, or the authority for the
18 remission or mitigation of the penalty. Upon receipt of the
19 application, the department, the administrator, or authority may remit
20 or mitigate the penalty upon whatever terms the department, the
21 administrator, or the authority in its discretion deems proper. The
22 department or the authority may ascertain the facts regarding all such
23 applications in such reasonable manner and under such rules as it may
24 deem proper and shall remit or mitigate the penalty only upon a
25 demonstration of extraordinary circumstances such as the presence of
26 information or factors not considered in setting the original penalty.

27 (2) Any penalty imposed under this section may be appealed to the
28 pollution control hearings board in accordance with this chapter if the
29 appeal is filed with the hearings board and served on the department,
30 the administrator, or authority thirty days after receipt by the person
31 penalized of the notice imposing the penalty or thirty days after
32 receipt of the notice of disposition of the application for relief from
33 penalty.

34 (3) A penalty shall become due and payable on the later of:

35 (a) Thirty days after receipt of the notice imposing the penalty;

36 (b) Thirty days after receipt of the notice of disposition on
37 application for relief from penalty, if such an application is made; or

1 (c) Thirty days after receipt of the notice of decision of the
2 hearings board if the penalty is appealed.

3 (4) If the amount of any penalty is not paid to the department or
4 the administrator within thirty days after it becomes due and payable,
5 the attorney general, upon request of the department or the
6 administrator, shall bring an action in the name of the state of
7 Washington in the superior court of Thurston county, or of any county
8 in which the violator does business, to recover the penalty. If the
9 amount of the penalty is not paid to the authority within thirty days
10 after it becomes due and payable, the authority may bring an action to
11 recover the penalty in the superior court of the county of the
12 authority's main office or of any county in which the violator does
13 business. In these actions, the procedures and rules of evidence shall
14 be the same as in an ordinary civil action.

15 (5) All penalties recovered shall be paid into the state treasury
16 and credited to the general fund except those penalties imposed
17 pursuant to RCW 18.104.155, which shall be credited to the reclamation
18 account as provided in RCW 18.104.155(7), RCW 70.94.431, the
19 disposition of which shall be governed by that provision, RCW
20 70.105.080, which shall be credited to the hazardous waste control and
21 elimination account, created by RCW 70.105.180, and RCW 90.56.330,
22 which shall be credited to the coastal protection fund created by RCW
23 90.48.390.

24 **Sec. 14.** RCW 43.21B.310 and 1992 c 73 s 3 are each amended to read
25 as follows:

26 (1) Except as provided in subsection (2) of this section, any order
27 issued by the department, the administrator of the office of marine
28 safety, or authority pursuant to RCW 70.94.211, 70.94.332, 70.105.095,
29 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any provision
30 enacted after July 26, 1987, or any permit, certificate, or license
31 issued by the department may be appealed to the pollution control
32 hearings board if the appeal is filed with the board and served on the
33 department or authority within thirty days after receipt of the order.
34 Except as provided under chapter 70.105D RCW, (~~this is~~) these are the
35 exclusive means of appeal of such an order.

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

1 (~~(3)~~) (b) At any time during the pendency of an appeal of such an
2 order to the board or to an administrative law judge acting pursuant to
3 RCW 34.05.425(3), the appellant may apply pursuant to RCW 43.21B.320 to
4 the hearings board or administrative law judge for a stay of the order
5 or for the removal thereof.

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

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

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

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

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

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

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

18 (~~(5)~~) (d) Upon failure to comply with any final order of the
19 department or the administrator or the administrative law judge acting
20 pursuant to RCW 34.05.425(3), the attorney general, on request of the
21 department or the administrator, may bring an action in the superior
22 court of the county where the violation occurred or the potential
23 violation is about to occur to obtain such relief as necessary,
24 including injunctive relief, to insure compliance with the order. The
25 air authorities may bring similar actions to enforce their orders.

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

30 (2) Water-related agency actions of the department listed in RCW
31 43.21A.070 may not be appealed to the hearings board; they may be
32 appealed to an administrative law judge as provided in RCW
33 34.05.425(3).

34 **Sec. 15.** RCW 43.21B.320 and 1987 c 109 s 7 are each amended to
35 read as follows:

36 (1) A person appealing to the hearings board, or to an
37 administrative law judge acting pursuant to RCW 34.05.425(3), an order
38 of the department or an authority, not stayed by the issuing agency,

1 may obtain a stay of the effectiveness of that order only as set forth
2 in this section.

3 (2) An appealing party may request a stay by including such a
4 request in the appeal document, in a subsequent motion, or by such
5 other means as the rules of the hearings board or the procedural rules
6 developed by the chief administrative law judge for appeals made
7 pursuant to RCW 34.05.425(3) shall prescribe. The request must be
8 accompanied by a statement of grounds for the stay and evidence setting
9 forth the factual basis upon which request is based. The hearings
10 board or the administrative law judge shall hear the request for a stay
11 as soon as possible. The hearing on the request for stay may be
12 consolidated with the hearing on the merits.

13 (3) The applicant may make a prima facie case for stay if the
14 applicant demonstrates either a likelihood of success on the merits of
15 the appeal or irreparable harm. Upon such a showing, the hearings
16 board or administrative law judge shall grant the stay unless the
17 department or authority demonstrates either (a) a substantial
18 probability of success on the merits or (b) likelihood of success on
19 the merits and an overriding public interest which justifies denial of
20 the stay.

21 (4) Unless otherwise stipulated by the parties, the hearings board
22 or administrative law judge, after granting or denying an application
23 for a stay, shall expedite the hearing and decision on the merits.

24 (5) Any party or other person aggrieved by the grant or denial of
25 a stay by the hearings board may petition the superior court for
26 Thurston county for review of that decision pursuant to chapter 34.05
27 RCW pending the appeal on the merits before the board. Any party or
28 other person aggrieved by the grant or denial of a stay by an
29 administrative law judge acting pursuant to RCW 34.05.425(3) may
30 petition the superior court for the county that will be directly and
31 immediately affected by the stay. The superior court shall expedite
32 its review of the decision of the hearings board or administrative law
33 judge.

34 **Sec. 16.** RCW 43.27A.190 and 1987 c 109 s 11 are each amended to
35 read as follows:

36 Notwithstanding and in addition to any other powers granted to the
37 department of ecology, whenever it appears to the department that a

1 person is violating or is about to violate any of the provisions of the
2 following:

3 (1) Chapter 90.03 RCW; or

4 (2) Chapter 90.44 RCW; or

5 (3) Chapter 86.16 RCW; or

6 (4) Chapter 43.37 RCW; or

7 (5) Chapter 43.27A RCW; or

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

10 (7) A rule or regulation adopted, or a directive or order issued by
11 the department relating to subsections (1) through (6) of this section;
12 the department may cause a written regulatory order to be served upon
13 (~~said~~) the person either personally, or by registered or certified
14 mail delivered to addressee only with return receipt requested and
15 acknowledged by him or her. The order shall specify the provision of
16 the statute, rule, regulation, directive or order alleged to be or
17 about to be violated, and the facts upon which the conclusion of
18 violating or potential violation is based, and shall order the act
19 constituting the violation or the potential violation to cease and
20 desist or, in appropriate cases, shall order necessary corrective
21 action to be taken with regard to such acts within a specific and
22 reasonable time. The regulation of a headgate or controlling works as
23 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other
24 person so authorized by the department shall constitute a regulatory
25 order within the meaning of this section. A regulatory order issued
26 hereunder shall become effective immediately upon receipt by the person
27 to whom the order is directed, except for regulations under RCW
28 90.03.070 which shall become effective when a written notice is
29 attached as provided therein. Any person aggrieved by such order may
30 appeal the order pursuant to RCW 43.21B.310 unless the order is a
31 water-related agency action of the department listed in RCW 43.21A.070,
32 in which case it may be appealed to an administrative law judge as
33 provided in RCW 34.05.425(3).

34 **Sec. 17.** RCW 90.03.383 and 1991 c 350 s 1 are each amended to read
35 as follows:

36 (1) The legislature recognizes the value of interties for improving
37 the reliability of public water systems, enhancing their management,
38 and more efficiently utilizing the increasingly limited resource.

1 Given the continued growth in the most populous areas of the state, the
2 increased complexity of public water supply management, and the trend
3 toward regional planning and regional solutions to resource issues,
4 interconnections of public water systems through interties provide a
5 valuable tool to ensure reliable public water supplies for the citizens
6 of the state. Public water systems have been encouraged in the past to
7 utilize interties to achieve public health and resource management
8 objectives. The legislature finds that it is in the public interest to
9 recognize interties existing and in use as of January 1, 1991, and to
10 have associated water rights modified by the department of ecology to
11 reflect current use of water through those interties, pursuant to
12 subsection (3) of this section. The legislature further finds it in
13 the public interest to develop a coordinated process to review
14 proposals for interties commencing use after January 1, 1991.

15 (2) For the purposes of this section, the following definitions
16 shall apply:

17 (a) "Interties" are interconnections between public water systems
18 permitting exchange or delivery of water between those systems for
19 other than emergency supply purposes, where such exchange or delivery
20 is within established instantaneous and annual withdrawal rates
21 specified in the systems' existing water right permits or certificates,
22 or contained in claims filed pursuant to chapter 90.14 RCW, and which
23 results in better management of public water supply consistent with
24 existing rights and obligations. Interties include interconnections
25 between public water systems permitting exchange or delivery of water
26 to serve as primary or secondary sources of supply, but do not include
27 development of new sources of supply to meet future demand.

28 (b) "Service area" is the area designated in a water system plan or
29 a coordinated water system plan pursuant to chapter 43.20 or 70.116 RCW
30 respectively. When a public water system does not have a designated
31 service area subject to the approval process of those chapters, the
32 service area shall be the designated place of use contained in the
33 water right permit or certificate, or contained in the claim filed
34 pursuant to chapter 90.14 RCW.

35 (3) Public water systems with interties existing and in use as of
36 January 1, 1991, or that have received written approval from the
37 department of health prior to that date, shall file written notice of
38 those interties with the department of health and the department of
39 ecology. The notice may be incorporated into the public water system's

1 five-year update of its water system plan, but shall be filed no later
2 than June 30, 1996. The notice shall identify the location of the
3 intertie; the dates of its first use; the purpose, capacity, and
4 current use; the intertie agreement of the parties and the service
5 areas assigned; and other information reasonably necessary to modify
6 the water right permit. Notwithstanding the provisions of RCW
7 90.03.380 and 90.44.100, for public water systems with interties
8 existing and in use as of January 1, 1991, the department of ecology,
9 upon receipt of notice meeting the requirements of this subsection,
10 shall, as soon as practicable, modify the place of use descriptions in
11 the water right permits, certificates, or claims to reflect the actual
12 use through such interties, provided that the place of use is within
13 service area designations established in a water system plan approved
14 pursuant to chapter 43.20 RCW, or a coordinated water system plan
15 approved pursuant to chapter 70.116 RCW, and further provided that the
16 water used is within the instantaneous and annual withdrawal rates
17 specified in the water right permit and that no outstanding complaints
18 of impairment to existing water rights have been filed with the
19 department of ecology prior to September 1, 1991. Where such
20 complaints of impairment have been received, the department of ecology
21 shall make all reasonable efforts to resolve them in a timely manner
22 through agreement of the parties or through available administrative
23 remedies.

24 (4) Notwithstanding the provisions of RCW 90.03.380 and 90.44.100,
25 exchange or delivery of water through interties commencing use after
26 January 1, 1991, shall be permitted when the intertie improves overall
27 system reliability, enhances the manageability of the systems, provides
28 opportunities for conjunctive use, or delays or avoids the need to
29 develop new water sources, and otherwise meets the requirements of this
30 section, provided that each public water system's water use shall not
31 exceed the instantaneous or annual withdrawal rate specified in its
32 water right authorization, shall not adversely affect existing water
33 rights, and shall not be inconsistent with state-approved plans such as
34 water system plans or other plans which include specific proposals for
35 construction of interties. Interties commencing use after January 1,
36 1991, shall not be inconsistent with regional water resource plans
37 developed pursuant to chapter 90.54 RCW.

38 (5) For public water systems subject to the approval process of
39 chapter 43.20 RCW or chapter 70.116 RCW, proposals for interties

1 commencing use after January 1, 1991, shall be incorporated into water
2 system plans pursuant to chapter 43.20 RCW or coordinated water system
3 plans pursuant to chapter 70.116 RCW and submitted to the department of
4 health and the department of ecology for review and approval as
5 provided for in subsections (5) through (9) of this section. The plan
6 shall state how the proposed intertie will improve overall system
7 reliability, enhance the manageability of the systems, provide
8 opportunities for conjunctive use, or delay or avoid the need to
9 develop new water sources.

10 (6) The department of health shall be responsible for review and
11 approval of proposals for new interties. In its review the department
12 of health shall determine whether the intertie satisfies the criteria
13 of subsection (4) of this section, with the exception of water rights
14 considerations, which are the responsibility of the department of
15 ecology, and shall determine whether the intertie is necessary to
16 address emergent public health or safety concerns associated with
17 public water supply.

18 (7) If the intertie is determined by the department of health to be
19 necessary to address emergent public health or safety concerns
20 associated with public water supply, the public water system shall
21 amend its water system plan as required and shall file an application
22 with the department of ecology to change its existing water right to
23 reflect the proposed use of the water as described in the approved
24 water system plan. The department of ecology shall process the
25 application for change pursuant to RCW 90.03.380 or 90.44.100 as
26 appropriate, except that, notwithstanding the requirements of those
27 sections regarding notice and protest periods, applicants shall be
28 required to publish notice one time, and the comment period shall be
29 fifteen days from the date of publication of the notice. Within sixty
30 days of receiving the application, the department of ecology shall
31 issue findings and advise the department of health if existing water
32 rights are determined to be adversely affected. If no determination is
33 provided by the department of ecology within the sixty-day period, the
34 department of health shall proceed as if existing rights are not
35 adversely affected by the proposed intertie. The department of ecology
36 may obtain an extension of the sixty-day period by submitting written
37 notice to the department of health and to the applicant indicating a
38 definite date by which its determination will be made. No additional

1 extensions shall be granted, and in no event shall the total review
2 period for the department of ecology exceed one hundred eighty days.

3 (8) If the department of health determines the proposed intertie
4 appears to meet the requirements of subsection (4) of this section but
5 is not necessary to address emergent public health or safety concerns
6 associated with public water supply, the department of health shall
7 instruct the applicant to submit to the department of ecology an
8 application for change to the underlying water right or claim as
9 necessary to reflect the new place of use. The department of ecology
10 shall consider the applications pursuant to the provisions of RCW
11 90.03.380 and 90.44.100 as appropriate. If in its review of proposed
12 interties and associated water rights the department of ecology
13 determines that additional information is required to act on the
14 application, the department may request applicants to provide
15 information necessary for its decision, consistent with agency rules
16 and written guidelines. Parties disagreeing with the decision of the
17 department of ecology ((~~en~~)) to approve or deny the application for
18 change in place of use may appeal the decision to ((~~the pollution~~
19 ~~control hearings board~~)) an administrative law judge as provided in RCW
20 34.05.425(3).

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

27 **Sec. 18.** RCW 90.14.130 and 1987 c 109 s 13 are each amended to
28 read as follows:

29 When it appears to the department of ecology that a person entitled
30 to the use of water has not beneficially used his or her water right or
31 some portion thereof, and it appears that said right has or may have
32 reverted to the state because of such nonuse, as provided by RCW
33 90.14.160, 90.14.170, or 90.14.180, the department of ecology shall
34 notify such person by order: PROVIDED, That where a company,
35 association, district, or the United States has filed a blanket claim
36 under the provisions of RCW 90.14.060 for the total benefits of those
37 served by it, the notice shall be served on such company, association,
38 district or the United States and not upon any of its individual water

1 users who may not have used the water or some portion thereof which
2 they were entitled to use. The order shall contain: (1) A description
3 of the water right, including the approximate location of the point of
4 diversion, the general description of the lands or places where such
5 waters were used, the water source, the amount involved, the purpose of
6 use, and the apparent authority upon which the right is based; (2) a
7 statement that unless sufficient cause be shown on appeal the water
8 right will be declared relinquished; and (3) a statement that such
9 order may be appealed to (~~the pollution control hearings board~~) an
10 administrative law judge. Any person aggrieved by such an order may
11 appeal it to (~~the pollution control hearings board~~) an administrative
12 law judge pursuant to RCW (~~43.21B.310~~) 34.05.425(3). The order shall
13 be served by registered or certified mail to the last known address of
14 the person and be posted at the point of division or withdrawal. The
15 order by itself shall not alter the recipient's right to use water, if
16 any.

17 **Sec. 19.** RCW 90.14.190 and 1987 c 109 s 14 are each amended to
18 read as follows:

19 Any person feeling aggrieved by any decision of the department of
20 ecology may have the same reviewed by an administrative law judge
21 pursuant to RCW (~~43.21B.310~~) 34.05.425(3). In any such review, the
22 findings of fact as set forth in the report of the department of
23 ecology shall be prima facie evidence of the fact of any waiver or
24 relinquishment of a water right or portion thereof. If the (~~hearings~~
25 ~~board~~) administrative law judge affirms the decision of the
26 department, a party seeks review in superior court of (~~that hearings~~
27 ~~board~~) the administrative law judge's decision pursuant to chapter
28 34.05 RCW, and the court determines that the party was injured by an
29 arbitrary, capricious, or erroneous order of the department, the court
30 may award reasonable attorneys' fees.

31 **Sec. 20.** RCW 90.14.200 and 1989 c 175 s 180 are each amended to
32 read as follows:

33 (1) All matters relating to the implementation and enforcement of
34 this chapter by the department of ecology shall be carried out in
35 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
36 except where the provisions of this chapter expressly conflict with
37 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are

1 adjudicative proceedings within the meaning of chapter 34.05 RCW.
2 Final decisions of the department of ecology in these proceedings are
3 subject to review by an administrative law judge in accordance with
4 (~~chapter 43.21B~~) RCW 34.05.425(3).

5 (2) RCW 90.14.130 provides nonexclusive procedures for determining
6 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
7 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
8 among other proceedings, general adjudication proceedings initiated
9 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
10 apply to litigation involving determinations of the department of
11 ecology under RCW 90.03.290 relating to the impairment of existing
12 rights.

13 **Sec. 21.** RCW 90.66.080 and 1979 c 3 s 8 are each amended to read
14 as follows:

15 The department is hereby empowered to promulgate such rules as may
16 be necessary to carry out the provisions of this chapter. Decisions of
17 the department, other than rule making, shall be subject to review by
18 an administrative law judge in accordance with (~~chapter 43.21B~~) RCW
19 34.05.425(3).

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