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**SUBSTITUTE HOUSE BILL 1115**

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**State of Washington**

**55th Legislature**

**1997 Regular Session**

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

Read first time 02/25/97.

1 AN ACT Relating to the water-related actions of the department of  
2 ecology; amending RCW 43.21B.110, 43.21B.130, 43.21B.240, 43.21B.310,  
3 43.27A.190, 90.14.130, 90.14.190, and 90.14.200; reenacting and  
4 amending RCW 34.05.514; adding new sections to chapter 43.21B RCW; and  
5 creating a new section.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** The legislature recognizes that in many cases  
8 the value of real property directly depends upon the amount of water  
9 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

1 board, and that relinquishment proceedings should be appealed to the  
2 local superior courts.

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

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

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

16 (3) For proceedings involving the relinquishment of a water right,  
17 the petition shall be filed in the superior court where the land is  
18 located upon which the water was used. Appeals of informal hearings of  
19 the pollution control hearings board shall be filed in the superior  
20 court designated in section 13 of this act.

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

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

28 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,  
29 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and  
30 90.56.330.

31 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,  
32 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,  
33 (~~90.14.130~~) and 90.48.120.

34 (c) The issuance, modification, or termination of any permit,  
35 certificate, or license by the department or any air authority in the  
36 exercise of its jurisdiction, including the issuance or termination of  
37 a waste disposal permit, the denial of an application for a waste

1 disposal permit, or the modification of the conditions or the terms of  
2 a waste disposal permit.

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

5 (e) Decisions of local health departments regarding the issuance  
6 and enforcement of permits to use or dispose of biosolids under RCW  
7 70.95J.080.

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

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

13 (a) The hearings board shall have no jurisdiction whatsoever to  
14 review orders pertaining to the relinquishment of a water right under  
15 RCW 90.14.130, or to review proceedings regarding general adjudications  
16 of water rights conducted pursuant to chapter 90.03 or 90.44 RCW.

17 (b) The following hearings shall not be conducted by the hearings  
18 board:

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

21 ~~((b))~~ (ii) Hearings conducted by the department pursuant to RCW  
22 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and  
23 90.44.180.

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

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

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

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

33 The administrative procedure act, chapter 34.05 RCW, shall apply to  
34 the appeal of rules and regulations adopted by the board to the same  
35 extent as it applied to the review of rules and regulations adopted by  
36 the directors and/or boards or commissions of the various departments  
37 whose powers, duties and functions were transferred by section 6,  
38 chapter 62, Laws of 1970 ex. sess. to the department. Except with

1 regard to orders pertaining to the relinquishment of a water right  
2 under RCW 90.14.130, all other decisions and orders of the director and  
3 all decisions of air pollution control boards or authorities  
4 established pursuant to chapter 70.94 RCW shall be subject to review by  
5 the hearings board as provided in this chapter.

6 **Sec. 5.** RCW 43.21B.240 and 1989 c 175 s 105 are each amended to  
7 read as follows:

8 The department and air authorities shall not have authority to hold  
9 adjudicative proceedings pursuant to the Administrative Procedure Act,  
10 chapter 34.05 RCW. ~~((Such))~~ All other hearings, except for appeals of  
11 orders pertaining to the relinquishment of a water right under RCW  
12 90.14.130, shall be held by the pollution control hearings board.

13 **Sec. 6.** 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, 70.105.095,  
18 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any provision  
19 enacted after July 26, 1987, or any permit, certificate, or license  
20 issued by the department may be appealed to the pollution control  
21 hearings board if the appeal is filed with the board and served on the  
22 department or authority within thirty days after receipt of the order.  
23 Except as provided under chapter 70.105D RCW, ~~((this is))~~ these are the  
24 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;

1       (~~(e)~~) (iii) A description of the substance of the order, permit,  
2 or license that is the subject of the appeal;

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

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

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

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

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

20       (2) Appeals of orders pertaining to the relinquishment of a water  
21 right shall be filed in superior court as provided by RCW 90.14.130.

22       **Sec. 7.** RCW 43.27A.190 and 1987 c 109 s 11 are each amended to  
23 read as follows:

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

28       (1) Chapter 90.03 RCW; or

29       (2) Chapter 90.44 RCW; or

30       (3) Chapter 86.16 RCW; or

31       (4) Chapter 43.37 RCW; or

32       (5) Chapter 43.27A RCW; or

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

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

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

20 **Sec. 8.** RCW 90.14.130 and 1987 c 109 s 13 are each amended to read  
21 as follows:

22 When it appears to the department of ecology that a person entitled  
23 to the use of water has not beneficially used his or her water right or  
24 some portion thereof, and it appears that (~~said~~) the person's right  
25 has or may have reverted to the state because of such nonuse, as  
26 provided by RCW 90.14.160, 90.14.170, or 90.14.180, the department of  
27 ecology shall notify such person by order: PROVIDED, That where a  
28 company, association, district, or the United States has filed a  
29 blanket claim under the provisions of RCW 90.14.060 for the total  
30 benefits of those served by it, the notice shall be served on such  
31 company, association, district or the United States and not upon any of  
32 its individual water users who may not have used the water or some  
33 portion thereof which they were entitled to use. The order shall  
34 contain: (1) A description of the water right, including the  
35 approximate location of the point of diversion, the general description  
36 of the lands or places where such waters were used, the water source,  
37 the amount involved, the purpose of use, and the apparent authority  
38 upon which the right is based; (2) a statement that unless sufficient

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

11 **Sec. 9.** RCW 90.14.190 and 1987 c 109 s 14 are each amended to read  
12 as follows:

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

25 **Sec. 10.** RCW 90.14.200 and 1989 c 175 s 180 are each amended to  
26 read as follows:

27 (1) All matters relating to the implementation and enforcement of  
28 this chapter by the department of ecology shall be carried out in  
29 accordance with chapter 34.05 RCW, the Administrative Procedure Act,  
30 except where the provisions of this chapter expressly conflict with  
31 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are  
32 (~~(adjudicative proceedings within the meaning of chapter 34.05 RCW.~~  
33 ~~Final decisions of the department of ecology in these proceedings)~~)  
34 appealable to superior court as provided in that section. Other final  
35 decisions of the department of ecology under this chapter are subject  
36 to review by the pollution control hearings board in accordance with  
37 chapter 43.21B RCW.

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

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

11 (1) A person who is aggrieved or adversely affected by a water  
12 quantity decision may appeal the decision to the pollution control  
13 hearings board pursuant to RCW 43.21B.310 or may elect an informal  
14 hearing by the board pursuant to this section. If any party requests  
15 an informal hearing, then an informal hearing must be granted.  
16 Informal hearings shall consist of mediation and fact finding if a  
17 settlement agreement cannot be reached. The hearings board shall adopt  
18 rules governing the election, practice, and procedures of informal  
19 hearings consistent with this section and section 12 of this act.

20 (2) For purposes of this section, a "water quantity decision"  
21 includes the following:

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

25 (b) A decision to enforce the conditions of a permit for, or right  
26 to, the beneficial use of water or to require any person to discontinue  
27 the use of water;

28 (c) A decision to establish or modify a minimum flow or level for  
29 water under chapter 90.03, 90.22, or 90.54 RCW, or to reserve water for  
30 such a minimum flow or level; and

31 (d) A decision to establish a water management plan under chapter  
32 90.03, 90.44, or 90.54 RCW.

33 NEW SECTION. **Sec. 12.** A new section is added to chapter 43.21B  
34 RCW to read as follows:

35 (1) When one of the parties elects an informal hearing pursuant to  
36 section 11 of this act, one of the board members or an administrative  
37 law judge from the environmental hearings office shall be assigned as



1 the mediator for the appeal. The mediation shall be conducted in the  
2 general area where the petitioner resides, but may be conducted by  
3 telephone.

4 (2) The parties involved in the mediation must provide the mediator  
5 in advance with a clear concise statement of the disputed issues and  
6 the parties' position in relation to the issues. The mediator shall  
7 meet with the parties either jointly or separately, and shall take such  
8 steps as the mediator deems appropriate to resolve their differences  
9 and reach a settlement agreement. If a settlement agreement is  
10 reached, the mediator shall prepare and submit to the hearings board a  
11 written order of dismissal to which the settlement agreement is  
12 attached. The hearings board shall enter the order and dismiss the  
13 case.

14 (3) If the mediator is unable to achieve a settlement agreement  
15 between the parties within fourteen days after being appointed, either  
16 party may request the hearings board to submit the dispute to fact  
17 finding with recommendations. Notice of the request for fact finding  
18 must be sent to the other party. The time for mediation may be  
19 extended by mutual agreement between the parties.

20 (4) Within five days of the receipt of the request for fact  
21 finding, the hearings board shall assign one of the board members or an  
22 administrative appeals judge from the environmental hearings office to  
23 serve as fact finder. The person who served as the mediator to the  
24 dispute may serve as the fact finder with the consent of both parties.

25 (5) Within five days of being appointed, the fact finder shall  
26 establish a date, time, and place for the fact-finding hearing. The  
27 hearing shall be conducted in the general area where the petitioner  
28 resides. At least seven days before the date of the hearing, each  
29 party must submit to the fact finder and to the other party written  
30 proposals on all of the issues it intends to submit to fact finding.  
31 The fact finder has the power to issue subpoenas requiring the  
32 attendance and production of witnesses and the production of evidence.  
33 The order of presentation at the hearing shall be as agreed by the  
34 parties or as determined by the fact finder. Each documentary exhibit  
35 shall be filed with the fact finder and copies shall be provided to the  
36 other party. The fact finder shall declare the hearing closed after  
37 the parties have completed presenting their testimony within agreed  
38 time limits.

1 (6) The fact finder shall, within thirty days following the  
2 conclusion of the hearing, make written findings of fact and written  
3 recommendations to the parties as to how the dispute should be  
4 resolved. The fact finder may not apply any presumption of  
5 noninterference against a senior water right holder as part of the  
6 findings of fact or recommendations. A copy of the findings and  
7 recommendations shall also be filed with the hearings board. The  
8 findings of fact and recommendations of the fact finder are advisory  
9 only, and are not subject to review by the hearings board.

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

12 (1) Within thirty days after the fact finder has issued the  
13 findings of fact and recommendations pursuant to section 12 of this  
14 act, either party may request a formal hearing from the hearings board  
15 or appeal directly to superior court. All parties must agree to a  
16 formal hearing before a formal hearing is granted.

17 (2) If one of the parties elects to file an action in superior  
18 court following an informal hearing, it must be filed in the county in  
19 which the water withdrawal would or does take place if the decision  
20 pertains to a withdrawal of water. An appeal of a decision regarding  
21 an instream flow or a water management plan must be filed in the county  
22 with the greatest amount of territory governed by the flow or plan.

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

25 In all appeals involving a decision or an order of the hearings  
26 board after an informal hearing of a water quantity decision by the  
27 department, as defined in section 12 of this act, the appeal to  
28 superior court shall be de novo. However, no issue may be raised in  
29 superior court that was not raised and discussed as part of the fact-  
30 finding hearing. The superior court may substitute its own judgment  
31 for that of the fact finder. The petition shall be filed in the  
32 superior court specified in section 1 of this act. Such appeal may be  
33 perfected by filing with the clerk of the superior court a notice of  
34 appeal, and by serving a copy thereof by mail, or personally on the  
35 director or on the board as the case may be. The hearings board shall  
36 serve upon the appealing party, the director, and on any other party  
37 appearing at the hearings board's proceeding, and file with the clerk

1 of the court before trial, a certified copy of the hearings board's  
2 decision and order. Appellate review of a decision of the superior  
3 court may be sought as in other civil cases. No bond may be required  
4 on appeals to the superior court or on review by the supreme court  
5 unless specifically required by the judge of the superior court.

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