
SUBSTITUTE HOUSE BILL 1774

State of Washington

54th Legislature

1995 Regular Session

By House Committee on Agriculture & Ecology (originally sponsored by Representatives Chandler, Mastin, Basich and Honeyford)

Read first time 03/01/95.

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; adding a new section to
6 chapter 43.21B RCW; and creating a new section.

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

8 NEW SECTION. **Sec. 1.** The legislature finds that it is difficult
9 for the pollution control hearings board to process all the appeals
10 pending before the board in an expedited manner because of the size of
11 the caseload. Members of the public suffer severe economic
12 consequences when their appeals cannot be processed quickly, especially
13 when the appeals pertain to water-related decisions of the department
14 of ecology. The purpose of this act is to provide for the expedited
15 review of certain water-related decisions of the department of ecology.

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

1 (1) The administrative procedure act, chapter 34.05 RCW, shall
2 apply to the review of ~~((decisions))~~ a water-related agency action by
3 the director ~~((to the same extent as it applied to decisions issued by~~
4 ~~the directors of the various departments whose powers, duties and~~
5 ~~functions are transferred by this 1970 amendatory act to the department~~
6 ~~of ecology))~~ when an administrative hearing is elected under section 22
7 of this act. The administrative procedure act shall further apply to
8 all other decisions of the director ~~((as in chapter 34.05 RCW~~
9 ~~provided))~~ except as limited by RCW 43.21B.240. In any adjudicative
10 proceeding commenced in response to a water-related agency action by
11 the department, an administrative law judge shall serve as the
12 presiding officer for the hearing in accordance with RCW 34.05.425(3).

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

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

18 (b) A decision to enforce the conditions of a permit for, or right
19 to, the beneficial use of water or to require any person to discontinue
20 the use of water; and

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

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

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

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

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

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

35 (2) An agency expressly exempted under RCW 34.12.020(4) or other
36 statute from the provisions of chapter 34.12 RCW or an institution of
37 higher education shall designate a presiding officer as provided by
38 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, when an administrative hearing is elected under section
4 22 of this act, shall be an administrative law judge assigned by the
5 office of administrative hearings in accordance with chapter 34.12 RCW.
6 The administrative law judge shall make the final decision and enter
7 the final order for these hearings.

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

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

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

19 (~~(6)~~) (7) When the presiding officer is an administrative law
20 judge, the provisions of this section regarding disqualification for
21 cause are in addition to the motion of prejudice available under RCW
22 34.12.050.

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

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

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

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

34 (1) Except in situations governed by subsection (2) (~~(or)~~), (3), or
35 (4) of this section, within ninety days after receipt of the
36 application or of the response to a timely request made by the agency
37 under subsection (2) of this section, the agency shall do one of the
38 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 under chapter 34.05 RCW in response to a water-related agency action
24 taken by the department of ecology, as defined in RCW 43.21A.070, the
25 department of ecology shall within thirty days of the receipt of the
26 application commence an adjudicatory proceeding in accordance with this
27 chapter.

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

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

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

35 (b) If the presiding officer is a person designated by the agency
36 to make the final decision and enter the final order, the presiding
37 officer shall enter a final order, or is an administrative law judge
38 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 under
2 chapter 34.05 RCW in response to a water-related agency action by the
3 department of ecology, as defined in RCW 43.21A.070, the hearing shall
4 be conducted by an administrative law judge assigned under this chapter
5 according to procedural rules developed by the chief administrative law
6 judge. The chief administrative law judge shall ensure that hearings
7 pertaining to water-related agency actions by the department of ecology
8 will be conducted in the general area where the petitioner resides, or
9 provide for the hearings to be conducted by telephone. In assigning
10 administrative law judges, the chief administrative law judge shall
11 wherever practical (1) use personnel having expertise in the field or
12 subject matter of the hearing, and (2) assign administrative law judges
13 primarily to the hearings of particular agencies on a long-term basis.

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

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

21 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
22 70.105.080, 70.107.050, 88.46.090, (~~(90.03.6007)~~) 90.48.144, 90.56.310,
23 and 90.56.330.

24 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
25 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
26 (~~(90.14.1307)~~) and 90.48.120.

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

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

35 (e) Decisions of local health departments regarding the issuance
36 and enforcement of permits to use or dispose of biosolids under RCW
37 70.95J.080.

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

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

6 (a) The hearings board shall have no jurisdiction whatsoever to
7 review water-related agency actions of the department of ecology listed
8 in RCW 43.21A.070, to review orders pertaining to the relinquishment of
9 a water right under RCW 90.14.130, or to review proceedings regarding
10 general adjudications of water rights conducted pursuant to chapter
11 90.03 or 90.44 RCW.

12 (b) The following hearings shall not be conducted by the hearings
13 board:

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

16 ~~((b))~~ (ii) Hearings conducted by the department pursuant to RCW
17 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
18 90.44.180.

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

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

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

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

28 The administrative procedure act, chapter 34.05 RCW, shall apply to
29 the appeal of rules and regulations adopted by the board to the same
30 extent as it applied to the review of rules and regulations adopted by
31 the directors and/or boards or commissions of the various departments
32 whose powers, duties and functions were transferred by section 6,
33 chapter 62, Laws of 1970 ex. sess. to the department. Except with
34 regard to water-related agency actions by the department, as defined in
35 RCW 43.21A.070, which are appealable to a superior court or to an
36 administrative law judge pursuant to section 22 of this act, and orders
37 pertaining to the relinquishment of a water right under RCW 90.14.130,
38 all other decisions and orders of the director and all decisions of air

1 pollution control boards or authorities established pursuant to chapter
2 70.94 RCW shall be subject to review by the hearings board as provided
3 in this chapter.

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

6 The department and air authorities shall not have authority to hold
7 adjudicative proceedings pursuant to the Administrative Procedure Act,
8 chapter 34.05 RCW, except with regard to water-related agency actions
9 of the department listed in RCW 43.21A.070 that may be appealed to an
10 administrative law judge as provided in RCW 34.05.425(3). ((Such)) All
11 other hearings, except for water-related agency actions that are
12 appealed to a superior court pursuant to section 22 of this act and
13 appeals of orders pertaining to the relinquishment of a water right
14 under RCW 90.14.130, shall be held by the pollution control hearings
15 board.

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

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

36 (2) Any penalty imposed under this section may be appealed to the
37 pollution control hearings board in accordance with this chapter if the

1 appeal is filed with the hearings board and served on the department,
2 the administrator, or authority thirty days after receipt by the person
3 penalized of the notice imposing the penalty or thirty days after
4 receipt of the notice of disposition of the application for relief from
5 penalty.

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

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

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

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

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

24 (5) All penalties recovered shall be paid into the state treasury
25 and credited to the general fund except those penalties imposed
26 pursuant to RCW 18.104.155, which shall be credited to the reclamation
27 account as provided in RCW 18.104.155(7), RCW 70.94.431, the
28 disposition of which shall be governed by that provision, RCW
29 70.105.080, which shall be credited to the hazardous waste control and
30 elimination account, created by RCW 70.105.180, and RCW 90.56.330,
31 which shall be credited to the coastal protection fund created by RCW
32 90.48.390.

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

35 (1) Except as provided in subsection (2) of this section, any order
36 issued by the department, the administrator of the office of marine
37 safety, or authority pursuant to RCW 70.94.211, 70.94.332, 70.105.095,
38 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any provision

1 enacted after July 26, 1987, or any permit, certificate, or license
2 issued by the department may be appealed to the pollution control
3 hearings board if the appeal is filed with the board and served on the
4 department or authority within thirty days after receipt of the order.
5 Except as provided under chapter 70.105D RCW, (~~this is~~) these are the
6 exclusive means of appeal of such an order.

7 ((+2)) (a) The department, the administrator, or the authority in
8 its discretion may stay the effectiveness of an order during the
9 pendency of such an appeal.

10 ((+3)) (b) At any time during the pendency of an appeal of such an
11 order to the board or to an administrative law judge acting pursuant to
12 RCW 34.05.425(3), the appellant may apply pursuant to RCW 43.21B.320 to
13 the hearings board or administrative law judge for a stay of the order
14 or for the removal thereof.

15 ((+4)) (c) Any appeal before the hearings board must contain the
16 following in accordance with the rules of the hearings board:

17 ((+a)) (i) The appellant's name and address;

18 ((+b)) (ii) The date and docket number of the order, permit, or
19 license appealed;

20 ((+c)) (iii) A description of the substance of the order, permit,
21 or license that is the subject of the appeal;

22 ((+d)) (iv) A clear, separate, and concise statement of every
23 error alleged to have been committed;

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

26 ((+f)) (vi) A statement setting forth the relief sought.

27 ((+5)) (d) Upon failure to comply with any final order of the
28 department or the administrator or the administrative law judge acting
29 pursuant to RCW 34.05.425(3), the attorney general, on request of the
30 department or the administrator, may bring an action in the superior
31 court of the county where the violation occurred or the potential
32 violation is about to occur to obtain such relief as necessary,
33 including injunctive relief, to insure compliance with the order. The
34 air authorities may bring similar actions to enforce their orders.

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

1 (2) Water-related agency actions of the department listed in RCW
2 43.21A.070 may not be appealed to the hearings board; they may be
3 appealed either to an administrative law judge or to a superior court
4 as provided in section 22 of this act. Appeals of orders pertaining to
5 the relinquishment of a water right shall be filed in superior court as
6 provided by RCW 90.14.130.

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

9 (1) A person appealing to the hearings board, or to an
10 administrative law judge acting pursuant to RCW 34.05.425(3), an order
11 of the department or an authority, not stayed by the issuing agency,
12 may obtain a stay of the effectiveness of that order only as set forth
13 in this section.

14 (2) An appealing party may request a stay by including such a
15 request in the appeal document, in a subsequent motion, or by such
16 other means as the rules of the hearings board or the procedural rules
17 developed by the chief administrative law judge for appeals made
18 pursuant to RCW 34.05.425(3) shall prescribe. The request must be
19 accompanied by a statement of grounds for the stay and evidence setting
20 forth the factual basis upon which request is based. The hearings
21 board or the administrative law judge shall hear the request for a stay
22 as soon as possible. The hearing on the request for stay may be
23 consolidated with the hearing on the merits.

24 (3) The applicant may make a prima facie case for stay if the
25 applicant demonstrates either a likelihood of success on the merits of
26 the appeal or irreparable harm. Upon such a showing, the hearings
27 board or administrative law judge shall grant the stay unless the
28 department or authority demonstrates either (a) a substantial
29 probability of success on the merits or (b) likelihood of success on
30 the merits and an overriding public interest which justifies denial of
31 the stay.

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

35 (5) Any party or other person aggrieved by the grant or denial of
36 a stay by the hearings board may petition the superior court for
37 Thurston county for review of that decision pursuant to chapter 34.05
38 RCW pending the appeal on the merits before the board. Any party or

1 other person aggrieved by the grant or denial of a stay by an
2 administrative law judge acting pursuant to RCW 34.05.425(3) may
3 petition the superior court for the county that will be directly and
4 immediately affected by the stay. The superior court shall expedite
5 its review of the decision of the hearings board or administrative law
6 judge.

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

9 Notwithstanding and in addition to any other powers granted to the
10 department of ecology, whenever it appears to the department that a
11 person is violating or is about to violate any of the provisions of the
12 following:

13 (1) Chapter 90.03 RCW; or

14 (2) Chapter 90.44 RCW; or

15 (3) Chapter 86.16 RCW; or

16 (4) Chapter 43.37 RCW; or

17 (5) Chapter 43.27A RCW; or

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

20 (7) A rule or regulation adopted, or a directive or order issued by
21 the department relating to subsections (1) through (6) of this section;
22 the department may cause a written regulatory order to be served upon
23 ((said)) the person either personally, or by registered or certified
24 mail delivered to addressee only with return receipt requested and
25 acknowledged by him or her. The order shall specify the provision of
26 the statute, rule, regulation, directive or order alleged to be or
27 about to be violated, and the facts upon which the conclusion of
28 violating or potential violation is based, and shall order the act
29 constituting the violation or the potential violation to cease and
30 desist or, in appropriate cases, shall order necessary corrective
31 action to be taken with regard to such acts within a specific and
32 reasonable time. The regulation of a headgate or controlling works as
33 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other
34 person so authorized by the department shall constitute a regulatory
35 order within the meaning of this section. A regulatory order issued
36 hereunder shall become effective immediately upon receipt by the person
37 to whom the order is directed, except for regulations under RCW
38 90.03.070 which shall become effective when a written notice is

1 attached as provided therein. Any person aggrieved by such order may
2 appeal the order pursuant to RCW 43.21B.310 unless the order is a
3 water-related agency action of the department listed in RCW 43.21A.070,
4 in which case it may be appealed to an administrative law judge or to
5 a superior court as provided in section 22 of this act.

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

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

25 (2) For the purposes of this section, the following definitions
26 shall apply:

27 (a) "Interties" are interconnections between public water systems
28 permitting exchange or delivery of water between those systems for
29 other than emergency supply purposes, where such exchange or delivery
30 is within established instantaneous and annual withdrawal rates
31 specified in the systems' existing water right permits or certificates,
32 or contained in claims filed pursuant to chapter 90.14 RCW, and which
33 results in better management of public water supply consistent with
34 existing rights and obligations. Interties include interconnections
35 between public water systems permitting exchange or delivery of water
36 to serve as primary or secondary sources of supply, but do not include
37 development of new sources of supply to meet future demand.

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

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

36 (4) Notwithstanding the provisions of RCW 90.03.380 and 90.44.100,
37 exchange or delivery of water through interties commencing use after
38 January 1, 1991, shall be permitted when the intertie improves overall
39 system reliability, enhances the manageability of the systems, provides

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

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

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

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

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

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

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

1 **Sec. 18.** 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 the county where the land is located upon which the
25 water was used. Any such appeal to superior court shall be de novo.
26 The order shall be served by registered or certified mail to the last
27 known address of the person and be posted at the point of division or
28 withdrawal. The order by itself shall not alter the recipient's right
29 to use water, if any.

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

32 Any person feeling aggrieved by any decision of the department of
33 ecology may have the same reviewed by an administrative law judge or a
34 superior court pursuant to ((RCW 43.21B.310)) section 22 of this act.
35 In any such review, the findings of fact as set forth in the report of
36 the department of ecology shall be prima facie evidence of the fact of
37 any waiver or relinquishment of a water right or portion thereof. If
38 the (~~hearings board~~) administrative law judge affirms the decision of

1 the department, a party seeks review in superior court of (~~that~~
2 ~~hearings board~~) the administrative law judge's decision pursuant to
3 chapter 34.05 RCW, and the court determines that the party was injured
4 by an arbitrary, capricious, or erroneous order of the department, the
5 court may award reasonable attorneys' fees. Any order regarding the
6 relinquishment of a water right shall be appealed pursuant to RCW
7 90.14.130.

8 **Sec. 20.** 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 that section. Other final
18 decisions of the department of ecology under this chapter are subject
19 to review by an administrative law judge or a superior court in
20 accordance with (~~chapter 43.21B RCW~~) section 22 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. 21.** RCW 90.66.080 and 1979 c 3 s 8 are each amended to read
30 as follows:

31 The department is hereby empowered to promulgate such rules as may
32 be necessary to carry out the provisions of this chapter. Decisions of
33 the department, other than rule making, shall be subject to review by
34 an administrative law judge or a superior court in accordance with
35 (~~chapter 43.21B RCW~~) section 22 of this act.

1 NEW SECTION. **Sec. 22.** A new section is added to chapter 43.21B
2 RCW to read as follows:

3 A person who is aggrieved or adversely affected by a water quantity
4 decision, as defined in RCW 43.21A.070, may appeal the decision either
5 to an administrative law judge under RCW 34.05.425(3) or directly to a
6 superior court. Any direct appeal to a superior court as authorized by
7 this section shall be de novo and must be filed in the superior court
8 in the county that will be directly and immediately affected by the
9 decision.

10 NEW SECTION. **Sec. 23.** If any provision of this act or its
11 application to any person or circumstance is held invalid, the
12 remainder of the act or the application of the provision to other
13 persons or circumstances is not affected.

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