

2 **ESSB 6068** - H COMM AMD **ADOPTED 3-4-94**
3 By Committee on Environmental Affairs

4

5 Strike everything after the enacting clause and insert the
6 following:

7 "**Sec. 1.** RCW 90.58.170 and 1988 c 128 s 76 are each amended to
8 read as follows:

9 A shorelines hearings board sitting as a quasi judicial body is
10 hereby established within the environmental hearings office under RCW
11 43.21B.005. The shorelines hearings board shall be made up of six
12 members: Three members shall be members of the pollution control
13 hearings board; two members, one appointed by the association of
14 Washington cities and one appointed by the association of county
15 commissioners, both to serve at the pleasure of the associations; and
16 the commissioner of public lands or his or her designee. The chairman
17 of the pollution control hearings board shall be the chairman of the
18 shorelines hearings board. Except as provided in section 2 of this
19 act, a decision must be agreed to by at least four members of the board
20 to be final. The members of the shorelines ((~~appeals~~)) board shall
21 receive the compensation, travel, and subsistence expenses as provided
22 in RCW 43.03.050 and 43.03.060.

23 NEW SECTION. **Sec. 2.** A new section is added to chapter 90.58 RCW
24 to read as follows:

25 (1) In the case of an appeal involving a single family residence or
26 appurtenance to a single family residence, including a dock or pier
27 designed to serve a single family residence, the request for review may
28 be heard by a panel of three board members, at least one and not more
29 than two of whom shall be members of the pollution control hearings
30 board. Two members of the three must agree to issue a final decision
31 of the board.

32 (2) The board shall define by rule alternative processes to
33 expedite appeals. These alternatives may include: Mediation, upon
34 agreement of all parties; submission of testimony by affidavit; or

1 other forms that may lead to less formal and faster resolution of
2 appeals.

3 **Sec. 3.** RCW 90.58.180 and 1989 c 175 s 183 are each amended to
4 read as follows:

5 (1) Any person aggrieved by the granting, denying, or rescinding of
6 a permit on shorelines of the state pursuant to RCW 90.58.140 may seek
7 review from the shorelines hearings board by filing a request for the
8 same within thirty days of the date of filing as defined in RCW
9 90.58.140(6).

10 Concurrently with the filing of any request for review with the
11 board as provided in this section pertaining to a final order of a
12 local government, the requestor shall file a copy of his or her request
13 with the department and the attorney general. If it appears to the
14 department or the attorney general that the requestor has valid reasons
15 to seek review, either the department or the attorney general may
16 certify the request within thirty days after its receipt to the
17 shorelines hearings board following which the board shall then, but not
18 otherwise, review the matter covered by the requestor(~~(:—PROVIDED,~~
19 ~~That))~~). The failure to obtain such certification shall not preclude
20 the requestor from obtaining a review in the superior court under any
21 right to review otherwise available to the requestor. The department
22 and the attorney general may intervene to protect the public interest
23 and insure that the provisions of this chapter are complied with at any
24 time within fifteen days from the date of the receipt by the department
25 or the attorney general of a copy of the request for review filed
26 pursuant to this section. The shorelines hearings board shall
27 initially schedule review proceedings on such requests for review
28 without regard as to whether such requests have or have not been
29 certified or as to whether the period for the department or the
30 attorney general to intervene has or has not expired, unless such
31 review is to begin within thirty days of such scheduling. If at the
32 end of the thirty day period for certification neither the department
33 nor the attorney general has certified a request for review, the
34 hearings board shall remove the request from its review schedule.

35 (2) The department or the attorney general may obtain review of any
36 final order granting a permit, or granting or denying an application
37 for a permit issued by a local government by filing a written request
38 with the shorelines hearings board and the appropriate local government

1 within thirty days from the date the final order was filed as provided
2 in RCW 90.58.140(6).

3 (3) The review proceedings authorized in subsections (1) and (2) of
4 this section are subject to the provisions of chapter 34.05 RCW
5 pertaining to procedures in adjudicative proceedings. Judicial review
6 of such proceedings of the shorelines hearings board (~~may be had as~~
7 ~~provided in~~) is governed by chapter 34.05 RCW.

8 (4) A local government may appeal to the shorelines hearings board
9 any rules, regulations, or guidelines adopted or approved by the
10 department within thirty days of the date of the adoption or approval.
11 The board shall make a final decision within sixty days following the
12 hearing held thereon.

13 If the board determines that the rule, regulation, or guideline:

14 (a) Is clearly erroneous in light of the policy of this chapter; or

15 (b) Constitutes an implementation of this chapter in violation of
16 constitutional or statutory provisions; or

17 (c) Is arbitrary and capricious; or

18 (d) Was developed without fully considering and evaluating all
19 material submitted to the department by the local government; or

20 (e) Was not adopted in accordance with required procedures;

21 the board shall enter a final decision declaring the rule, regulation,
22 or guideline invalid, remanding the rule, regulation, or guideline to
23 the department with a statement of the reasons in support of the
24 determination, and directing the department to adopt, after a thorough
25 consultation with the affected local government, a new rule,
26 regulation, or guideline. Unless the board makes one or more of the
27 determinations as hereinbefore provided, the board shall find the rule,
28 regulation, or guideline to be valid and enter a final decision to that
29 effect.

30 (5) Rules, regulations, and guidelines shall be subject to review
31 in superior court, if authorized pursuant to RCW (~~34.05.538:~~
32 ~~PROVIDED, That~~) 34.05.570(2). No review shall be granted by a
33 superior court on petition from a local government unless the local
34 government shall first have obtained review under subsection (4) of
35 this section and the petition for court review is filed within three
36 months after the date of final decision by the shorelines hearings
37 board.

1 **Sec. 4.** RCW 43.21C.075 and 1983 c 117 s 4 are each amended to read
2 as follows:

3 (1) Because a major purpose of this chapter is to combine
4 environmental considerations with public decisions, any appeal brought
5 under this chapter shall be linked to a specific governmental action.
6 The State Environmental Policy Act provides a basis for challenging
7 whether governmental action is in compliance with the substantive and
8 procedural provisions of this chapter. The State Environmental Policy
9 Act is not intended to create a cause of action unrelated to a specific
10 governmental action.

11 (2) Unless otherwise provided by this section:

12 (a) Appeals under this chapter shall be of the governmental action
13 together with its accompanying environmental determinations.

14 (b) Appeals of environmental determinations made (or lacking) under
15 this chapter shall be commenced within the time required to appeal the
16 governmental action which is subject to environmental review.

17 (3) If an agency has a procedure for appeals of agency
18 environmental determinations made under this chapter, such procedure:

19 (a) Shall not allow more than one agency appeal proceeding on a
20 procedural determination (the adequacy of a determination of
21 significance/nonsignificance or of a final environmental impact
22 statement), consistent with any state statutory requirements for
23 appeals to local legislative bodies. The appeal proceeding on a
24 determination of significance/nonsignificance may occur before the
25 agency's final decision on a proposed action. Such an appeal shall
26 also be allowed for a determination of significance/nonsignificance
27 which may be issued by the agency after supplemental review;

28 (b) Shall consolidate appeal of procedural issues and of
29 substantive determinations made under this chapter (such as a decision
30 to require particular mitigation measures or to deny a proposal) by
31 providing for simultaneous appeal of an agency decision on a proposal
32 and any environmental determinations made under this chapter, with the
33 exception of the threshold determination appeal as provided in (a) of
34 this subsection or an appeal to the local legislative authority under
35 RCW 43.21C.060 or other applicable state statutes;

36 (c) Shall provide for the preparation of a record for use in any
37 subsequent appeal proceedings, and shall provide for any subsequent
38 appeal proceedings to be conducted on the record, consistent with other
39 applicable law. An adequate record consists of findings and

1 conclusions, testimony under oath, and taped or written transcript. An
2 electronically recorded transcript will suffice for purposes of review
3 under this ((paragraph)) subsection; and

4 (d) Shall provide that procedural determinations made by the
5 responsible official shall be entitled to substantial weight.

6 (4) If a person aggrieved by an agency action has the right to
7 judicial appeal and if an agency has an appeal procedure, such person
8 shall, prior to seeking any judicial review, use such procedure if any
9 such procedure is available, unless expressly provided otherwise by
10 state statute.

11 (5) RCW 43.21C.080 establishes an optional "notice of action"
12 procedure which, if used, imposes a time period for appealing decisions
13 under this chapter. Some statutes and ordinances contain time periods
14 for challenging governmental actions which are subject to review under
15 this chapter, such as various local land use approvals (the "underlying
16 governmental action"). This section does not modify any such time
17 periods. This section governs when a judicial appeal must be brought
18 under this chapter where a "notice of action" is used, and/or where
19 there is another time period which is required by statute or ordinance
20 for challenging the underlying governmental action. In this
21 subsection, the term "appeal" refers to a judicial appeal only.

22 (a) If there is a time period for appealing the underlying
23 governmental action, appeals under this chapter shall be commenced
24 within thirty days. The agency shall give official notice stating the
25 date and place for commencing an appeal. If there is an agency
26 proceeding under subsection (3) of this section, the appellant shall,
27 prior to commencing a judicial appeal, submit to the responsible
28 official a notice of intent to commence a judicial appeal. This notice
29 of intent shall be given within the time period for commencing a
30 judicial appeal on the underlying governmental action.

31 (b) A notice of action under RCW 43.21C.080 may be used. If a
32 notice of action is used, judicial appeals shall be commenced within
33 the time period specified by RCW 43.21C.080, unless there is a time
34 period for appealing the underlying governmental action in which case
35 (a) of this subsection shall apply.

36 (c) Notwithstanding RCW 43.21C.080(1), if there is a time period
37 for appealing the underlying governmental action, a notice of action
38 may be published within such time period.

1 (6)(a) Judicial review of an appeal decision made by an agency
2 under RCW 43.21C.075(5) shall be on the record, consistent with other
3 applicable law.

4 (b) A taped or written transcript may be used. If a taped
5 transcript is to be reviewed, a record shall identify the location on
6 the taped transcript of testimony and evidence to be reviewed. Parties
7 are encouraged to designate only those portions of the testimony
8 necessary to present the issues raised on review, but if a party
9 alleges that a finding of fact is not supported by evidence, the party
10 should include in the record all evidence relevant to the disputed
11 finding. Any other party may designate additional portions of the
12 taped transcript relating to issues raised on review. A party may
13 provide a written transcript of portions of the testimony at the
14 party's own expense or apply to that court for an order requiring the
15 party seeking review to pay for additional portions of the written
16 transcript.

17 (c) Judicial review under this chapter shall without exception be
18 of the governmental action together with its accompanying environmental
19 determinations.

20 (7) Jurisdiction over the review of determinations under this
21 chapter in an appeal before an agency or superior court shall upon
22 consent of the parties be transferred in whole or part to the
23 shorelines hearings board. The shorelines hearings board shall hear
24 the matter and sign the final order expeditiously. The superior court
25 shall certify the final order of the shorelines hearings board and said
26 certified final order may only be appealed to an appellate court. In
27 the case of an appeal under this chapter regarding a project or other
28 matter that is also the subject of an appeal to the shorelines hearings
29 board under chapter 90.58 RCW, the shorelines hearings board shall have
30 sole jurisdiction over both the appeal under this section and the
31 appeal under chapter 90.58 RCW, shall consider them together, and shall
32 issue a final order.

33 (8) For purposes of this section and RCW 43.21C.080, the words
34 "action", "decision", and "determination" mean substantive agency
35 action including any accompanying procedural determinations under this
36 chapter (except where the word "action" means "appeal" in RCW
37 43.21C.080(2) and (3)). The word "action" in this section and RCW
38 43.21C.080 does not mean a procedural determination by itself made
39 under this chapter. The word "determination" includes any

1 environmental document required by this chapter and state or local
2 implementing rules. The word "agency" refers to any state or local
3 unit of government. The word "appeal" refers to administrative,
4 legislative, or judicial appeals.

5 (9) The court in its discretion may award reasonable attorney's
6 fees of up to one thousand dollars in the aggregate to the prevailing
7 party, including a governmental agency, on issues arising out of this
8 chapter if the court makes specific findings that the legal position of
9 a party is frivolous and without reasonable basis.

10 NEW SECTION. **Sec. 5.** A new section is added to chapter 43.21B RCW
11 to read as follows:

12 With the consent of all parties, an appeal may be heard by one
13 member of the board. The decision of the member shall be the final
14 decision of the board. The board shall define by rule alternative
15 procedures to expedite appeals. These alternatives may include:
16 Mediation, upon agreement of all parties; submission of testimony by
17 affidavit; or other forms that may lead to less formal and faster
18 resolution of appeals.

19 **Sec. 6.** RCW 43.21B.180 and 1989 c 175 s 104 are each amended to
20 read as follows:

21 Judicial review of a decision of the hearings board (~~(shall be de~~
22 ~~novo except when the decision has been rendered pursuant to a formal~~
23 ~~hearing elected under the provisions of this chapter, in which event~~
24 ~~judicial review)) may be obtained only pursuant to RCW 34.05.510
25 through 34.05.598. The director shall have the same right of review
26 from a decision made pursuant to RCW 43.21B.110 as does any person.~~

27 **Sec. 7.** RCW 43.21B.190 and 1988 c 202 s 43 are each amended to
28 read as follows:

29 Within thirty days after the final decision and order of the
30 hearings board upon such an appeal has been communicated to the
31 interested parties, (~~(or within thirty days after an appeal has been~~
32 ~~denied after an informal hearing,)) such interested party aggrieved by
33 the decision and order of the hearings board may appeal to the superior
34 court. In all appeals involving a decision or an order of the hearings
35 board after an informal hearing, the petition shall be filed in the
36 superior court for the county of the petitioner's residence or~~

1 principal place of business, or in the absence of a residence or
2 principal place of business, for Thurston county. Such appeal may be
3 perfected by filing with the clerk of the superior court a notice of
4 appeal, and by serving a copy thereof by mail, or personally on the
5 director, the air pollution control boards or authorities, established
6 pursuant to chapter 70.94 RCW or on the board as the case may be. The
7 hearings board shall serve upon the appealing party, the director, the
8 air pollution control board or authorities established pursuant to
9 chapter 70.94 RCW, or the board, as the case may be, and on any other
10 party appearing at the hearings board's proceeding, and file with the
11 clerk of the court before trial, a certified copy of the hearings
12 board's decision and order. Appellate review of a decision of the
13 superior court may be sought as in other civil cases. No bond shall be
14 required on appeals to the superior court or on review by the supreme
15 court unless specifically required by the judge of the superior court.

16 **Sec. 8.** RCW 43.21B.230 and 1990 c 65 s 6 are each amended to read
17 as follows:

18 Any person having received notice of a denial of a petition, a
19 notice of determination, notice of or an order made by the department
20 may appeal, within thirty days from the date of the notice of such
21 denial, order, or determination to the hearings board. The appeal
22 shall be perfected by serving a copy of the notice of appeal upon the
23 department or air pollution authority established pursuant to chapter
24 70.94 RCW, as the case may be, within the time specified herein and by
25 filing the original thereof with proof of service with the clerk of the
26 hearings board. ~~((If the person intends that the hearing before the
27 hearings board be a formal one, the notice of appeal shall so state.
28 In the event that the notice of appeal does not so state, the hearing
29 shall be an informal one:— PROVIDED, HOWEVER, That nothing shall
30 prevent the department or the air pollution authority, as the case may
31 be, within ten days from the date of its receipt of the notice of
32 appeal, from filing with the clerk of the hearings board notice of its
33 intention that the hearing be a formal one.))~~

34 **Sec. 9.** RCW 76.09.230 and 1992 c 52 s 23 are each amended to read
35 as follows:

36 (1) ~~((In all appeals over which the appeals board has jurisdiction,
37 a party taking an appeal may elect either a formal or an informal~~

1 hearing, unless such party has had an informal hearing with the
2 department. Such election shall be made according to the rules of
3 practice and procedure to be promulgated by the appeals board. In the
4 event that appeals are taken from the same decision, order, or
5 determination, as the case may be, by different parties and only one of
6 such parties elects a formal hearing, a formal hearing shall be
7 granted.

8 (2)) In all appeals over which the appeals board has jurisdiction,
9 upon request of one or more parties and with the consent of all
10 parties, the appeals board shall promptly schedule a conference for the
11 purpose of attempting to mediate the case. The mediation conference
12 shall be held prior to the hearing on not less than seven days' advance
13 written notice to all parties. All other proceedings pertaining to the
14 appeal shall be stayed until completion of mediation, which shall
15 continue so long as all parties consent: PROVIDED, That this shall not
16 prevent the appeals board from deciding motions filed by the parties
17 while mediation is ongoing: PROVIDED, FURTHER, That discovery may be
18 conducted while mediation is ongoing if agreed to by all parties.
19 Mediation shall be conducted by an administrative appeals judge or
20 other duly authorized agent of the appeals board who has received
21 training in dispute resolution techniques or has a demonstrated history
22 of successfully resolving disputes, as determined by the appeals board.
23 A person who mediates in a particular appeal shall not participate in
24 a hearing on that appeal or in writing the decision and order in the
25 appeal. Documentary and other physical evidence presented and evidence
26 of conduct or statements made during the course of mediation shall be
27 treated by the mediator and the parties in a confidential manner and
28 shall not be admissible in subsequent proceedings in the appeal except
29 in accordance with the provisions of the Washington rules of evidence
30 pertaining to compromise negotiations.

31 ((3)) (2) In all appeals the appeals board shall have all powers
32 relating to administration of oaths, issuance of subpoenas, and taking
33 of depositions, but such powers shall be exercised in conformity with
34 chapter 34.05 RCW.

35 ((4)) (3) In all appeals (~~involving formal hearing~~) the appeals
36 board, and each member thereof, shall be subject to all duties imposed
37 upon and shall have all powers granted to, an agency by those
38 provisions of chapter 34.05 RCW relating to adjudicative proceedings.

1 ~~((5))~~ (4) All proceedings ~~(, including both formal and informal~~
2 ~~hearings,~~) before the appeals board or any of its members shall be
3 conducted in accordance with such rules of practice and procedure as
4 the board may prescribe. The appeals board shall publish such rules
5 and arrange for the reasonable distribution thereof.

6 ~~((6))~~ (5) Judicial review of a decision of the appeals board
7 ~~((shall be de novo except when the decision has been rendered pursuant~~
8 ~~to the formal hearing, in which event judicial review))~~ may be obtained
9 only pursuant to RCW 34.05.510 through 34.05.598.

10 NEW SECTION. **Sec. 10.** The office of the administrator for the
11 courts, under the direction of the appellate courts, shall conduct a
12 study to expedite appeals from administrative hearings. The study
13 shall be conducted in close cooperation with the environmental hearings
14 office. Recommendations from the study shall be made to the
15 appropriate standing committees of the legislature by September 1,
16 1994."

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