

FINAL BILL REPORT

ESHB 2039

C 347 L 24
Synopsis as Enacted

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).

House Committee on Environment & Energy
Senate Committee on Environment, Energy & Technology

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).

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.

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, 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.

Land Use Petition Act.

With limited exceptions, the Land Use Petition Act is the exclusive means of judicial review of land use decisions. The term "land use decision" means a final determination by a county, city, or incorporated town's body or officer with the highest level of authority, including those with authority to hear appeals, to make a determination on certain types of decisions, including, among others, applications for a project permit or other governmental approval.

As part of the commencement of a proceeding for review under the Land Use Petition Act,

a petitioner must serve the petition for review on the local jurisdiction by delivering a copy of the petition to specified persons within the local jurisdiction, such as, depending on the jurisdiction, the mayor, city manager, county auditor, deputy county auditor, or their designated agents.

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:

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 must 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.

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.

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.

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.

Beginning July 1, 2026, a final adjudicative decision issued by 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.

The superior court must 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.

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.

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.

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.

Consolidation of Appeals Before the Environmental Boards.

Where multiple permits for the same underlying clean energy 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 and 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 within 240 days, which must be measured from the date that the last of the consolidated appeals was filed; and
- the 240-day deadline may be extended 60 days on motion from a party or by the PCHB upon a finding of good cause. The 240-day deadline may also be waived if agreed to 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
- hazardous waste requirements;
- the Children's Safe Products Act;
- floodplain management requirements; and
- electronic products recycling requirements.

Service of Process for Land Use Petitions.

The procedure for effective service of process upon local jurisdictions in filing land use petitions is amended to permit service of process as designated by the local jurisdiction. Service on the local jurisdiction is effective upon delivery.

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.

Votes on Final Passage:

House 64 33

Senate 44 5 (Senate amended)
House 72 24 (House concurred)

Effective: June 6, 2024
July 1, 2026 (Section 2)