

2 **SB 5087** - H COMM AMD **NOT ADOPTED 4/14/95**
3 By Committee on Agriculture & Ecology

4

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

7 "NEW SECTION. **Sec. 1.** The legislature finds that it is difficult
8 for the pollution control hearings board to process all the appeals
9 pending before the board in an expedited manner because of the size of
10 the caseload. Members of the public suffer severe economic
11 consequences when their appeals cannot be processed quickly, especially
12 when the appeals pertain to water-related decisions of the department
13 of ecology. The purpose of this act is to provide for the expedited
14 review of certain water-related decisions of the department of ecology.

15 **Sec. 2.** RCW 43.21A.070 and 1970 ex.s. c 62 s 7 are each amended to
16 read as follows:

17 (1) The administrative procedure act, chapter 34.05 RCW, shall
18 apply to the review of ((decisions)) a water-related agency action by
19 the director ((to the same extent as it applied to decisions issued by
20 the directors of the various departments whose powers, duties and
21 functions are transferred by this 1970 amendatory act to the department
22 of ecology)) when an administrative hearing is elected under section 22
23 of this act. The administrative procedure act shall further apply to
24 all other decisions of the director ((as in chapter 34.05 RCW
25 provided)) except as limited by RCW 43.21B.240. In any adjudicative
26 proceeding commenced in response to a water-related agency action by
27 the department, an administrative law judge shall serve as the
28 presiding officer for the hearing in accordance with RCW 34.05.425(3).

29 (2) For purposes of this section, a "water-related agency action"
30 includes the following:

31 (a) A decision to grant or deny a permit or certificate for a right
32 to the beneficial use of water or to amend, change, or transfer such a
33 right;

1 (b) A decision to enforce the conditions of a permit for, or right
2 to, the beneficial use of water or to require any person to discontinue
3 the use of water; and

4 (c) A decision to establish a minimum flow or level for water under
5 chapter 90.03, 90.22, or 90.54 RCW, or to reserve water for such a
6 minimum flow or level.

7 **Sec. 3.** RCW 34.05.425 and 1989 c 175 s 14 are each amended to read
8 as follows:

9 (1) Except as provided in subsections (2) and (3) of this section,
10 in the discretion of the agency head, the presiding officer in an
11 administrative hearing shall be:

12 (a) The agency head or one or more members of the agency head;

13 (b) If the agency has statutory authority to do so, a person other
14 than the agency head or an administrative law judge designated by the
15 agency head to make the final decision and enter the final order; or

16 (c) One or more administrative law judges assigned by the office of
17 administrative hearings in accordance with chapter 34.12 RCW.

18 (2) An agency expressly exempted under RCW 34.12.020(4) or other
19 statute from the provisions of chapter 34.12 RCW or an institution of
20 higher education shall designate a presiding officer as provided by
21 rules adopted by the agency.

22 (3) The presiding officer in an administrative hearing for a water-
23 related agency action taken by the department of ecology, as defined in
24 RCW 43.21A.070, when an administrative hearing is elected under section
25 22 of this act, shall be an administrative law judge assigned by the
26 office of administrative hearings in accordance with chapter 34.12 RCW.
27 The administrative law judge shall make the final decision and enter
28 the final order for these hearings.

29 (4) Any individual serving or designated to serve alone or with
30 others as presiding officer is subject to disqualification for bias,
31 prejudice, interest, or any other cause provided in this chapter or for
32 which a judge is disqualified.

33 ~~((4))~~ (5) Any party may petition for the disqualification of an
34 individual promptly after receipt of notice indicating that the
35 individual will preside or, if later, promptly upon discovering facts
36 establishing grounds for disqualification.

1 (~~(5)~~) (6) The individual whose disqualification is requested
2 shall determine whether to grant the petition, stating facts and
3 reasons for the determination.

4 (~~(6)~~) (7) When the presiding officer is an administrative law
5 judge, the provisions of this section regarding disqualification for
6 cause are in addition to the motion of prejudice available under RCW
7 34.12.050.

8 (~~(7)~~) (8) If a substitute is required for an individual who
9 becomes unavailable as a result of disqualification or any other
10 reason, the substitute must be appointed by the appropriate appointing
11 authority.

12 (~~(8)~~) (9) Any action taken by a duly appointed substitute for an
13 unavailable individual is as effective as if taken by the unavailable
14 individual.

15 **Sec. 4.** RCW 34.05.419 and 1988 c 288 s 404 are each amended to
16 read as follows:

17 After receipt of an application for an adjudicative proceeding,
18 other than a declaratory order, an agency shall proceed as follows:

19 (1) Except in situations governed by subsection (2) (~~(or)~~) (3), or
20 (4) of this section, within ninety days after receipt of the
21 application or of the response to a timely request made by the agency
22 under subsection (2) of this section, the agency shall do one of the
23 following:

24 (a) Approve or deny the application, in whole or in part, on the
25 basis of brief or emergency adjudicative proceedings, if those
26 proceedings are available under this chapter for disposition of the
27 matter;

28 (b) Commence an adjudicative proceeding in accordance with this
29 chapter; or

30 (c) Dispose of the application in accordance with RCW 34.05.416;

31 (2) Within thirty days after receipt of the application, the agency
32 shall examine the application, notify the applicant of any obvious
33 errors or omissions, request any additional information the agency
34 wishes to obtain and is permitted by law to require, and notify the
35 applicant of the name, mailing address, and telephone number of an
36 office that may be contacted regarding the application;

37 (3) If the application seeks relief that is not available when the
38 application is filed but may be available in the future, the agency may

1 proceed to make a determination of eligibility within the time limits
2 provided in subsection (1) of this section. If the agency determines
3 that the applicant is eligible, the agency shall maintain the
4 application on the agency's list of eligible applicants as provided by
5 law and, upon request, shall notify the applicant of the status of the
6 application;

7 (4) After receipt of an application for an adjudicative proceeding
8 under chapter 34.05 RCW in response to a water-related agency action
9 taken by the department of ecology, as defined in RCW 43.21A.070, the
10 department of ecology shall within thirty days of the receipt of the
11 application commence an adjudicatory proceeding in accordance with this
12 chapter.

13 **Sec. 5.** RCW 34.05.461 and 1989 c 175 s 19 are each amended to read
14 as follows:

15 (1) Except as provided in subsection (2) of this section:

16 (a) If the presiding officer is the agency head or one or more
17 members of the agency head, the presiding officer may enter an initial
18 order if further review is available within the agency, or a final
19 order if further review is not available;

20 (b) If the presiding officer is a person designated by the agency
21 to make the final decision and enter the final order, or is an
22 administrative law judge acting pursuant to RCW 34.05.425(3), the
23 presiding officer or the administrative law judge shall enter a final
24 order; and

25 (c) If the presiding officer is one or more administrative law
26 judges, the presiding officer shall enter an initial order.

27 (2) With respect to agencies exempt from chapter 34.12 RCW or an
28 institution of higher education, the presiding officer shall transmit
29 a full and complete record of the proceedings, including such comments
30 upon demeanor of witnesses as the presiding officer deems relevant, to
31 each agency official who is to enter a final or initial order after
32 considering the record and evidence so transmitted.

33 (3) Initial and final orders shall include a statement of findings
34 and conclusions, and the reasons and basis therefor, on all the
35 material issues of fact, law, or discretion presented on the record,
36 including the remedy or sanction and, if applicable, the action taken
37 on a petition for a stay of effectiveness. Any findings based
38 substantially on credibility of evidence or demeanor of witnesses shall

1 be so identified. Findings set forth in language that is essentially
2 a repetition or paraphrase of the relevant provision of law shall be
3 accompanied by a concise and explicit statement of the underlying
4 evidence of record to support the findings. The order shall also
5 include a statement of the available procedures and time limits for
6 seeking reconsideration or other administrative relief. An initial
7 order shall include a statement of any circumstances under which the
8 initial order, without further notice, may become a final order.

9 (4) Findings of fact shall be based exclusively on the evidence of
10 record in the adjudicative proceeding and on matters officially noticed
11 in that proceeding. Findings shall be based on the kind of evidence on
12 which reasonably prudent persons are accustomed to rely in the conduct
13 of their affairs. Findings may be based on such evidence even if it
14 would be inadmissible in a civil trial. However, the presiding officer
15 shall not base a finding exclusively on such inadmissible evidence
16 unless the presiding officer determines that doing so would not unduly
17 abridge the parties' opportunities to confront witnesses and rebut
18 evidence. The basis for this determination shall appear in the order.

19 (5) Where it bears on the issues presented, the agency's
20 experience, technical competency, and specialized knowledge may be used
21 in the evaluation of evidence.

22 (6) If a person serving or designated to serve as presiding officer
23 becomes unavailable for any reason before entry of the order, a
24 substitute presiding officer shall be appointed as provided in RCW
25 34.05.425. The substitute presiding officer shall use any existing
26 record and may conduct any further proceedings appropriate in the
27 interests of justice.

28 (7) The presiding officer may allow the parties a designated time
29 after conclusion of the hearing for the submission of memos, briefs, or
30 proposed findings.

31 (8) Initial or final orders shall be served in writing within
32 ninety days after conclusion of the hearing or after submission of
33 memos, briefs, or proposed findings in accordance with subsection (7)
34 of this section unless this period is waived or extended for good cause
35 shown.

36 (9) The presiding officer shall cause copies of the order to be
37 served on each party and the agency.

1 **Sec. 6.** RCW 34.05.514 and 1994 c 257 s 23 are each amended to read
2 as follows:

3 (1) Except as provided in subsections (2) and (3) of this section
4 (~~and RCW 36.70A.300(3)~~), proceedings for review under this chapter
5 shall be instituted by filing a petition in the superior court, at the
6 petitioner's option, for (a) Thurston county, (b) the county of the
7 petitioner's residence or principal place of business, or (c) in any
8 county where the property owned by the petitioner and affected by the
9 contested decision is located.

10 (2) For proceedings involving institutions of higher education, the
11 petition shall be filed either in the county in which the principal
12 office of the institution involved is located or in the county of a
13 branch campus if the action involves such branch.

14 (3) For proceedings involving water-related agency actions taken by
15 the department of ecology, as defined in RCW 43.21A.070, the petition
16 shall be filed in the superior court in the county that will be
17 directly and immediately affected by the decision.

18 **Sec. 7.** RCW 34.05.530 and 1988 c 288 s 506 are each amended to
19 read as follows:

20 A person has standing to obtain judicial review of agency action if
21 that person is aggrieved or adversely affected by the agency action.
22 An agency has standing to obtain judicial review of a final order if
23 the final order is adverse to the agency and is issued by an
24 administrative law judge acting pursuant to RCW 34.05.425(3). A person
25 is aggrieved or adversely affected within the meaning of this section
26 only when all three of the following conditions are present:

27 (1) The agency action has prejudiced or is likely to prejudice that
28 person;

29 (2) That person's asserted interests are among those that the
30 agency was required to consider when it engaged in the agency action
31 challenged; and

32 (3) A judgment in favor of that person would substantially
33 eliminate or redress the prejudice to that person caused or likely to
34 be caused by the agency action.

35 **Sec. 8.** RCW 34.05.534 and 1988 c 288 s 507 are each amended to
36 read as follows:

1 A person may file a petition for judicial review under this chapter
2 only after exhausting all administrative remedies available within the
3 agency whose action is being challenged, or available within any other
4 agency authorized to exercise administrative review, except:

5 (1) A petitioner for judicial review of a rule need not have
6 participated in the rule-making proceeding upon which that rule is
7 based, or have petitioned for its amendment or repeal;

8 (2) A petitioner for judicial review need not exhaust
9 administrative remedies to the extent that this chapter or any other
10 statute states that exhaustion is not required; ((or))

11 (3) The court may relieve a petitioner of the requirement to
12 exhaust any or all administrative remedies upon a showing that:

13 (a) The remedies would be patently inadequate;

14 (b) The exhaustion of remedies would be futile; or

15 (c) The grave irreparable harm that would result from having to
16 exhaust administrative remedies would clearly outweigh the public
17 policy requiring exhaustion of administrative remedies; or

18 (4) A petitioner for judicial review of a final order issued by an
19 administrative law judge acting pursuant to RCW 34.05.425(3) need not
20 exhaust any other administrative remedy.

21 **Sec. 9.** RCW 34.12.040 and 1981 c 67 s 4 are each amended to read
22 as follows:

23 Whenever a state agency conducts a hearing which is not presided
24 over by officials of the agency who are to render the final decision,
25 the hearing shall be conducted by an administrative law judge assigned
26 under this chapter. In any adjudicative proceeding commenced under
27 chapter 34.05 RCW in response to a water-related agency action by the
28 department of ecology, as defined in RCW 43.21A.070, the hearing shall
29 be conducted by an administrative law judge assigned under this chapter
30 according to procedural rules developed by the chief administrative law
31 judge. The chief administrative law judge shall ensure that hearings
32 pertaining to water-related agency actions by the department of ecology
33 will be conducted in the general area where the petitioner resides, or
34 provide for the hearings to be conducted by telephone. In assigning
35 administrative law judges, the chief administrative law judge shall
36 wherever practical (1) use personnel having expertise in the field or
37 subject matter of the hearing, and (2) assign administrative law judges
38 primarily to the hearings of particular agencies on a long-term basis.

1 **Sec. 10.** RCW 43.21B.110 and 1993 c 387 s 22 are each amended to
2 read as follows:

3 (1) The pollution control hearings board shall only have
4 jurisdiction to hear and decide appeals from the following decisions of
5 the department, the director, the administrator of the office of marine
6 safety, and the air pollution control boards or authorities as
7 established pursuant to chapter 70.94 RCW, or local health departments:

8 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
9 70.105.080, 70.107.050, 88.46.090, (~~(90.03.600)~~) 90.48.144, 90.56.310,
10 and 90.56.330.

11 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
12 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
13 (~~(90.14.130)~~) and 90.48.120.

14 (c) The issuance, modification, or termination of any permit,
15 certificate, or license by the department or any air authority in the
16 exercise of its jurisdiction, including the issuance or termination of
17 a waste disposal permit, the denial of an application for a waste
18 disposal permit, or the modification of the conditions or the terms of
19 a waste disposal permit.

20 (d) Decisions of local health departments regarding the grant or
21 denial of solid waste permits pursuant to chapter 70.95 RCW.

22 (e) Decisions of local health departments regarding the issuance
23 and enforcement of permits to use or dispose of biosolids under RCW
24 70.95J.080.

25 (f) Any other decision by the department, the administrator of the
26 office of marine safety, or an air authority which pursuant to law must
27 be decided as an adjudicative proceeding under chapter 34.05 RCW.

28 (2) The jurisdiction of the pollution control hearings board is
29 further limited as follows:

30 (a) The hearings board shall have no jurisdiction whatsoever to
31 review water-related agency actions of the department of ecology listed
32 in RCW 43.21A.070, to review orders pertaining to the relinquishment of
33 a water right under RCW 90.14.130, or to review proceedings regarding
34 general adjudications of water rights conducted pursuant to chapter
35 90.03 or 90.44 RCW.

36 (b) The following hearings shall not be conducted by the hearings
37 board:

38 (~~(a)~~) (i) Hearings required by law to be conducted by the
39 shorelines hearings board pursuant to chapter 90.58 RCW.

1 (~~(b)~~) (ii) Hearings conducted by the department pursuant to RCW
2 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
3 90.44.180.

4 (~~(c)~~ ~~Proceedings by the department relating to general~~
5 ~~adjudications of water rights pursuant to chapter 90.03 or 90.44 RCW.~~

6 (~~(d)~~) (iii) Hearings conducted by the department to adopt, modify,
7 or repeal rules.

8 (3) Review of rules and regulations adopted by the hearings board
9 shall be subject to review in accordance with the provisions of the
10 Administrative Procedure Act, chapter 34.05 RCW.

11 **Sec. 11.** RCW 43.21B.130 and 1990 c 65 s 3 are each amended to read
12 as follows:

13 The administrative procedure act, chapter 34.05 RCW, shall apply to
14 the appeal of rules and regulations adopted by the board to the same
15 extent as it applied to the review of rules and regulations adopted by
16 the directors and/or boards or commissions of the various departments
17 whose powers, duties and functions were transferred by section 6,
18 chapter 62, Laws of 1970 ex. sess. to the department. Except with
19 regard to water-related agency actions by the department, as defined in
20 RCW 43.21A.070, which are appealable to a superior court or to an
21 administrative law judge pursuant to section 22 of this act, and orders
22 pertaining to the relinquishment of a water right under RCW 90.14.130,
23 all other decisions and orders of the director and all decisions of air
24 pollution control boards or authorities established pursuant to chapter
25 70.94 RCW shall be subject to review by the hearings board as provided
26 in this chapter.

27 **Sec. 12.** RCW 43.21B.240 and 1989 c 175 s 105 are each amended to
28 read as follows:

29 The department and air authorities shall not have authority to hold
30 adjudicative proceedings pursuant to the Administrative Procedure Act,
31 chapter 34.05 RCW, except with regard to water-related agency actions
32 of the department listed in RCW 43.21A.070 that may be appealed to an
33 administrative law judge as provided in RCW 34.05.425(3). (~~(Such)~~) All
34 other hearings, except for water-related agency actions that are
35 appealed to a superior court pursuant to section 22 of this act and
36 appeals of orders pertaining to the relinquishment of a water right

1 under RCW 90.14.130, shall be held by the pollution control hearings
2 board.

3 **Sec. 13.** RCW 43.21B.300 and 1993 c 387 s 23 are each amended to
4 read as follows:

5 (1) Any civil penalty provided in RCW 18.104.155, 70.94.431,
6 70.105.080, 70.107.050, 88.46.090, (~~(90.03.600,)~~) 90.48.144, 90.56.310,
7 and 90.56.330 shall be imposed by a notice in writing, either by
8 certified mail with return receipt requested or by personal service, to
9 the person incurring the penalty from the department, the administrator
10 of the office of marine safety, or the local air authority, describing
11 the violation with reasonable particularity. Within fifteen days after
12 the notice is received, the person incurring the penalty may apply in
13 writing to the department, the administrator, or the authority for the
14 remission or mitigation of the penalty. Upon receipt of the
15 application, the department, the administrator, or authority may remit
16 or mitigate the penalty upon whatever terms the department, the
17 administrator, or the authority in its discretion deems proper. The
18 department or the authority may ascertain the facts regarding all such
19 applications in such reasonable manner and under such rules as it may
20 deem proper and shall remit or mitigate the penalty only upon a
21 demonstration of extraordinary circumstances such as the presence of
22 information or factors not considered in setting the original penalty.

23 (2) Any penalty imposed under this section may be appealed to the
24 pollution control hearings board in accordance with this chapter if the
25 appeal is filed with the hearings board and served on the department,
26 the administrator, or authority thirty days after receipt by the person
27 penalized of the notice imposing the penalty or thirty days after
28 receipt of the notice of disposition of the application for relief from
29 penalty.

30 (3) A penalty shall become due and payable on the later of:

31 (a) Thirty days after receipt of the notice imposing the penalty;

32 (b) Thirty days after receipt of the notice of disposition on
33 application for relief from penalty, if such an application is made; or

34 (c) Thirty days after receipt of the notice of decision of the
35 hearings board if the penalty is appealed.

36 (4) If the amount of any penalty is not paid to the department or
37 the administrator within thirty days after it becomes due and payable,
38 the attorney general, upon request of the department or the

1 administrator, shall bring an action in the name of the state of
2 Washington in the superior court of Thurston county, or of any county
3 in which the violator does business, to recover the penalty. If the
4 amount of the penalty is not paid to the authority within thirty days
5 after it becomes due and payable, the authority may bring an action to
6 recover the penalty in the superior court of the county of the
7 authority's main office or of any county in which the violator does
8 business. In these actions, the procedures and rules of evidence shall
9 be the same as in an ordinary civil action.

10 (5) All penalties recovered shall be paid into the state treasury
11 and credited to the general fund except those penalties imposed
12 pursuant to RCW 18.104.155, which shall be credited to the reclamation
13 account as provided in RCW 18.104.155(7), RCW 70.94.431, the
14 disposition of which shall be governed by that provision, RCW
15 70.105.080, which shall be credited to the hazardous waste control and
16 elimination account, created by RCW 70.105.180, and RCW 90.56.330,
17 which shall be credited to the coastal protection fund created by RCW
18 90.48.390.

19 **Sec. 14.** RCW 43.21B.310 and 1992 c 73 s 3 are each amended to read
20 as follows:

21 (1) Except as provided in subsection (2) of this section, any order
22 issued by the department, the administrator of the office of marine
23 safety, or authority pursuant to RCW 70.94.211, 70.94.332, 70.105.095,
24 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any provision
25 enacted after July 26, 1987, or any permit, certificate, or license
26 issued by the department may be appealed to the pollution control
27 hearings board if the appeal is filed with the board and served on the
28 department or authority within thirty days after receipt of the order.
29 Except as provided under chapter 70.105D RCW, (~~this is~~) these are the
30 exclusive means of appeal of such an order.

31 (~~(2)~~) (a) The department, the administrator, or the authority in
32 its discretion may stay the effectiveness of an order during the
33 pendency of such an appeal.

34 (~~(3)~~) (b) At any time during the pendency of an appeal of such an
35 order to the board or to an administrative law judge acting pursuant to
36 RCW 34.05.425(3), the appellant may apply pursuant to RCW 43.21B.320 to
37 the hearings board or administrative law judge for a stay of the order
38 or for the removal thereof.

1 ~~((4))~~ (c) Any appeal before the hearings board must contain the
2 following in accordance with the rules of the hearings board:

3 ~~((a))~~ (i) The appellant's name and address;

4 ~~((b))~~ (ii) The date and docket number of the order, permit, or
5 license appealed;

6 ~~((c))~~ (iii) A description of the substance of the order, permit,
7 or license that is the subject of the appeal;

8 ~~((d))~~ (iv) A clear, separate, and concise statement of every
9 error alleged to have been committed;

10 ~~((e))~~ (v) A clear and concise statement of facts upon which the
11 requester relies to sustain his or her statements of error; and

12 ~~((f))~~ (vi) A statement setting forth the relief sought.

13 ~~((5))~~ (d) Upon failure to comply with any final order of the
14 department or the administrator or the administrative law judge acting
15 pursuant to RCW 34.05.425(3), the attorney general, on request of the
16 department or the administrator, may bring an action in the superior
17 court of the county where the violation occurred or the potential
18 violation is about to occur to obtain such relief as necessary,
19 including injunctive relief, to insure compliance with the order. The
20 air authorities may bring similar actions to enforce their orders.

21 ~~((6))~~ (e) An appealable decision or order shall be identified as
22 such and shall contain a conspicuous notice to the recipient that it
23 may be appealed only by filing an appeal with the hearings board and
24 serving it on the department within thirty days of receipt.

25 (2) Water-related agency actions of the department listed in RCW
26 43.21A.070 may not be appealed to the hearings board; they may be
27 appealed either to an administrative law judge or to a superior court
28 as provided in section 22 of this act. Appeals of orders pertaining to
29 the relinquishment of a water right shall be filed in superior court as
30 provided by RCW 90.14.130.

31 **Sec. 15.** RCW 43.21B.320 and 1987 c 109 s 7 are each amended to
32 read as follows:

33 (1) A person appealing to the hearings board, or to an
34 administrative law judge acting pursuant to RCW 34.05.425(3), an order
35 of the department or an authority, not stayed by the issuing agency,
36 may obtain a stay of the effectiveness of that order only as set forth
37 in this section.

1 (2) An appealing party may request a stay by including such a
2 request in the appeal document, in a subsequent motion, or by such
3 other means as the rules of the hearings board or the procedural rules
4 developed by the chief administrative law judge for appeals made
5 pursuant to RCW 34.05.425(3) shall prescribe. The request must be
6 accompanied by a statement of grounds for the stay and evidence setting
7 forth the factual basis upon which request is based. The hearings
8 board or the administrative law judge shall hear the request for a stay
9 as soon as possible. The hearing on the request for stay may be
10 consolidated with the hearing on the merits.

11 (3) The applicant may make a prima facie case for stay if the
12 applicant demonstrates either a likelihood of success on the merits of
13 the appeal or irreparable harm. Upon such a showing, the hearings
14 board or administrative law judge shall grant the stay unless the
15 department or authority demonstrates either (a) a substantial
16 probability of success on the merits or (b) likelihood of success on
17 the merits and an overriding public interest which justifies denial of
18 the stay.

19 (4) Unless otherwise stipulated by the parties, the hearings board
20 or administrative law judge, after granting or denying an application
21 for a stay, shall expedite the hearing and decision on the merits.

22 (5) Any party or other person aggrieved by the grant or denial of
23 a stay by the hearings board may petition the superior court for
24 Thurston county for review of that decision pursuant to chapter 34.05
25 RCW pending the appeal on the merits before the board. Any party or
26 other person aggrieved by the grant or denial of a stay by an
27 administrative law judge acting pursuant to RCW 34.05.425(3) may
28 petition the superior court for the county that will be directly and
29 immediately affected by the stay. The superior court shall expedite
30 its review of the decision of the hearings board or administrative law
31 judge.

32 **Sec. 16.** RCW 43.27A.190 and 1987 c 109 s 11 are each amended to
33 read as follows:

34 Notwithstanding and in addition to any other powers granted to the
35 department of ecology, whenever it appears to the department that a
36 person is violating or is about to violate any of the provisions of the
37 following:

38 (1) Chapter 90.03 RCW; or

1 (2) Chapter 90.44 RCW; or
2 (3) Chapter 86.16 RCW; or
3 (4) Chapter 43.37 RCW; or
4 (5) Chapter 43.27A RCW; or
5 (6) Any other law relating to water resources administered by the
6 department; or

7 (7) A rule or regulation adopted, or a directive or order issued by
8 the department relating to subsections (1) through (6) of this section;
9 the department may cause a written regulatory order to be served upon
10 (~~said~~) the person either personally, or by registered or certified
11 mail delivered to addressee only with return receipt requested and
12 acknowledged by him or her. The order shall specify the provision of
13 the statute, rule, regulation, directive or order alleged to be or
14 about to be violated, and the facts upon which the conclusion of
15 violating or potential violation is based, and shall order the act
16 constituting the violation or the potential violation to cease and
17 desist or, in appropriate cases, shall order necessary corrective
18 action to be taken with regard to such acts within a specific and
19 reasonable time. The regulation of a headgate or controlling works as
20 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other
21 person so authorized by the department shall constitute a regulatory
22 order within the meaning of this section. A regulatory order issued
23 hereunder shall become effective immediately upon receipt by the person
24 to whom the order is directed, except for regulations under RCW
25 90.03.070 which shall become effective when a written notice is
26 attached as provided therein. Any person aggrieved by such order may
27 appeal the order pursuant to RCW 43.21B.310 unless the order is a
28 water-related agency action of the department listed in RCW 43.21A.070,
29 in which case it may be appealed to an administrative law judge or to
30 a superior court as provided in section 22 of this act.

31 **Sec. 17.** RCW 90.03.383 and 1991 c 350 s 1 are each amended to read
32 as follows:

33 (1) The legislature recognizes the value of interties for improving
34 the reliability of public water systems, enhancing their management,
35 and more efficiently utilizing the increasingly limited resource.
36 Given the continued growth in the most populous areas of the state, the
37 increased complexity of public water supply management, and the trend
38 toward regional planning and regional solutions to resource issues,

1 interconnections of public water systems through interties provide a
2 valuable tool to ensure reliable public water supplies for the citizens
3 of the state. Public water systems have been encouraged in the past to
4 utilize interties to achieve public health and resource management
5 objectives. The legislature finds that it is in the public interest to
6 recognize interties existing and in use as of January 1, 1991, and to
7 have associated water rights modified by the department of ecology to
8 reflect current use of water through those interties, pursuant to
9 subsection (3) of this section. The legislature further finds it in
10 the public interest to develop a coordinated process to review
11 proposals for interties commencing use after January 1, 1991.

12 (2) For the purposes of this section, the following definitions
13 shall apply:

14 (a) "Interties" are interconnections between public water systems
15 permitting exchange or delivery of water between those systems for
16 other than emergency supply purposes, where such exchange or delivery
17 is within established instantaneous and annual withdrawal rates
18 specified in the systems' existing water right permits or certificates,
19 or contained in claims filed pursuant to chapter 90.14 RCW, and which
20 results in better management of public water supply consistent with
21 existing rights and obligations. Interties include interconnections
22 between public water systems permitting exchange or delivery of water
23 to serve as primary or secondary sources of supply, but do not include
24 development of new sources of supply to meet future demand.

25 (b) "Service area" is the area designated in a water system plan or
26 a coordinated water system plan pursuant to chapter 43.20 or 70.116 RCW
27 respectively. When a public water system does not have a designated
28 service area subject to the approval process of those chapters, the
29 service area shall be the designated place of use contained in the
30 water right permit or certificate, or contained in the claim filed
31 pursuant to chapter 90.14 RCW.

32 (3) Public water systems with interties existing and in use as of
33 January 1, 1991, or that have received written approval from the
34 department of health prior to that date, shall file written notice of
35 those interties with the department of health and the department of
36 ecology. The notice may be incorporated into the public water system's
37 five-year update of its water system plan, but shall be filed no later
38 than June 30, 1996. The notice shall identify the location of the
39 intertie; the dates of its first use; the purpose, capacity, and

1 current use; the intertie agreement of the parties and the service
2 areas assigned; and other information reasonably necessary to modify
3 the water right permit. Notwithstanding the provisions of RCW
4 90.03.380 and 90.44.100, for public water systems with interties
5 existing and in use as of January 1, 1991, the department of ecology,
6 upon receipt of notice meeting the requirements of this subsection,
7 shall, as soon as practicable, modify the place of use descriptions in
8 the water right permits, certificates, or claims to reflect the actual
9 use through such interties, provided that the place of use is within
10 service area designations established in a water system plan approved
11 pursuant to chapter 43.20 RCW, or a coordinated water system plan
12 approved pursuant to chapter 70.116 RCW, and further provided that the
13 water used is within the instantaneous and annual withdrawal rates
14 specified in the water right permit and that no outstanding complaints
15 of impairment to existing water rights have been filed with the
16 department of ecology prior to September 1, 1991. Where such
17 complaints of impairment have been received, the department of ecology
18 shall make all reasonable efforts to resolve them in a timely manner
19 through agreement of the parties or through available administrative
20 remedies.

21 (4) Notwithstanding the provisions of RCW 90.03.380 and 90.44.100,
22 exchange or delivery of water through interties commencing use after
23 January 1, 1991, shall be permitted when the intertie improves overall
24 system reliability, enhances the manageability of the systems, provides
25 opportunities for conjunctive use, or delays or avoids the need to
26 develop new water sources, and otherwise meets the requirements of this
27 section, provided that each public water system's water use shall not
28 exceed the instantaneous or annual withdrawal rate specified in its
29 water right authorization, shall not adversely affect existing water
30 rights, and shall not be inconsistent with state-approved plans such as
31 water system plans or other plans which include specific proposals for
32 construction of interties. Interties commencing use after January 1,
33 1991, shall not be inconsistent with regional water resource plans
34 developed pursuant to chapter 90.54 RCW.

35 (5) For public water systems subject to the approval process of
36 chapter 43.20 RCW or chapter 70.116 RCW, proposals for interties
37 commencing use after January 1, 1991, shall be incorporated into water
38 system plans pursuant to chapter 43.20 RCW or coordinated water system
39 plans pursuant to chapter 70.116 RCW and submitted to the department of

1 health and the department of ecology for review and approval as
2 provided for in subsections (5) through (9) of this section. The plan
3 shall state how the proposed intertie will improve overall system
4 reliability, enhance the manageability of the systems, provide
5 opportunities for conjunctive use, or delay or avoid the need to
6 develop new water sources.

7 (6) The department of health shall be responsible for review and
8 approval of proposals for new interties. In its review the department
9 of health shall determine whether the intertie satisfies the criteria
10 of subsection (4) of this section, with the exception of water rights
11 considerations, which are the responsibility of the department of
12 ecology, and shall determine whether the intertie is necessary to
13 address emergent public health or safety concerns associated with
14 public water supply.

15 (7) If the intertie is determined by the department of health to be
16 necessary to address emergent public health or safety concerns
17 associated with public water supply, the public water system shall
18 amend its water system plan as required and shall file an application
19 with the department of ecology to change its existing water right to
20 reflect the proposed use of the water as described in the approved
21 water system plan. The department of ecology shall process the
22 application for change pursuant to RCW 90.03.380 or 90.44.100 as
23 appropriate, except that, notwithstanding the requirements of those
24 sections regarding notice and protest periods, applicants shall be
25 required to publish notice one time, and the comment period shall be
26 fifteen days from the date of publication of the notice. Within sixty
27 days of receiving the application, the department of ecology shall
28 issue findings and advise the department of health if existing water
29 rights are determined to be adversely affected. If no determination is
30 provided by the department of ecology within the sixty-day period, the
31 department of health shall proceed as if existing rights are not
32 adversely affected by the proposed intertie. The department of ecology
33 may obtain an extension of the sixty-day period by submitting written
34 notice to the department of health and to the applicant indicating a
35 definite date by which its determination will be made. No additional
36 extensions shall be granted, and in no event shall the total review
37 period for the department of ecology exceed one hundred eighty days.

38 (8) If the department of health determines the proposed intertie
39 appears to meet the requirements of subsection (4) of this section but

1 is not necessary to address emergent public health or safety concerns
2 associated with public water supply, the department of health shall
3 instruct the applicant to submit to the department of ecology an
4 application for change to the underlying water right or claim as
5 necessary to reflect the new place of use. The department of ecology
6 shall consider the applications pursuant to the provisions of RCW
7 90.03.380 and 90.44.100 as appropriate. If in its review of proposed
8 interties and associated water rights the department of ecology
9 determines that additional information is required to act on the
10 application, the department may request applicants to provide
11 information necessary for its decision, consistent with agency rules
12 and written guidelines. Parties disagreeing with the decision of the
13 department of ecology ((~~en~~)) to approve or deny the application for
14 change in place of use may appeal the decision to ((the pollution
15 control hearings board)) an administrative law judge or a superior
16 court as provided in section 22 of this act.

17 (9) The department of health may approve plans containing intertie
18 proposals prior to the department of ecology's decision on the water
19 right application for change in place of use. However, notwithstanding
20 such approval, construction work on the intertie shall not begin until
21 the department of ecology issues the appropriate water right document
22 to the applicant consistent with the approved plan.

23 **Sec. 18.** RCW 90.14.130 and 1987 c 109 s 13 are each amended to
24 read as follows:

25 When it appears to the department of ecology that a person entitled
26 to the use of water has not beneficially used his or her water right or
27 some portion thereof, and it appears that ((~~said~~)) the right has or may
28 have reverted to the state because of such nonuse, as provided by RCW
29 90.14.160, 90.14.170, or 90.14.180, the department of ecology shall
30 notify such person by order: PROVIDED, That where a company,
31 association, district, or the United States has filed a blanket claim
32 under the provisions of RCW 90.14.060 for the total benefits of those
33 served by it, the notice shall be served on such company, association,
34 district or the United States and not upon any of its individual water
35 users who may not have used the water or some portion thereof which
36 they were entitled to use. The order shall contain: (1) A description
37 of the water right, including the approximate location of the point of
38 diversion, the general description of the lands or places where such

1 waters were used, the water source, the amount involved, the purpose of
2 use, and the apparent authority upon which the right is based; (2) a
3 statement that unless sufficient cause be shown on appeal the water
4 right will be declared relinquished; and (3) a statement that such
5 order may be appealed to (~~(the pollution control hearings board)~~)
6 superior court. Any person aggrieved by such an order may appeal it to
7 (~~(the pollution control hearings board pursuant to RCW 43.21B.310)~~) the
8 superior court in the county where the land is located upon which the
9 water was used. Any such appeal to superior court shall be de novo.
10 The order shall be served by registered or certified mail to the last
11 known address of the person and be posted at the point of division or
12 withdrawal. The order by itself shall not alter the recipient's right
13 to use water, if any.

14 **Sec. 19.** RCW 90.14.190 and 1987 c 109 s 14 are each amended to
15 read as follows:

16 Any person feeling aggrieved by any decision of the department of
17 ecology may have the same reviewed by an administrative law judge or a
18 superior court pursuant to ((RCW 43.21B.310)) section 22 of this act.
19 In any such review, the findings of fact as set forth in the report of
20 the department of ecology shall be prima facie evidence of the fact of
21 any waiver or relinquishment of a water right or portion thereof. If
22 the (~~(hearings board)~~) administrative law judge affirms the decision of
23 the department, a party seeks review in superior court of (~~(that~~
24 ~~hearings board)~~) the administrative law judge's decision pursuant to
25 chapter 34.05 RCW, and the court determines that the party was injured
26 by an arbitrary, capricious, or erroneous order of the department, the
27 court may award reasonable attorneys' fees. Any order regarding the
28 relinquishment of a water right shall be appealed pursuant to RCW
29 90.14.130.

30 **Sec. 20.** RCW 90.14.200 and 1989 c 175 s 180 are each amended to
31 read as follows:

32 (1) All matters relating to the implementation and enforcement of
33 this chapter by the department of ecology shall be carried out in
34 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
35 except where the provisions of this chapter expressly conflict with
36 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are
37 (~~(adjudicative proceedings within the meaning of chapter 34.05 RCW.~~

1 ~~Final decisions of the department of ecology in these proceedings~~)
2 appealable to superior court as provided in that section. Other final
3 decisions of the department of ecology under this chapter are subject
4 to review by an administrative law judge or a superior court in
5 accordance with (~~chapter 43.21B RCW~~) section 22 of this act.

6 (2) RCW 90.14.130 provides nonexclusive procedures for determining
7 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
8 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
9 among other proceedings, general adjudication proceedings initiated
10 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
11 apply to litigation involving determinations of the department of
12 ecology under RCW 90.03.290 relating to the impairment of existing
13 rights.

14 **Sec. 21.** RCW 90.66.080 and 1979 c 3 s 8 are each amended to read
15 as follows:

16 The department is hereby empowered to promulgate such rules as may
17 be necessary to carry out the provisions of this chapter. Decisions of
18 the department, other than rule making, shall be subject to review by
19 an administrative law judge or a superior court in accordance with
20 (~~chapter 43.21B RCW~~) section 22 of this act.

21 NEW SECTION. **Sec. 22.** A new section is added to chapter 43.21B
22 RCW to read as follows:

23 A person who is aggrieved or adversely affected by a water quantity
24 decision, as defined in RCW 43.21A.070, may appeal the decision either
25 to an administrative law judge under RCW 34.05.425(3) or directly to a
26 superior court. Any direct appeal to a superior court as authorized by
27 this section shall be de novo and must be filed in the superior court
28 in the county that will be directly and immediately affected by the
29 decision.

30 NEW SECTION. **Sec. 23.** If any provision of this act or its
31 application to any person or circumstance is held invalid, the
32 remainder of the act or the application of the provision to other
33 persons or circumstances is not affected."

1 **SB 5087** - H COMM AMD
2 By Committee on Agriculture & Ecology

3

4 On page 1, line 2 of the title, after "boards;" strike the
5 remainder of the title and insert "amending RCW 43.21A.070, 34.05.425,
6 34.05.419, 34.05.461, 34.05.514, 34.05.530, 34.05.534, 34.12.040,
7 43.21B.110, 43.21B.130, 43.21B.240, 43.21B.300, 43.21B.310, 43.21B.320,
8 43.27A.190, 90.03.383, 90.14.130, 90.14.190, 90.14.200, and 90.66.080;
9 adding a new section to chapter 43.21B RCW; and creating a new
10 section."

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