

# SENATE BILL REPORT

## SHB 2935

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As Reported by Senate Committee On:  
Ways & Means, March 1, 2010

**Title:** An act relating to environmental and land use hearings boards.

**Brief Description:** Regarding environmental and land use hearings boards and making more uniform the timelines for filing appeals with those boards.

**Sponsors:** House Committee on General Government Appropriations (originally sponsored by Representatives Van De Wege, Sells, Blake, Takko, Darneille, Walsh, Hinkle and Kessler; by request of Governor Gregoire).

**Brief History:** Passed House: 2/26/10, 89-7.

**Committee Activity:** Ways & Means: 3/01/10 [DPA, w/oRec].

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass as amended.

Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Tom, Vice Chair, Operating Budget; Fairley, Hobbs, Keiser, Kline, Kohl-Welles, McDermott, Murray, Oemig, Pridemore, Regala and Rockefeller.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Brandland, Hewitt, Honeyford, Parlette and Schoesler.

**Staff:** Maria Hovde (786-7710)

**Background:** Environmental Hearings Office. The Environmental Hearings Office was established by the Legislature in 1979 to provide consolidated administrative services for the Pollution Control Hearings Board, the Forest Practices Appeals Board, and the Shorelines Hearings Board. The Hydraulic Appeals Board was added in 1986 and the Environmental and Land Use Hearings Board was added in 2003. As a general rule, the proceedings of these boards are guided by the Administrative Procedure Act (APA).

Pollution Control Hearings Board. The Pollution Control Hearings Board (PCHB) hears appeals from orders and decisions made by the Department of Ecology (Ecology), local conservation districts, local air pollution control boards, and local health departments. The PCHB consists of three members appointed by the Governor and confirmed by the Senate.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

These members must have experience or training in matters pertaining to the environment, and at least one member must be a lawyer admitted to practice law in this state. Proceedings before the PCHB are conducted in accordance with procedures adopted by the PCHB. The PCHB must make findings of fact and conclusions of law in each of its decisions. Decisions of the PCHB may be appealed to superior court by any of the parties.

Shorelines Hearings Board. The Shoreline Management Act (SMA), enacted in 1971, governs uses of state shorelines. The Shorelines Hearings Board (SHB) hears appeals from shoreline substantial development, conditional use, and variance permit decisions, and from those shoreline penalties jointly issued by local government and Ecology, or issued by Ecology alone. Three of the SHB members, who also serve on the PCHB, are full-time employees, appointed by the Governor and confirmed by the Senate. At least one member is an attorney. The three other members who serve part time are: the State Lands Commissioner or designee, a representative from the Washington State Association of Counties, and one from the Association of Washington Cities.

Hydraulic Appeals Board. A hydraulic project approval is required for any project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. The Hydraulic Appeals Board (HAB) has jurisdiction to hear appeals arising from the approval, denial, conditioning, or modification of a hydraulic approval issued by the Department of Fish and Wildlife (DFW) for the diversion of water for agricultural irrigation or stock watering purposes or when associated with streambank stabilization to protect farm and agricultural land or off-site mitigation proposals. The HAB also has jurisdiction to hear appeals of the approval, denial, conditioning, or modification of a hydraulic permit for the construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences or property under. The board consists of three members: the director of Ecology or the director's designee, the director of the Department of Agriculture or the director's designee, and the director or the director's designee of DFW.

Forest Practices Appeals Board. In 1974 the Legislature passed the Forest Practices Act which established the Forest Practices Appeals Board (FPAB). The FPAB consists of three members who are appointed by the Governor and confirmed by the state Senate for staggered six-year terms. One of the three must be an attorney. The FPAB hears appeals relating to the approval or disapproval of forest practice applications, landscape plans, or watershed analyses. Superior court review of FPAB decisions is available through the APA.

Environmental and Land Use Hearings Board. Any state or local permit, license, certificate, approval, or other regulatory or management program document pertaining to the land, air, or water of the state must be appealed to the Environmental and Land Use Hearings Board (ELUHB) if it is for a qualifying economic development project. A qualifying project is an economic development project that is:

- located within a county that entirely qualifies as both a distressed area and a rural natural resources impact area;
- designed to provide at least 30 full-time year-round jobs, and
- designated as a qualifying project by the Office of Permit Assistance.

The ELUHB is composed of six members, three of whom are the part-time SHB members, and three of whom are the PCHB members, who are full-time employees

appointed by the Governor and confirmed by the Senate. At least one member is an attorney. The three other members who serve part time are: the State Lands Commissioner or designee, a representative from the Washington State Association of Counties, and one from the Association of Washington Cities. The chairperson of the PCHB is the chairperson of the ELUHB.

Growth Management Hearings Board. The Growth Management Act (GMA) establishes three regional Growth Management Hearings Boards (GMHB) with defined geographic jurisdictions: an Eastern Washington Board; a Central Puget Sound Board; and a Western Washington Board. Each GMHB consists of three gubernatorial appointee members who are qualified by experience or training and who also meet residency requirements. At least one member of each GMHB must be admitted to practice law in Washington, and at least one member of each GMHB must have been a city or county elected official. No more than two members of a GMHB may be from the same political party. The GMHB members serve six-year terms. The GMHBs have limited jurisdiction and may only hear and determine petitions alleging:

- that a state agency or planning jurisdiction is noncompliant with the GMA, specific provisions of the SMA, or certain mandates of the State Environmental Policy Act relating to qualifying plans, regulations, or amendments; or
- that the 20-year planning population projections adopted by the Office of Financial Management should be adjusted.

The GMHBs must make findings of fact and prepare a written decision in each decided case. Findings of fact and decisions become effective upon being signed by two or more members and upon being filed at the applicable GMHB office. Final decisions of the GMHB may be appealed to the superior court. If all parties agree, the superior court may directly review a petition filed with a GMHB.

**Summary of Bill (Recommended Amendments):** On July 1, 2010, the Environmental Hearings Office consists of the PCHB, the SHB, and the ELUHB. The FPAB and HAB functions are transferred to the PCHB. On July 1, 2011, the Environmental and Land Use Hearings Office will consist of the PCHB, the SHB, and the GMHB and the ELUHB is repealed. Not later than July 1, 2012, the GMHB must consist of seven members qualified by experience or training in matters pertaining to land use law or land use planning. The Governor may reduce the GMHB to six members if warranted by the board's caseload. The Governor must designate one member of either the PCHB or the GMHB to be the director of the Environmental and Land Use Hearings Office during the term of the Governor. The director may appoint one or more administrative appeals judges in the cases before the environmental boards, and with the consent of the chair of the GMHB, one or more hearing examiners in cases before the land board. The administrative appeals judges possess the powers and duties conferred by the APA.

The PCHB has jurisdiction to hear and decide appeals from the Department of Natural Resources (DNR) and DFW. This includes decisions of DNR and DFW that are reviewable under the Forest Practices Act, decisions by DFW relating to a hydraulic project approval permit, and decisions by DNR relating to surface mining. The PCHB also has jurisdiction over decisions of a state agency to take temporary possession of a derelict vessel.

The environmental hearings boards may schedule a conference for the purposes of attempting to mediate the case upon the request of one or more parties and with the consent of all the parties. Mediation must be conducted by an administrative appeals judge or other duly authorized agent of the board who has received training in dispute resolution techniques or has a demonstrated history of successfully resolving disputes.

Any person with standing may commence an appeal to the PCHB by filing a notice of appeal with the board within 30 days from the date of receipt of the decision being appealed. The appeal is timely if it is filed with the PCHB and served upon the state or local agency within the same 30-day period. The appeal must contain: (1) the appellant's name and address; (2) the date and docket number of the order, permit, license, or decision appealed; (3) a copy of the order, permit, license, or decision that is the subject of the appeal; (4) a clear, separate, and concise statement of every error alleged to have been committed; (5) a clear and concise statement of the facts upon which the requester relies to sustain his or her statement of error; and (7) a statement setting forth the relief sought. Any party aggrieved by a final decision and order of the PCHB may obtain judicial review of the final decision and order. The state or local agency that issued the decisions appealed to the board can also obtain judicial review.

If Ecology disapproves a comprehensive solid waste management plan or plan amendments prepared by a county or a city, the county or city may appeal the decision to the PCHB.

Forest landowners who have been issued a forest health hazard order may appeal the order to the PCHB. A person aggrieved by the approval or disapproval of an application to DNR to conduct a forest practice or the approval or disapproval of any landscape plan, permit, or watershed analysis may seek review from the PCHB by filing a request within 30 days from the date of receipt of the decision.

A hydraulic project permit may be appealed to the PCHB within 30 days from the date of the receipt of the decision by DFW. Issuance, denial, conditioning, or modification of a hydraulic project permit may be informally appealed to DFW within 30 days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the department by rule. A permit decision that has been informally appealed to the department is appealable to the board within 30 days from the date of receipt of the department's decision on the informal appeal. Issuance of a penalty for a hydraulic project permit violation may be informally appealed to DFW within 30 days from the date of receipt of the penalty. A penalty that has been informally appealed to DFW is appealable to the PCHB with 30 days from the date of receipt of DFW's decision on the informal appeal.

Decisions by DNR concerning surface mining may be appealed to the PCHB. Regarding surface mining stop work orders, the PCHB must proceed as quickly as feasible to complete any requested adjudicative proceedings unless the parties stipulate to an appeal timeline or DNR's stop work order states that it is not effective until after the administrative review process.

A person seeking to contest the temporary possession or custody of a derelict vessel by a state agency may be appealed to the PCHB within 30 days of the date the state agency acquired custody of the vessel. The PCHB must hear and determine the validity of the

decision to take the vessel. Within five days after the request for a hearing, the PCHB must notify the vessel owner and the state agency of the date, time, and location for the hearing. A proceeding brought regarding a derelict vessel may be heard by one member of the PCHB, whose decision is the final decision of the board.

Ecology's final decision on a proposed master program or master program amendment by a local government planning under GMA may be appealed to the GMHB by filing a petition within 60 days from the date of Ecology's final decisions to approve or reject a proposed master program or master program amendment. Ecology's written notice must conspicuously and plainly state that it is Ecology's final decision and there will be no further modifications. Any person incurring a penalty under the SMA may appeal the penalty to the SHB within 30 days after the date of receipt of the penalty.

This act applies only to appeals that are commenced on or after the effective date of this act. Various sections concerning the FPAB and the HAB are repealed. However, these repeals do not affect any existing right acquired or liability or obligation incurred under these statutes, nor do they affect any proceeding instituted under them. All pending cases before the FPAB and HAB must be continued and acted upon by those boards. All existing rules of the FPAB remain in effect to be used by the PCHB until the PCHB adopts superseding rules for forest practices appeals.

**EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Amendments):**

- Removes references that would extend the deadlines related to shoreline permits from 21 days to 30 days.
- Restores current law that allows a person in violation of forest practice rules to appeal to DNR.
- Clarifies that the PCHB has the jurisdiction to hear and decide appeals from authorized public entities who have taken possession or custody of derelict vessels.
- Effective July 1, 2011, the Environmental and Land Use Hearings Board is repealed.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony on Substitute House Bill:** PRO: This bill was part of the Governor's reform efforts. It reduces five Boards down to two and is intended to be policy neutral and does not reduce any existing rights or timelines. It will produce long-term efficiency by co-location and eliminates confusion by simplifying and streamlining the process. The workload of the Hydraulics Appeals Board and the Forest Practices Appeals Boards is very small and can be absorbed into the Pollution Control Hearings Board. Although one reason for the small workload of the Forest Practices Appeals Board is that DNR currently has an internal process to handle appeals. As a result, this existing process

should be maintained. This is an important step forward to save money, time, and to make the process more efficient for customers.

OTHER: When working in the water, there is already limited time available because of the fish window. As a result, the timelines for shoreline permits should be restored to the existing 21 days.

**Persons Testifying:** PRO: John Mankowski, Governor's Policy Office; Kathleen Mix, Environmental Hearings Office; Deborah Munguia, Washington Forest Protection Association; Heath Packard, Department of Natural Resources.

OTHER: Eric Johnson, Washington Public Ports Association.