

HOUSE BILL REPORT

ESHB 2039

As Passed House:
February 12, 2024

Title: An act relating to modifying the appeals process for environmental and land use matters.

Brief Description: Modifying the appeals process for environmental and land use matters.

Sponsors: House Committee on Environment & Energy (originally sponsored by Representatives Fitzgibbon, Ramel, Reed, Ormsby, Fosse and Duerr).

Brief History:

Committee Activity:

Environment & Energy: 1/8/24, 1/23/24 [DPS].

Floor Activity:

Passed House: 2/12/24, 64-33.

Brief Summary of Engrossed Substitute Bill

- Modifies the process for direct review by the Court of Appeals for decisions issued by the Pollution Control Hearings Board (PCHB) and the Shoreline Hearings Board (SHB) that relate to clean energy projects.
- Extends without expiration the current process for direct review by the Court of Appeals for decisions issued by the PCHB, the SHB, and the Growth Management Hearings Board that do not relate to clean energy projects.
- Establishes the circumstances in which multiple appeals arising out of the same project must be consolidated for hearing in proceedings before the PCHB and the SHB.
- Modifies the jurisdiction of the PCHB to hear appeals arising pursuant to specified additional environmental laws.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

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

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Doglio, Chair; Mena, Vice Chair; Ybarra, Assistant Ranking Minority Member; Berry, Duerr, Fey, Goehner, Lekanoff, Ramel, Slatter and Street.

Minority Report: Without recommendation. Signed by 4 members: Representatives Dye, Ranking Minority Member; Abbarno, Barnard and Sandlin.

Staff: Robert Hatfield (786-7117).

Background:

Authority of the Department of Ecology.

The Department of Ecology (Ecology) is responsible for managing many of the state's environmental programs and policies. Ecology's authority derives from multiple statutes that direct it to manage the state's water resources, air quality, pollution, solid and hazardous wastes, toxic hazards, and the state shorelines. Some of the programs administered by Ecology include the authority to:

- adopt rules that establish statewide exemptions from local solid waste permitting requirements for certain solid wastes with beneficial uses;
- prepare and update a statewide master oil and hazardous substance spill prevention and contingency plan;
- administer and enforce the operations of stewardship organizations formed to collect and recycle mercury-containing lights;
- enforce the requirements of the Children's Safe Products Act, which establishes restrictions on the amount of certain chemicals in children's products and requires manufacturers to provide information to Ecology about their use of other chemicals of concern; and
- review and approve shoreline master programs submitted by local governments.

Administrative decisions, orders, and civil penalties issued pursuant to certain environmental laws may be appealed to the Pollution Control Hearings Board (PCHB). Orders and civil penalties issued pursuant to other environmental laws are not appealable to the PCHB, but instead may be appealed to superior court; these laws include, among others:

- mercury handling requirements;
- the Children's Safe Products Act; and
- electronics product recycling requirements.

Pollution Control Hearings Board.

The PCHB is an administrative body that hears and decides appeals from state and local governmental agencies on a wide variety of environmental permits, orders, and civil penalties, including orders and civil penalties related to water well construction, water

rights, hazardous waste, noise control, and carryout bags.

Shoreline Hearings Board.

The Shoreline Hearings Board hears and decides appeals of shoreline building and construction permits or penalty orders issued by local or state government agencies under the Shoreline Management Act.

Administrative Procedure Act.

The Administrative Procedure Act sets the process state agencies must follow when an agency takes administrative action. Individuals appealing agency actions must exhaust their administrative remedies with the agency prior to judicial review. Agencies offer quasi-judicial administrative hearings to hear appeals of agency actions. Administrative hearings adjudicate appeals by interpreting agency policy and regulations. Adjudication resembles what a court does, but is less formal. Adjudicative proceedings determine legal rights, duties, or privileges when a hearing is required by law or by the Constitution.

The Administrative Procedure Act—Direct Review by Court of Appeals.

As a result of legislation enacted in 2021 that is effective until July 1, 2026, the final decision of an administrative agency in an adjudicative proceeding, including decisions issued by the PCHB, the SHB, or the Growth Management Hearings Board (collectively referred to as environmental boards), may be directly reviewed by the court of appeals upon certification by the superior court. Transfer of cases does not require the filing of a motion for discretionary review with the court of appeals. The superior court may certify cases for transfer to the court of appeals upon finding the following:

- all parties have consented to the transfer to the court of appeals and agreed that the judicial review can occur based upon the agency record developed before the administrative body without supplementing the record; or
- one or more of the parties have not consented to the transfer, but the superior court finds that transfer would serve the interest of justice, would not cause substantial prejudice to any party, including any unrepresented party, and further finds that:
 - the judicial review can occur based upon the agency record developed before the administrative body without supplementing the record; or
 - the superior court has completed any necessary supplementation of the record, such that only issues of law remain for determination.

After July 1, 2026, an agency decision, other than a decision that has been issued by an environmental board, that has been appealed to the superior court may be directly reviewed by the court of appeals if the judicial review is limited to the record of the agency proceeding and the superior court finds that:

- fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination;

- a delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest;
- an appeal to the court of appeals would be likely regardless of the determination in the superior court; and
- the appellate court's determination in the proceeding would have significant precedential value.

After July 1, 2026, a final decision issued by an environmental board may be directly reviewed by the court of appeals upon acceptance by the court of appeals after a certificate of appealability has been filed by the environmental board that issued the final decision.

An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

- fundamental and urgent statewide or regional issues are raised; or
- the proceeding is likely to have significant precedential value.

The court of appeals may accept direct review of a decision from an environmental board based on a consideration of the same criteria used by the environmental board to issue the certificate of appealability.

Clean Energy Projects.

Clean energy projects are defined as the following facilities together with their associated facilities:

- clean energy product manufacturing facilities;
- electrical transmission facilities;
- facilities to produce nonemitting electric generation or electric generation from renewable resources, with certain exceptions;
- storage facilities;
- facilities or projects at any facilities that exclusively or primarily process biogenic feedstocks into biofuel;
- biomass energy facilities; or
- facilities or projects at any facilities that exclusively or primarily process alternative jet fuel.

Solid Waste—Beneficial Uses—Permitting Requirement Exemptions.

Ecology may exempt a solid waste from the permitting requirements of solid waste handling regulations for one or more beneficial uses by approving an application for such an exemption. An applicant may appeal Ecology's denial of an application to the PCHB. In addition, waste-derived soil amendments that meet specified standards may apply for exemption from the permitting requirements of solid waste handling regulations, and an applicant may appeal Ecology's denial of an application to the PCHB.

Summary of Engrossed Substitute Bill:

Direct Review by Court of Appeals of Decisions Issued by the Pollution Control Hearings Board and the Shoreline Hearings Board Related to Clean Energy Projects.

For the appeal of a permit related to a clean energy project that is the subject of a final decision of either the Pollution Control Hearings Board (PCHB) or the Shoreline Hearings Board (SHB), upon a motion filed by any party to the appeal, the superior court shall certify a case for transfer to the court of appeals upon a finding that:

- the judicial review can occur based upon the agency record developed before the administrative body without supplementing the record; or
- the superior court has completed any necessary supplementation of the record.

Transfer of cases for direct review by the court of appeals does not require the filing of a motion for discretionary review with the court of appeals.

If the superior court certifies a final decision of an administrative agency in an adjudicative proceeding, the superior court must transfer the matter to the court of appeals as a direct appeal.

A party contesting a superior court decision granting or denying certification for direct review may file a motion for discretionary review with the court of appeals. Where a contesting party demonstrates that substantial prejudice would result from direct review by the court of appeals, the court of appeals may remand to the superior court.

Direct Review by Court of Appeals of Decisions Issued by the Pollution Control Hearings Board, the Shoreline Hearings Board, and the Growth Management Hearings Board that Do Not Relate to Clean Energy Projects.

A final adjudicative decision issued the PCHB, the SHB, or the Growth Management Hearings Board (collectively referred to as environmental boards), that does not relate to a clean energy project, may be directly reviewed by the court of appeals upon certification by the superior court. Transfer of cases does not require the filing of a motion for discretionary review with the court of appeals. The superior court shall certify cases for transfer to the court of appeals upon finding the following:

- all parties have consented to the transfer to the court of appeals and agreed that the judicial review can occur based upon the agency record developed before the administrative body without supplementing the record; or
- one or more of the parties have not consented to the transfer, but the superior court finds that transfer would serve the interest of justice, would not cause substantial prejudice to any party, including any unrepresented party, and further finds that:
 - the judicial review can occur based upon the agency record developed before the administrative body without supplementing the record; or
 - the superior court has completed any necessary supplementation of the record,

such that only issues of law remain for determination.

Consolidation of Appeals Before the Environmental Boards.

Where multiple permits for the same underlying project are appealed to one or more of the environmental boards, the presiding officer must consolidate the appeals for hearing when one or more of the following criteria are met:

- when appeals for the permits related to the same underlying clean energy project are either:
 - filed within 60 days of each other; or
 - if the permits are not filed within 60 days of each other, the environmental board issues a stay of the appeal of the permit following the applicant's request. Such a stay must include a stay of the construction of the project pending appeal to allow other anticipated appeals of permits for the same underlying project to be filed to accommodate consolidation, but the environmental board may set a deadline after which an appeal may proceed in the absence of other permit appeals in order to ensure efficient resolution of appeals; or
- the presiding officer determines that the following three criteria have been met:
 - consolidation will expedite disposition of the appeals;
 - consolidation will avoid duplication of testimony; and
 - consolidation will not prejudice the rights of the parties.

When all appeals of individual permits are within the jurisdiction of the PCHB, the PCHB must retain jurisdiction over the consolidated matter. When all appeals of individual permits are within the jurisdiction of the SHB, the SHB must retain jurisdiction over the consolidated matter. When appeals to the PCHB and appeals to the SHB are consolidated, the following applies:

- the consolidated appeals must be heard by the PCHB;
- the PCHB must issue its decision on the consolidated appeal, which must be measured from the date that the last of the consolidated appeals was filed; and
- the 240-day deadline may be extended on motion from a party or by the PCHB upon a showing that the consolidated appeal raises issues of unique complexity and that delay is not against the public interest. In no case may the 240-day deadline be extended for a period greater than 30 days unless the time period is waived by all parties.

Appeal of Orders and Civil Penalties Issued Pursuant to Specified Environmental Laws.

The jurisdiction of the PCHB to hear appeals arising from the issuance of civil penalties, orders, and decisions under various environmental laws is amended to include appeals arising pursuant to specified additional environmental laws, including, among others:

- mercury handling requirements
- the Children's Safe Products Act; and

- electronic products recycling requirements.

Waste-Derived Soil Amendments.

A statute regarding an exemption from solid waste handling regulations for waste-derived soil amendments is repealed. A broader statute regarding an exemption from solid waste handling regulations for solid wastes put to a beneficial use is retained.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains multiple effective dates. Please see the bill.

Staff Summary of Public Testimony:

(In support) This bill will improve predictability of the review process for projects. The desire for the bill is to save time on appeals without compromising the due process rights of participants. The bill does not make any change to the substantive standards by which appeals are decided.

This bill will improve the appeal process. There is a desire for updated language in several areas.

The state has made transformative changes in the past few years regarding the permitting process for energy projects. This bill deals with the permitting pathway for projects that do not get permitted through the Energy Facility Site Evaluation Council. The bill improves the permitting pathway in two main ways: by allowing appeals to go directly to the court of appeals, and by allowing for consolidation of appeals hearings where appropriate.

This bill will improve the local permitting pathway for projects. It is important for local permitting pathways to be as attractive and efficient as state-level permitting pathways.

Modifying the appeals process is helpful and will help accelerate the construction of clean energy projects, which will help the state meet its greenhouse gas reduction goals.

This bill would shorten the permitting and appeals process overall.

There is a desire for the bill to prioritize improvements for clean energy.

(Opposed) There is opposition to the bill because of various technical aspects. The bill currently removes the ability for some parties to collect their attorney fees because it skips over certain steps in the Land Use Petition Act (LUPA) appeals process. It is important to make sure attorney fees remain accessible for prevailing parties in LUPA appeals.

(Other) It does not appear that this bill does anything for the cost of housing in Washington. It appears that the bill may actually be delaying the construction process.

There are several areas where terminology in the bill could be improved, such as in clarifying the term "project." There are also suggestions for revising criteria in the bill to align with existing law.

Persons Testifying: (In support) Representative Joe Fitzgibbon, prime sponsor; Cassie Bordelon, Puget Sound Energy; Mark Riker, Washington State Building and Construction Trades Council; Matthew Hepner, East Wenatchee City Council; Isaac Kastama, Clean and Prosperous Washington; Carly Michiels, Washington Public Ports Association; Altinay Karasapan, Climate Solutions; Peter Godlewski, Association of Washington Business; and Diane Butorac, Department of Ecology.

(Opposed) Jan Himebaugh, Building Industry Association of Washington.

(Other) Eric Pratt; and Dominga Soliz, Environmental and Land Use Hearings Office.

Persons Signed In To Testify But Not Testifying: None.