
Bill Analysis
HB 1157

- Title:** An act relating to environmental appeals
- Brief Description:** Amends statutes governing certain environmental hearings boards to shift the burden of proof to the agency whose action is the subject matter of the appeal; requires trial courts to apply a *de novo* standard of review of certain environmental hearings board decisions.
- Sponsors:** Dunn, Buck, Thompson, D. Schmidt, Boldt and Delvin
- Hearing Date:** January 29, 1997

Background:

Agency actions are governed by the Administrative Procedure Act (APA). A party aggrieved by an agency's action has the right to challenge the agency through an administrative appeals process. The actions of some agencies, such as the Department of Ecology and the Department of Fish and Wildlife, may be challenged before special hearings boards which enter final orders with respect to the challenged action.

A party wishing to appeal the final order of a hearings board may file a petition for review in superior court. Under the judicial review provisions of the APA, the party challenging an agency's action bears the burden of demonstrating that the agency's action was invalid. The APA sets forth the trial court's standard of review, except to the extent that another statute may provide a different one.

A court will grant relief from an agency order if the order is not supported by *substantial evidence*, the order was *arbitrary or capricious*, the order was outside the statutory authority or jurisdiction of the agency, the agency engaged in unlawful procedure or failed to follow a prescribed procedure, or the agency *erroneously* interpreted or applied the law. If a court of law reviews a matter that lies within agency discretion, the court may only consider whether the agency has exercised its discretion in accordance with law and cannot substitute its discretion for that of the agency. If the court finds that an agency exceeded its discretion, it must remand the matter to the agency for modification unless remand is "impracticable" or would "cause unnecessary delay."

After reviewing an agency action, a trial court must enter an order containing findings and conclusions with respect to each violation or error by the agency. The court may do any one of the following:

- affirm the agency action;
- order an agency to take action required by law;
- order an agency to exercise discretion required by law;
- set aside an agency action;
- enjoin or stay the agency action;
- remand the matter for further proceedings; or
- enter a declaratory judgment order.

Pollution Control Hearings Boards

The pollution control hearings board hears challenges to decisions and orders of the Department of Ecology (DOE). The hearings board has jurisdiction to hear and decide appeals relating to, among other things, the issuance, modification, or termination of any permit, certificate, or license by the DOE or any air authority in the exercise of its jurisdiction. In all appeals, the hearings board has duties and powers as set forth in the APA, and all proceedings before the hearings board must be conducted in accordance with rules that the hearings board prescribes. An interested party aggrieved by the decision and order of the hearings board may appeal to the superior court as set forth in the APA.

Growth Management Hearings Boards

Under the Growth Management Act (GMA), each county and each city in counties that meet the GMA's requirements adopts a comprehensive plan that includes a list of elements and subjects set forth in the statute. Counties and cities must also adopt *development regulations* consistent with their comprehensive plan, and must also designate and protect critical areas, designate and conserve certain natural resource lands, and designate urban growth areas.

The GMA created an administrative review process consisting of three regional growth management hearing boards to resolve disputes over comprehensive plans, development regulations, or population projections. The boards hear requests for review of growth management actions taken by counties and cities located in each of the regions the boards represent if a person with standing to request the review files a petition challenging a county or city's comprehensive plan or population projections.

Comprehensive plans and development regulations are presumed to be valid. A hearings board must find a plan or regulations in compliance unless it finds by a *preponderance of the evidence* that a state agency, county, or city erroneously interpreted or applied the planning component of the GMA. If the board finds that the comprehensive plan reviewed is not in

compliance with the GMA's requirements or that the population projection should be adjusted, the board issues an order to the county or city requiring it to take some action to bring it into compliance. After a period of time not to exceed 180 days, the county or city resubmits the comprehensive plan and development regulations to the board, and the board holds another hearing (known as a compliance hearing) to determine whether the comprehensive plan or development regulations are in compliance. If the hearings board finds that the county or city is still not in compliance, the board must transmit that finding to the Governor and may, at its discretion, recommend that the Governor impose sanctions.

Comprehensive plans and development regulations are presumed valid under the GMA. A finding of invalidity must include a determination that the comprehensive plan "substantially interferes with the fulfillment of the goals of the GMA."

Hydraulic Appeals Boards

The hydraulic appeals board has exclusive jurisdiction to hear appeals arising from the approval, denial, conditioning, or modification of a hydraulic approval issued by the Department of Fish and Wildlife (DFW). Any person aggrieved by the approval, denial, conditioning, or modification of a hydraulic approval may seek review from the board under the standards set forth in the APA. A party aggrieved by the decision and order of the hearings board may appeal to the superior court as set forth in the APA.

Shorelines Hearings Boards

Under the Shoreline Management Act of 1971 (SMA), any development on the shorelines of Washington must be consistent with the policy of the SMA and applicable guidelines, rules, or a master program. A "substantial development" cannot be undertaken on shorelines without first obtaining a permit from the appropriate agency.

The SMA created a shorelines hearings board that sits as a quasi judicial body. Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines may seek review from the hearings board. Both the administrative review proceedings and the judicial review proceedings are governed by the APA. A decision of the shorelines hearings board on the validity of a rule, regulation, or guideline is subject to review in superior court in accordance with the APA.

The SMA provides for a special appeals process with respect to any rules, regulations, or guidelines adopted or approved by the DOE. The board must find the rule, regulation, or guideline to be valid and enter a final decision to that effect *unless* it determines that the rule, regulation, or guideline falls into one of five categories: (1) *clearly erroneous* in light of the policy of the SMA, (2) constitutes an *unlawful or unconstitutional* implementation of the SMA, (3) is *arbitrary and capricious*, (4) was developed *without fully considering and evaluating all material* submitted to the DOE during public review and comment, or (5) was *not adopted in accordance with required procedures*. If the board determines that any of these conditions exists, it must declare the rule, regulation, or guideline invalid, remand the rule, regulation, or guideline to the DOE with a statement of reasons in support of the determination, and direct the DOE to adopt a new rule, regulation, or guideline consistent with the DOE's decision.

Summary of Bill:

Pollution Control Hearings Board Decisions

HB 1157 requires the Department of Ecology (DOE) to do three things at a pollution control board hearing:

- Furnish the hearings board and the party appealing the DOE's decision with a copy of all evidence relied upon by the DOE in making its decision. The DOE must provide this information to the party appealing the DOE's decision at least one day prior to the hearing;
- Submit to the hearings board only the evidence that supports the findings set forth in the DOE's decision being appealed; and
- Identify and make available for examination and cross-examination before the hearings board any individuals whose observations the DOE relied upon in making its decision.

The DOE has the burden of proof in all proceedings before the hearings board. The DOE must show that its decision was *justified* and has the burden of moving forward with the evidence.

Judicial review of a pollution control hearings board decision in superior court is *de novo*. The DOE has the burden of proof in appeals to superior court from board decisions.

2. *Growth Management Hearings Board Decisions*

HB 1157 does not address the burden of proof in proceedings before the hearings board. HB 1157 does not amend the existing burden of proof (burden on party asserting invalidity) in appeals to superior court from growth management hearings board decisions. Judicial review of a growth management hearings board decision to superior court is *de novo*.

Shoreline Management Hearings Board Decisions

HB 1157 does not address the burden of proof in proceedings before the hearings board. HB 1157 deletes language that directed the hearings board to schedule review proceedings on a petition for review without regard to whether the period for the DOE or attorney general to intervene has or has not expired.

The DOE has the burden of proof in appeals to superior court from board decisions. Judicial review of a shoreline management hearings board decision in superior court is *de novo*.

Hydraulic Control Hearings Boards Decisions

HB 1157 does not address the burden of proof in proceedings before the hearings board. The Department of Fish and Wildlife has the burden of proof in appeals to superior court from board decisions. Judicial review of a hydraulic control hearings board decision in superior court is *de novo*.

Fiscal Note: Yes

HB 1157

- Changes *burden of proof* and *standard of review* in certain hearings boards proceedings
- Changes *standard of review* in appeals from four environmental review board proceedings to superior court.

	Growth Management Hearings Boards	Pollution Control Hearings Board	Shorelines Hearings Board	Hydraulic Appeals Board
Applicable Statute	Growth Management Act (GMA)	Creation of Environmental Hearings Office	Shoreline Management Act	Construction Projects in State Waters
Judicial Standard of Review	<i>De novo</i> judicial review of any board decision.	<i>De novo</i> judicial review of a board decision.	<i>De novo</i> judicial review of a board decision	<i>De novo</i> judicial review of a decision by the board
Burden of Proof	(1) No change in burden of proof at administrative review level; (2) No change in burden of proof in appeals to superior court from board decisions.	(1) DOE has burden of proof at board hearings to show that "decision justified." Includes burden of moving forward with evidence; (2) DOE has burden of proof in appeals to superior court from board decisions.	(1) No change to burden of proof at administrative review level; (2) DOE has burden of proof in appeals to superior court from board decisions.	(1) No change to burden of proof at administrative review level; (2) DFW has burden of proof in appeals to superior court from board decisions.
Other Appeals Provisions	—	<i>Board's Rules require DOE to do 3 things at board hearings:</i> (1) furnish board and party appealing DOE's decision with copy of all evidence relied on by DOE; (2) DOE may only submit evidence to board which supports findings set forth in DOE's decision being appealed; and (3) if DOE relied on observations of individuals in reaching decision, the individuals must be identified and made available for examination/cross-examination before board.	—	—