

SENATE BILL REPORT

SB 5086

As Reported By Senate Committee On:
Natural Resources, Energy & Water, February 6, 2003
Ways & Means, March 10, 2003

Title: An act relating to the water-related actions of the department of ecology.

Brief Description: Altering appeal procedures for water-related actions of the department of ecology.

Sponsors: Senators Honeyford, Doumit, Hewitt, Deccio, Hale, Sheahan, Morton, Parlette, Mulliken and Rasmussen.

Brief History:

Committee Activity: Natural Resources, Energy & Water: 1/21/03, 2/6/03 [DPS-WM, DNPS].

Ways & Means: 3/10/03 [DPS (NR), DNP].

SENATE COMMITTEE ON NATURAL RESOURCES, ENERGY & WATER

Majority Report: That Substitute Senate Bill No. 5086 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Morton, Chair; Hewitt, Vice Chair; Doumit, Hale, Hargrove, Honeyford and Oke.

Minority Report: Do not pass substitute.

Signed by Senators Fraser and Regala.

Staff: Sam Thompson (786-7413)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 5086 as recommended by Committee on Natural Resources, Energy & Water be substituted therefor, and the substitute bill do pass.

Signed by Senators Rossi, Chair; Hewitt, Vice Chair; Zarelli, Vice Chair; Doumit, Hale, Honeyford, Johnson, Parlette, Roach and Sheahan.

Minority Report: Do not pass.

Signed by Senators Brown, Fraser, Poulsen, Regala and B. Sheldon.

Staff: Chelsea Buchanan (786-7446)

Background: The Pollution Control Hearings Board (PCHB) hears and rules upon appeals of orders and decisions made by the Department of Ecology (DOE) concerning water rights.

Superior courts have initial jurisdiction over appeals of PCHB decisions, and, in such appeals, are confined to reviewing case records (including evidence) established in PCHB proceedings.

Summary of Substitute Bill: A person appealing a DOE "water quantity decision" (i.e., a decision to grant or deny, amend, transfer, or enforce the conditions of a water right, or to require any person to discontinue use of water) may appeal the decision to the PCHB or to the superior court where the affected land is located. Any appeal to the superior court will be de novo (i.e., the superior court is not confined to reviewing the case record developed by DOE). If the person appeals the decision to the PCHB, the PCHB's decision could subsequently be appealed directly to the Court of Appeals.

Substitute Bill Compared to Original Bill: Provisions are deleted that:

- Eliminate the PCHB's jurisdiction to review DOE orders pertaining to the relinquishment of a water right or regarding general adjudications of water rights, and provide for direct de novo appeal of orders pertaining to the relinquishment of a water right to the Court of Appeals.
- Permit persons aggrieved or adversely affected by a "water quantity decision" to initially request an informal hearing before the PCHB, potentially followed by a formal hearing before the PCHB or a direct de novo appeal to the Court of Appeals.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For (Natural Resources, Energy & Water): This bill hastens judicial review of DOE water right decisions and streamlines the appeal process; direct appeal of PCHB decisions to the Court of Appeals is a good idea, according to PCHB members and some other parties otherwise opposed; superior courts are just as fair as PCHB in deciding cases; PCHB should be abolished.

Testimony Against (Natural Resources, Energy & Water): PCHB complies with the law and has expertise in water law that some superior court judges lack; PCHB aids pro se parties appearing before it; PCHB ensures uniform interpretation of water laws; some superior courts do not hear cases as quickly as PCHB; there are concerns regarding fiscal impact on superior courts and courts of appeal; the proposal should be studied by the Water Rights Disputes task force.

Testified (Natural Resources, Energy & Water): Bill Lynch and Robert Jensen, Pollution Control Hearings Board (con); Judge Elaine Houghton, Washington Court of Appeals (con); Nancy Rust, Center for Environmental Law and Policy (con); Mike Moran, Center for Environmental Law and Policy and Samish Indian Nation (con); Eric Johnson, Washington Water Quality Alliance (pro; concerns about bill as introduced); Dave Monthie, King County (concerns); Denise Smith, League of Women Voters (no position); James Waldo, advisor to Governor Locke (no comment on substitute bill); Josh Baldi, Washington Environmental Council (con); Richard Reich and Steve Wehrli, Muckleshoot Tribe (concerns); Kevin Lyon,

Northwest Indian Fisheries Commission (con); Mike Kayser, citizen (pro); Tom Myrum, Washington Water Resources Association (pro); Darryll Olson, Columbia-Snake River Irrigators Association (pro); Jim Halstrom, Washington State Horticultural Association (pro); Chris Cheney, Washington State Dairy Federation, Washington Cattlemen's Association, Washington Fryer Commission (pro); Hertha Lund, Washington Farm Bureau (pro); Toni McKinley, Washington State Grange (pro); Dawn Vyvyan, Yakima Indian Nation (opposed bill as introduced).

Testimony For (Ways & Means): This bill simply provides another choice for the appeals process, and the fiscal impact should be negligible. This bill streamlines the appeals process and should generate savings. The fiscal note appears to be based on total PCHB filings rather than water quantity filings, which would overstate the cases.

Testimony Against (Ways & Means): Concerns: The requirement that Superior Court review be de novo means that there will be a new trial, which will add to review time and add cost to the appeals process. It could take longer for appellants to get into Superior Court than the PCHB, even up to two years. The complicated cases in this area of law require specialized expertise most members of the judiciary do not have. Water rights is a major issue for the PCHB. The fiscal note is accurate in its assumptions about the number of expected water quantity filings that could be appealed. The Supreme Court has already stated a preference for case resolution in this area of law through the PCHB, since it can provide uniform decisions statewide. This bill would create a two-tiered system and allow "forum shopping." CON: The PCHB has the expertise to handle these cases and is faster than the Superior Court. Only 10 percent of PCHB cases are appealed currently--that shows the system is working well. The appeal rate could be higher if the Superior Court handles the cases de novo. The Water Rights Dispute Task Force should address this issue.

Testified (Ways & Means): PRO: Senator Jim Honeyford, prime sponsor; Kristen Sawin, Association of Washington Business; Concerns: Martha Harden, Superior Court Judges Association; Bob Jensen, Environmental Hearings Board; CON: Josh Baldi, Washington Environmental Council.