

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 6068

Chapter 253, Laws of 1994

(partial veto)

53rd Legislature
1994 Regular Session

ENVIRONMENTAL HEARINGS BOARDS--APPEALS

EFFECTIVE DATE: 6/9/94

Passed by the Senate March 9, 1994
YEAS 45 NAYS 0

JOEL PRITCHARD

President of the Senate

Passed by the House March 9, 1994
YEAS 97 NAYS 0

BRIAN EBERSOLE

**Speaker of the
House of Representatives**

Approved April 1, 1994, with the
exception of section 11, which is
vetoed.

MIKE LOWRY

Governor of the State of Washington

CERTIFICATE

I, Marty Brown, Secretary of the
Senate of the State of Washington,
do hereby certify that the attached
is **ENGROSSED SUBSTITUTE SENATE BILL
6068** as passed by the Senate and the
House of Representatives on the
dates hereon set forth.

MARTY BROWN

Secretary

FILED

April 1, 1994 - 11:15 a.m.

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 6068

AS RECOMMENDED BY THE CONFERENCE COMMITTEE

Passed Legislature - 1994 Regular Session

State of Washington 53rd Legislature 1994 Regular Session

By Senate Committee on Ecology & Parks (originally sponsored by Senators Fraser, Deccio, Spanel and Oke)

Read first time 01/27/94.

1 AN ACT Relating to appeals involving boards within the
2 environmental hearings office; amending RCW 90.58.170, 90.58.180,
3 43.21C.075, 43.21B.180, 43.21B.190, 43.21B.230, and 76.09.230; adding
4 a new section to chapter 90.58 RCW; adding a new section to chapter
5 43.21B RCW; and creating new sections.

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

7 **Sec. 1.** RCW 90.58.170 and 1988 c 128 s 76 are each amended to read
8 as follows:

9 A shorelines hearings board sitting as a quasi judicial body is
10 hereby established within the environmental hearings office under RCW
11 43.21B.005. The shorelines hearings board shall be made up of six
12 members: Three members shall be members of the pollution control
13 hearings board; two members, one appointed by the association of
14 Washington cities and one appointed by the association of county
15 commissioners, both to serve at the pleasure of the associations; and
16 the commissioner of public lands or his or her designee. The chairman
17 of the pollution control hearings board shall be the chairman of the
18 shorelines hearings board. Except as provided in section 2 of this
19 act, a decision must be agreed to by at least four members of the board

1 to be final. The members of the shorelines ((appeals)) board shall
2 receive the compensation, travel, and subsistence expenses as provided
3 in RCW 43.03.050 and 43.03.060.

4 NEW SECTION. **Sec. 2.** A new section is added to chapter 90.58 RCW
5 to read as follows:

6 (1) In the case of an appeal involving a single family residence or
7 appurtenance to a single family residence, including a dock or pier
8 designed to serve a single family residence, the request for review may
9 be heard by a panel of three board members, at least one and not more
10 than two of whom shall be members of the pollution control hearings
11 board. Two members of the three must agree to issue a final decision
12 of the board.

13 (2) The board shall define by rule alternative processes to
14 expedite appeals. These alternatives may include: Mediation, upon
15 agreement of all parties; submission of testimony by affidavit; or
16 other forms that may lead to less formal and faster resolution of
17 appeals.

18 **Sec. 3.** RCW 90.58.180 and 1989 c 175 s 183 are each amended to
19 read as follows:

20 (1) Any person aggrieved by the granting, denying, or rescinding of
21 a permit on shorelines of the state pursuant to RCW 90.58.140 may seek
22 review from the shorelines hearings board by filing a request for the
23 same within thirty days of the date of filing as defined in RCW
24 90.58.140(6).

25 Concurrently with the filing of any request for review with the
26 board as provided in this section pertaining to a final order of a
27 local government, the requestor shall file a copy of his or her request
28 with the department and the attorney general. If it appears to the
29 department or the attorney general that the requestor has valid reasons
30 to seek review, either the department or the attorney general may
31 certify the request within thirty days after its receipt to the
32 shorelines hearings board following which the board shall then, but not
33 otherwise, review the matter covered by the requestor(~~(:—PROVIDED,~~
34 ~~That)).~~ The failure to obtain such certification shall not preclude
35 the requestor from obtaining a review in the superior court under any
36 right to review otherwise available to the requestor. The department
37 and the attorney general may intervene to protect the public interest

1 and insure that the provisions of this chapter are complied with at any
2 time within fifteen days from the date of the receipt by the department
3 or the attorney general of a copy of the request for review filed
4 pursuant to this section. The shorelines hearings board shall
5 initially schedule review proceedings on such requests for review
6 without regard as to whether such requests have or have not been
7 certified or as to whether the period for the department or the
8 attorney general to intervene has or has not expired, unless such
9 review is to begin within thirty days of such scheduling. If at the
10 end of the thirty day period for certification neither the department
11 nor the attorney general has certified a request for review, the
12 hearings board shall remove the request from its review schedule.

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

19 (3) The review proceedings authorized in subsections (1) and (2) of
20 this section are subject to the provisions of chapter 34.05 RCW
21 pertaining to procedures in adjudicative proceedings. Judicial review
22 of such proceedings of the shorelines hearings board (~~may be had as~~
23 ~~provided in~~) is governed by chapter 34.05 RCW.

24 (4) A local government may appeal to the shorelines hearings board
25 any rules, regulations, or guidelines adopted or approved by the
26 department within thirty days of the date of the adoption or approval.
27 The board shall make a final decision within sixty days following the
28 hearing held thereon.

29 If the board determines that the rule, regulation, or guideline:

30 (a) Is clearly erroneous in light of the policy of this chapter; or

31 (b) Constitutes an implementation of this chapter in violation of
32 constitutional or statutory provisions; or

33 (c) Is arbitrary and capricious; or

34 (d) Was developed without fully considering and evaluating all
35 material submitted to the department by the local government; or

36 (e) Was not adopted in accordance with required procedures;

37 the board shall enter a final decision declaring the rule, regulation,
38 or guideline invalid, remanding the rule, regulation, or guideline to
39 the department with a statement of the reasons in support of the

1 determination, and directing the department to adopt, after a thorough
2 consultation with the affected local government, a new rule,
3 regulation, or guideline. Unless the board makes one or more of the
4 determinations as hereinbefore provided, the board shall find the rule,
5 regulation, or guideline to be valid and enter a final decision to that
6 effect.

7 (5) Rules, regulations, and guidelines shall be subject to review
8 in superior court, if authorized pursuant to RCW (~~(34.05.538:~~
9 ~~PROVIDED, That)~~) 34.05.570(2). No review shall be granted by a
10 superior court on petition from a local government unless the local
11 government shall first have obtained review under subsection (4) of
12 this section and the petition for court review is filed within three
13 months after the date of final decision by the shorelines hearings
14 board.

15 **Sec. 4.** RCW 43.21C.075 and 1983 c 117 s 4 are each amended to read
16 as follows:

17 (1) Because a major purpose of this chapter is to combine
18 environmental considerations with public decisions, any appeal brought
19 under this chapter shall be linked to a specific governmental action.
20 The State Environmental Policy Act provides a basis for challenging
21 whether governmental action is in compliance with the substantive and
22 procedural provisions of this chapter. The State Environmental Policy
23 Act is not intended to create a cause of action unrelated to a specific
24 governmental action.

25 (2) Unless otherwise provided by this section:

26 (a) Appeals under this chapter shall be of the governmental action
27 together with its accompanying environmental determinations.

28 (b) Appeals of environmental determinations made (or lacking) under
29 this chapter shall be commenced within the time required to appeal the
30 governmental action which is subject to environmental review.

31 (3) If an agency has a procedure for appeals of agency
32 environmental determinations made under this chapter, such procedure:

33 (a) Shall not allow more than one agency appeal proceeding on a
34 procedural determination (the adequacy of a determination of
35 significance/nonsignificance or of a final environmental impact
36 statement), consistent with any state statutory requirements for
37 appeals to local legislative bodies. The appeal proceeding on a
38 determination of significance/nonsignificance may occur before the

1 agency's final decision on a proposed action. Such an appeal shall
2 also be allowed for a determination of significance/nonsignificance
3 which may be issued by the agency after supplemental review;

4 (b) Shall consolidate appeal of procedural issues and of
5 substantive determinations made under this chapter (such as a decision
6 to require particular mitigation measures or to deny a proposal) by
7 providing for simultaneous appeal of an agency decision on a proposal
8 and any environmental determinations made under this chapter, with the
9 exception of the threshold determination appeal as provided in (a) of
10 this subsection or an appeal to the local legislative authority under
11 RCW 43.21C.060 or other applicable state statutes;

12 (c) Shall provide for the preparation of a record for use in any
13 subsequent appeal proceedings, and shall provide for any subsequent
14 appeal proceedings to be conducted on the record, consistent with other
15 applicable law. An adequate record consists of findings and
16 conclusions, testimony under oath, and taped or written transcript. An
17 electronically recorded transcript will suffice for purposes of review
18 under this ((paragraph)) subsection; and

19 (d) Shall provide that procedural determinations made by the
20 responsible official shall be entitled to substantial weight.

21 (4) If a person aggrieved by an agency action has the right to
22 judicial appeal and if an agency has an appeal procedure, such person
23 shall, prior to seeking any judicial review, use such procedure if any
24 such procedure is available, unless expressly provided otherwise by
25 state statute.

26 (5) RCW 43.21C.080 establishes an optional "notice of action"
27 procedure which, if used, imposes a time period for appealing decisions
28 under this chapter. Some statutes and ordinances contain time periods
29 for challenging governmental actions which are subject to review under
30 this chapter, such as various local land use approvals (the "underlying
31 governmental action"). This section does not modify any such time
32 periods. This section governs when a judicial appeal must be brought
33 under this chapter where a "notice of action" is used, and/or where
34 there is another time period which is required by statute or ordinance
35 for challenging the underlying governmental action. In this
36 subsection, the term "appeal" refers to a judicial appeal only.

37 (a) If there is a time period for appealing the underlying
38 governmental action, appeals under this chapter shall be commenced
39 within thirty days. The agency shall give official notice stating the

1 date and place for commencing an appeal. If there is an agency
2 proceeding under subsection (3) of this section, the appellant shall,
3 prior to commencing a judicial appeal, submit to the responsible
4 official a notice of intent to commence a judicial appeal. This notice
5 of intent shall be given within the time period for commencing a
6 judicial appeal on the underlying governmental action.

7 (b) A notice of action under RCW 43.21C.080 may be used. If a
8 notice of action is used, judicial appeals shall be commenced within
9 the time period specified by RCW 43.21C.080, unless there is a time
10 period for appealing the underlying governmental action in which case
11 (a) of this subsection shall apply.

12 (c) Notwithstanding RCW 43.21C.080(1), if there is a time period
13 for appealing the underlying governmental action, a notice of action
14 may be published within such time period.

15 (6)(a) Judicial review of an appeal decision made by an agency
16 under RCW 43.21C.075(5) shall be on the record, consistent with other
17 applicable law.

18 (b) A taped or written transcript may be used. If a taped
19 transcript is to be reviewed, a record shall identify the location on
20 the taped transcript of testimony and evidence to be reviewed. Parties
21 are encouraged to designate only those portions of the testimony
22 necessary to present the issues raised on review, but if a party
23 alleges that a finding of fact is not supported by evidence, the party
24 should include in the record all evidence relevant to the disputed
25 finding. Any other party may designate additional portions of the
26 taped transcript relating to issues raised on review. A party may
27 provide a written transcript of portions of the testimony at the
28 party's own expense or apply to that court for an order requiring the
29 party seeking review to pay for additional portions of the written
30 transcript.

31 (c) Judicial review under this chapter shall without exception be
32 of the governmental action together with its accompanying environmental
33 determinations.

34 (7) Jurisdiction over the review of determinations under this
35 chapter in an appeal before an agency or superior court shall upon
36 consent of the parties be transferred in whole or part to the
37 shorelines hearings board. The shorelines hearings board shall hear
38 the matter and sign the final order expeditiously. The superior court
39 shall certify the final order of the shorelines hearings board and said

1 certified final order may only be appealed to an appellate court. In
2 the case of an appeal under this chapter regarding a project or other
3 matter that is also the subject of an appeal to the shorelines hearings
4 board under chapter 90.58 RCW, the shorelines hearings board shall have
5 sole jurisdiction over both the appeal under this section and the
6 appeal under chapter 90.58 RCW, shall consider them together, and shall
7 issue a final order.

8 (8) For purposes of this section and RCW 43.21C.080, the words
9 "action", "decision", and "determination" mean substantive agency
10 action including any accompanying procedural determinations under this
11 chapter (except where the word "action" means "appeal" in RCW
12 43.21C.080(2) and (3)). The word "action" in this section and RCW
13 43.21C.080 does not mean a procedural determination by itself made
14 under this chapter. The word "determination" includes any
15 environmental document required by this chapter and state or local
16 implementing rules. The word "agency" refers to any state or local
17 unit of government. The word "appeal" refers to administrative,
18 legislative, or judicial appeals.

19 (9) The court in its discretion may award reasonable attorney's
20 fees of up to one thousand dollars in the aggregate to the prevailing
21 party, including a governmental agency, on issues arising out of this
22 chapter if the court makes specific findings that the legal position of
23 a party is frivolous and without reasonable basis.

24 NEW SECTION. Sec. 5. A new section is added to chapter 43.21B RCW
25 to read as follows:

26 In an appeal that involves a penalty of five thousand dollars or
27 less, the appeal may be heard by one member of the board, whose
28 decision shall be the final decision of the board. The board shall
29 define by rule alternative procedures to expedite small appeals. These
30 alternatives may include: Mediation, upon agreement of all parties;
31 submission of testimony by affidavit; or other forms that may lead to
32 less formal and faster resolution of appeals.

33 **Sec. 6.** RCW 43.21B.180 and 1989 c 175 s 104 are each amended to
34 read as follows:

35 Judicial review of a decision of the hearings board (~~shall be de~~
36 ~~novo except when the decision has been rendered pursuant to a formal~~
37 ~~hearing elected under the provisions of this chapter, in which event~~

1 ~~judicial review~~)) may be obtained only pursuant to RCW 34.05.510
2 through 34.05.598. The director shall have the same right of review
3 from a decision made pursuant to RCW 43.21B.110 as does any person.

4 **Sec. 7.** RCW 43.21B.190 and 1988 c 202 s 43 are each amended to
5 read as follows:

6 Within thirty days after the final decision and order of the
7 hearings board upon such an appeal has been communicated to the
8 interested parties, (~~or within thirty days after an appeal has been~~
9 ~~denied after an informal hearing,~~) such interested party aggrieved by
10 the decision and order of the hearings board may appeal to the superior
11 court. In all appeals involving a decision or an order of the hearings
12 board after an informal hearing, the petition shall be filed in the
13 superior court for the county of the petitioner's residence or
14 principal place of business, or in the absence of a residence or
15 principal place of business, for Thurston county. Such appeal may be
16 perfected by filing with the clerk of the superior court a notice of
17 appeal, and by serving a copy thereof by mail, or personally on the
18 director, the air pollution control boards or authorities, established
19 pursuant to chapter 70.94 RCW or on the board as the case may be. The
20 hearings board shall serve upon the appealing party, the director, the
21 air pollution control board or authorities established pursuant to
22 chapter 70.94 RCW, or the board, as the case may be, and on any other
23 party appearing at the hearings board's proceeding, and file with the
24 clerk of the court before trial, a certified copy of the hearings
25 board's decision and order. Appellate review of a decision of the
26 superior court may be sought as in other civil cases. No bond shall be
27 required on appeals to the superior court or on review by the supreme
28 court unless specifically required by the judge of the superior court.

29 **Sec. 8.** RCW 43.21B.230 and 1990 c 65 s 6 are each amended to read
30 as follows:

31 Any person having received notice of a denial of a petition, a
32 notice of determination, notice of or an order made by the department
33 may appeal, within thirty days from the date of the notice of such
34 denial, order, or determination to the hearings board. The appeal
35 shall be perfected by serving a copy of the notice of appeal upon the
36 department or air pollution authority established pursuant to chapter
37 70.94 RCW, as the case may be, within the time specified herein and by

1 filing the original thereof with proof of service with the clerk of the
2 hearings board. ((If the person intends that the hearing before the
3 hearings board be a formal one, the notice of appeal shall so state.
4 In the event that the notice of appeal does not so state, the hearing
5 shall be an informal one:— PROVIDED, HOWEVER, That nothing shall
6 prevent the department or the air pollution authority, as the case may
7 be, within ten days from the date of its receipt of the notice of
8 appeal, from filing with the clerk of the hearings board notice of its
9 intention that the hearing be a formal one.))

10 **Sec. 9.** RCW 76.09.230 and 1992 c 52 s 23 are each amended to read
11 as follows:

12 (1) ((In all appeals over which the appeals board has jurisdiction,
13 a party taking an appeal may elect either a formal or an informal
14 hearing, unless such party has had an informal hearing with the
15 department. Such election shall be made according to the rules of
16 practice and procedure to be promulgated by the appeals board. In the
17 event that appeals are taken from the same decision, order, or
18 determination, as the case may be, by different parties and only one of
19 such parties elects a formal hearing, a formal hearing shall be
20 granted.

21 (2)) In all appeals over which the appeals board has jurisdiction,
22 upon request of one or more parties and with the consent of all
23 parties, the appeals board shall promptly schedule a conference for the
24 purpose of attempting to mediate the case. The mediation conference
25 shall be held prior to the hearing on not less than seven days' advance
26 written notice to all parties. All other proceedings pertaining to the
27 appeal shall be stayed until completion of mediation, which shall
28 continue so long as all parties consent: PROVIDED, That this shall not
29 prevent the appeals board from deciding motions filed by the parties
30 while mediation is ongoing: PROVIDED, FURTHER, That discovery may be
31 conducted while mediation is ongoing if agreed to by all parties.
32 Mediation shall be conducted by an administrative appeals judge or
33 other duly authorized agent of the appeals board who has received
34 training in dispute resolution techniques or has a demonstrated history
35 of successfully resolving disputes, as determined by the appeals board.
36 A person who mediates in a particular appeal shall not participate in
37 a hearing on that appeal or in writing the decision and order in the
38 appeal. Documentary and other physical evidence presented and evidence

1 of conduct or statements made during the course of mediation shall be
2 treated by the mediator and the parties in a confidential manner and
3 shall not be admissible in subsequent proceedings in the appeal except
4 in accordance with the provisions of the Washington rules of evidence
5 pertaining to compromise negotiations.

6 ~~((+3))~~ (2) In all appeals the appeals board shall have all powers
7 relating to administration of oaths, issuance of subpoenas, and taking
8 of depositions, but such powers shall be exercised in conformity with
9 chapter 34.05 RCW.

10 ~~((+4))~~ (3) In all appeals ~~((involving formal hearing))~~ the appeals
11 board, and each member thereof, shall be subject to all duties imposed
12 upon and shall have all powers granted to, an agency by those
13 provisions of chapter 34.05 RCW relating to adjudicative proceedings.

14 ~~((+5))~~ (4) All proceedings~~((, including both formal and informal
15 hearings,))~~ before the appeals board or any of its members shall be
16 conducted in accordance with such rules of practice and procedure as
17 the board may prescribe. The appeals board shall publish such rules
18 and arrange for the reasonable distribution thereof.

19 ~~((+6))~~ (5) Judicial review of a decision of the appeals board
20 ~~((shall be de novo except when the decision has been rendered pursuant
21 to the formal hearing, in which event judicial review))~~ may be obtained
22 only pursuant to RCW 34.05.510 through 34.05.598.

23 NEW SECTION. **Sec. 10.** The office of the administrator for the
24 courts, under the direction of the appellate courts, shall conduct a
25 study to expedite appeals from administrative hearings. The study
26 shall be conducted in close cooperation with the environmental hearings
27 office. Recommendations from the study shall be made to the
28 appropriate standing committees of the legislature by September 1,
29 1994.

30 *NEW SECTION. **Sec. 11.** (1) *The environmental hearings office*
31 *shall review and make recommendations regarding the consolidation of*
32 *the following boards into a single board with jurisdiction over such*
33 *land use and environmental decisions as such boards collectively*
34 *exercise under current law:*

35 (a) *Pollution control hearings board;*

36 (b) *Growth planning hearings boards;*

37 (c) *Shorelines hearings board;*

- 1 (d) *Hydraulics appeals board; and*
2 (e) *Forest practices appeals board.*

3 *The office shall review the caseloads, staffing, and appeal procedures*
4 *of such boards, as well as current and anticipated caseloads in view of*
5 *future regulatory, planning or other requirements likely to impact the*
6 *caseloads of such boards.*

7 (2) *The office shall include the results of its review in a report*
8 *to the governor and the standing committees of the legislature on*
9 *environmental and judiciary matters on or before December 1, 1994. The*
10 *report shall include recommendations on whether such board*
11 *consolidation may achieve administrative efficiencies while ensuring*
12 *timely resolution of all matters which may be considered by such a*
13 *board. The report shall also include recommendations on board size,*
14 *staffing, and other considerations relevant to consolidation of the*
15 *existing boards.*

16 *Sec. 11 was vetoed, see message at end of chapter.

 Passed the Senate March 9, 1994.

 Passed the House March 9, 1994.

 Approved by the Governor April 1, 1994, with the exception of
 certain items which were vetoed.

 Filed in Office of Secretary of State April 1, 1994.

1 Note: Governor's explanation of partial veto is as follows:

2 "I am returning herewith, without my approval as to section 11,
3 Engrossed Substitute Senate Bill No. 6068 entitled:

4 "AN ACT Relating to appeals involving boards within the
5 Environmental Hearings Office;"

6 This is a thoughtful piece of legislation helping to reduce the
7 time it takes for the Environmental Hearings Office and its constituent
8 boards to resolve environmental disputes consistent with maintaining
9 the quality of the state's environment. It is a part of larger efforts
10 at regulatory reform designed to maintain the state's environmental
11 quality and high standards while simplifying the regulatory and dispute
12 resolution process.

13 Section 11 directs the Environmental Hearings Office to review and
14 make recommendations as to whether the Pollution Control Hearings
15 Board, the Growth Planning Hearings Boards, the Shorelines Hearings
16 Boards, the Hydraulic Appeals Board, and the Forest Practices Appeals
17 Board should be consolidated into a single board with jurisdiction over
18 land use and environmental decisions.

19 While I am always interested in efforts to increase governmental
20 efficiency, I do not agree with the provision as drafted. It is not
21 clear why a study to consolidate state environmental boards should be
22 conducted by the office managing some of the functions to be
23 consolidated. Any such review should be undertaken independently if it
24 is to achieve the desired results. It is also not clear to me that

1 consolidation of these boards, of itself, would reduce any backlogs or
2 delays which are a function of workload and resources.

3 The Regulatory Reform Task Force is currently reviewing the
4 relationship between the State Environmental Policy Act, the Growth
5 Management Act, the Shoreline Management Act, and other statutes. The
6 goal of its efforts is to provide recommendations for ways to integrate
7 land use and environmental review statutes so that they will continue
8 to protect the state's environment and quality of life while
9 simplifying and unifying regulations. I believe that it is better to
10 allow this task force to complete its review and to make
11 recommendations before approving an additional study of this topic.

12 For these reasons, I have vetoed section 11 of Engrossed Substitute
13 Senate Bill No. 6068.

14 With the exception of section 11, Engrossed Substitute Senate Bill
15 No. 6068 is approved."