

# SENATE BILL REPORT

## SB 5041

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As Reported By Senate Committee On:  
Agriculture & Environment, March 4, 1997

**Title:** An act relating to environmental appeals.

**Brief Description:** Implementing appeals procedures and judicial review standards for several environmental regulation hearings and appeals boards.

**Sponsors:** Senator Benton.

**Brief History:**

**Committee Activity:** Agriculture & Environment: 1/21/97, 3/4/97 [DPS, DNP].

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### SENATE COMMITTEE ON AGRICULTURE & ENVIRONMENT

**Majority Report:** That Substitute Senate Bill No. 5041 be substituted therefor, and the substitute bill do pass.

Signed by Senators Morton, Chair; Swecker, Vice Chair; Rasmussen and Oke.

**Minority Report:** Do not pass.

Signed by Senators Fraser and McAuliffe.

**Staff:** Richard Duggan (786-7414)

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

Appeals from a wide variety of decisions by the Director of the Department of Ecology, air pollution control boards or authorities, and local health departments may be taken only to the PCHB. Although the APA prescribes procedures generally applicable to adjudicative proceedings of this nature, the PCHB has exercised the authority granted to it by the Legislature and has adopted its own rules of practice and procedure. Those rules provide for de novo review by it and for voluntary pre-hearing conferences but do not include a formal mediation process.

The procedures established by the APA for judicial review of agency decisions are applicable to PCHB decisions. The superior court, or the Court of Appeals in limited circumstances, determines whether substantial evidence supports the action of the agency and whether that action was taken in conformity with the law. The court is limited to the record in determining factual questions. Additional evidence may be taken only to aid it in deciding legal issues. The burden of proof in such a review is on the party asserting the invalidity of the agency action.

**Summary of Substitute Bill:** In appeals to superior court from decisions of the PCHB, the Hydraulic Appeals Board, and the Shorelines Hearings Board, the agency making the decision under appeal is given the burden of justifying that decision, and de novo review is made available to designated parties, essentially permit or water right holders or applicants.

For Department of Ecology (DOE) decisions which meet the definition of "water quantity decisions," appeals directly to superior court are authorized. DOE decisions relating to the relinquishment of a water right are made appealable to superior court only. Venue is established for judicial review of water quantity decisions and water right relinquishment decisions, overriding the APA, and the option of a de novo proceeding is given to an appellant permit holder.

A procedure is established providing for mediation of any water quantity decision appealed to the PCHB. At the option of the appellant, the board would arrange for a mediator, then hold its consideration of the appeal in abeyance for up to 180 days.

The PCHB is directed to include certain evidentiary requirements in its rules of practice and procedure.

The authority of the Shorelines Hearings Board to schedule hearings prior to expiration of the period allowed for intervention of the attorney general is withdrawn.

**Substitute Bill Compared to Original Bill:** De novo review by superior courts is made optional, and application of the bill to decisions of to the growth management hearings boards and the Forest Practices Appeals Board is eliminated.

Provisions requiring certain procedural rules and withdrawing the Shorelines Hearings Board authority to schedule hearings without waiting for the Attorney General's decision on intervening were left unchanged in the substitute. Special treatment of water quantity decisions and water rights relinquishment decisions is added, as is provision for mediation.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Peer review, rather than trials by experts, is a basic principle of founding fathers. Optional de novo review gives parties concerned with due process an opportunity for a full hearing. Proceedings before the PCHB are not necessarily less expensive or faster than de novo court review would be, and even if they were it would not justify curtailing constitutional rights. There is no guarantee that boards have special expertise to enhance reviews; may have biases. Mediation process would provide new opportunities to expedite the appeal process, and could be a tool to reduce costs and time involved.

**Testimony Against:** Benefits of administrative review by environmental review boards « consistent interpretation of laws, special expertise to aid in reviewing agency decisions « would be lost by allowing direct appeal to courts. Judicial review is faster when conducted

on the record. Imposition of the burden of proof on the agency is unusual and unfair. De novo review increases expense of appeals, and in some instances might violate constitutional separation of powers. Direct appeals could potentially increase work load on superior courts.

**Testified:** Scott Merriman, WA Environmental Council (con); Gary Smith, Ind. Bus. Assn.