

SENATE BILL REPORT

ESHB 2039

As Reported by Senate Committee On:
Environment, Energy & Technology, February 21, 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: Passed House: 2/12/24, 64-33.

Committee Activity: Environment, Energy & Technology: 2/16/24, 2/21/24 [DPA, w/oRec].

Brief Summary of Amended Bill

- Modifies the process for direct review by the court of appeals for decisions issued by environmental boards 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 environmental boards that do not relate to clean energy projects.
- Authorizes the consolidation of appeals arising out of the same projects when certain criteria are met.
- Modifies the jurisdiction of the pollution control hearings board to hear appeals arising pursuant to specified environmental laws.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

Majority Report: Do pass as amended.

Signed by Senators Nguyen, Chair; Lovick, Short, Trudeau and Wellman.

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.

Minority Report: That it be referred without recommendation.

Signed by Senators Lovelett, Vice Chair; MacEwen, Ranking Member; Boehnke.

Staff: Adam Brunmeier (786-7357)

Background: Administrative Procedure Act. The Administrative Procedure Act (APA) sets the process state agencies must follow when an agency takes administrative action. Agencies offer quasijudicial administrative hearings to hear appeals of agency actions. The APA establishes standards for when the final decision of an administrative agency may be directly reviewed by the court of appeals. Legislation enacted in 2021 offers a more relaxed standard for direct review by a court of appeals that expires on July 1, 2026.

Effective until July 1, 2026, the final decision of an administrative agency in an adjudicative proceeding, 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 and agree that judicial review can occur without supplementing the record; or
- one or more parties have not consented to the transfer, but the superior court finds that transfer would serve the interests of justice, would not cause substantial prejudice to any party, and makes further findings regarding the adequacy of the record.

If the superior court certifies a final decision of an administrative agency in an adjudicative proceeding, the superior court shall 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.

Environmental Boards. For purposes of direct review of final decisions environmental boards include the Pollution Control Hearings Board (PCHB), the Shorelines Hearings Board (SHB), and the Growth Management Hearings Board (GMHB). These boards review environmental and land use decisions from agencies and local governments, including the issuance of permits, orders, and civil penalties.

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.

Summary of Amended Bill: Direct Review by Court of Appeals Decisions Issued by the Environmental Boards Related to Clean Energy Projects. For the appeal of a permit related to a clean energy project that is the subject of a final adjudicative decision of an environmental board, 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 agency record is sufficiently developed; or
- the court has completed any necessary supplementation of the record.

If the superior court certifies a final decision of an adjudicative proceeding, the superior court shall 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 pursuant to this section 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 Environmental Boards Not Related to Clean Energy Projects. The final adjudicative decision of an environmental board 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 shall certify cases for transfer to the court of appeals upon finding that:

- all parties have consented to the transfer and the agency record is sufficiently developed; or
- one or more of the parties have not consented to the transfer, but the superior court finds that transfer would serve the interests of justice, would not cause substantial prejudice to any party, and makes further findings regarding the adequacy of the record.

If the superior court certifies a final decision of an administrative agency in an adjudicative proceeding, the superior court shall 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.

Consolidation of Appeals Before the Environmental Boards. When multiple permits for the

same underlying clean energy project have been appealed to one or more of the environmental boards, the presiding officer shall 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 project are either:
 1. filed within 60 days of each other; or
 2. 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:
 1. consolidation will expedite disposition of the appeals;
 2. consolidation will avoid duplication of testimony; and
 3. consolidation will not prejudice the rights of the parties.

When appeals filed separately to the PCHB and SHB are consolidated, the following applies:

- the consolidated appeals must be heard by the PCHB;
- the PCHB must issue its decision within 240 days; and
- the time period may be extended up to 30 days where the moving party can show sufficient complexity and that it is not against the public interest.

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:

- mercury handling requirements;
- the Children's Safe Products Act;
- electronic products recycling requirements; and
- floodplain management regulations.

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.

EFFECT OF ENVIRONMENT, ENERGY & TECHNOLOGY COMMITTEE

AMENDMENT(S):

- Amends the penalty provision of an electronic product recycling statute to clarify by reference, consistent with other provisions under the bill, that appeals may be filed to the pollution control hearings board and include references to the relevant administrative procedures for imposition of penalties and the appeals process.
- Amends the service of process requirements for service of land use petitions upon local jurisdictions to allow service as otherwise designated by the local jurisdiction. Establishes that service on the local jurisdiction is effective upon delivery.
- Makes technical changes.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 14, 2024.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony on Engrossed Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* Pro: This bill will help to expedite the appeals process. Getting the permitting and siting processes right is critical to creating new jobs and achieving clean energy goals. Prior efforts have focused on the EFSEC pathway, this bill will improve the non-EFSEC pathway. This bill improves the non-EFSEC process by allowing parties to go directly to the court of appeals instead of replicating the duplicative process in the superior courts which bears considerable costs. This bill also allows consolidation of appeals which will facilitate a more efficient process. This bill helps make the process more effective but retains opportunities for fact-finding and critical safeguards.

Other: Concerns are raised regarding the timelines presented for consolidated appeals. The 240 day timeline is too aggressive for a proceeding before the PCHB, let alone a consolidated appeal. The discovery and fact-finding processes necessary for a PCHB hearing require more time. A request is made for timelines that are consistent with other provisions of the APA and fair to all parties.

Persons Testifying: PRO: Diane Butorac, WA Dept of Ecology; Peter Godlewski, Association of Washington Business; Matthew Hepner, IBEW/CEWW; Altinay Karasapan, Climate Solutions.

OTHER: Dominga Soliz, Environmental and Land Use Hearings Office; Shona Voelckers, Confederated Tribes and Bands of the Yakama Nation.

Persons Signed In To Testify But Not Testifying: No one.