

2 **ESHB 1115** - S COMM AMD

3 By Committee on Agriculture & Environment

4

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

7 "NEW SECTION. **Sec. 1.** The legislature recognizes that in many
8 cases the value of real property directly depends upon the amount of
9 water that is available for use on that property. The legislature also
10 recognizes that water rights are a type of property right in which many
11 different parties may assert an interest. Current statutes require
12 many property rights actions in which different parties assert
13 interests, such as actions for partition or eminent domain, to be
14 brought to be filed in superior court. The legislature further finds
15 that informal procedures such as mediation and fact finding have been
16 employed successfully in other areas of the law, and may produce
17 positive results in certain types of water disputes. The legislature
18 therefore finds that property owners should have a choice to select
19 informal or formal hearings before the pollution control hearings
20 board, and that relinquishment proceedings should be appealed to the
21 local superior courts.

22 **Sec. 2.** RCW 34.05.514 and 1995 c 347 s 113 and 1995 c 292 s 9 are
23 each reenacted and amended to read as follows:

24 (1) Except as provided in subsections (2) and (3) of this section,
25 proceedings for review under this chapter shall be instituted by paying
26 the fee required under RCW 36.18.020 and filing a petition in the
27 superior court, at the petitioner's option, for (a) Thurston county,
28 (b) the county of the petitioner's residence or principal place of
29 business, or (c) in any county where the property owned by the
30 petitioner and affected by the contested decision is located.

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

1 (3) For proceedings involving the relinquishment of a water right
2 and appeals of informal hearings of the pollution control hearings
3 board, the petition shall be filed in the superior court for the county
4 in which is located the land upon which the water was used.

5 **Sec. 3.** RCW 43.21B.110 and 1993 c 387 s 22 are each amended to
6 read as follows:

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

12 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
13 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and
14 90.56.330.

15 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
16 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
17 (~~90.14.130~~) and 90.48.120.

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

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

26 (e) Decisions of local health departments regarding the issuance
27 and enforcement of permits to use or dispose of biosolids under RCW
28 70.95J.080.

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

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

34 (a) The hearings board has no jurisdiction to review orders
35 pertaining to the relinquishment of a water right under RCW 90.14.130,
36 or to review proceedings regarding general adjudications of water
37 rights conducted pursuant to chapter 90.03 or 90.44 RCW.

1 **(b)** The following hearings shall not be conducted by the hearings
2 board:

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

5 ~~((b))~~ **(ii)** Hearings conducted by the department pursuant to RCW
6 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
7 90.44.180.

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

10 ~~(d))~~ **(iii)** Hearings conducted by the department to adopt, modify,
11 or repeal rules.

12 **(3)** ~~(Review of))~~ Rules and regulations adopted by the hearings
13 board shall be subject to review in accordance with the provisions of
14 the Administrative Procedure Act, chapter 34.05 RCW.

15 **Sec. 4.** RCW 43.21B.130 and 1990 c 65 s 3 are each amended to read
16 as follows:

17 The administrative procedure act, chapter 34.05 RCW, shall apply to
18 the appeal of rules and regulations adopted by the board to the same
19 extent as it applied to the review of rules and regulations adopted by
20 the directors and/or boards or commissions of the various departments
21 whose powers, duties and functions were transferred by section 6,
22 chapter 62, Laws of 1970 ex. sess. to the department. ~~((All other
23 decisions and orders of the director and all decisions of air pollution
24 control boards or authorities established pursuant to chapter 70.94 RCW
25 shall be subject to review by the hearings board as provided in this
26 chapter.))~~

27 **Sec. 5.** 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. Such hearings, except those involving water
32 quantity decisions, as defined in section 13 of this act, that are
33 appealed directly to a superior court, and appeals of orders pertaining
34 to the relinquishment of a water right issued pursuant to RCW
35 90.14.130, shall be held by the pollution control hearings board.

1 **Sec. 6.** RCW 43.21B.305 and 1994 c 253 s 5 are each amended to read
2 as follows:

3 In an appeal that involves a penalty of five thousand dollars or
4 less, and in an informal hearing appeal relating to a water quantity
5 decision as defined in section 13 of this act, the appeal may be heard
6 by one member of the board, whose decision shall be the final decision
7 of the board. The board shall define by rule alternative procedures to
8 expedite small appeals. These alternatives may include: Mediation,
9 upon agreement of all parties unless initiated as provided in section
10 13 of this act; submission of testimony by affidavit; conducting
11 hearing by telephone; or other forms that may lead to less formal and
12 faster resolution of appeals.

13 **Sec. 7.** RCW 43.21B.310 and 1992 c 73 s 3 are each amended to read
14 as follows:

15 (1) Except as provided in subsection (2) of this section, any order
16 issued by the department~~((, the administrator of the office of marine~~
17 ~~safety,))~~ or authority pursuant to RCW 70.94.211, 70.94.332,
18 70.105.095, 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any
19 provision enacted after July 26, 1987, or any permit, certificate, or
20 license issued by the department may be appealed to the pollution
21 control hearings board if the appeal is filed with the board and served
22 on the department or authority within thirty days after receipt of the
23 order. Except as provided under chapter 70.105D RCW, ~~((this is))~~ these
24 are the exclusive means of appeal of such an order.

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

28 ~~((3))~~ (b) At any time during the pendency of an appeal of such an
29 order to the board, the appellant may apply pursuant to RCW 43.21B.320
30 to the hearings board for a stay of the order or for the removal
31 thereof.

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

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

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

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

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

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

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

6 ~~((5))~~ (d) Upon failure to comply with any final order of the
7 department or the administrator, the attorney general, on request of
8 the department or the administrator, may bring an action in the
9 superior court of the county where the violation occurred or the
10 potential violation is about to occur to obtain such relief as
11 necessary, including injunctive relief, to insure compliance with the
12 order. The air authorities may bring similar actions to enforce their
13 orders.

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

18 (2) Water quantity decisions of the department, as defined in
19 section 13 of this act, may be appealed either to the pollution control
20 hearings board or directly to a superior court as provided in section
21 13 of this act. Appeals of orders pertaining to the relinquishment of
22 a water right are filed in superior court as provided by RCW 90.14.130.

23 **Sec. 8.** RCW 43.27A.190 and 1987 c 109 s 11 are each amended to
24 read as follows:

25 Notwithstanding and in addition to any other powers granted to the
26 department of ecology, whenever it appears to the department that a
27 person is violating or is about to violate any of the provisions of the
28 following:

29 (1) Chapter 90.03 RCW; or

30 (2) Chapter 90.44 RCW; or

31 (3) Chapter 86.16 RCW; or

32 (4) Chapter 43.37 RCW; or

33 (5) Chapter 43.27A RCW; or

34 (6) Any other law relating to water resources administered by the
35 department; or

36 (7) A rule or regulation adopted, or a directive or order issued by
37 the department relating to subsections (1) through (6) of this section;
38 the department may cause a written regulatory order to be served upon

1 ((said)) the person either personally, or by registered or certified
2 mail delivered to addressee only with return receipt requested and
3 acknowledged by him or her. The order shall specify the provision of
4 the statute, rule, regulation, directive or order alleged to be or
5 about to be violated, and the facts upon which the conclusion of
6 violating or potential violation is based, and shall order the act
7 constituting the violation or the potential violation to cease and
8 desist or, in appropriate cases, shall order necessary corrective
9 action to be taken with regard to such acts within a specific and
10 reasonable time. The regulation of a headgate or controlling works as
11 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other
12 person so authorized by the department shall constitute a regulatory
13 order within the meaning of this section. A regulatory order issued
14 hereunder shall become effective immediately upon receipt by the person
15 to whom the order is directed, except for regulations under RCW
16 90.03.070 which shall become effective when a written notice is
17 attached as provided therein. Any person aggrieved by such order may
18 appeal the order pursuant to RCW 43.21B.310, except that appeals of
19 orders pertaining to the relinquishment of a water right shall be filed
20 in superior court pursuant to RCW 90.14.130.

21 **Sec. 9.** RCW 90.14.130 and 1987 c 109 s 13 are each amended to read
22 as follows:

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

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

12 **Sec. 10.** RCW 90.14.190 and 1987 c 109 s 14 are each amended to
13 read as follows:

14 Any person feeling aggrieved by any decision of the department of
15 ecology may have the same reviewed pursuant to RCW 43.21B.310.
16 However, any order pertaining to the relinquishment of a water right
17 shall be filed in superior court pursuant to RCW 90.14.130. In any such
18 review, the findings of fact as set forth in the report of the
19 department of ecology shall be prima facie evidence of the fact of any
20 waiver or relinquishment of a water right or portion thereof. If the
21 hearings board affirms the decision of the department, a party seeks
22 review in superior court of that hearings board decision pursuant to
23 chapter 34.05 RCW, and the court determines that the party was injured
24 by an arbitrary, capricious, or erroneous order of the department, the
25 court may award reasonable attorneys' fees.

26 **Sec. 11.** RCW 90.14.200 and 1989 c 175 s 180 are each amended to
27 read as follows:

28 (1) All matters relating to the implementation and enforcement of
29 this chapter by the department of ecology shall be carried out in
30 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
31 except where the provisions of this chapter expressly conflict with
32 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are
33 (~~adjudicative proceedings within the meaning of chapter 34.05 RCW.~~
34 ~~Final decisions of the department of ecology in these proceedings~~)
35 appealable to superior court as provided in that section. Other final
36 decisions of the department of ecology under this chapter are subject

1 to review by the pollution control hearings board in accordance with
2 chapter 43.21B RCW.

3 (2) RCW 90.14.130 provides nonexclusive procedures for determining
4 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
5 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
6 among other proceedings, general adjudication proceedings initiated
7 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
8 apply to litigation involving determinations of the department of
9 ecology under RCW 90.03.290 relating to the impairment of existing
10 rights.

11 **Sec. 12.** RCW 90.66.080 and 1979 c 3 s 8 are each amended to read
12 as follows:

13 The department is hereby empowered to promulgate such rules as may
14 be necessary to carry out the provisions of this chapter. Decisions of
15 the department, other than rule making, shall be subject to review by
16 the pollution control hearings board or a superior court in accordance
17 with chapter 43.21B RCW.

18 NEW SECTION. **Sec. 13.** A new section is added to chapter 43.21B
19 RCW to read as follows:

20 (1) A water right claimant, or permit or certificate holder or
21 applicant who is aggrieved or adversely affected by a water quantity
22 decision may appeal the decision either to the pollution control
23 hearings board pursuant to RCW 43.21B.310 or to the superior court for
24 a county in which is located land on which the water is or was put to
25 a beneficial use.

26 (2) At the request of any party, the board shall conduct an
27 informal hearing, consisting of mediation and, if a settlement cannot
28 be agreed upon, fact finding with recommendations. The hearings board
29 shall adopt rules governing the election, practice, and procedures of
30 informal hearings consistent with this section and section 14 of this
31 act.

32 (3) For purposes of this chapter, a "water quantity decision"
33 includes the following:

34 (a) A decision to grant or deny a permit or certificate for a right
35 to the beneficial use of water or to amend, change, or transfer such a
36 right; and

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.

4 NEW SECTION. **Sec. 14.** A new section is added to chapter 43.21B
5 RCW to read as follows:

6 (1) When one of the parties elects an informal hearing pursuant to
7 section 13 of this act, a board member or an administrative law judge
8 from the environmental hearings office shall be assigned as the
9 mediator for the appeal.

10 (2) The parties involved in the informal hearing must provide the
11 mediator and the other parties in advance with a clear, concise
12 statement of the disputed issues and the parties' position in relation
13 to the issues and supporting documentation. The mediator shall meet
14 with the parties either jointly or separately, in the general area of
15 the project under review or by telephone, at the discretion of the
16 mediator, and shall take such steps as the mediator deems appropriate
17 to resolve their differences and reach a settlement agreement. If a
18 settlement agreement is reached, the mediator shall prepare and submit
19 to the hearings board a written order of dismissal to which the
20 settlement agreement is attached. The hearings board shall enter the
21 order and dismiss the case unless the hearings board finds that the
22 settlement agreement is contrary to law.

23 If the hearings board finds that the settlement agreement is
24 contrary to law, it shall notify the parties and refer the dispute back
25 to mediation.

26 (3) If the parties are unable to achieve a settlement agreement
27 within ninety days after being appointed, the mediator shall issue a
28 statement that a settlement agreement has not been reached. After
29 issuance of the statement, the party filing the appeal may request the
30 hearings board to submit the dispute to fact finding with
31 recommendations. Notice of the request for fact finding must be sent
32 to the other parties.

33 (4) Within five days of the receipt of the request for fact
34 finding, the hearings board shall assign a board member or an
35 administrative appeals judge from the environmental hearings office to
36 serve as fact finder. The person who served as the mediator to the
37 dispute may serve as the fact finder with the consent of both parties.

1 (5) Within five days of being appointed, the fact finder shall
2 establish a date, time, and place for the fact-finding hearing. The
3 date of the hearing must be within thirty days of the appointment of
4 the fact finder. The hearing shall be conducted in the general area
5 where the project under review is located. At least seven days before
6 the date of the hearing, each party must submit to the fact finder and
7 to the other parties written proposals on all of the issues it intends
8 to submit to fact finding. The fact finder has the power to issue
9 subpoenas requiring the attendance and production of witnesses and the
10 production of evidence. The order of presentation at the hearing shall
11 be as agreed by the parties or as determined by the fact finder. Each
12 documentary exhibit shall be filed with the fact finder and copies
13 shall be provided to the other parties. The fact finder shall declare
14 the hearing closed after the parties have completed presenting their
15 testimony within agreed time limits.

16 (6) The fact finder shall, within thirty days following the
17 conclusion of the hearing, make written findings of fact and written
18 recommendations to the parties as to how the dispute should be
19 resolved. The fact finder may not apply any presumption as part of the
20 findings of fact or recommendations. A copy of the findings and
21 recommendations shall be filed with the hearings board. The findings
22 of fact and recommendations of the fact finder are advisory only, and
23 are not subject to review by the hearings board.

24 (7) The time limits established in this section may be extended by
25 mutual agreement of all the parties.

26 NEW SECTION. **Sec. 15.** A new section is added to chapter 43.21B
27 RCW to read as follows:

28 (1) Within thirty days after the fact finder has filed the findings
29 of fact and recommendations pursuant to section 14 of this act, a party
30 may request a formal hearing by the hearings board or appeal the water
31 quantity decision directly to superior court. All parties must agree
32 to a formal hearing before a formal hearing is granted.

33 (2) If a party elects to file an action in superior court following
34 an informal hearing, it must be filed in the county in which is located
35 the land upon which the water is or would be used.

36 NEW SECTION. **Sec. 16.** A new section is added to chapter 43.21B
37 RCW to read as follows:

1 In all appeals involving a water quantity decision by the
2 department, as defined in section 13 of this act, the appeal to
3 superior court shall be heard de novo. If an informal hearing on the
4 decision or order had been completed by the pollution control hearings
5 board, no issue may be raised in superior court that was not raised and
6 discussed as part of the fact-finding hearing. No bond may be required
7 on appeals to the superior court or on review by the supreme court
8 unless specifically required by the judge of the superior court.

9 NEW SECTION. **Sec. 17.** If any provision of this act or its
10 application to any person or circumstance is held invalid, the
11 remainder of the act or the application of the provision to other
12 persons or circumstances is not affected."

13 **ESHB 1115** - S COMM AMD
14 By Committee on Agriculture & Environment

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16 On page 1, line 2 of the title, after "ecology;" strike the
17 remainder of the title and insert "amending RCW 43.21B.110, 43.21B.130,
18 43.21B.240, 43.21B.305, 43.21B.310, 43.27A.190, 90.14.130, 90.14.190,
19 90.14.200, and 90.66.080; reenacting and amending RCW 34.05.514; adding
20 new sections to chapter 43.21B RCW; and creating a new section."

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