

ESSB 5776 - H AMD 393

By Representative Kessler

ADOPTED 04/14/2003

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The purpose of this chapter is to reform
4 the process of appeal and review of final permit decisions made by
5 state agencies and local governments for qualifying economic
6 development projects, by establishing uniform, expedited, and
7 coordinated appeal procedures and uniform criteria for reviewing such
8 decisions, in order to provide consistent, predictable, and timely
9 review. The appeal process authorized in this chapter is intended to
10 be the exclusive process for review of final decisions made by state
11 agencies and local governments on permit applications for qualifying
12 economic development projects, superseding other existing
13 administrative board and judicial appeal procedures.

14 NEW SECTION. **Sec. 2.** The definitions in this section apply
15 throughout this chapter unless the context clearly requires otherwise.

16 (1) "Board" means the environmental and land use hearings board
17 established in this chapter.

18 (2) "Final decision" means the highest and last decision available
19 within the permit agency with respect to a permit application to the
20 agency, including but not limited to decisions resulting from internal
21 appeals available within the agency for the permit decision.

22 (3) "Participating permit agency" means any permit agency in which
23 the applicant for a qualifying project has filed an application for an
24 environmental or land use permit that is required for the qualifying
25 project.

26 (4) "Permit" means any license, permit, certificate, certification,
27 approval, compliance schedule, or other similar document pertaining to
28 any regulatory or management program related to the protection,
29 conservation, use of, or interference with the land, air, or water in

1 the state. This document must be required to be obtained from a state
2 agency or local government, including but not limited to counties,
3 cities, and air agencies, prior to constructing or operating a
4 qualifying project. Local government permits include, but are not
5 limited to, subdivisions, binding site plans, planned unit
6 developments, shoreline permits or other approvals under RCW 90.58.140,
7 master plan approvals, site plan approvals, permits or approvals
8 required by critical area ordinances, conditional use permits,
9 variances, and site-specific rezones authorized by a comprehensive plan
10 or subarea plan or other equivalent documents however titled or
11 denominated. Local government permits excluded under this definition
12 include the adoption or amendment of a comprehensive plan, subarea
13 plan, legislative actions on development regulations, certifications by
14 local health districts of water and sewer availability, and building,
15 grading, flood hazard, utility connection, and other nondiscretionary
16 construction permits.

17 (5) "Permit agency" means any state agency or local government,
18 including but not limited to air agencies, authorized by law to issue
19 permits.

20 (6) "Qualifying project" means an economic development project that
21 is (a) located within a county that in its entirety qualifies as a
22 distressed area as defined in RCW 43.168.020(3) and a rural natural
23 resources impact area as defined in RCW 43.160.020, (b) designed to
24 provide at least thirty full-time year-round jobs, and (c) designated
25 as a qualifying project by the office of permit assistance established
26 under chapter 43.42 RCW if a request for a determination of such
27 designation is made to the office by the project applicant as provided
28 under this chapter.

29 NEW SECTION. **Sec. 3.** The appeal process authorized in this
30 chapter shall, notwithstanding any other provisions of this code, be
31 the exclusive process for review of the decisions made by participating
32 permit agencies on permit applications for a qualifying project. This
33 chapter shall not apply to applications for certification by the energy
34 facility site evaluation council pursuant to chapter 80.50 RCW. The
35 superior court civil rules and the rules of appellate procedure shall

1 govern procedural matters for the judicial appeal process under this
2 chapter to the extent that the rules are consistent with this chapter.

3 NEW SECTION. **Sec. 4.** (1) Any applicant for a project that meets
4 the criteria set forth in section 2(6) (a) and (b) of this act may use
5 the process of appeal and review of this chapter by filing with the
6 office of permit assistance a request for a determination of
7 designation as a qualifying project as required in section 2(6)(c) of
8 this act. Such request shall be filed with the office no later than
9 thirty days after the filing with a permit agency of the first
10 application for a permit relating to the subject project that is filed
11 after the effective date of this act. No requests may be filed with
12 the office of permit assistance after December 31, 2010. The request
13 shall include a list of permits that the project applicant reasonably
14 believes will be required for the subject project.

15 (2) The office of permit assistance shall: (a) Respond to such
16 request within thirty days after the filing of the request; and (b) if
17 the office determines to designate the project as a qualifying project
18 under section 2(6)(c) of this act, contemporaneously provide a copy of
19 the designation response to all permit agencies responsible for the
20 project permits listed in the request. The office of permit assistance
21 shall provide notice of any project designation to the code reviser for
22 publication in the state register and to any persons that have filed
23 with the office of permit assistance a general request for such notice.
24 Nothing in this section creates an independent cause of action or
25 affects any existing cause of action.

26 (3) All final decisions of a permit agency notified under
27 subsection (2) of this section shall include the following sentence:
28 Any appeal of this decision shall be in accordance with the provisions
29 of this chapter.

30 NEW SECTION. **Sec. 5.** (1) An environmental and land use hearings
31 board is hereby established within the environmental hearings office
32 created under RCW 43.21B.005. The environmental and land use hearings
33 board shall be composed of six members, as provided in RCW 90.58.170.
34 The chairperson of the pollution control hearings board shall be the
35 chairperson of the environmental and land use hearings board. The

1 members of the environmental and land use hearings board shall receive
2 the compensation, travel, and subsistence expenses as provided in RCW
3 43.03.050 and 43.03.060.

4 (2) All proceedings before the board or any of its members shall be
5 conducted in accordance with such rules of practice and procedure as
6 the board may adopt. In all such proceedings, the board shall have all
7 powers relating to the administration of oaths, issuance of subpoenas,
8 and taking of depositions as set forth in RCW 34.05.446. The board
9 shall publish any such rules and arrange for the reasonable
10 distribution thereof. Failure to adopt such rules shall not deprive
11 the board of jurisdiction nor relieve the board of the duty to hear
12 petitions for review filed under this chapter.

13 NEW SECTION. **Sec. 6.** (1) Proceedings for review under this
14 chapter shall be commenced by filing a petition with the environmental
15 and land use hearings board. The board may adopt by rule procedures
16 for filing and service that are consistent with this chapter.

17 (2) Such petition is barred, and the board may not grant review,
18 unless the petition is timely filed with the board and timely served on
19 the following persons who shall be parties to the review of the
20 petition:

21 (a) The participating permit agencies, which for purposes of the
22 petition shall be (i) if a state agency, the director thereof, and (ii)
23 if a local government, the jurisdiction's corporate entity which shall
24 be served as provided in RCW 4.28.080; and

25 (b) Each of the following persons if the person is not the
26 petitioner:

27 (i) Each person identified by name and address as applicant in the
28 application to the participating permit agencies;

29 (ii) Each person identified in project application documents as an
30 owner of the property at issue or, if none, each person identified as
31 a taxpayer for the property at issue in the records of the county
32 assessor.

33 (3) The petition is timely if it is filed and served on all parties
34 listed in subsection (2) of this section within twenty-one days of the
35 issuance by the permit agency of the permit for the qualifying project.

1 (4) For the purposes of this section, the date on which a permit
2 decision is issued is:

3 (a) Three days after a written decision is mailed by the permit
4 agency to the project applicant or, if not mailed, the date on which
5 the permit agency provides notice that a written decision is publicly
6 available; or

7 (b) If (a) of this subsection does not apply, the date the decision
8 is entered into the public record.

9 (5) Service on all parties shall be by personal service or by mail.
10 Service by mail is effective on the date of mailing. Proof of service
11 shall be by affidavit or declaration under penalty of perjury.

12 NEW SECTION. **Sec. 7.** Standing to bring a petition under this
13 chapter is limited to the following persons:

14 (1) The applicant and the owner of the property to which the permit
15 decision is directed;

16 (2) Another person aggrieved or adversely affected by the permit
17 decision, or who would be aggrieved or adversely affected by a reversal
18 or modification of the permit decision. A person is aggrieved or
19 adversely affected within the meaning of this section only when all of
20 the following conditions are present:

21 (a) The permit decision has prejudiced or is likely to prejudice
22 that person;

23 (b) That person's asserted interests are among those that the
24 permit agency was required to consider when it made its permit
25 decision;

26 (c) A decision of the board in favor of that person would
27 substantially eliminate or redress the prejudice to that person caused
28 or likely to be caused by the permit decision; and

29 (d) The petitioner has exhausted his or her administrative remedies
30 to the extent required by law;

31 (3) A participating permit agency under this chapter.

32 NEW SECTION. **Sec. 8.** A petition must set forth:

33 (1) The name and mailing address of the petitioner;

34 (2) The name and mailing address of the petitioner's attorney, if
35 any;

1 (3) The name and mailing address of the permit agency whose permit
2 is at issue, if any;

3 (4) A duplicate copy of the permit decision;

4 (5) Identification of each person to be made a party under this
5 chapter;

6 (6) Facts demonstrating that the petitioner has standing to seek
7 board review under this chapter;

8 (7) A separate and concise statement of each error alleged to have
9 been committed;

10 (8) A concise statement of facts upon which the petitioner relies
11 to sustain the statement of error; and

12 (9) A request for relief, specifying the type and extent of relief
13 requested.

14 NEW SECTION. **Sec. 9.** (1) Within seven days after receipt of
15 service of the petition filed pursuant to section 6 of this act, the
16 project applicant shall file with the board and serve on all parties an
17 affidavit certifying all applications for permits that the project
18 applicant has filed with participating permit agencies for the
19 qualifying project, provided, however, that no permit may be included
20 that has been issued and appealed to an administrative hearings board
21 or to court prior to the date of service of the petition filed with the
22 board under this chapter. The board shall request verification from
23 the participating agencies of the permit applications certified in the
24 project applicant's affidavit and of the expected date for final
25 decision on the permit applications. Filing of the affidavit shall
26 toll the schedule for hearing by the board until twenty-one days after
27 issuance of the final permit decision on the last permit required for
28 the qualifying project that has been certified in the project
29 applicant's affidavit and verified by a participating agency as applied
30 for, unless the petition filed and served by the petitioner relates to
31 the final permit decision.

32 (2) Within seven days after the expiration of the appeal period for
33 the final permit decision on the last permit required for the
34 qualifying project, the petitioner shall note an initial hearing on
35 jurisdictional and other preliminary matters, and, if applicable, on
36 other pretrial matters. This initial hearing shall be set no sooner

1 than thirty-five days and not later than fifty days after the
2 expiration of the appeal period for the final permit decision on the
3 last permit required for the qualifying project.

4 (3) If petitions for review of more than one permit issued by
5 participating permit agencies for a qualifying project are filed with
6 the board, the board shall contemporaneously process all such petitions
7 in accordance with the case schedule requirements set forth in this
8 act.

9 (4) The parties shall note all motions on jurisdictional and
10 procedural issues for resolution at the initial hearing, except that a
11 motion to allow discovery may be brought sooner.

12 (5) The defenses of lack of standing, untimely filing or service of
13 the petition, lack of good faith or improper purpose in filing, and
14 failure to join persons needed for just adjudication are waived if not
15 raised by timely motion noted to be heard at the initial hearing,
16 unless the board allows discovery on such issues.

17 (6) The petitioner shall move the board for an order at the initial
18 hearing that sets the date on which the permit decision record or
19 records of the applicable permit agency or agencies, if any, must be
20 submitted, sets a briefing schedule, sets a discovery schedule if
21 discovery is to be allowed, and schedules a hearing or hearings on the
22 merits.

23 (7) The parties may waive the initial hearing by scheduling with
24 the board a date for the hearing or hearings on the merits and filing
25 a stipulated order that resolves the jurisdictional and procedural
26 issues raised by the petition, including the issues identified in
27 subsections (5) and (6) of this section.

28 (8) A party need not file an answer to a petition for review filed
29 pursuant to section 6 of this act.

30 NEW SECTION. **Sec. 10.** The board shall provide expedited review of
31 petitions filed under this chapter. Any matter reviewed on the
32 decision record as provided in section 13(1) of this act must be set
33 for hearing within sixty days of the date set for submitting the
34 decision record of all participating permit agencies, absent a showing
35 of good cause for a different date or a stipulation of the parties.
36 Any matter reviewed de novo as provided in section 13(3) of this act

1 must be set for hearing or trial no later than one hundred twenty days
2 after the initial hearing date. The board shall issue a final decision
3 and order within thirty days after the final hearing required in this
4 section.

5 NEW SECTION. **Sec. 11.** (1) A petitioner or other party may request
6 the board to stay or suspend an action by a participating permit agency
7 or another party to implement the decision under review. The request
8 must set forth a statement of grounds for the stay and the factual
9 basis for the request.

10 (2) The board may grant a stay only if the board finds that: (a)
11 The party requesting the stay is likely to prevail on the merits, (b)
12 without the stay the party requesting it will suffer irreparable harm,
13 (c) the grant of a stay will not substantially harm other parties to
14 the proceedings, and (d) the request for the stay is timely in light of
15 the circumstances of the case.

16 (3) The board may grant the request for a stay upon such terms and
17 conditions, including the filing of security, as are necessary to
18 prevent harm to other parties by the stay.

19 NEW SECTION. **Sec. 12.** (1) Within forty-five days after entry of
20 an order to submit the decision record, where applicable, or within
21 such a further time as the board allows or as the parties agree, each
22 participating agency shall submit to the board a certified copy of the
23 decision record for board review of the permit decision, except that
24 the petitioner shall prepare at the petitioner's expense and submit a
25 verbatim transcript of any hearings held on the matter.

26 (2) If the parties agree, or upon order of the board, the record
27 shall be shortened or summarized to avoid reproduction and
28 transcription of portions of the record that are duplicative or not
29 relevant to the issues to be reviewed by the board.

30 (3) The petitioner shall pay the participating agency the cost of
31 preparing the record before the participating agency submits the
32 decision record to the board. Failure by the petitioner to timely pay
33 the participating agency relieves the participating agency of
34 responsibility to submit the record and is grounds for dismissal of the
35 petition.

1 (4) If the relief sought by the petitioner is granted in whole or
2 in part the board shall equitably assess the cost of preparing the
3 record among the parties. In assessing costs the board shall take into
4 account the extent to which each party prevailed and the reasonableness
5 of the parties' conduct in agreeing or not agreeing to shorten or
6 summarize the record under subsection (2) of this section.

7 NEW SECTION. **Sec. 13.** (1) For all permit decisions being reviewed
8 that were made by quasi-judicial bodies or permit agency officers who
9 made factual determinations in support of the decisions, after the
10 conduct of proceedings in which the parties had an opportunity
11 consistent with due process to make records on the factual issues,
12 board review of factual issues and the conclusions drawn from the
13 factual issues shall be confined to the records created by the
14 quasi-judicial bodies or permit agency officers, except as provided in
15 subsections (2) through (4) of this section.

16 (2) For decisions described in subsection (1) of this section, the
17 records may be supplemented by additional evidence only if the
18 additional evidence relates to:

19 (a) Grounds for disqualification of a member of the body or of the
20 officer that made the permit decision, when such grounds were unknown
21 by the petitioner at the time the record was created;

22 (b) Matters that were improperly excluded from the record after
23 being offered by a party to a permit decision proceeding; or

24 (c) Matters that were outside the jurisdiction of the body or
25 officer that made the permit decision.

26 (3) For permit decisions other than those described in subsection
27 (1) of this section, the board review of the permit decision shall be
28 de novo on issues presented as error in the petition.

29 (4) The board may require or permit corrections of ministerial
30 errors or inadvertent omissions in the preparation of the record.

31 (5)(a) The parties may not conduct pretrial discovery except with
32 the prior permission of the board, which may be sought by motion,
33 subject to any applicable rules adopted by the board, at any time after
34 service of the petition. The board shall not grant permission unless
35 the party requesting it makes a prima facie showing of need. The board

1 shall strictly limit discovery to what is necessary for equitable and
2 timely review of the issues.

3 (b) If the board allows the record to be supplemented, or in any de
4 novo proceeding under subsection (3) of this section, the board shall
5 require the parties to disclose before the hearing or trial on the
6 merits the identity of witnesses and the specific evidence they intend
7 to offer.

8 (c) If any party, or anyone acting on behalf of any party, requests
9 records under chapter 42.17 RCW relating to the matters at issue, a
10 copy of the request shall simultaneously be given to all other parties,
11 and the board shall take such request into account in fashioning an
12 equitable discovery order under this section.

13 NEW SECTION. **Sec. 14.** (1) The board shall review the decision
14 record and all such evidence as is permitted to supplement the record
15 for review restricted to the decision record or is required for de novo
16 review under section 13 of this act. The board may grant relief only
17 if the party seeking relief has carried the burden of establishing that
18 one of the standards set forth in (a) through (f) of this subsection
19 has been met. The standards are:

20 (a) The body or officer that made the permit decision engaged in
21 unlawful procedure or failed to follow a prescribed process, unless the
22 error was harmless;

23 (b) The permit decision is an erroneous interpretation of the law,
24 after allowing for such deference as is due the construction of a law
25 by an agency with expertise;

26 (c) The permit decision is not supported by evidence that is
27 substantial when viewed in light of the whole record before the board;

28 (d) The permit decision is a clearly erroneous application of the
29 law to the facts;

30 (e) The permit decision is outside the authority or jurisdiction of
31 the body or officer making the decision; or

32 (f) The permit decision violates the constitutional rights of the
33 party seeking relief.

34 (2) The board may affirm or reverse each and every permit decision
35 under review or remand the decision for modification or further
36 proceedings involving the permit agencies.

1 NEW SECTION. **Sec. 15.** (1) In order to obtain judicial review of
2 a final decision of the environmental and land use hearings board, a
3 party to the board case as consolidated shall timely file a petition
4 for judicial review in the superior court for Thurston county and
5 timely serve the board and all parties to the proceedings before the
6 board by personal service or by mail. Such petition is timely filed
7 and served only if it is filed and served on all parties within thirty
8 days after the filing of the final decision and order of the board.
9 Service by mail shall be deemed effective on the date of deposit with
10 the United States postal service. Any party may apply for direct
11 review by the court of appeals. An application for direct review must
12 be filed with the superior court within ten days after the filing of
13 the petition for judicial review. In considering an application for
14 direct review under this chapter, it shall be presumed that: (a) The
15 qualifying project presents fundamental and urgent issues affecting the
16 public interest which require a prompt determination, and (b) delay in
17 obtaining a final and prompt determination of such issues would be
18 detrimental to a party and the public interest.

19 (2) The presumption set forth in subsection (1) of this section
20 shall require that the superior court certify the direct review not
21 less than ten days, and not more than fifteen days, after the filing of
22 the application therefore, unless, upon motion of a party with
23 supporting excerpts from the record within ten days after the filing of
24 such application, the superior court finds that: (a) The project is
25 not a qualifying project, or (b) the project will not in fact provide
26 new employment within the county in which the project is located. The
27 court may make such findings upon a showing that said record contains
28 clear, cogent, and convincing evidence to support such findings, which
29 evidence has been testified to by at least one witness competent to
30 testify on employment matters.

31 (3) A motion as set forth in subsection (2) of this section shall
32 be heard within fourteen days after the filing of the motion and shall
33 be confined to certified excerpts from the record, which any party may
34 produce. It shall not be necessary to certify the entire record to the
35 court for the purpose of hearing such motion.

36 (4) The court of appeals shall accept direct review of a case
37 unless it finds that the superior court's certification under the

1 standards contained in this section was clearly erroneous. Review by
2 the court of appeals shall be restricted to the decision record of the
3 permit agency and the board proceedings. All certified appeals shall
4 be provided priority processing by the court of appeals.

5 **Sec. 16.** RCW 34.05.518 and 1995 c 382 s 5 are each amended to read
6 as follows:

7 (1) The final decision of an administrative agency in an
8 adjudicative proceeding under this chapter may, except as otherwise
9 provided in chapter 43.-- RCW (sections 1 through 15 of this act), be
10 directly reviewed by the court of appeals either (a) upon certification
11 by the superior court pursuant to this section or (b) if the final
12 decision is from an environmental board as defined in subsection (3) of
13 this section, upon acceptance by the court of appeals after a
14 certificate of appealability has been filed by the environmental board
15 that rendered the final decision.

16 (2) For direct review upon certification by the superior court, an
17 application for direct review must be filed with the superior court
18 within thirty days of the filing of the petition for review in superior
19 court. The superior court may certify a case for direct review only if
20 the judicial review is limited to the record of the agency proceeding
21 and the court finds that:

22 (a) Fundamental and urgent issues affecting the future
23 administrative process or the public interest are involved which
24 require a prompt determination;

25 (b) Delay in obtaining a final and prompt determination of such
26 issues would be detrimental to any party or the public interest;

27 (c) An appeal to the court of appeals would be likely regardless of
28 the determination in superior court; and

29 (d) The appellate court's determination in the proceeding would
30 have significant precedential value.

31 Procedures for certification shall be established by court rule.

32 (3)(a) For the purposes of direct review of final decisions of
33 environmental boards, environmental boards include those boards
34 identified in RCW 43.21B.005 and growth management hearings boards as
35 identified in RCW 36.70A.250.

1 (b) An environmental board may issue a certificate of appealability
2 if it finds that delay in obtaining a final and prompt determination of
3 the issues would be detrimental to any party or the public interest and
4 either:

5 (i) Fundamental and urgent statewide or regional issues are raised;
6 or

7 (ii) The proceeding is likely to have significant precedential
8 value.

9 (4) The environmental board shall state in the certificate of
10 appealability which criteria it applied, explain how that criteria was
11 met, and file with the certificate a copy of the final decision.

12 (5) For an appellate court to accept direct review of a final
13 decision of an environmental board, it shall consider the same criteria
14 outlined in subsection (3) of this section, except as otherwise
15 provided in chapter 43.-- RCW (sections 1 through 15 of this act).

16 (6) The procedures for direct review of final decisions of
17 environmental boards include:

18 (a) Within thirty days after filing the petition for review with
19 the superior court, a party may file an application for direct review
20 with the superior court and serve the appropriate environmental board
21 and all parties of record. The application shall request the
22 environmental board to file a certificate of appealability.

23 (b) If an issue on review is the jurisdiction of the environmental
24 board, the board may file an application for direct review on that
25 issue.

26 (c) The environmental board shall have thirty days to grant or deny
27 the request for a certificate of appealability and its decision shall
28 be filed with the superior court and served on all parties of record.

29 (d) If a certificate of appealability is issued, the parties shall
30 have fifteen days from the date of service to file a notice of
31 discretionary review in the superior court, and the notice shall
32 include a copy of the certificate of appealability and a copy of the
33 final decision.

34 (e) If the appellate court accepts review, the certificate of
35 appealability shall be transmitted to the court of appeals as part of
36 the certified record.

1 (f) If a certificate of appealability is denied, review shall be by
2 the superior court. The superior court's decision may be appealed to
3 the court of appeals.

4 **Sec. 17.** RCW 36.70C.030 and 1995 c 347 s 704 are each amended to
5 read as follows:

6 (1) This chapter replaces the writ of certiorari for appeal of land
7 use decisions and shall be the exclusive means of judicial review of
8 land use decisions, except that this chapter does not apply to:

9 (a) Judicial review of:

10 (i) Land use decisions made by bodies that are not part of a local
11 jurisdiction;

12 (ii) Land use decisions of a local jurisdiction that are subject to
13 review by a quasi-judicial body created by state law, such as the
14 shorelines hearings board, the environmental and land use hearings
15 board, or the growth management hearings board;

16 (b) Judicial review of applications for a writ of mandamus or
17 prohibition; or

18 (c) Claims provided by any law for monetary damages or
19 compensation. If one or more claims for damages or compensation are
20 set forth in the same complaint with a land use petition brought under
21 this chapter, the claims are not subject to the procedures and
22 standards, including deadlines, provided in this chapter for review of
23 the petition. The judge who hears the land use petition may, if
24 appropriate, preside at a trial for damages or compensation.

25 (2) The superior court civil rules govern procedural matters under
26 this chapter to the extent that the rules are consistent with this
27 chapter.

28 **Sec. 18.** RCW 43.21B.005 and 1999 c 125 s 1 are each amended to
29 read as follows:

30 (1) There is created an environmental hearings office of the state
31 of Washington. The environmental hearings office shall consist of the
32 pollution control hearings board created in RCW 43.21B.010, the forest
33 practices appeals board created in RCW 76.09.210, the shorelines
34 hearings board created in RCW 90.58.170, the environmental and land use
35 hearings board created in chapter 43.-- RCW (sections 1 through 15 of

1 this act), and the hydraulic appeals board created in RCW ((75.20.130))
2 77.55.170. The chairman of the pollution control hearings board shall
3 be the chief executive officer of the environmental hearings office.
4 Membership, powers, functions, and duties of the pollution control
5 hearings board, the forest practices appeals board, the shorelines
6 hearings board, and the hydraulic appeals board shall be as provided by
7 law.

8 (2) The chief executive officer of the environmental hearings
9 office may appoint an administrative appeals judge who shall possess
10 the powers and duties conferred by the administrative procedure act,
11 chapter 34.05 RCW, in cases before the boards comprising the office.
12 The administrative appeals judge shall have a demonstrated knowledge of
13 environmental law, and shall be admitted to the practice of law in the
14 state of Washington. Additional administrative appeals judges may also
15 be appointed by the chief executive officer on the same terms.
16 Administrative appeals judges shall not be subject to chapter 41.06
17 RCW.

18 (3) The administrative appeals judges appointed under subsection
19 (2) of this section are subject to discipline and termination, for
20 cause, by the chief executive officer. Upon written request by the
21 person so disciplined or terminated, the chief executive officer shall
22 state the reasons for such action in writing. The person affected has
23 a right of review by the superior court of Thurston county on petition
24 for reinstatement or other remedy filed within thirty days of receipt
25 of such written reasons.

26 (4) The chief executive officer may appoint, discharge, and fix the
27 compensation of such administrative or clerical staff as may be
28 necessary.

29 (5) The chief executive officer may also contract for required
30 services.

31 **Sec. 19.** RCW 43.21B.110 and 2001 c 220 s 2 are each amended to
32 read as follows:

33 (1) The hearings board shall only have jurisdiction to hear and
34 decide appeals from the following decisions of the department, the
35 director, local conservation districts, and the air pollution control

1 boards or authorities as established pursuant to chapter 70.94 RCW, or
2 local health departments:

3 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
4 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and
5 90.56.330.

6 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
7 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
8 90.14.130, 90.48.120, and 90.56.330.

9 (c) Except as provided in RCW 90.03.210(2), the issuance,
10 modification, or termination of any permit, certificate, or license by
11 the department or any air authority in the exercise of its
12 jurisdiction, including the issuance or termination of a waste disposal
13 permit, the denial of an application for a waste disposal permit, the
14 modification of the conditions or the terms of a waste disposal permit,
15 or a decision to approve or deny an application for a solid waste
16 permit exemption under RCW 70.95.300.

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

19 (e) Decisions of local health departments regarding the issuance
20 and enforcement of permits to use or dispose of biosolids under RCW
21 70.95J.080.

22 (f) Decisions of the department regarding waste-derived fertilizer
23 or micronutrient fertilizer under RCW 15.54.820, and decisions of the
24 department regarding waste-derived soil amendments under RCW 70.95.205.

25 (g) Decisions of local conservation districts related to the denial
26 of approval or denial of certification of a dairy nutrient management
27 plan; conditions contained in a plan; application of any dairy nutrient
28 management practices, standards, methods, and technologies to a
29 particular dairy farm; and failure to adhere to the plan review and
30 approval timelines in RCW 90.64.026.

31 (h) Any other decision by the department or an air authority which
32 pursuant to law must be decided as an adjudicative proceeding under
33 chapter 34.05 RCW.

34 (2) The following hearings shall not be conducted by the hearings
35 board:

36 (a) Hearings required by law to be conducted by the shorelines
37 hearings board pursuant to chapter 90.58 RCW.

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

3 (c) Proceedings conducted by the department, or the department's
4 designee, under RCW 90.03.160 through 90.03.210 or 90.44.220.

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

7 (e) Appeals of decisions by the department as provided in chapter
8 43.-- RCW (sections 1 through 15 of this act).

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

12 **Sec. 20.** RCW 76.09.220 and 1999 sp.s. c 4 s 902 are each amended
13 to read as follows:

14 (1) The appeals board shall operate on either a part-time or a
15 full-time basis, as determined by the governor. If it is determined
16 that the appeals board shall operate on a full-time basis, each member
17 shall receive an annual salary to be determined by the governor. If it
18 is determined that the appeals board shall operate on a part-time
19 basis, each member shall be compensated in accordance with RCW
20 43.03.250. The director of the environmental hearings office shall
21 make the determination, required under RCW 43.03.250, as to what
22 statutorily prescribed duties, in addition to attendance at a hearing
23 or meeting of the board, shall merit compensation. This compensation
24 shall not exceed ten thousand dollars in a fiscal year. Each member
25 shall receive reimbursement for travel expenses incurred in the
26 discharge of his or her duties in accordance with the provisions of RCW
27 43.03.050 and 43.03.060.

28 (2) The appeals board shall as soon as practicable after the
29 initial appointment of the members thereof, meet and elect from among
30 its members a chair, and shall at least biennially thereafter meet and
31 elect or reelect a chair.

32 (3) The principal office of the appeals board shall be at the state
33 capital, but it may sit or hold hearings at any other place in the
34 state. A majority of the appeals board shall constitute a quorum for
35 making orders or decisions, adopting rules necessary for the conduct of
36 its powers and duties, or transacting other official business, and may

1 act though one position on the board be vacant. One or more members
2 may hold hearings and take testimony to be reported for action by the
3 board when authorized by rule or order of the board. The appeals board
4 shall perform all the powers and duties granted to it in this chapter
5 or as otherwise provided by law.

6 (4) The appeals board shall make findings of fact and prepare a
7 written decision in each case decided by it, and such findings and
8 decision shall be effective upon being signed by two or more members
9 and upon being filed at the appeals board's principal office, and shall
10 be open to public inspection at all reasonable times.

11 (5) The appeals board shall either publish at its expense or make
12 arrangements with a publishing firm for the publication of those of its
13 findings and decisions which are of general public interest, in such
14 form as to assure reasonable distribution thereof.

15 (6) The appeals board shall maintain at its principal office a
16 journal which shall contain all official actions of the appeals board,
17 with the exception of findings and decisions, together with the vote of
18 each member on such actions. The journal shall be available for public
19 inspection at the principal office of the appeals board at all
20 reasonable times.

21 (7) The forest practices appeals board shall have exclusive
22 jurisdiction to hear appeals arising from an action or determination by
23 the department, and the department of fish and wildlife, and the
24 department of ecology with respect to management plans provided for
25 under RCW 76.09.350.

26 (8)(a) Any person aggrieved by the approval or disapproval of an
27 application to conduct a forest practice or the approval or disapproval
28 of any landscape plan or permit or watershed analysis may, except as
29 otherwise provided in chapter 43.-- RCW (sections 1 through 15 of this
30 act), seek review from the appeals board by filing a request for the
31 same within thirty days of the approval or disapproval. Concurrently
32 with the filing of any request for review with the board as provided in
33 this section, the requestor shall file a copy of his or her request
34 with the department and the attorney general. The attorney general may
35 intervene to protect the public interest and ensure that the provisions
36 of this chapter are complied with.

1 (b) The review proceedings authorized in (a) of this subsection are
2 subject to the provisions of chapter 34.05 RCW pertaining to procedures
3 in adjudicative proceedings.

4 **Sec. 21.** RCW 77.55.170 and 2000 c 107 s 20 are each amended to
5 read as follows:

6 (1) There is hereby created within the environmental hearings
7 office under RCW 43.21B.005 the hydraulic appeals board of the state of
8 Washington.

9 (2) The hydraulic appeals board shall consist of three members:
10 The director of the department of ecology or the director's designee,
11 the director of the department of agriculture or the director's
12 designee, and the director or the director's designee of the department
13 whose action is appealed under subsection (6) of this section. A
14 decision must be agreed to by at least two members of the board to be
15 final.

16 (3) The board may adopt rules necessary for the conduct of its
17 powers and duties or for transacting other official business.

18 (4) The board shall make findings of fact and prepare a written
19 decision in each case decided by it, and that finding and decision
20 shall be effective upon being signed by two or more board members and
21 upon being filed at the hydraulic appeals board's principal office, and
22 shall be open to public inspection at all reasonable times.

23 (5) The board has exclusive jurisdiction to hear appeals arising
24 from the approval, denial, conditioning, or modification of a hydraulic
25 approval issued by the department: (a) Under the authority granted in
26 RCW 77.55.110 for the diversion of water for agricultural irrigation or
27 stock watering purposes or when associated with streambank
28 stabilization to protect farm and agricultural land as defined in RCW
29 84.34.020; or (b) under the authority granted in RCW 77.55.230 for off-
30 site mitigation proposals.

31 (6)(a) Any person aggrieved by the approval, denial, conditioning,
32 or modification of a hydraulic approval pursuant to RCW 77.55.110 may,
33 except as otherwise provided in chapter 43.-- RCW (sections 1 through
34 15 of this act), seek review from the board by filing a request for the
35 same within thirty days of notice of the approval, denial,
36 conditioning, or modification of such approval.

1 (b) The review proceedings authorized in (a) of this subsection are
2 subject to the provisions of chapter 34.05 RCW pertaining to procedures
3 in adjudicative proceedings.

4 **Sec. 22.** RCW 90.58.180 and 1997 c 199 s 1 are each amended to read
5 as follows:

6 (1) Any person aggrieved by the granting, denying, or rescinding of
7 a permit on shorelines of the state pursuant to RCW 90.58.140 may,
8 except as otherwise provided in chapter 43.-- RCW (sections 1 through
9 15 of this act), seek review from the shorelines hearings board by
10 filing a petition for review within twenty-one days of the date of
11 filing as defined in RCW 90.58.140(6).

12 Within seven days of the filing of any petition for review with the
13 board as provided in this section pertaining to a final decision of a
14 local government, the petitioner shall serve copies of the petition on
15 the department, the office of the attorney general, and the local
16 government. The department and the attorney general may intervene to
17 protect the public interest and insure that the provisions of this
18 chapter are complied with at any time within fifteen days from the date
19 of the receipt by the department or the attorney general of a copy of
20 the petition for review filed pursuant to this section. The shorelines
21 hearings board shall schedule review proceedings on the petition for
22 review without regard as to whether the period for the department or
23 the attorney general to intervene has or has not expired.

24 (2) The department or the attorney general may obtain review of any
25 final decision granting a permit, or granting or denying an application
26 for a permit issued by a local government by filing a written petition
27 with the shorelines hearings board and the appropriate local government
28 within twenty-one days from the date the final decision was filed as
29 provided in RCW 90.58.140(6).

30 (3) The review proceedings authorized in subsections (1) and (2) of
31 this section are subject to the provisions of chapter 34.05 RCW
32 pertaining to procedures in adjudicative proceedings. Judicial review
33 of such proceedings of the shorelines hearings board is governed by
34 chapter 34.05 RCW. The board shall issue its decision on the appeal
35 authorized under subsections (1) and (2) of this section within one
36 hundred eighty days after the date the petition is filed with the board

1 or a petition to intervene is filed by the department or the attorney
2 general, whichever is later. The time period may be extended by the
3 board for a period of thirty days upon a showing of good cause or may
4 be waived by the parties.

5 (4) Any person may appeal any rules, regulations, or guidelines
6 adopted or approved by the department within thirty days of the date of
7 the adoption or approval. The board shall make a final decision within
8 sixty days following the hearing held thereon.

9 (5) The board shall find the rule, regulation, or guideline to be
10 valid and enter a final decision to that effect unless it determines
11 that the rule, regulation, or guideline:

12 (a) Is clearly erroneous in light of the policy of this chapter; or

13 (b) Constitutes an implementation of this chapter in violation of
14 constitutional or statutory provisions; or

15 (c) Is arbitrary and capricious; or

16 (d) Was developed without fully considering and evaluating all
17 material submitted to the department during public review and comment;
18 or

19 (e) Was not adopted in accordance with required procedures.

20 (6) If the board makes a determination under subsection (5)(a)
21 through (e) of this section, it shall enter a final decision declaring
22 the rule, regulation, or guideline invalid, remanding the rule,
23 regulation, or guideline to the department with a statement of the
24 reasons in support of the determination, and directing the department
25 to adopt, after a thorough consultation with the affected local
26 government and any other interested party, a new rule, regulation, or
27 guideline consistent with the board's decision.

28 (7) A decision of the board on the validity of a rule, regulation,
29 or guideline shall be subject to review in superior court, if
30 authorized pursuant to chapter 34.05 RCW. A petition for review of the
31 decision of the shorelines hearings board on a rule, regulation, or
32 guideline shall be filed within thirty days after the date of final
33 decision by the shorelines hearings board.

34 NEW SECTION. **Sec. 23.** Sections 1 through 15 of this act
35 constitute a new chapter in Title 43 RCW.

1 NEW SECTION. **Sec. 24.** The legislature does not intend to
2 appropriate additional funds for the implementation of this act and
3 expects all affected state agencies to implement this act's provisions
4 within existing appropriations.

5 NEW SECTION. **Sec. 25.** This act is necessary for the immediate
6 preservation of the public peace, health, or safety, or support of the
7 state government and its existing public institutions, and takes effect
8 immediately."

9 Correct the title.

EFFECT: Clarifies that references to "board" are referring to the Environmental and Land Use Hearings Board (ELUHB); exempts water and sewer availability certifications and Energy Facility Site Evaluation Council certifications from the bill; requires the permit applicant, within 30 days of filing the first permit application, to request OPA to designate the project as a "qualifying project"; requires the designation request to include a list of permits that the project applicant reasonably believes will be required for the project; requires OPA to make a decision within 30 days and, if it grants the request, provide copies of its decision to each permitting agency; requires OPA to provide notice of its decision to the code reviser and to any parties that have requested notification; clarifies that the "qualifying project" designation does not create an independent cause of action; requires "qualifying project" permits to include a sentence stating that any appeal must be according to the ELUHB process; clarifies that permits that have already been appealed to a hearings board cannot be appealed to the ELUHB; clarifies that discovery must be subject to rules adopted by the ELUHB; states that affected agencies are expected to implement the bill within existing appropriations; and prohibits permit applicants from applying to use this process after December 31, 2010.

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