

HOUSE BILL REPORT

ESHB 1115

As Passed House
January 14, 1998

Title: An act relating to the water-related actions of the department of ecology.

Brief Description: Altering appeal procedures for water-related actions of the department of ecology.

Sponsors: By House Committee on Agriculture & Ecology (originally sponsored by Representatives Mastin, Chandler, McMorris, Koster, Delvin, Mulliken, Johnson, Dyer and Honeyford).

Brief History:

Committee Activity:

Agriculture & Ecology: 1/23/97, 2/20/97 [DPS].

Floor Activity:

Passed House: 3/14/97, 93-3;

Passed House: 1/14/98, 90-5.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Chandler, Chairman; Parlette, Vice Chairman; Schoesler, Vice Chairman; Linville, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; Cooper; Delvin; Koster; Mastin; Regala and Sump.

Staff: Bill Lynch (786-7092).

Background: The Pollution Control Hearings Board (PCHB) presides over certain appeals of decisions made by the Department of Ecology, Office of Marine Safety, air pollution control boards or authorities, and local health departments. Certain water-related actions by the Department of Ecology are appealable to the PCHB. Decisions of the PCHB may be appealed to superior court by any of the parties.

Summary of Bill: A party electing to appeal a water quantity decision to the PCHB may elect an informal or a formal hearing. If one of the parties requests an informal hearing, then an informal hearing must be granted. An informal hearing consists of mediation and may consist of fact-finding if a settlement agreement cannot be reached. A

single member of the board or an administrative law judge of the Environmental Hearings Office is appointed to act as mediator. The mediation must be conducted in the general area where the project under review is located but may be conducted by telephone at the discretion of the mediator.

Parties to the mediation must submit a statement of the issues in dispute and supporting documentation to the mediator and other parties in advance of the mediation. The mediator shall meet with the parties either jointly or separately and take such steps as necessary to resolve their differences. If a settlement agreement is reached, the mediator sends the agreement to the PCHB who enters an order of dismissal for the case unless the PCHB finds the agreement is contrary to law.

If the PCHB finds that the settlement agreement is contrary to law, it must notify the parties and refer the dispute back to mediation. The parties may elect further mediation or fact finding.

If the mediator is unable to facilitate a settlement agreement within 30 days of being appointed, either party may request that the dispute be submitted for fact-finding. The time for mediation may be extended upon the consent of the parties. The PCHB must appoint a board member or an administrative law judge of the Environmental Hearings Office to act as the fact finder. The person who served as mediator may be appointed as the fact finder upon the consent of the parties.

Within five days of being appointed, the fact finder must set a hearing for the fact-finding. The hearing must be conducted in the general area where the project under review is located. The date of the hearing must be set within 30 days after the fact finder's appointment. At least seven days before the hearing, each party must submit written proposals of all issues it intends to submit to fact-finding. The fact finder declares the hearing closed after the parties have completed presenting their testimony.

Within 30 days after the close of the hearing, the fact finder must make written findings of fact and recommendations as to how to resolve the dispute. The findings and recommendations are nonbinding and are not subject to review by the PCHB. A presumption may not be applied in the findings or recommendations by the fact finder which presumes that an action will not impair the rights of a senior water right holder.

Within 30 days of the findings of fact and recommendations being issued, either party may request a formal hearing

before the PCHB or appeal to superior court. The appeal to superior court is de novo, but no issues can be raised that were not raised and discussed as part of the fact-finding hearing. All parties must agree to a formal hearing before the PCHB before a formal hearing is granted.

An appeal of a decision related to a water withdrawal must be filed in the superior court of the county where the land is located upon which the water is or would be used. An appeal pertaining to the relinquishment of a water right must be made to superior court in the county where the land is located where the water was used.

"Water-related agency actions" by the Department of Ecology include: (1) decisions to grant or deny permits or certificates for a right to the beneficial use of water, or to amend, change, or transfer such a right; and (2) decisions to enforce the conditions of a permit for, or right to, the beneficial use of water or to require any person to discontinue the use of water.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For (original bill): There is a great deal of concern by some people with the current process. People should have some options for their hearings. Informal hearings were never used before because the department always elected a formal hearing. Some members of the PCHB have much expertise and some do not. People can still choose a formal hearing before the PCHB.

Testimony Against (original bill): A direct appeal to superior court increases the workload on the courts because the superior court must develop the record. Direct appeals to superior court will take longer than appeals to the PCHB. Criminal cases take priority in superior court. The more the court takes on the role of a permit issuer, the more likely the law is unconstitutional. The PCHB has a good track record. Giving these cases to superior court increases fragmentation of decisions.

Testified (original bill): Rep. Dave Mastin, prime sponsor; Judge Gordon Godfrey (neutral); Robert Jensen, Environmental Hearings Office (con); Judy Turpin, Washington Environmental Council (con); and Dick Ducharme, Yakima Growers and Shippers.