

SSB 5235 - H COMM AMD

By Committee on Agriculture & Natural Resources

1 Strike everything after the enacting clause and insert the  
2 following:

3 "Sec. 1. RCW 76.09.220 and 1999 sp.s. c 4 s 902 are each amended  
4 to read as follows:

5 (1) The appeals board shall operate on either a part-time or a  
6 full-time basis, as determined by the governor. If it is determined  
7 that the appeals board shall operate on a full-time basis, each member  
8 shall receive an annual salary to be determined by the governor. If it  
9 is determined that the appeals board shall operate on a part-time  
10 basis, each member shall be compensated in accordance with RCW  
11 43.03.250. The director of the environmental hearings office shall  
12 make the determination, required under RCW 43.03.250, as to what  
13 statutorily prescribed duties, in addition to attendance at a hearing  
14 or meeting of the board, shall merit compensation. This compensation  
15 shall not exceed ten thousand dollars in a fiscal year. Each member  
16 shall receive reimbursement for travel expenses incurred in the  
17 discharge of his or her duties in accordance with the provisions of RCW  
18 43.03.050 and 43.03.060.

19 (2) The appeals board shall as soon as practicable after the  
20 initial appointment of the members thereof, meet and elect from among  
21 its members a chair, and shall at least biennially thereafter meet and  
22 elect or reelect a chair.

23 (3) The principal office of the appeals board shall be at the state  
24 capital, but it may sit or hold hearings at any other place in the  
25 state. A majority of the appeals board shall constitute a quorum for  
26 making orders or decisions, adopting rules necessary for the conduct of  
27 its powers and duties, or transacting other official business, and may  
28 act though one position on the board (~~be~~) is vacant. One or more  
29 members may hold hearings and take testimony to be reported for action

1 by the board when authorized by rule or order of the board. The  
2 appeals board shall perform all the powers and duties granted to it in  
3 this chapter or as otherwise provided by law.

4 (4) The appeals board shall make findings of fact and prepare a  
5 written decision in each case decided by it, and such findings and  
6 decision shall be effective upon being signed by two or more members  
7 and upon being filed at the appeals board's principal office, and shall  
8 be open to public inspection at all reasonable times.

9 (5) The appeals board shall either publish at its expense or make  
10 arrangements with a publishing firm for the publication of those of its  
11 findings and decisions which are of general public interest, in such  
12 form as to assure reasonable distribution thereof.

13 (6) The appeals board shall maintain at its principal office a  
14 journal which shall contain all official actions of the appeals board,  
15 with the exception of findings and decisions, together with the vote of  
16 each member on such actions. The journal shall be available for public  
17 inspection at the principal office of the appeals board at all  
18 reasonable times.

19 (7) The forest practices appeals board shall have exclusive  
20 jurisdiction to hear appeals arising from:

21 (a) An action or determination by the department, and the  
22 department of fish and wildlife, and the department of ecology with  
23 respect to management plans provided for under RCW 76.09.350; and

24 (b) A procedural determination of significance or nonsignificance  
25 by the department, pursuant to chapter 43.21C RCW, when the  
26 environmental review procedures of chapter 43.21C RCW are triggered by  
27 a sale of state timber that is to be harvested by either a class I, II,  
28 or III forest practice, as those terms are defined in RCW 76.09.050.  
29 When hearing an appeal under this subsection (7)(b), the board shall  
30 consolidate the hearing with any other appeals arising from the  
31 department's decision to make the particular track of timber available  
32 for public sale.

33 (8)(a) Any person aggrieved by the approval or disapproval of an  
34 application to conduct a forest practice ~~((or))~~, the approval or  
35 disapproval of any landscape plan ~~((or))~~, permit, or watershed  
36 analysis, or any procedural determination made by the department  
37 consistent with subsection (7)(b) of this section, may seek review from

1 the appeals board by filing a request for the same within thirty days  
2 of the approval or disapproval. Concurrently with the filing of any  
3 request for review with the board as provided in this section, the  
4 requestor shall file a copy of his or her request with the department  
5 and the attorney general. The attorney general may intervene to  
6 protect the public interest and ensure that the provisions of this  
7 chapter are complied with.

8 (b) The review proceedings authorized in (a) of this subsection are  
9 subject to the provisions of chapter 34.05 RCW pertaining to procedures  
10 in adjudicative proceedings.

11 **Sec. 2.** RCW 43.21C.075 and 1997 c 429 s 49 are each amended to  
12 read as follows:

13 (1) Because a major purpose of this chapter is to combine  
14 environmental considerations with public decisions, any appeal brought  
15 under this chapter shall be linked to a specific governmental action.  
16 The state environmental policy act provides a basis for challenging  
17 whether governmental action is in compliance with the substantive and  
18 procedural provisions of this chapter. The state environmental policy  
19 act is not intended to create a cause of action unrelated to a specific  
20 governmental action.

21 (2) Unless otherwise provided by this section:

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

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

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

29 (a) Shall allow no more than one agency appeal proceeding on each  
30 procedural determination (the adequacy of a determination of  
31 significance/nonsignificance or of a final environmental impact  
32 statement);

33 (b) Shall consolidate an appeal of procedural issues and of  
34 substantive determinations made under this chapter (such as a decision  
35 to require particular mitigation measures or to deny a proposal) with  
36 a hearing or appeal on the underlying governmental action by providing

1 for a single simultaneous hearing before one hearing officer or body to  
2 consider the agency decision or recommendation on a proposal and any  
3 environmental determinations made under this chapter, with the  
4 exception of:

5 (i) An appeal of a determination of significance;

6 (ii) An appeal of a procedural determination made by an agency when  
7 the agency is a project proponent, or is funding a project, and chooses  
8 to conduct its review under this chapter, including any appeals of its  
9 procedural determinations, prior to submitting an application for a  
10 project permit;

11 (iii) An appeal of a procedural determination made by an agency on  
12 a nonproject action; or

13 (iv) An appeal to the local legislative authority under RCW  
14 43.21C.060 or other applicable state statutes;

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

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

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

29 (5) If a decision by the board of natural resources to make a  
30 particular track of timber available for public sale leads to an  
31 appealable action under this chapter, then any appeal may only be heard  
32 by the forest practices appeals board consistent with RCW 76.09.220,  
33 and must be consolidated with any other appeals heard by the forest  
34 practices appeals board in connection with the particular timber sale.  
35 This subsection only applies to timber sales that are to be harvested  
36 under either a class I, II, or III forest practice, as those terms are  
37 defined in RCW 76.09.050.

1        (6) Some statutes and ordinances contain time periods for  
2 challenging governmental actions which are subject to review under this  
3 chapter, such as various local land use approvals (the "underlying  
4 governmental action"). RCW 43.21C.080 establishes an optional "notice  
5 of action" procedure which, if used, imposes a time period for  
6 appealing decisions under this chapter. This subsection does not  
7 modify any such time periods. In this subsection, the term "appeal"  
8 refers to a judicial appeal only.

9        (a) If there is a time period for appealing the underlying  
10 governmental action, appeals under this chapter shall be commenced  
11 within such time period. The agency shall give official notice stating  
12 the date and place for commencing an appeal.

13        (b) If there is no time period for appealing the underlying  
14 governmental action, and a notice of action under RCW 43.21C.080 is  
15 used, appeals shall be commenced within the time period specified by  
16 RCW 43.21C.080.

17        (~~((6))~~) (7)(a) Judicial review under subsection (~~((5))~~) (6) of this  
18 section of an appeal decision made by an agency under subsection (3) of  
19 this section shall be on the record, consistent with other applicable  
20 law.

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

34        (c) Judicial review under this chapter shall without exception be  
35 of the governmental action together with its accompanying environmental  
36 determinations.

1       (~~(7)~~) (8) Jurisdiction over the review of determinations under  
2 this chapter in an appeal before an agency or superior court shall upon  
3 consent of the parties be transferred in whole or part to the  
4 shorelines hearings board. The shorelines hearings board shall hear  
5 the matter and sign the final order expeditiously. The superior court  
6 shall certify the final order of the shorelines hearings board and the  
7 certified final order may only be appealed to an appellate court. In  
8 the case of an appeal under this chapter regarding a project or other  
9 matter that is also the subject of an appeal to the shorelines hearings  
10 board under chapter 90.58 RCW, the shorelines hearings board shall have  
11 sole jurisdiction over both the appeal under this section and the  
12 appeal under chapter 90.58 RCW, shall consider them together, and shall  
13 issue a final order within one hundred eighty days as provided in RCW  
14 90.58.180.

15       (~~(8)~~) (9) For purposes of this section and RCW 43.21C.080, the  
16 words "action", "decision", and "determination" mean substantive agency  
17 action including any accompanying procedural determinations under this  
18 chapter (except where the word "action" means "appeal" in RCW  
19 43.21C.080(2)). The word "action" in this section and RCW 43.21C.080  
20 does not mean a procedural determination by itself made under this  
21 chapter. The word "determination" includes any environmental document  
22 required by this chapter and state or local implementing rules. The  
23 word "agency" refers to any state or local unit of government. Except  
24 as provided in subsection (~~(5)~~) (6) of this section, the word  
25 "appeal" refers to administrative, legislative, or judicial appeals.

26       (~~(9)~~) (10) The court in its discretion may award reasonable  
27 attorneys' fees of up to one thousand dollars in the aggregate to the  
28 prevailing party, including a governmental agency, on issues arising  
29 out of this chapter if the court makes specific findings that the legal  
30 position of a party is frivolous and without reasonable basis.

31       NEW SECTION. Sec. 3. A new section is added to chapter 79.01 RCW  
32 to read as follows:

33       The department shall not initiate the actual auction of any timber  
34 subject to an appeal under RCW 76.09.220(7)(b) until thirty days after  
35 the forest practices appeals board reaches its final ruling.

1       **Sec. 4.** RCW 34.05.010 and 1997 c 126 s 2 are each amended to read  
2 as follows:

3       The definitions set forth in this section shall apply throughout  
4 this chapter, unless the context clearly requires otherwise.

5       (1) "Adjudicative proceeding" means a proceeding before an agency  
6 in which an opportunity for hearing before that agency is required by  
7 statute or constitutional right before or after the entry of an order  
8 by the agency. Adjudicative proceedings also include all cases of  
9 licensing and rate making in which an application for a license or rate  
10 change is denied except as limited by RCW 66.08.150, or a license is  
11 revoked, suspended, or modified, or in which the granting of an  
12 application is contested by a person having standing to contest under  
13 the law.

14       (2) "Agency" means any state board, commission, department,  
15 institution of higher education, or officer, authorized by law to make  
16 rules or to conduct adjudicative proceedings, except those in the  
17 legislative or judicial branches, the governor, or the attorney general  
18 except to the extent otherwise required by law and any local  
19 governmental entity that may request the appointment of an  
20 administrative law judge under chapter 42.41 RCW.

21       (3) "Agency action" means licensing, the implementation or  
22 enforcement of a statute, the adoption or application of an agency rule  
23 or order, the imposition of sanctions, or the granting or withholding  
24 of benefits.

25       Except as provided in section 5 of this act, agency action does not  
26 include an agency decision regarding (a) contracting or procurement of  
27 goods, services, public works, and the purchase, lease, or acquisition  
28 by any other means, including eminent domain, of real estate, as well  
29 as all activities necessarily related to those functions, or (b)  
30 determinations as to the sufficiency of a showing of interest filed in  
31 support of a representation petition, or mediation or conciliation of  
32 labor disputes or arbitration of labor disputes under a collective  
33 bargaining law or similar statute, or (c) any sale, lease, contract, or  
34 other proprietary decision in the management of public lands or real  
35 property interests, or (d) the granting of a license, franchise, or  
36 permission for the use of trademarks, symbols, and similar property  
37 owned or controlled by the agency.

1 (4) "Agency head" means the individual or body of individuals in  
2 whom the ultimate legal authority of the agency is vested by any  
3 provision of law. If the agency head is a body of individuals, a  
4 majority of those individuals constitutes the agency head.

5 (5) "Entry" of an order means the signing of the order by all  
6 persons who are to sign the order, as an official act indicating that  
7 the order is to be effective.

8 (6) "Filing" of a document that is required to be filed with an  
9 agency means delivery of the document to a place designated by the  
10 agency by rule for receipt of official documents, or in the absence of  
11 such designation, at the office of the agency head.

12 (7) "Institutions of higher education" are the University of  
13 Washington, Washington State University, Central Washington University,  
14 Eastern Washington University, Western Washington University, The  
15 Evergreen State College, the various community colleges, and the  
16 governing boards of each of the above, and the various colleges,  
17 divisions, departments, or offices authorized by the governing board of  
18 the institution involved to act for the institution, all of which are  
19 sometimes referred to in this chapter as "institutions."

20 (8) "Interpretive statement" means a written expression of the  
21 opinion of an agency, entitled an interpretive statement by the agency  
22 head or its designee, as to the meaning of a statute or other provision  
23 of law, of a court decision, or of an agency order.

24 (9)(a) "License" means a franchise, permit, certification,  
25 approval, registration, charter, or similar form of authorization  
26 required by law, but does not include (i) a license required solely for  
27 revenue purposes, or (ii) a certification of an exclusive bargaining  
28 representative, or similar status, under a collective bargaining law or  
29 similar statute, or (iii) a license, franchise, or permission for use  
30 of trademarks, symbols, and similar property owned or controlled by the  
31 agency.

32 (b) "Licensing" includes the agency process respecting the  
33 issuance, denial, revocation, suspension, or modification of a license.

34 (10) "Mail" or "send," for purposes of any notice relating to rule  
35 making or policy or interpretive statements, means regular mail or  
36 electronic distribution, as provided in RCW 34.05.260. "Electronic

1 distribution" or "electronically" means distribution by electronic mail  
2 or facsimile mail.

3 (11)(a) "Order," without further qualification, means a written  
4 statement of particular applicability that finally determines the legal  
5 rights, duties, privileges, immunities, or other legal interests of a  
6 specific person or persons.

7 (b) "Order of adoption" means the official written statement by  
8 which an agency adopts, amends, or repeals a rule.

9 (12) "Party to agency proceedings," or "party" in a context so  
10 indicating, means:

11 (a) A person to whom the agency action is specifically directed; or

12 (b) A person named as a party to the agency proceeding or allowed  
13 to intervene or participate as a party in the agency proceeding.

14 (13) "Party to judicial review or civil enforcement proceedings,"  
15 or "party" in a context so indicating, means:

16 (a) A person who files a petition for a judicial review or civil  
17 enforcement proceeding; or

18 (b) A person named as a party in a judicial review or civil  
19 enforcement proceeding, or allowed to participate as a party in a  
20 judicial review or civil enforcement proceeding.

21 (14) "Person" means any individual, partnership, corporation,  
22 association, governmental subdivision or unit thereof, or public or  
23 private organization or entity of any character, and includes another  
24 agency.

25 (15) "Policy statement" means a written description of the current  
26 approach of an agency, entitled a policy statement by the agency head  
27 or its designee, to implementation of a statute or other provision of  
28 law, of a court decision, or of an agency order, including where  
29 appropriate the agency's current practice, procedure, or method of  
30 action based upon that approach.

31 (16) "Rule" means any agency order, directive, or regulation of  
32 general applicability (a) the violation of which subjects a person to  
33 a penalty or administrative sanction; (b) which establishes, alters, or  
34 revokes any procedure, practice, or requirement relating to agency  
35 hearings; (c) which establishes, alters, or revokes any qualification  
36 or requirement relating to the enjoyment of benefits or privileges  
37 conferred by law; (d) which establishes, alters, or revokes any

1 qualifications or standards for the issuance, suspension, or revocation  
2 of licenses to pursue any commercial activity, trade, or profession; or  
3 (e) which establishes, alters, or revokes any mandatory standards for  
4 any product or material which must be met before distribution or sale.  
5 The term includes the amendment or repeal of a prior rule, but does not  
6 include (i) statements concerning only the internal management of an  
7 agency and not affecting private rights or procedures available to the  
8 public, (ii) declaratory rulings issued pursuant to RCW 34.05.240,  
9 (iii) traffic restrictions for motor vehicles, bicyclists, and  
10 pedestrians established by the secretary of transportation or his  
11 designee where notice of such restrictions is given by official traffic  
12 control devices, or (iv) rules of institutions of higher education  
13 involving standards of admission, academic advancement, academic  
14 credit, graduation and the granting of degrees, employment  
15 relationships, or fiscal processes.

16 (17) "Rules review committee" or "committee" means the joint  
17 administrative rules review committee created pursuant to RCW 34.05.610  
18 for the purpose of selectively reviewing existing and proposed rules of  
19 state agencies.

20 (18) "Rule making" means the process for formulation and adoption  
21 of a rule.

22 (19) "Service," except as otherwise provided in this chapter, means  
23 posting in the United States mail, properly addressed, postage prepaid,  
24 or personal service. Service by mail is complete upon deposit in the  
25 United States mail. Agencies may, by rule, authorize service by  
26 electronic telefacsimile transmission, where copies are mailed  
27 simultaneously, or by commercial parcel delivery company.

28 NEW SECTION. **Sec. 5.** A new section is added to chapter 34.05 RCW  
29 to read as follows:

30 A procedural determination of significance or nonsignificance by  
31 the department of natural resources, pursuant to chapter 43.21C RCW,  
32 when the environmental review procedures of chapter 43.21C RCW are  
33 triggered by a sale of state timber that is to be harvested by either  
34 a class I, II, or III forest practice, as those terms are defined in  
35 RCW 76.09.050, shall proceed pursuant to this title as provided in RCW  
36 76.09.220(8)(b).

1       **Sec. 6.** RCW 79.01.500 and 1988 c 202 s 59 and 1988 c 128 s 56 are  
2 each reenacted and amended to read as follows:

3       (1) Except as provided in subsection (2) of this section, any  
4 applicant to purchase, or lease, any public lands of the state, or any  
5 valuable materials thereon, and any person whose property rights or  
6 interests will be affected by such sale or lease, feeling himself  
7 aggrieved by any order or decision of the board of natural resources,  
8 or the commissioner of public lands, concerning the same, may appeal  
9 therefrom to the superior court of the county in which such lands or  
10 materials are situated, by serving upon all parties who have appeared  
11 in the proceedings in which the order or decision was made, or their  
12 attorneys, a written notice of appeal, and filing such notice, with  
13 proof, or admission, of service, with the board, or the commissioner,  
14 within thirty days from the date of the order or decision appealed  
15 from, and at the time of filing the notice, or within five days  
16 thereafter, filing a bond to the state, in the penal sum of two hundred  
17 dollars, with sufficient sureties, to be approved by the secretary of  
18 the board, or the commissioner, conditioned that the appellant shall  
19 pay all costs that may be awarded against him on appeal, or the  
20 dismissal thereof. Within thirty days after the filing of notice of  
21 appeal, the secretary of the board, or the commissioner, shall certify,  
22 under official seal, a transcript of all entries in the records of the  
23 board, or the commissioner, together with all processes, pleadings and  
24 other papers relating to and on file in the case, except evidence used  
25 in such proceedings, and file such transcript and papers, at the  
26 expense of the applicant, with the clerk of the court to which the  
27 appeal is taken. The hearing and trial of said appeal in the superior  
28 court shall be de novo before the court, without a jury, upon the  
29 pleadings and papers so certified, but the court may order the  
30 pleadings to be amended, or new and further pleadings to be filed.  
31 Costs on appeal shall be awarded to the prevailing party as in actions  
32 commenced in the superior court, but no costs shall be awarded against  
33 the state, the board, or the commissioner. Should judgment be rendered  
34 against the appellant, the costs shall be taxed against him and his  
35 sureties on the appeal bond, except when the state is the only adverse  
36 party, and shall be included in the judgment, upon which execution may  
37 issue as in other cases. Any party feeling himself aggrieved by the

1 judgment of the superior court may seek appellate review as in other  
2 civil cases. Unless appellate review of the judgment of the superior  
3 court is sought, the clerk of said court shall, on demand, certify,  
4 under his hand and the seal of the court, a true copy of the judgment,  
5 to the board, or the commissioner, which judgment shall thereupon have  
6 the same force and effect as if rendered by the board, or the  
7 commissioner. In all cases of appeals from orders or decisions of the  
8 commissioner of public lands involving the prior right to purchase  
9 tidelands of the first class, if the appeal be not prosecuted, heard  
10 and determined, within two years from the date of the appeal, the  
11 attorney general shall, after thirty days' notice to the appellant of  
12 his intention so to do, move the court for a dismissal of the appeal,  
13 but nothing herein shall be construed to prevent the dismissal of such  
14 appeal at any time in the manner provided by law.

15 (2) Any appeal from a decision made by the department to sell a  
16 specified track of timber that is to be harvested by either a class I,  
17 II, or III forest practice, as those terms are defined in RCW  
18 76.09.050, may only be heard under the procedures established in RCW  
19 76.09.220, if a procedural determination of significance or  
20 nonsignificance by the department, pursuant to chapter 43.21C RCW, is  
21 also being appealed."

22 Correct the title.

EFFECT: Replaces the content of the underlying bill with a requirement that any appeal from a finding of significance or nonsignificance in a Department of Natural Resources environmental assessment, that arises from a state timber sale, be consolidated into any other appeals arising from the same timber sale and heard exclusively by the Forest Practices Appeals Board.

--- END ---