
SENATE BILL 5086

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By Senators Honeyford, Doumit, Hewitt, Deccio, Hale, Sheahan, Morton, Parlette, Mulliken and Rasmussen

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1 AN ACT Relating to the water-related actions of the department of
2 ecology; amending RCW 34.05.514, 43.21B.110, 43.21B.130, 43.21B.240,
3 43.27A.190, 90.14.130, 90.14.190, and 90.14.200; reenacting and
4 amending RCW 43.21B.310; 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
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 filed
14 in superior court. The legislature further finds that informal
15 procedures such as mediation and fact-finding have been employed
16 successfully in other areas of the law, and may produce positive
17 results in certain types of water disputes. The legislature therefore
18 finds that property owners should have a choice to select informal or

1 formal hearings before the pollution control hearings board, and that
2 relinquishment proceedings should be appealed to the court of appeals.

3 **Sec. 2.** RCW 34.05.514 and 2001 c 220 s 3 are each amended to read
4 as follows:

5 (1) Except as provided in subsections (2) (~~(and (3))~~) through (4)
6 of this section, proceedings for review under this chapter shall be
7 instituted by paying the fee required under RCW 36.18.020 and filing a
8 petition in the superior court, at the petitioner's option, for (a)
9 Thurston county, (b) the county of the petitioner's residence or
10 principal place of business, or (c) in any county where the property
11 owned by the petitioner and affected by the contested decision is
12 located.

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

17 (3) For proceedings conducted by the pollution control hearings
18 board pursuant to chapter 43.21B RCW or as otherwise provided in RCW
19 90.03.210(2) involving decisions of the department of ecology on
20 applications for changes or transfers of water rights that are the
21 subject of a general adjudication of water rights that is being
22 litigated actively under chapter 90.03 or 90.44 RCW, the petition must
23 be filed with the superior court conducting the adjudication, to be
24 consolidated by the court with the general adjudication. A party to
25 the adjudication shall be a party to the appeal under this chapter only
26 if the party files or is served with a petition for review to the
27 extent required by this chapter.

28 (4) For proceedings involving the relinquishment of a water right,
29 the petition shall be filed in the court of appeals where the land is
30 located upon which the water was used. Appeals of informal hearings of
31 the pollution control hearings board shall be filed in the court of
32 appeals designated in section 13 of this act.

33 **Sec. 3.** RCW 43.21B.110 and 2001 c 220 s 2 are each amended to read
34 as follows:

35 (1) The hearings board shall only have jurisdiction to hear and
36 decide appeals from the following decisions of the department, the

1 director, local conservation districts, and the air pollution control
2 boards or authorities as established pursuant to chapter 70.94 RCW, or
3 local health departments:

4 (a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431,
5 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and
6 90.56.330.

7 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
8 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
9 90.14.130, 90.48.120, and 90.56.330.

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

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

20 (e) Decisions of local health departments regarding the issuance
21 and enforcement of permits to use or dispose of biosolids under RCW
22 70.95J.080.

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

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

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

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

37 (a) The hearings board has no jurisdiction whatsoever to review

1 orders pertaining to the relinquishment of a water right under RCW
2 90.14.130, or to review proceedings regarding general adjudications of
3 water rights conducted pursuant to chapter 90.03 or 90.44 RCW.

4 (b) The following hearings shall not be conducted by the hearings
5 board:

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

8 ~~((b))~~ (ii) Hearings conducted by the department pursuant to RCW
9 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
10 90.44.180.

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

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

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

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

20 The administrative procedure act, chapter 34.05 RCW, shall apply to
21 the appeal of rules and regulations adopted by the board to the same
22 extent as it applied to the review of rules and regulations adopted by
23 the directors and/or boards or commissions of the various departments
24 whose powers, duties and functions were transferred by section 6,
25 chapter 62, Laws of 1970 ex. sess. to the department. Except with
26 regard to orders pertaining to the relinquishment of a water right
27 under RCW 90.14.130, all other decisions and orders of the director and
28 all decisions of air pollution control boards or authorities
29 established pursuant to chapter 70.94 RCW shall be subject to review by
30 the hearings board as provided in this chapter.

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

33 The department and air authorities shall not have authority to hold
34 adjudicative proceedings pursuant to the Administrative Procedure Act,
35 chapter 34.05 RCW. ~~((Such))~~ All other hearings, except for appeals of

1 orders pertaining to the relinquishment of a water right under RCW
2 90.14.130, shall be held by the pollution control hearings board.

3 **Sec. 6.** RCW 43.21B.310 and 2001 c 220 s 4 and 2001 c 36 s 3 are
4 each reenacted and amended to read as follows:

5 (1) Except as provided in RCW 90.03.210(2) and subsection (2) of
6 this section, any order issued by the department or local air authority
7 pursuant to RCW 70.94.211, 70.94.332, 70.105.095, 43.27A.190,
8 86.16.020, 88.46.070, or 90.48.120(2) or any provision enacted after
9 July 26, 1987, or any permit, certificate, or license issued by the
10 department may be appealed to the pollution control hearings board if
11 the appeal is filed with the board and served on the department or
12 authority within thirty days after receipt of the order. Except as
13 provided under chapter 70.105D RCW and RCW 90.03.210(2), ~~((this is))~~
14 these are the exclusive means of appeal of such an order~~((-))~~:

15 ~~((+2))~~ (a) The department or the authority in its discretion may
16 stay the effectiveness of an order during the pendency of such an
17 appeal.

18 ~~((+3))~~ (b) At any time during the pendency of an appeal of such an
19 order to the board, the appellant may apply pursuant to RCW 43.21B.320
20 to the hearings board for a stay of the order or for the removal
21 thereof.

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

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

25 ~~((+b))~~ (ii) The date and docket number of the order, permit, or
26 license appealed;

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

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

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

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

34 ~~((+5))~~ (d) Upon failure to comply with any final order of the
35 department, the attorney general, on request of the department, may
36 bring an action in the superior court of the county where the violation
37 occurred or the potential violation is about to occur to obtain such

1 relief as necessary, including injunctive relief, to (~~insure~~) ensure
2 compliance with the order. The air authorities may bring similar
3 actions to enforce their orders.

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

8 (2) Appeals of orders pertaining to the relinquishment of a water
9 right shall be filed in the court of appeals as provided by RCW
10 90.14.130.

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

13 Notwithstanding and in addition to any other powers granted to the
14 department of ecology, whenever it appears to the department that a
15 person is violating or is about to violate any of the provisions of the
16 following:

- 17 (1) Chapter 90.03 RCW; or
- 18 (2) Chapter 90.44 RCW; or
- 19 (3) Chapter 86.16 RCW; or
- 20 (4) Chapter 43.37 RCW; or
- 21 (5) Chapter 43.27A RCW; or
- 22 (6) Any other law relating to water resources administered by the
23 department; or

24 (7) A rule or regulation adopted, or a directive or order issued by
25 the department relating to subsections (1) through (6) of this section;
26 the department may cause a written regulatory order to be served upon
27 (~~said~~) the person either personally, or by registered or certified
28 mail delivered to addressee only with return receipt requested and
29 acknowledged by him or her. The order shall specify the provision of
30 the statute, rule, regulation, directive, or order alleged to be or
31 about to be violated, and the facts upon which the conclusion of
32 violating or potential violation is based, and shall order the act
33 constituting the violation or the potential violation to cease and
34 desist or, in appropriate cases, shall order necessary corrective
35 action to be taken with regard to such acts within a specific and
36 reasonable time. The regulation of a headgate or controlling works as
37 provided in RCW 90.03.070, by a watermaster, stream patrolman, or other

1 person so authorized by the department shall constitute a regulatory
2 order within the meaning of this section. A regulatory order issued
3 hereunder shall become effective immediately upon receipt by the person
4 to whom the order is directed, except for regulations under RCW
5 90.03.070 which shall become effective when a written notice is
6 attached as provided therein. Any person aggrieved by such order may
7 appeal the order pursuant to RCW 43.21B.310, except that appeals of
8 orders pertaining to the relinquishment of a water right shall be filed
9 in the court of appeals pursuant to RCW 90.14.130.

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

12 When it appears to the department of ecology that a person entitled
13 to the use of water has not beneficially used his or her water right or
14 some portion thereof, and it appears that (~~said~~) the person's right
15 has or may have reverted to the state because of such nonuse, as
16 provided by RCW 90.14.160, 90.14.170, or 90.14.180, the department of
17 ecology shall notify such person by order(~~:- PROVIDED, That~~).
18 However, where a company, association, district, or the United States
19 has filed a blanket claim under the provisions of RCW 90.14.060 for the
20 total benefits of those served by it, the notice shall be served on
21 such company, association, district or the United States and not upon
22 any of its individual water users who may not have used the water or
23 some portion thereof which they were entitled to use. The order shall
24 contain: (1) A description of the water right, including the
25 approximate location of the point of diversion, the general description
26 of the lands or places where such waters were used, the water source,
27 the amount involved, the purpose of use, and the apparent authority
28 upon which the right is based; (2) a statement that unless sufficient
29 cause be shown on appeal the water right will be declared relinquished;
30 and (3) a statement that such order may be appealed to (~~the pollution~~
31 ~~control hearings board~~) superior court. Any person aggrieved by such
32 an order may appeal it to (~~the pollution control hearings board~~
33 ~~pursuant to RCW 43.21B.310~~) the court of appeals in the county where
34 the land is located upon which the water was used. Any such appeal to
35 the court of appeals shall be de novo. The order shall be served by
36 registered or certified mail to the last known address of the person

1 and be posted at the point of division or withdrawal. The order by
2 itself shall not alter the recipient's right to use water, if any.

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

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

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

19 (1) All matters relating to the implementation and enforcement of
20 this chapter by the department of ecology shall be carried out in
21 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
22 except where the provisions of this chapter expressly conflict with
23 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are
24 ~~((adjudicative proceedings within the meaning of chapter 34.05 RCW.~~
25 ~~Final decisions of the department of ecology in these proceedings))~~
26 appealable to the court of appeals as provided in that section. Other
27 final decisions of the department of ecology under this chapter are
28 subject to review by the pollution control hearings board in accordance
29 with chapter 43.21B RCW.

30 (2) RCW 90.14.130 provides nonexclusive procedures for determining
31 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
32 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
33 among other proceedings, general adjudication proceedings initiated
34 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
35 apply to litigation involving determinations of the department of

1 ecology under RCW 90.03.290 relating to the impairment of existing
2 rights.

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

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

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

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

20 (b) A decision to enforce the conditions of a permit for, or right
21 to, the beneficial use of water or to require any person to discontinue
22 the use of water.

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

25 (1) When one of the parties elects an informal hearing pursuant to
26 section 11 of this act, one of the board members or an administrative
27 law judge from the environmental hearings office must be assigned as
28 the mediator for the appeal. The mediation shall be conducted in the
29 general area where the project under review is located, but may be
30 conducted by telephone at the discretion of the mediator.

31 (2) The parties involved in the informal hearing must provide the
32 mediator and the other parties in advance with a clear concise
33 statement of the disputed issues and the parties' position in relation
34 to the issues and supporting documentation. The mediator must meet
35 with the parties either jointly or separately, and shall take such
36 steps as the mediator deems appropriate to resolve their differences

1 and reach a settlement agreement. If a settlement agreement is
2 reached, the mediator must prepare and submit to the hearings board a
3 written order of dismissal to which the settlement agreement is
4 attached. The hearings board must enter the order and dismiss the case
5 unless the hearings board finds that the settlement agreement is
6 contrary to law.

7 If the hearings board finds that the settlement agreement is
8 contrary to law, it shall notify the parties and refer the dispute back
9 to mediation. The parties may elect for further mediation or for fact-
10 finding with recommendations in accordance with subsection (3) of this
11 section.

12 (3) If the mediator is unable to achieve a settlement agreement
13 between the parties within thirty days after being appointed, the
14 mediator must issue a statement that a mutually acceptable settlement
15 agreement has not been reached. After the issuance of the statement,
16 either party may request the hearings board to submit the dispute to
17 fact-finding with recommendations. Notice of the request for fact-
18 finding must be sent to the other parties. The time for mediation may
19 be 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 must 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 must
26 establish a date, time, and place for the fact-finding hearing. The
27 date of the hearing must be set within thirty days of the appointment
28 of the fact-finder. The hearing must be conducted in the general area
29 where the project under review is located. At least seven days before
30 the date of the hearing, each party must submit to the fact-finder and
31 to the other parties written proposals on all of the issues it intends
32 to submit to fact-finding. The fact-finder has the power to issue
33 subpoenas requiring the attendance and production of witnesses and the
34 production of evidence. The order of presentation at the hearing shall
35 be as agreed by the parties or as determined by the fact-finder. Each
36 documentary exhibit must be filed with the fact-finder and copies must
37 be provided to the other parties. The fact-finder must declare the

1 hearing closed after the parties have completed presenting their
2 testimony within agreed time limits.

3 (6) The fact-finder must, within thirty days following the
4 conclusion of the hearing, make written findings of fact and written
5 recommendations to the parties as to how the dispute should be
6 resolved. The fact-finder may not apply any presumption as part of the
7 findings of fact or recommendations that presumes that an action will
8 not impair the rights of a senior water right holder. A copy of the
9 findings and recommendations must also be filed with the hearings
10 board. The findings of fact and recommendations of the fact-finder are
11 advisory only, and are not subject to review by the hearings board.

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

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

20 (2) If one of the parties elects to file an action in the court of
21 appeals following an informal hearing, it must be filed where the land
22 is located upon which the water is or would be used.

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 the
28 court of appeals shall be de novo. However, no issue may be raised in
29 the court of appeals that was not raised and discussed as part of the
30 fact-finding hearing. The court of appeals may substitute its own
31 judgment for that of the fact-finder. The petition shall be filed in
32 the court of appeals specified in section 13 of this act. Such an
33 appeal may be perfected by filing with the clerk of the court of
34 appeals a notice of appeal, and by serving a copy thereof by mail, or
35 personally on the director. Appellate review of a decision of the
36 court of appeals may be sought as in other civil cases. No bond may be

1 required on appeals to the court of appeals or on review by the supreme
2 court unless specifically required by the judge of the court of
3 appeals.

4 NEW SECTION. **Sec. 15.** If any provision of this act or its
5 application to any person or circumstance is held invalid, the
6 remainder of the act or the application of the provision to other
7 persons or circumstances is not affected.

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